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S A M U E L J. C R A W F O R D ,

Briefs and arguments relating to the Osage

Indian lands in Kansas.

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Claims of the Cheyenne and Arapahoe Indians

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Rights of the Creek nation to certain lands

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Articles concerning the cession of the Cherokee outlet .

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Pamphlets
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I N D E X

1. Before the Hon.L.Q.C.Lamar...in the matter of the proceeds of sales of Osage Indian Lands in Kansas by Samuel J.Crawford. Feb. 22,1886.

2. Supplemental Argument before the Hon.M.J.Durham... relative to the proceeds of Sales of Osage Indian lands in Kansas. Samuel J.Crawford. March 20,1886.

3. Before the Hon.M.J.Durham...relative to the proceeds of sales of Osage Indian Lands in Kansas. Samuel J. Crawford. March 30,1886.

4. Before the Honorable Secretary of the Interior. Brief and Argument on Five per cent. account. Indian lands and reservations in Kansas. By Samuel J. Crawford. Nov.24,1886.

5. Application to the Secretary of the Treasury for an adjustment of accounts between the United States and the Osage Nation, relative to the sale of lands in Kansas. Samuel J. Crawford. July 4,1887.

6. In the United States District Court for the western District of Arkansas...Brief on Behalf of Respondents by Shellabarger & Wilson, and Rogers and Read. Jan.31,1889.

7. Before the Hon Sigourney Butler...Relative to Receipts from filing fees and expenses of selling the Osage Indian Lands of Kansas. Samuel J.Crawford, Howard B. Abbott. March 9,1889.

8. Before the Hon. United States Commissioners... in the matter of the Claim of the Cheyenne and Arapahoe Indians...Petition and statement of facts. Samuel J Crawford, et al. July 5,1889.

9. Letter from Pleasant Porter, delegate of the Creek Nation to the Attorney-General of the United States, relative to the Government, laws, and rights of said nation and official action of delegates representing the same. August 16,1889.

10. Statement to the Hon. Secretary of the Interior, relative to Attorneys' fees for services in establishing the right of the Creek Nation to certain Lands and securing pay for the Same. By Samuel J. Crawford. August 19,1889.

11. To the Attorney General of the United States. In the matter of Attorneys' fees paid for services in Establishing the right of the Creek Nation to certain lands and securing pay for the same. Brief on Behalf of Samuel J. Crawford. By S.Shellabarger. J.M.Wilson. August 24, 1889.

12. Articles of agreement aonderning the cession of the Cherokee Outlet.... March 3,1893.

BEFORE THE

HON. L. Q. C. LAMAR,

Secretary of the Interior,

IN THE MATTER

OF THE

PROCEEDS OF SALES

OF

OSAGE INDIAN LANDS

IN KANSAS.

BY SAMUEL J. CRAWFORD,

ATTORNEY FOR THE OSAGE NATION.

1886.

Feb. 22, 1886

WASHINGTON, D. C.,

February 22d, 1886.

HON. L. Q. C. LAMAR,

Secretary of the Interior.

SIR: By article 1 of the treaty between the United States and the Great and Little Osage Indians, concluded September 29th, 1865, ratified June 26th, 1866, and proclaimed January 21st, 1867, the said Indians ceded to the United States a tract of land on the east end of their reservation in the State of Kansas, bounded as follows:

"Beginning at the southeast corner of their present reservation, and running thence north with the eastern boundary thereof fifty miles to the northeast corner; thence west with the northern line thirty miles; thence south fifty miles, to the southern boundary of said reservation, and thence east with said southern boundary to the place of beginning." * * * "And in consideration of the grant and sale to them of the above-described lands the United States agree to pay the sum of three hundred thousand dollars, which sum shall be placed to the credit of said tribe of Indians in the Treasury of the United States, and interest thereon at the rate of five per centum per annum shall be paid to said tribes semi-annually, in money, clothing, provisions, or such articles of utility as the Secretary of the Interior may from time to time direct. Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, but no pre-emption claim or homestead settlement shall be recognized; and after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States to the credit of the 'civilization fund,' to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States."

By article 2 of said treaty the said Indians also ceded a tract of land twenty miles in width from north to south, off the north side of the remainder of their reservation, and extending its entire length from east to west, to be surveyed and sold, in trust, for the benefit of said Indians. (14 Stat., 687.)

In pursuance of this treaty, Congress, on April 10th, 1869, passed the following joint resolution:

"That any *bona fide* settler residing upon any portion of the lands sold to the United States by virtue of the first and second articles of the treaty concluded between the United States and the Great and Little Osage tribe of Indians September twenty-ninth, eighteen hundred and sixty-five, and proclaimed January twenty-first, eighteen hundred and sixty-seven, who is a citizen of the United States or shall have declared his intention to become a citizen of the United States, shall be, and hereby is, entitled to purchase the same in quantity, not exceeding one hundred and sixty acres, at the price of one dollar and twenty-five cents per acre, within two years from the passage of this act, under such rules and regulations as may be prescribed by the Secretary of the Interior." (16 Stat., 55.)

On July 15th, 1870, Congress passed an act, of which the following is an extract:

"That whenever the Great and Little Osage Indians shall agree thereto, in such manner as the President shall prescribe, it shall be the duty of the President to remove said Indians from the State of Kansas to lands provided or to be provided for them for a permanent home in the Indian Territory. * * * And the United States, in consideration of the relinquishment by said Indians of their lands in Kansas, shall pay annually interest *on the amount of money received as proceeds of sale of said lands*, at the rate of five per centum, to be expended by the President for the benefit of said Indians, in such manner as he may deem proper. And for this purpose an accurate account shall be kept by the Secretary of the Interior of the money received as proceeds of sale, and the *aggregate amount* received prior to the first day of November of each year *shall be the amount* upon which the payment of interest shall be

based. The proceeds of sale of said land shall be carried to the credit of said Indians on the books of the Treasury, and shall bear interest at the rate of five per cent. per annum." (16 Stat., 362.)

On May 9th, 1872, Congress passed an act for the relief of settlers on Osage lands, with a proviso as follows:

"That the twelfth section of said act of July 15th, 1870, is hereby so amended that the *aggregate amount of the proceeds of sale*, received prior to the first day of March of each year, shall be the amount upon which the payment of interest *shall be based.*" (17 Stat., 91.)

From this it will be observed that by article 1 of said treaty the Osages ceded to the United States a tract of land 30 by 50 miles on the east end of their reservation in Kansas, to be surveyed and sold, and "after reimbursing the United States the cost of said survey and sale, and the said sum of $300,000 to be placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States to the credit of the 'civilization fund,' to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States."

The act of July 15th, 1870, above quoted, (which was passed subsequent to the treaty of 1865) says: *And the United States, in consideration of the relinquishment by said Indians of their lands in Kansas, shall pay annually interest on the amount of money received as proceeds of sale of said lands, at the rate of five per centum. And for this purpose an accurate account shall be kept by the Secretary of the Interior of the money received as proceeds of sale, and the aggregate amount received prior to the first day of November of each year, shall be the amount upon which the payment of interest shall be based. The proceeds of sale of said land shall be carried to the credit of said Indians on the books of the Treasury, and shall bear interest at the rate of five per cent. per annum.*

This we submit, is a positive declaration by Congress, that the proceeds of sales of the Osage lands in Kansas, including the "ceded lands," shall be placed to the credit of said Indians.

These lands belonged to the Osage Indians, and were recognized as their property by the United States, in the first lines of the treaty quoted.

And while the said treaty, which was not understood by the Indians who signed the same, provided that a certain part of the proceeds of such sales should be placed to the credit of the "Civilization Fund," this later law of Congress, expressly provides that the aggregate amount received from the sale of said lands, should be placed to the credit of said Indians, and bear interest at the rate of five per cent.

It is difficult to understand how the intention of Congress could be more clearly expressed. The treaty is a law, but no more so than an act of Congress.

The acts quoted, as already stated, are positive declarations that the aggregate amount received from the sale of all lands ceded by said treaty should be placed to the credit of said Osage Indians.

And there was a reason and a valid reason and consideration for it.

By the said act of 1870, the Osages were ceding the remainder of their lands in Kansas, and by far the greater part thereof, to the United States, and agreeing to remove to the Indian Territory.

And as the said Act says: "The United States, in consideration of the relinquishment by said Indians of their lands in Kansas, *shall pay* annually interest *on the amount of money received* as proceeds of sale of said lands," &c.

To this Act, as will be observed, there was attached a proviso as follows:

"That the diminished reserve of said Indians in Kan-
as shall be surveyed under the direction of the Secretary

of the Interior, as other public lands are surveyed, as soon as the consent of said Indians is obtained, as above provided, the expense of said survey to be paid from proceeds of sale of said land."

But, as already shown, this Act was amended by the snbsequent Act of May 9th, 1872, which provides as follows:

"That the twelfth section of said Act of July sixteenth (15th), 1870, is hereby so amended that the aggregate amount of the proceeds of sale received prior to the first day of March of each year shall be the amount upon which the payment of interest shall be based."

The treaty and the Acts of Congress, relative thereto, must be construed as one act.

And where there is a conflict or contradiction between them, the last act must prevail.

This I submit for the careful consideration of the Department, and such action as may be deemed just and equitable.

But, referring to the "ceded lands," the treaty, upon its face, is manifestly unjust, and shows without reference to the subsequent Acts of Congress, that it could not have been, from the very nature of things, understood by the Indians who signed it.

It says—

"Having more lands than are necessary for their occupation, and all payments from the Government to them under former treaties, having ceased, leaving them greatly impoverished, and being desirous of improving their condition by disposing of their surplus lands, do hereby grant and sell to the U. S. the lands contained in the following boundaries," &c.

Now, if they were greatly impoverished and forced to sell a part of their lands, is it reasonable to presume that they would knowingly and willingly consent to give two-thirds, or any other amount of the proceeds of the lands

they were selling, to Indians whom they did not know, and many of whom, they had never heard ?

Such a proposition is absurd on its face.

It shows that the Indians, (who could neither read nor write) were deceived and misled by the United States commissioners; who represented the Government in the making of said treaty.

The Indians say, and the survivors who signed the treaty are ready to testify, that the Commissioners told them that when said treaty was ratified, the sum of $300,000 would be placed to their credit, and as soon as the lands were sold by the United States the money received therefor, after deducting the cost of survey and sale, and the said $300,000, would be paid to the Indians in common: meaning, as they understood, the Osage Indians.

The Interpreter was an uneducated Osage and scarcely understood the meaning of the English language, while not a single one of the Indians, who made the treaty, could either read or write. And the same is true of all who signed it as witnesses.

In view of these facts, it is not to be wondered at, that Congress sought an early opportunity to correct the treaty and prevent the consummation of so great a wrong.

But notwithstanding the Acts of Congress, above quoted, and the manifest injustice and injury to the Osage people, the Department of the Interior, as shown by Senate Ex. Doc. No. 30, 47th Congress, 2d session, (copy herewith,) diverted and used the entire amount of the proceeds of sales of said lands, not merely for the "education and civilization" of Indians generally, but for general purposes, in connection with the Indian Bureau expenditures.

Prior to the 23d day of November, 1882, the sum of $770,179.42, less $11,577.45, of the proceeds of sales of the said Osage ceded lands, every dollar of which justly belonged to the Osage Indians, was taken and used by the Interior Department for the support, maintenance, education, and comfort of Indians and tribes of Indians, in whom

the Osage Nation of Indians had no interest whatever. How much of said proceeds has been diverted and so used, since that time, the records will show.

This I submit was unauthorized and wrong.

The land ceded was the the property of the Osage Indians, and when sold by the United States, the money received therefor should have been placed to their credit.

I would therefore respectfully ask that you cause the account between the United States and said Indians, relative to their lands in Kansas, to be examined and adjusted according to law; and that if an appropriation by Congress is required, to reimburse said Indians, on account of the proceeds of sales of said ceded lands, diverted and misapplied as aforesaid, that you report the facts to Congress, with such recommendation for relief as in your judgment the facts warrant.

Respectfully submitted.

SAMUEL J. CRAWFORD,
Attorney for the Osage Nation.

SUPPLEMENTAL ARGUMENT

BEFORE THE

HON. M. J. DURHAM,

First Comptroller of the Treasury,

RELATIVE TO THE

PROCEEDS OF SALES

OF

OSAGE INDIAN LANDS

IN KANSAS.

SAMUEL J. CRAWFORD,
ATTORNEY FOR OSAGE NATION.

Wr. 20.

1886.

Wm. H. Moore, Printer, 511 Eleventh street.

Washington, D. C.,

March 20, 1886.

The Honorable First Comptroller:

SIR: I respectfully call attention to article 2 of the treaty with the Osage Indian nation, (14 Stats., 688,) which states:

"The said tribe of Indians also hereby cede to the United States a tract of land twenty miles in width from north to south, off the north side of the remainder of their present reservation, and extending its entire length from east to west, which land is to be held *in trust* for said Indians, and to be surveyed and sold for *their benefit* by the Secretary of the Interior, under such rules and regulations as he may from time to time prescribe, under the direction of the Commissioner of the General Land Office, as other lands are surveyed and sold."

This shows conclusively—

1st. That the Osage lands are and were to be held "*in trust*" for the Indians.

2d. That the lands are and were to be sold under the direction of the Commissioner of the General Land Office, for their exclusive benefit.

The Commissioner had, therefore, abundant authority for directing that the filing fee be covered in for the benefit of the Indians.

3d. The treaty states that these lands are to be sold for *the benefit of the Indians.* If the *filing fees* are covered in as receipts from miscellaneous sources while the Indians are also charged with the expenses of selling their lands, then the United States derives a revenue from the sale of such lands. This is not the meaning nor intent of the law. All the laws bearing on this subject are explicit on the one point, that the United States is to be reimbursed for

only the expenses incurred in selling the land. If, now, the receipts from filing fees are diverted from the source to which they belong, namely, the Osage Indian fund, it is plain to be seen that this fund is twice charged with the expenses of selling the lands.

In this connection, I beg leave to call your attention to the method of determining the proportion of expenses chargeable to the Osages. Take, for instance, the business done at Garden City, Kansas, as shown by the report of the Commissioner of the General Land Office for 1885:

The salary of register and receiver amounts to		$1,000 00
2 per cent. commission on public land sales	-	770 02
Commissions on homestead entries	- -	12,146 60
Commissions on final homestead entries	-	554 95
Commissions on timber culture entries	-	11,352 00
Fees on declaratory statements	- - -	4.182 00
Fees on soldiers' declaratory statements	-	504 00
		$30,509 57
Amount allowed register and receiver by law		6,000 00
Excess of maximum allowance to register and receiver	- - - -	24,509 57
2 per cent. commission on Osage lands	-	328 66
Fees on Osage filings	- - - -	5,144 00
		$5,472 66

The manner of determining the proportion of the salaries and commissions of the register and receiver in a case like this is as follows:

Their salary and earnings from the public lands are	- - - - -	$30.509 57
Deduct the $1,000 salary allowed by law	-	1,000 00
		$29,509 57
Their earnings from the Osage lands are	-	5,472 66
Total earnings from all sources	-	$34,982 23

Now, $34,982.23 is to $\left\{\begin{matrix}\$29,509.57\\5,472.66\end{matrix}\right\}$ as $6,000 is to the proportion payable from the appropriation for "salaries and commissions of R. and R.," and the amount payable direct from the Osage moneys—which is salaries and commissions $5,061.35; Osage moneys $938.65.

You will see by this that the register and receiver receive their *proportion* of the Indian filing fee when the earnings are in excess of maximum, and when less than maximum, the register and receiver receive the full filing fee, as is often the case at the land office at Independence, Kansas. Now, if the right of the Osage Indian nation to the filing fee is denied, it is plain to be seen that the United States has not only collected and paid from the Osage moneys $938.65, but also $5,144, or $6,082.65, or $82 65 more than the maximum allowance due the register and receiver.

Is it held that the Government has the right to charge the Indians twice for selling their lands? Can it be equitable that the Government should deduct from the Osage moneys more than the entire cost of selling both the public and Indian lands? I respectfully call attention to the fact that in this instance the public land sold at Garden City amounted to $120,161.25, and the Indian land to $21,577.61, and yet it is proposed to charge the said Indians with more money than was actually paid out to the register and receiver. I think your sense of justice will lead you to the conclusion that this is unjust. Not only are the officers above named paid a proportion of salaries and commissions, from the Indian fund, but a just proportion of all other expenses is also deducted. The filing fee is a revenue derived from the sale of Indian lands, in this instance; it is therefore a part of the proceeds of the lands—for if no Indian lands were sold, no fee would of course be collected.

I also desire to call attention to the fact that the First Comptroller has already virtually decided that these fees

belong to the Indians. By referring to the following reports, it will be seen that the Indian accounts have been credited with filing fees. (See Report Nos. 36225, 36278, 37610, 37612, 37780 and 36860.)

If the Comptroller now decides that the filing fee is not a part of the proceeds of sales of Indian lands, of course all these accounts must be reopened and restated, thus involving a vast amount of confusion, in addition to the perpetration of an act not consistent, in my judgment, with the ends of justice.

Very respectfully,

SAMUEL J. CRAWFORD,
Attorney for the Osage Nation.

BEFORE THE

HON. M. J. DURHAM,

First Comptroller,

MOTION FOR A RECONSIDERATION

OF THE

Comptroller's Decision

Of March 25th, 1886,

RELATIVE TO THE

PROCEEDS OF SALES

OF

OSAGE INDIAN LANDS

IN KANSAS.

SAMUEL J. CRAWFORD,
ATTORNEY FOR OSAGE NATION.

Mar. 30 1886.

Printed by W. H. Moore, 511 Eleventh St., N. W.

Washington, D. C.,

March 30, 1886.

Hon. M. J. Durham, First Comptroller:

SIR: I am in receipt of your letter of 25th inst., relative to the filing fees received from the sale of Osage Indian lands.

This being a matter of considerable importance to the Osage Indians, and involving questions affecting the rights and interests of other Indians as well, I deem it my duty to do all that can reasonably be done to secure a decision in the premises that will be just and equitable to all parties in interest. I would therefore respectfully move for a reconsideration of the case, and a review of the questions involved, and in support of this motion, I respectfully submit the following statement bearing upon the subject:

On page four of your letter, you say:

"The same is paid by the purchaser, not as a part of the price of said lands, but as a fee to those officers [the register and receiver] for certain services they render in the sale of the land."

The declaratory statement is in the nature of a contract to bind the bargain for the sale of a piece of Government or *Indian land*, sold under the pre-emption laws.

The purchaser in that instrument declares his intention to claim certain lands under the pre-emption law, and that alone secures or holds the lands for him for the space of a year. It is the initiatory step toward securing the land and he makes a preliminary payment of two dollars. This money does not go to the register and receiver, because, under section 3617 R. S., all moneys are covered into the Treasury "without deductions on account of salary, fees, costs, charges, expenses, or claim of any description whatever." The register and receiver are paid

from appropriations made by Congress, and their compensation otherwise than the fixed salary of $500 each per annum, is based on the amount of business done at the local office, providing that both salary and commissions shall not exceed $3,000 each. The only exception to this rule is made by the Act of August 5th, 1882, which provides that the expenses incident to the sale of the Osage lands shall be paid by the receivers of public moneys from the proceeds of the sale. You admit that these filing fees arise from the sale of the Osage lands. Is it not therefore unreasonable to deprive the Indians of the amount of the fees, and at the same time charge them with a proportion of the salaries and commissions of these officers?

In paragraph second of page four of your letter, you add:

"It is urged by you that the Government makes a profit by the sale of said lands, and that the two dollars on each sale of 160 acres amounts to more than enough to pay the maximum salaries of the officers making the sales. This may be true, yet the Indians cannot complain if they get all they are entitled to under their cession."

The point we make is, the Indians do not get all they are entitled to under their cession. They did not part with their lands to the United States for a money consideration. The United States acts merely as a trustee or agent for the sale of these lands to others, and the treaty expressly stipulates these lands are to be sold for the *benefit of the Indians.* The Government has no rights, therefore, either in law or equity to make one dollar out of the Indians.

The filing fees up to June 30th, 1884, amount to $92,700, and the expenses of selling the land, per the report of the Commissioner of the General Land Office, amounts to $132,676.45.

Are the several appropriations to be reimbursed by this large sum, $132,676.45, and at the same time does the United States propose to make $92,700 clear profit by selling the Indian lands? If the United States had agreed by its

treaty to pay the Indians a definite price for their lands, we might concede the right of the Government to "make money" by the sale of them, but as the law says in so many words that these lands are to be "*sold for their benefit*," we insist that the statute means exactly what it says, and that the United States has no interest whatever in the sale of the Osage lands.

In the latter part of said paragraph you further say:

"The provisions of section 2238 R. S. were in force long before this cession was made; and those making the cession are presumed to know how said lands were to be sold, and were willing, as they stipulated that the same should be done as other lands are sold."

The decision of the Comptroller (III Lawrence, 365) was not in force until December 30, 1882, or fifteen years after the treaty was signed.

By that decision the United States enters into partnership to sell its own lands with those of the Indians, and to divide the expense of the same.

Prior to that time it had been customary to pay from the Indian moneys the only real expenses of selling them, namely, clerk hire, but under said decision the Government proposes to go back to the date of the commencement of the sale of the land and calculate a pro rata of the salaries and commissions of registers and receivers, clerk hire, office rent, stationery, furniture, and the expense of depositing the public money.

The Land Office saw the effect of that decision at once, viz: that the United States would be charging the Indians twice with the expense of selling their lands, and accordingly the order was issued turning the Osage filing fees into their proper channel, to the credit of the said Indians.

If the Government is obliged to pay $6,000, the maximum compensation of a register and a receiver, for the sale of its own or the public lands, what can be the expense

of selling the Indian lands since the extra duty involves no greater compensation?

On page five you state:

"The Government, in selling other lands, fixes the price, say, at $1.25 per acre, and the man wishing to purchase comes and says: 'I want 160 acres, and here is $200 to pay for the same.' But the officers say: 'There are certain fees which you must pay before the land can be sold to you.' He pays these fees, because he wants the land, for services rendered by said officers in selling the land, but the purchaser never claims that he has paid more than $200 for the same, if that was the price. The additional cost is for services rendered as above stated, and he never complains that the Government, by charging him these fees, is making money out of him. He gets all he contracts for."

Now, if this man, whose case you have cited above, has made an erroneous entry, and the General Land Office cancels the same and returns his purchase-money, what amount will be repaid?

I am assured on competent authority that the sum returned to the settler in this class of cases is $202. Why should $202 be returned? Because the $2 filing fee proceeds from the sale of the land. The settler paid $202 for his land, and that amount is returned to him. What are "proceeds?" The "sum afforded by a sale." What is the result of a sale of 160 acres of Osage land? $202 in every instance.

We have never contended that the settler or purchaser did not get his value received. We have stated, however, that it was either illegal to charge the settler the $2 filing fee or that the Indians were entitled to the benefit of it.

In paragraph second of page 5, you state that the excess of maximum is covered into the Treasury "as other public moneys," by miscellaneous warrants. So are the moneys received from the sale of Indian lands covered in by miscellaneous warrants. There are no Indian land warrants. It is not a question of what kind of warrant

shall be used, but once the Indian moneys are in the Treasury, we insist that they should constitute a fund for the benefit of the Indian, as provided by law.

I therefore respectfully request that you will reconsider your decision that the filing fees are not a part of the proceeds of the sale of the Osage Indian lands.

If this is denied, I make a second request—that as you do not propose to readjust the accounts already stated on the supposition that these fees belong to the Indian, on the ground that they are *res judicata*, that you will decide that said Indians are entitled to the amount of said filing-fees *as an offset* to the expenses charged them under the act of August 5th, 1882, and the Lawrence decision, from the date of the commencement of the sale of said lands to Dec. 31st, 1885. In support of this proposition I need only say, that by reference to my brief, dated March 20th, 1886, page 2, you will see that the amount chargeable to the Osages as salaries and commissions of register and receiver is $938.65. If the proportion were computed on the basis that said fees belong to the Government, the amount chargeable to the Osages would be $56.37. The Commissioner of the Land Office has not, I am informed, changed his ruling in this matter up to the present time; and it would be impossible for him to return the accounts since July 1st, 1884, and have them restated; some of them have been adjusted and certified by yourself as correct. The most equitable plan, therefore, it seems to me, would be to give the Indians credit for the filing-fees *as an offset* to the $132,676.45, which you have certified is reimbursable from the Osage moneys to the appropriations. Commencing with the 1st of January, 1886, the Commissioner could then direct the receivers to restate their accounts.

Very respectfully,

SAMUEL J. CRAWFORD,

Attorney for the Osage Nation.

4

BEFORE THE

Honorable Secretary of the Interior.

BRIEF AND ARGUMENT

ON

FIVE PER CENT. ACCOUNT.

Indian Lands and Reservations

IN KANSAS.

By SAMUEL J. CRAWFORD,
Attorney for the State.

Nov. 24 1886.

Before the Honorable the Secretary of the Interior.

Referring to the claim of the State of Kansas ($43,790.32) now pending before the Department, relative to five per centum of the net proceeds of public lands and permanent reservations, as guaranteed by Congress, I have the honor to say—

I.

That the identical questions involved in this case have heretofore been decided by the Commissioner of the General Land Office, by the Secretary of the Interior, by the First Comptroller of the Treasury, by the Secretary of the Treasury, and by Congress.

On June 30th, 1877, the State of Kansas presented its claim to the Commissioner of the General Land Office for five per centum of the net proceeds of sales on former Indian lands and permanent reservations, as guaranteed by Congress. After duly considering the matter, the Commissioner caused an account to be stated, embracing all sales of lands in former reservations which had been held by the common Indian title and sold subsequent to the admission of the State. This account, when stated, was certified to the Treasury, by the Commissioner, for final action. Through the proper channels it reached the First Comptroller, who, on May 6th, 1880, after a careful and tedious consideration of the case in all its bearings, rendered a decision in favor of the State. (Copy herewith.)

According to this decision, as will be observed, an appropriation of the amount found due was deemed essential, whereupon the said amount, ($190,268.27,) being an

amount equal to five per centum of the net proceeds of such sales from January 29th, 1861, (date of admission,) to June 30th, 1877, was duly reported to Congress by the Secretary of the Treasury, when, on March 3d, 1881, the necessary appropriation was made. (21 Stats., p. 428.)

Following this the accounts on sales of such lands were and have been regularly stated and passed at the close of each fiscal year, since 1877, until the Assistant Commissioner of the General Land Office thought proper to ask for instructions concerning the account for the fiscal year 1885.

Thus it will be seen that the present case and every question connected therewith has already been carefully considered and decided by the proper officers of the Government.

If such an adjudication and settlement of a case does not bring it within the rule of *res adjudicata*, then it is difficult to conceive of a case to which that rule could properly be applied.

In Bank of the Metropolis (15 Pet., 401) the Supreme Court limited the right of an executive officer to review his predecessors' decisions "to mistakes of fact arising from errors of calculation, and to cases of rejected claims in which material testimony is afterwards discovered and produced."

In Stone *vs.* The United States (2 Wall., p. 535) the Supreme Court held that one "officer of the Land Office is not competent to cancel or annul the act of his predecessor."

In the case of Jackson (19 Court of Claims, p. 504) it was held that the Secretary of the Treasury could not reopen a claim adjusted by his predecessor

See, also, Lavallette *vs.* The United States. (1 Court of Claims R., p. 149.)

Also, State of Illinois *vs.* The United States (20 Court of Claims R., p. 342) and authorities therein cited.

Also, case of Agricultural College lands in Kansas, decided by the Honorable Secretary on October 25, 1886.

In this case, after briefly stating the facts relative to previous action and former decisions, the Honorable Secretary says:

"To open the case now on such showing would be to invite the re-examination by this Department of all questions decided during that time in which errors of law might be alleged. Such an undertaking cannot be assumed. It is entirely opposed to the practice of Courts and of this Department."

It is conceded by all, I believe, who have examined this Agricultural College case, that the State is lawfully entitled to a part of the lands claimed; one tract, especially, of 320 acres, which lies entirely outside and beyond all railroad limits, and which by mistake was certified as double minimum; but the case having been once examined and decided, there is now, it seems, no relief under the principle of *res adjudicata*. Therefore, if the rule holds good in the case of Agricultural College lands, it ought to be equally good and binding in the five per cent. case now pending.

II.

But, Mr. Secretary, we do not raise the question of *res adjudicata* in this case because of any doubt as to the legality of the claim or the validity of former decisions, but because the case has been properly adjudicated and settled. The States were all admitted into the Union on equal footing in every respect.

The acts, under and by virtue of which they were admitted, provide that they shall have five per centum of the net proceeds of sales of all public lands within their respective borders, and the act of March 3, 1857, provides:

"That the Commissioner of the General Land Office be, and he is hereby, required to state an account between the United States and the State of Mississippi for the purpose of ascertaining what

sum or sums of money are due to said State, heretofore unsettled, on account of the public lands in said State, and upon the same principles of allowance and settlement as prescribed in the act to settle certain accounts between the United States and the State of Alabama, approved March 2d, 1855, and that he be required to include in said account the several reservations under the various treaties with the Chickasaw and Choctaw Indians within the limits of Mississippi, and allow and pay to the said State five per centum thereon, as in case of other sales, estimating the lands at the value of one dollar and twenty-five cents per acre.

"SEC. 2. *And be it further enacted*, That the said Commissioner shall also state an account between the United States and each of the other States upon the same principles, and shall allow and pay to each State such amount as shall thus be found due, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre." (11 Stats., p. 200.)

Section four of the act admitting Kansas into the Union provides:

"That from and after the admission of the State of Kansas, as hereinbefore provided, *all laws* of the United States which are not locally inapplicable shall have the same force and effect within that State as in other States of the Union." (12 Stats., 127.)

The Supreme Court, in Smith *vs.* Cockrill, (6 Wall., 756,) in construing this identical section 4 in connection with a general law of 1828, held that the said section was a virtual re-enactment of the said law of 1828. The case turned upon the sole question whether an act of Congress passed in 1828 was applicable to the State of Kansas.

The Secretary of the Interior, in his decision of November 9th, 1874, in passing upon a similar case to the one under consideration, says that the said act of 1857 is applicable to the State of Nebraska.

If applicable to Nebraska, why not to Kansas? The clause in the Nebraska act of admission is the same as section four in the act admitting Kansas. The truth is, this law of 1857 is a part of the general land system, and applies to each of the public land States, and any attempt to give it any other or less meaning, force, or effect, is simply an attempt to draw a line of distinction, by the splitting of hairs, between States of the Union.

The law says the Commissioner shall state an account between the United States and each of the other States upon the same principles as provided for the States of Alabama and Mississippi, and pay the amount found due, estimating *all lands* and permanent reservations at one dollar and twenty-five cents per acre.

It is said that when the State of Alabama was admitted there were large bodies of land therein reserved for Indians, and that "evidently it was not considered that the compact with Alabama (almost identical with that subsequently made with Kansas) entitled that State to any part of the proceeds of the Indian lands," for afterwards, by act of March 2d, 1855, (10 Stats., 630,) the Commissioner of the General Land Office was required to state an account between the United States and Alabama for the purpose of ascertaining what sums were due the State under the act of admission, and he was required to include in said account "the several reservations under the various treaties with the Indians, and allow and pay to said State five per centum thereon, as in the case of other sales."

True, there were large reservations in Alabama when the State was admitted, but it is not true, as stated, that it was considered that the State was not entitled to any part of the proceeds of Indian lands therein.

From time to time after the admission of Alabama these reservations were ceded to the United States. (See Creek treaty of November 24, 1832, (7 Stats., 366;) Chickasaw treaty of October 20, 1832, (7 Stats., 382;) Chickasaw treaty of May 24, 1834, (7 Stats., 450;) Choctaw treaty of October 18, 1830, (7 Stats., 210.)

As will be observed, a part of the lands were ceded outright, for so much money; a part were ceded in trust, to be sold for the benefit of said Indians; a part were exchanged for lands west of the Mississippi river, and a part were allotted to individual Indians in severalty. On all lands ceded outright, sold in trust, or exchanged for lands

west of the Mississippi the State of Alabama received its five per centum as fast as the lands were sold, but on lands (called reservations) allotted to Indians in severalty the State did not receive its five per centum, because the lands had not, and could not, be sold by the United States. Hence the act of March 2d, 1855, which, in substance, directed the Commissioner of the General Land Office to state an account between the State of Alabama and the United States, and allow and pay to said State the said five per centum, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre.

That State, as heretofore stated and as the records will show, had already received its five per centum on all lands which had been sold, whether they were formerly Indian reservations or not, and then, under the said act of 1855, received five per centum on Indian allotments (called reservations.)

Having established the precedent for Alabama, Congress, on March 3d, 1857, passed another act similar to the act of 1855, and made it general, so as to apply to all the States, as heretofore shown.

I refer thus fully to the acts of 1855 and 1857 to show conclusively that Congress intended that the public land States should be placed on the same footing one with another, and receive an amount equal to five per centum on all lands sold by Congress or set apart as permanent reservations in the States, respectively.

To pay the States this sum out of the proceeds of sales of the public lands, as guaranteed by Congress, does not in the least interfere with Indian trust funds. At least, such payments never have so interfered, and yet the policy has been in practice for more than half a century.

Such payments are made, as I understand it, under a permanent annual appropriation, and do not in any manner interfere with trust funds.

III.

But even though the said acts of 1855 and 1857 had never been passed, and the question as to the right of the State to the said five per centum had not already been decided, I submit that the act of admission, fairly construed, is conclusive in favor of the claim of the State.

Section three of this act says:

"The following propositions are hereby offered to said people of Kansas for their free acceptance or rejection, which, if accepted, *shall be obligatory* on the United States and upon the State of Kansas, to wit: First. That sections numbered 16 and 36 in every township of public lands in said State shall be granted to said State for the use of schools. * * * Fifth. That five per centum of the net proceeds of sales of all public lands, lying within said State, which shall be sold by Congress after the admission of the State into the Union, after deducting all expenses incident to the same, shall be paid to said State for the purpose of making public roads and internal improvements and for other purposes, as the Legislature may direct: * * * *Provided*, That the foregoing propositions herein offered are on the condition that the people of Kansas shall provide by an ordinance irrevokable, without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States or with any regulation Congress may find necessary for securing the title in said soil to *bona fide* purchasers thereof, and that the said State shall never tax the lands or the property of the United States in said State." (12 Stats., 727.)

Now, the question is, What did Congress mean by this compact and agreement; what did Congress understand to be *public lands* at the date of the compact?

To determine these questions it is necessary, perhaps, to refer to the legislation of Congress relative to the disposition of lands within the State.

