8 Yer. 256

16 Tenn. 256
Supreme Court of Tennessee.

THE STATE
v.
FOREMAN.

July Term, 1835.

West Headnotes (5)

[1] **Commerce**
Subjects of Commerce in General

"Commerce" means not only traffic, but also intercourse, between nations.

[2] **Commerce**
Subjects and Regulations in General

The statute of 1829, extending the jurisdiction of the state over the Indian Nation, was not in violation of the commerce clause.

[3] **Criminal Law**
Conferring Extraterritorial Jurisdiction
Indians
Jurisdiction and Power to Enforce Criminal Laws

The act of 1833, ch. 16, extending the criminal laws of the state, so far as to punish murder, rape and larceny, to its southern boundary, and over that part of the Cherokee nation, lying within Tennessee, is constitutional.

[4] **Indians**
State Court or Authorities

Under Acts 1833, c. 16, extending the criminal jurisdiction of the state to its southern boundary, the state courts have jurisdiction of an indictment for murder committed by a Cherokee Indian upon a Cherokee Indian within the Cherokee Nation.

[5] **Indians**
State Court or Authorities

The defendant was indicted in the circuit court of M'Minn county, for the murder of John Walker. He pleaded that he was a native Cherokee Indian; that John Walker, for whose murder he was indicted, was also a native Cherokee; and that the offense charged, if committed at all, was committed beyond the rightful jurisdiction of the courts of Tennessee, and within the Cherokee nation; and that the act of the Legislature of Tennessee, passed in 1813, extending the jurisdiction of the state, over the country now in the occupancy of the Cherokees, was unconstitutional and void: Held, that the plea was insufficient, and that the courts of Tennessee had jurisdiction to punish such crimes committed within its chartered limits, as are specified in the act of 1833.

2 Cases that cite this headnote

****1** ***256** The defendant was indicted in the circuit court of McMinn county for the murder of John Walker. He pleaded that he was a native Cherokee Indian; that John Walker, for whose murder he was indicted, was also a native Cherokee; and that the offence charged, if committed at all, was committed beyond the rightful jurisdiction of the courts of Tennessee, and within the Cherokee Nation; and that the act of the legislature of Tennessee, passed in 1833, extending the jurisdiction of the state over the country now in the occupancy of the Cherokees, was unconstitutional and void.

To this plea the attorney for the state demurred. The circuit court overruled the demurrer and sustained the plea, from which judgment the solicitor general prosecuted this appeal in error.

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Attorneys and Law Firms

J. Crozier, Solicitor for the Fourth District, and *George S. Yerger,* for the State.

S. Jarnagan, for defendant.

***257** CATRON, Ch. J., delivered the opinion of the court.

On the 18th of November, 1833, the legislature of this state extended the civil jurisdiction of the counties of Marion, Hamilton, Rhea, McMinn, and Monroe, so as, by the extension of the limits of the several counties, to include the country within the occupancy of the Cherokee Indians which lies within the boundary of the state of Tennessee. But the act declares that our courts shall not take jurisdiction of any criminal offence committed within the Indian territory by any Cherokee Indian residing therein, except for murder, rape, or larceny, and the usages and customs of said Cherokee Indians, in all other respects, are allowed to them within the Indian boundary; (2) no white man shall be allowed to settle on the lands of the Indians; nor (3) shall the act be construed to invalidate any law or treaty of the United States, made in pursuance of the Constitution thereof, nor shall the act authorize any entry, appropriation, or occupancy of any of the lands within the Cherokee country.

Foreman was indicted in the McMinn circuit court, in 1835, with another, for the murder of John Walker within said county.

To the indictment the defendant, in substance, pleaded that he was a Cherokee native, a member of the Cherokee Nation of Indians, residing within the jurisdiction of the nation; and that John Walker was a Cherokee native, a member of the same nation, residing therein; and that the crime, if committed, was committed within said nation, and within the jurisdiction of its courts; that it was an independent nation, with full powers to try said offence, and that the laws of Tennessee could not and did not have any force there.

To this plea the attorney for the government demurred. The circuit court determined that the legislature had no power to extend the jurisdiction of our courts over the Cherokee Indians within our limits, overruled the ***258** demurrer, and ordered the defendant to be discharged; from which judgment the attorney general appealed to the supreme court.

****2** On this complicated and important question much labor has been bestowed, and which has resulted in the conclusion that the legislature has the power to cause to be punished Indian natives, for crimes committed within the Cherokee limits, and that the act of 1833 is not in conflict with either the treaties or laws of the United States constitutionally made.

The authorities examined are found in our history, colonial charters, constitutions--state and federal--legislative acts, Indian treaties, resolutions and acts of Congress, executive acts and documents, and judicial decisions, embracing near four centuries of time, and such a vast mass of learning and evidence as to render it impossible to compress the authorities into a judicial opinion save to a very partial extent; yet, to some extent, it is indispensable for an understanding of the subject. Our rights on this continent had their origin in discovery in the fifteenth century. In 1497 John Cabot, a Venetian, then residing in England, was fitted out with a ship by King Henry VII., to proceed upon a voyage of discovery, and to subdue and take possession of any lands unoccupied by any christian power, in the name and for the benefit of the British crown. He was accompanied by four small barques, fitted out by the merchants of Bristol, from which point he sailed in May, supposing when he passed the islands discovered by Columbus, three years before, he would reach the great continent of India, and by bearing northwest he might reach China. After sailing west for some weeks he discovered Newfoundland and St. Johns. He landed on these, made some observations, and brought off three of the natives. Continuing his course westward, he soon reached the continent of North America, and sailed along it from the fifty-sixth to the thirty-eighth degree of latitude, ***259** from the coast of Labrador to that of Virginia. Robertson's History of America, book 9. The subjects of Henry VII. were undoubtedly, says Robertson, the first who had visited that part of the American continent, and were entitled to whatever right of property prior discovery is supposed to confer.

The pope claimed the right to dispose of all countries possessed by infidels-- a right that it would have been deemed as absurd to deny before and during the fifteenth century as it would now be absurd to admit. In virtue of this right he had, in 1344, erected the Canary Islands into a kingdom, and bestowed it on Lewis de la Creda, of the royal family of Castile. The most successful navigators and discoverers, previous to Columbus, in the fifteenth century

were the Portuguese--especially under the reign of John, and under the auspices of his son Henry, duke of Visco, a man greatly in advance of the age in which he lived, in scientific acquirements, and rising far above monkish superstition, but adroitly profiting by its arrogance, rapacity, and power. Having made discovery of the Island of Madeira, and the coast of Africa as far as the river Senegal, but meeting with opposition from some of the grandees--who, from ignorance, from envy, or from that cold and timid prudence which rejects whatever has the air of novelty or enterprise, condemned the prince's schemes as chimerical, and intimated they were sinful, that their fathers had rested satisfied with cultivating the territory providence had allotted them, and that the strength of the kingdom was already exhausted by the expense of attempting discoveries--to silence all cavil at once, and obtain the sanction of a power whose fiat was law to kings and emperors, Prince Henry applied to the pope in favor of his operations, representing in pompous terms the pious and unwearied zeal with which he had exerted himself during twenty years in discovering unknown countries, the wretched inhabitants of which were utter strangers to true religion, wandering ***260** in heathen darkness or led astray by the delusions of Mahomet. He besought the holy father, to whom, as the vicar of Christ, all the kingdoms of the earth were subject, to confer on the crown of Portugal a right to all the countries, possessed by infidels, which should be discovered by the industry of its subjects and subdued by the force of its arms. He promised to make it his chief object to spread the knowledge of the christian religion, and to establish the power of the holy see and increase the flock of the universal pastor. His holiness was entreated to enjoin all christian powers, under the highest penalties, not to molest Portugal while engaged in this laudable enterprise, and to prohibit them from settling in any of the countries which the Portuguese should discover.

