

OPINION

ON THE RIGHT OF THE

STATE OF GEORGIA

TO EXTEND HER LAWS

OVER

THE CHEROKEE NATION.

BY WILLIAM WIRT, ESQ.

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OPINION, &c.

The Cherokee Nation of Indians have submitted, for my opinion, the following

CASE.

LONG before the arrival of the Europeans on this continent, and from time immemorial, they have been a sovereign nation, rightfully under the sole and exclusive government of their own laws, usages and customs, within their own dominions, of which dominions, except so far as altered by treaty, they have ever been and still are the absolute lords and masters, acknowledging no earthly superior. The arrival of the Europeans on this continent, produced no change in their political condition. They were never conquered. They have had various wars with the white people, which have been followed by treaties of peace, of which, the white people were always as desirous as themselves. They have also made various cessions of their lands to the white people, by voluntary treaty. But they have always been respected, and treated with, by the British Government, by the State Governments, by that of the United States, under their articles of confederation, and lastly, by that of the present United States, under their federal constitution, as a *sovereign people*, to be governed *exclusively*, by their own laws, usages and customs, and owing no allegiance, either to the State Governments, or to the Government of the United States; nor amenable to their laws, except so far as they have engaged, by their own voluntary treaties, to respect those of the United States, *made to give effect to these treaties*. If the United States declare war against a foreign country, the Cherokees are not bound to take a part in that war, unless they chose to do so of their own accord. If a civil war take place among the States, the Cherokees are not involved in that war, nor responsible for its consequences. They

have nothing to do, either with the State Governments or the Federal Government ; had no voice in the formation of their respective constitutions ; are not represented in their councils ; are not called upon to contribute to the expense of those governments, which are to them, *foreign governments* ; and have never, heretofore, been required, or expected to obey the laws of these Governments, nor in any manner to intermeddle with them, or to be affected by them.

By various cessions of their lands, made from time to time, by treaties, and for valuable consideration, their once extensive domain has been much reduced, but is still sufficiently large for all their purposes. This domain lies within what are called *the chartered limits* of four of the states of the Union, the states of Georgia, North Carolina, Tennessee and Alabama. Within this domain they are still *sovereign*, and governed *exclusively* by their own laws ; having never been considered or treated as *citizens of these states*, or of the *United States* ; having none of the rights of *such citizens* ; but on the contrary, in all their treaties with the United States, being continually spoken of as *contra-distinguished from the citizens of the United States*. They have had wars with the United States, which have been terminated by treaties of peace ; they have never been regarded as *traitors* in such wars, which they must have been, if they were *citizens of the United States* ; but on the contrary, the treaties of peace, which have followed such wars, have borne all the characters, and have contained all the stipulations which are usual in such treaties, when made between two sovereign nations who have been engaged in war.

Their first treaty with the United States, was at that made at Hopewell in 1785. The preamble to this treaty, as it stands in the English language, in which it was reduced to writing, states that the Commissioners of the United States “ *give peace* to all the Cherokees, and receive them into the favour and protection of the United States on the following conditions.” The Cherokees have understood that a certain description of men, whose trade it is to deal in *words*, and who, therefore, think more of *words* than *things*, have caught at the expression “ *give peace*” as an admission, on the part of the Cherokees, that they were a *conquered people*, and were suing for peace, at the feet of their conquerors, on such terms as they should be pleased to dictate ; but these word-mongers can know very little of the history

of that time and that transaction, or must suppose themselves addressing others equally ignorant upon this subject, when they venture to draw such an inference from those words. To those who know the truth of the case, this inference is mere smoke. Every white man, decently acquainted with the history of his own country, knows that the United States came out of the war of the revolution in a state of extreme exhaustion, and were the first to sue for peace from the Indians, who had been engaged in that war, on the British side. The United States asked peace of the Cherokees, and after having refused it for some time, the Cherokees at length acceded to it, and it was established by this treaty. As to the words employed in the preamble, it is idle to attempt to draw an inference of fact from them, so directly opposed to the well known historical truth of the case. In making this treaty, the Cherokees, according to their habit, looked to the *substance* of the thing, not to the *form*. The expression in the preamble, on which this quibble is raised, against the known fact, is in a language not then understood by the Cherokees. The treaty was arranged by interpreters: and the *thing* understood was, that *there was to be peace* by mutual consent, and this was the only thing understood. The Cherokees well knew that they were inferior to their white brethren in the arts of peace as well as the science of war. Aware of this, they were willing to profit by their protection. Before the revolution, they had declared themselves under the protection of the British, and the King of England was called their "Great Father." And the United States having now become an independent nation, they were willing to place themselves, in like manner, under the protection of the United States. But *protection* is one thing, and *subjection* another. The first they were willing to receive; if the last had been demanded, as a condition of the treaty, the hatchet would not have been buried at Hopewell, in 1785. But the question whether they were a conquered people or not, who were thenceforth to lose their separate national existence, to renounce the rights of self-government, to become *citizens of the United States*, and to be governed in common with their other citizens, by the laws of the United States or of the individual States, is not to be answered by a reference to these few words only, thus foisted into the preamble in a language unknown to the Cherokees. This question is to be answered by an appeal to the *stipulations* of the treaty,

themselves. This is *substance* not *form*. And to these the Cherokees fearlessly appeal in proof of the fact that they were treated with, and acknowledged as a *separate, sovereign nation*, who were to have the exclusive possession of their own territory, designated in that treaty by metes and bounds, free from any interruption by the citizens of the United States, from whom the treaty clearly distinguishes them; and they are regarded, by that very treaty, as clothed with that pre-eminent badge of sovereignty, *the right of making war*; even of *making war upon the United States*.

The first and second articles in the treaty are in these words: "The head men and warriors of *all the Cherokees*, shall restore all the prisoners, *citizens of the United States*, or subjects of their allies, to their entire liberty; they shall, also restore all the negroes and all other property taken during the late war, from the *citizens* to such person, and at such time and place, as the Commissioners shall appoint."

2d. "The commissioners of the United States in Congress assembled, shall restore all the prisoners taken from the Indians, during the late war, to the head men and warriors of the Cherokees, as early as is practicable."