Section 12 of the act creating the office of Surveyor General in the Territory of Kansas and providing for the survey and sale of lands therein, says:

"That *all* the lands to which the Indian title has been or shall be extinguished within said Territory of Kansas shall be subject to the operations of the pre-emption act of September 4, 1841, and under the conditions, restrictions, and stipulations therein mentioned."

Section 13 of the same act says:

"That the *public lands* in the Territory of Kansas to which the Indian title shall have been extinguished shall constitute a new land district. * * * And the President is hereby authorized to cause the surveyed lands to be exposed for sale from time to time in the same manner and upon the same terms and conditions as the other public lands of the United States." (10 Stats., 310.)

By act of March 3, 1857, the land district created by the act above quoted was divided into three districts, and the "public lands"—*i. e.*, the lands to which the Indian title had been extinguished—were again directed to be sold as "other public lands." (11 Stats., 187.)

By a joint resolution of Congress approved April 10th, 1869, it was provided that the Osage ceded and trust lands in Kansas should be sold to *bona fide* settlers residing thereon, except the 16th and 36th sections, which were to be reserved for school purposes. "*in accordance with the act of admission.*" (16 Stats., 55.)

The act of May 9th, 1872, provides for the disposal of the Osage trust and diminished reserve lands to active settlers, except the 16th and 36th sections, *in accordance with the general principles of the pre-emption laws.* (17 Stats., 91.)

By act of June 23d, 1874, time was extended to settlers on the Osage trust and diminished reserve lands to complete their purchases, and all the remainder of the "*diminished reserve*" was made *subject to entry*, &c. (18 Stats., 272.)

This is the legislation by Congress relative to the Osage Indian lands in Kansas, which form the basis of almost the entire amount of the pending claim.

By the treaty of June 2d, 1825, (7 Stats., 240,) the Osage reservation was established and boundaries defined. As will be observed, it gave them simply the right of occupancy, leaving the fee-simple title in the United States.

By treaty proclaimed January 21st, 1867, (14 Stats., 687,) this common Indian title or right of occupancy was extinguished and provision made by Congress for sale of lands embraced therein to actual settlers, as already shown.

The Miami, Kansas, and other reservations upon which the five per centum is claimed were also held by the common Indian title and disposed of by Congress under similar legislation as that relating to the Osage lands. (See Revised Indian Treaties, pp. 504, 511, 512, 410, 757.)

If anything can be settled by decisions of the Supreme Court and by opinions of Attorney Generals, it is settled that in all such reservations the *fee* is in the United States, and that the United States may dispose of the *fee*, and when the Indian occupancy ceases the entire right vests in the owner of the fee, the United States, or the grantees of the United States.

If such lands are not public lands, pray tell us what they are? The United States has the fee, the Indians the mere right to occupy. They cease to occupy, no matter why. Whether they are killed, driven away, or bought off, is of no consequence; their occupancy is ended, and when ended what are the lands left vacant, if not public lands? They have been surveyed by the United States, made subject to sale or pre-emption by acts of Congress.

It is simply absurd to claim that such lands are not public lands, completely and absolutely within the control of Congress. If not, then why all this legislation by Congress relative to the Osage reservation and other Indian lands herein mentioned?

If there could have been doubt on the subject, it was removed by the Supreme Court in the case of Beecher *vs.* Wetherby (5 Otto, 517.) In that case the United States had agreed that the 16th section of "*public lands*" in each township should be granted to the State of Wisconsin for the use of schools. The land in controversy was the 16th

section in a township covered by an Indian reservation, and it was claimed that the section did not pass to the State *because, being covered by this reservation, it was not embraced in the compact, not being public lands.*

But the court thought otherwise, and held that the fee was in the United States, the occupancy merely in the Indians, and when that occupancy ceased the right of occupancy was in the owner of the fee. The court also held that the lands were public lands at the date of the compact with the State, (notwithstanding they were at that time covered by an Indian reservation,) and that when the United States agreed that the State should have the 16th section in each township of "public lands" there was thereby conveyed to the State the fee in the 16th section in a township covered by an Indian reservation, subject only to the Indian right of occupancy.

If this does not settle the question, that lands covered by an Indian right of occupancy are *public lands*, it is difficult to understand how the question could be settled.

Apply that case to the one under consideration.

Take the Osages. Is there any room to doubt that their right was a mere right of occupancy? Certainly not. And that was all that the United States did or could buy from them. Simply their right to occupy. That was the only right they held when the compact was made between the United States and the State of Kansas.

It is a case exactly like the Wisconsin case. If, in the Wisconsin case, the lands were *public lands*, then it must be held that in this case the lands were *public lands*, and there is no honorable way by which the United States can avoid paying the five per centum on the net proceeds of such sales.

It will be observed in the Beecher case, *supra*, that the court held that when the compact was made with the State the right to the fee in the 16th section vested in the State,

and no subsequent act of the United States could divest that fee; *i. e.*, the United States could not afterwards convey by patent to another.

So in the Kansas case. When the act of admission was passed the right to the five per centum vested, and no subsequent act of the Government could defeat that right. The United States could not get rid of paying the five per centum by agreeing to make a specific application of the purchase-money in some other way.

Again, the Supreme Court, in United States *vs.* Cook, says, with reference to the last-named class of titles, that the fee is in the United States, subject only to the right of occupancy. The possession, when abandoned by the Indian occupants, attaches itself to the fee without further grant. (19 Wall., 591.)

The First Comptroller of the Treasury, in his decision of May 6th, 1880, relative to this five per cent. account, said:

"The grant of the five per centum having been made it could not afterwards be revoked. The right of the State became by the grant a vested right, which Congress could not recall. By treaties made after the admissson of the State with the several tribes who occupied these lands it was stipulated that the net proceeds of the sales of all but one of the reservations, viz., the Kansas trust, should be invested by the United States for the benefit of the respective tribes. Without doubt, these treaties, together with subsequent acts of Congress, passed to carry out their provisions, entitle these tribes to a sum equal to these net proceeds; but they did not destroy the antecedent right of the State of Kansas to the five per cent. which had been granted when the United States, holding the fee in said lands, had capacity to make the grant, and made it without provision for any subsequent limitation."

This, I submit, is conclusive in favor of the claim of the State of Kansas now pending before the Honorable Secretary.

The case of Wilcox *vs.* Jackson (10 Peters, 498) has been referred to as bearing upon the present case, but, as will be observed by reference to the decision in Beecher *vs.*

Wetherby, *supra*, Indian reservations are not legally appropriated or severed from the public lands when held by the common Indian title or right of occupancy. If such Indian reservations were legally appropriated and severed from the public domain then there was scarcely an acre of public land in either of the States of Indiana, Illinois, Michigan, Wisconsin, Missouri, Iowa, Minnesota, or any other State heretofore admitted into the Union, because almost the entire body of lands in those States was embraced in Indian reservations prior to their admission.

Even the Military reservation, out of which grew the said Wilcox-Jackson suit, was established on a former Indian reservation. So, then, one of two things is true: either the lands embraced in Indian reservations while the fee-simple title was in the United States were public lands, or else there were no public lands in any State admitted into the Union.

Again, the L. L. and G. R. R. case (92 U. S., 733) has been referred to as in point, but an examination of that case will show that it has no bearing whatever. That grant (12 Stats., 772) provided that if, at the time the line of said road is definitely located, it shall appear that the United States has sold any of the granted lands, or that the same has been reserved for any purpose whatever, then other lands in lieu thereof could be selected. When this grant was made the Osage Indian title had not been extinguished, and before the road was definitely located other disposition had been made of the lands, so the railroad company had to accept lieu lands, as the grant provided.

Now, with this brief statement of the facts and the law, I respectfully submit the case, with the hope that it will receive such consideration as its merits require.

SAMUEL J. CRAWFORD,
Attorney for the State.

WASHINGTON, D. C., *November 24th*, 1886.

5

APPLICATION

TO THE

SECRETARY OF THE TREASURY

For an Adjustment of Accounts

BETWEEN

THE UNITED STATES AND THE OSAGE NATION,

RELATIVE TO THE SALE OF LANDS IN KANSAS.

SAMUEL J. CRAWFORD,
Attorney for the Osage Nation.

July 4, 1887

W. H. MOORE, PRINT. NO. 511 ELEVENTH ST.

WASHINGTON, D. C.,

July 4th, 1887.

To the Hon. Secretary of the Treasury.

SIR: By treaty between the United States and the Osage Nation of Indians, concluded September 29th, 1865, ratified June 26th, 1866, and proclaimed January 21st, 1867, the said Indians ceded their lands in Kansas to the United States, to be sold in trust for their benefit.

14 Stats., 687.

In pursuance of this treaty Congress, by proper legislation, made provision for the survey and sale of said lands.

See 16 Stats., 55, 362; 17 Stats., 91; 18 Stats., 272; 22 Stats., 267.

By article 1 of said treaty, as will be observed, a tract 30 by 50 miles, on the east end of the said Osage reservation, was first ceded to the United States, to be surveyed and sold, and "after reimbursing the United States the cost of said survey and sale, and the said sum of $300,000, to be placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States to the credit of the *civilization fund*, to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States."

By article 2 of said treaty the said Indians also ceded a tract of land, 20 miles in width, off the north side of the remainder of said reservation, to be surveyed and sold in trust for said Indians; and by the same article provision was made for the disposition of the remainder of said reservation according to restrictions therein stated.

In pursuance of these provisions of the treaty Congress, by act approved July 15th, 1870, above quoted, says: "And the United States, in consideration of the relinquishment by said Indians of their lands in Kansas, shall pay annually interest on the *amount of money received as proceeds of sale of said lands, at the rate of five per centum.* And for this purpose an accurate account shall be kept by the Secretary of the Interior of the money received as proceeds of sale, *and the aggregate amount received prior to the first day of November of each year shall be the amount upon which the payment of interest shall be based. The proceeds of sale of said land shall be carried to the credit of said Indians on the books of the Treasury, and shall bear interest at the rate of five per cent. per annum.*

This, I submit, requires the aggregate amount of the proceeds of sales of all Osage lands in Kansas, including the ceded lands, to be placed to the credit of said Indians.

Again, by act of Congress approved May 9, 1872, above quoted, it was, and is, provided: "That the 12th section of said act of July 15th, 1870, is hereby so amended that the *aggregate amount of the proceeds of sale*, received prior to the first day of March of each year, *shall be* the amount upon which the payment of interest *shall be based.*"

It is difficult to understand how or by what language the intention of Congress could be more clearly expressed.

These acts of Congress expressly say that the aggregate amount received from the sale of said lands should be placed to the credit of said Indians; and there was a reason for it, although article 1 of the treaty provided differently. The Indians, by this act of 1870, were relinquishing the remainder of their lands in Kansas, and by far the greater portion thereof to the United States, and agreeing to remove to the Indian Territory.

The act says: "The United States, in consideration of the relinquishment by said Indians of their lands in Kansas, shall pay annually interest on the aggregate amount of money received," &c.

Their lands in Kansas were all embraced in one reservation, known as the Osage ceded, the Osage trust, and the Osage diminished reserve lands.

By the first article of the treaty a great wrong had been perpetrated upon the Osage people. Schemers had worded the article in such a way as to completely deceive and mislead the Indians, in so far as a part of the proceeds of the ceded lands were concerned. Not one of the Osages who made and signed the treaty could either read or write, and, of course, they could not understand the meaning and effect of the language used. This was, and is, apparent to every person who understands the English language.

It is, therefore, in no wise surprising that Congress should avail itself of the earliest opportunity to correct such a flagrant outrage. And that is just what Congress did, or attempted to do, by the acts of 1870 and 1872, above quoted.

The recent settlement of the claim for filing fees, arising from the sale of Osage lands, wherein a credit of $87,003.38 was allowed in favor of the Osage Nation as an offset for expenses incident to the sale of said lands prior to June 30th, 1884, was, as I understand the matter, only a partial adjustment of said account.

I, therefore, in view of the law and the facts, respectfully request a full and complete adjustment of all accounts, as between the United States and the Osage tribe or Nation of Indians, arising from, or growing out of, the sale of all Osage lands in Kansas, to the end that the said Osage Nation may receive credit for whatever sum is justly due. This, I submit, the Government is in honor bound to do.

The United States, in this matter, is charged with the sacred obligations of a trust, and they ought to be willing to render an account that will balance with even-handed justice.

I submit herewith copy of a printed brief relative to the proceeds of the Osage ceded lands; also, a copy of Senate Ex. Doc. No. 30, 47th Cong., 2d Sess., showing disposition of the same.

Respectfully submitted.

SAMUEL J. CRAWFORD,
Attorney for the Osage Nation.

6

Motion

In the United States District Court

FOR THE WESTERN DISTRICT OF ARKANSAS.

THE UNITED STATES, ON THE RELATION OF DANIEL McINTOSH *et al.*, *Complainants*,

vs.

SAMUEL J. CRAWFORD *et al.*, *Respondents.*

Brief on Behalf of Respondents,

By SHELLABARGER & WILSON, and
ROGERS & READ,
Attorneys for Defendants.

Jan. 31, 1889

WM. H. MOORE, PRINT., 511 ELEVENTH ST. N. W.

U.S. D

IN THE

U. S. District Court for the Western District of Arkansas

THE UNITED STATES *ex rel.*, DANIEL MCINTOSH, WILLIAM FISHER, WILLIAM ELIJAH GENTRY, ELIJAH HERMOGINE LERBLANCE, ROLY MCINTOSH, and WALLACE MACNAC, all described as residing in the Indian Territory, *Complainants*,

vs.

SAMUEL J. CRAWFORD, citizen of the United States, resident of Topeka, Kansas; CLARENCE W. TURNER, citizen of the United States, residing in the Indian Territory; PLEASANT PORTER, a Creek Indian, residing in the Indian Territory; ALBERT PIKE MCKELLOP, Creek Indian, residing in the Indian Territory; DAVID M. HODGE, Creek Indian, residing in the Indian Territory; ESPARHECHER, Creek Indian, residing in the Indian Territory; LEGUS C. PERRYMAN, Chief Creek Indian, residing in the Indian Territory; A. J. BROWN, Seminole Indian, residing in the Indian Territory; JOHN F. BROWN, Seminole Indian, residing in the Indian Territory, and GEORGE W. STIDHAM, Creek Indian, residing in the Indian Territory, *Respondents.*

Two penal actions are prosecuted; one in behalf of the Creeks and the other in behalf of the Seminoles, in each

case by the same informers, complainants, above named, and each against the same respondents, to wit, those above named, in the District Court for the Western District of Arkansas; each presecuted under the same statute, presumably section 2103; the one being for $270,283.71, to wit, that on behalf of the Creek Nation, and the other for $191,294.20, to wit, on behalf of the Seminoles.

We give below first a synopsis of the complaint on behalf of the Creek Nation, and, afterwards, give a synopsis of the complaint on behalf of the Seminoles.

The two complaints are substantially identical in all the respects, which we shall here consider, but we will below indicate briefly wherein the two complaints differ.

The following is a synopsis of the complaint filed on behalf of the Creek Nation:

SYNOPSIS OF COMPLAINT ON BEHALF OF THE CREEK NATION.

1. The title and the parties are as above set forth.

2. Avers that the names, vocations, and the places of the parties are correctly set forth in caption.

3. That on March 1, 1889, respondents, Porter, Hodge, and Esparhecher, were appointed and confirmed delegates representing the Creek Nation in pending negotiations for sale of their tribal lands designated as "Oklahoma," and that sale was consummated on said day for a consideration of $2,280,887.10; that the functions of the delegates ceased with the consummation of said sale and the making of their report; that afterwards, on March 15, 1889, without any proper authority from the Creeks, the delegates obtained from the Treasurer of the United States, on account of Creek Nation, $270,283.71, part of the consideration of said sale; that said money paid to said delegates was for the account of said Creek Nation, and such delegates received it in trust to be carried and paid to the treasurer of

the Creek Nation, or other person authorized to receive it; that said delegates failed to pay any part of said moneys to the Creek Nation, but wickedly contriving to cheat said nation out of said money, said delegates, Porter, Hodge, and Esparhecher, conspired with Crawford, Turner, McKellop, Perryman, Stidham, A. J. Brown, and John F. Brown for the purpose of defrauding the Creeks out of said $270,283.71 to unlawfully appropriate same to their own uses; and respondents, and each and all of them, in pursuance of said conspiracy, under the pretense of paying said money in discharge of pretended liability of the Creeks to said Crawford, for legal services, assumed to have been rendered by Crawford, under pretended contract for legal services alleged to have been made with Crawford in the interest of the Creeks, touching the sale of said tribal lands to the United States, did pay, *or pretend* to pay, to Crawford said $270,283.71, which was, to extent of *entire* amount thereof, *in excess* of any valid properly authenticated and approved contract for services had by said Crawford.

4. That the payment of said sum of $270,283.71 was fraudulent and but one of the methods of said conspiracy between respondents, and all of them, to distribute said sum among themselves and their abettors, and to fraudulently appropriate the same to their own use; all of which they then and there did so do.

Wherefore relators sue under said statute and pray judgment against respondents for $270,283.71, with interest.

(Signed) G. P. M. TURNER,
ZACH. TAYLOR,
TABOR, HENDERICK & HORTON,
for Relators.

Affidavit attached, made by Daniel M. McIntosh, swearing that the statements of the complaint are true.

Defects Appearing on Face of Complaint.

Due Authority to Prosecute Does Not Appear.

One question likely to arise in this case in behalf of and affecting all the defendants is this:

Whether, since this suit professes to be prosecuted by the informers named, although stated to be by the United States *ex rel.*, etc., and is a penal statutory *qui tam* action, authorized by section 2103, and whether, moreover, since section 2105 makes it the duty of district attorneys to prosecute such suits when applied to to do so, and makes their failure to be a ground of removal from office; and whether, since the said complaints nowhere show that the district attorney of the United States or the Attorney-General has had anything to do with the prosecution of the suit, and their names do not anywhere appear as authorizing the suit, and the petition in the concluding clause shows that the suit is prosecuted by the relators alone, is the suit, as disclosed by the face of the declaration or complaint, brought by authority of law?

The following suggestions are made in answer to this question:

1. It is thoroughly settled that a suit to vacate a patent cannot be prosecuted except by the authority of the Attorney-General of the United States, acting through the proper local attorney of the United States.

This is decided in the following cases:

U. S. *vs.* Throckmorton, 98 U. S., 61; Western Pacific R. R. Co. *vs.* U. S., 108 U. S., 512; Bookwalter *vs.* Clark, 10 Fed. Rep., 793; U. S. *vs.* Mullan, 7 Sawyer, 476; U. S. *vs.* San Jacinto Tin Co., 10 Sawyer, 855 (S. C. in 23 Fed. Rep., 290).

The general principle applicable to *qui tam* actions like this is stated in the case of Smith *vs.* Look *et al.*, 108 Mass., 138–141.

There a certain statute gave a *qui tam* action to informers, under which "one-half of the money recovered as a penalty in any case arising under the laws relating to inland fisheries shall be paid to the person making the complaint in the case in which the same is recovered, and the remainder to the commonwealth." (Stat. of 1869, chap. 384, sec. 33.)

There the court held that the statute did not authorize the informer to prosecute or manage the suit; that an interest in the penalty is a different thing from the right to bring the action in his own name, the court (p. 140) saying:

"It is a general rule that no such action can be maintained by the informer unless power is given to him by the statute for that purpose."

Colburn *vs.* Swett, 1 Met., 232.
Wiley *vs.* Yale, Ib., 553.
Flemming *vs.* Bailey, 5 East., 313.
Barnard *vs.* Gostling, 2 East., 569.
Davis *vs.* Edmonson, 3 B. & P., 382.

The opinion concludes in the following words:

"The statute in question does not in express terms give a right to any private prosecutor to bring an action in his own name, nor does it, in our judgment, by any necessary implication. 'When no such right is given to any individual, or body of individuals, then, as the right to enforce all penalties made to insure obedience to general laws is in the commonwealth,' they are to be prosecuted by the commonwealth."

Colburn *vs.* Swett, 1 Met., 232, 236.
Nye *vs.* Lamphere, 2 Gray, 295.

"A *qui tam* action is a well-established remedy, which is to be resorted to only in cases where it is expressly given." (Wheeler *vs.* Goulding, 13 Gray, 539.)

"In the case of Levy *vs.* Gowdy, 2 Alken, 320, which is relied upon by the plaintiff, the question as to the proper party to bring the action was not raised.

"As we are of opinion that this action cannot be maintained we have not thought it necessary to consider the other exceptions."

The general principle being thus established that the suit can only be brought in the name of and by the United States, under its direction and authority, and remains under the control of the United States to the end of the suit, therefore the principle which is asserted in the case of United States *vs.* Throckmorton, *supra*, and the other similar cases above cited, is here alike applicable as in a case brought to vacate a patent, as asserted in said cases following Throckmorton.

The principle we allude to is this, and thus stated in Throckmorton, to wit, that wherever a suit must be prosecuted by the United States and under its control and authority, there it is essential "that it shall appear in some way, without regard to the special form, that the Attorney-General (in this case, at least, the district attorney) has brought it himself, or given such authority for bringing it as will make him, the United States officer, officially responsible therefor through all the stages of its prosecution." (United States *vs.* Throckmorton, 98 U. S., 61, 70, 71.)

Rule as to Prosecutions Under Penal Statutes.

Another principle applicable to the present prosecution is that all penal actions, whether *qui tam* or other, must, in the pleading instituted in the suit throughout the prosecution, be brought strictly within the terms of the penal statutes authorizing them.

Some of the authorities establishing this proposition are thus stated in 5 Wait's Actions and Defenses, 156:

"A penalty cannot be raised by *implication*, but must be *expressly* imposed.

Jones *vs.* Estes, 2 Johns., 379.
Allaire *vs.* Howell Works Co., 14 N. J. L., 21.

"And where a statute gives a penalty such statute must be *strictly* pursued.

Broadwell *vs.* Conger, 2 N. J. L., 210.
Adams *vs.* Scull, 2 N. J. L., 741.

"The penalty cannot be raised or altered, neither made less nor increased by the court."

Id. See *ex parte* Swift, 3 Dowl., P. C., 636.
Gilbert *vs.* Bone, 97 Ill., 343.

And this same doctrine is explicitly laid down in Elliott *vs.* R. R. Co., 99 U. S., 573–576, where it was attempted to add to the $1,000 penalty imposed by the internal revenue amendatory act of July 13, 1866 (14 Stats., 138), a penalty of five per cent. and interest at one per cent. a month, as provided for in section 119 of the revenue law (14 Stats., 480).

In rejecting this contention the court states what the head-note thus expresses:

"Penalties are *never extended by implication; unless expressly imposed they cannot be enforced.*"

In the body of the opinion the Chief Justice says:

"Penalties are never extended by implication; they must be expressly imposed or they cannot be enforced."

In the case of U. S. *vs.* Reese, 92 U. S., 214, the court held what is thus expressed:

"A penal statute must be *construed strictly.* This court *cannot introduce words* of limitation into a penal statute so as to make it specific when as expressed it is general."

In Tiffany *vs.* National Bank of Missouri, 18 Wallace, 409, 410, what is decided is thus stated:

"In an action to recover a statutory penalty the defendant it not to be subjected to a penalty unless the *words* of the statute *plainly* imposed it."

The language of the court on this point (p. 410) is in these words:

"In an action like the present, brought to recover that which is substantially a statutory penalty, the statute must receive a *strict construction*, that is, a *literal* construction. The defendant cannot be subjected to a penalty unless the *words* of the statute *plainly* impose it."

In the case of the United States *vs.* Reese (92 U. S., *supra*) the court found the third and fourth sections of the act of Congress of May 18, 1879 (16 Stats., 140), to have, by plain words, extended to every wrongful refusal, by officers of election, to receive the vote of qualified electors at said election, whether of whites or blacks, and to therein and thereby go beyond the only power which Congress possessed regarding such matter, to wit, the power to punish wrongful refusals at such elections when based upon race, color, or previous condition of servitude; and the court was urged to hold that the penal statute then under consideration, although of greater scope in the language employed, was yet to be construed as one *confined* to refusals of votes based on the consideration of race.

In rejecting this conclusion the court says (p. 219):

"This *penal* statute must be construed *strictly*; not so strictly, indeed, as to defeat the clear intention of Congress, but the *words* employed must be understood in the sense they were *obviously* used. (United States *vs.* Wiltberger, 5 Wheat., 85.) If, taking the whole statute together, it is apparent that it was not the intention of Congress to limit the operation of the act, we cannot give it that effect."

The court then proceeds at length to show that sections 3 and 4 (16 Stats., 140, 141) do not *confine* their operation to unlawful discriminations on account of race, and then proceeds to inquire whether, this being the character of these sections, their provisions can be made available for the punishment of those who may be guilty of

unlawful discriminations against citizens of the United States, while exercising the elective franchise, on account of their race.

That is, here is a penal statute evidently including wrongful exclusions from voting, made on account of race, but *also* including more than this, and the question was whether the courts could inflict a penalty under an act which was broader in its terms than the Constitution authorized, although the Constitution authorized a statute covering the very act of exclusion on account of race, then and there being prosecuted.

The court held that no such construction could be placed upon the statute, the court (p. 221) saying:

"We are therefore directly called upon to decide whether a penal statute enacted by Congress with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the Constitutional jurisdiction, *can be limited by judicial construction* so as to make it operate *only* on that which Congress may rightfully prohibit and punish.

* * * * * * *

"The question, then, to be determined, is whether we can *introduce words* of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Goverment.

* * * * * * *

"To limit this statute in the manner now asked for *would be to make a new law, not to enforce an old one.* This is no part of our duty.

"We must therefore decide that Congress has not as yet provided by 'appropriate legislation' for the punishment of the offense charged in the indictment, and that the circuit court properly sustained the demurrers, and gave judgment for the defendants."

The same thing is strongly stated in the following cases:

Chief Justice Marshal, in the case of United States *vs.* Wiltberger, 5 Wheaton, 95, states the rule we allude to in these words:

"The rule that penal laws are to be construed strictly is, perhaps, not less old than that construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of *punishment* is vested in the *legislative*, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment.

"It is said that, notwithstanding this rule, the intention of the law-maker must govern in the construction of penal as well as other statutes. This is true. But this is not a new, independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed *strictly*, they are not to be construed so strictly as to defeat the obvious intention of the legislature."

Chief Justice Taney, in the case of United States *vs.* Morris, 14 Peters, 475, states the same rule thus:

"In expounding a penal statute the court certainly will not extend it beyond the *plain meaning* of its *words*; for it has been long and well settled that such statutes must be construed strictly."

The case of United States *vs.* Clayton, 2 Dillon, 217-25-26, was a case wherein the defendant, then governor of Arkansas, was indicted under section 22 of the act of Congress of the 31st of May, 1870 (16 Stats., 145), being an act to enforce the rights of citizens of the United States to vote, &c., and provides "that any *officer of any election* at which any representative or delegate in the Congress of the United States shall be voted for," who should neglect or refuse to do his duty in regard to the election, or the certificate or returns, should be deemed guilty of a crime liable to in-

dictment, &c.; and the question was, whether Governor Clayton was an "officer of election" within the sense of these words in section 22. In holding that he was not such an officer, Judge Dillon, in a careful opinion, states the rule we now invoke for obtaining the intent of the legislature, as found in the words of one of these penal laws, as follows:

"In the office of interpretation courts, particularly in statutes that create crimes, must *closely* regard and even *cling* to the language which the legislature has selected to express its purpose. * * *

"When courts, in construing statutes, depart from the language employed by the legislator, they incur the risk of mistaking the legislative will, or declaring it to exist where, in truth, it has never had an expression. The legitimate function of courts is to interpret the legislative will, not to supplement it or to supply it. The judiciary must limit themselves to expounding the law; they cannot *make* it. It belongs only to the legislative department to create crimes and ordain punishments.

"Accordingly, courts, in the construction of statutable offenses, have always regarded it as their *plain* duty *cautiously* to keep clearly within the expressed will of the legislature, lest otherwise they shall hold an act or an omission to be a crime, and punish it, when, in fact, the legislature had never so intended. 'If this rule is violated,' says Chief Justice Best, '*the fate of the accused person is decided by the arbitrary discretion of the judges*, and not by the express authorities of the laws.' (Fletcher *vs.* Lord Sondes, 3 Bingham, 580.)

"The principle that the legislative intent is to be found, if possible, in the enactment itself, and that the statutes are not to be extended by construction to cases not fairly and *clearly* embraced in their terms, is one of great importance to the citizen. The courts have no power to create offenses, but if by a latitudinarian construction they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizens are put in peril, and that the legislative domain has been invaded. * * *

"These principles of law admit of no dispute, and have been often declared by the highest courts, and by no judicial tribunal more clearly than the Supreme Court of the United States." (U. S. *vs.* Morris, 14 Peters, 464; U. S. *vs.* Wiltberger 5 Wheaton, 76; U. S. *vs.* Sheldon, 2 *ib.*, 119; and see, also, Ferrett *vs.* Atwill, 1 Blatchford, 151, 156; Sedgw. Const. and St. Law, 324, 326, 334; 1 Bish. Cr. Law, Secs. 134, 145.)

This rule for the interpretation of criminal and highly penal laws is applicable to laws in derogation or restraint of the liberty of citizens; as, for instance, laws prohibitory of ordinary trade and commerce.

These principles will, also, be found in—

Providence Steam Engine Co. *vs.* Hubbard, 101 U.S., 188, 191, 192, and cases cited.

Shaw *vs.* R. R. Co., 101 U. S., 565.

Brown *vs.* Barry, 3 Dal., 367.

Tiffany *vs.* National Bank of Missouri, 18 Wallace, 409, 410.

U. S. *vs.* Strain, 17 Fed. Rep., 435, 437.

U. S. *vs.* Buchanan, 9 Fed. Rep., 689.

French *vs.* Foley, 11 Fed. Rep., 804.

In the case of Fish *vs.* Manning (31 Fed. Rep., 340) a *qui tam* action prosecuted under section 4901, Rev. Stats., which imposes a penalty made recoverable, *qui tam*, for falsely stamping as patented any article, and which was decided in the District Court, Southern District of New York, in 1887, opinion by Brown, J. (31 Federal Reporter, 340), it was held that the sufficiency of the complaint was to be prosecuted according to the rules applicable in civil actions and according to the State practice in similar or analogous actions at common law, and not according to the analogies of criminal procedure.

It was also held, in that case, that, since, under section 1897 of the New York Code of Procedure, the statute relied

on and the particular section thereof must be referred to with certainty, it was therefore insufficient to refer in said complaint to different statutes without specifying which. It was also held, as expressed in the head-note, that—

"*All* the essential facts must be *distinctly* alleged. *Exceptions* forming a part of the statute constituting the offense should be negative. In this case *held* on demurrer necessary to allege (*a*) that the defendant had no patent; (*b*) that the stamped article contained the patented improvement; (*c*) that it was stamped without consent of plaintiff's assigns or representatives."

In the body of the opinion the court says:

"2. In an action upon a penalty, the statute imposing it, and the section thereof, must be pleaded with certainty. (Code, § 1897. See Brown *vs.* Pond, 5 Fed. Rep., 31–41; Brown *vs.* Church, *id.*, 41.) It is therefore improper and insufficient to refer to different statutes without specifying which is relied on. The common-law rule was the same. (Cross *vs.* U. S., 1 Gall., 30–31; Sears *vs.* U. S., *id.*, 257; Jones *vs.* Vanzandt, 2 McLean, 630, and 5 How., 229; Briscoe *vs.* Hinman, Deady, 588; U. S. *vs.* Babson, 1 Ware, 452.) This objection is therefore sustained.

"3. *Every* essential fact, to constitute a statutory offense, must be *distinctly* alleged. (Ferrett *vs.* Atwill, 1 Blatch, 151.) Hence, those conditions or qualifications which the statute makes exceptions in constituting the offense should be negatived by the pleader. (That practice at law, Control. See also Comw. *vs.* Davenger, 10 Phil., 478; Canfield *vs.* Mitchell, 3 Conn., 359.)

The case of U. S. *vs.* Morris *et al.* was debt brought in the name of the United States to recover the penalty of $100 prescribed by the 5th section of the act of 29th of August, 1842, that being a section substantially the same as what is now section 4901 of the Revised Statutes. There was nothing in that section limiting the penalty to cases where the article stamped was patentable, and it gave the action to any person or persons who should sue for the same, giving the informer one-half the recovery.

In the body of the opinion the court says (2 Bond, 28):

"As the statute under which this action is brought is highly penal, it must receive a *strict* construction, and cannot be held to embrace *any act which, though within the strictness of its letter, is against reason and common sense.* It would be doing injustice to the framers of this law to suppose that they intended to include in its prohibitions and to visit with a penalty the mere act of putting the word 'patent' on an article neither patented nor patentable. Novelty and utility are essential elements of every valid patent issued under the laws of the United States, and it is clear to my mind that to justify a judgment or a penalty for putting the word 'patent' on an article the declaration must allege and there must be proof on the trial that it was legally the subject of a patent."

Judge Deady, in Oliphant *vs.* Salem Flour Mills Co., in 5th Sawyer, 128, dissents from that part of Judge Leavett's opinion in U. S. *vs.* Morris, *supra*, which holds that the article stamped must be a *patentable* article, but, of course, does not question the legal principle, which is the only point for which we refer to said case of Morris, to wit, that such statutes must be strictly construed and never extended by inference or departed from in pleading or procedure.

The case of Ferrett *vs.* Atwill, 1 Blatch., 151, *supra*, is one that was prosecuted under section 11 of the act of February 3, 1831 (4 Stats., 438), which imposed a forfeiture of $100 (one-half thereof to "*the person*" who should sue for the same, and made it recoverable in an action of debt in any court having cognizance thereof) on any party who should stamp any book, map, etc., as entered under copyright act when the same was not so copyrighted. The opinion in that case is by Betts, J., and was decided in 1846. There the court held that (1) a suit under that statute could not be prosecuted in the name of *two* persons, and that a declaration in the name of *two was bad on de-*

murrer; (2) that in an action on a statute the party prosecuting must allege every fact necessary to make out his title and his competency to sue; (3) that the language of the statute is to be *particularly* adhered to in the construction of penal laws.