****3** The high penalties referred to by Prince Henry were those imposed by a bull of excommunication, and were ample to restrain all christendom, then exclusively catholic, from interfering with the discoveries of Portugal. The beneficial consequences of such a step were apparent to the see of Rome, anxious to extend its power, then successfully resisted by the followers of the religion of Mahomet in Western Asia, Prince Henry's object being to find and subdue that country on the south. Eugene IV., the pontiff to whom this application was made, eagerly seized the opportunity which now presented itself. A bull was accordingly issued, in which, after applauding in the strongest terms the past efforts of the Portuguese, the pope exhorted them to proceed in that laudable career on which they had entered, and he granted them an exclusive right to all the countries which they should discover from Cape Non, on the northern coast of Africa, to the continent of India. Robertson's History of America, book 1. The spirit of propagating the then supposed true faith combined itself with that of discovery under the highest earthly sanctions, and drew to the service of the prince of Portugal crowds of enterprising adventurers from ***261** every part of Europe, the Venetians and the Genoese in particular, who were at that time superior to all other nations in naval affairs, and who acquired more perfect knowledge in this new school of navigation. In emulation of these foreigners the Portuguese exerted their own talents. The nation and the merchants seconded the designs of the prince. They ventured boldly into the open sea--discovered the Cape de Verd Islands and the Azores. This first essay in maritime affairs, feeble and unskillful as it appears, compared to the present state of maturity and improvement in navigation, gave the impulse that thirty years after led to the discovery of America; and to the pope's bull of protection and grant of the heathen lands discovered is the world principally indebted for the grand result. That such a power should be recognized in the head of the church excites our wonder; yet it is entitled to our admiration when we remember that the Roman empire had been overthrown by a race of men ignorant and barbarous as any known to European history, and that the lingering remains of civilization was only to be found amongst a few priests, who, by force of mind and concert, established a church government of such controlling influence as again to civilize a considerable portion of mankind. The means employed are foreign to our present purpose. Whether the pope's bull was enforced through the superstitious fears of christendom, or by the sword, is immaterial; it gave the law of nations, and had accorded to it the unqualified sanction of all christian governments. Nor did the kings of England dare to call it in question, either before or after the secession of that country from papal authority. During the reign of Edward IV. some English merchants, having resolved to open a trade with the coast of Guinea, John II. of Portugal despatched embassadors to the king of England, in order to lay before him the right Portugal had acquired, by the pope's bull, to the dominion of that country, and to request of him to prohibit ***262** his subjects from prosecuting their intended voyage. Edward was so much satisfied with the exclusive title of the Portuguese that he issued his orders in the terms which they desired.

**4 After Columbus had returned from his first voyage of discovery, and when preparing to set out upon his second, with the most formidable and best appointed fleet heretofore known, Ferdinand and Isabella were not willing to rest their title to the possession of the newly-discovered countries upon the operations of the fleet alone, but the example of the Portuguese, as well as the superstitions of the age, made it necessary to obtain from the Roman pontiff a grant of those territories which they wished to occupy. The pope, as the successor of St. Peter, and vicar and representative of Jesus Christ, was supposed to have a right of dominion over all the kingdoms of the earth. Alexander VI. was applied to, and granted in full right to Ferdinand and Isabella of Spain all the countries, inhabited by infidels, which they had discovered or should discover. As it was necessary to prevent this grant from interfering with that formerly made to Portugal, he appointed that a line, supposed to be drawn from pole to pole, a hundred leagues to the westward of the Azores, should serve as a limit between them; and, in the plenitude of his power, bestowed all to the east of this imaginary line upon the Portuguese, and all west of it upon the Spaniards. Zeal for propagating the christian faith was the consideration employed by Ferdinand in soliciting this bull, and is mentioned by Alexander as the chief motive for issuing it. See Robertson, vol. 1, p. 105. This title was then deemed completely valid to authorize the monarchs of Spain to extend their discoveries, and to establish their dominion over such portion of the globe. Id.; Vattel, b. 1, ch, 18, sec. 208; 1 Irving's Col. 171.

The doctrine originated with the crusades--expeditions to recover the holy land and sepulchre from infidels, *263 and to accomplish which, eventually, was one of the leading motives that gave that power of energy and perseverance to Columbus which resulted in the discovery of America. The master-spring was religious enthusiasm, to an extent that the finger of scorn pointed at him as a madman. To the purposes of recovering the holy land from the infidel power of the followers of Mahomet, Columbus made a vow he would appropriate the profits arising from his anticipated discoveries. To this scheme he was a devotee to the day of his death, and solemnly provided for its accomplishment in his will. 1 Irving's Life of Col. 60, 73. Another object was the discovery of pagan nations that might be converted to the faith of the christian, and subdued and governed as a means of propagating that faith and extending the dominion of the church. Ib. 64, 72. The domination of the clergy extended over the state as well as the church; nor was it uncommon to find cardinals and bishops at the head of armies. According to the doctrine of the day, every nation that refused to acknowledge the truths of christianity was fair spoil for the christian invader. Id. 72, 73. It was contemplated by conquest to bring about what had been foretold in holy writ--that "the light of revelation should be extended to the remotest ends of the earth." And when the court of Rome was applied to, in 1495, by the king and queen of Spain, for a bull confirming in them the discoveries made by Columbus, the grand achievement was pronounced by the papal see the fulfilment of one of the sublime promises made to the church; it was giving to it "the heathen for an inheritance, and the uttermost parts of the earth for a possession." Id. 186. In accordance to this claim was drawn up a formula, digested by the most distinguished and profound jurists and divines of Spain, in which the rights claimed by the church and the crown are fully set forth, and which was the authority and guide to all Spaniards taking possession of and settling newly-discovered countries inhabited *264 by infidels. Its terms are curious enough, but nohow differing from the British charters of settlement, in substance. Neither allowed to the natives any political rights. 3 Irving's Col. 66, 347. This was not only the recognized national law of Spain, but of France and all Europe, in 1803, when we obtained Louisiana--then a province of France, two years before obtained from Spain--and on which rests our rights of sovereignty and soil to all that country now appropriating to the settlement of the Indians transferred from this to the west of the river Mississippi, and for which we are warring with the Pawnee, the Osage, and other tribes, to whose claim we pay not the least respect. Every West India island and the South and North American continents were seized upon by the right of discovery; almost every christian power occupied parts thereof--catholic and reformed equally claiming to hold and govern the parts first discovered, not only as against Europeans, but against the people found in the respective countries. Neither the fierce Carib--who was a notorious cannibal--his naked and unoffending neighbor of the islands preyed upon, the amiable people of the southern continent, governed by the Incas, nor those of Mexico, more than the hardy and untamable race found here, were allowed any rights; and the claim to sovereignty (and, until recently, to soil) by the first christian discoverers was enforced by the sword. From the opening of the first crusade, to this day, it is amongst the most curious and most prominent truths in the history of man.

**5 The same motive that impelled the popes, in the fifteenth century, to send forth the Portuguese and Spaniards to conquer, equally influenced the English in more enlightened ages. Calvert, the governor of Maryland, sent out by Lord Baltimore, in 1632, to form a colony, soon as he landed on the shore, took possession of the country "for our Savior, and for our sovereign lord the king of England." 1 Graham's Hist. of North America, 9. So when *265 the first charter of Carolina was granted by Charles II., the motive assigned was to propagate the blessings of religion and the civilizing of a barbarous land. Such men as Lords Clarendon and Berkley aver "that, being excited with a laudable and pious zeal for the propagation of the gospel, they desire a certain country in the parts of America not yet cultivated and planted, and only inhabited by some barbarous people who had no knowledge of God." Ib. 82.