Does this mutual exchange of prisoners import a conquered people, who had lost their national sovereignty by right of conquest? On the contrary, it is the stipulation of equal sovereigns who had been engaged in lawful war, and finds a place in all treaties of peace among the sovereigns of Europe.

Again, the 8th article is in these words: "It is understood that the punishment of the innocent under the idea of retaliation, is unjust, and shall not be practised on either side, except where there is a manifest violation of this treaty; and then it shall be preceded first by a demand of justice; and if refused, then, *by a declaration of hostilities*." Is it possible to reconcile this right of declaring regular war against the United States with the idea that the Cherokees were a conquered people, who had surrendered their national sovereignty, and had agreed to become amalgamated with *the citizens of the United States*? What right could *citizens of the United States* have to levy war against the United States? Such an act would be *treason*, not regular war.

The 4th article begins thus: "The boundary line allotted to the Cherokees for their hunting grounds, *between the said Indians and the citizens of the United States*, within the limits

of the United States of America, is and shall be the following:" in this striking manner distinguishing between *the Indians* and *the citizens of the United States*, and *separating them by a marked boundary*.

The 4th article having designated the boundary, the 5th provides "that if *any citizen of the United States* shall attempt to settle on any of the lands within that boundary, he shall forfeit the protection of the United States, and the *Indians* may punish him or not, as they please." Thus again recognizing the distinction between *the Indians* and *citizens of the United States*; and recognizing, at the same time, the *sovereign right of the Indians to give the law and to inflict punishment within their own boundaries*. The 6th article provides for the *delivering up*, by the Indians, of any *Indian* or other person residing among them, or *who shall take refuge in their nation*, who shall have committed robbery or murder or other capital crime on any *citizen of the United States*. The 7th article contains a correspondent provision for the punishment of any *citizen of the United States* or person under their protection, who shall have committed the same sort of crimes on the *Indians*. The 10th article gives liberty to all traders, *citizens of the United States* to go to any of the tribes, or towns of the *Cherokees*, to trade with them, and stipulates that they shall be protected in their persons and property, and kindly treated. The 11th stipulates that the said *Indians* shall give notice to the *citizens of the United States* of any hostile design of the neighbouring tribes against them.

Thus, the distinction between *the Indians* and *the citizens of the United States* pervades the whole treaty. The *Cherokees* are, in every part of this national compact, treated as a *separate and sovereign nation*, clothed with the right of self-government within their own territory, and the high and solemn right of making peace and war with the United States, with an express stipulation that the citizens of the United States who intrude upon them, shall be entirely at their mercy.

Some of the officers of the United States claim this treaty as a still subsisting treaty, and insist on all its stipulations in their favour; while another high officer of the United States on the occasion of a recent punishment inflicted by the Indians under the 5th article, has denied the authority of the treaty, on the ground that it was "*made more than forty years ago*." The *Cherokees* presume that the treaty is either in force, or not in force; it cannot be in force as against them, and, at

the same time, obsolete where it works in their favour. As to its having been made more than forty years ago, they have not been favoured with a reference to that work on the law of nations, from which the very enlightened officer in question has derived the principle that a treaty, unlimited in its terms, becomes *obsolete, after forty years*: more especially when, as in this case, the treaty has been recognized by the parties as a subsisting treaty, down to the present time. The language with which the 4th article opens—"the boundary *allotted* to the Cherokees for their *hunting grounds*"—has given occasion to farther quibbles on words which scarcely deserve notice. The word *allotted* is, again, supposed to imply and admit a conquest of the Cherokees, and that the United States as their sovereigns, were making them a gracious and temporary *loan* of these lands, for the mere purpose of hunting on them, until the United States should be pleased to resume them. The criticism either means this, or it means nothing of any account or value. But it is a mere *hypercriticism on words* which is refuted by every provision of the treaty, by the practical construction under it, by every subsequent treaty and its practical construction; and, lastly, by the courts of the United States, themselves, whenever they have been called to consider the character of the Indian title to their lands. How would these phrases, which are deemed so significant in the English language, have been interpreted to the Cherokees, who, from their ignorance of the language, could have been negotiated with, only, through an interpreter? What other idea could have been conveyed to them, by any interpreter, than that the boundary about to be described *was to be the boundary between them and the citizens of the United States*. As the boundary, itself, the only material *thing* in question, accorded with their own notions of their rights, was it to have been expected of them to take exceptions to the niceties of expression in a language which they did not understand, in order to guard against the future possibility of quibbles which they as little understood? Quibbles, too, *in a treaty*, whose object and essence is plain and honest good faith, and a treaty with *unenlightened Indians*, who were invited to place themselves *under the protection of the United States*? As to their grounds being called *hunting grounds*, the designation was proper: the Cherokees were, then, in the *hunter state*, and, at that time, had no other use for these grounds but for the support and chase of their game. They

have since, *on the solicitation and under the tuition and assistance of the United States, become agriculturists*: and their right to use their grounds for agriculture has been acknowledged in solemn treaties: yet on this phrase "hunting grounds," "in a treaty made more than forty years ago," an argument is attempted to be raised that their only right to these grounds is for the purpose of hunting on them.

After this treaty of Hopewell, another war broke out between the United States and the Cherokee Indians, and this was terminated by the treaty of Holston in 1791. The federal constitution of the United States had then been adopted; and this treaty was negotiated by commissioners appointed and instructed by President Washington, by and with the *previous* advice and concurrence of the Senate of the United States. In the message of consultation which he sent to the Senate on that occasion, he states that the white people had intruded on the Indian lands, as bounded by the treaty of *Hopewell*; declares his determination to execute the power entrusted to him by the constitution, to carry *that treaty* into faithful execution, unless a new boundary should be arranged with the Cherokees, embracing the intrusive settlement, and compensating the Cherokees therefor,

And he puts to the Senate, among others, this question.

"3. *Shall the United States stipulate solemnly to guaranty the new boundary which shall be arranged?*"

The Senate answer:

"Resolved, that in case a new, or other boundary, than that stipulated by the treaty of Hopewell, shall be concluded with the Cherokee Indians, that the Senate do advise and consent *solemnly* to guaranty the same."