In the body of the opinion the court uses the following language (p. 155):

"In actions directly upon a statute, or on rights derived from a statute, the party prosecuting must allege, and consequently prove, *every* fact necessary to make out his title to the thing demanded, and *his competency* to sue for it. (Com. Dig. Action on Stat., A. 1, 2, 3, and Pleader, c. 76.) An informer cannot support an action unless there be an express provision in the statute enabling him to sue. (Rex *vs.* Malland, 2 Stra., 828; Fleming *vs.* Bailey, 5 East, 313.) And, if the statute creating the penalty and bestowing it upon the informer does not give the mode of proceeding, he is bound to set forth the special matter upon which the right of action arises, and allege and prove in what way the penalty vests in him. (Cole *vs.* Smith, 4 Johns., 193; Bigelow *vs.* Johnson, 13 Johns., 428; Smith *vs.* Merwin, 15 Wen., 184; Fairbanks *vs.* Antrim, 2 M. Hamp., 105; Ellis *vs.* Hall, 2 Aik., 41.) The doctrine, in effect, is applicable to actions founded upon statutes other than for penalties; for, when a statute is made to remedy any mischief or grievance, or bestow any interest or right upon an individual, the mode of remedy, when one is designated by it, must be EXACTLY followed. (Stowell *vs.* Flagg, 11 Mass., 264; Stevens *vs.* The Proprietors of the Middlesex Canal, 12 Mass., 466.) And, if the form of remedy is not pointed out, and the law supplies one by implication, the plaintiff must aver and prove *every* fact necessary to show the existence of the right in him under the statute. (Bigelow *vs.* The Cambridge & Concord Turnpike Company, 7 Mass., 202; Bigelow *vs.* Johnson, 13 Johns., 428.) *We think, under these well-established rules at law, that the two plaintiffs prosecuting this action do not come within and satisfy the provisions of the statute giving the penalty 'to the person who shall sue for the same.*"

"There is a manifest distinction between giving a penalty to a common informer and imposing one for the benefit of

the aggrieved by the violation of the statute. In the latter case the term '*person*' might justly be regarded as comprehending *every one affected by the injury; because the design of such enactment must be to give a remedy co-extensive with the mischief or grievance provided against. This consideration has no relation to positive penalties established as sanctioned of the law, and not intended to recompense individuals because of their particular injuries.*

"The language of the statute is to be *particularly* adhered to in the construction of penal laws, and, when it has a natural and plain meaning, an artificial or forced one is not to be adopted. (1 Bl. Com., 88; Dwarr. on Stat., 707, 711; Van Valkenburg *vs.* Torrey, 7 Cow., 252.) Courts will not give an *equitable construction to a penal law, even for the purpose of embracing cases within the mischief intended to be remedied.* (United States *vs.* Sheldon, 2 Wheat., 119; Myers *vs.* Foster, 6 Cow., 567; Daggett *vs.* State, 4 Conn., 61.) THEY SEDUOUSLY LIMIT THE ACTION OF PENAL STATUTES TO THE PRECISE CASES PRESCRIBED IN THEM, AND REJECT AN INTERPRETATION TENDING TO COMPREHEND MATTERS NOT NAMED BY THE LEGISLATURE, ALTHOUGH ANALOGOUS. The authorities cited are explicit to this point, and in unison with numerous others, English and American. (Cone *vs.* Bowles, 1 Salk., 205; Reniger *vs.* Fogossa, 1 Plow., 17; Fleming *vs.* Bailey, 5 E., 213.)

"The privilege or claiming, or enforcing, the penalty is one of statutory appointment, *and must be construed with like strictness.* In an action by husband and wife against executors to recover a penalty imposed by statute for not proving a will within a fixed period, one-half of the penalty being given to the plaintiff and the other to the legatees, and the wife being a legatee, it was held by the Supreme Court of Massachusetts, that the suit could not be maintained in the name of husband and wife, the action being a popular one, and there being no joint interest in the verdict. (Hill *vs.* Davis, 4 Mass., 137.) The doctrine was still more fully and explicitly declared in a later case in that court, in which it was held that *several persons could not unite in a qui tam action as informers*, the right to sue in such case resting upon the express provisions of the statute. (Vinton *vs.* Welsh, 9 Pick., 87.) When the penalty was given to *any person or persons*, a corporation aggregate cannot sue for it. (1 Kyd. on Corp., 218; The Weavers'

Company *vs.* Forrest, 2 Stra., 1241, margin.) Hammond, in his treaties on Parties (48) says: '*It seems two cannot join as common informers in a penal action unless specially allowed by statute.*'

"The plain language and sense of the statute under consideration *restrict the right of action to a single person;* and we should not be disposed, on general principles, to enlarge its operation, so as to encourage the associations of individuals in instituting and conducting penal actions, the nature of those actions in our opinion exacting a rigorous adherence to the terms of the law.

"Judgment is accordingly rendered in this case for the demurrant, with costs; and the same judgment is rendered in the ten other suits between the same parties on like pleadings."

That more than one cannot sue in such *qui tam* action, see also Comw. *vs.* Winchester, 3 Pa., L. J. R., 34.

In Wilson *vs.* Manufacturing Company, (12 Fed. R., 57), decided in the Circuit Court for the Northern District of New York, in 1882, by Drummond, C. J., in a *qui tam* action, prosecuted under section 4901 of the Revised Statutes, the court held what is thus expressed in the syllabus:

"In an action for the penalty, for affixing the word 'patent' unlawfully on an article, an intention on the part of the defendant to affix a stamp or plate, indicating that there was, at the time, a present subsisting patent upon the machine, *is necessary*, and unless that appears the offense is not committed."

In Pentlarge *vs.* Kirby, decided in the Southern District of New York, in 1884, opinion by Brown, J. (19 Fed. Rep. 501), and prosecuted under the same section 4901, the court, in the body of the opinion, regarding prosecutions on such penal statutes, uses the language we quote below.

On the point as to whether the words "within whose district the offense may have been committed," in said section 4901, admit of the construction that one is guilty of affixing the stamp, &c., in a district into which he has

only carried and sold the article, the court says (19 Fed. R., 504):

"Had it been the object of Congress to make penal the exposure of such articles for sale, it must be presumed that appropriate words to indicate that intention would have been used. Under the rule of construction above referred to the *language of the statute cannot be thus extended merely because the statute may be easily evaded, or because the same mischief may be done by means of other acts not prohibited, and which cannot possibly be brought within the fair meaning of the statutory terms.* The language of Marshall, C. J., in the case of U. S. *vs.* Wiltberger, 5 Wheat., 96, is especially applicable here: 'The case,' he says, 'must be a *strong* one indeed which would justify a court in *departing from the plain meaning of the words*, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its *language* must authorize us to say so. *It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated.*"

Ferrett *vs.* Atwill, 1 Blatchf., 151–156.
See also The Saratoga, 9 Fed. Rep., 322–325.
U. S. *vs.* Temple, 105 U. S., 97.
U. S. *vs.* Graham, 3 Sup. Ct. Rep., 583.
Ruggles *vs.* State, 2 Sup. Ct. Rep., 832–838.
French *vs.* Foley, 11 Fed. Rep., 801–804, and cases there cited.

And again, in the same case (pp. 505–6):

"The enactment of the offense, of the penalty, of the person who may sue, the mode of suit, and in what district the prosecution is to be brought, are all connected parts of one single enactment. In such cases, where the offense is new and the remedy prescribed, the general *rule has long been that the remedy must be sought in the precise mode and subject to the precise limitations provided by the act which creates the offense.* The rule is founded upon the presumed intent of the legislative authority in connecting the

new offense with the particular remedy prescribed, to exclude all other remedies."

The court then quotes from Millar *vs.* Taylor, 4 Burrows, 2305, 2323; also from Donaldson *vs.* Beckett, 2 Brown C. P., 129; also from Dudley *vs.* Mayhew, 3 N. Y., 9. The court also cites 5 Johns., 175; 3 Wend., 494; 7 Hill, 575; 4 Hill, 207; 80 N. Y., 117.

In French *vs.* Foley, decided in the Southern District of New York, in 1882, opinion by Brown, J. (11 Fed. Rep., 801), the action was upon the same section 4901.

The following, from the syllabus, indicates what was decided:

"A penalty is not to be imposed for acts not within the fair meaning and construction of the language of the penal statute as it stands; its scope is not to be enlarged by the addition of *other words*, which would be essential in order to warrant the extended construction claimed for it.

"Subdivision 2 of section 4901 of the Revised Statutes, which imposes a penalty of $100 for affixing the word 'patent,' &c., to any patented article, with intent to imitate or counterfeit the mark or device of the patentee, means the mark or device of the patentee of the patented article on which the words are so stamped. The language and fair construction of this subdivision do not include the case of a patented article stamped with the mark of a person who has no patent embracing or affecting the article stamped, but only a patent for a different article, and no penalty can be recovered therefor; the remedy of the person whose mark is improperly used must be sought independent of this section. The statute cannot be extended by inserting, in effect, after the words 'the patentee' the additional words "of the same or any other similar article.'"

In the body of the opinion the court uses this language (p. 804):

"This statute is a highly penal one. In this case the sum of $4,500 is claimed for affixing the stamp in question upon articles whose retail price is less than $100."

The court then quotes the language of Chief Justice Marshall, from U. S. *vs.* Wiltberger, 5 Wheat., 95, which we have quoted above; also from U. S. *vs.* Morris, 14 Pet., 475, the language which we have above quoted; also the language of Swayne, from U. S. *vs.* Hartwell, 6 Wall., 396, and says what we now quote in regard to this quotation from Swayne, stating, in substance, that where the penal statute admits of *two* constructions, that one may be adopted which will best manifest the legislative intent, but this without "bending" the words either one way or the other, as follows:

"I know of no rule in the construction of criminal or penal statutes, or of any instance, going further in the support of courts may be supposed to be the general intent of the legislature, than that indicated in the language of Swayne, J., above quoted."

The same principle, which is so explicitly held in the cases above cited, and especially in Pentlarge *vs.* Kirby (19 Fed. Rep., 504), is distinctly enunciated in many other cases, to wit, that the words of a penal statute cannot be extended by construction to cases not coming within the words of the statute, merely because such cases not so coming within said words do in fact come within the *mischief* intended to be prevented by the penal statute.

For example, it is held in Leonard *vs.* Bosworth, 4th Comm., 421, that—

"To subject a party to a penalty for a violation of a statute it is not sufficient that the offense is within the *mischief*, if it be not within the *literal* construction of the statute."

In principle the same thing is found in Eastport *vs.* Hawkes, 15th Maine, 155; Pray *vs.* Burbank, 12 N. Hampshire, 267; and also in Marson *vs.* Tryon, 108 Pa. St., 270; State *vs.* R. R. Co., 76 Me., 411; Gilbert *vs.* Bone, 79 Ill.,

343; Chaffee & Co. *vs.* U. S., 18 Wall., 517, 545, 546; Kempton *vs.* Savings Institute, 53 N. H., 518.

A citation of authorities on a proposition so elementary and undisputed, alleging that penal prosecutions under penal statutes must strictly pursue the letter of such statute, the statute being also strictly construed, would hardly be excusable but for the fact that the cases we have now gone over have been resorted to, not so much to establish the rule as to obtain from them illustrations of the classes of cases and of facts to which this familiar rule is applied, and thus to show that, tried by the test of these cases, the complaints now before the court utterly bad in law.

We now again return to the notice of the averments of the present complaint in the light of these decisions, uniformly holding, as we have seen, that penal statutes are strictly construed, and that, in order to bring within the penal recoveries authorized by such statutes, no new words or terms can be added—none can be subtracted—no inferences can be resorted to which are not with the "obvious sense of the words actually used," that no judicial crimes can, by the courts, be created, and which are not, in advance, prescribed by the obvious language of the statute; and that where the act being prosecuted is within the "mischiefs" which the penal statute meant to suppress, yet no prosecution, under such statute, can be maintained where the words of the act do not obviously include the act sought to be punished.

Payment in Excess of an Approved Compensation Essential.

Applying these principles, then, to the case at bar, the first and a most obviously fatal defect of the complaint is that it does not aver the existence of any contract for services, as contemplated by section 2103, wherein the Commissioner of Indian Affairs and the Secretary of the Inte-

rior had fixed and "approved" an "amount of compensation," which was exceeded.

But, on the contrary, the complaint shows, on its face, that the only contract for services named in the complaint was a "pretended" one.

This statute obviously contents itself to making it a crime to receive money "in excess" of a limitation which had been fixed by the Commissioner of Indian Affairs and Secretary of the Interior, through and by means of the "approval" named in said section 2103.

It makes the crime to be the transgression of a fixed limitation established by law, through the action of said officers; and where no such transgression of a fixed limitation exists no crime or right of recovery exists under this statute.

It may here serve to illustrate what is meant by what has just been stated as to the defects of this complaint to here state what the complaint *lacks* in the regard now being considered.

It should aver substantially as follows:

"That a contract between the defendants (naming them) and the Creek Nation of Indians was duly made; and, before a judge of a court of record, executed, under and in pursuance of and conforming, as to its contents, to the requirements of said statute, contracting for the services of the defendants in and about making sale of said lands; that such contract bore the approval of the Secretary of the Interior and the Commissioner of Indian Affairs, as required by said statute; that the amount of compensation allowed to the said defendants, as fixed by said contract, and which was approved by the said Secretary and Commissioner, was $—, and no more, and was, by the said contract and approval, limited to that amount; and the amount so paid for the said services by the Creek Indians, to wit, by the said (here naming them) to the said (here naming the defendants who received the excess of compensation) was in excess of said amount so fixed, limited and approved as aforesaid by the sum of $—, for which excess this suit is brought."

Should it be replied (to the foregoing statement that there must be, in order to make out the right of action created by the last part of section 2103, an "approval," by said Commissioner and Secretary, of a contract fixing the "amount of compensation," and which order of "approval" must be disregarded, or, in the language of the statute, "exceeded") that where compensation for the specified services is taken in the absence of any and *all* contracts, there is a taking "*in excess of the amount approved by*" said officers within the sense of and within the mischief meant to be prevented by section 2103, then the answer to such reply is obvious and conclusive.

That answer is, that this statute does not say that the crime named in section 2105 and the penal action named in section 2103 shall exist where there is no transgression of an "approved" amount as fixed by said officers. It only says that such crime and such penal action shall arise where there is a taking of payment "in excess of" a limitation fixed by said officers. To make said crime named in section 2105 and said penal action to exist in the absence of all contract, simply because that taking any compensation in the absence of all contracts is within the *mischief* meant to be remedied by section 2103, is, as is expressly and repeatedly stated in the cases which we above cite, to create a crime by judicial interpretation; and to do so is tolerated by no decision or authority to be found either in England or America.

If the taking of compensation from Indians in the absence of all contracts ought to be made a crime by statute, then that makes out simply *cassus omissus*, and does not make out, or tend to make out, the existence of either said penal right of action or of said crime named in section 2105.

Synopsis of Complaint for Seminoles.

We have above given a synopsis of the pending complaint filed in behalf of the Creek Nation. We now add below a synopsis of the complaint filed in behalf of the Seminoles. By contrasting the Creek synopsis with the Seminole synopsis, which we give below, it will be seen wherein they differ, such difference being in fact only as follows:

(*a*) The difference in the names of the tribes.

(*b*) The difference in the amount sued for.

(*c*) The Creek complaint contains the averment that the $270,283.71 was paid to the Creek delegates, whereas the Seminole complaint alleges that the $191,294.20 was paid to A. J. Brown.

(*d*) The Creek complaint avers that the delegates received the $270,283.71 without authority, but in the same connection says that they received it in trust for the Creeks, to be carried and paid into the national treasury of the Creek Nation; being therein contradictory; whilst the Seminole complaint says that Brown was authorized to receive the $191,294.20.

(*e*) The Creek complaint alleges that the Creek delegates conspired with the other co-respondents to defraud, whilst the Seminole complaint alleges that A. J. Brown failed to pay and combined with the other respondents.

The substance of the Seminole complaint is as follows:

That A. J. Brown and J. F. Brown and Thomas Factor were, on the 2d of March, 1889, duly appointed agents for the Seminole Nation in negotiations then pending for a sale and cession to the United States of certain Seminole tribal lands, designated as Oklahoma; * * * that said agents on said day consummated the sale for $1,912,942.20; * * * that said A. J. Brown was then and there authorized to receive from the United States, on account of

the Seminoles, $191,294.20, and on or about the 26th of March, 1889, did receive from the Treasurer of the United States said sum in trust for the Seminoles, that being part of the consideration of said sale; * * * that the said sum paid to A. J. Brown was for the Seminoles, and he received it in trust to be carried and paid into the national treasury of the Seminoles; * * * that Brown wholly failed to pay any part of said money to the tresury of the Nation, but wickedly contriving to cheat the Seminoles out of their money, they, the said A. J. Brown, and John F. Brown, Pleasant Porter, David M. Hodge, Esparhecher, Samuel J. Crawford, Clarence W. Turner, Albert Pike McKellop, Legus C. Perryman, and George W. Stidham, sr., conspiring together, with the unlawful purpose to cheat the Seminoles out of their money, to wit, out of $191,294.20, and to appropriate the same to their own use, said A. J. Brown and his co-conspirators, each and all in pursuance of the conspiracy, "under pretense of paying said money in the discharge of the pretended liability of the said Seminole Nation or tribe of Indians to the said respondent, Samuel J. Crawford, for legal services, assumed to have been rendered by the said Crawford under a pretended contract for legal services, alleged to have been made with the said Crawford in the interest and behalf of the said Seminole Nation or tribe of Indians, in, about, and touching the negotiation, sale, and cession of them, said tribal lands, known as 'Oklahoma,' to the United States, did then and there pay, or pretend to pay, into the hands of the said Crawford the said sum of $191,294.20, which said payment was, to the extent and entire amount thereof, in excess of any valid, properly authenticated, and approved contract for services then and there held by the said Samuel J. Crawford.

"That the said payment of the said sum of money, to wit, $191,294.20, was fraudulent and unwarranted, and

was but one of the methods of the said conspiracy, confederation, and combination by and between the said respondents, and all of them, to distribute the said sum of money among themselves, their aiders and abettors, and to fraudulently appropriate the same to their own uses and purposes; all of which they did then and there, on the day of the month and year aforesaid, so do."

For the purposes of the present point, regarding the absence of all averment as to the alleged payment being in excess of a *limitation* fixed by said officers, the thing which is now to be carefully observed as the result of these synopses of the complaints is this (considering now the Seminole case):

That it avers the money to have been paid by the United States to A. J. Brown lawfully; that said A. J. Brown, having thus come lawfully into the possession of the money, entered into a conspiracy with all the defendants (naming them) to defraud the Seminoles out of their said $191,294.20, and to appropriate these moneys to the use of all the defendants; and that all the defendants, pursuant to the conspiracy, under what was a mere "pretense" of paying this money in discharge of what is alleged to have been only a "pretended" liability of the tribe to Crawford, for what was only "assumed" services rendered, under what was only a "pretended" contract, regarding the Seminole's interest in said lands, and the sale thereof, "pretended" to pay to Crawford said $191,294.20; and that this payment, in its entire amount, was in excess of any contract held by Crawford; that said payment was fraudulent "and was but one of the methods of the said conspiracy, confederation, and combination by and between said respondents, and all of them, to distribute the said sum of money amongst themselves, their aiders and abettors, and to fraudulently appropriate the same to their own uses and purposes."

It is thus made express and plain, by the positive averments of this complaint, that, *as a matter of fact*, not a dollar of this money was paid either to Crawford, or to any one else of the defendants, for legal services in excess of any contract.

On the contrary, the substance and effect of the averments, taken as a whole, is that everything was a "pretense" and a sham in regard to there being any contract, there being any services, *and there being any payment made on account of services rendered;* and, on the contrary, that the real transaction, from its beginning to its end, was, in fact and in law, a conspiracy to divide between the conspirators the Seminole money, ending in an embezzlement. Instead of these averments, amounting to a sufficient declaration under this penal statute, to wit, that it was in fact and in law a payment for services *in excess of the amount allowed by the Secretary and Commissioner*, it is an averment of a conspiracy to *embezzle* this money and to divide the fund embezzled between the co-conspirators.

Instead, therefore, of these averments bringing the case within the statute, they carefully, fully, and literally exclude it from the scope and purview of the statute, and simply aver what amounts to an embezzlement, wrought out through a set of "false pretenses" executed pursuant to a conspiracy.

What has just been stated is so obvious and express, as written in the text of these complaints, as to render, as really seems to us, any illustration or enforcement of the proposition stated, unnecessary.

Specific Defects of Complaints.

In the analysis which we have now made of the entire scope of the two complaints, and in stating the conclusion which we have just stated, from such analyses, that the complaints fail to charge any offense made penal by said

last clause of section 2103, making penal the taking of payment "to any person, by any Indian or tribe, or any one else, for or on his or their behalf, on account of services, *in excess of the amount approved by the Commissioner and Secretary for such services*," and in showing that these complaints, instead of charging the offense so made penal, charge what would, ordinarily, amount to an "embezzlement," we have, necessarily, included *all the parts and particulars* of said two complaints, and have thus included *all* the defects thereof. But now it becomes important that we should descend to specific details, and point out the special and individual defects of the complaints, thus showing the particulars in which they fall short of meeting the requirements of a penal prosecution under said statute.

In entering upon a statement of these particulars it is essential to add to the principles of law which we have gone over, showing the strictness with which penal statutes must be construed and followed in such penal prosecutions, that additional maxim of the law, which is thus stated in Chitty (1 Chitty's Pleadings, side-page, 241):

"It is a maxim in pleading that everything shall be taken most strongly against the party pleading, or, rather, that if the meaning of the words be equivocal they shall be construed most strongly against the party pleading them; for it is to be intended that every person states his case as favorably for himself as possible."

Take first the fact that this prosecution is brought by *six* different informers or prosecutors or complainants, and notice that the authority given by section 2103 is in these words:

"May be recovered by suit in the name of the United States, regardless of the amount in controversy; and one-half thereof shall be paid *to the person* suing for the same," &c.

So that the statute expressly limits the right to become informer, or the party suing, to one "person," the words being "*the person* suing for the same."

This language is precisely identical with that found in section 11 (4 Stats., 438), which was brought under review in the case of Ferrett *et al. vs.* Atwill, 1 Blatchf., 115, and where, as we have seen, the court, upon most abundant authority, held what the head-note thus expresses:

"The penalty imposed by section 11 of the copyright act of February 3, 1841 (4 U. S. Stat. at Large, 438), for putting the imprint of a copyright upon a work not legally copyrighted, and given by the act to '*the person who shall sue for the same*,' *cannot be recovered in the name of more than one person.*"

In the light of this authority and of the cases which the court cites (pp. 156–157), this defect, to wit, six persons uniting in a suit where the statute permits but one to sue, is, of course, fatal, unless said authorities are disregarded.

The next specific defect which we point to is, that the complaints—neither of them—allege what said last paragraph of section 2103 makes to be the gist of the offense, namely, the actual "*payment*" of money or other thing of value to any person, by an Indian or tribe, "*in excess of the amount approved by the Secretary and Commissioner.*" If no such payment was made for services, then, of course, no offense under this statute is possible.

Now, turning to each of these complaints, that for the Creeks and that for the Seminoles, and it will be seen that no averment of any payment is contained in either of the complaints.

On the contrary, the utmost averment in that direction, regarding payment being made, is that the parties accused "did then and there pay, *or pretend to pay*," into the hands of Crawford.

Now, applying the above rules regarding the necessity of strictly construing and strictly following penal statutes, and also the rule that pleadings are construed most strongly against the pleader, and here there is obviously, and at the most, only an averment of a "*pretense*" of payment, and that "pretense" of payment is not alleged to have been, if made, made in compensation for any services ever rendered, but was only a pretense of payment on and for "pretended" services.

It is, of course, not possible to make this glaring defect of the complaints more apparent than it is made by simply reading the text thereof; and this defect is, therefore, utterly fatal.

Another specific defect of the petition (but which is really embraced in the above proposition, alleging the complaints to amount to a charge of embezzlement) is this: That the last clause but one in each of the complaints amounts to an explicit averment that no contract ever existed between Crawford and the Indians; that no services were ever rendered by Crawford on behalf of the tribe; that no approval of any compensation was ever made by the Commissioner and Secretary; *that no payment in excess of the amount approved by said officers* ever was made; that each and all of these were shams, mere pretenses; and that the real transaction was but a felonious conspiracy between the defendants "to distribute the said sums of money" named in the respective petitions, and amongst the defendants and their aiders and abettors, and to fraudulently appropriate the same to their own uses and purposes, and which appropriation they did make.

This just stated is not a matter of *inference* or *construction* on our part, but it is simply the literal reading of the complaints; and there is no escape from the proposition that this is an indictment for a conspiracy to embezzle and an actual embezzlement pursuant to the conspiracy,

and is nothing more; and the complaints have not even the semblance of sufficiency as complaints prosecuted under said section 2103.

And we will, therefore, not pursue this feature of the case farther.

Suit out of a Defendant's District Unlawful.

We now turn to a distinct point in objection to this action, and which point is confined to the defendant, Crawford.

It is averred in each complaint that the defendant, Crawford, is a resident of Topeka, Kansas, a different district from that in which the suit is brought.

The last enactment by Congress upon the matter as to the district in which suits shall be prosecuted is that of August 13, 1888 (25 Stats. at Large, 434). Section 1 of that act, which is an amendment of the act of March 3, 1875, provides (in the only paragraph here material) in these words:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; *and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant*, but where the jurisdiction is founded only on the fact that the action is between citizens of different States suit shall be brought only in the district of the residence of either the plaintiff or defendant."

The present suit, of course, is not one prosecuted in the Federal court because of the citizenship of the parties being in different States, and is brought in the Federal courts because supposed to be based on an act of Congress.

Therefore the only provision of this section 1 of the act approved August 13, 1888 (25 Stats., 434), that we need here notice is that which reads:

"And no civil suit shall be brought before either of the said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

It is, of course, hardly necessary to refer the court to decisions showing the unlawfulness of the issuing to the Marshal of the District of Columbia, in the present case, a summons for the defendant, Crawford, and the unlawfulness of the service and return of that summons by such marshal as to Crawford.

This is so because the express, unambiguous letter of the statute not only does not authorize, but expressly *prohibits* the bringing of any civil suit in either the District or Circuit Court of the United States, against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant.

Still, since this summons has been issued, and this suit has been so brought, it may not be amiss to point to some of the decisions, showing how flagrant is the error of so issuing and serving said writ.

It will be kept in mind that by section 11 of the first judiciary act of September 24, 1789, a suit might be brought against a defendant in another district than that in which he was an inhabitant, provided he could be "*found*" in such other district, the words of that act being:

"And no civil suit shall be brought before either of the said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be *found* at the time of serving the writ." (1 Stat., 79.)

So that under this statute a man could be sued in a civil suit away from his district, provided he was "found" in the district where suit was brought, and there served, in a transitory action.

The same provision is retained and re-enacted in the act March 3, 1875 (18 Stats., 470), allowing a man to be sued

in transitory actions, in any district where he could be "found," that is, where process could be served upon him.

This provision allowing a suit in transitory actions to be brought against a defendant in any district where he could be "found" at the time of serving process and of commencing such proceeding, is dropped and not re-enacted in section 1 of the act of March 3, 1887 (24 Stats., 552); but, on the contrary, the clause here is in the following words:

"And no civil suit shall be brought before either of the said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

This clause, it will be perceived, is therefore identical with the corresponding provision in said act of August 13, 1888 (25 Stats., 434).

It has, accordingly, been steadily held by the courts, since the enactment of the said acts of 1887 and 1888 that no civil suit, of a transitory nature, can be brought against any defendant in any other district than that whereof he is an inhabitant. For example, in Preston *vs.* Manufacturing Company (36 Fed. Rep., 721), decided November, 1888, in Circuit Court, Northern District Illinois, by Blodgett, J., it is decided that—

"Under the act of Congress of March 3, 1887, as modified and explained by the act of August 13, 1888, requiring an action in the Federal courts to be brought in the district of which the defendant is a resident, a New York corporation, having its principal office in that state, and doing business in Illinois, cannot be sued in the Federal courts in Illinois."

In the body of the opinion Blodgett, J., uses this language:

"In the case of Manufacturing Co. *vs.* Manufacturing Co., in 34 Federal Reporter, 818, before me in March last, I

had occasion to examine this question, and there came to the conclusion that under the act of March 3, 1887, and the same holds good in regard to the act as explained and modified by the act of August 13, 1888, a non-resident corporation cannot be sued in this district; that is, a corporation not a resident of this district cannot be sued here merely by service upon the agent or officer. The opinion in that case has been published, and counsel are familiar with it, so it is hardly necessary to quote from it. It is enough to say that the act of 1887 requires suit to be brought in the district where the defendant is an inhabitant, but drops the provision in prior statutes upon the subject that he may also be sued in any district where he may be found at the time of the serving of the process.

"I have re-examined that question in the light of suggestions made by counsel for complainant and still adhere to the conclusion there announced that a corporation created and existing solely under the laws of another State and having its principal office and place of business in another State and district cannot be said to be inhabitant of this district and be sued here even although such corporation may do business in this district through agents, except, possibly, where the jurisdiction depends solely on citizenship."

Justice Miller, in the case of Railroad Co. *vs.* Railroad Co., 1 McCreary, 647, in a case where he set aside a process because it had been served on a defendant outside the district where the suit was brought, explains, with his usual felicity, the principles and foundations of the rule embodied in the law which prohibits a court from issuing its process beyond its own jurisdiction.

He says:

"It is of the essence of the power and jurisdiction of all courts that their process is of no validity beyond the territory in which the court sits and to which its jurisdiction extends. If therefore there is no other statute on the subject than simply that the Circuit Court of the United States for the Eastern District of Missouri shall have jurisdiction co-extensive with the limits of the district, it would follow logically from this limitation upon the inherent

power of all courts that its process shall be of no validity beyond its territorial lines. There is nothing in any statute of the United States that gives to the process of the circuit courts of the United States in a civil case any power to bring a party within the jurisdiction of the court when he is not in and cannot be served within the limits of the territory."

He then proceeds to say that the case he was dealing with was not one coming within section 738, allowing defendants, not resident of a district, in a case where the suit *is in equity to enforce a legal or equitable claim against real or personal property*, and that it was one coming within section 738 of the R. S., prohibiting a suit against any inhabitant of the United States in any other district than that whereof he is an inhabitant, or in which he might be "found." He reaches the conclusion that the writ in that case must be quashed; and it was.

The case of *ex parte* Schollenberger, 96 U. S., 369, 374, 375, *et seq.*, is one fully analyzing the provisions and operations of the various statutes on this subject, to wit, that found in section 11 of the act of 1789 (1 Stats., 79); also said act of 1875 (18 Stats., 470), and there the court fully elucidates the rule regarding the matter as to when a defendant can be said to be "found" within a district for the purposes of suit.

As already remarked, it seems to us quite useless to cite authorities in support of a proposition of law which depends for its determination upon a statute, and where the statute is explicit and unambiguous and direct in establishing the proposition that a defendant cannot be sued in any district, other than that in which he is an inhabitant, in any civil suit of a transitory character.

But it may not be improper to here give a reference to the cases where these statutes have *recently* come under judicial review in almost every conceivable aspect. These cases are as follows:

Romaine *et al. vs.* Insurance Co., 28 Fed. Rep., 675 (Circuit Court of the United States, Western District Tennessee, 1886, opinion by Hammond, J.).

U. S. *vs.* Bell Telephone Co. *et al.*, 29 Fed. Rep., 17 (Circuit Court of the United States, Southern District, 1886, opinion by Jackson, J.).

Manufacturing Co. *vs.* Manufacturing Co., 34 Fed. Rep., 818 (Circuit Court United States, Northern District Illinois, 1888, opinion by Blodgett, J.).

Preston *vs.* Fire Extinguisher Company, 36 Fed. Rep., 721 (decided Circuit Court United States, Northern District Illinois, 1888, opinion by Blodgett, J.).

These cases all concur in holding that a defendant cannot be sued in a district other than that of which he is an inhabitant in any transitory civil action, and, therefore, it is conclusively fixed in the case, by the concurrent force of explicit statute law and of unanimous decisions in expounding such law, that the writ, in the present case against Crawford, must be quashed.

The Words "in any Court of the United States."

Should it be urged, in reply to what we have last stated, regarding the prohibition contained in the acts of 1887 and 1888 against a citizen being sued, in transitory actions, outside of his district, that section 2103, in the provision authorizing this particular suit to be brought "in the name of the United States in *any* court of the United States, regardless of the amount in controversy," is a provision that authorizes a citizen of Maine to be sued in California, where he never was, provided the suit is brought in a United States court, then our reply to such contention is as follows:

1. That giving this statute such a construction is to render it extremely harsh, oppressive, and absurd, and such construction will never be given to statutes where it can be avoided.

The language of the court in U. S. *vs.* Kirby, 7 Wall., 482, 486, 487, is as follows:

"All laws should receive a reasonable construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

This formula of statement of this rule of construction is repeated in the following cases, where reference is made to this case of United States *vs.* Kirby:

Carlisle *vs.* U. S., 16 Wall., 156.
Otis *vs.* National Bank, 100 U. S., 244.
Chen Heong *vs.* U. S., 112 U. S., 555.
Woodbridge *vs.* McKenna, 8 F. R., 655.
Chinese Labor Case, 21 F. R., 799.
State of Maine, 22 F. R., 736.
The Egypt, 25 F. R., 327.
U. S. *vs.* Dougherty, 27 F. R., 734.
The Aurabia, 29 F. R., 103.
In re Leong Yick Dew, 10 Sawyer, 45.

2. It is not only absurd, but it is impossible to give these words, "in any court of the United States," their *literal* signification, because the Supreme Court of the United States comes within the denomination "any court of the United States," and yet it is simply impossible to bring the suit in that court owing to its being, by the Constitution, deprived of jurisdiction thereof; and therefore some other construction than the literal sense of the words must be found.

3. The words here employed, to wit, "any court of the United States," receive a reasonable, and, as we submit, their true construction, when they are made to mean, as the statutes stood at the date of this act, any district court or any circuit court of the United States where, under the

general laws, the defendant might be "found," within the sense of the word "found" as explained in the above cited cases.

4. The above statutes of 1887 (24 Stats., 552) and of 1888 (25 Stats., 434) have *superseded and repealed* the provisions contained in the act of 1789 and 1875 allowing a defendant, in a transitory action, to be sued in any district where he should be "found," and they, therefore, repealed that part of section 2103 which originally allowed a defendant to be sued wherever "found;" and being the later statute, and being, necessarily, literally, clearly, and directly in conflict with the provision allowing the suit to be brought "in any court," it supersedes and repeals so much of section 2103 as permits the suit "in any court," without regard to its being in the district of which the defendant is an inhabitant.

5. Section 6 of said act of August 13, 1888 (25 Stats., 436, 437), in express words, repeals "all laws and parts of laws in conflict with the provisions of this act;" and that part of section 2103 which allowed the defendant named in that section to be sued in any district in the United States where found (if, indeed, that be the meaning of said section 2103), is, as we have said, in literal and unmistakable conflict with that part of the section of said act of 1888, which, in express terms, provides that—

"*No civil suit shall be brought before either of the said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant.*"

And, therefore, in so far as said section 2103 permitted suit to be brought anywhere where the defendant should be found (if it did), it is repealed.