Much as we may contemn the hypocrisy of the pretence for the grant of the Carolinas, yet the principle by which the country was taken possession of was the only rule of action possible to be observed--one not open to question in a legal point of view, or morally wrong; it was more just the country should be peopled by Europeans than continue the haunt of savage beasts, and of men yet more fierce and savage, who, "if they might not be extirpated for their want of religion and just morals, they might be reclaimed for their errors" (1 Story's Com. 6); a rule in the course of application to the natives of New Holland, now settling by Great Britain, and which will, ere long, be of necessity applied by us to the Pawnees and Blackfoot tribes of Indians, with many others near to, and on the west side of, the Rocky Mountains; a rule of which savages of this description have no just right to complain. It is the law they daily practice against each other, and under which nations have melted away in the presence of the Indians; for our ancestors found on this continent nations obviously far advanced in civilized life, as the memorials left us show. Towards a people whose principal avocation was war and human destruction no other rule than that declared by Coke, in Calvin's case, could be observed; nor from the earliest history of man has any other than that they were perpetual alien enemies been recognized. "All infidels are, in law, perpetual enemies, for the law presumes not that they will be converted, that being a remote possibility; *266 for between them, as with the devils, whose subjects they be, and the christian there is perpetual hostility, and can be no peace; for the apostle saith (2 Cor. vi. 16): "And what concord hath Christ with Belial? or what part hath he that believeth with an infidel?" Calvin's Case, 7 Co. 33; 4 Inst. 155. This was the undoubted national law in the days of Coke and of James I.; and, disgusted as we may be with its bigoted manner of assertion and indiscriminate execution, yet it continued to be as much the law at the Revolution as that the oldest son took the whole estate. And so Judge Haywood declared the rule in reference to the Cherokees, in 1826. 2 Yer. 152.

**6 That mere wandering tribes of savages, or such as have a stated place of residence, should claim a vast extent of forest, as hunting grounds, for the nurture of wild animals, and exclude the cultivation of the earth, is unreasonable and unjust. The earth belongs to all men in general, destined by the Creator to be their common habitation; and all derived from nature the right of drawing from it their subsistence and those things suitable to their wants. This it would be incapable of affording was it uncultivated. Every nation is, then, obliged by the law of nature to cultivate the ground that has fallen to its share. Those people, like the ancient Germans and the modern Tartars, who, having fertile countries, disdain to cultivate the earth, and choose rather to live by rapine, are wanting to themselves, and deserve to be exterminated as savage and pernicious beasts. There are others who avoid agriculture, and would live only by hunting and their flocks. This was allowable in the first ages of the world, when the earth, without cultivation, produced more than was sufficient to feed its few inhabitants. But at present, when the human race is so greatly multiplied, it could not subsist if all nations resolved to live in this manner. Those who still retain this idle life usurp more extensive territories than they would have occasion *267 for were they to use honest labor, and have, therefore, no reason to complain if other nations, more laborious or too closely confined, come to possess part. Thus, though the conquest of the uncivilized empires of Peru and Mexico were notorious usurpations, the establishment of many colonies on the continent of North America may, on their confining themselves within just bounds, be extremely lawful. The people of these vast countries rather overrun than inhabited them. Vattel, b. 1, ch. 7.

It is a celebrated question, says the same author, whether a nation may lawfully take possession of a part of a vast country in which there are found none but erratic nations, incapable, by the smallness of their numbers, to people the whole. It has been observed, in establishing the obligation to cultivate the earth, that these nations cannot exclusively appropriate to themselves more land than they have occasion for, and which

they are unable to settle and cultivate. Their removing their habitations through these immense regions cannot be taken for a true and legal possession; and the people of Europe, too closely pent up, finding land of which these nations are in no particular want, and of which they make no actual and constant use, may lawfully possess it and establish colonies there. Were it otherwise, our globe would not be sufficient to maintain a tenth part of its present inhabitants. People have not, then, deviated from the views of nature in confining the Indians within narrow limits.

Partly in conformity with these just rules of national law, but principally by the authority of the rule, established by the see of Rome, conferring soil and sovereignty on the discoverer, was this continent settled and colonial charters granted.

****7** All the charters vested sovereignty in the grantees, substantially in the same terms. By that of the 17th, Charles II., to Lord Clarendon and others (13th June 1665), granting the Carolinas, it is declared and covenanted on part of the crown:

"And forasmuch ***268** as we have made and ordained the aforesaid Edward, Lord Clarendon, etc., their heirs and assigns, the true lords proprietors of the province or territory aforesaid, know ye, therefore, moreover, that we, reposing especial trust and confidence in their fidelity, wisdom, justice, and provident circumspection, for us, our heirs and successors, do grant full and absolute power, by virtue of these presents, to them, the said Edward, earl of Clarendon, etc., their heirs and assigns, for the good and happy government of the whole province or territory, full power and authority to erect, constitute, and make several counties, baronies, and colonies of and within the said provinces, territories, lands, and hereditaments in and by the said letters patent granted, or mentioned to be granted, as aforesaid, with several and distinct jurisdictions, powers, liberties, and privileges; and also to ordain, make, and enact, and under their seals to publish, any laws and constitutions whatsoever, either appertaining to the whole state of the province or territory, or of any distinct or particular county, barony, or colony of or within the same, or to the private utility of particular persons, according to the best directions, by and with the advice, assent, and approbation of the freemen of said province or territory, or of the freemen of the county, barony, or colony for which such laws or constitutions shall be made; and the same laws to execute upon all people within said province or territory, county, barony, colony, or the limits thereof, by imposition of penalties, imprisonment, or any other punishment--yea, if it shall be needful, and the quality of the offence require it, by taking away member or life--to be done by the lords proprietors, their deputies, or judges; to grant pardons, establish courts of justice," etc.

Full power and authority is given to the lords proprietors, their heirs and assigns, at their will and pleasure, to assign, alien, grant, demise, or enfeoff the premises, or any part or parcel thereof, to him or them that shall be ***269** willing to purchase the same, and to such person or persons as they shall think fit, to be held of them the said Edward, Lord Clarendon, etc., and not of us, our heirs and successors.

Power to train and organize armies, erect and maintain forts, and to make war, defensive and offensive, is given, of which we will have occasion hereafter to speak.

The above charter included what now constitutes the states of North and South Carolina, Georgia, Tennessee, Alabama, and Mississippi, for although it purported to extend west to the South Sea, yet a great portion of the country was undiscovered, and that west of the Mississippi river was afterwards claimed by France in virtue of the discovery and settlement made by La Salle, in 1685, under the authority of Louis XIV. The absolute powers granted to the proprietors had hardly an exception, save that the country should be a province of England; the reasons for which are found in the volatile and reckless character of Charles II., and in the characters and situation of the eight eminent persons to whom the grant was made, whose fidelity the monarch had experienced in his exile, "or whose treachery had contributed to his restoration," and who were his principal officers of state.

****8** The province under the first charter, in 1663, had been divided into two counties, Cape Fear river being the boundary of division. The northern was called Albemarle, the southern Clarendon, and eventually the province was separated into North and South Carolina. Within the limits of the northern colony, and in the midst of whom the English formed their early settlements, were various tribes of Indians: the Pasquotanks, Tuteloes, Meherrins, Wapomeaks, and Chowanocks, on the north; the Tuscaroras, Hatteras, Coraminese, Pamplicoes, Mattamuskeets, and Croatans, on the east; the Saras, Neuses, Saponas, and Sippahaws, on

the south; with the Cherokees and Chickasaws on the west, extending far inland. ***270** Those were the people "there abiding," for whose better government the charter was published to all to whom it might concern. Martin, in his History of North Carolina, informs us (vol. 1, pp. 127-128) that the tribes within the range of the North Carolian settlements had large towns, enclosed with huge palisadoes, and sent several hundred, and some several thousand, warriors to the field; others, less stationary and numerous, depended for subsistence on the chase, and wandered about in search of advantageous hunting grounds. The more peaceful were sometimes disturbed by irruptions from the warlike nations that dwelt on the northern lakes, even as far as the Simmagons, who dwelt in Canada, and who, while their country was covered with snow, came southerly to prey on the occupants of a softer climate. The Indians from the west side of the Apalachian Mountains, even those of the Mississippi, at times joined the northern invaders, and the country exhibited, in miniature, the spectacle which Europe and Asia have witnessed in the irruptions of the Huns, the Goths, and the Vandals on the Gauls and the Germans, and the Tartars on the Chinese

Thus surrounded by savages destroying each other, for mere pastime, with the fierceness of wild beasts, a colony was attempted in their midst on the coast of Carolina, and, after a struggle of about three-fourths of a century, was fairly crowned with success. This great effort to build up a civilized community was accomplished partly by compacts with the Indians, partly by laws passed for their government, but mainly by the sword. The tribes found inland have passed under the dominion, and melted away under the influence and superior powers, mental and moral, of the white man, as did the savages of Europe, Asia, and Africa pass under the dominion of the Romans, and as will him of Australasia, Africa, and the Rocky Mountains be compelled to submit to the stroke of fate sooner or later--to accept a master or perish. It is the destiny of man. Ignorance and division cannot stand ***271** before science and combination, nor can the civilized community exist by the side of a savage foe. And foes to each other, and foes to all men, our ancestors found the North American savages, the main business of their lives being war, and that a war of extermination (the foe taking no prisoners, save for the exercise of a refined cruelty--to burn him at the stake); a people that had no government, and with whom the right of the strongest alone was respected.