This consultation took place in August, 1790: and, in consequence of it, the treaty of Holston was made on the 2d July, 1791. It is a treaty between the *Cherokee Nation* on the one side, and the *United States* on the other, *treating as sovereigns*. The obnoxious words, "the United States *give peace*," do not occur here. The first article is: "There shall be perpetual peace and friendship between *all the citizens of the United States of America, and all the individuals composing the Cherokee nation of Indians*." Here we have the same distinction again presented, between *all the citizens of the United States* and *all the individuals composing the Cherokee nation of Indians*.

By the 2d article the Cherokees acknowledge themselves

to be *under the protection of the United States of America, and of no other sovereign whosoever*; and stipulate that they "*will not hold any treaty with any foreign power, individual State, or with individuals of any State.*"

They, thus placed themselves exclusively under the protection of the *United States*, and not of *any one state*, and *their political capacity to treat with foreign powers is admitted, by the stipulation required of them, that they will not exercise this right.* Is not this an additional admission on the part of the United States, of the sovereignty of the Cherokee Nation?

The third article again stipulates a *mutual exchange of prisoners*, in the style constantly in use among equal sovereigns, who are concluding a war by a treaty of peace.

"Article 4th. The boundary between *the citizens of the United States* and the *Cherokee Nation* is and shall be as follows"—the article then proceeds to designate the boundary—provides for the marking of it—and "*in order to extinguish forever all claims of the Cherokee Nation or any part thereof,*" to the lands lying out of this boundary, the compensation is fixed, and the lands are ceded by the Cherokees.

The 5th article stipulates that the *citizens and inhabitants of the United States* shall have a free and unmolested use of a road through the *Cherokee Territory*. The Cherokee Territory is thus acknowledged to have been so exclusively theirs, that the citizens of the United States would have no right even of passage through it, unless the Cherokees had conceded this right by treaty.

The 7th article contains the guaranty which President Washington had proposed to the Senate, and which the Senate had advised. The article is in these words :

"Article 7th. *The United States solemnly guaranty to the Cherokee Nation, all their lands, not hereby ceded.*"

"Article 8th. *If any citizen of the United States, or other person, not being an Indian, shall settle on any of the Cherokees' lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not as they please.*"

"Article 9th. *No citizen or inhabitant of the United States shall attempt to hunt or destroy the game on the lands of the Cherokees; nor shall any citizen or inhabitant go into the Cherokee country, without a passport first obtained from the Governor of some one of the United States or territorial*

districts, or such other person as the President of the United States may, from time to time, authorize to grant the same."

By the 10th article, the Cherokees bind themselves to deliver up any of their own people, or others, fugitives from justice, who shall have committed crimes *against citizens of the United States*, and have taken *refuge in the Nation*. Why was *this* necessary, if their Territory belonged to the jurisdiction of Georgia?

By the 11th article, it is provided that "if *any citizen or inhabitant of the United States, or of either of the territorial districts of the United States shall go into any town or settlement or territory belonging to the Cherokees, and shall there commit any crime upon, or trespass against the person or property of any peaceable and friendly Indian, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punished by the laws of such state or district, such offenders shall be subject to the same punishment, and shall be proceeded against in the same manner, as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong.* against a citizen or white inhabitant thereof." Here is a distinct and decisive admission by the United States, that "the towns, settlements and territory belonging to the Cherokees," *are not within the jurisdiction of any state or territory of the United States, nor subject to the laws of those states or territories; and that but for this consent on the part of the Cherokees by treaty, that citizens of the United States committing crimes within their jurisdiction might be punished by the laws of their own states or territories, those citizens would have been regularly punishable for such crimes only by the jurisdiction of the Cherokees, against which they had offended.*

The 12th article of the treaty stipulates that, in case of violence on the persons or property of the individuals of either party, *neither retaliation or reprisal shall be committed by the other, until satisfaction shall have been demanded of the party of which the aggressor is, and shall have been refused.* Here is the right of war by the Cherokees against the United States again admitted.

The 13th article, again stipulates, that the Cherokees shall give notice to *the citizens of the United States* of any hostile designs which may have been formed against them.

Art. 14th. "That the Cherokee nation may be led to a greater degree of civilization, and to become *herdsmen and cultivators instead of remaining in a state of hunters*, the United States will, from time to time, furnish *gratuitously*, the said nation with *useful implements of husbandry*; and *further to assist the said Nation in so desirable a pursuit*, and at the same time to establish a certain mode of communication, the United States will send such, and so many persons to *reside in said Nation*, as they may judge proper, *not exceeding four in number*, who shall qualify themselves to act as interpreters. *These persons shall have lands assigned them by the Cherokees* for cultivation for themselves, and their successors in office; but they shall be precluded exercising any kind of traffic."

In this manner the United States have continued to treat with the Cherokee Nation, as a sovereign Nation, down to the present time.

In the year 1808, the Cherokee Nation expressed to the United States their inclination to divide themselves into two Nations. Part of them, about one third, were disposed to continue the *hunter state*, and, with this view, to remove to the west, where game was more abundant, on lands to be assigned to them by the United States in exchange for their proportion of the lands east of the Mississippi; the other part were disposed to remain "*to engage in the pursuits of agriculture and civilized life in the country they then occupied*"—where, "they proposed to begin *the establishment of fixed laws, and a regular government.*" Their wishes were communicated to the President of the United States, who favoured the scheme. Under his permission, and sanction, part of them removed, in the year 1809, to the Arkansas, and the separation was carried into complete effect by the treaties of 1817, 1819; it being perfectly understood, agreed, and encouraged by the United States, that those who should remain, would "*engage in the pursuits of agriculture and civilized life,*" under the protection of "*fixed laws and a regular government,*" to be established by themselves.