Conclusion.

Our design has been to, in the main, limit the considerations covered by this brief to the defects of the com-

plaints filed in this case, as these would be considered upon a motion to quash the summons as to Crawford, and on demurrer to such complaints.

We have not, in the foregoing, embraced even *all* the considerations which arise on demurrer.

We have, in other papers hitherto prepared by us, gone over carefully most of the material points which have not been considered in the foregoing, and these are already embraced in two printed pamphlets hitherto, by Gov. Crawford, laid before the Secretary of the Interior and the Attorney-General of the United States.

The pamphlet presented to the Secretary of the Interior is entitled—

"A Statement to the Honorable Secretary of the Interior, relative to attorney's fees for services in establishing the right of the Creek Nation to certain lands, and securing the payment for the same. By Samuel J. Crawford."

The statement prepared for the Attorney-General is entitled—

"To the Attorney-General of the United States. In the matter of attorney's fees paid for services in establishing the right of the Creek Nation to certain lands, and securing pay for the same. Brief on behalf of Samuel Crawford, by S. Shellabarger and J. M. Wilson."

The points covered by said two pamphlets and which are not embraced in the above discussion are, in the main, the following:

1. That section 2103 of the Revised Statutes and the kindred sections have no application to the tribes known to the statutes of the United States as the "civilized tribes," these embracing the Creeks and Seminoles; and that, hence, these suits based on said section must fail.

2. That the autonomy and right of self-government secured and confirmed by the laws of the United States to

the said tribes is such as to authorize them, through their proper authorities, to dispose of the moneys involved in these suits, and that such disposition, when made, is binding upon the executive and judicial departments of the Government of the United States.

3. That, even assuming that sections 2103 and 2105 would, in the absence of the legislation we here allude to, render any money received by Governor Crawford and named in said two complaints forfeitable, and would make him liable under sections 2103 and 2105, yet the joint operation and effect of section 4 of the act approved March 1, 1889 (25 Stats., 759), and of the legislation of the National Council embodied in the four acts of the Creek Council, which are set forth in the Appendix hereto and marked "Exhibits B, C, E, and F," is to exempt the said last-named moneys, so directed to be paid over under said section 4, from the operation of sections 2103 and 2105 (did these sections otherwise apply), and to authorize and empower the Creek Nation to pay, and the said attorneys of the nation to receive, the said six and one-half, plus three and one-half per cent. upon said $2,280,857.10 (equaling $228,085.71).

The discussion of these subjects, should such discussion ever become necessary, will be postponed to a future time, but will be, in substance, found in said pamphlets, to wit, the statement to the Secretary of the Interior and that to the Attorney-General of the United States.

As a matter of convenience we print in the Appendix attached hereto copies of said sections 2103, 2104, and 2105, and of the acts of the Creek Council above alluded to—B, C, E, and F.

SHELLABARGER & WILSON and
ROGERS & READ,
Attorneys for Defendants.

"SEC. 2103. No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for the said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

"First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

"Second. It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

"Third. It shall contain the names of all the parties in interest, their residence and occupation; and, if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority shall be given specifically.

"Fourth. It shall state the time when, the place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

"Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

"Sixth. The judge before whom such contract or agreement is executed shall certify officially the time when, and place where such contract or agreement was executed, and that it was in his presence, and who are the interested parties thereto, as stated to him at the time; the parties pres-

ent making the same; the source and extent of authority claimed at the time by the contracting parties to make the contract or agreement, and whether made in person or by agent or attorney of either party or parties.

"All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

"SEC. 2104. No money shall be paid to any agent or attorney by an officer of the United States under any such contract or agreement, other than the fees due him for services rendered thereunder; but the moneys due the tribe, Indian, or Indians, as the case may be, shall be paid by the United States, through its own officers or agents, to the party or parties entitled thereto; and no money or thing shall be paid to any person for services under such contract or agreement until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract.

"SEC. 2105. The person so receiving such money contrary to the provisions of the two preceding sections, and his aiders and abettors, shall, in addition to the forfeiture of such sum, be punishable by imprisonment for not less than six months, and by a fine of not less than one thousand dollars. And it shall be the duty of all district attorneys to prosecute such cases when applied to to do so, and their failure and refusal shall be ground for their removal from office. Any Indian agent, or other person in the employment of the United States who shall, in violation of the

provisions of the preceding section, advise, sanction, or in any way aid in the making of such contracts or agreements, or in making such payments as are here prohibited, shall, in addition to the punishment herein imposed on the person making such contract, or receiving such money, be, on conviction, dismissed from the service of the United States, and be forever disqualified from holding any office of profit or trust under the same."

Said act of Congress of the 1st of March, 1889, in section 4, provides as follows (25 Stats., 759):

"The Secretary of the Treasury is hereby authorized and directed to pay out of the appropriation hereby made the sum of two hundred and eighty thousand eight hundred and fifty-seven dollars and ten cents to the national treasurer of the Muscogee (or Creek) Nation, *or to such persons as shall be duly authorized to receive the same,* at such time and in such sums as shall be directed and required by the national council of the said Nation; and the Secretary of the Treasury is hereby further authorized and directed to place the remaining sum of two million dollars in the Treasury of the United States to the credit of the Muscogee (or Creek) Nation of Indians, to be held for and as provided in said articles of cession and agreement, and to bear interest at the rate of 5 per centum per annum, from and after the 1st day of July, A.D. 1889, and said interest to be paid to the treasurer of said Nation annually."

Thus the act of Congress is explicit in requiring the United States to pay this $280,857.10 "*to such person as shall be duly authorized to receive the same, as directed and required by the National Council of said Nation.*"

"EXHIBIT B."

AN ACT to ratify and confirm a certain contract made and entered into by and between the Muscogee or Creek Nation and Samuel J. Crawford.

Whereas the Muscogee or Creek Nation, by L. C. Perryman and Fi-e-maht-la, delegates duly appointed to represent the Muscogee or Creek Nation at Washington, did, on the 4th day of February, A. D. 1885, make and enter into

a contract with Samuel J. Crawford, of the city of Washington and District of Columbia, and employ the said Samuel J. Crawford as its attorney, solicitor, and counsel, to appear for and on behalf of said Nation to do and perform any and every proper thing necessary to be done in order to secure to said Muscogee or Creek Nation its just rights, privileges, and immunities under the said treaty of August 11, 1866, and under any laws of Congress relating to said treaty, and the lands thereby ceded: Now, therefore,

Be it enacted by the National Council of the Muscogee or Creek Nation, That the said contract made and entered into by and between the said L. C. Perryman and Fi-e-maht-la, delegates of the said Muscogee or Creek Nation as aforesaid, and Samuel J. Crawford, of the city of Washington, be, and the same is hereby, ratified, approved, and confirmed for six and one-half per cent.

And be it further enacted, That the Principal Chief of the Muscogee Nation be, and he is hereby, authorized and empowered to attach a certified copy of this act to each original copy of the said contract.

This act shall take effect and be in force from and after its passage.

Adopted.

THOMAS W. PERRYMAN,
Speaker pro tem. House of Warriors.

A. F. McKELLOP, *Clerk.*

Concurred in.

WARD COACHMAN,
President House of Kings.

G. W. STIDHAM, Jr., *Clerk.*

Approved January 31, 1889.

L. C. PERRYMAN,
Principal Chief Muscogee Nation.

This is to certify that the foregoing is a true and correct copy from the original act now on file in this office.

Witness my hand and the great seal of the Muscogee Nation this 31st day of January, 1889.

L. C. PERRYMAN,
Principal Chief Muscogee Nation.

[SEAL.]

"EXHIBIT C."

AN ACT to ratify and confirm a certain contract made and entered into by and between the Muscogee or Creek Nation and Samuel J. Crawford.

Whereas the Muscogee or Creek Nation, by Pleasant Porter, D. M. Hodge, and Es-pa-he-cher, delegates duly appointed and empowered in that behalf, did, on the 8th day of January, 1889, make and enter into a contract with Samuel J. Crawford, of the city of Washington and the District of Columbia, and employ him as its attorney, solicitor, and counsel, to appear for and on behalf of the said Muscogee or Creek Nation to assist in securing an equitable adjustment of the questions arising from or growing out of the treaty of August 11, 1866, between the United States and the Creek Nation of Indians, and also to assist in securing to the said Nation a fair and reasonable compensation for the lands ceded to the United States by said treaty: Now, therefore,

Be it enacted by the National Council of the Muscogee or Creek Nation, That the said contract made and entered into by and between the said Pleasant Porter, D. M. Hodge, and Es-pa-he-cher, delegates as aforesaid, and Samuel J. Crawford, of the city of Washington, be, and the same is hereby, ratified, approved, *and confirmed for three and one-half per centum instead of ten per centum, as provided in said contract.*

And be it further enacted, That the Principal Chief of the Muscogee or Creek Nation be, and he is hereby, authorized and empowered to attach a certified copy of this act to each original copy of the said contract.

This act shall take effect and be in force from and after its passage.

Adopted.

THOMAS W. PERRYMAN,
Speaker pro tem. House of Warriors.

A. P. MCKELLOP, *Clerk.*

Concurred in.

WARD COACHMAN,
President House of Kings.

G. W. STIDHAM, Jr., *Clerk.*

Approved January 31, 1889.

L. C. PERRYMAN,
Principal Chief Muscogee Nation.

This is to certify that the foregoing is a true and correct copy from the original act now on file in this office.

Witness my hand and the great seal of the Muscogee Nation this 31st day of January, 1889.

L. C. PERRYMAN,
Principal Chief Muscogee Nation.

[SEAL.]

"EXHIBIT E."

AN ACT for the appropriation and payment of the sums of money agreed upon by the delegates of the Muscogee Nation and the authorities of the United States, as the price of the lands ceded to the United States by the treaty of 1866.

Whereas the sale to the United States, under agreement of January 19th, A. D. 1889, of the lands ceded to the United States by the treaty of 1866 has been approved and confirmed by the National Council of the Muscogee Nation: Therefore,

I. *Be it enacted by the National Council of the Muscogee Nation*, That the Congress of the United States is hereby requested to appropriate the full sums of money agreed upon as the price of said lands—that is to say, the amount to be invested for the benefit of the Muscogee Nation, and the amount to be paid in money directly to the proper authorities of the said Muscogee Nation, and the said amount which is to be paid in money to be paid over in such sums and at such times and places as may be required directly to the National Treasurer of the Muscogee Nation, or to such officer or other person or persons as shall be *named* in the requisition of the proper authorities of the Muscogee Nation; and the proper authorities of the Muscogee Nation, for the purpose of making such requisition or requisitions, is hereby declared to be the National Council of the Muscogee Nation, or such officer or other person or persons as shall be designated and authorized by an act or resolution of the said National Council for that purpose; and such requisition or requisitions, when made, shall be taken and accepted as, and is and are hereby declared to be, the requisition of the proper authorities of the Muscogee Nation.

II. *Be it further enacted,* That this act shall take effect and be in force from and after its passage.

Adopted.

THOMAS W. PERRYMAN,
Speaker pro tem. House of Warriors.

A. P. McKellop, *Clerk.*

Concurred in.

WARD COACHMAN,
President House of Kings.

G. W. Stidham, Jr., *Clerk.*

Approved, January 31, 1889.

L. C. PERRYMAN,
Principal Chief Muscogee Nation.

This is to certify that the foregoing is a true and correct copy from the original act now on file in this office

Witness my hand and the great seal of the Muscogee Nation this 31st day of January, 1889.

L. C. PERRYMAN,
[seal.] *Principal Chief Muscogee Nation.*

"Exhibit F."

An Act to authorize a requisition to be made for the payment of a portion of the amount that may be appropriated by Congress for payment to the Muscogee Nation, under the agreement of January 19th, A. D. 1889, for its interest in and to the lands ceded to the United States by the treaty of 1866.

I. *Be it enacted by the National Council of the Muscogee Nation,* That the Principal Chief of the Muskogee Nation be, and he is hereby, authorized and directed, for and on behalf of the Muscogee Nation, to make requisition upon the proper authorities of the United States, in such form as may be required by such authorities, for the payment to Pleasant Porter, David M. Hodge, and Es-par-he-cher, the duly authorized delegates of the Muscogee Nation, or in the event of the death or inability to act of any or either of them, then to the surviving member or members of

them, of the sum of 10 per cent. of the additional price of the lands ceded to the United States by the treaty of 1866, under the agreement of January 19th, A. D. 1889, between Honorable William F. Vilas, Secretary of the Interior, and and said delegates, the same to be paid out of the amount that may be appropriated by Congress to be paid in money to the Muscogee Nation on account of the purchase of said lands; the same to be paid in such sums and at such times and places as shall be requested by said delegates, and said requisition, when made, shall be taken and accepted as, and is hereby declared to be, the requisition of the proper authorities of the Muscogee Nation.

II. *Be it further enacted*, That this act shall take effect and be in force from and after its passage.

Adopted.

THOMAS W. PERRYMAN,
Speaker pro. tem. House of Warriors.

A. P. McKELLOP, *Clerk.*

Concurred in.

WARD COACHMAN,
President House of Kings.

G. W. STIDHAM, Jr., *Clerk.*

Approved January 31, 1889.

L. C. PERRYMAN,
Principal Chief Muscogee Nation.

This is to certify that the foregoing is a true and correct copy from the original act now on file in this office.

Witness my hand and the great seal of the Muscogee Nation this 31st day of January, 1889.

L. C. PERRYMAN,
Principal Chief Muscogee Nation.

[SEAL.]

BEFORE THE

HON. SIGOURNEY BUTLER,

Second Comptroller of the Treasury,

RELATIVE TO THE

RECEIPTS FROM FILING FEES

AND

EXPENSES OF SELLING

THE

Osage Indian Lands in Kansas.

SAMUEL J. CRAWFORD,
HOWARD B. ABBOTT,
Attorneys for Osage Nation.

Wo. 9, 1889

LAW OFFICE OF SAMUEL J. CRAWFORD,
1416 F Street N. W.,
WASHINGTON, D. C., *March 9th*, 1889.

The Honorable
SECOND COMPTROLLER OF THE TREASURY.

SIR: We are informed that an account between the United States and the Osage Indian Nation, involving the recovery of the fees received by the Receivers of Public Moneys from declaratory statements made in entering the lands of the Osages in the State of Kansas, is before you. This account was stated by the Commissioner of the General Land Office, at our request, as the Attorneys for the Osages, acting by authority conferred in a contract dated August 10th, 1885.

The question as to the ownership of the fees received from the declaratory statements filed on Osage Indian lands under sections 2238 and 2283, R. S., have been fully discussed in three briefs on this subject, filed with the First Comptroller of the Treasury, dated March 17th, 20th, and 30th, 1886. (Copies herewith.) That officer decided adversely to the claim of the Osages March 25th, 1886. It is, perhaps, unnecessary to state that every point made in this decision by the First Comptroller, was refuted in the motion for reconsideration, dated March 30th, 1886. We succeeded in obtaining a later decision upon the case by the Second Comptroller, which was dated December 6th, 1886, the Supreme Court of the United States having decided that the latter officer was the proper person to decide in matters relating to Indian affairs, in the Brindle case. (110 U. S. Reports, 694.) It was supposed that the last decision finally ended the matter, and, accordingly, application was made as stated December 22d, 1888, to the Commissioner of the General Land Office, for the statement of an account between the United States and

the Osages, for the filing fees received subsequent to the former account, which embraced all fees received up to and including June 30th, 1884. Acting upon the same supposition, that the former decision of the Second Comptroller was binding in relation to this matter, the account which is now before you has been stated by the Commissioner of the General Land Office, and passed the Commissioner of Indian Affairs and the Second Auditor. We learn, however, that you are about to consider this question *de novo*. It may not be improper to present to you, therefore, the main points in the case. We hold—

First. That the United States acts merely as trustee for the Osage Indian Nation.

Second. That under the specific terms of that trust, it is the clearly defined intention of law and treaty obligations to sell the lands of the Osages, and after paying the expenses incident to the sale thereof, the balance is to be placed to the credit of the Osages as an interest-bearing fund.

On these two propositions is based the pending claim for $43,934.62. Both are sustained by the unequivocal statement of the treaty with the Osages, dated Sept. 29th, 1865, (14 Stats., 688.) After giving certain boundaries, the language of the treaty is:

"*Which land is to be held in trust for said Indians, and to be surveyed and sold for their benefit* by the Secretary of the Interior under such rules and regulations as he may from time to time prescribe, under the direction of the Commissioner of the General Land Office, as other lands are surveyed and sold. *The proceeds of such sales as they accrue, after deducting all expenses incident to the proper execution of the trust, shall be placed in the Treasury of the United Seates to the credit of said tribe of Indians.*"

The question now arises as to what constitutes the "proceeds of the sales" and what the "expenses incident to the proper execution of the trust." Let us first consider how the lands are sold. Section 2283 R. S. prescribes that—

"The Osage Indian trust and diminished reserve lands in the State of Kansas, excepting the sixteenth and thirty-sixth sections in each township, shall be subject to disposal for cash only to actual settlers, in quantities not exceeding one hundred and sixty acres or one quarter section to each in compact form, in accordance with the general principles of the pre-emption laws, under the direction of the Commissioner of the General Land Office; but claimants shall file their declaratory statements as prescribed in other cases upon unoffered lands," &c., &c.

It is clear from the foregoing that one settler can only purchase 160 acres of land, and that such a sale can only be initiated by the settler making a declaratory statement. What is this declaratory statement? It is in the nature of a contract for the sale of land. The settler declares his intention of taking the land under the provisions of the pre-emption act of September 4th, 1841, and the Government promises him that on the fulfillment of certain conditions he shall have a title by patent for the land. When the settler makes this declaratory statement he pays to the Receiver of the Land Office a fee of two dollars. This is collected by authority of paragraph 1 of section 2238, R. S., which provides that Registers and Receivers shall each receive a fee of one dollar on the filing of the instrument. We suppose this fee is collected for the purpose of reimbursing the Land Officers for their labor, and for the further reason that no promise can be enforced without a consideration. When the declaratory statement is filed the contract is completed, the Government as a trustee covenants with the settler for the sale of the Osage land, the consideration is agreed upon, and the advance amount of two dollars is paid. This transaction has all of the elementary proceedings of a sale. We might concede that this two dollars was the property of the Register and Receiver but for the provisions of section 3617, R. S., which provides that the gross amount of money received shall be covered into the

Treasury without deduction on account of salary, fees, costs, &c. To whom, then, do these fees belong since the same are not the property of the Land Officers? Clearly not to the United States, because its office is simply a trust, and after deducting the expenses of survey and sale the moneys received from the disposal of the Osage lands shall, under the treaty, constitute a fund to the credit of the Osages. In support of the fact that the two-dollar filing fee is a part of the purchase price of the lands, we respectfully call attention to the fact that in those cases where the Government has allowed an erroneous entry of the land, and is consequently obliged to refund the purchase-money to the settler, the price per acre ($\$1\frac{25}{100}$,) and the filing fee ($2) is always refunded. If the filing fee is not part of the proceeds of the sale of the Osage lands as Comptroller Durham decided, why, we submit, is it refunded in this class of cases? So much for the filing fees. We feel confident that in the foregoing statement of fact we have demonstrated that no lands of the Osages can be sold without payment of the filing fees, and that therefore it becomes part of the price of the lands; and, secondly, that the Government acts merely as a trustee and has no right to a further recompense in the matter than the actual expense of the sale through its agents.

We desire now to call attention briefly to the expenses chargeable to the Osages for the sale of the lands. Comptroller Lawrence decided (III Lawrence, 365) that the expense of selling such lands was a *pro rata* of the salaries of the register and receiver, clerk hire, office rent, furniture, &c., and the expense of depositing. We held in our brief of March 30th, 1886, that the only real expense of selling the Osage lands was the extra clerk hire involved by reason of the business of selling the Indian lands in addition to the public lands. The Land Offices are kept open for the purpose of selling the public lands, and the officers thereof receive a fixed salary for their services,

namely, $500 each; also, they receive, in the way of fees and commissions, whatever sums they are entitled to under the various provisions of section 2238, R. S., not in excess of $3,000 each, per annum, from appropriations made by Congress for that purpose. We called attention to the fact in the former part of our brief that moneys collected by Receivers of Land Offices were required to be deposited without abatement. (Section 3617, R. S.) There is this exception to that rule: under the act of August 5th, 1882, (22 Stats., 267,) Receivers of Public Moneys pay direct from the Osage funds the expenses of selling those lands. A disbursing account is rendered, which is incorporated as a credit in the Receiver's account. Your predecessor very properly decided that certain expenses which were paid under the Lawrence decision were not chargeable to the Indians. Prior to the passage of the act of August 5th, 1882, the Indian moneys had been covered in without rebate, except for allowances for clerk hire. The Government, in the account rendered up to June 30th, 1884, claimed expenses amounting to $132,676.45; but the Second Auditor scaled that amount down to $87,003.38, in accordance with the decision of the Second Comptroller dated December 6th, 1886.

The filing fees for the same period amounted to $92,700. The Second Comptroller decided that the filing fees must be taken as a set-off to the expenses, which was done, leaving a balance of $5,696.62 unappropriated. Since that settlement the Receivers have paid out direct from the Osage trust moneys $55,781.30, as salaries and expenses of Registers and Receivers, and the Treasury has received and covered in to the credit of the U. S. $38,238 in filing fees. We have asked that this amount, and the former balance of $5,696.62—in all, $43,934.62, be recovered to the credit of the Osages.

The mere fact that the accounts which are for one and the same class of debits and credits were rendered at differ-

ent periods, will not, we think, make any difference in the claim for $5,696.62, the balance before mentioned. If the Osages were entitled to credit for filing fees in 1886, their claim for such amounts as were then remaining, and have been since received, is equally good, there having been no new laws passed or decisions made bearing on the subject.

Very respectfully,

SAMUEL J. CRAWFORD,
HOWARD B. ABBOTT,
Attorneys for the Osage Indian Nation.

BEFORE THE HONORABLE,

United States Commissioners

Appointed under Act of Congress approved March 2, 1889.

IN THE MATTER OF THE CLAIM

OF THE

CHEYENNE AND ARAPAHOE INDIANS,

RELATIVE TO THEIR LANDS IN THE INDIAN TERRITORY.

Petition and Statement of Facts.

SAMUEL J. CRAWFORD,
MATT. G. REYNOLDS,
JOHN D. MILES,
D. B. DYER,

Counsel for the Cheyenne and Arapahoe Tribes.

July 5, 1889

THE GEO. W. CRANE PUBLISHING CO.

BEFORE THE HONORABLE,

United States Commissioners

Appointed under Act of Congress approved March 2, 1889.

IN THE MATTER OF THE CLAIM

OF THE

CHEYENNE AND ARAPAHOE INDIANS,

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Counsel for the Cheyenne and Arapahoe Tribes.

THE GEO. W. CRANE PUBLISHING CO.

Petition and Statement of Facts.

To the Honorable Commissioners appointed by the President to negotiate with the Cherokees and other Indians owning or claiming lands west of the ninety-sixth degree of longitude in the Indian Territory, for the cession of said lands to the United States:

GENTLEMEN—The act of Congress under which you were appointed says: "The President is hereby authorized to appoint three commissioners, not more than two of whom shall be members of the same political party, to negotiate with the Cherokee Indians, and with all other Indians owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory, for the cession to the United States of all their title, claim or interest of every kind or character in and to said lands, and any and all agreements resulting from such negotiations shall be reported to the President, and by him to Congress at its next session, and to the council or councils of the nation or nations, tribe or tribes agreeing to the same for ratification, and for this purpose the sum of twenty-five thousand dollars, or as much thereof as may be necessary, is hereby appropriated, to be immediately available: *Provided*, That said commission is further authorized to submit to the Cherokee Nation the proposition that said nation shall cede to the United States, in the manner and with the effect aforesaid, all the rights of said nation in said lands, upon the same terms as to payment as is provided in the agreement made with the Creek Indians of date January nineteenth, eighteen hundred and eighty-

nine, and ratified by the present Congress; and if said Cherokee Nation shall accept, and by act of its legislative authority, duly passed, ratify the same, the said lands shall thereupon become a part of the public domain for the purpose of such disposition as is herein provided, and the President is authorized, as soon thereafter as he may deem advisable, by proclamation to open said lands to settlement in the same manner and to the same effect as in this act provided concerning the lands acquired from said Creek Indians, but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall be permitted to enter any of said lands or acquire any right thereto."

I.

On behalf of the Cheyenne and Arapahoe tribes of Indians, who own lands west of the said ninety-sixth degree, we respectfully submit for your consideration, and such action as you may deem proper, the following brief statement of the law and the facts:

Prior to October 14, 1865, the said Cheyenne and Arapahoe Indians, from time immemorial, owned and occupied a tract of country bounded as follows—

"Beginning at the junction of the north and south forks of the Platte river; thence up the north fork to the top of the principal range of the Rocky Mountains, or to the Red Buttes; thence southwardly along the summit of the Rocky Mountains to the headwaters of the Arkansas river; thence down the Arkansas river, to the Cimarron crossing of the same; thence to the place of beginning." (14 Stat. 704.)

By treaty concluded October 14, 1865, ratified May 22, 1866, and proclaimed February 2, 1867, the said Cheyennes and Arapahoes ceded and relinquished to the United States the above described lands, and in consideration thereof received a reservation described as follows:

"The United States hereby agree that the district of country embraced within the following limits, or such portion of the same as may hereafter be designated by the President of the United States for that purpose, viz.: Commencing at the mouth of Red creek or Red fork of the Arkansas river; thence up said creek or fork to its source; thence westwardly to a point on the Cimarron river, opposite the mouth of Buffalo Creek; thence due north to the Arkansas river; thence down the same to the beginning, shall be, and is, hereby set apart for the absolute and undisturbed use and occupation of the tribes who are parties to this treaty, and of such other friendly tribes as they may from time to time agree to admit among them, and that no white person, except officers, agents and employes of the government, shall go upon or settle within the country embraced within said limits, unless formally admitted and incorporated into some one of the tribes lawfully residing there, according to its laws and usages: *Provided, however*, That said Indians shall not be required to settle upon said reservation until such time as the United States shall have extinguished all claims of title thereto on the part of other Indians, so that the Indians parties hereto may live thereon at peace with all other tribes." (14 Stat. 704.)

By treaty concluded October 28, 1867, ratified July 25, 1868, and proclaimed August 19, 1868, the said Cheyennes and Arapahoes relinquished their right to the last above described reservation, and in consideration of such relinquishment, received a reservation bounded and described as follows:

"The United States agrees that the following district of country, to wit: Commencing at the point where the Arkansas river crosses the 37th parallel of north latitude, thence west on said parallel — the said line being the southern boundary of the State of Kansas — to the Cimarron river (sometimes called the Red Fork of the Arkansas river), thence down said Cimarron river, in the middle of the channel thereof, to the Arkansas river; thence up the Arkansas river, in the middle of the channel thereof, to the place of beginning, shall be, and the same is hereby set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians, as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States now solemnly agrees, that no persons except those herein authorized so to do, and except such officers, agents and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, *shall ever be permitted to pass over, settle upon, or reside in the territory described in this article*, or in such territory as may be added to this reservation for the use of said Indians." (15 Stat. 594.)

II.

Now if the United States had a right to thus cede and convey these lands to the Cheyenne and Arapahoe tribes, in consideration of said tribes relinquishing their right to lands elsewhere, as the treaties show they did, then the said lands belong to said tribes.

This cession to the Cheyennes and Arapahoes in 1867, and ratified by Congress in 1868, was made with the rights of all the parties then perfectly and thoroughly understood. The United States had by purchase received a solemn relinquishment of the rights of the Cherokees, whatever those rights

were, to the same, and then, with full knowledge on the part of the Cherokees, conveyed, by the most solemn form known to our civilized people, the title to the same to the Cheyennes and Arapahoes *for a valuable consideration*; and the title thus conveyed has never been relinquished nor divested.

In order to arrive at a correct conclusion as to the first of these propositions, we deem it essential to refer to the history of the title from the time said lands were severed from the public domain, and especially the title to that portion situated in what is known as the Cherokee Outlet.

By article two of the treaty between the United States and the Cherokee Nation, proclaimed May 28, 1828, (7 Stat. 311,) the United States agreed to possess the Cherokees with seven millions of acres of land (their present home). And in the same article it is provided as follows:

"In addition to the seven millions of acres thus provided for and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits, and as far west as the sovereignty of the United States and their right of soil extend." (7 Stat. 312.)

The treaties with said nation of date February 14, 1833, and December 29, 1835, (7 Stat. 415–478,) with a slight modification of the boundaries, reaffirmed this grant. But as will be observed, it was, in so far as the outlet is concerned, simply a grant of a right of way to the hunting grounds, with no right whatever to the soil. Of this fact

the Cherokees were duly informed by the Secretary of War, Hon. J. C. Calhoun, who, on October 8, 1821, in reply to the demands of the Cherokees, that certain parties be removed from the outlet, said:

"It is to be always understood that in removing the white settlers from Loveley's purchase for the purpose of giving the outlet promised you to the west, you acquire thereby no rights to the soil, but merely to an outlet, of which you appear to be already apprised, and that the Government reserves to itself the right of making such disposition as it may think proper with regard to the salt springs upon that tract of country.

J. C. CALHOUN."

TEKE-E-TOKE,
JOHN JOLLY,
BLACK FOX,
W. WEBBER,
THOMAS GRAVES,
Chiefs of Arkansas Cherokees.

In an able opinion delivered by Judge Brewer in 1887, that distinguished jurist used this language:

"Manifestly Congress set apart the 7,000,000 acres as a home, and that was thereafter to be regarded as set aside and occupied, because, as expressed in the preamble of the treaty, Congress was intent upon securing a permanent home; beyond that the guaranty was of an outlet—not territory for residence—but for passage ground, over which the Cherokees might pass to all the unoccupied domain west. But while the exclusive right to this outlet was guarantied, while patent was issued conveying this outlet, it was described and intended obviously as an outlet, and not as a home. (*U. S. v. Soule et al.*, 30 Fed. R., p. 918.) But be that as it may, it matters little in so far as the questions now under consideration are concerned, whether the Cherokees held said outlet by title in fee simple, or whether it was the common Indian title, or merely a road to the hunting ground, they have parted with their title whatever it was."

Article 16 of the Cherokee treaty of July 19, 1866, is as follows:

"The United States may settle friendly Indians in any part of the Cherokee country west of 96 degree, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee simple to each of said tribes, to be held in common or by their members in severalty, as the United States may decide."

"Said lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree, then the price to be fixed by the President."

"The Cherokee Nation to retain the right of possession of and jurisdiction over all of said country west of 96 degree of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." (14 Stat. 804.)

On February 16, 1872, the Commissioner of Indian Affairs addressed a letter to the Secretary of the Interior, of which the following is an extract:

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
February 16, 1872.

SIR: By the terms of a treaty concluded October 28, 1867, with the Cheyenne and Arapahoe tribes of Indians, a portion of said Cherokee country west of 96 degree west longitude, covering 4,300,000 acres, more or less, was assigned to and set apart as a reservation for said tribes. The United States having *received* these lands from the Cherokees and *transferred them under the treaty* provision recited to the Cheyennes and Arapahoes, are of course responsible for the payment to the Cherokees of the sums properly to

be paid on account of these lands. The Cheyennes and Arapahoes are entirely destitute, dependent upon the Government in the main for subsistence, and have no tribal fund or possible means out of which payment could be made for the tract of country thus set aside for them; nor has the price to be paid for such lands at any time been fixed, either by agreement between the Cherokees on the one part and the Cheyennes and Arapahoes on the other, or by executive order, as provived in said treaty.

In view of these facts and treaty stipulations, I should deem it my duty to recommend that the President be requested to proceed to fix and determine the price to be paid for these lands, but that I regard it as highly desirable, both in the interest of economy and on other grounds, that the entire tract thus ceded by the Cherokees in the treaty of 1866, excepting only that portion upon which the Osages have been located, and from which the price to be paid has been determined by the President, as before cited, should be appraised at the same time with the lands ceded to the Cheyennes and Arapahoes, and without awaiting the actual settlements thereon of other friendly tribes as contemplated in the treaty.

I have therefore the honor to recommend that Congress be asked to pass an act authorizing the President, upon the expression of assent to such action by the council of the Cherokee Nation, to proceed to fix the price of all the lands ceded by the Cherokees in the treaty of 1866, excepting such only as have been sold to and occupied by the Osages: *Provided*, That the tract set apart as a reservation for the Cheyennes and Arapahoes by the treaty of 1867 shall be separately appraised.

Very respectfully, your obedient servant,

F. A. WALKER,
Commissioner.

To the Honorable Secretary of the Interior.

In pursuance of this recommendation, Congress, on May 29, 1872, passed the following act:

"That the President of the United States and the Secretary of the Interior are hereby authorized to make an appraisement of the Cherokee lands lying west of the ninety-sixth meridian of west longitude, and west of the land of the Osage Indians, in the Indian Territory, and south of the southern line of the State of Kansas, ceded to the United States by the Cherokee Indians under their treaty of July nineteenth, eighteen hundred and sixty-six, for settlement of friendly Indians, and report the same to Congress." (17 Stat. 190.)

In accordance with the treaty and act of Congress, last above quoted, the Secretary of the Interior, on January 30, 1877, appointed three commisioners to appraise the lands therein mentioned. The result and final conclusion of the work enjoined upon said commission is fully set forth in official papers, signed by the Secretary of the Interior and the President, as follows:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, June 21, 1879.

SIR: The 5th section of the act of May 29, 1872, (17 Stat. 190), declares, "That the President of the United States, and the Secretary of the Interior are hereby authorized to make an appraisement of the Cherokee lands west of the 96th meridian of west longitude and west of the Osage Indians in the Indian Territory, and south of the south line of the State of Kansas, ceded to the United States by the Cherokee Indians under their treaty of July 19, 1866, for the settlement of friendly Indians, and report the same to Congress."

The 4th section of the act of April 10, 1876, (19 Stat. 29), declares, "That the following-described reservation in Indian

Territory be, and the same is hereby set apart for the use and occupancy of the Pawnee tribe of Indians, namely: All that tract of country between the Cimarron and Arkansas rivers embraced within the limits of Townships 21, 22, 23 and 24 north, of range 4 east, Townships 18, 19, 20, 21, 22, 23 and 24 north, of range 5 east, Townships 18, 19, 20, 21, 22 and 23 north, of range 6 east of the Indian meridian: *Provided*, That the terms of the 16th article of the Cherokee treaty of July 19, 1866, shall be complied with so far as the same may be applicable thereto: *And provided, further*, That the sum be paid the Cherokees by the Pawnees for such quantity of the land herein described as may be within the limits of the Cherokee country west of the ninety-sixth meridian west longitude, shall not exceed seventy cents per acre."