****9** The philosopher and jurist of the quiet city may easily prove that such a people had undoubted rights of soil and of sovereignty, and sympathy and eloquence may, as in the Cherokee case, powerfully urge their adoption on the courts of justice--forgetting that it was impossible for our ancestors to recognize the rights claimed; that they had actually, by law and the sword, established what their charters granted--dominion over all abiding within their limits--and this upon a principle admitting of no countervailing right, that of self-preservation. They were obliged to conquer and to govern, or to perish. Such rights as they acquired were transmitted to us, unless they have been impaired by the American Revolution, or the institutions, laws, and treaties consequent upon the Revolution. If so, to the destruction of sovereignty it can be safely affirmed, the people of North Carolina and Tennessee have been overreached by indirect provisions in the federal Constitution, treaties, and acts of Congress of which they were unaware for nearly fifty years after we declared ourselves independent of Great Britain.

In the cause of Worcester against the state of Georgia it is declared "that the colonial charters asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned. That the power of war was given only for defence, not for conquest. 6 Peters, 546. That our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the ***272** internal affairs of the Indians, further than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands, when they were willing to sell, at a price they were willing to take, but never coerced a surrender of them. The king also purchased their alliance and dependence, by subsidies, but never intruded into the interior of their affairs, or interfered with their self-government so far as respected themselves only." Is it true of the Carolina charter that it asserted a title against Europeans only, and that it was considered as blank paper in reference to Indian rights?

Parts of the charter have been set forth, and in language cogent as its distinguished authors were masters of, asserts a title against all within its limits, both as to soil and sovereignty, and provides most distinctly for the exercise of the latter over the Indian natives; and the power of war is given in the amplest terms to the proprietors, to enforce the charter.

The crown of Great Britain did not recognize in the North American savages any possessory rights of soil, or afford them protection, save in particular cases, until the middle of the eighteenth century, and then only as matter of policy. The first distinct general prohibition on British subjects not to settle within the Indian hunting grounds, or not to purchase lands from the Indians, was by the proclamation of George III., in 1763, consequent upon the conquest of Canada and the treaty of Paris. The governors of the newly-acquired countries on this continent, as also the governors or commanders-in-chief of the other colonies in America, "are prohibited for the present, until our further pleasure be known," not to grant warrants of survey, or pass patents for lands, beyond the Indian boundaries; which lands, not having been ceded to or purchased by us, are reserved to the Indians, or any of them. That the absurdity of conferring the right of sovereignty on the various tribes of Indians within the British limits, who had no organized ***273** governments, and who never had been recognized by any civilized power as belonging to the family of nations, might not be inferred, the proclamation provides: "And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty, protection, and dominion, for the use of said Indians, all the lands and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company, as also all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest, as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchase or settlements whatever, or taking possession, of any of the lands above reserved, without our special leave and license for that purpose first obtained."

****10** It is next provided that those residing on the Indian lands remove therefrom. And because of frauds and abuses having been committed in treating, by individuals, for Indian lands, it is strictly enjoined "that no private person do presume to make any purchase from the Indians, of any lands reserved to them within those parts where we have allowed settlements, but the same shall only be purchased, for us, in our own name, at some public assembly or meeting of said Indians, to be held for that purpose by the governor of our colony within which they shall lie."

The last clause requires all officers, as well military as those employed in the management and direction of Indian affairs, "within the territories reserved, as aforesaid, for the use of said Indians," to apprehend all persons flying from justice.

How little ground there is for the assumption that the British government did not assert dominion over the Indians is manifest from this most important state paper, which has been from its date to this day the charter of ***274** Indian relations to the colonies and to these states. That private persons could not purchase lands from the Indians was always the law, because the lands were granted by the charters, or, where the governments were royal, the lands were holden to belong to the crown, regardless of the Indian occupancy, if such was its pleasure.

How the charter to Lord Clarendon and others was "considered" by the grantor, Charles II., appears from its face; and how it was considered by the grantees their future acts will best attest.

Of the forms of government established and administered by the proprietors, or of the laws enacted by the colony of North Carolina, for the first fifty years after its settlement, we have no particular account. The first regular legislative acts recognized by the states of North Carolina and Tennessee are those of 1715, when an act was passed (ch. 59) restraining the Indians from molesting or injuring the inhabitants of that government, and securing to them the right and property of their own lands. Iredell, 31.

In 1711 the Tuskarora war broke out, there having been a combination to destroy the colony by all the Indian tribes on its immediate border. The colonists on the Neuse, about Newbern, were generally massacred in the most treacherous and cruel manner. This revolt was suppressed with the aid of troops from South Carolina; in allusion to which the statute of 1715 recites: "Whereas, before the late war, daily and grievous complaints of the depredations of the Indians were exhibited against them by divers persons bordering upon and residing near to the habitations of the said Indians, for the prevention of the like disorders for the time to come," etc., "it is enacted that whoever shall discover any Indians killing, hunting, or in pursuit of any horses, cattle, or hogs, the property of a white man, every such person, on discovery or sight thereof, may, and is hereby empowered to, apprehend and seize every such Indian or Indians, and him or them so ***275** taken to convey before some one of the commissioners to be appointed for Indian affairs or before the

next magistrate, which commissioner or magistrate, together with the head man or ruler of the town to which such Indian delinquent belongs, is and are hereby empowered to punish every such delinquent in such manner as the nature of the case may require, and to award restitution to the party injured for all damages he may have sustained; saving always an appeal to the governor and council by either party that may think himself aggrieved.

****11** Sec. 3. That if any difference shall for the future arise between any white man and Indian concerning trade, or otherwise, howsoever, every such difference shall be heard, tried, and determined by such commissioners as the governor or commander-in-chief for the time being shall appoint, together with the ruler or head man of the town to which the Indian belongs; saving only the right of appeal as herein before saved and excepted."

Further than this the exercise of sovereignty was not desirable; yet that the whole power to govern the Indians was claimed and exercised to every necessary extent is free from doubt. The statute of 1715 stands unrepealed to this day; it extended to every part of the government of North Carolina, and, although it may not in practice have been extensively applied to the Cherokees, still no judge of the colony could pronounce it void because the charter "was a blank piece of paper," and conferred no power to enact the statute.

Unfortunately, in the discussion of our Indian relations, the claims to soil and to sovereignty have been confounded as identical. Nothing is further from truth, or more calculated to embarrass the understanding of the subject. From the first settling of Carolina, so early as the year 1669, it was ordained by the 112th constitution of the form of government, drawn up for the colony by Mr. Locke, that "no person whatever shall hold or claim any land in Carolina, by purchase or gift, or otherwise, from the natives, ***276** or any other whatsoever, but merely from and under the lords proprietors, upon pain of forfeiture of all his estate, movable or immovable, and perpetual banishment." 1 Martin's H., Appendix.

When this scheme of government, so celebrated for its author and its extravagant folly, was abandoned, a similar provision was made by the 4th section of the act of 1715, declaring that no white man should purchase from an Indian, without leave from the governor and council. After the charter was surrendered by the proprietors (1729), the royal government, by the act of 1748, ch. 2, secs. 5 and 8, provided that "no person, for any consideration whatever, shall purchase or buy any tract or parcel of land claimed or in possession of any Indian or Indians, but all such bargains and sales shall be, and are hereby declared to be, null and void, and of none effect, and any person so purchasing shall forfeit." etc.