These admissions of their separate sovereignty as a nation, of their *exclusive* right to govern themselves within their own territory, and the inviolability of that territory, thus distinctly made by all their treaties with the United States, have been no less distinctly made in practice, and this distinction

has been made throughout all past time. Neither the King of England, nor his colonial Governors, nor the several States, nor the United States have ever pretended a right to extend their laws over the Cherokee people within their own territory, until the 19th December, 1829. On that day, the state of Georgia passed a law entitled "an act to *add the territory lying within the chartered limits of Georgia, now in the occupancy of the Cherokee Indians*, to the counties of *Carroll, Dekalb, Gwinnett, Hall and Habersham*, and to extend the laws of this state over the same, and to annul all laws and ordinances made by the Cherokee Nation of Indians, and to provide for the compensation of officers serving legal process in said territory, and to regulate the testimony of Indians, and to repeal the 9th section of the act of 1820 on this subject."

The first five sections of the act are employed in distributing the Cherokee territory among the five Counties named in the title.

The 6th section extends all the laws of Georgia, both civil and criminal, over the portions of the Cherokee territory so annexed to those Counties.

The 7th abolishes the Cherokee laws, and declares that in all cases of indictment or civil suits, it shall not be lawful for the defendant to justify under any of those laws, and forbids the Courts of the state to permit those laws to be given in evidence.

The 8th makes it unlawful for the Cherokees to attempt to prevent the individuals of their own nation from enrolling for emigration: and the 9th subjects them to indictment and punishment before the state Courts for the offence described in the former section.

The 10th makes it unlawful in the Cherokee Nation to prevent the individuals of that nation from *selling or ceding* their lands to the United States for the use of the state of Georgia; (there being no such thing as *individual* title to lands in the Cherokee Nation; but the whole of those lands, according to their laws, belonging to *the entire nation, as a nation.*)

The 11th annexes the punishment of imprisonment for four years to the foregoing offence.

The 12th and 13th make it murder in the Executive, Ministerial, or Judicial officers of the Cherokee Nation to inflict sentence of death, though in conformity with their own laws;

declaring all those officers so concerned in carrying their own laws into effect, principals; and subjects them, all, to indictment and death, by hanging.

The 14th extends the jurisdiction of the Georgia magistrates into the Cherokee Territory, and authorizes the officers who shall carry the process for service to call out the militia of the state to overcome resistance.

And the 15th section declares "that no Indian or descendant of any Indian, residing within the Creek or Cherokee Nations of Indians, shall be deemed a competent witness in any Court of this state, to which a white person may be a party, except such white person resides within the said Nation."

On this case I am asked the following

QUESTION:

Has the state of Georgia a right to extend her laws over the Cherokees, within the Cherokee Territory?

OPINION.

The answer to this question depends on the political relation which the Cherokees hold to the State of Georgia. If they are *citizens of that State, residing within the jurisdiction*, they are unquestionably subject to her laws; *if not*, it is just as clear that the state of Georgia has no authority to extend her laws over them. How is the question of the political condition of these people to be settled? I know of no other mode of doing it than by an appeal to their history. Looking to this history, we find that they composed a part of the *aboriginal* inhabitants of this country, and, in their origin, they were, unquestionably, *a sovereign people, owing allegiance to no other earthly potentate*. Has this condition been altered by any thing that has since occurred? We are not informed, by history, of any such alteration.

The Europeans held that *the title of the Indians to their lands* underwent a change by force of discovery: that is to say, that the particular power of Europe which made the first discovery acquired the right to purchase these lands of the Indians, in preference to and in exclusion of all other discoverers. But this *change of the Indian title to their lands* was not considered by the powers of Europe as altering the *political condition* of these people. With regard to *their*

lands, they were admitted" says chief Justice Marshall, in the case of Johnson and McIntosh, "*to be rightful occupants of the soil, with a legal as well as just claim to retain the possession of it, and to use it according to their own discretion;*" and with regard to their *political condition*, Great Britain, the prior discoverer of this part of the continent, continually *treated* with these people, as a *sovereign people*, and acknowledged in practice, as well as theory, their exclusive right to govern themselves by their own laws, usages and customs, upon the territory of which they held the present right of possession, and which they and their heirs forever were entitled to hold, *exclusively*, until they chose to surrender it by treaty. The same right which had been held by Great Britain, and no other, passed to the United States by the revolution; and the same rights and no others have been uniformly asserted by the United States. The various treaties which have been set forth and referred to in the case stated, and to which the State of Georgia as one of the United States was a party, contains the most unequivocal admissions, that *these people are not citizens of the United States, and therefore cannot be citizens of any one of the States*; that the territory within which they dwell, *belongs to them* as a separate people; that, *within this territory*, they are the sovereign and only lawgivers. And these treaties exhibit them as clothed with attributes of sovereignty utterly irreconcilable with the idea of their being *citizens of the United States*, or of any one of the states: Such for example, as the right of declaring War against the United States, on a demand and refusal of a redress of injuries.

The State of Georgia, it has been said, has a right to legislate over *all people within her territory*. But the Cherokee Indians are not *people within her territory*. The territory which they occupy is not, *at present*, a part of the *territory of Georgia*. Her title is that only of the *ultimate domain after it shall have been relinquished by the Indians*. *At present*, it is the territory of the Indians. "*They are the rightful occupants of the soil, with a legal as well as just claim to retain the possession, and to use it according to their discretion.*" And although their right is lightly spoken of, because it is *a mere right of occupancy*, yet it is to be remembered, that it is *an exclusive right of occupancy; a right which stands solemnly guaranteed to them by the United States; a right which belongs to them and their heirs forever; a right which they may*

alienate, or not, at their pleasure, subject to no other restriction than this, that they can alienate only to the United States of America.

The Territory which the Cherokees occupy is not, at present, therefore, *the territory of Georgia, considered as property.* But the material question with reference to the enquiry before us, is, whether this territory be *within the jurisdiction of Georgia.* If it be not, it is clearly not subject to her laws. And this question is directly answered by the whole scope and tenor of the treaties which have been cited and quoted in the case prefixed to this opinion. The 11th article of the treaty of Holston, contains an *express and decisive admission*, of the principle *implied* in all these treaties, throughout all their provisions: to wit, *that the territory of the Cherokees is not within the jurisdiction of the States, nor subject to their laws.* This treaty is recognized as in full force by all the subsequent treaties. Georgia, as one of the United States, is a party to it, and is estopped to deny what she has thus solemnly admitted.