Article XVI of the Cherokee treaty of July 19, 1866, referred to above (14 Stat. 804), provides as follows: "The United States may settle friendly Indians in any part of the Cherokee country west of 96 degrees, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled, the boundaries of each of said districts to be distinctly marked, and the land to be conveyed in fee simple to each of said tribes, to be held in common or by their members in severalty as the United States may decide."

"Said lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree, then the price to be fixed by the President."

Under date 30th January, 1877, three commissioners were appointed by the Secretary of the Interior, to appraise the lands ceded by the Cherokees under the provisions of the treaty above cited.

In valuing the lands the commissioners adopted as the basis of their appraisal a one-half valuation, on the ground that being for Indian occupancy and settlement only, these lands were worth about one-half as much as they would be if open to settlement by white people.

On this basis the average appraised valuation of the entire tract of 6,574,576.05 acres, including the Pawnee Reservation, was 41 cents per acre.

The Pawnee Reservation empraces within its limits about 230,014.04 acres, and the average valuation placed upon these lands was 59 cents per acre.

Deducting the Pawnee Reservation from the entire tract, the average valuation of the remaining 6,344,562.01 acres would be, according to the commissioners' report, 40.47 cents per acre.

The Cherokees object to the half valuation adopted by the commissioners as both unreasonable and unjust, and are not satisfied with the appraisement made thereon.

After a careful examination of all the facts bearing upon the question of appraisement, I am satisfied that the restriction placed upon the use of these lands does not warrant a reduction of one-half in their appraised valuation.

The Osage lands, comprising 1,466,167 acres, were purchased from the Cherokees at 70 cents per acre. The average character of these lands is about the same as the Pawnee tract, while the percentage of tillable land is much larger in the Pawnee Reservation than in that of the Osages.

Regarding the amount paid for the Osage lands, per acre, as a fair price, there would appear to be no good reason why lands equally valuable should not be paid for at the same rate.

I would therefore, respectfully recommend that the price of the lands occupied by the Pawnees be fixed at seventy (70) cents per acre; and that the remainder of the lands lying west of the 69 degree west longitude, embraced in the report of

said commissioners be valued at forty-seven and forty-nine hundredths (47·49) cents per acre.

I have the honor to be, sir, very respectfully your obedient servant,

C. SCHURZ, *Secretary.*

The action of the Secretary of the Interior, as conveyed to me by letter dated the 19th inst., in appraising and fixing the value of certain lands ceded by the Cherokee Indians to the United States, to be used in the settlement of friendly Indians, as follows:

"Lands lying west of 96 degrees west longitude, in Indian Territory, set apart under act of April 10, 1876, (19 Stat. 29,) as a portion of the reservation for the Pawnee Indians, embracing an area of 230,014.04 acres, at 70 cents per acre.

"All other lands ceded by the Cherokees in the treaty of 1866, article 16, (14 Stat. 304), embracing an area of 6,344,562.01 acres, at 47.49 cents per acre, is hereby approved and ratified as my act, under the act of May 29, 1872."

R. B. HAYES.

EXECUTIVE MANSION, June 23, 1879.

This appraisement and price, fixed by the Secretary of the Interior and President of the United States, was accepted by the Cherokee Nation, and payments made thereon.

We suggest there was no defeasance clause in the treaty of 1866, made with the Cherokees, by which the title that the United States might thereafter convey to innocent Indians would defeat the title so conveyed, and the Cherokees have estopped themselves from asserting any such claim by demanding and receiving from the United States part of the purchase price for the same, as fixed according to law.

Again, it is clear whatever rights the Cherokees had were absolutely relinquished by the treaty of 1866, for the purpose, in part, of enabling the United States to exchange the same with the Cheyennes and Arapahoes for a magnificent domain held by them under the treaty concluded October 14, 1865, ratified May 22, 1866, and proclaimed February 2, 1867, which the United States was then needing in the State of Kansas, and which at that time far exceeded in actual value per acre, and was very much larger in extent, than that obtained from the Cherokees under the treaty of 1866.

If the United States has failed to pay the Cherokees in full for the same, that cannot lessen or degrade, much less have declared void, the title that they (the Cherokees) enabled the United States to convey to the Cheyennes and Arapahoes in exchange for a much more valuable tract than that ceded to it. If so, then the "Great Father," (whom the Cheyennes and Arapahoes trusted as such), with the assistance of the Cherokees, has practiced a gross fraud upon the Cheyenne and Arapahoe Indians by obtaining their magnificent domain, now comprising a large portion of the States of Kansas and Colorado, upon the faith of a solemn treaty, and has given them comparatively nothing in return therefor. Such was never the intention, but it intended and did vest them with the title under the treaty of 1867.

For the purpose of showing the part payment by the United States of the purchase money to the Cherokee Nation, and the acceptance by said nation of the price as fixed

by the President, we quote the following official communications:

WASHINGTON, D. C., January 11, 1882.

Hon. J. S. Kirkwood, Secretary of the Interior:

SIR—In compliance with your instructions, we desire to bring before you a matter of considerable importance, calling for early action.

Your predecessor, under date of February 9, 1880, sent a communication to Congress containing the appraisement of certain lands belonging to us and lying west of the Arkansas river, being in all 6,514,576.05 acres. Of that amount 230,-014.04 acres was appraised separately, and was to be paid for in a manner already prescribed by act of April 10, 1876; and the remainder, 6,344,562, were appraised by the Secretary and the President, as the law directed, in June, 1879, at 47.49 cents per acre, making an aggregate of $3,013,032.

Upon this there is due us interest from July 1, 1879, to the present date, or date of payment, at the rate of five per cent. per annum. Upon that amount there has been paid, by an appropriation in the deficiency bill of 1880, the sum of $300,-000, and also an appropriation last year of $50,000, passed to our credit last summer as sums paid on our lands thus appaised at an aggregate for the entire tract of 47.49 cents per acre. It will thus be seen that there has been a full recognition of the amount thus due us, by the President, the department, and Congress. We have so far been unable to secure full payment, and now ask that you send an estimate for the principal and interest due us. Of the amount due, we ask that the sum of five hundred thousand dollars be vested, under the act of April 1, 1880, as a perpetual school and seminary fund, and that the remainder be placed to the credit of the Cherokee Nation, subject to the action of the Cherokee Legislature or National Council.

At the time the treaty of July 19, 1866, was entered into, the demand was made on us that we cede all our lands west of 96 degrees, on the ground that they were immediately needed for the occupancy of other Indian tribes. A treaty had been made with the Osages in 1865, contemplating their removal to the Indian Territory, which was accomplished, and took part of the tract.

Treaties were also being at that time entered into with the Arapahoes, the Kiowas, and the Comanches, and the Cheyennes, by which all the remainder of our lands lying west of 96 degrees were set apart for these Indians, and the lands were so set apart by the ratification of these treaties, and which allotments have never been changed by law, save insomuch as has been hereinbefore specified. Every consideration of law and equity required that we should have been paid for the land ceded long ago. Had our treaty been complied with, we should have been paid fifteen years ago.

The treaty has, in all essential particulars, been set aside. In no instance were the Cherokees permitted to have a voice in their appraisement or disposition. In 1872 General Francis Walker, then Commissioner of Indian Affairs, in a letter dated February 16, 1872, called the attention of the Secretary of the Interior to the subject, and by the Secretary the matter was presented to Congress.

In the letter the commissioner said: "By the terms of a treaty concluded October 23, 1867, with the Cheyennes and Arapahoes, a portion of said Cherokee country west of 96 degrees of west longitude, covering (4,300,000) four million three hundred thousand acres, more or less, *was assigned to and set apart as a reservation for said tribes, the United States having received these lands from the Cherokees and transferred them, under treaty provisions recited,* to the Cheyennes and Arapahoes, *are of course responsible for the*

payment to the Cherokees of the sums properly to be paid on account of these lands."

Under these communications the act of May 29, 1872, was enacted; and finally, under it, as stated, the entire tract was appraised by the Secretary and the President. It was not appraised as for particular tribes, but as it had been all at the date of the law authorizing it set apart for certain tribes, the boundaries of said district distinctly set forth, and the occupants determined, it was, without reference to the difference in value of timber, valley and pasture land, appraised as one entire tract, the valuation being for the whole as a single body thus disposed of, and not an appraisement of particular tracts.

It was neither the purpose of the law, nor would it be in accordance with either law or equity, to pick out the most valuable tracts and take them at the price fixed for the whole. We could not permit such a gross abuse of the trust, nor is it to be presumed that the United States authorities would be guilty of it. We have already suffered great wrong by this delay. We ask a prompt remedy. The whole amount should be paid now, and it is all due under the only existing regulations and provisions; nor is there any authority of law under which only a part of it could be paid.

If the United States is unable to pay for it all at present, we ask that it pay principal and interest for what it wants, and restore the remainder to us as it was before the treaty of 1866.

To one of these two things we are beyond all question entitled. Asking your favorable recommendatien at an early day as practicable, we are, very respectfully,

DANIEL H. ROSS,
R. W. WOLFE,
Cherokee Delegation.

W. A. PHILLIPS, *Special Agent.*

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, February 7, 1882.

Sir: I have the honor to acknowledge the receipt, by your reference of the 14th inst., of a communication dated the 11th ult., from the Cherokee delegates, wherein they ask that an estimate be submitted to Congress for principal and interest due the Cherokee Nation, under the sixteenth article of the treaty of 1866 (14 Stat. 804), for lands lying west of the Arkansas river, $500,000 of the amount to be invested under the act of April 1, 1881, as a perpetual school fund, and the remainder to be placed to the credit of the Cherokee Nation, subject to the action of the National Council.

In your reference indorsement upon this communication, you request to be furnished with all information in this office showing what payments have been made in any way to the Cherokee Indians, or for their benefit, for the lands, or any of them, mentioned in the report of the Commissioner of the General Land Office, which accompanies the communication of the delegates above referred to.

In reply I have to state, that of the lands west of the Arkansas river mentioned in the sixteenth article of the treaty of 1866, there has actually been "sold and occupied" the following quantities, viz.:

	ACRES.
To the Pawnees	230,014.04
To the Poncas	101,894.31
To the Nez Perces	90,710.89
To the Otoes and Missouries	129,113.20
Total	551,732.44

By the deficiency act of June 16, 1880, (21 Stat. 248), an appropriation of $300,000 was made, "to be paid into the treasury of the Cherokee Nation, out of the funds due said nation, for its lands in the Indian Territory west of the Arkansas river." . . .

By the deficiency act of March 3, 1881, (21 Stat. 422), $50,000 was appropriated for the purchase of the lands occupied by the Poncas.

As before stated, there was assigned to the Poncas 101,-894.31 acres, which at 47.49 cents per acre, the price fixed by the President June 23, 1879, amounts to $48,389.46, which amount has been carried to the credit of the Cherokees.

The Cherokee Nation has therefore received, on account of their lands west of the Arkansas river, "sold and occupied," the sum of $348,389.46.

I will add that the President fixed the price of the Pawnee lands at 70 cents per acre, and the remainder of the lands west of the Arkansas river at 47.49 cents per acre.

The papers referred by you are herewith returned.

Very respectfully, your obedient servant,

H. PRICE, *Commissioner.*

The Honorable the Secretary of the Interior.

The sum of $300,000 referred to in the foregoing letters was appropriated by act of Congress, approved June 16, 1880, in words as follows:

"That the sum of three hundred thousand dollars is hereby appropriated, to be paid into the treasury of the Cherokee Nation for its lands in the Indian Territory west of the Arkansas river, as per estimate of the Secretary of the Interior, and which sum shall be expended, as the acts of the Cherokee Legislature direct, to relieve the destitution of the Cherokee people, caused by the failure of crops during the past season, by reason of the drought; this amount to be immediately available." (21 Stat. 248.)

In 1881 the further sum of $50,000 was appropriated by Congress and paid to the Cherokee Nation, under the ap-

praisement of land (occupied by the Poncas), west of the Arkansas river at 47.49 cents per acre. (21 Stat. 422.)

And again, by an act approved March 3, 1883, Congress appropriated the further sum of $300,000 as follows:

"That the sum of three hundred thousand dollars is hereby appropriated, to be paid into the treasury of the Cherokee Nation, out of the funds due under appraisement for Cherokee lands west of the Arkansas river, which sum shall be expended as the acts of the Cherokee Legislature direct; this amount to be immediately available: *Provided*, That the Cherokee Nation, through its proper authorities, shall execute conveyances, satisfactory to the Secretary of the Interior, to the United States in trust only for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missouries, and Osages now occupying said tract, as they respectively occupy the same before the payment of said sum of money." (22, Stat. 624.)

The status of the lands in question, at the time the Cherokee Nation was demanding and receiving pay therefor, according to the price, 47.49 cents per acre, as fixed by the President, is shown by Hon. N. C. McFarland, then Commissioner of the General Land Office, in an official report to to the Secretary of the Interior, as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., February 3, 1882.

Hon. S. J. Kirkwood, Secretary of the Interior:

SIR: I have the honor to acknowledge the receipt, by reference from the department, of a letter from Messrs. Daniel H. Ross and R. M. Wolfe, Cherokee delegation, dated January 11, 1882, asking for an estimate for principal and interest due the Cherokees for lands lying west of the Arkansas river, (referred to in Article XVI of the treaty of July 19,

1866), and that investment of $500,000 be made under act of April 1, 1880, as a perpetual school fund, and the remainder placed to the credit of the Cherokee Nation, subject to action of the National Council. In reply to the request of the department for any information in this bureau bearing on the matter, I have to state as follows:

The Cherokee lands west of the Arkansas river have all been surveyed, and the area thereof according to the official plats of survey is 6,574,586.55 acres, embracing the following tracts:

	ACRES.
Cheyenne and Arapahoe lands east of Pawnee..	105,455.52
Cheyenne and Arapahoe, between Arkansas river, Pawnee and Cimarron.....	3,635,473.19
Cheyenne and Arapahoe, occupied by Nez Perces,	90,710.89
Cheyenne and Aropahoe, occupied by Poncas...	101,894.31
Cheyenne and Arapahoe, occupied by Otoes and Missouries.....	129,113.20
Pawnee lands north of Creek boundary.....	230,014.04
Lands west of Cimarron (unassigned).....	2,281,925.40

The letter from Messrs. Ross and Wolf, with inclosure, herewith returned.

Very respectfully,

N. C. McFarland,
Commissioner.

Of the 6,574,586.55 acres embraced in the Cherokee outlet west of the Arkansas river, 4,294,734 acres were ceded to the Cheyenne and Arapahoe tribes, by the said treaty of 1867.

Of these 4,294,734 acres there were subsequently sold to the

	ACRES.
Nez Perces and Tonkowas.....	90,710
Poncas.....	101,892
Otoes and Missouries	129,113
Pawnees.....	230,014
Total.....	551,731

This deducted from the original amount leaves 3,743,003 acres.

Besides the Cherokee lands thus ceded, there were also ceded to the Cheyenne and Arapahoe tribes, by the said treaty of 1867, 732,162 acres, lying between the Cimarron river and the south line of the Cherokee outlet, which formerly belonged to the Creek Nation.

	ACRES.
Of these, the Government sold to the Pawnees....	53,006
Opened to settlement, under act of March 2, 1889,	676,156
Total, ...	732,162
Total Cheyenne and Arapahoe lands.....	5,064,896
Total disposed of.....	1,281,893
Total undisposed of.....	4,783,003

Thus it will be observed:

First. That the lands embraced in the said Cheyenne and Arapahoe reservation, and bounded by the Arkansas river on the east, by the south line of Kansas on the north, and by the Cimarron river on the south and west (except Creek lands disposed of), were ceded to the Cherokee Nation, for an outlet, by the treaties of 1828, 1833 and 1835.

Second. That by the treaty of 1866, the Cherokee Nation ceded said lands to the United States, for the purpose of locating other tribes thereon.

Third. That by the treaty of 1867, the said lands were ceded to the Cheyenne and Arapahoe tribes, in exchange for lands in Kansas which had been ceded to the said Cheyenne and Arapahoe tribes by the treaty of 1865.

Fourth: That the said lands ceded to the United States by the Cherokee treaty of 1866, and re-conveyed to the Cheyennes and Arapahoes by the treaty of 1867, were appraised by commissioners appointed in pursuance of law, and the price to be paid the Cherokees for said lands fixed by the President of the United States at 47.49 cents per acre, as provided for by the said Cherokee treaty of 1866.

Fifth: That in pursuance of the price so fixed by the President, and at the request of the proper authorities of the Cherokee Nation, Congress appropriated, as we have shown, large sums of money, which the said nation accepted as part payment for said lands.

Sixth. That on January 11, 1882, the duly appointed delegates, and a special agent of the Cherokee Nation, in an official communication addressed to the Hon. S. J. Kirkwood, Secretary of the Interior, demanded pay for the balance of said lands at the rate of 47.49 cents per acre, and thereby agreed to the price as fixed by the President.

III.

It is perfectly clear that the United States at the date of the Cheyenne and Arapahoe treaty of 1867 had the lawful right to cede and convey said lands to the Cheyenne and Arapahoe tribes. It is equally clear that the United States did by the said treaty cede and convey said lands to said tribes.

It is also equally clear that the Cheyennes and Arapahoes paid the full value for every acre of said lands by the relinquishment of their right to other lands of superior quality and value. It may be claimed that the Cheyennes and Arapahoes did not occupy or cultivate the lands so ceded and conveyed to them, but that, if true, is not their fault, nor is it the concern of any other tribe.

The lands were sold and conveyed to them by the United States for a valuable consideration, and their title has never been relinquished or extinguished.

The lands are the property of these Indians to-day as much and as completely as the Cherokees own the 7,000,000 acres which they now occupy.

That all of the Cheyenne and Arapahoe Indians did not settle upon or occupy the lands in question, is not disputed. Some of them located there, and some of them, as we are informed, are still there, but the majority, at the time of the treaty of 1867, were just coming in from the war-path, at the close of a long, bloody war with the frontier settlers, and it was not intended or expected by the United States that they would settle down at once on their new reservation and accustom themselves to habits of industry and civilization.

The feelings engendered by the strife between the Indians and the settlers naturally made the Indians desirous of pushing as far away from the settlements as possible, and hence many of them were slow in making up their minds to settle

near the borders of Kansas. While in this unsettled condition measures were instituted to have them located on the North Canadian river and its tributaries, where a majority of them now reside. They were located here by an executive order, of date August 10, 1869, and many of them now have valuable farms, well improved.

In 1872 and subsequently an attempt was made by the Secretary of the Interior to have the Cheyenne and Arapahoe tribes exchange their reservation on the Cherokee outlet for lands elsewhere, but Congress took no action thereon.

The lands now occupied by the majority of the Cheyenne and Arapahoe people were ceded to the United States by the Creek and Seminole Nations June 14th and March 21, 1866, respectively, for the purpose of locating freedmen and other friendly tribes thereon.

The Creek treaty mentioned, as will be observed, ceded the said lands to the United States "to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon."

The Seminole treaty is substantially the same as that of the Creeks, with the words "to be sold to," etc., omitted.

But Congress, by act of March 2, 1889, interpreted them as meaning the same, and purchased from said tribes their reversionary interest in said lands.

Under existing law the Cheyennes and Arapahoes are entitled to their homes, 160 acres for each head of a family

and eighty acres each for single persons, where they now reside, but all other lands embraced in the reservation set apart to them by executive order, as aforesaid, were included in the Creek and Seminole cessions of last winter, and are now public lands.

It being the purpose and policy of the government, as we understand it, to open to settlement all surplus and unoccupied lands west of the 96th degree of longitude in the Indian Territory. The Cheyennes and Arapahoes do not wish to reoccupy or take possession of the lands embraced in their reservation on the so-called Cherokee outlet, but are willing to enter into negotiations with the proper authorities of the United States for the sale and relinquishment of said lands upon just and equitable terms.

These lands, as we have shown, belong absolutely to the Cheyenne and Arapahoe tribes, and although the Government may have neglected or failed in the performance of its duty with the Cherokee Nation, it may have failed to complete its payments or neglected to pay interest justly due, but that in no wise interferes with the lawful rights of the Cheyennes and Arapahoes, nor does the fact that the Cherokees claimed the right of possession and jurisdiction over said lands, or the right to lease the same, detract in the least from the Cheyenne and Arapahoe rights.

Since the ratification of the Cheyenne and Arapahoe treaty of 1867, the Cherokees have never been permitted, by the proper authorities of the United States, to exercise any

right of possession or jurisdiction over said lands, nor has their right to lease said lands in any way been recognized by the United States. But on the contrary, all such pretensions have been denied and repudiated by the Government.

It is true the Cherokees have for many years been leasing these Cheyenne and Arapahoe lands to cattle syndicates, and collecting a large revenue therefrom, which they had no right to collect. And as a matter of justice and equity they should be required by the Government to account to the Cheyennes and Arapahoes for their proportion of moneys so received.

As previously stated, it is not the fault of the Cheyennes and Arapahoes that they did not locate on their treaty reservation so soon as the disturbance between them and the settlers quieted.

On several occasions they made the attempt, but the influence of cattle syndicates, who had possession of their lands, and the Cherokees, who were receiving a large revenue therefrom, was greater than that of the Cheyennes and Arapahoes, and so they were compelled to remain away.

On September 20, 1880, the Secretary of the Interior authorized them to locate on their treaty reservation, but again they were ordered to remain away, as will be observed from the following communication:

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, March 24, 1882.

John D. Miles, Esq., U. S. Indian Agent, Cheyenne and Arapahoe Agency, Indian Territory:

SIR — In reply to your letter of the 6th inst., in which you say that relying upon the information given them by the Secretary of the Interior in person, at Washington, September 20, 1880, the Cheyennes are organizing a move to locate on the north side of the Cimarron river, upon the lands embraced in their treaty reservation, and that you fear trouble between them and the cattle men, who are there under authority from the Cherokees, I have to inform you that this office has heretofore held (see letter to you of June 26, 1879,) that as the Indians refused to locate upon the lands set apart for them by the treaty of October 28, 1867, and accepted other lands in lieu thereof, they would not now be allowed to occupy the same. A portion of the land given them by the above treaty has been granted to other Indians, who are now occupying the same, and if the Cheyennes were permitted to return to the former reservation, serious complications might arise.

I do not find that the assurance of Secretary Schurz is of record, and have no other evidence of it than the statements of the Indians as reported by you.

As at present advised, it would seem to be best that the present reservation should be confirmed to these tribes, as recommended in your annual report of last year, and the matter will be laid before the Honorable Secretary of the Interior at once, with a view to securing the necessary legislation.

You will therefore direct the Indians to remain within the limits of the reservation as established by the executive order

of August 10, 1869, and under no circumstances to leave it.

Very respectfully,

H. PRICE,
Commissioner.

The assertion in this letter, to the effect that the Cheyennes and Arapahoes refused to locate on their treaty reservation, and accepted other lands in lieu thereof, is not correct. If so, why would they send a delegation to Washington to ask the Secretary of the Interior for permission to locate on said lands, and why should they desire to so return and locate, if they had accepted other lands and were satisfied?

But the question of occupancy cuts no figure in this case. If so, it cuts more than one way.

The treaty of 1835 (7 Stat. 480), and the act of May 28, 1830, (4 Stat. 412), under which the Cherokees claim these lands, say: "*Provided, always*, That such lands shall revert to the United States, if the Indians become extinct, or abandon the same."

The Cherokees have never occupied an acre of the lands embraced in the Cheyenne and Arapahoe reservation.

Many years after said lands had been abandoned by the Cherokees, as a road to the hunting ground, they were ceded as aforesaid, by the treaty of 1866, to the United States.

By the treaty of 1867, they were ceded to the Cheyennes and Arapahoes, appraised, and large payments made thereon; after which the Cherokees attempted to get possession by leasing the same.

The Cheyennes and Arapahoes attempted to move upon and occupy said lands, but were prevented by an order from the Commissioner of Indian Affairs, as we have shown. So, if the failure to occupy, works a forfeiture in one case, it does in the other.

But there is no forfeiture in so far as the Cheyennes and Arapahoes are concerned. They own the lands, and as already stated, stand ready to enter into negotiations with the proper authorities of the United States, for the sale and relinquishment of the same.

We respectfully present the foregoing, with the request that we may be fully heard by your honorable Commission, in support of the same.

Respectfully submitted.

SAMUEL J. CRAWFORD.

MATT G. REYNOLDS.

JOHN D. MILES.

D. B. DYER.

July 5th, 1889.

LETTER FROM

PLEASANT PORTER,

DELEGATE OF THE

CREEK NATION,

TO THE

ATTORNEY-GENERAL

OF THE

UNITED STATES,

RELATIVE TO THE

Government, Laws, and Rights of said Nation, and Official Action of Delegates representing the same.

Aug. 16, 1889.

Washington, D. C., Aug. 16, 1889.

To the Hon. Attorney General
of the United States:

SIR: I am informed that certain unauthorized and irresponsible persons residing in the States of Tennessee, Arkansas, and the Indian Territory have constituted themselves guardians of the Creek Nation and people.

I am further informed that some of these so-called guardians have recently addressed communications to you alleging conspiracy to defraud the Creek Nation, on the part of the delegates who were duly appointed by said nation, to negotiate with the United States for the final disposition of lands ceded by the treaty of 1866.

I was, and am, one of said Delegates, and we assume the responsibility of all that was done.

The Creek Nation is an organized government, with a written Constitution and Code of printed laws. It has its own Executive Officers, Legislature, Courts, Schools, and other local institutions in full operation, as complete and successful, perhaps, as the average State of the Union.

The right to such local self government is inherent in the people, besides, it was guaranteed to the Creek people by the United States in the treaty of 1856, and re-affirmed by the treaty of 1866.

When our local government was thus established, we, at that moment, *ceased to be a tribe of Indians*, and became a community of civilized people, with a government of laws; or, in other words, we became a State with limited powers, but republican in form.

True, we have no representation in Congress, nor have we a voice in the selection of United States officers, but we have a United States court, and the revenue laws are in full force throughout the Creek Nation.

Since the establishment of our local government and institutions under the treaty of 1856, the Government of the United States has had no more to do with us, our government or our institutions, than it has had to do with the several States of the Union.

We have managed our own affairs in our own way, without any interference on the part of the United States. We levy and collect revenue, pay our just debts, and endeavor to collect what is justly due our Nation.

The greatest difficulty we have experienced thus far, has been in our dealings with the Government of the United States.

By the treaty of 1866, which was simply a contract by and between the United States and the Creek Nation, the said Creek Nation ceded and sold to the United States the west half of their entire domain, about thirty-four hundred thousand acres of land, at thirty cents per acre, for the special purpose of locating freedmen and other Indians thereon.

The greater part of these lands was left unoccupied for nineteen years, at which time bills were introduced in both houses of Congress, declaring said lands, so ceded as aforesaid, to be public lands of the United States, and proposing to open them to settlement under the homestead laws of the United States, without paying the Creek Nation for the same.

Thoroughly alarmed at this bold proposition and conscious of the danger of being cheated out of said lands, the Creek authorities employed counsel in 1884, to assist the Nation in establishing and securing its rights in the premises.

After a long tedious contest, in which counsel so employed rendered every assistance in their power, our right to additional compensation was finally acknowledged and pay for said lands secured.

The negotiation was closed on the 19th day of January last, ratified by the council of the Creek Nation on the 31st day of January, and an appropriation of $2,280,857.10 was made by Congress on March 1, 1889.

Of this amount the sum of $2,000,000 was placed to the credit of the Creek Nation, to draw interest at the rate of 5 per cent. per annum, and the further sum of $270,283.71 was directed by Congress, at the request of the Creek National Council, to be paid to the duly authorized Delegates of said Nation. By virtue of said authority the said sum of $270,283.71 was paid to the said Delegates, and by them disbursed as the National Council had directed.

We paid the honest debts of the Nation as we had been directed and were in honor bound to do.

The proper authorities of the Creek Nation and all honorable men who understand the facts are satisfied with what was done by the Delegation.

The aforesaid self constituted guardians, who are complaining to you and making charges of conspiracy against the Delegates and others, had nothing whatever to do with this case, and represent only themselves.

The United States, by finally negotiating and paying for said lands, thereby admitted that the debt was just, and yet for twenty-three years, and until we employed counsel to interpret the treaty and prepare our case, the money was withheld from us and no interest whatever paid thereon.

Now, we are to receive one hundred thousand dollars annually as interest on the two million dollars placed to our credit by Congress, as the result of the negotiation and sale of said lands.

On account of the unreasonable delay in making this negotiation and payment by the United States, the Creek Nation lost the interest thereon, one hundred thousand

dollars annually, for twenty-three years, or in the aggregate they lost twenty-three hundred thousand dollars.

If it is the desire of these would-be guardians, who are charging conspiracy and fraud to honestly serve the Creek Nation, why do they not have something to say about this interest matter? And why did they not take steps to collect pay from the Government for said lands without waiting twenty-three years, and until somebody else had accomplished the work?

Again, if the Government of the United States adjusts and settles on its own motion all such matters with the Creek Nation, without said Nation being represented by counsel, why did it not settle and pay for these lands without waiting so many years?

Why did it not pay the Creek Orphan Fund and every other claim of importance which the Creek Nation has had against the United States since it became a Nation, without waiting until said Nation employed counsel to aid in prosecuting such claims?

I know of no claim of the Creek Nation, large or small, against the United States, that was ever secured or paid without the aid of attorneys; nor do I believe that the said negotiation of January 19th last, and the payment for said lands, would ever have been secured but for the aid and assistance of counsel employed by the Nation.

The assertion that the Creek Nation had no right to employ and pay such counsel, in matters of such vast importance as those herein mentioned, or any other, it seems to me is absurd, if not monstrous.

No other civilized government of which I have ever read denies, even to the poorest of its subjects, the privilege of being represented by counsel of their own choosing. And to say that the Creek Nation can not exercise this right, is to say that the Creek Nation does not exist.

I trust, therefore, that you will take no step calculated

to reflect discredit upon any person connected with this case, unless you find that such person has exceeded his authority under the law.

The Creek Nation was driven to the necessity of acting for itself in this matter. It had what it believed to be a just and lawful claim against the United States.

The United States disputed the claim and for over twenty years neglected and refused to pay the same.

In view of these facts we employed counsel to assist us, just as any other State or individual would have done, and when the work was accomplished and done to the entire satisfaction of the proper authorities of the Creek Nation, such counsel were honestly paid for their services, honestly and faithfully rendered.

The Delegates in charge of this case were appointed by the Creek Nation. They received their instructions from the Creek Nation, and they were responsible alone to the Creek Nation.

Trusting, therefore, that you will consider carefully the record, the law, and the facts of this case before anything is done to the injury of any person,

I remain, with great respect,

Your obedient servant,

PLEASANT PORTER,

Delegate of the Creek Nation.

A STATEMENT

TO THE

HON. SECRETARY OF THE INTERIOR

RELATIVE TO

ATTORNEYS' FEES

FOR SERVICES IN ESTABLISHING THE RIGHT
OF THE

CREEK NATION

To certain Lands, and securing pay for the same.

By SAMUEL J. CRAWFORD.

Aug. 19 1889.

W. H. MOORE, PRINT. NO. 511 ELEVENTH ST.

Washington, D. C., August 19, 1889.

Hon. John W. Noble,
Secretary of the Interior:

SIR: I have, unofficially, learned that the Attorney-General of the United States has been appealed to by certain parties, who, in making said appeal, profess to act under section 2103 of the Revised Statutes of the United States, to institute against myself and others prosecutions for alleged wrong-doings in regard to the disposition made of the $280,857.10 of Creek moneys, which are named in the 4th section of the act of Congress approved March 1, 1889, and entitled:

"An act to ratify and confirm an agreement with the Muskogee (or Creek) Nation of Indians in the Indian Territory, and for other purposes."

I am also informed that the Attorney-General has asked you to furnish him with such facts as your Department may be enabled to furnish bearing upon the fact of such alleged wrong-doings, and which tend to show the propriety of instituting such legal prosecutions.

I have further been informally and unofficially informed through the courtesy of your Department that, pursuant to the said request by the Attorney-General asking you to furnish information, Special Agent Gardner, an agent of your Department, was directed to proceed to make investigation and report to you regarding said matter of the disposition of said moneys, and that he has, under such authority, taken eertain *ex parte* affidavits, and has made a report to your Department, pursuant to his said authority, submitting said *ex parte* affidavits and other documents along with his report. I have been permitted, through your courtesy and that of the Commissioner of

Indian Affairs, to make a hurried inspection of this report and the accompanying documents, but am not in possession of a copy of said report nor of such accompanying documents except as such documents have been by me otherwise obtained. My knowledge, therefore, of this report and of these accompanying documents is not full or accurate, I not having had opportunity to inspect portions ot them.

I have further ascertained that the Attorney-General, apparently pursuant to the said application to him to institute legal prosecutions, has appointed the Hon. Z. Taylor, of Tennessee, to make further investigations and report regarding the said disposition of said moneys, and that said Taylor is now proceeding to make such investigation.

I have alluded to the matters now stated for the purpose of indicating to you the reasons for my making to you the application which I hereby most respectfully make.

It is, of course, obvious that when a citizen is threatened with prosecutions of the character above alluded to, he cannot be otherwise than extremely solicitous that he should not be subjected to such prosecution unless reasonable ground for the prosecution exists, and that he should be extremely anxious that the Government should not act upon erroneous, *ex parte*, and misleading reports and statements made in his absence.

I have, therefore, ventured to make this communication to you, in which I desire to bring to your attention a full and accurate statement of all the material facts bearing upon my connection with this case (the said matter of the disposition of said moneys.)

I, at the outset of this communication, wish to say to you that the report and its accompanying documents to which I have alluded, made by the said Gardner, is in some vital particulars erroneous and misleading. It is not intended by this to indicate that intentional error or

false statement is involved in said report or affidavits, but only to say that, as a matter of *fact*, they are in vital particulars radically erroneous.

I wish further to say, at the outset of this statement, that in making the same I am fortunate in being enabled to support every material point, unless it be one, by record evidence, and written documents, the authenticity of which is incapable of being disputed. The one material fact as to which I am unable to produce written documents, and to which I have just alluded, is in regard to the fact that I never received, directly or indirectly, any part of the said moneys, except that part which was paid to me as my fee for four years' services and expenses incurred in the prosecution of said case, to wit, $52,966. As to *that* fact I can only *here and now* support it by my own solemn and positive declaration.