"Sec. 8. And whereas the Indians complain of injuries received from people driving stocks of horses, cattle, and hogs to range on their lands, for remedy whereof be it enacted that persons driving stocks to range, or stocks actually ranging on the Indian lands, shall and are hereby declared to be liable and subject to the like penalties and forfeitures, and may be proceeded against in the same manner, and subject to the same recoveries, as, by the law of this province, stocks driven or ?? anging upon any white people's land are liable and subject to; and the said Indians shall and may enjoy the benefit of the laws in that case made and provided, in the same manner as the white people do or can; any law, usage, or custom to the contrary notwithstanding."

****12** Boundaries had been assigned to the Indians by contracts with them, denominated treaties, as still continues to be the case, defining their ands occupied by the respective tribes, and the exclusive use of which ??he act of 1748 secured to them; but, so far from recognizing sovereignty in the Indians, the statute, by the strongest ***277** implication, denies its existence, declaring that, for trespasses committed by the whites within the Indian limits, the courts of the colony shall afford ??elief, as in case of like trespasses on the lands of white persons.

We maintain that the principle declared in the fifteenth century as the ??aw of Christendom--that discovery gave title to assume sovereignty over, and to govern, the unconverted natives of Africa, Asia, and North and South America-- has been recognized as a part of the national ??aw for nearly four centuries, and that it is now so recognized by every christian power, in its political department and in its judicial, unless the case of Worcester has formed an exception in these States; that, from Cape Horn to Hudson's Bay, it is acted upon as the only known rule of sovereign power by which the native Indian is coerced--for conquest is unknown in reference to him in the international sense. Our claim is based on the right to coerce obedience. The claim may be denounced by ??he moralist. We answer, it is the law of the land. Without its assersion and vigorous execution this

continent never could have been inhabited by our ancestors. To abandon the principle now is to assert that ??hey were unjust usurpers, and that we, succeeding to their usurped authority and void claims to possess and govern the country, should in ??onesty abandon it, return to Europe, and let the subdued parts again become a wilderness and hunting ground. It is in the memory of man, and almost in that of the middle-aged, when the valley of the Mississippi ??as a wilderness. A great portion of it is yet so; and before we adjudge ?? ts continuance in that state, for the benefit of a few tribes of savages, we should look well to our powers, and the probability of submission to our judgments, lest the authority of the judiciary be weakened by successful resistance. It is not on the title to sovereignty of a few Cherokees only we are deciding--a small tribe, with a population not more ?? han equal to the third of a respectable county, in all, and in Tennessee ***278** perhaps less than five hundred--but we must contemplate the mmense west and northwest; the many savage tribes claiming the ??rairies, the Rocky Mountains, and great country beyond; tribes that subsist on the raw flesh, and are savage as the most savage beasts that ??nfest that mighty wilderness. It is from the hunter of the Rocky Mountains the jurist must draw lessons of the truth of our position, as well as from the forensic scholar and orator of the refined city. And in th?? consideration of this subject it is our duty not to shrink from a principle on which the title and value of Louisiana depend, either because modern casuists condemned it or because the popes of Rome made and, by th?? force of their once sovereign authority, established it. Its promulgation may have been a harsh fiat, and it may have been cruelly executed b?? the Spaniards in Peru and Mexico; yet it is the fiat of our recognition from the catholic reign of Henry VII. through every change of religio?? and government in England, by the colonies up to the Revolution, an?? the states having Indian relations since. The christian enthusiast wh?? fled from persecution, real or imaginary, at home, claimed the right, th?? moment he set foot on the American shore, to convert and govern th?? unconverted "heathen." He professed it to be his principal aim an?? leading object, and claimed the right, then unquestioned, to enforce hi?? pretensions by the sword, if resisted; and he and his descendants hav?? enforced it, from the Rock of Plymouth to the Rocky Mountains, fo?? our authorized fur companies have never made, nor will they ever make?? an enquiry after Indian rights. The rifle and the knife are referred t?? as their passports. Refined sensibility and elevated philanthropy ma?? hold what it will; the truth is, neither our theory nor practice has eve?? allowed to the Indians any political right extending beyond our pleasure?? The principle, in its application, is general, extending to all the India?? nations and tribes on this continent, to which the Cherokees form n?? exception. Theirs is not a case of conscience before this court, but case of law.

****13** ***279** But suppose in this we are mistaken, and that our right t?? assume jurisdiction over the Cherokees must be rested on conquest?? what then is their condition?

That these Indians, in common with all others east of the Mississippi?? had passed under the dominion of the British crown before the American Revolution; that we succeeded to all the rights of Great Britain b?? that event; and that the Indians have been holden in subjection by th?? United States since, we hold to be admitted historical facts, recognized by the courts of justice. Johnson v. McIntosh, 8 Wheaton. The case of the Cherokees is more unfavorable than this; they, in fact, surrendered their sovereign power to the British crown.

In 1720, the inhabitants of South Carolina having for a time been i?? open revolt, the charter of the proprietors, so far as it extended jurisdiction over that colony, was declared forfeited by the crown, and wa?? repealed by *scire facias.*

In 1728 the house of commons in England addressed the king, praying him to contract with the lords proprietors for the purchase and surrender of their charter and title to the Carolinas, promising to mak?? compensation out of the next aid granted by Parliament. The king made the proposition, to which seven of the eight proprietors agreed, in consideration of £2,500 each, which was confirmed by act of Parliament. 2 Geo. 2 C. 34. From this time (26th July, 1729) the government of the northern province became regal, as that of the southern had for a time been. The provinces were separated by an order in council, and a dividing boundary fixed. 1 Martin's H. 301; 1 L. U. S. 446. On the 29th of April, 1730, George Burrington was appointed governor of North Carolina, and the administration of the government settled much in the form it afterwards continued up to the Revolution.

The prosperity of the king's new acquisition depending in a great degree on the tranquility of its inhabitants, ***280** it had been judged by the British ministry an object of primary importance to secure the friendship of the nations of Indians by whom there was most reason to apprehend it might be disturbed. For this purpose Sir Alexander Cumming was sent

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to conclude a treaty of alliance with the Cherokees, at that time a warlike and formidable nation. They occupied the land on the back part of the settlements of both of the colonies, towards the Apalachian Mountains. The country they claimed as their hunting grounds was of immense extent, and the boundaries of it had never been ascertained. The inhabitants of their different towns were computed to amount to more than twenty thousand, six thousand of whom were warriors fit to take the field on any emergency. The relation of peace with this nation was an object of importance to the Carolinas, and likewise to the mother country. Sir Alexander arrived at Charleston about the same time that Gov. Burrington arrived at Edenton. He lost no time, and in a few weeks after met the chiefs of the Cherokee lower towns at Keowee. They received him with marks of friendship and esteem. Messengers were immediately sent to the towns in the middle, valley, and over-hill settlements, to summon a general meeting of the chiefs for the purpose of holding a congress with Sir Alexander, in the month of April, at Requassee.

****14** Early in the month of April the chief warriors met Sir Alexander at the place appointed, and acknowledged King George for their sovereign lord, and, on their knees, promised fidelity and obedience to him. Sir Alexander, by their unanimous consent, appointed Moytoy commander-in-chief of the Cherokee Nation, and the warriors and different tribes acknowledged him for their king, and promised to be accountable to him for their conduct. Sir Alexander made several useful presents to the Indians, and the congress broke up to the satisfaction of all. The crown, or diadem of the nation, which consisted of five eagle tails and four scalps of their enemies, was brought ***281** from Tennessee, their chief town, and Moytoy presented it to Sir Alexander, desiring him to lay it at the feet of his sovereign; but at his request the Indian king deputed six of his warriors to carry it to England, and there to do homage with it to the king. They accompanied Sir Alexander to Charleston, and embarked on board of the Fox ship of war.