The fact that the territory occupied by the Cherokees lies *within the chartered limits of Georgia*, establishes nothing with regard to the question under consideration. That charter granted the title of the monarch who gave it, and nothing more; and neither himself nor his grantees considered it as conferring any right to take from the Indians, their lands, by force, much less to abolish their laws, usages and customs, and to extend the British laws, compulsively, over them. The impressions of the British monarch, or rather the several British monarchs, in succession, since the discovery by Cabot, including the particular monarch who gave the charter of Georgia, George II., with regard to their relation to these people and their lands, has been already stated. They considered the Indians as the present owners of the land, and that these lands could be rightfully acquired in no other way than by voluntary surrender by *treaty, made by the whole nation in full Council.* They treated with them *as sovereigns* possessed of the *exclusive right of self government.* They styled them their *Indian allies and Friends*, and never, in any age, was an attempt made, or a right insinuated, by any British monarch, to abolish their own laws, and to substitute, by compulsion, those of Great Britain. So much for the understanding of the monarch who gave the charter of Georgia, and of all his

predecessors and his successors, with regard to the rights and authorities of the British Crown, over the Indians and their lands.

Now let us look to the understanding of the original grantees of that charter, on this same subject. Governor Oglethorpe led the first colony into Georgia under that charter. He arrived at the present site of Savannah in 1733. And how did he proceed? Did he consider his charter as conferring a right to expel the Indians from their possessions by force, or to abolish their own laws among themselves, and enforce the British laws upon them? Far from it. "*A treaty was held with the Creek Indians to whom the lands were admitted to belong, and the cession of a considerable tract was obtained from them.*" 1st. Vol. Marshall's life of Washington, ch. IX. Thus the very first step under this charter, *by the original grantees*, was an admission that those lands *belonged to the Indians*, and were to be gained only by cession; and was a *practical* admission of the *sovereignty* of the Indians, by the act of *treating with them as sovereigns*: and, of necessity, was an admission of their exclusive right of self-government, for they could not be *sovereign*, without such right. Will it be said that these admissions were wrung from the infant colony, by their want of physical strength to assert their rights against the *vis major* of the Indians? But the same admissions continued to be made after the colony had acquired maturity and power to assert all their rights. The British Colonial Government, under this charter, had some respect for their own character, and for the opinion of the world. So anxious were they to avoid every appearance of taking an unfair advantage of the ignorance of their Indian allies and friends, that, in a treaty of cession, made shortly before the American revolution, they take care to declare on the face of the treaty, that it was made in consequence of the *solicitation of the Indians themselves, who wished to raise money for the payment of their debts.* Such was the practical construction of the British monarch who gave this charter, and of the grantees under it, prior to the American revolution, and the same, as has been shewn, has been the practical construction by the United States (Georgia included) since the revolution.

The charter, it is presumed, has not experienced a new vegetation, and put forth new rights, within the last few years. The position of Georgia, herself, is that she took all

the rights of British colonists, under that charter, with regard to these people: granted, and it has been shewn by the concession of the British colonists themselves, that they had no right to dispossess the Indians, by force, or to interfere with their right of self-government.

Although this territory, then, does lie within the chartered limits of Georgia, I am of the opinion that the people of Georgia have no right to disturb the Indian possession of these lands, nor to interfere with their government. *The United States stand pledged by the solemn guaranty of a subsisting treaty, twice sanctioned by the Senate of the United States, to protect the possession of the Indians.*

By the same treaty, it is stipulated that no citizen of the United States shall even cross the Indian boundary, without a *passport* first obtained from the governor of some one of the States or territorial districts, or such other person as the President shall appoint. Is a writ from a court, or a warrant from a magistrate of Georgia such a passport from the Governor as the treaty contemplates? Or is the service of such process upon the Indians, within their own territory, under the authority of the State of Georgia, such a visit, under a *passport*, as the parties to this treaty manifestly contemplated? Shall the inviolability of the Indian territory have been consecrated by the treaty against even a peaceable visit, without a *passport*: and can it be believed to have been within the contemplation of the parties, that the State of Georgia should be at liberty to dismember the whole territory, at her pleasure, to amalgamate it with her Counties, and to spread her officers over it, in every direction, for the apprehension and punishment of these Indians, for obedience to their own laws? This can scarcely be believed by any man, who is not blinded by prejudice or passion, to have been the intention of the parties to this treaty. And, if so, it must be manifest that every officer in the State of Georgia, who crosses the Indian boundary in execution of her law, violates that guaranty which the faith and honour of the United States stand pledged to make good.

It is said, that to permit them to govern themselves on those lands, would be to permit a *Government within a Government*, which is represented as a monster in politics, never heard of before. But, the objection is not true in point of fact: it is not a *Government within a Government*, in the sense of the political axiom to which the objection alludes. The

absurdity which the axiom repels, is that of two distinct and equal sovereignties affecting to operate, at the same time, upon the same portion of territory. But that is not the case, here; for the Cherokees do not pretend to any right of government, beyond the limits of the territory whose exclusive possession they hold, under the guaranty of the United States; and as long as the neighbouring States respect that guaranty, they have no government within the Indian limits; for they cannot exercise the powers of government there, without a direct and continued violation of the Indian right of possession. It is only by begging the question, and assuming the right of the neighbouring states to govern the Indians by state laws, within the Indian possessions, that the political solecism of a government within a government is produced. Instead of proving the right of the states to overleap the guaranty of the treaty, this right is assumed, and having thus gained foothold within the Indian limits, the *exclusive right* of government *on the part of the States* is, then, maintained on account of a political solecism created solely by this unwarranted assumption. For it is manifest that so long as the Indians confine their government within their own limits; and the states operate only on the territory exterior to those limits, there is no conflict of laws, no political paradox, no *imperium in imperio*: each moves in its own separate sphere, without the slightest collision with the other.