With the foregoing suggestions premised, I now proceed to state to you carefully and (for the sake of clearness) in separate and distinctly numbered paragraphs the history of my connection with the said matter about which said prosecutions are urged.

I.

I, prior to the 4th day of February, 1885, had been the attorney of the Creek Nation for a number of years, and had successfully engaged in the prosecution of claims for moneys due to that Nation, to an amount exceeding half a million dollars, and in that way the Creek Nation and its Delegates became acquainted with me and I with them.

II.

In December, 1884, when the Creek Delegates, L. C. Perryman and Fi-e-maht-la, came to Washington, they found that certain bills were pending in the respective Houses of Congress, declaring the Creek lands which were

ceded to the United States by the treaty of the 14th of June, 1866, (14th Stats., 785), and which are the lands covered by the agreement of the 19th of January, 1889, hereinafter named, to be a part of the public domain and, opening the same to homestead settlement. For the purpose of preventing the passage of such bills, or if that could not be done, of securing proper compensation for such lands, the Delegates at once applied to me to become the attorney of the Creek Nation for said purpose, and under said application, and without, at that time, reducing to writing their employment of me, I entered upon their service under their oral application.

Pursuant to said employment I, amongst other services, rendered prior to the 4th of Pebruary, 1885, prepared for them the memorial to the President and to the Senate of the United States, which is found on pages 5, 6, and 7 of Senate Executive Document No. 54, 48th Congress, 2d Session, being a special message of the President and accompanying documents.

I also, through the delegation, advised with the Hon. J. M. Perryman, the Principal Chief of said Nation, regarding the communication which is found on pages 4 and 5 of said Executive Document, No. 54, and, in effect, prepared the material of said letter. I continued to render service to and advise with the said Delegates regarding their said rights until the 4th of February, 1885.

III.

On the 4th day of February, 1885, the contract of my employment between myself and the said Delegates was executed before Justice Cartter, of the Supreme Court of the District of Columbia, and approved by the Commissioner of Indian Affairs and Secretary of the Interior, for six and a half per cent. compensation, and which contract is recorded in Land Division Record of Mescellaneous Con-

tracts, Volume I, page 470, 2d of March, 1885, to which contract, together with its approval by the Secretary of the Interior, on the 26th day of February, 1885, I particularly refer and invite attention.

It will be seen by reference to the said approval that whilst the contract stipulates for ten per cent. compensation, the approval is for only six and a half per cent. But it will be further observed that the contract, in terms, provides as follows, to wit:

"For the compensation herein fixed and agreed upon" (to wit, 10 per cent.) "*and as the same may be sanctioned, approved and ratified by the proper authorities of the Government of the United States and the Creek Nation of Indians.*" So that, although the stipulation in the contract was for ten per cent., yet this stipulation made it binding for whatever per cent. should be fixed by the Commissioner and Secretary.

This contract was never submitted to the Creek Council for approval until the 31st day of January, 1889, when the same was ratified, with the modification which appears by the act of approval hereinafter named. It was under this contract, so approved by the Commissioner and Secretary, that my services continued to be rendered, from the making of the said contract, and up to the 8th day of January, 1889. It is impossible for me, from the nature of the subject-matter, to state, in detail, the extent, items, and character of the said services which I rendered under said contract. In a general way these services may be truthfully stated substantially as follows:

I proceeded to advise and direct the Delegates in the matter of securing their interests in said lands in every particular in which I thought they needed advice and counsel. Amongst the things, in which I so rendered service, were, that I advised with the Delegates and co-operated, as between them and myself on the one hand,

and Committees of Congress on the other, in agreeing upon and adopting the provisions contained in the 8th Section of the act of the 3d of March, 1885, (23d Stats., 362, *et seq.*) providing for negotiations with said Creek Nation and others for opening their lands to homestead settlements.

Soon after the approval of this act, I presented and explained the case to the Commissioner of Indian Affairs, the Assistant Secretary of the Interior, and the President of the United States, and urged action thereon. I continued to act as attorney for the Creeks in all matters relating to their interests in said lands and securing compensation therefor. I advised them in regard to the character of the acts of the Creek National Council, requisite for the purpose of enabling the Delegates to negotiate under said Section 8, or under other similar law, and my advice in such matters was in substance followed by the Creek Nation and Council and Delegates. I, after full investigation of treaties and the law, informed the Delegates of the nature of their interest in said lands. I assisted them to the extent of my ability in every material step in their negotiations, which resulted in the said agreement of the 19th of January, 1889, and which was ratified by the Council, 31st of January, 1889, and which is set forth in Senate Executive Document No. 98, 50th Congress, 2d Session, pages 5 and 6, whereby the said Nation secured for its interest in said land the said sum of $2,280,857.10.

In short, I continued from December, 1884, up to the final conclusion of said negotiation and until said collection was accomplished, to advise the said Delegates in every important particular regarding their action and proceedings, which resulted in the collection of the said moneys. In the rendering of this service, I, after the surrender of my written contracts hereinafter named, found it necessary to employ, and did employ and pay, assistants to render

lawful and necessary service in and about said negotiations and collections.

J. M. Perryman, the then Chief of the said Creek Nation, in January or first of February, 1885, and prior to the making of said contract of the 4th of February, sent a telegram, which I saw and read, and which in substance authorized and directed the Delegates to employ me as their attorney in the premises covered by said contract of February 4th.

The fact of my said employment and of my being engaged in rendering said service, continued from 1884 on until 1889, to be known, approved, and understood by the authorities of the said Creek Nation, and also of the United States—my contract being of record, as aforesaid, and yet, during all that time, no objection, so far as I know, was ever made to such employment by any person in authority, except a letter addressed to the Secretary of the Interior by the then Chief, Hon. J. M. Perryman, the character of which letter I suppose to be accurately indicated in the letter of the Secretary of the Interior, the Honorable William F. Vilas, addressed to Hon. S. W. Peel, dated February 11th, 1889, and hereinafter named.

IV.

In December, 1888, and after said service had been rendered under said contract of the 4th of February as aforesaid, a new set of Delegates appeared at Washington representing the said Nation, to wit: Hon. Pleasant Porter, D. M. Hodge, and Es-pa-he-cha. These Delegates at once applied to me, as the Attorney of the Nation in said matters, to continue the said service, and recommended the making of a new contract, to take the place of said contract of the 4th of February, 1885. Accordingly a contract was entered into between the said Delegates and myself of date

January 8th, 1889, a copy of which is hereto attached and marked Exhibit "A."

This contract was submitted to the Council of the Creek Nation for ratification, and it called for a compensation to me of ten per cent.

V.

The said Council of the Creek Nation, instead of ratifying the said contract of the 8th of January, 1889, stipulating for said ten per cent. compensation, ratified the said contract of the 4th of Februrary, 1885, for six and a half per cent., and ratified the said contract of the 8th of January, 1889, for three and a half per cent., the two ratifications thus making ten per cent. in the aggregate.

This was done by the Creek Council on the 31st of January, 1889, in the two acts of the said Creek Council, which acts are hereto attached as Exhibits "B" and "C."

It is thus seen that the Creek Nation, in full view of all the services rendered by me and the services yet to be rendered, solemnly approved my services and authorized a compensation to be paid equal to ten per cent. of the amount collected for said lands.

VI.

The agreement between the United States and the Creek Nation, stipulating for the cession of said lands and for the payment of said $2,280,857.10, was concluded on the 19th day of January, 1889, and a copy thereof is found in Senate Executive Document No. 98, 50th Congress, 2nd Session. The value of the services of Attorneys may be in some degree realized by your knowing the fact that the Principal Chief and others of the said Nation were so discouraged and alarmed shortly before the making of the said agreement of the 19th of January, 1889, regarding the said negotiations, as that they became willing

and so declared to accept compensation for only the 1,392,000 acres of unoccupied lands in Oklahoma, instead of the amount for which they, in fact, were paid by said agreement, to wit: about 2,400,000 acres. In fact was largely through the earnest efforts of myself that the said additional quantity of land was compensated for, as was just and proper.

VII.

Said act of Congress of the 1st of March, 1889, in Section 4, provides as follows:

"The Secretary of the Treasury is hereby authorized and directed to pay out of the appropriation hereby made the sum of $280,857.10 to the National Treasurer of the Muskogee (or Creek) Nation, *or to such persons as shall be duly authorized to receive the same*, at such time and in such sums as shall be directed and required by the National Council of the said Nation; and the Secretary of the Treasury is hereby further authorized and directed to place the remaining sum of $2,000,000 in the Treasury of the United States to the credit of the Muskogee (or Creek) Nation of Indians, to be held for and as provided in said articles of cession and agreement, and to bear interest at the rate of five per centum per annum, from and after the first day of July, A. D. 1889, and said interest to be paid to the Treasurer of said Nation annually."

Thus the act of Congress is explicit in requiring the United States to pay this $280,857.10 "*to such person as shall be duly authorized to receive the same as directed and required by the National Council of said Nation.*"

The National Council of said Nation passed the two following acts, to wit, each approved the 31st of January, 1889.

In the one act it is in substance provided that Congress is requested to appropriate the full sums agreed to be paid by said agreement of the 19th of January, 1889, and to

fix the amount which is to be invested for the benefit of the Nation, and the amount which is to be paid *in money directly to the authorities of the Nation;* and it provides that the amount which is to be paid over in money to the proper authorities should be paid over in such sums and at such times as may be required directly to the Treasurer of the Nation, *or to such officer or other person or persons as shall be named in the requisition of the authorities of the Nation;* and it declares the proper authority for the making of the requisition is the National Council, or such officer or other person as shall be designated by the National Council for that purpose.

The other act, bearing said date of the 31st of January, 1889, in substance provides that the Principal Chief of the Nation is authorized and directed to make requisition upon the United States *for the payment to the Delegates, Porter, Hodge, and Es-pa-he-cha, or in the event of the death or inability of either, then to the surviving ones,* the sum of ten per cent. of said amount, stipulated to be paid by the said agreement of the 19th of January, 1889. The same to be paid in such sums and at such times and places as shall be requested by said Delegates. Copies of each of the said acts are hereto annexed and made Exhibits "E" and "F."

It is thus perceived, reading together the said 4th section of the act of Congress and said provisions of the said two acts of the National Council, that said ten per cent. was paid over to said Delegates in strict obedience to the peremptory requirements of the said 4th section of the law of Congress.

And it is by this legislation also further seen that the Council of the Nation, on the very same day (31st of January, 1889) on which they directed the United States to pay said $280,857.10 to said Delegates, also ordered, as a part of their same transaction, that six and a half per

cent., plus three and a half per cent. of the money so realized from said sale, should be paid out to the Attorneys who made said collection. Thus it is seen that the thing proposed to be prosecuted as a crime is the precise thing ordered to be done by the National Council, and which, so far as I am concerned, was in fact done.

VIII.

After these two acts had been passed providing for requisitions, etc., and the two acts ratifying said six and a half and said three and a half per cent., to wit, upon the 11th day of February, 1889, the Secretary of the Interior made the objection to the said contracts which is embodied in his letter to S. W. Peel of the 11th of February, 1889, a copy of which is hereto annexed and made Exhibit "G."

The character of his objections and the action which he required at my hands are also alluded to and fully set forth in my letter bearing date February 11th, 1889, a copy of which is hereto annexed and is made Exhibit "H." These two letters, to wit, mine and that of the Secretary, *were written by the Secretary*, and were assented to by me under protest and under the constraint which was induced by the threat of the Secretary to withdraw and defeat the said agreement of the 19th of January, and which was then pending for ratification in Congress. My said consent to surrender the said contracts was made with the distinct assurance by the Secretary, earnestly pressed upon and repeated to me, that the Creek Nation had perfect authority in law, under their existing government, to make to me reasonable and proper compensation for my services without any contract to that effect being made and approved under Section 2103 of the Revised Statutes, and with the understanding that I should have the right to receive such compensation as the proper authorities of the Nation should be willing to pay to me,

independently of all express contracts (and with that understanding alone,) it was that I surrendered, as I did, said written contracts.

It will be seen by reference to my said letter, and also to the said letter of the Secretary, that this understanding is, in substance, embodied in both of said letters. On this point my letter has the following language:

"It being the purpose of this agreement to obliterate and annul all written contracts made with the Creek Nation or its Delegates for the purpose or of the nature aforesaid, and to *leave the rights to the parties to be determined independently of such written contracts.*" My said letter also says that I "*covenant not to present or make any claim or bring any suit or action thereon or under and by virtue of the said contracts alone.*"

Thus plainly indicating that all rights founded upon implied contracts or the *quantum meruit* were preserved.

The same thing is found in said letter to Hon. S. W. Peel by the Secretary. He says, speaking of his own action:

"Declining to approve the contract, Mr. Crawford has surrendered it at my request, and *expressed his willingness to accept in compensation such sum only as the National Council of the Creek Nation shall deem to be a just compensation for his services and such as they may be willing to pay him by a direct act of their Council for that purpose.*"

It is thus shown by the record itself that the surrender of the written contracts was no surrender of my right to a just and equitable compensation such as the authorities of the Nation might deem proper to pay. We have just seen that the Council of the Nation deemed it proper to pay and did direct the payment of ten per cent., to wit, six and a half plus three and a half to the Attorneys of the Nation.

IX.

In the hurried inspection which I was permitted to make of the said report of the said Special Agent Gardner and of the affidavits and documents accompanying that report, I get the impression that it is sought by the Special Agent to make it appear that I was in some way responsible for the distribution of the *entire* $228,000 named in said report of Gardner, being the major part of said $280,857.10 named in said Section 4 of said act of Congress, and that I *received or at least receipted for the same;* and I further notice that some of the affidavits state, in effect, that I received and gave the receipt for the same. Now, on the contrary of this, I wish to solemnly assert and declare to you that I did not, either directly or indirectly, receive or receipt for, or see, or in any way handle or control the disposition of any part of the said moneys appropriated under the said act of Congress, except the sum of $52,966 which was paid to me about the first of April, 1889. Had my written contracts remained in force, I would have been entitled to receive said moneys, and it would have been my duty to disburse the same in payment for services rendered by Attorneys in said case.

But when said contracts were surrendered to the Secretary of the Interior, as aforesaid, my responsibility to others ceased, and I at once suggested to the Creek Delegates the propriety of making their own arrangements with such attorneys as had been assisting in the case and such others as they might deem proper to employ. I further informed them of the fact that my contracts were surrendered on condition that I look to the proper auuthorities of the Creek Nation for such compensation as they might deem proper to make for my services in said case. I also notified other attorneys, who up to that time had been assisting in the case, that said contracts had been surren-

dered, and that they must look to the Creek Nation for compensation, and they assented thereto.

I have no doubt about other attorneys having been employed by the Delegates after my said contracts were surrendered, nor have I any doubt about the payment of such attorneys and every other attorney in the case by or under the direction of said Delegates; but of my own knowledge I know nothing about such payments personally, except what was paid to me, as aforesaid, for my services individually. And any statement in the said report of Inspector Gardner or the exhibits accompanying the same attributing to me the receipt or the direction of the payment of any moneys in excess of said $52,966, or which attributes to me any direction or control over the payment of any of the said money other than the said $52,966, is erroneous. I had no such authority to control any of said payments, and I attempted to exercise no authority whatever in that regard. And I do not *now* know to whom any of the said moneys were paid, except the said $52,966 paid to myself.

I further declare to you that I never gave any receipt for any of the said moneys otherwise than the paper which is made Exhibit "A" in said Gardner report, a true copy of which is as follows:

"WASHINGTON, D. C., *June 17th, 1889.*

"Hon. P. PORTER,

"*Muskogee, Indian Territory:*

"I regret my inability to be present and explain in detail to the Council what was done by attorneys for the Creek Nation in the matter of the negotiation and sale of the Oklahoma land. You can, however, assure the Chief and Council that said attorneys did their whole duty and have been paid in full.

"Yours truly,

"SAMUEL J. CRAWFORD."

After my said written contracts had been surrendered to the Secretary of the Interior, the retained copies of the same were cancelled and returned by me to the Principal Chief of the Creek Nation, but such cancellation and return is not a receipt for money.

The foregoing, including the annexed exhibits, I believe to be a substantially full and true history of my connection with said matter now under investigation in your Department and in the Department of Justice.

You will, of course, observe that this communication is not intended to enter upon, much less discuss, the legal aspects of the question of liability for any act of mine done in the premises aforesaid. If the Secretary of the Interior were required to decide upon the question of such liability I should ask to be heard by him upon said questions of law, but as it is, questions of law will be, so far as presented by me at all, submitted to the Attorney-General.

And yet it is proper for me to say here that, in believing, as I then did, and now confidently do, that no provisions of said sections 2103,–'4–'5, nor any other rule of law or morality, prohibited me from receiving, from said Nation and its Delegates, that just compensation which was due to me for protracted and arduous services, rendered as aforesaid, and which the Nation was willing to pay. I was supported by the decision of the Supreme Court of the District of Columbia rendered in the case of the United States *vs.* W. A. Phillips, (not reported); also by the concurrent views of Secretary Vilas and of said Hon. S. W. Peel, as earnestly pressed upon me at the time I was induced, as above set forth, to surrender the contracts under which my said services were, in good faith, rendered as above set forth. In such belief I was further supported by the advice of counsel whom I consulted, in that regard, before accepting said compensation.

It is further proper for me to say that no one who is acquainted with the holdings of the Supreme Court (21 Wall., 450) defining the distinction between lobby work and legitimate professional services, rendered in matters under consideration in the Departments or in Congress, and who, moreover, knows the kind and the extent of the services rendered by me during the said four years, (involving, as these services did, investigating, deciding upon, and advising about the state of the treaties, of the laws, of the rulings of the courts, and of the Departments, upon which the said rights of the Creek Nation depended—in enforcing those rights before the authorities having the disposition of such rights, in drawing memorials—in writing letters—in holding consultations and correspondence with the said Nation, in preparing the other documents required in furtherance of the legislation and treaties which resulted in the securement of the said rights of the Creek Nation,) can, with any pretense of truth or reason, deny that my services were lawful, were legitimate, and were not only needful, but indispensible to the securement of the said rights ultimately attained in virtue of said agreement of the 19th of January, 1889, and the appropriation act of the 1st of March, 1889.

Their lawful character, their great value, and my right to be compensated therefor, were and are, so far as I know, never denied, but on the contrary, were expressly affirmed by the Legislative Council of the Creek Nation. And my said right to compensation was admitted by the said Secretary Vilas, not only in the two letters above-named, written by him, but also in his interviews with me in procuring my said surrender of said written contracts.

I conclude this communication by again requesting that the Secretary of the Interior will transmit, along with any report he may make to the Attorney-General in the pre-

mises, this communication of mine and all the documents which I make a part of this communication.

And since some of the documents which will probably be transmitted by you to the Attorney-General are statements made upon oath, I deem it proper that I should make this statement to you upon oath, and I therefore do so.

I am, dear sir, with great respect,

Your obedient servant,

SAMUEL J. CRAWFORD.

CITY AND COUNTY OF WASHINGTON, D. C.

I, Samuel J. Crawford, on solemn oath say that the statements contained in the foregoing communication by me subscribed, which are stated as upon information or belief, I believe to be true, and all other statements as to matters of fact therein contained are true in substance.

Sworn to and subscribed before me August 19, 1889.

[SEAL.] ROB'T V. HUGHES,

Notary Public.

"EXHIBIT A."

This memorandum of an agreement, made and entered into at the City of Washington, in the District of Columbia, on this eighth day of January, A. D. 1889, by and between the Creek Nation of Indians, in the Indian Territory, party of the first part, by Pleasant Porter, D. M. Hodge, and Es-pa-he-cha, Delegates duly authorized and empowered to represent the said Creek Nation at the City of Washington, and Samuel J. Crawford, of the City of Washington, District of Columbia, Attorney-at-Law, party of the second part.

WITNESSETH: That whereas by treaty proclaimed August 11th, 1866, the Creek Nation of Indians ceded and conveyed to the United States, to be sold to and used as homes for such other civilized Indians and Freedmen as

the United States might choose to settle thereon, the west half of their entire domain in the Indian Territory, and in consideration of said cession the United States agreed to pay the sum of thirty cents per acre for the lands so ceded:

And whereas it is now proposed by the United States to use the said lands for purposes other than as provided by said treaty;

And whereas the said lands cannot be so used or otherwise disposed of without the assent of the said Creek Nation;

And whereas, in view of the rights and interests of the said Creek Nation in and to the lands mentioned, it is deemed essential and necessary to employ an Attorney, solicitor and counsel, to appear for and on behalf of said Creek Nation, to assist in securing an equitable adjustment of the questions arising from or growing out of said treaty, and also to assist in securing to the Creek Nation a fair and reasonable compensation for the lands ceded as aforesaid, in case they are taken or to be taken and used or disposed of by the United States for any other purpose than that which is expressed in the said Treaty of August 11th, 1866;

Now, therefore, be it known that the said Creek Nation, by Pleasant Porter, D. M. Hodge, and Es-pa-he-cha, duly authorized Delegates, has and does hereby retain and employ the said Samuel J. Crawford as its Attorney, Solicitor and Counsel, to appear for and on behalf of said Creek Nation, in any of the Exeeutive Departments of the Government of the United States, or in any of the Courts thereof, or before Committees of Congress, or before any Board of Arbitrators or Commissioners duly appointed, and do and perform any and every proper thing necessary to be done in order to secure to said Creek Nation its just rights, privileges, immunities, moneys, or other things of value arising from or growing out of the cession or sale of lands by the said treaty of August 11th, 1866, or under any and all laws and resolutions of Congress relating to said treaty and the lands thereby ceded. And also in case said ceded lands as aforesaid are taken or to be taken by the United States and used or disposed of for any other purpose than the one mentioned in said treaty, then and in that event the said Samuel J. Crawford, party of the

second part, shall, and hereby agrees to, use every honorable means in his power to secure to and for the said Creek Nation a fair and just compensation from the United States for the said lands ceded as aforesaid.

And the said Creek Nation, by the said Pleasant Porter, D. M. Hodge, and Es-pa-he-cha, party of the first part, hereby covenants and agrees to and with the said Samuel J. Crawford, party of the second part, subject to ratification and approval by the Council and Principal Chief of the said Creek Nation, to pay to him for his services as aforesaid the sum of ten per centum of whatever amount or amounts may hereafter be secured to the said Creek Nation on account of the cession, sale, and relinquishment of the lands heretofore ceded as aforesaid.

And the said party of the second part covenants and agrees to and with the said party of the first part that he will be retained as aforesaid, and will act and serve as Attorney, Solicitor, and Counsel in the matters and things as hereinbefore stated, and do whatever else may be deemed proper and necessary to establish, secure, or enforce the rights of the said party of the first part in the premises, at and for the compensation hereinbefore fixed and agreed upon, and as the same may be sanctioned, approved, and ratified by the proper authorities of the Creek Nation of Indians.

The particular purpose for which this contract is made on the part of the said Creek Nation is to procure the services of the said party of the second part as Attorney, Solicitor, and Counsel to secure the rights and interests of the said party of the first part under the said treaty of August 11th, 1866.

The basis of the claim and matters herein set forth is the said treaty of August 11th, 1866. The source of any money collected, if any be collected, is the Government of the United States; and the disposition of said money, if collected, is that it shall be paid to said Creek Nation of Indians or as said Nation may otherwise direct.

This contract shall be and remain in force for the term of three years from the date thereof. And in the event nothing is secured to said Creek Nation as provided and contemplated by this contract, then, and in that event, nothing shall be paid by the Creek Nation to the said

party of the second part, and at the expiration of the said three years this contract shall be null and void.

In testimony whereof the parties hereto set their names and seals the day and year first above written, at the City of Washington, in the District of Columbia, before the Honorable M. V. Montgomery, Justice of the Supreme Court of said District of Columbia, the said court being a court of record.

PLEASANT PORTER,
D. M. HODGE,
his
IS-PAR-HE-CHER, X
mark
Creek Delegates.
SAMUEL J. CRAWFORD.

In presence of—
I. EDWIN CROUSE,
JAS. CROGGAN.

COUNTY AND CITY OF WASHINGTON, *District of Columbia.* } *ss:*

I, M. V. Montgomery a justice of the Supreme Court of the District of Columbia, said court being a court of record, do hereby officially certify that the foregoing contract was executed in my presence at the City of Washington, in said District of Columbia, on the 8th day of January, A. D., 1889, and that the interested parties thereto, as stated to me at the time and place of execution, were the Creek Nation of Indians on the one part, and Samuel J. Crawford on the other part. That the same was executed on the part of the said Creek Nation by Pleasant Porter, D. M. Hodge and Es-pa-he-cha, and by the said Samuel J. Crawford, on his own behalf, the said parties being personally present before me when said contract was executed.

In testimony whereof I have hereunto set my hand officially this 8th day of January, A. D. 1889, in the City of Washington, in said District, at the time and place of the execution of the foregoing contract.

MARTIN V. MONTGOMERY,
Associate Justice Supreme Court
of the District of Columbia.

"EXHIBIT B."

AN ACT to ratify and confirm a certain contract made and entered into by and between the Muscogee or Creek Nation and Samuel J. Crawford.

Whereas, the Muscogee or Creek Nation, by L. C. Perryman and Fi-e-maht-la, Delegates duly appointed to represent the Muscogee or Creek Nation at Washington, did, on the 4th day of February, A. D. 1885, make and enter into a contract with Samuel J. Crawford, of the city of Washington and District of Columbia, and employ the said Samuel J. Crawford as its attorney, solicitor and counsel to appear for and on behalf of said Nation to do and perform any and every proper thing necessary to be done, in order to secure to said Muscogee or Creek Nation its just rights, privileges, and immunities under the said treaty of August 11, 1866, and under any laws of Congress relating to said treaty, and the lands thereby ceded. Now, therefore,

Be it enacted by the National Council of the Muscogee or Creek Nation, That the said contract made and entered into by and between the said L. C. Perryman and Fi-e-maht-la, Delegate of the said Muscogee or Creek Nation as aforesaid, and Samuel J. Crawford, of the city of Washington, be and the same is hereby ratified, approved, and confirmed, for six and one-half per cent.

And be it further enacted, That the Principal Chief of the Muscogee Nation be and he is hereby authorized and empowered to attach a certified copy of this act to each original copy of the said contract.

This act shall take effect and be in force from and after its passage.

Adopted.

THOMAS W. PERRYMAN,
Speaker pro tem. House of Warriors.

A. F. MCKELLOP, *Clerk.*

Concurred in,

WARD COACHMAN,
President House of Kingv.

G. W. STIDHAM, JR., *Clerk*

Approved January 31, 1889.

L. C. PERRYMAN.
Principal Chief Muscogee Nation.

This is to certify that the foregoing is a true and correct copy from the original act now on file in this office.

Witness my hand and the great seal of the Muscogee Nation this 31st day of January, 1889.

L. C. PERRYMAN,
Principal Chief Muscogee Nation.

[SEAL]

"EXHIBIT C."

AN ACT to ratify and confirm a certain contract made and entered into by and between the Muscogee or Creek Nation and Samuel J. Crawford.

Whereas, the Muscogee or Creek Nation, by Pleasant Porter, D. M. Hodge, and Es-pa-he-cher, Delegates duly appointed and empowered in that behalf, did on the 8th day of January, 1889, make and enter into a contract with Samuel J. Crawford, of the city of Washington, and the District of Columbia, and employ him as its attorney, solicitor, and counsel, to appear for and on behalf of the said Muskogee or Creek Nation to assist in securing an equitable adjustment of the questions arising from or growing out of the treaty of August 11, 1866, between the United States and the Creek Nation of Indians, and also to assist in securing to the said Nation a fair and reasonable compensation for the lands ceded to the United States by said treaty; now, therefore

Be it enacted by the National Council of the Muskogee or Creek Nation, That the said contract made and entered into by and between the said Pleasant Porter, D. M. Hodge, and Es-pa-he-cher, Delegates as aforesaid, and Samuel J. Crawford, of the city of Washington, be and the same is hereby ratified, approved, *and confirmed, for three and one-half per centum instead of ten per centum, as provided in said contract.*

And be it further enacted, That the Principal Chief of the Muskogee or Creek Nation be and he is hereby authorized

and empowered to attach a certified copy of this act to each original copy of the said contract.

This act shall take effect and be in force from and after its passage.

Adopted.

THOMAS W. PERRYMAN,
Speaker pro tem. House of Warriors.

A. P. McKellop, *Clerk.*

Concurred in.

WARD COACHMAN,
President House of Kings.

G. W. Stidham, Jr., *Clerk.*

Approved, January 31, 1889.

L. C. PERRYMAN,
Principal Chief, Muskogee Nation.

This is to certify that the foregoing is a true and correct copy from the original act now on file in this office.

Witness my hand and the great seal of the Muskogee Nation, this 31st day of January, 1889.

L. C. PERRYMAN,
[seal.] *Principal Chief, Muskogee Nation.*

"Exhibit E."

An Act for the appropriation and payment of the sums of money agreed upon by the Delegates of the Muscogee Nation and the authorities of the United States, as the price of the lands ceded to the United States by the Treaty of 1866.

Whereas the sale to the United States, under agreement of January 19th, A. D. 1889, of the lands ceded to the United States by the Treaty of 1866, has been approved and confirmed by the National Council of the Muscogee Nation: Therefore

I. *Be it enacted by the National Council of the Muscogee Nation,* That the Congress of the United States is hereby requested to appropriate the full sums of money agreed

upon as the price of said lands, that is to say, the amount to be invested for the benefit of the Muscogee Nation, and the amount to be paid in money directly to the proper authorities of the said Muscogee Nation, and the said amount which is to be paid in money to be paid over in such sums and at such times and places as may be required directly to the National Treasurer of the Muscogee Nation, or to such officer or other person or persons as shall be *named* in the requisition of the proper authorities of the Muscogee Nation; and the proper authorities of the Muscogee Nation, for the purpose of making such requisition or requisitions, is hereby declared to be the National Council of the Muscogee Nation, or such officer or other person or persons as shall be designated and authorized by an act or resolution of the said National Council for that purpose; and such requisition or requisitions, when made, shall be taken and accepted as, and is and are, hereby declared to be the requisition of the proper authorities of the Muscogee Nation.

II. *Be it further enacted*, That this act shall take effect and be in force from and after its passage.

Adopted.

THOMAS W. PERRYMAN,
Speaker Pro Tem., House of Warriors.

A. P. McKELLOP, *Clerk.*

Concurred in.

WARD COACHMAN,
President House of Kings.

G. W. STIDHAM, JR., *Clerk.*

Approved, January 31, 1889.

L. C. PERRYMAN,
Principal Chief, Muscogee Nation.

This is to certify that the foregoing is a true and correct copy from the original act now on file in this office.

Witness my hand and the great seal of the Muscogee Nation, this 31st day of January, 1889.

[SEAL.]

L. C. PERRYMAN,
Principal Chief, Muscogee Nation.

"Exhibit F."

An Act to authorize a requisition to be made for the payment of a portion of the amount that may be appropriated by Congress for payment to the Muskogee Nation, under the agreement of January 19th, A. D. 1889, for its interest in and to the lands ceded to the United States by the Treaty of 1866.

I. *Be it enacted by the National Council of the Muskogee Nation,* That the Principal Chief of the Muskogee Nation be, and he is hereby, authorized and directed, for and on behalf of the Muskogee Nation, to make requisition upon the proper authorities of the United States, in such form as may be required by such authorities, for the payment to Pleasant Porter, David M. Hodge, and Es-par-he-cher, the duly authorized Delegates of the Muskogee Nation, or in the event of the death or inability to act of any or either of them, then to the surviving member or members of them, of the sum of ten per cent. of the additional price of the lands ceded to the United States by the Treaty of 1866, under the agreement of January 19th, A. D. 1889, between Honorable William F. Vilas, Secretary of the Interior, and said Delegates, the same to be paid out of the amount that may be appropriated by Congress to be paid in money to the Muskogee Nation on account of the purchase of said lands; the same to be paid in such sums and at such times and places as shall be requested by said Delegates, and said requisition, when made, shall be taken and accepted as, and is hereby declared to be, the requisition of the proper authorities of the Muskogee Nation.

II. *Be it further enacted,* That this act shall take effect and be in force from and after its passage.

Adopted.

THOMAS W. PERRYMAN,
Speaker Pro Tem., House of Warriors.

A. P. McKellop, *Clerk.*

Concurred in.

WARD COACHMAN,
President House of Kings.

G. W. Stidham, Jr., *Clerk.*

Approved, January 31, 1889.

L. C. PERRYMAN,
Principal Chief, Muskogee Nation.

This is to certify that the foregoing is a true and correct copy from the original act now on file in this office.

Witness my hand and the great seal of the Muskogee Nation this 31st day of January, 1889.

[SEAL.]

L. C. PERRYMAN,
Principal Chief, Muskogee Nation.

"EXHIBIT G."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *February 11, 1889.*

SIR: I have the honor to advise you that since the making of the agreement for the relinquishment and cession of the claims of the Muscogee or Creek Nation to the lands which were ceded to the United States in the treaty and cesssion of 1866, I have learned that a contract, which was made between that nation and the Honorable S. J. Crawford for the special services of Mr. Crawford in presenting the claims and interests of that nation, which contract was dated on the 4th day of February, 1885, and made with him by two Delegates of the said nation, but which was subsequently disaffirmed by a letter to the Commissioner of Indian Affairs, signed by the principal chief of the said nation, had been practically renewed by the Delegates of the said Creek Nation with whom the agreement of cession now pending before Congress was negotiated, and that an act of ratification of the said agreement was recently passed by the National Council of the said Creek Nation. The recent agreement of cession was made by me without the intervention of any attorney, but directly; and I have not been cognizant of the extent or value of any services which have been rendered by Mr. Crawford in the past upon the request of the present Delegates or of any former Delegates of that nation. Declining to approve the contract, Mr. Crawford has surrendered it at my request and expressed his willingness to accept in compensation such sum only as the National Council of the Creek Nation shall deem to be a just compensation for his

services and such as they may be willing to pay him by a direct act of their council for that purpose. It is suggested, however, that under the statutes of the United States authority is necessary to be conferred by Congress upon the Creek Nation to give, and upon him to receive, any sum of money in payment of his services in this behalf. It has seemed to me that this was the proper course for this business to take. Whatever may be justly due from the Creek Nation, in view of its advanced position among Indian nations and its independent powers, may properly be left to itself to adjust and pay.

I therefore transmit herewith copies of the papers referred to, and a suggestion of such an amendment as, in my opinion, would, if the judgment of Congress approved that course, effectuate the object. All of which is respectfully submitted for the consideration of the Committee.