On the 30th of June the Fox ship of war, on board of which Sir Alexander Cumming and six Cherokee chiefs had embarked, arrived at Dover. They proceeded to London, were introduced to the king, and laid the regalia of their nation at the foot of the throne. Considerable presents were made to them of cloth, guns, shot, vermillion, flints, hatchets, knives, etc. They entered into a treaty, by which they submitted themselves and their people to the sovereignty of the king and his successors; they engaged not to suffer their people to trade with any other nation than the English; not to permit white men of any other nation to build forts or cabins, or plant corn among them, and, in case any such attempt was made, to give information of it to the king's governor, and to do whatever he would direct for the maintenance and defence of the king's right to the country. They engaged to apprehend runaway negroes, and deliver them to their owners or to the governor, and a gun and watch-coat were agreed to be given to them for every negro they apprehended and brought back. Provision was made for the punishment of any Englishman killing an Indian, and the surrender of any Indian killing an Englishman was stipulated. They were sent back by the ship that brought them, and met their countrymen?? with the highest idea of the power and greatness of the English nation, and not a little pleased with the kind and generous treatment they had received. Such is the account given by Martin, in his History of North Carolina, of this transaction, vol. 2, pp. 3, 9, 11.

Smollet, in his History of England, vol. 2, p. 384, informs ***282** us ?? “This year (1730) seven chiefs of the Cherokee Nation of Indians in America, were brought to England by Sir Alexander Cumming. Being introduced to the king, they laid their crown and regalia at his feet, and by an authentic deed acknowledged themselves subjects to his dominion, in the name of their compatriots, who had vested them with full power for this purpose. They were amazed and confounded at the riches and magnificence of the British court. They compared the king and queen to the sun and moon, and the princes to the stars of heaven, and themselves to nothing. They gave their assent in the most solemn manner to articles of friendship and commerce proposed by the lords commissioners for trade and plantations; and, being loaded with presents of necessaries, arms, and ammunition, were reconveyed to their own country, which borders on the province of South Carolina.”

****15** It must be born in mind that in 1730 the Cherokee Nation was composed of various tribes making no pretense to regular government, and that the amendment which now presents itself in the upper towns is the growth of the last thirty years, and has been brought about by half-breeds and whites residing amongst them, aided by the fostering care of the government, and that the number who govern the common Indian, at present, is limited to a very few, as we are informed by the reports of the senate and house of representatives of

the Congress of the United States, made in 1830, and which gives the best known account of our Indian relations.

Great Britain established a military post, called Fort Loudon, in the midst of the upper towns, on the Little Tennessee, near Tellico, which the Indians besieged in 1760, starved the garrison into a capitulation, and, when they got it into their power, and under the escort of a pretended safe conduct, fell upon the British soldiers and massacred a great portion of them. The Indian war had then existed some two years, and great exertions were ***283** made by North Carolina to suppress it. A statute was passed (1760, ch. 1), granting aid to his majesty; and, for the greater encouragement to persons to enlist voluntarily against the Cherokee and other Indians in alliance with France, every Indian that might be taken during the war, it was declared, should be the slave of the captor; and ten pounds was offered for every Indian killed, to those not in actual service, and five pounds to those in service, to be proved by the production of the scalp, with a title to all plunder taken from the enemy or within twenty miles of any Cherokee town. The Cherokees suffered exceedingly in 1760 and 1761, by the provincial and British troops marching three several times into the nation and destroying their towns. They of course came out of the war conquered and partly destroyed. The peace of 1763 between France and England left the Cherokees dependent on, and at the mercy of, the latter power; and so they continued until the American Revolution. Their history after this is too well known to require further reference to it here.

The Cherokees, therefore, like the other tribes and nations of Indians residing south of the mountains in North and South Carolina (twenty in number, at the least), were conquered by Great Britain, and surrendered their last claim to independence in 1730, to the crown itself, after the provinces had become royal governments. As to them, therefore, the assumption in Worcester's case that they remained unconquered because the charter to the proprietors did not confer the right of conquest, but only of defence, is unfounded, as is the assertion throughout unfounded. The charter does, in cogent terms, vest in the lords proprietors the right of vanquishing and taking savage enemies, and, being taken, to put them to death by the law of war, or to save them, at their pleasure. The right to govern savages having been based on the principle that discovery gave title, the term conquer is not used in the charter, as it could not with propriety be, in reference to a ***284** loose and straggling multitude not formed into a recognized society--and so all the North American savages were deemed by Great Britain and other christian powers, how justly is now too late to enquire. The proprietors had limits assigned to their province, and ample powers given of war, of life, and of death, as a means to govern "*all* the people there abiding." They needed nothing more, nor had their sovereign higher powers to confer. But taking the Cherokees to have been a recognized nation of people, as is assumed by the Supreme Court of the United States, then they were conquered, and the rule laid down in Calvin's case (7 Co. 34) applied to them. "If a christian king should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against christianity, but against the law of God and nature contained in the decalogue; and in that case, until certain laws be established amongst them, the king himself, and such judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as kings in ancient time did with their kingdoms, before any certain municipal laws were given."

****16** Who are infidels subject to this rule of national law? "Heathens (says the same author, 1 Inst. 6), who may not be witnesses, by the laws of this kingdom, because they believe neither in the Old or New Testament to be the word of God, on which oaths must be taken." Such was the condition of the Cherokees during the colonial government, and so it is now with a few exceptions.

The rule laid down in Calvin's case is that, until certain laws be established, the king, or judges appointed by him, shall judge the infidels and their causes according to natural equity, and in such sort as kings in ancient time did before municipal laws were given. In precise conformity with this rule is the act of 1715, ch. 59. Indian commissioners, to reside amongst them, were to be appointed by the governor of the province (the king's ***285** deputy); and a commissioner, together with the ruler or head man of the town to which the Indian party belonged, were to adjudge and determine all controversies arising between the white and Indian inhabitants, in such manner as the nature of the case might require, from which decision either party might appeal to the governor and council. No further certain laws were established or deemed necessary by the colony. Since the Revolution, Congress has passed laws for the punishment of crimes within the Indian limits, grounded on its power to regulate commerce with the Indian tribes, thereby superseding the laws of the colony;

but the courts of the Union have very justly pronounced them unconstitutional and void. It follows, if the states have no jurisdiction likewise, that murder on the highway, and other crimes, must go unpunished, and that the Cherokees are in fact, whatever jurists may pronounce them in name, a separate, sovereign, and independent state; and, did they now own the lands claimed long since the Revolution, might form a splendid monarchy, and may yet form a respectable one, within the limits of the original states, notwithstanding the Constitution guarantees to every state in the Union a ?? epublican form of government, and that no new state shall be erected ??ithin the jurisdiction of any other state, even republican and of the ??nion, without the consent of the legislature of the state concerned. Consent to the erection of a Cherokee sovereign government by the ??ederal power is certainly wanting on the part of North Carolina or ??ennessee.