If by a *government within a government*, it be meant that the territory all around the Indians is under the government of several of the States, this is no political paradox, and is not at all the meaning of the axiom in question. It is a thing of every days occurrence, for a small state to be surrounded by the territories of another sovereignty. It was the condition of all the small republics in Europe: of Venice, of Silesia, of Lucca, the Hanse Towns, of Switzerland, and is, now, the condition of every district, arsenal, dockyard, fort and hospital under the exclusive government of the United States, within the bosom of the States. I see not why the government of Congress, within the D. of Columbia should not as well be considered a *government within a government*, because surrounded by the State authorities of Maryland and Virginia, as that the self-government of the Cherokees, within their limits, should be considered a *government within a government* because surrounded by the State authorities of Georgia, Alabama and Tennessee. In both cases, it is matter of com-

compact: and so long as the compact is respected, there is no collision of authorities, but the political relations of the parties are as separate and distinct, and their action as harmonious, as if they were parted by oceans.

The mutual annoyance resulting from the neighbourhood of the parties is a consideration of *mere expediency*, and does not touch the question of *right*: it is to the last alone, that my opinion is confined. But on this objection of expediency it may be observed that, in our own society, the inconveniences of bad neighbourhood are often severely felt; yet they are not considered as authorizing the stronger of the two to expel his neighbour, or to strip him of his legal rights, in order to get rid of his vicinity.

If the right of the states to govern the Cherokees within their borders be rested on the position that the ultimate dominion of the lands, now possessed by the Cherokees, belongs to these states, and that, as soon as these lands shall be evacuated by the Indians, the possession will fall to the States, the same is equally true of the District of Columbia; for if that district shall ever be evacuated by Congress, there is no doubt that the several portions of it will revert, respectively, to the States of Maryland and Virginia. But this future contingent consequence does not at all impair the present authority of Congress to govern the district, while it remains in their occupancy, nor does it, in the mean time, incommode, in the slightest degree, the action of the State governments around them.

If this right be rested on the position assumed by the Supreme Court, in the cases of Fletcher and Peck and M'Intosh and Johnson, that the States own the present fee in the lands occupied by the Indians, and may grant those lands, subject to the Indian occupancy; it is to be remembered that, according to the same decision, it is *only subject to the Indian occupancy* that the States can grant those lands, and that the grantees of the States, *though they take the whole title of the States*, cannot interfere with the Indian possession, until the title shall be extinguished by a voluntary cession on their part.

By these cases, therefore, the principle is established that these States, themselves, cannot interfere with the possession of the latter without their consent. How, then, can they parcel out the Indian lands among their coterminous counties, and incorporate them with these counties for the

purpose of government? How can they tax the Indian lands in common with their own, and sell them for nonpayment of taxes? How can they enter and sell them for debts? How can they regulate the conveyance of these lands? and, above all, how can they send their constables, bailiffs, sheriffs, inquests, *posse comitatus*, and military officers into the Indian lands, for the service of process, and the enforcement of their government, without a continual invasion of the Indian possession? According to the cases on which the opposite argument relies, the States have no right to divest or to disturb the Indian possession, against their consent; and the case of Johnson and McIntosh goes farther: for, in that case, the Supreme Court contemplate not only an *exclusive possession* of their lands by the Indians, and "*a legal as well as a just claim to retain that possession, and to use it according to their own discretion,*" but they contemplate, also, *the exclusive action of the Indian laws within the Indian territory, free from any power of control by the courts of the United States.*

In resisting the right of an individual to acquire a title to these lands by a purchase from the Indians, they say—"If an individual might extinguish the Indian title for his own benefit, or in other words might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of *their territory* and is held *under them* by a title dependent *on their own laws*. The grant derives its efficacy from their will; and if they choose to resume it, and make a different disposition of the land, *the courts of the United States cannot interfere with the protection of the title.*

"The person who purchases land from the Indians, *within their territory*, incorporates himself with them, so far as respects the property purchased; holds *their title* under *their protection*, subject to *their laws*. If *they* annul the grant, we know of no tribunal which can revise and set aside the proceeding."

If the right of the neighbouring States to extend their laws into the Cherokee nation, be defended upon the notion that they are a conquered people, in the first place the fact of such a conquest either by Great Britain or by those States cannot be maintained; and the fact of *such a conquest* by

the United States is denied. If there ever was a conquest of them at all, it was by the latter. But suppose for argument, that there was such a conquest by the United States; it is for the conqueror alone to say how far he will extend the rights and powers of conquest. Conquered nations have often been left in the undisturbed possession of their lands and of their own laws, and if the conqueror chooses so to leave them, what other power shall dispute his will? This has been done in the present instance. It was done by the treaty of Hopewell in 1785, and by that of Holston in 1791. The provisions of these treaties have been already detailed, and it has been shown by that detail, that the United States acknowledge the Cherokees to be a *sovereign nation*, clothed with attributes of *sovereignty too unequivocal and decisive* to be mistaken: that they not only acknowledge the territory in their possession to belong to them; but have bound the faith and honor of the United States *to guaranty that possession*, against the world: and that they have acknowledged that territory to lie *without the jurisdiction of any State or District of the United States*. If, therefore, the United States be the conquerors of these people, they have set limits to their own rights of conquest, by the treaty of peace: by that treaty, they have left these people a sovereign people, in the exclusive possession of their lands and their laws, and have guaranteed that possession to them. And since the conqueror himself, the sole arbiter on the occasion, has set these limits to his own rights of conquest, what other power can break through these limits in right of that conquest? Can Georgia do it? But she was one of the United States, by whom the supposed conquest was made, and, of necessity, a party to the very treaty which limited those rights of conquest. Her claim, therefore, is inconsistent with her own acts; and the very moment that she exhibits those treaties as evidence of conquest, she furnishes the proof which destroys her right to legislate over these people, by right of conquest.