Very respectfully, your obedient servant,

WM. F. VILAS,

Secretary.

Hon. S. W. PEEL.

"EXHIBIT H."

Whereas an agreement was made between L. C. Perryman and Fi-e-math-la, Delegates of the Muscogee or Creek Nation, on the one part, and the undersigned, Samuel J. Crawford, on the other part, bearing date on the 4th day of February, A. D. 1885, whereby the professional services of the said Crawford were contracted for in the prosecution of certain claims, rights, or interests of the aforesaid Creek Nation to an additional compensation for lands ceded to the United States by the treaty and cession of 1866, for which it was therein agreed the said Crawford should be paid the sum of ten per centum of whatever amounts might thereafter be secured; which agreement was approved by H. Price, Commissioner of Indian Affairs, under date of the 14th of February, 1885, and at a rate of compensation provided to be six and one-half per centum and no more of the amount which might be paid or secured by the United States on account of said cession, which said contract as so limited was approved by H. M. Teller, Secretary of the Interior, under date of the 26th of February, 1885;

And whereas, by letter under date of the 30th of March, 1886, J. M. Perryman, Principal Chief of the Creek Nation, advised the Commissioner of Indian Affairs that the said contract was entered into without authority on the part of the Delegates making the same, and therefore was declared to be of no binding force upon the Creek Nation;

And whereas Pleasant Porter, D. M. Hodge, and Is-par-he-cher, Delegates of the Creek Nation, on the one part, and the undersigned, Samuel J. Crawford, on the other part, have made a contract dated the 8th day of January, 1889, for a similar purpose, and therein have stipulated for the payment to the said Crawford of the sum of ten per centum upon whatever amount or amounts might be secured on account of the sale or relinquishment of the lands aforesaid; which contract was subject to ratification and approval by the Council and Principal Chief of said Nation;

And whereas the National Council of the said Muscogee or Creek Nation did by an act approved on the 31st day January, 1889, by the Principal Chief of said Nation, ratify and confirm the first of said contracts which was approved in 1885, and by another act also approved on the 31st of January, 1889, by the Principal Chief of said Nation, ratify, approve, and confirm the said second contract, dated January 8th, 1889. for three and one-half per centum, instead of ten per centum;

And whereas an agreement was entered into between the said Pleasant Porter, D. M. Hodge, and Es-par-he-cher, Delegates of the Creek Nation, acting for said Nation, on the one part, and William F. Vilas, Secretary of the Interior, on behalf of the United States, on the other part, for the relinquishment and cession of the interest and title of the said Muscogee or Creek Nation in and to certain lands therein described, in consideration of the sum of two million, two hundred and eighty thousand eight hundred and fifty-seven dollars and ten cents, to be paid to the said Creek Nation, which agreement has been submitted to Congress for its approval.

And whereas the said Secretary of the Interior, to whom the contracts and act of ratification aforesaid have been submitted since said agreement between him and the Creek Nation was presented to Congress, declines to ratify or approve the said agreements in whole or in part, not having been previously aware of the existence of the same

or now aware of the extent of the services rendered by the undersigned, but is of the opinion that the Creek Nation, through its National Council and properly constituted officers, should be left to pay the undersigned what he may be reasonably entitled to claim for his services only.

Now, therefore, I, the said Samuel J. Crawford, have, upon his disproval of said contract and ratification, and in compliance with the wishes of the Secretary of the Interior, and in consideration of $1 surrendered, and hereby to me in hand paid by the said Muscogee or Creek Nation, receipt of which is hereby acknowledged, surrendered and hereby do surrender the said contracts, together with the said acts of ratification with the Muscogee or Creek Nation thereof, and all rights, claims, or interests thereunder, through the said Department of the Interior of the United States Government to the said Creek Nation, and do hereby relinquish and discharge the said Creek Nation, its Delegates, officers and people, from any and all claims under and by virtue of said contracts, and covenant not to present or make any claim or bring any suit or action thereon, or under and by virtue of said contracts alone; it being the purpose of this agreement to obliterate and annul all written contracts made with the Creek Nation or its Delegates for the purpose or of the nature aforesaid, and to leave the rights of the parties to stand independently of any such written contracts. Hereunto attached is the first agreement, a copy of the letter of the said principal chief, a certified copy of the act of ratification, and the second agreement, and a certified copy of the act of ratification, hereinbefore referred to.

In witness whereof I have hereunto set my hand and seal this 11th day of February, 1889.

SAMUEL J. CRAWFORD.

Witnesses:

JOHN R. HIND.

ROBERT V. BALL.

To the Attorney General

of the United States.

IN THE MATTER OF ATTORNEYS' FEES

PAID FOR SERVICES

In Establishing the Right of the Creek Nation to Certain Lands and Securing Pay for the same.

BRIEF ON BEHALF OF SAMUEL J. CRAWFORD.

By S. SHELLABARGER.
J. M. WILSON.

Ag. Br A 1889.

THOMAS MCGILL & CO., Printers, Washington, D. C.

In the Matter of Payment by the Creek Nation of certain Attorneys' Fees.

WASHINGTON, D. C., *August 24th, 1889.*

To the Attorney-General:

You have, as we are reliably informed, under consideration the matter of giving your sanction to the institution of a suit or suits, or a prosecution or prosecutions against Governor Samuel J. Crawford, and others, under the provisions of sections 2103 and 2105 of the Revised Statutes of the United States; such suits or prosecutions, if of a civil nature, to be under the provisions of the last clause of section 2103 of the Revised Statutes, for the recovery of certain moneys paid Governor Crawford by the Creek Nation, for services rendered, as attorney for said Nation, out of the moneys appropriated and paid under the act of March 1st, 1889, entitled—

"An act to ratify and confirm an agreement with the Muscogee (or Creek) Nation of Indians, in the Indian Territory, and for other purposes." (25 Stats., 759.)

If a criminal prosecution is urged against Governor Crawford, it, we assume, is contemplated to be prosecuted under the provisions of section 2105 of the Revised Statutes.

It is, of course, not necessary or proper that we should make any explanation or apology about being solicitous that such prosecution should not be instituted without "probable cause;" and it is obvious that we ought, as his counsel, to be desirous of having opportunity to present to you such considerations as may be proper tending to prevent such prosecution.

We, therefore, most respectfully beg to be permitted to submit to you, and to secure your attention to, the following suggestions in objection to said prosecution.

The facts bearing upon Governor Crawford's connection with the receipt of said moneys are carefully and accurately set forth in a "printed statement" (so-called), which Governor Crawford had the honor to submit to the Secretary of the Interior, and which is now before you, dated August 19th, 1889. Other reports are before you relating to Governor Crawford's connection with the said matter.

Without now attempting (what is wholly unnecessary) a repetition of the details of this matter, we may state here that the following controlling facts, bearing upon the propriety of such prosecution, will not be successfully controverted, because they are established by unassailable record and documentary proofs.

They are as follows:

First. That Governor Crawford rendered the service, to the Creek Nation, from December, 1884, to March, 1889, which was needful, and, in its nature, lawful professional service, and which was arduous and protracted; and which resulted in the collection, for said Nation, of $2,280,857.10.

Second. That this service, up to the 8th of January, 1889, was rendered under a contract in its character conforming to the requirements of said section 2103, between Governor Crawford and the delegates of the Creek Nation, dated February 4th, 1885, and which is recorded in volume I, page 470, of Miscellaneous Contracts of the Indian Bureau; and which was duly approved by the Commissioner of Indian Affairs on the 14th day of February, 1885, and by the Secretary of the Interior on the 26th day of February, 1885; and that this agreement

was ratified, by the Creek National Council, for *six and one-half per cent. compensation*, by the act of such Council, approved January 31st, 1889, (being Exhibit B, p. 21, of said "printed statement.")

Third. That if said contract of the 4th of February, 1885, is to furnish the rule and measure of Governor Crawford's compensation for said services, he would be entitled thereunder to be paid six and one-half per cent. upon the amount collected by the Creek Nation, in virtue of the agreement with the United States of January 19th, 1889, and which was ratified by said act of Congress of March 1st, 1889, (25 Stats., 759) to-wit, upon $2,280,857.10, such per cent. amounting to $148,255.71.

Fourth. That under the constraint caused by the threat of the Secretary of the Interior, made after Governor Crawford had rendered the said service, and after said agreement of January 19th was duly executed by both parties thereto, to-wit on the 11th of February, 1889, such threat being that he would defeat the ratification of said agreement of the 19th of January, and the recovery of the said $2,280,857.10 unless Governor Crawford would *surrender said contract* of the 4th of February, 1885, (see the record), and, also, the subsequent contract of the 8th of January, 1889, which last is set forth in said printed statement as Exhibit A, (p. 17), and that Governor Crawford *surrendered said contracts under protest and the operation of said threat, but on the condition stated in the letter of the Secretary, dated February 11th, 1889, to the Hon. S. W. Peale, (see printed statement bottom page 26, top page 27), that Governor Crawford should "accept, in compensation, such sum only as the National Council of the Creek Nation shall deem to be a just compensation for his services and such as they may be willing to pay him by direct act of their Council for that purpose."*

Fifth. That the National Council of the Creek Nation did vote a compensation, to attorneys, for the said service, equal to *six and one-half per cent.*, plus *three and one-half per cent.*, making, in the aggregate, *ten per cent.* upon said collection; these votes being the two acts made, Exhibits B and C, set forth in said printed statement (pp. 21, 22, and 23), and which amount of compensation so approved far exceeds anything that was paid to Governor Crawford, and being a little less than the amount ordered to be paid in money by section 4 of said act of March 1st, 1889, (25 Stats., 759.)

Sixth. That the $280,857.10 named in section 4 of said act of March 1st, 1889, (25 Stats., 759,) was lawfully paid, by the Secretary of the Treasury, to the delegates of the Creek Nation; such payment being rendered lawful by the joint operation of the provisions of said section 4, directing said moneys to be paid "*to such persons as shall be duly authorized to receive the same by the National Council,*" and of the said act of the National Council (made Exhibit F, Printed Statement, p. 25) authorizing requisition to be made for said payment *to the delegates Porter, Hodge, and Es-par-he-cher.*

Seventh. That the action of the Creek Council, in passing the acts, made Exhibits B and C in said printed statement, approving the six and one-half per cent. which had been approved by the Commissioner and the Secretary as aforesaid, and the said three and one-half per cent. compensation, as just and reasonable, is an explicit, unmistakable, and direct vote *approving the payment of as much as ten per cent. to counsel for said services;* and that when Governor Crawford received, as he did, as set forth in said printed statement, $52,966 as his compensation for said service, it was not "*in excess of,*" but was far under the authorization made by said acts

of the Creek Council, and under that approved as aforesaid (six and one-half per cent.) by the Commissioner and the Secretary, (Exhibits B and C.)

The foregoing are the controlling facts in this case. Any details omitted from the foregoing statement, which are possible to be brought under your consideration, cannot change the essential nature of the matter before you from what it is alleged to be in the foregoing recital of facts.

It is in view, then, of this recital that we are brought to the question in the case which you are to consider, namely, whether, under said sections of the Revised Statutes, Governor Crawford is made liable to be, either civilly or criminally, prosecuted for his aforesaid connection with said transactions.

As a matter of convenience we set forth in the appendix to this brief said sections 2103, 2104, and 2105 of the Revised Statutes.

In now craving the indulgence of the Attorney-General in allowing us to submit some considerations in support of our conviction that Governor Crawford has been guilty of no *impropriety*, much less of crime, in the matters just recited, we shall, in our first view of the case, assume, *what we do not admit to be true*, namely, that sections 2103, 2104, and 2105 do apply to the nations of Indians known as the "civilized tribes," and of which the Creeks are one—that these sections do apply to them even as against the powers of self-government which are secured to this Nation of Indians by the provisions of the fifteenth article of the Treaty of August 7th, 1856, (11 Stats., 703, 704,) the provisions of which article are renewed and re-enacted in articles 10 and 12 of the Treaty of June 14th, 1866, (14 Stats., 789, 790,) such pro-

vision in article 15, securing self-government, being in these words:

"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 Creeks and Seminoles *shall be secured in the unrestricted right of self-government and full jurisdiction over persons and property within their respective limits.*"

But assuming now, as already remarked, that these provisions of the treaty and other laws do *not* exempt the Creeks from the operation of sections 2103, 2104, and 2105, we proceed to inquire whether said sections prohibit what was done by Governor Crawford in this case.

Let it be carefully noticed, at the outset, that it is impossible to hold that section 2104 of the Revised Statutes has any application to the present case. It has no application because the prohibitions and provisions of that section are *confined to payments made by officers of the United States* to agents and attorneys of Indians for services.

In this case no claim or pretense is set up that any agent or attorney of the Indians received, *from officers of the United States*, any moneys. Hence, section 2104 must be wholly dismissed from this case, except so far as that section is alluded to in the first part of section 2105. And that allusion in section 2105 to section 2104 cuts no manner of figure in this case.

It is further proper to premise that is *manifest*, on the face of these sections, that the very and *only* mischief they were made to suppress is the making, by Indians, of *express* contracts, improvident, extortionate, and unnecessary in their kind about affairs between the Indians and the Government; and to render all *such express* contracts unlawful, unless made and approved in the way section 2103 prescribes—and that it was no part of the design of said section to render unlawful *needful* services,

rendered to the tribes in *the absence* of express contracts, and relying on the integrity of such tribes to pay for the service what it was worth.

It is essential to keep carefully in mind that it is the suppression of these oppressive express contracts and this alone that these sections are directed to, as the mischief meant to be prevented.

Another matter, somewhat preliminary in its character, it is essential should be carefully fixed in mind, namely, that these sections 2103 and 2105, taken together, *do not cause any transaction to work a "forfeiture" of payments made, which transaction is not, also, made to be a crime by the first clause of section 2105.* This feature is expressly and unmistakably fixed in the statute by that provision of section 2105 which enacts that—

"The person so receiving such money *contrary to the provisions of the two preceding sections, and his aiders and abettors, shall, in addition to the forfeiture of such sum, be punishable by imprisonment for not less than six months, and by a fine of not less than one thonsand dollars.*"

Thus it is seen that the sections, taken together, define the thing that is made a crime *in no other way than by making the acts which work a forfeiture under section 2103 to be a crime under section 2105.*

The importance of keeping this in mind, is that this renders it impossible to say that this statute tolerates *a forfeiture* and a recovery back of moneys paid, in cases or under facts *different from, and less culpable than*, those which section 2105 makes to be crimes; and that, therefore, the principles of law which we presently invoke, which prohibit the courts from creating "constructive crimes," and compel strict construction of such penal statutes, are not applicable to section 2103 creating a mere forfeiture, and not a crime. In other words, no forfeiture or recovery back is here tolerated for any act

different from, or less culpable, than that which is made criminal by section 2105, and, therefore, the authorities cited below are applicable *both* to the provisions relating to forfeiture and recovery back, and those creating the crime. Besides this, forfeitures are *penal*, and all acts creating them are strictly construed the same as are criminal laws.

In turning now to an analysis of these sections, with the purpose of discovering whether they render unlawful any transaction by Governor Crawford, we have decided to quote, at the outset, from an opinion of ours, of date April 5th, 1889, which, before Governor Crawford received said moneys, we, on his request, prepared and delivered to him in answer to his question whether there was any impropriety in his accepting his said compensation, as he did.

In deciding to make this quotation from our opinion, we are actuated by two principal considerations: One is that we do not see, upon a careful review of the whole matter, that we can materially improve the statement contained in these quotations, which we make from our opinion; and the other is that we desire to make the Attorney-General aware of the scrupulous care with which Governor Crawford proceeded in ascertaining what was lawful and proper before he accepted his said compensation.

This opinion, after stating, in substance, the facts as they are above recited, and after quoting the material parts of said sections of the Revised Statutes, says:

But, as already remarked, we have, in the view we take of these sections of the Revised Statutes, not found it necessary to consider or determine the question of their applicability to the 'civilized tribes,' because, we hold that there is nothing in these sections which, according to the true sense thereof, operates as a prohibition upon your receiving the said compensation for your services.

Without entering, at any considerable length, into the presentation of our reasons for this conclusion, we state to you here the leading considerations which have led us to it.

And, first and most important of all, it is essential to observe, in construing these sections of the Revised Statutes, a fundamental rule for construing such penal statutes, which is of universal application to all such penal legislation.

Chief-Justice Marshal, in the case of United States *v.* Wiltberger, 5 Wheaton, 95, states the rule we allude to, in these words:

"The rule that penal laws are to be construed strictly, is, perhaps, not less old than that construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of *punishment* is vested in the *legislative*, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.

"It is said, that notwithstanding this rule, the intention of the law-maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed *strictly*, they are not to be construed so strictly as to defeat the obvious intention of the legislature."

Chief-Justice Taney, in the case of United States *v.* Morris, 14 Peters, 475, states the same rule thus:

"In expounding a penal statute the court certainly will not extend it beyond the *plain meaning* of its *words;* for it has been long and well settled that such statutes must be construed strictly."

The case of United States *v.* Clayton, 2 Dillon, 217–25–26, was a case wherein the defendant, then governor of Arkansas, was indicted under section 22 of the act of Congress of the 31st of May 1870, 16 Stats., 145, being

an act to enforce the rights of citizens of the United States to vote, &c.; and provides "that any *officer of any election* at which any representative or delegate in the Congress of the United States shall be voted for," who should neglect or refuse to do his duty in regard to the election, or the certificate or returns, should be deemed guilty of a crime liable to indictment, &c.; and the question was, whether Governor Clayton was an "officer of election," within the sense of these words in section 22. In holding that he was not such an officer, Judge Dillon, in a careful opinion, states the rule we now invoke for obtaining the intent of the legislature, as found in the words of one of these penal laws, as follows:

"In the office of interpretation, courts, particularly in statutes that create crimes, must *closely* regard and even *cling* to the language which the legislature has selected to express its purpose. * * *

"When courts, in construing statutes, depart from the language employed by the legislator, they incur the risk of mistaking the legislative will, or declaring it to exist where, in truth, it has never had an expression. The legitimate function of courts is to interpret the legislative will, not to supplement it, or to supply it. The judiciary must limit themselves to expounding the law; they cannot *make* it. It belongs only to the legislative department to create crimes and ordain punishments.

"Accordingly, courts, in the construction of statutable offences, have always regarded it as their *plain* duty *cautiously* to keep clearly within the expressed will of the legislature, lest otherwise they shall hold an act or an omission to be a crime, and punish it, when, in fact, the legislature had never so intended. 'If this rule is violated,' says Chief-Justice Best, '*the fate of the accused person is decided by the arbitrary discretion of the judges, and* not by the express authorities of the laws. (Fletcher *v.* Lord Sondes, 3 Bingham, 580.)'

"The principle that the legislative intent is to be found, if possible, in the enactment itself, and that the statutes are not to be extended by construction to cases not fairly and *clearly* embraced in their terms, is one of

great importance to the citizen. The courts have no power to create offences, but if by a latitudinarian construction they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizens are put in peril, and that the legislative domain has been invaded. * * *

"These principles of law admit of no dispute, and have been often declared by the highest courts, and by no judicial tribunal more clearly than the Supreme Court of the United States. (U. S. *v.* Morris, 14 Peters, 464; U. S. *v.* Wiltberger, 5 Wheaton, 76; U. S. *v.* Sheldon, 2 *ib.*, 119; and see, also, Ferret *v.* Atwill, 1 Blatchford, 151, 156; Sedgw. Const. and St. Law, 324, 326, 334; 1 Bish. Cr. Law, Secs. 134, 145.)"

This rule for the interpretation of criminal and highly penal laws is applicable to laws in derogation or restraint of the liberty of citizens; as, for instance, laws prohibitory of ordinary trade and commerce.

These principles will, also, be found in—

Providence Steam Engine Co. *v.* Hubbard, 101 U. S., 188, 191, 192, and cases cited;
Shaw *v.* R. R. Co., 101 U. S., 565;
Brown *v.* Barry, 3 Dal., 367;
Tiffany *v.* National Bank of Missouri, 18 Wallace, 409, 410;
U. S. *v.* Strain, 17 Fed. Rep., 435, 437;
U. S. *v.* Buchanan, 9 Fed. Rep., 689;
French *v.* Foley, 11 Fed. Rep., 804.

We have referred to these familiar and settled rules for interpreting such statutes as these sections of the Revised Statutes, not because we are of opinion that the application of this rule is essentially necessary in order to reach a safe conclusion regarding the present question, because we do not think there is really any serious difficulty in reaching the conclusion that nothing in these three sections prohibits your receiving your said compensation; but we have appealed to this rule of construc-

tion by way of abundant caution, and in order to make it plain beyond doubt, that these sections do not affect your case.

Now observe what these sections contain. And first, it must be observed, and kept in mind, that neither of these sections attach any criminal or penal consequences to the mere act of making such a contract with the Indians as section 2103 forbids.

These sections stop at simply rendering void any contract so made, and coming within the prohibitions of such section 2103, without making it penal or criminal to enter into one of said forbidden contracts. * * *

Again, the only prohibition against a citizen receiving from Indians, or of Indian money, other than payments by officers of the United States, is that contained in the above quoted clause at the conclusion of section 2103, which quotation we repeat as follows:

"All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe or any one else, for or on his or their behalf, on account of such services, *in excess* of the amount approved by the Commissioner and Secretary, for such services, may be recovered by a suit in the name of the United States in any court of the United States, regardless of the amount in controversy."

Here it is seen that the express letter of this last clause of section 2103 prohibits no payment by an Indian or any one else, except such a payment as would be "in excess" of that fixed by the contract required by section 2103. The gist of the offence here defined is in *its disregard of a limitation as to the amount of pay or compensation which is fixed by an actual existing contract.* There must be a contract the compensation of which is *exceeded*, and this act of taking compensation in excess of a solemn, written, approved, acknowledged, and recorded stipulation is the offence, and nothing else is.

Then, when you turn to section 2105, the first clause thereof defines the only crime covered by these three sections. This sentence has already been quoted, and is as follows:

"The person so receiving such money contrary to the provisions of the two preceding sections, and his aiders and abettors, shall, in addition to the forfeiture of such sum, be punishable by imprisonment not less than six months and by a fine not less than one thousand dollars."

Now remember that, as already stated, the receiving of money which is prohibited by section 2104, has no application to your case, because *that* receiving is exclusively from officers of the United States. Therefore, the only receiving made criminal by the first clause of section 2105 which could, by possibility, be applicable to your case, is the receiving named in the last clause of section 2103, which is a receiving "*in excess of the amount approved by the Commissioner and Secretary.*" But we have already seen that the receiving which is prohibited in the last clause of section 2103 is only the receiving of compensation "in excess of" an actual existing statutory contract.

It seems to us, therefore, utterly plain that it is impossible to hold that your receiving of your compensation, such as the authorities of the tribe decide to be justly and reasonably due to you, out of moneys in the hands of the tribe, or its representatives, can be a receiving of money in excess of the amount "approved by the Commissioner and Secretary for such services;" this being so because, in the first place, if your contract of February 4th is to be deemed, for the purpose of the present inquiry, still in force, then the proposed payment to you is not in excess of, but far below, what such contract entitles you to. But your said relinquishment of the 11th of February, 1889, has, so far as it bears on this point, put out of existence all contracts made under section 2103 fixing the amount of your compensation.

There can be no such thing imputed to you as receiving money "*in excess of the amount approved by the Commissioner and Secretary*," for your services, when there is no contract fixing the amount of your services, nor any approval by these officers of any sum. In other words, there can be no transgression of the limitation fixed by the Commissioner and Secretary when no such limitation exists. But, as already remarked, the very gist of the crime or offence named in section 2105, is the transgression of such *limitation* by a receipt "in excess of" the limit.

It may be said that the receipt by you of *any* money is a receipt in excess of the amount approved by the Commissioner and Secretary, because they have approved *no* compensation. But the reply to that suggestion is, that this penal statute *has not provided for that case.* If the receipt of money from the Indians, where *no contract exists*, ought to have been made a crime, then such omission by the statute, to make *this* a crime gives no authority to the court to legislate it into a crime. For the court to legislate that it shall be a crime when money is paid by the tribe itself, in payment of just compensation for valuable services, in the absence of all limitations fixed by the Commissioner and Secretary, is for the court to flagrantly transgress the very rule of interpretation quoted from the above authorities. It is, in other words, for the court, by its inferences, constructions, interpretations, to create crimes unknown to the statute; and, hence, unknown to the people who are to be visited by these judicially-created crimes.

This statute has not chosen to define as an offence, or to prohibit, the receipt of money where no contract exists, such as is contemplated by section 2103. But the statute has, as already remarked, been content with defining as an offence a violation of a statutory contract, by taking money in excess of said statutory contract. If

Congress should have made it a crime to receive money for services from a tribe where no contract exists, it presents simply a *cassus omissus*.

It is proper for us to here observe that your proposed receipt of what is justly and reasonably due to you for your said services cannot only *not* be brought within the prohibition of these sections of the Revised Statutes, but such receipt by you cannot be objected to as in any degree improper, immoral, or against the policy of these statutes. It is made absolutely plain by the above-recited facts, that before your said relinquishment, on the morning of the 11th of February, 1889, there was justly due to you from the tribe, for the services rendered under your duly-acknowledged, approved, and recorded contract of the 4th of February, 1885, an amount equal to six and one-half per cent. of what you were instrumental in collecting. This should have been paid to you, according to the express letter of the statute, as your *then dues* from the tribe; and that amount had been expressly approved by a law of the National Council. You chose to surrender, in order to advance the interests of your client, all of said six and one-half per cent., except such amount as the authorities of the tribe might decide to pay to you. This you did in your said letter of the 11th of February, 1889.

Now, to say that you, as a matter of either justice, reason, or law, shall be held not only to have surrendered that six and one-half per cent., but, also, to have surrendered all right to all just compensation, even such as the tribe wishes to pay to you, and that said statute makes it a crime for you to receive that, is, as seems to us, a preposterous interpretation of the statute, and of what you did in regard to the premises.

This ends our quotation from our said opinion.

Such, in substance, was our view, at the said date of our said opinion, of the important matters which that opinion covers.

Since the attack upon Governor Crawford, which is now pending before you, was commenced, we have carefully reviewed the whole matter covered by that opinion, and we now venture to add, to what we have above quoted from that opinion, some additional suggestions, mainly in the way of added authorities enforcing our said views.

In the recent case of Steam Engine Co. *v.* Hubbard, 101 U. S, 188, the Supreme Court was brought to the consideration of the question whether corporation officers were liable for debts which *continued*, during the period of their neglect, but which were not *contracted* during that period, under a statute which made such officers of a corporation jointly and severally liable for debts contracted during the period in which they *neglected to make certain required returns* touching the condition of the corporation. In holding that this penal statute did not apply to debts contracted *before* the neglect, although they *continued during the neglect*, the court comments upon the above-named rule for construing criminal and penal statutes. Of this comment we here wish to avail ourselves and ask a reference to the cases there cited. Regarding this rule of interpretation the court says:

"Preliminary to these inquiries, the defendant contends that *the statute upon which the action is brought is penal and should be strictly construed; in which proposition the court unhesitatingly concurs.*"

After citing a large number of authorities sustaining the same doctrine, the court says:

"Corresponding decisions have been made in other courts, and to such an extent as to justify the remark that the rule is universal."

Some of the Supreme Court authorities we have already cited.

The U. S. *v.* Hunter, decided by Justice Brewer, in the Circuit Court of the United States for the Eastern Dis-

trict of Missouri, in 1884, (21 Federal Reporter, 615), is one much like the present case. In it the question came before that court whether *negotiating a lease of six million acres of Indian lands of the Cherokee Nation, for a term of five years*, for grazing purposes, and which was executed by the authority of the National Council, came within the prohibition of section 2116 of the Revised Statutes, which, amongst other things, declares that no such purchase or lease shall be valid unless made pursuant to the constitution; and enacts that every person, who is not in the employ of the United States, *who attempts to negotiate with the Indians "for the title or purchase of any lands by them held or claimed, is liable to a penalty of one thousand dollars."*

Although, in that case, a lease had, in fact, been executed, of the magnitude aforesaid, yet the court held that this did not come within the prohibitions of section 2116, for the reason which the court states in these words:

"*The section quoted, being a penal one, is to be strictly construed.* By this, of course, it is not intended that the language should be strained so as to exclude the act of the defendant, but simply that giving the language a fair and reasonable construction, having in view the plain and ordinary meaning of the terms employed and the evident intent of Congress, the act of the defendant must be *clearly* within the scope of the prohibition."

The court proceeds, in view of the entire scope of section 2116, to hold, that such lease for private purposes was not within the prohibition of section 2116, and that that section applied to the treaties and conventions having a *public*, as distinguished from mere private nature. This was held, although the very words of the section seemed to cover just such a lease.

This case is much stronger, in favor of the lease being within the prohibition, than is the case under considera-

tion. The prohibitions in sections 2103 and 2105 have not regard, at all, to the matter of the Indians paying for services actually necessary and rendered *in the absence of express written contract.* The statute did not render unlawful, services rendered to the Indians on implied obligations to pay what the service was worth, and such contracts are constantly made and enforced. So far as these sections are either penal, declaring forfeitures, or are criminal, *they stop* at making the *violation of the limit of compensation fixed by the Commissioner and Secretary* an offence, and nothing else than that is made such.

We are anxious to be exceedingly careful, and to be precisely right, in regard to our application to the present case of the familiar rule of interpretation requiring statutes highly penal or criminal to be "strictly construed." We, therefore, proceed to present other authority.

In the recent work of "Endlich on the Interpretation of Statutes," in section 329 *et seq.*, will be found a valuable collection of the authorities upon this matter, and a very comprehensive and technically accurate analysis of the most modern meaning of these words "strictly construed," as found in the said rule of interpretation.

And, in now adding this reference to other authority, it is proper here to say, that *two* rules, although akin to each other, yet distinct, are by us here invoked. One of these is that requiring all penal laws to be "strictly construed." The other is that which says that there are in the family of statutory crimes no "*constructive crimes;*" that is, no crimes that are not included by the *very words* of the criminal law as such words were *meant* to be employed in the law. As bearing now upon each of these two rules of interpretation, we refer you to some of the language of, and some of the cases cited in, said section 329 *et seq.* of Endlich. The author says (p. 452):

"An offence cannot be *created or inferred by vague implications.*" (Citing Atlanta *v.* White, 33 Georgia, 229.)

That—

"It is true that a penal law must be construed *strictly* and *according to its letter*. But this strictness, which has run into an aphorism, means no more than that it is to be interpreted *according to its language*." (Pp. 453, 454.)

That—

"The purpose of the rule is to prevent acts from being brought within the scope of punishment, because *courts may suppose they fall within the spirit of the law, though not within its terms.*" (Citing Commonwealth *v.* Cooke, 50 Pa. St., 201–207, p. 454.)

That—

"The meaning of the rule is, 'that acts of this kind are not to be regarded as *including anything which is not within their letter* as well as their spirit'" (citing Dewey *v.* Goodenough, 56 Barber, 54), "which is not *clearly and intelligibly described in the very words of the statute, as well as manifestly intended by the Legislature*" (citing Wilb., 246); "that is, the rule of strict construction requires that the *language* shall be so construed that *no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms, and within the spirit and scope of the enactment.*" (Citing a large number of English authorities in note *a*.)

That—

"To determine that a case is within the intention of a statute, its *language must authorize the court to say so; but it is not admissible to carry the principle that a case which is within the mischief of a statute is within its provisions, so far as to punish a crime not specified in the statute, because it is of equal atrocity, or of a kindred character with those which are enumerated.*" (Citing other English authorities in note *b*.)

Here we stop to suggest, what is vital in the present case, and which is derived from the last cited paragraph. The paragraph, in substance, says, that it is not permissible to carry the principle that a case which is within

the mischief of a statute is within its provisions because it is of equal atrocity, or of a kindred character, with those which are enumerated in the words of the act.

Now, apply that rule here. It may be suggested that to receive money from an Indian tribe where no contract exists, and where, therefore, *any* payment is one in excess of what has been fixed by a contract approved by the Commissioner and Secretary, is an act of *equal enormity* with receiving pay in excess of the limitation actually fixed by a contract; and, therefore, the receiving of pay actually and justly due for services *where no contract exists* is as culpable as the offence actually covered by the words of the statute, and, therefore, is within the statute. But the authorities just cited (and they are endless in number), say that it is not permissible to make that a crime which is not covered by the very words of the statute, merely because the act sought to be made a crime within the statute is as wicked as some that are within the words of the act. To do such a thing is the very enormity denounced so forcibly by Judge Dillon in Clayton's case and the authorities he cites.

This decision, by Judge Dillon, by the way, has come to be, already, a leading case on said rule of interpretation, and is approved and cited, in subsequent cases, and text-books, as an accurate exposition of this important rule of law. (See, for example, Endlich on Interpretation of Statutes, pp. 101 and 451.)

The author, Endlich, declares that this paragraph, last cited, holding that because an act is *equally culpable* with one named in the statute, and is within the *spirit of the statute*, it is *not*, therefore, brought under the statute, where no *words* bring it there, is the *true test* of the difference between "liberal" and "strict construction." He says (p. 454):

"In this characteristic, the difference between 'liberal' and 'strict' construction is clearly presented."

The author proceeds, speaking specially of the interpretation of *penal* laws:

"Their *language*, properly given its full meaning, must, at least by that meaning, *expressly* include the case; and in ascertaining that meaning the court cannot go *beyond the plain meaning of the words and phraseology* employed, in search of an intention not certainly implied in them."

The author proceeds (p. 455):

"In other words, whilst a case may come within the purview of a remedial statute, unless its *language*, properly construed, excludes it, it is excluded from the reach of a criminal statute, unless the *language* includes it." (Citing State *v.* Powers, 36 Conn., 77.)

The author proceeds—

"Unless the proper meaning of the *language* of the statute brings a case within its *letter*, the rule of a strict construction forbids the court to create *a crime or penalty by construction, and requires it to avoid the same by construction.*"

To this the author cites—

69 Indiana, 199.
25 N. J. Law, 522.
4 Philadelphia, 138.

The author again proceeds:

"And although the court may be unable to *conceive any reason why the case in question should have been omitted, and considers it highly improbable that an omission was intended,*" (citing U. S. *v.* Wiltberger, 5 Wheaton, 105, *supra,*) "*it is not at liberty to extend the enactment to cases not included within the clear and obvious import of the language.*" (Citing here the same case of Wiltberger, *supra;* also, U. S. *v.* Ragsdale, Hemstead, 497; State *v.* Peters, 37 La. Annual, 730.)