A total dissolution of the British government took place when the ??olonies declared themselves independent and successfully maintained ??he assumption, and, by the Revolution, the states of the Union suc??eeded to all the rights of soil and sovereignty over the territory within ??he chartered limits which pertained to Great Britain before the change ?? f government. The separate states were independent of each other as ??o internal government. ***286** Thus circumstanced, North Carolina, ?? December, 1776, by a congress convened at Halifax, proceeded to ??stablish a constitution and form of government, prefaced by a decla??ation of rights, made part of the constitution (sec. 44). The bound??ries of the state to which the constitution extends are declared, being ??he same that now exist, Tennessee inclusive; and it maintains “that ?? he people of this state ought to have the sole and exclusive right of ??egulating the internal government and police thereof; that all the terri??ories lying within the boundaries described are the right and property ??f the people of the state, to be held by them in sovereignty; provided, ??lways, that this declaration of rights shall not prejudge any nation or ?? ations of Indians from enjoying such hunting grounds as may have ?? een, or shall hereafter be, secured to them by any former or future ?? egislature of this state.” The proclamation of 1763 declared the ??ndian hunting grounds should be the the territories lying to the west??ard of the sources of the rivers which fall into the sea from the west ??nd northwest; and all the subjects of the king were strictly forbidden ??rom making purchases or making settlements or taking possession of ??ny of the lands above reserved, without license for that purpose ??btained. These were the hunting grounds referred to in the constitu??ion of North Carolina. They included all of what is now the state of ??ennessee, and that part of North Carolina lying west of the Blue Ridge, on the waters of New river and Tennessee, including territory ??qual to four large counties, part of which is now in possession of the Cherokees. The western end of this state was claimed by the Chicka??aws. If it be true (as holden in Worcester's Case, 6 Peters, 561) that ??he Cherokee Nation was a distinct community, occupying its own terri??ory, with boundaries accurately described, in which the laws of North Carolina had no right to enter but with the assent of the Cherokees ?? hemselves, and the ***287** same being true of the Chickasaw Nation, ??hen North Carolina was greatly mistaken in issuing grants, for the ??ervices of the Revolutionary soldiers and to pay the arrears due the army, for the greater portion of the valuable lands lying within the exclusive jurisdiction of these Indian governments, and beyond that of North Carolina, “and in which her law could have no force.” Yet she did order the country to be entered upon, cause it to be surveyed and granted, and the lands to be settled by her people, which they have enjoyed for fifty years to a great extent, during all which time her powe?? to assume jurisdiction has not been questioned; and, with all due deference to the highest judicial tribunal in the Union, we think that the jurisdiction of North Carolina, as assumed by her state constitution,?? will not now be questioned, when both sides of the controversy for jurisdiction are heard, freed from a controlling sympathy in favor of the weak and withering remnant of a people sought to be rescued from annihilation. In this conclusion we are fortified by the great and well-considered case of Johnson against McIntosh, the reasoning in which?? by the same distinguished jurist, it must be admitted, if not in direc?? opposition, is greatly in conflict with Worcester's case, as the argu??ment on the part of the state but too manifestly proves.

****17** North Carolina, in virtue of her sovereignty and jurisdiction, legis?? lated without the least regard to any supposed title in the Indians to the lands claimed by them. In July, 1777, she made a treaty with the Cherokees, at Long Island, on the Holstein, fixing the boundaries of the Indian hunting grounds. Hayw. Hist. 488. In her land law of the next year (1778, ch. 3, sec. 5) she prohibited entries from being made west of the line described in the treaty. This boundary left open to location only a small portion of the eastern part of East Tennessee ?? but in 1783 (ch. 2, sec. 5) the Cherokees were restricted to south o?? the Tennessee, Holstein, French

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Broad, and ***288** Pigeon rivers, cutting them off from nine-tenths of the hunting grounds they claime?? within the limits of North Carolina.

The Indians could set up no claim on the score of merit. They had been in fact what the national law held them in theory, perpetual ene??mies to the people of North Carolina, and continued either treacherou?? friends or open enemies to the country now comprising Tennessee up to?? the year 1795, making war upon the people residing in the limits cede?? by the treaty of Hopewell, of 1785. Hardly a family of the early set??tlers but can number some of its former members amongst the slain?? generally at or near their own dwellings, and far off from the India?? towns or boundary. The Cherokees were then wild, vindictive savages whose amusement was war upon us. This we had a right to expect?? We had also a right, as American citizens, to expect protection from the federal power; but, so far from receiving protection, the conduct o?? that power, unfortunately, afforded encouragement to the Cherokees?? We were not permitted to enter their country and punish them there by an offensive war, although the work of death was daily doing upon u?? at our own doors; and although the Indian country was occasionally invaded, near its borders, it was always deemed unlawful by the general government. The claim on the part of the federal power to protect and govern, in fact, the Indian tribes residing within the limits of the states, in exclusion of the state authorities, was the basis of this policy, and has resulted in a controversy for jurisdiction, between the states and the general government, as momentous as any arising since we became independent, to understand which the authority and proceedings of the latter power must be examined.

As early as June, 1775, the Continental Congress began to take steps to obtain the friendship of the Indians and secure the safety of our western borders. Indian departments were established, and the same policy, in substance, ***289** pursued that had been by Great Britain. This was of course by assumption of power, and necessarily without limit, as the power of revolution must be. An existing government was to be destroyed, and another founded on its ruins, until this was organized, all power rested with the revolutionary tribunal. It will, therefore, be useless to look into the resolves of the Continental Congress on Indian relations.

****18** On the 1st of March, 1781, the articles of confederation were finally adopted, in which it is provided, "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled." Art. 2. "No state shall be deprived of territory for the benefit of the United States." Art. 9. "The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the trade and managing all affairs with the ??ndians not members of any of the states; provided, that the legislative ??ight of any state, within its own limits, be not infringed or violated."

The clause that no state should be deprived of territory was resisted ??y Maryland, Massachusetts, and New Jersey. They insisted the char??ers calling for the South Sea, and extending in fact to the Mississippi, ??ncluded the unsettled crown lands of the British king for which the states equally were wasting their blood and treasure; and to permit Virginia, North Carolina, and Georgia to hold so immense a fund would ??eave them not only able to pay their Revolutionary debt, but rich after ??its extinguishment, whereas the other states would earn the fund and ??hen be oppressed with poverty. The articles of confederation, from ?? his consideration principally, were postponed, especially on the part of Maryland, from the 9th of July, 1778, to the 1st of March, 1781. But ??lthough it was desired that the property in the lands should be deemed ?? o belong to the United States, and ***290** should be disposed of for the ?? enefit of the whole confederation, yet it was declared there should be ?? eserved to the states within whose limits such crown lands might be the entire and complete jurisdiction thereof, and the articles were adopted on the faith that the states holding crown lands would surrender them for the benefit of the whole united.

The legislative rights of the states where Indian nations or tribes not incorporated into the body politic resided within their limits having been carefully reserved to the states, this reservation was for a time respected by Congress. Thus the Catawbas, in November, 1782, applied to Congress to cause the lands reserved to them in South Carolina to be so secured to the tribe that they could not themselves part therewith. Congress recommended to the legislature of South Carolina to take measures for the security of the tribe. They were no more members of that state than the Cherokees were of North Carolina, yet Congress did not see proper to act.

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The first general step taken by Congress in Indian affairs, in virtue of the power to regulate the trade and manage all affairs with the Indians, was by resolve of the 15th of October, 1783. They ordered that a convention be held with the Indians of the northern and middle departments, for admitting into favor those who had been at war with us, and for establishing boundary lines separating the white citizens from the Indian villages. But they resolve that these measures should not be construed to affect the territorial claims of any of the states, or their legislative rights within their respective limits.

****19** The next step worthy of notice here was taken March 15, 1785, preparatory to making the treaty of Hopewell. Three commissioners were to be appointed to treat with the Cherokees and other Indians in the south who had been at war with the United States, notice of which was to be given to the executives of North Carolina, Virginia, South Carolina, and Georgia, "in order ***291** that each of them appoint one o?? more persons to attend during the treaty, if they think proper." William Blount was appointed on the part of North Carolina. The commissioners were to inform the Indians of the great occurrences of the late war with Great Britain, and of the extent of country relinquished by the treaty of peace--to inform them, of course, that all the rights the king of England had to govern them we had won by the sword, and were ready to enforce.

Benjamin Hawkins, Andrew Pickens, Joseph Martin, and Lachli?? McIntosh were appointed, by the authority of the United States, commissioners to treat with the southern Indians. They were to meet the Creeks at Galphinston, in Georgia, and the Cherokees at the Keowee?? (the east branch of Savannah river), in South Carolina. Mr. Bloun?? was instructed by the governor of North Carolina to be present "a?? each of the treaties, as the representative or agent of the state." "You?? will be pleased," say his instructions, "to use your best endeavors to advance the interests of the state, and to prevent any encroachments upon the territory?? or liberties of the same." These bear date the 3d of September, 1785.

On the 11th of November Mr. Blount informed the governor of North Carolina that the Creeks had not met the United States commissioners. Although no treaty was entered into, the commissioners of Congress, soon after their arrival at Galphinston, showed to the agents on the part of North Carolina and Georgia the draft of the treaty they meant to propose to the Indians; against which the agents of Georgia entered a formal protest, because in their opinion the proposed treaty tended to deprive their state of a part of her soil and sovereignty.