It is understood as having been urged, among other things, in opposition to this course of reasoning, that these treaties are, in fact, not *treaties* in the sense of the law of nations: Why? because treaties are compacts between *sovereigns*, and it is said that the Cherokee Nation is not a sovereign. But this is begging the question. Before the invasion of this country by Great Britain, they were unquestionably sove-

reigns, for they had no earthly superior. When and by what cause were they divested of this character? By discovery? But this was a principle agreed on only by the discoverers themselves, the nations of Europe, for the adjustment of their own respective rights. As against the *aborigines*, it was nothing; it gave no right. It has never been pretended as giving the discoverer any right as against the Indians: unless the exclusive right to acquire the title of the *aborigines* in preference to and in exclusion of all other discoverers, be a right against the Indians themselves. Did they lose their sovereignty by conquest? Great Britain never maintained such a pretension. On the contrary, she treated with them as sovereigns, and left them in the undisturbed possession of their lands and their laws, and the right of self-government. But, under our constitution, who is to judge of the sovereignty of a Nation, with regard to its capacity to enter into a treaty? The treaty making power is lodged with the President and Senate of the United States. The power of treating involves, of necessity, the power of deciding on the sovereign capacity of the other party to enter into such a compact. But, in the present instance, this had been decided, again and again, by the President and Senate of the United States, the only tribunal to which our constitution refers the decision of this question. They have decided it by making and confirming many treaties with these people: treaties of peace at the close of their wars—treaties of cession—treaties regulating the intercourse between the contracting parties—treaties, on the faith of which, those States, who were parties to them through their regularly constituted organs, have derived vast and most valuable acquisitions of territory. If these compacts be not *treaties*, what are they? What name can be given to them which will authorize either the United States, or the States, individually, to violate them, at pleasure, consistently with the faith, justice and honor of this country?

But if the right of conquest be still the ground of this pretension, is this the time to assert it, or is one state of the union the party to assert it? All pretensions of conquest have been long since closed by treaties of peace and amity. On the faith of these treaties, the Cherokee Nation is now in profound peace with the United States, the only war making power under our constitution: and by these treaties, they are left and *guaranteed* in the possession of their remaining lands and

their self-government. What *new right of conquest* has arisen? Has there been a fresh war? None is pretended. What ground is there, then, for the pretension of any new right of conquest? What offence has been given by the Cherokee people, to call up such a question?

They have, it seems, framed a constitution, modelled a form of government, and made laws for themselves. But what offence is there in this? Their right of self-government was never before disputed: their mode of doing it, is, consequently, a question for themselves, alone. Why is it more offensive in them to have a written, rational constitution and laws, than to have them unwritten, barbarous, and resting in tradition, which they have had, heretofore, and which they have constantly enforced without any objection from the State of Georgia?

But there is something even yet more unjust and inhuman in this objection. We have been labouring, ever since the adoption of our constitution, to civilize these people. All the states, represented in the federal government, have pushed this subject of civilization, with all their power and at great expense. We have sought to civilize and to christianize them, on the avowed motives of *humanity to them*, and *safety to the neighbouring whites*. With the Cherokees, we have so far succeeded that they have adopted our manners, our dress, our agricultural and mechanical pursuits; they have imitated our form of government, and our laws, and Christianity, it is said, has made considerable progress among them. And the result now is, that we have quarrelled with our own success, and fallen out with this people for yielding to our solicitations. For how was the civilization, which we have been so long and so strenuously urging forward, to shew itself, otherwise than by the very fruits it has borne, and at which we now take offence? Is it a crime or offence in them to have yielded to our own exertions to civilize them? If it be a crime or offence in them, and furnish even a pretext to strip them of their rights, who is to blame for it? Would it not be most perfidious, and an offence on our part that would "smell to Heaven," to have sought and laboured at the civilization of these people for the last forty years, and this, too, under the fair guise of *humanity and religion*, and the moment that we have accomplished this purpose, to make that very civilization, which is our own work, a ground of offence in these people, and an excuse for driv-

ing them from their possessions, or enslaving them on their own territory.

What treaty have they violated by their constitution and laws? No treaty had prescribed to them any form of self-government. This matter was left wholly to themselves. No treaty had prohibited them from making a government and laws for themselves. *On the direct contrary*, the treaty of 1817, founded on the previous conferences between the President (Mr. Jefferson) and their nation in 1808--9, leaves them in possession of their lands, for the *express purpose of "engaging in the pursuits of agriculture and civilized life,"* and "*beginning the establishment of fixed laws and a regular government.*" And again the treaty of 1819, in allusion to these same measures, waives the delay of the census, for the express purpose that the Cherokees may the sooner "*commence those measures which they deem necessary to the civilization and preservation of their tribe.*" In having established a government and fixed laws, then, they have done no more than the United States have, by their late treaties, acknowledged their authority to do: and shall one of these states, itself a party to these treaties, affect to take offence at proceedings which they have sanctioned by their own treaties?

But these treaties furnish a still more weighty argument against the authority of the state to interfere with the Cherokee laws, or to displace them by the laws of Georgia. The right of the Cherokees to establish a government and laws of their own, is here sanctioned and authorized by two treaties made with the whole United States, the State of Georgia being one of them. With these treaties still in force, is it competent to the State of Georgia, alone, to destroy a work which all the states have sanctioned and authorized by solemn treaties? Can one state revoke or violate a treaty made by the whole? These treaties admit the right of the Cherokees to establish a government and laws for themselves within their own territory. Georgia alone (herself one of the parties to these treaties) now denies this right, and makes it highly penal in the Cherokees either to obey or to enforce their own laws. Thus; these treaties and the law of Georgia are directly repugnant. Which shall stand? The Constitution of the United States answers this question. Treaties are declared to form a part of the *supreme law* of the land, and the constitution commands that "the Judges in every state shall be bound thereby, any thing in the con-

stitution or laws of any state, to the contrary, notwithstanding.”

But, if their constitution and laws could be justly considered as offensive, who, under our constitution, has the right to complain, and to punish these people for this transgression?