The author proceeds:

"So that, for instance, under an act, which, in its eighth section provided for the punishment of certain offences, among which *manslaughter* was *not* mentioned, committed upon the *high seas*, or in any river, haven, basin, or bay, and in section twelve punished *manslaughter on the high seas*, no indictment could be maintained against one for manslaughter committed on board an American vessel *in the river Tigris*, in China, sixty-five miles from its mouth." (Citing U. S. *v.* Wiltberger, *supra*.)

Apply this last paragraph and the doctrine of Wiltberger to the case at bar. Shall it be said that because receiving the compensation due him *in the absence of all contracts* is as culpable as to receive an "excess" above his contract, where a contract existed, therefore this act of Governor Crawford shall be brought within the statute, *although the statute makes nothing a crime except the act* of exceeding—*taking "in excess of"*—a limitation fixed by an express contract? It is absolutely self-evident that so to construe this statute is to defy these principles of law so abundantly established by the authorities now pointed to.

The author proceeds:

"If the legislature has not used *words* sufficiently comprehensive to include within its prohibition *all the cases* which fall within the mischief intended to be prevented, it is not competent to a court to extend them." (Citing the English cases in note *a*, to-wit, Lord Tenterden in Proctor *v.* Manwaring, 3 B. & A., 145.)

In this case of Proctor *v.* Manwaring, the court says:

"However desirable it may perhaps be to prevent the mischief attending such cases as the present, yet we cannot extend a penal statute so as to bring this case within it. The words of the statute appear to me applicable only to a general supply of the poor by the parish officers. This case, therefore, does not fall within the act."

It would, of course, be useless for us to further multiply authorities upon this matter, because if those which we have gone over, (and to which might be added cases of equal authority, literally innumerable) are not sufficient to establish our point, then nothing in the way of authority or reason will establish it.

There is absolutely no conflict of authority upon these definitions of, and limitations upon, the rule of "strict construction" which we have now cited from the authorities.

Here, then, is a statute which makes it criminal to *violate the limitations fixed by an express contract approved and recorded, by* receiving pay *in excess of such limitation;* and the statute *stops there*, and makes nothing a crime, nor any money forfeitable, where there was no receiving in *excess of* such contract limitation.

It is self-evident and incapable of being made plainer by argument that any construction which makes this statute to create a crime where there was no contract—where there was no violation of any limitation fixed by contract—where there was no receiving "*in excess of the amount approved by the Commissioner and Secretary of the Interior for such services*,"—is a construction which does not *construe* but *legislates*, and legislates in violent disregard of the letter of the law, and of all the unvarying authorities to which we have pointed.

Here, then, we submit this question of law to the Attorney-General, with the unfeigned confidence that we cannot be mistaken in saying that Governor Crawford has committed no act for which he is either civilly or criminally liable.

We may here add (what has been virtually already stated) that Governor Crawford has been guilty of no manner of moral delinquency. On the morning of the 11th of February, 1889, he had, in substance, fully earned the compensation provided for in the contract of Febru-

ary 4th, 1885, as approved by the Commissioner and the Secretary. That contract had been approved immediately after its date for six and one-half per cent. by the Commissioner of Indian Affairs and by the Secretary of the Interior, had been recorded, and the United States officials, as well as the Indian Nation, and all the world, were thus made cognizant of its existence. Under it he became entitled to a compensation equal to $148,255.71. His compensation was wholly *contingent upon success.* For four mortal years he had toiled, in a way described in his said printed statement, for these people, with dim prospects of getting *any* compensation. After it was thus earned, after the United States and its officials and the Indian Nation had seen him thus serve for these years, and seen him at last succeed on the 19th of January, 1889, the Secretary of the Interior, without, so far as anybody can see or show the reason, demanded that he should surrender these contract rights, or else that said cession of land and payment therefor should be, by the Secretary, defeated. Rather than sacrifice the Indians' interest Governor Crawford yielded to this unreasoning and unreasonable demand, he, however, attaching the condition to his surrender of his contract that he should be allowed to collect such just compensation as the Nation might allow him. That Nation on the 31st of January, 1889, did allow him all that he received and three times more. To say that the receiving of his compensation was in any moral aspect of the matter wrong, is palpably to say what is not justified by the undisputed facts in this case.

The view now presented, as seems to us, is clearly conclusive both of the innocence of Governor Crawford and the justice and propriety of his action, and if we are not mistaken, then this, of course, determines the question of the propriety of instituting suits against him under sections 2103 and 2105.

But, in abundant caution, we deem it proper to present to you two other views of this matter which lead to the same result.

One of these views may be stated as follows:

Granting, for the sake of argument, that sections 2103 and 2105 would, in the *absence* of the legislation we are now about to refer to, make the money, received by Crawford, "forfeitable," and make him criminally liable under section 2105, yet the joint operation and effect of section 4 of the act approved March 1st, 1889, (25 Stats., 759), and of that legislation of the National Council, embodied in Exhibits B and C, set forth in said printed statement, ratifying the contracts with Crawford for six and one-half per cent., plus three and one-half per cent.; these taken in connection with that other legislation of the Council, of date January 31st, 1889, embodied in Exhibits E and F, in said printed statement, requiring the $280,857.10, named in said section 4, to be paid according to the directions of the Council to the delegates, is to exempt said last-named moneys, so directed to be paid over under said section 4, from the operation of said sections 2103 and 2105 (did these sections otherwise apply) and to authorize and empower the Creek Nation to *pay*, and said attorneys of the Nation to *receive*, their said six and one-half plus three and one-half per cent. upon said $2,280,857.10, (equalling $228,085.71).

The way in which this legislation of Congress and of the Creek Council operates to exempt the said ten per cent. ordered to be paid to attorneys, from said sections 2103 and 2105, did such sections otherwise apply, may be stated in paragraphs as follows:

First. Whenever an act of Congress recognizes some treaty, law, rule, government, institution, or other state of things as existing, and provides some legislation concerning them, or either of them, which legislation con-

templates the *continued* existence of the matter so recognized, there the act of Congress *validates* the thing so recognized; *provided* it is within the powers of Congress; this without any express words in the act of Congress so validating the matter recognized.

No principle of law is better settled than this. Take, for example, the case of Holden *v.* Joy, 17 Wallace, 211. There the Supreme Court held that the sale of "the Cherokee neutral lands" west of the Mississippi, made by Treaty of December 29th, 1835, even if not otherwise valid as a sale, was rendered valid by the fact that Congress made appropriations in execution of the treaty; and the Supreme Court held that such appropriations would validate the sale without express provision, in such appropriation, acts so accomplishing the validation.

So in the case of Phillips *v.* Payne, 92 U. S., 130. There that court held that whether the law which re-ceded to Virginia that part of the District of Columbia which was taken from that State, was originally a valid law and worked the retrocession or not, yet the fact that *other* laws of Congress had been passed which *recognized* that said part of the District was re-ceded to the State of Virginia, this *recognition* validated the cession without regard to the question of the validity of the original law of retrocession, and although no law expressly validated the retrocession.

Other authorities, to the same effect, might be added, but this is unnecessary since the principle is familiar and settled.

Second. When the act of Congress of March 1st, 1889, 25 Stats., 759, was considered by Congress, and when it was passed, the said legislation of the Creek Nation which voted said ten per cent. (or $228,085.71) to the attorneys who had been instrumental in collecting said $2,280,-857.10, *was on the statute books of the Creek Nation.* This

being so, therefore when Congress passed this law of March 1st, 1889, having express relation to the moneys out of which alone said ten per cent., or any other compensation to the attorneys, must be paid, and providing, in said section 4, for the disposition of said moneys, and thus making the act of Congress to be *in pari materia* with said Creek legislation, it is therefrom *presumed*, as a matter of law, and as a rule of interpretation of statutes, that Congress had in view and mind, *and thus recognized and validated*, the said Creek legislation including said two acts ratifying the said six and one-half and said three and one-half per cent. compensation.

Third. Not only is it *presumed*, as a matter of law, as stated in the preceding paragraph, that said section 4 of the act of March 1st, 1889, was passed in *view and recognition* of said Creek legislation, but the letter of Secretary Vilas, to the chairman of the committee having said legislation in charge, when it was still pending in Congress (such letter being Exhibit G in said printed statement, p. 26), expressly called the attention of the committee, and, through the committee, of Congress to the existence of said contracts for compensation, and *invited Congressional action regarding the same*, such letter suggesting that the existing contracts should be annulled, and declaring the willingness of Crawford "*to accept in compensation such sum only as the National Council of the Creek Nation shall deem to be just for his services, and such as they may be willing to pay him by a direct act of their Council for that purpose.*" (See Printed Statement, pp. 26, 27.)

Thus is fixed upon Congress express and official *notice*, from the Executive, that it was understood the compensation of Crawford should be that just compensation voted by the Creek National Council, and also *express notice* of the ratification of that contract of February 4th by the Creek National Council.

Fourth. With this knowledge so presumed and so *expressly shown* to be in Congress, Congress passed the act which says that this money—the $280,857.10, out of which the attorneys *must* be paid if at all—should be paid to the persons authorized by the National Council to receive it, and "*at such time and in such sums as shall be directed and required by the National Council of said Nation.*"

Thus in express terms, by this act, Congress has directed that the money should be paid *in obedience to the direction of the National Council.*

Fifth. But, as already remarked, at the time that this law was passed by Congress, it had been *already voted by this same National Council that ten per cent. of this money should be paid to the attorneys who were instrumental in collecting it*, and, therefore, under the principle of law stated in the above paragraph 1, this act of Congress recognizes and validates the orders of the Council which ratified the payment of ten per cent. to the attorneys, and thus in legal effect, this act of Congress, directed its officers to make payment to Crawford according to the said existing votes of the Creek Nation, as embodied in Exhibits B and C in said printed statement. This order stood, so directing unless, indeed, before the payment was made to the attorneys, the National Council should take contrary action and forbid the payment.

Thus, we submit, it is demonstrated, if demonstration is possible in law, that this ten per cent. out of $280,857.10, named in said section 4, was, by Congress, authorized to be paid to the said attorneys without regard to the requirements of sections 2103 and 2105, or any other law of Congress.

It is true that the National Council of the Creek Nation after the passage of said act of Congress *could* have changed its direction touching the payment to attorneys,

and could, so far as section 4 is concerned, have directed a different payment. But until a change, in the legislation of the National Council, is effected the operation of section 4 is to legalize the direction by the National Council, existing at the date of said act of Congress, directing the payment of ten per cent. to attorneys; and its effect is to so legalize it without regard, as already remarked, to any other existing act of Congress, whether it be section 2103 or otherwise.

But the National Council not only has not changed its legislation, but it seems to be left to speculators in Tennessee and others, by this application to the Attorney-General, to take charge of the affairs of the Creek Nation, and institute suits in the name of the United States, in which the United States has no interest, and which the action of the Creek Nation shows they do not approve.

After the attorneys have been duly settled with and paid in pursuance of the laws of the Nation, and the whole business closed, it is, of course, not competent for any party, *not even the National Council*, to alter its legislation and thus recover back said payment so lawfully made under the laws of the Nation.

The pending case being considered in the light alone of this second point now submitted, we insist that no illegality or impropriety is traced either to the Creek delegates or to Governor Crawford, in the matter under consideration, and we respectfully submit that the Attorney-General will hardly give his approval to prosecutions so in disregard of law and of justice.

We now turn to another and distinct defense in this case, and the last one we deem it necessary to present.

It is this: That even if the action of Crawford, above recited, would bring him within the prohibitions of sections 2103 and 2105, if the matters transacted by him had been for other tribes of Indians than one of the five "civilized tribes," yet that these sections do not apply to

this case, because the Creeks are a "civilized tribe" of Indians, to whom the United States, through its treaties and laws, has conceded such rights of self-government as exclude the application of sections 2103 and 2105 from the Creek Nation.

We have already alluded to some of these provisions of the treaties; for example, to article 15 of the treaty of 1856, (11 Stats., 703, 704), and articles 10 and 12 of the Treaty of 1866, (14 Stats., 788–90), from which we have already quoted, and need not repeat, except to say that said article 10 of the Treaty of 1866 expressly covenants that the "legislation" (of Congress) "*shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges and customs.*"

It is thus seen that, although article 15 of the Treaty of 1856 (and which is re-enacted by article 12 of the Treaty of 1866) has in it a provision that "the unrestricted rights of self-government and full jurisdiction over persons and property within the limits of the Creek country," should be subject to the condition that this power was given "so far as compatible with the Constitution of the United States, and the laws made in pursuance thereof, including trade and intercourse with the Indians," yet that reserved power of the United States is, in said article 10 of the Treaty of 1866 (14 Stats., 788) so restricted that the power of Congress should not extend so as to "*in any manner interfere with or annul their present tribal organization, rights, laws, privileges, or customs.*"

It must be further observed, in determining whether this and the other civilized tribes are subject to sections 2103 and 2105, that the Government of the United States attempts no such dominion over or control of the internal affairs and property of this tribe, as it exercises in regard to what are called, in the parlance of the Indian Bureau, the "ward tribes," as distinguished from the "civilized tribes."

As to the "ward" tribes, the control of the United States is complete and absolute, descending to all particulars of clothing, feeding, governing, educating, &c.; whilst as to the Creek Nation and other "civilized" tribes, nothing of this kind is true.

The "civilized tribes" have their own constitution and legislature, with two houses, with a form of government like our own, with power to make laws, have their complete codes of printed laws, covering every proper subject-matter of government control; have their own courts; have their systems of taxation; have their common-school systems; have every element and feature of civilized States.

These powers are not only conceded to them by the Government of the United States, but the possession and exercise thereof are insisted upon by the United States, and protected to them for the purpose of the complete civilization and christianization of the tribes.

The case of the United States *v.* Joseph, 94 U. S., 614, is one which analyzes the question as to what qualities, in the direction of civilization, &c., shall take Indians out of the category of "Indian tribes;" and in that case it was settled that the Pueblo tribes of Indians in New Mexico were not "Indian tribes" within the sense of the laws applicable to Indian tribes.

The tests applied in that case, if now applied to the Creek Nation, will surely take this tribe out of the category of "wild," or "ward," or "uncivilized," Indians, and place them where the decision of the Supreme Court, in the case of Joseph, placed the Pueblo tribes of Mexico.

This, which we have just asserted, has been solemnly decided by the Supreme Court of the District of Columbia, but the case is, unfortunately, not reported. We have availed ourselves, in reaching a conclusion as to the precise character of that case and the decision, of the information contained in the pleadings in the case, in the briefs made by counsel, and in oral statements made to

us by eminent counsel engaged in that trial; and are, thus, enabled to state to the Attorney-General what the case and the decision were like.

William A. Phillips, a citizen of Kansas, and long a member of Congress, and others, were indicted in case No. 16,268, in the Supreme Court of the District of Columbia, under section 2105, for having taken compensation for services rendered to the Cherokee Indians in the absence of the contract and its approval required by section 2103. A plea was put in in the case, and, by arrangement between counsel, also a demurrer. The grounds of the demurrer were, in substance, that the Cherokee Nation was not within the purview of sections 2103 and 2105. The case was elaborately considered on full argument, and on printed briefs, and Judge MacArthur decided just what we have asserted, that the Cherokee Nation of Indians was not a tribe of Indians in the "ward" sense, and not, therefore, within the prohibitions contained in said sections 2103 and 2105.

It will not be disputed that the rights of self-government conceded to the Creeks, by treaty and law and usage of the Department, is *equal* to that conceded to the Cherokees, and that the two are, in respect of the degrees of self-government enjoyed by them respectively, identical.

It would unduly lengthen this brief to enter into a detailed examination of the treaties, the laws and the practices of the Department, &c., bearing upon this point; nor do we deem it necessary.

We shall, therefore, not do so in the brief, but should the Attorney-General indicate to us that he would be willing to hear us further touching this point, we will gladly avail ourselves of his kindness in an oral argument.

SHELLABARGER & WILSON,
For Samuel J. Crawford.

APPENDIX.

"SEC. 2103. No agreement shall be made by any person with any tribe of Indians, or individual indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for the said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

"First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

"Second. It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

"Third. It shall contain the names of all parties in interest, their residence and occupation; and, if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority shall be given specifically.

"Fourth. It shall state the time when, and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

"Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

"Sixth. The judge before whom such contract or agreement is executed shall certify officially the time

when, and place where such contract or agreement was executed, and that it was in his presence, and who are the interested parties thereto, as stated to him at the time; the parties present making the same; the source and extent of authority claimed at the time by the contracting parties to make the contract or agreement, and whether made in person or by agent or attorney of either party or parties.

"All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

"SEC. 2104. No money shall be paid to any agent or attorney by an officer of the United States under any such contract or agreement, other than the fees due him for services rendered thereunder; but the moneys due the tribe, Indian, or Indians, as the case may be, shall be paid by the United States, through its own officers or agents, to the party or parties entitled thereto; and no money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract.

"SEC. 2105. The person so receiving such money contrary to the provisions of the two preceding sections, and his aiders and abettors, shall, in addition to the forfeiture of such sum, be punishable by imprisonment

for not less than six months, and by a fine of not less than one thousand dollars. And it shall be the duty of all district attorneys to prosecute such cases when applied to to do so, and their failure and refusal shall be ground for their removal from office. Any Indian agent, or other person in the employment of the United States, who shall, in violation of the provisions of the preceding section, advise, sanction, or in any way aid in the making of such contracts or agreements, or in making such payments as are here prohibited, shall, in addition to the punishment herein imposed on the person making such contract, or receiving such money, be, on conviction, dismissed from the service of the United States, and be forever disqualified from holding any office of profit or trust under the same."

ARTICLES OF AGREEMENT

CONCERNING THE

CESSION OF THE CHEROKEE OUTLET,

TOGETHER WITH THE

PROVISIONS TO CARRY THE SAME INTO EFFECT CONTAINED

IN THE INDIAN APPROPRIATION ACT FOR THE

FISCAL YEAR ENDING JUNE 30, 1894,

APPROVED MARCH 3, 1893.

COMPILED IN THE DEPARTMENT OF THE INTERIOR.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1893.

ARTICLES OF AGREEMENT

Made and Concluded at Talequah, in the Indian Territory, on the 19th day of December, A. D. 1891, by and between David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, Commissioners on the part of the United States, and Elias C. Boudinot, Joseph A. Scales, George Downing, Roach Young, Thomas Smith, William Triplett, and Joseph Smallwood, Commissioners on the part of the Cherokee Nation.

ARTICLE I.

The Cherokee Nation by act duly passed, shall cede and relinquish all its title, claim' and interest of every kind and character in and to that part of the Indian Territory bounded on the west by the one hundredth degree (100°) of west longitutde; on the north by the State of Kansas; on the east by the ninety-sixth degree (96°) of west longitude, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation created or defined by Executive order dated August 10, 1869. The tract of land embraced within the above boundaries containing eight million one hundred and forty-four thousand six hundred and eighty-two and ninety-one one-hundredths (8,144,-682.91) acres, more or less.

ARTICLE II.

For and in consideration of the above cession and relinquishment, the United States agrees:

First. That all persons now resident, or who may hereafter become residents, in the Cherokee Nation, and who are not recognized as citizens of the Cherokee Nation by the constituted authorities thereof, and who are not in the employment of the Cherokee Nation, or in the employment of citizens of the Cherokee Nation, in conformity with the laws thereof, or in the employment of the United States Government, and all citizens of the United States who are not resident in the Cherokee Nation under the provisions of treaty or acts of Congress, shall be deemed and held to be intruders and unauthorized persons within the intent and meaning of section six of the treaty of 1835, and sections twenty-six and twenty-seven of the treaty of July 19, 1866, and shall, together with their personal effects, be removed without delay from the limits of said nation by the United States, as trespassers, upon the demand of the principal chief of the Cherokee Nation. In such removal no houses, barns, outbuildings, fences, orchards, growing crops, or other chattels real, being attached to the soil and belonging to the Cherokee Nation, the owner of the land, shall be removed, damaged, or destroyed, unless it shall become necessary in order to effect the removal of such trespassers: *Provided, always*, That nothing in this section shall be so construed as to affect in any manner the rights of any persons in the Cherokee Nation under the ninth article of the treaty of July 19, 1866: *And provided further*, That before any intruder or unauthorized person occupying houses, lands, or improvements, which occupancy commenced before the eleventh day of August, Anno Domini eighteen hundred and eighty-six, shall be removed therefrom, upon demand of the principal chief or otherwise, the value of his improvements, as the same shall be appraised by a board of three appraisers, to be appointed by the President of the United States, one of the same upon the recommendation of the principal chief of the Cherokee Nation, for that purpose, shall be paid to him by the Cherokee Nation; and upon such payment such improvements shall become the property of the Cherokee Nation: *Provided*, That the amount so paid for said improvements shall not exceed the sum of two hundred and fifty thousand dollars: *And provided further*, That the appraisers in determining the value of such improvements may consider the value of the use and occupation of the land.

Second. That article fifteen (15) of the treaty of July 19, 1866, by and between the United States and the Cherokee Nation, shall be abrogated and held for naught from and after the day that Congress may ratify this agreement providing for such cession and relinquishment of title: *Provided*, That the rights of any person or persons heretofore acquired under and by virtue of said article fifteen shall in no manner, and to no extent whatever, be affected by such abrogation.

Third. The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of monies due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835–6, 1846, 1866, and 1868, and any laws passed by the Congress of the United

States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting should the Cherokee Nation by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve (12) months to enter suit against the United States, in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall, at its next session after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting.

Fourth. That any citizen of the Cherokee Nation, who, prior to the first day of November, 1891, was a bona fide resident upon and further had, as a farmer and for farming purposes, made permanent and valuable improvements upon any part of the land herein ceded and who has not disposed of the same, but desires to occupy the particular lands so improved as a homestead and for farming purposes, shall have the right to select one-eighth of a section of land, to conform however to the United States surveys; such selection to embrace, as far as the above limitation will admit, such improvements. The wife and children of any such citizen shall have the same right of selection that is above given to the citizen, and they shall have the preference in making selections to take any lands improved by the husband and father that he can not take—until all of his improved land shall be taken.

That any citizen of the Cherokee Nation not a resident within the land herein ceded, who, prior to the first day of November, 1891, had for farming purposes made valuable and permanent improvements upon any of the land herein ceded, shall have the right to select one-eighth of a section of land to conform to the United States surveys; such selection to embrace, as far as the above limitation will admit, such improvements.

It is further agreed and understood that the number of such allotments shall not exceed seventy (70) in number, and the land allotted shall not exceed five thousand and six hundred (5,600) acres; that such allotments shall be made and confirmed under such rules and regulations as shall be prescribed by the Secretary of the Interior, and when so made and confirmed shall be conveyed to the allottees respectively by the United States in fee simple.

It is further agreed that from the price to be paid to the Cherokee Nation for the cession herein provided for there shall be deducted the sum of one dollar and forty cents ($1.40) for each acre so taken in allotment.

Fifth. That in addition to the foregoing enumerated considerations for the cession and relinquishment of title to the lands hereinbefore provided, the United States shall pay to the Cherokee Nation at such time, and in such manner as the Cherokee national council shall determine the sum of eight million five hundred and ninety-five thousand seven hundred and thirty-six and twelve one-hundredths (8,595,736.12) dollars, in excess of the sum of seven hundred and twenty-eight thousand three hundred and eighty-nine and forty-six one hundredths ($728,389.46) doilars, the aggregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas River; and also in excess of the amount heretofore paid by the Osage Indians for their reservation. So long as the money, or any part of it, shall remain in the Treasury of the United States after this agreement shall have become effective such sum so left in the Treasury of the United States shall bear interest at the rate of 5 per cent. per annum, payable semiannually.

Provided, That the United States may at any time pay to said Cherokee Nation the whole or any part of said sum, and thereupon terminate the obligation of the United States in respect to so much thereof as shall be so paid, and in respect to any further interest upon the same. *Provided further*, That should the Cherokee Nation determine to distribute said money or any part thereof, principal or interest, to any of its citizens *per capita*, and should the classes of persons provided for in the ninth and fifteenth articles of the treaty of July 19, 1866, claim that in such distribution they have been unjustly or illegally discriminated against, then, on complaint made by such persons, Congress shall by law authorize a suit in a proper court by and between such classes of persons and the United States and the Cherokee Nation to determine that question, giving to any party thereto the right of appeal to the Supreme Court of the United States, and providing that such suit or suits may in proper manner be advanced upon the dockets of such courts to secure a speedy hearing of the same; and the United States shall retain a sufficient sum of such money under its control to adjust and relieve such discrimination, should it be adjudged that such discrimination has been made. It is expressly understood that this agreement ceding and relinquishing the title to the lands herein described shall not be effective for any purpose whatever until

it shall in its entirety be ratified by Congress, and the amount of money herein agreed to be paid to the Cherokee Nation for such cession and relinquishment shall have been appropriated by Congress and placed in the Treasury of the United States, subject to the order of the Cherokee national council: *Provided further*, That nothing contained in this agreement shall have the effect to limit or impair any rights whatever the Cherokee Nation has in or to or over the lands herein ceded until it shall be so ratified by Congress; and

Provided further, That if this agreement shall not be ratified by Congress and the appropriation of money, as herein provided for, made on or before March 4, 1893, it shall be utterly void.

In witness whereof we have hereunto set our hands, the day and year first above written.

DAVID H. JEROME,
ALFRED M. WILSON,
WARREN G. SAYRE,
Commissioners on the part of the United States.
ELIAS C. BOUDINOT,
JOSEPH A. SCALES,
ROACH YOUNG,
WILLIAM TRIPLETT,
THOMAS SMITH,
JOSEPH SMALLWOOD,
GEORGE DOWNING,
Commissioners on the part of the Cherokee Nation.

In presence of
CHAS. S. KING.
W. P. BOUDINOT.

Therefore, be it it enacted by the national council, That said agreement be, and the same is hereby, accepted, ratified, and confirmed on the part of the Cherokee Nation, and that the cession and relinquishment of claim, title, and interest recited in the first article of said agreement is hereby made, declared, and enacted to take and have effect in the manner, and at the time, and in accordance with the terms recited in said agreement; and the Cherokee Nation hereby gives its consent that such lands when so ceded and relinquished may be included in the territorial limits and jurisdiction of any State or Territory directed or authorized by Congress of the United States: *Provided*, That the sum of one hundred and twelve dollars ($112) shall be deducted from the per capita share of money of each and every person who may take an allotment of land according to the provisions of said agreement.

Passed the senate Jan. 2, 1892.

T. M. BUFFINGTON,
President of the Senate.
J. L. THOMPSON,
Clerk of Senate.

Concurred in by the council January 4, 1892.

J. B. COBB,
Speaker pro tem. of Council.
W. G. FIELDS,
Clerk of Council.

Approved January 4, 1892.

C. J. HARRIS,
Principal Chief.

CHEROKEE NATION, *Indian Territory, ss:*

I, the undersigned, principal chief of the Cherokee Nation, hereby certify that the foregoing is a full, true, and complete copy of the act of the national council, approved the 4th day of January, 1892, by me as principal chief, as the same appears and remains of record in my office; and I further certify that by the laws of the Cherokee Nation I am the proper person to make such certificate.

In witness whereof I have hereunto set my hand and caused to be affixed hereto the great seal of the Cherokee Nation, this 7th day of January, 1892.

[SEAL.]

C. J. HARRIS,
Principal Chief, Cherokee Nation.

J. A. SCALES,
Chief Executive Clerk.

That the sum of two hundred and ninety-five thousand Seven Hundred and thirty-six dollars, payable as hereinafter provided, is hereby appropriated out of any money in the Treasury not otherwise appropriated, and the Secretary of the Interior is hereby authorized and directed

to contract to pay eight million three hundred thousand dollars, or so much thereof as may be necessary in addition, to pay the Cherokee Nation of Indians for all the right, title, interest, and claims which the said nation of Indians may have in and to certain lands described and specified in an agreement concluded between David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, duly appointed commissioners on the part of the United States, and Elias C. Boudinot, Joseph A. Scales, George Downing, Roach Young, Thomas Smith, William Triplett, and Joseph Smallwood, duly appointed commissioners on the part of the Cherokee Nation of Indians in the Indiana [Indian] Territory, on the nineteenth day of December, eighteen hundred and ninety-one, bounded on the west by the one hundredth degree of west longitude; on the north by the State of Kansas; on the east by the ninety-sixth degree of west longitude, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapaho Reservation, created or defined by Executive order dated August tenth, eighteen hundred and sixty-nine; which said agreement is fully set forth in the message of the President of the United States, communicating the same to congress, known as Executive Document Numbered Fifty-six, of the first session of the Fifty-second Congress, the lands referred to being commonly known and called the "Cherokee Outlet;" and said agreement is hereby ratified by the congress of the United States, subject, however to the Constitution and laws of the United States and the acts of congress that have been or may be passed regulating trade and intercourse with the Indians, and subject, also, to certain amendments thereto.

And the provisions of said agreements so amended shall be fully performed and carried out on the part of the United States: *Provided*, that the money hereby appropriated shall be immediately available and the remaining sum of eight million three hundred thousand dollars or so much thereof as is required to carry out the provisions of said agreement as amended and according to this act, to be payable in five equal annual installments, commencing on the fourth day of March, eighteen hundred and ninety-five, and ending on the fourth day of March, eighteen hundred and ninety-nine, said deferred payments to bear interest at the rate of four per centum per annum, to be paid annually, and the amount required for the payment of interest as aforesaid is hereby appropriated: *And provided further*, That of the money hereby appropriated a sufficient amount to pay the Delawares and Shownees [Shawnees] their pro rata share in the proceeds of said outlet shall remain in the Treasury of the United States until the status of said Delaware and Shawnee Indians shall be determined by the courts of the United States before which their suits are now pending; and a sufficient amount shall also be retained in the Treasury to pay the freedmen who are citizens of the Cherokee Nation or their legal heirs and representatives such sums as may be determined by the courts of the United States to be due them. Nor shall anything herein be held to abridge or deny to said freedmen any rights to which they may be entitled under existing laws or treaties. The acceptance by the Cherokee Nation of Indians of any of the money appropriated as herein set forth shall be considered and taken and shall operate as a ratification by said Cherokee Nation of Indians of said agreement, as it is hereby proposed to be amended, and as a full and complete relinquishment and extinguishment of all their title, claim, and interest in and to said lands; but such relinquishment and extinguishment shall not inure to the benefit of any railroad company nor vest in any railroad company any right title or interest in or too [to] any of

said lands: *Provided*, said railroad shall be relieved from any further payments of compensation to said Cherokee Nation as required by law for running said railroad across said Cherokee outlet.

And said lands, except the portion to be allotted as provided in said agreement, shall, upon the payment of the sum of two hundred and ninety-five thousand seven hundred and thirty-six dollars, herein appropriated, to be immediately paid, become and be taken to be and treated as a part of the public domain. But in any opening of the same to settlement, sections sixteen and thirty-six in each township, whether surveyed or unsurveyed, shall be, and are hereby reserved for the use and benefit of the public schools to be established within the limits of such lands, under such conditions and regulations as may be hereafter enacted by Congress: *Provided*, That if the legislative Council of the Cherokee Nation shall deem it more advantageous to their people they may issue a loan for the principal and interest of the deferred payments pledging said amounts of interest and principal to secure payments of such debt.

Sections thirteen, fourteen, fifteen sixteen, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight and the east half of sections seventeen, twenty and twenty-nine, all in township numbered twenty-nine north, of range numbered two east of the Indian Meridian, the same being lands reserved by Executive order dated July twelfth eighteen hundred and eighty-four, for use of and in connection with the Chilocco Indian Industrial School, in the Indian Territory, shall not be subject to public settlement, but shall, until the further action of Congress, continue to be reserved for the purposes for which they were set apart in the said Executive order. And the President of the United States, in any order or proclamation which he shall make for the opening of the lands for settlement, may make such other reservations of lands for public purposes as he may deem wise and desirable.

The President of the United States is hereby authorized, at any time within six months after the approval of this act and the acceptance of the same by the Cherokee Nation as herein provided, by proclamation, to open to settlement any or all of the lands not allotted or reserved, in the manner provided in section thirteen of the act of Congress approved March second, eighteen hundred and eighty-nine, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and ninety, and for other purposes" (Twenty-fifth United States Statutes, page ten hundred and five); and also subject to the provisions of the act of Congress approved May second, eighteen hundred and ninety, entitled "An act to provide a temporary government for the Territory of Oklahoma to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes;" also, subject to the second proviso of section seventeen, the whole of section eighteen of the act of March third, eighteen hundred and ninety-one, entitled "An act making appropriations for the current expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and ninety-two, and for other purposes;" except as to so much of said acts and sections as may conflict with the provisions of this act. Each settler on the lands so to be opened to settlement as aforesaid shall, before receiving a patent for his homestead, pay to the United States for the lands so taken by him, in addition to the fees provided by law, the sum

of two dollars and fifty cents per acre for any land east of ninety-seven and one-half degrees west longitude, the sum of one dollar and a half per acre for any land between ninety-seven and one-half degrees west longitude and ninety-eight and one-half degrees west longitude, and the sum of one dollar per acre for any land west of ninety-eight and one-half degrees west longitude, and shall also pay interest upon the amount so to be paid for said land from the date of entry to the date of final payment therefor at the rate of four per centum per annum.

No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands. The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations, not inconsistent with this act, for the occupation and settlement of said lands, to be incorporated in the proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands.

The allotments provided for in the fifth [fourth] section of said agreement shall be made without delay by [to] the persons entitled thereto, and shall be confirmed by the Secretary of the Interior before the date when said lands shall be declared open to settlement; and the allotments so made shall be published by the Secretary of the Interior, for the protection of proposed settlers. And a sum equal to one dollar and forty cents per acre for the lands so allotted shall be deducted from the full amount of the deferred payments, hereby appropriated for: *Provided*, That D. W. Bushyhead, having made permanent or valuable improvements prior to the first day of November, eighteen hundred and ninety-one, on the lands ceded by the said agreement, he shall be authorized to select a quarter section of the lands ceded thereby, whether reserved or otherwise, prior to the opening of said lands to public settlement; but he shall be required to pay for such selection, at the same rate per acre as other settlers, into the Treasury of the United States in such manner as the Secretary of the Interior shall direct.

The President of the United States may establish, in his discretion, one or more land offices to be located either in the lands to be opened, or at some convenient place or places in the adjoining organized Territory of Oklahoma; and to nominate and, by and with the advice and consent of the Senate, to appoint registers and receivers thereof.

The sum of five thousand dollars, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to pay for the services of the appraisers to be appointed as aforesaid, at a rate not exceeding ten dollars a day for the time actually employed by each appraiser, and their reasonable expenses, and to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to effect a removal of intruders required by the first paragraph of article two of said agreement as amended.

The sum of five thousand dollars, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth [third] subdivision of article two of said agreement.

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