To Congress alone belongs the right to declare war, as well as to regulate commerce, with the Indian tribes. Is this consistent with a right in the neighbouring states to *extinguish* these tribes on the lands which they occupy? For the law which has been placed before me amounts to an *extinguishment* of them, as a tribe of Indians. Not only are their own laws abolished by it, it being made highly penal in them either to enforce or obey them, but the laws of the state, exclusively, are extended over them, and what is still worse, by the same law these oppressed people are stripped even of the right of giving evidence in a court of justice against their oppressors, which is the common privilege of every citizen of Georgia, however humble, unprincipled or despicable. While, then, the constitution, laws and treaties of the United States acknowledge this tribe as a sovereign nation, while Congress alone has the power to declare war against them and to regulate commerce with them, and the President and Senate, alone, have the power to treat with them, while, by the second article of the treaty of Holston, they are placed expressly “*under the protection of the United States, and of no other sovereign,*” and while they are yet holding their lands under the pledged faith of the United States, given by that treaty, here is one of these same states which claims the right of entering their territory by force, of extinguishing the political existence of the whole tribe at once, and forever, and, at the same time, of disfranchising them even of one of the poorest and commonest privileges of the humblest citizen of Georgia, that of giving evidence in a court of justice against their oppressors!

If these things are to be permitted, what becomes of the stipulations of protection and guaranty, under the second and seventh articles of the treaty of Holston? What becomes of the good faith and honor of the United States.

Again: One of the conditions on which the State of Georgia ceded her Western lands to the United States, in 1802, was, that the latter would extinguish the Indian title to the lands within her remaining limits, *as soon as it could be done*

peaceably and on reasonable terms.” Here is an admission of the *existing title* of these Indians, and an agreement that it is *to be extinguished by the United States*: when and how? as soon as it can be done *peaceably* and on *reasonable terms*: that is to say, that no force is to be employed in the case: the Indians are, therefore, to be at liberty to cede these lands or not, at their pleasure; and if they choose to cede them, the terms shall be such as shall receive their assent. The United States have gone on to redeem this pledge as fast as the Indians have been disposed to cede. These people are now disposed to cede no more of their lands, but to retain such as are yet left to them. Can the State of Georgia require the United States to *compel* these Indians to relinquish their lands? Certainly not: for the express stipulation is, that the extinguishment of title shall be *peaceably* made, and on *reasonable terms*. Does it consist with the title of the Indians, thus admitted, that the State of Georgia, herself, shall enter forcibly on their possessions, and drive them out, at the point of the bayonet, or, what is the same thing, potentially, that she shall put it to their option either to remove, or to remain and live in subjection and slavery to Georgia, on so much of their own lands as she shall be pleased to assign to them? This question can admit of but one answer.

It has been said that several other states of the Union have legislated over the tribes of Indians within their chartered limits; and it is insisted, that the State of Georgia and the other states within whose boundaries the Cherokees dwell, have the same right of legislation with regard to them.

Before the authority of these precedents can be allowed to establish the right of legislation in the present instance, it will be necessary to enquire

1. Whether the tribes over which the other states have thus legislated, were, at the time, acknowledged by the United States to be sovereign nations, and were under the protection of the United States by treaty, with a solemn guaranty by treaty of the exclusive possession of their lands?

2. Whether such tribes were in full force and strength as a nation, as the Cherokees now are, or whether they had melted away to a few individuals, who had no fixed habitation, but wandered about in the white settlements, begging a subsistence from the charity of the whites?

3. To what extent the legislation of the States was extended over them? whether it went to annihilate their own laws, usages and institutions altogether, and to subject them to the whole mass of State laws, civil and criminal? to extinguish their existence as a separate nation, and to blend them, by force, completely with the whites, under the degrading disability of giving evidence in a court of justice? In the State of New York, one of the States whose example has been quoted, all this has been disavowed. In a recent case in that State (*Goodell vs. Jackson*, 20 Johnson's reports, 693—decided in 1822) the highest court of that state have, with one accord, pronounced the Indian tribes within the State to be *a separate people, alien and sovereign tribes, and not citizens of the United States, not born within the allegiance of the State, nor owing it allegiance, but owing allegiance only, to their own tribe.*

4. But, what is more important than all, it must be inquired whether the question of the right of these States to legislate over the tribes within their chartered limits, has been ever raised and decided by a competent tribunal, in favor of that right? or whether these ignorant and comparatively impotent people (the Indians) have silently submitted to this legislation, because unable to resist it by force, and too poor and ignorant of their rights to submit it for decision to an impartial and enlightened court of judicature? The fact of the exercise of a power is no proof of its right. Instances of usurpation by the strong, over the weak, have abounded in every age and every nation, but they have never been considered as establishing the right of the usurper, or justifying, by the precedent, a right of usurpation in others. Augustus, at the close of those wars which made him the emperor of Rome, turned out the peaceable land-holders of Italy, from their possessions, and gave them to his victorious legions; but the precedent has never been considered as establishing the right and justice of the procedure, or as worthy of imitation by any just Prince or State.

On every ground of argument on which I have been enabled by my own reflections, or the suggestions of others, to consider this question, I am of the opinion.

1. That the Cherokees are a sovereign nation: and that their having placed themselves under the protection of the United States does not at all impair their sovereignty and independence as a nation. "One community may be bound

to another by a very unequal alliance, and still be a *sovereign State*. Though a weak State, in order to provide for its safety, *should place itself under the protection of a more powerful one*, yet according to Vattel (B. 1 Ch. 1, § 5 and 6,) *if it reserves to itself the right of governing its own body* it ought to be considered as an *independent State*." 20 Johnson's Reports, 711, 712, Goodell vs. Jackson.

2. That the territory of the Cherokees is not within the jurisdiction of the State of Georgia, but within the sole and exclusive jurisdiction of the Cherokee nation.

3. That, consequently, the State of Georgia has no right to extend her laws over that territory.

4. That, the law of Georgia which has been placed before me, is unconstitutional and void. 1. Because it is repugnant to the treaties between the United States and the Cherokee nation. 2. Because it is repugnant to a law of the United States passed in 1802, entitled "an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." 3. Because it is repugnant to the constitution, inasmuch as it impairs the obligation of all the contracts arising under the treaties with the Cherokees: and affects, moreover, to *regulate intercourse with an Indian tribe*, a power which belongs, *exclusively*, to Congress.

WM. WIRT.

Baltimore, June 20th, 1830.