To this protest the commissioners of Congress gave a written answer, from which the following is an extract: "We find, moreover, that the several Indian nations have uniformly, both before and since the Revolution, been treated with as free and independent people, and the sole ***292** proprietors of the soil, until any part of it is fairly and willingly purchased from or relinquished by them; that the protection and guardianship of these their rights, which were universally allowed to have been in the king of Great Britian, are now devolved upon and vested in the Congress of the United States, which they have exercised before, as well as since, our independence, and very early divided the execution of this trust into three districts--the northern, middle, and southern."

On the 1st of March, 1786, Mr. Blount informed Governor Caswell ??hat the Cherokees, Chickasaws, and Choctaws had met at Hopewell, on ??he Keowee, and formed treaties very prejudicial to the state of North Carolina; that the treaties were the same in substance except as to ??oundary.

****20** In the letter of 22d November, 1785, to the commissioners, Mr. Blount says: "Having yesterday had the honor to lay before you my ??ommission, appointing me agent on the part of the state of North Carolina, I now consider it my duty to lay before you the following ??xtract from the constitution of that state, which was agreed to in full ??onvention, at Halifax, on the 11th of December, 1776 (he here recites ??he article declaring the boundaries of the state), and to remark to you ??hat, years after the formation and publication of the aforesaid con??titution, the state of North Carolina entered into and signed the ??rticles of confederation, by which she has not given up to the United ?? tates any part of the soil described in the aforesaid constitution, nor ??e sovereignty thereof."

By another letter, of the 28th of November, Mr. Blount informed the ?? ommissioners that North Carolina had a law in force and use, allotting ??e lands south of the Tennessee and Holstein, and west of French Broad ??nd Pigeon, to the Cherokee Indians, describing the boundaries as in the ??nd law of 1783. "Should you (says the letter), by treaty, fix any other boundary between North Carolina and the Cherokee

Indians, that state will consider ***293** such act as a violation and infringement of her legislative and constitutional rights."

He refers the commissioners to the fact that the military district has been laid off within the county of Davidson, and that several millions of acres had been granted out of the military district; and says the underwritten agent, on the part of the state of North Carolina, protests against the treaty at this instant about to be signed and entered into between B. H., A. P., J. M., and L. M., commissioners, on the part of the United States of America, and the Cherokee Indians, on the other part, as containing several stipulations that infringe and violate the legislative rights of that state.

A similar protest was entered against the Chickasaw treaty, dated July 10, 1786.

The Cherokees had been engaged in the Revolutionary war; they and their ally had been conquered; no provisions in the treaty of peace had been made by Great Britain for their protection; they were not supposed to know the effect of the Revolution, and but imperfectly that the contest had ended. To them the treaty of Hopewell was one of peace?? and the terms were prescribed by the conqueror, who met the Indians?? with it in his hand, and said, by way of introduction to the treaty stipu??lations: "The commissioners plenipotentiary of the United States in Con??gress assembled give peace to all the Cherokees, and receive them in?? the favor and protection of the United States of America, on the following conditions: 1. All prisoners to be restored, as all negroes and goods 2. All prisoners taken from the Indians to be restored to them. 3 The Indians acknowledge themselves under the exclusive protection o?? the United States. 4. The boundary allotted to the Cherokees, for thei?? hunting grounds, to begin at the mouth of Duck river, on Tennessee?? to run N. E. to the ridge dividing the waters of Duck and Cumber?? land, and with the ridge until the line run N. E. will strike the Cumber?? land forty miles above ***294** Nashville; up the river to the Kentuck?? road; thence to Cumberland Gap; thence to the mouth of Cloud'?? creek, on Holstein (below Rogersville); thence to the Chimney To Mountain; thence to the mouth of Camp creek (above Greenville), o?? Nollichuckey, and to the North Carolina line. 5. None to settle on th?? allotted lands; those that had, to remove in six months, or to forfeit th?? protection of the United States, and the Indians to punish them as the saw proper, except the people south of French Broad and Holstei?? whose situation was to be submitted to Congress. 6. The Indians, ?? persons residing with them or taking refuge there, who should comm?? robbery, murder, or other capital crime, on any citizen of the Unit?? States, or person under their protection, to be delivered up, and pu?? ished according to the ordinances of the United States, the same as committed by citizen against citizen. 7. The same punishment to be inflicted by the United States for similar crimes upon Indians. 8. Retal??iation not to be practised."

****21** Condition the 9th, on which the peace was granted: "For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in Congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, in such manner as they think proper."

"10. Until Congress act on the 9th article, traders to be protected in person and property."

Condition the 12th: "That the Indians may have full confidence in the justice of the United States respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress."

This treaty, with those made at the same time with the Choctaws and Chickasaws, are the groundwork of the great question now threatening the repose of the Union in five of the states, if no more. Congress assumed the power to conquer, and to govern the conquered by ***295** setting up independent governments, being neither states of the Union nor territories of the United States, yet within the limits of the original states forming the confederation, notwithstanding the states were declared to have retained the sovereignty and right of soil, and that the legislative right of any state should not be infringed or violated, within its limits, in the exercise of the power to regulate trade and manage all affairs with the Indians.

If the power was in Congress to establish and govern Indian sovereignties over a country bounded north by the Cumberland and Ohio rivers, west by the Mississippi, south by the thirty-first degree of north latitude, and east by the Blue Ridge, in the midst of North Carolina, the same authority could, and of course would, be exercised northwest of the Ohio, and thus the larger and better portion of the country acquired by the Revolution, and the treaty of 1783, would be formed into governments never contemplated by the

articles of confederation. Congress had the power to regulate intercourse with the Indians, and might admit white men to reside amongst them, citizens or foreigners; and if, for the prevention of injuries or oppressions on the part of the citizens or Indians, she could exercise the sole and exclusive government of the country, and allow the Indian nations to be represented in Congress, nothing stood in the way of the creation of a great federal power in the west and south. Such authority is assumed by the treaty of Hopewell, in terms so decidedly explicit as to admit of no doubt to what extent Congress claimed power. Truly, the Choctaws and Chickasaws were not authorized, as the Cherokees were, to send a deputy of their choice to Congress, but the same authority that conferred this high privilege on the Cherokee Nation might confer it on every Indian tribe within the bounds of the Union.

North Carolina was feeble, worn down by the war, and could only complain. The treaty had donated to the ***296** Cherokees nearly half the state, and the most fertile part of it, including, perhaps, a million of acres of granted land, and on which resided many of her citizens, especially in East Tennessee and west of the line running from Cumberland Gap to the mouth of Camp creek, on Nollichuckey, the condition of some of whom, however (those residing south of French Broad and Holstein), was by treaty referred to the mercy of Congress, before they were turned over to that of the Cherokees, as all others were residing within the prescribed Indian limits who did not remove within six months after the ratification of the treaty.

****22** The legislature of North Carolina, which met in the fall of 1786, had the facts occurring at the treaty of Hopewell communicated to them by the governor. A report was made, and a protest entered to the powers assumed by Congress, as will be seen from the following extracts from their proceedings, which are given at some length because the history of our Indian relations forms the law of this case, and the records set out can only be had at the secretary's office of North Carolina.

Extract from Governor Caswell's message: "The treaties entered into by commissioners, under the authority of Congress, with the Indians of the Cherokee and Chickasaw Nations, are so inconsistent with the legislative rights of this state, and such an infringement on the constitution, that I flatter myself they will not be passed over unnoticed by you."

Extract from the Journal of the House of Commons, January 6, 1787: "The house resumed the consideration of the report of the committee on sundry papers respecting Indian treaties, etc.; which, being read and amended was concurred with in the following words, viz.:

***297** Your committee, to whom was referred sundry papers respecting Indian treaties and Indian affairs, beg leave to report that they have examined with attention the papers to them referred, and they find that, by the treaties entered into between the commissioners appointed by the United States to treat with the southern Indians and the Cherokee and Chickasaw Indians, at Hopewell, on the Keowee, the commissioners of the United States have allotted to said Indians certain lands as their hunting grounds which are obviously within the jurisdiction of this state, being north of the boundary established by law between the citizens and Indians, and a great part of which is for a valuable consideration sold to our citizens, some of whom are now actually living thereon.

Your committee observe that, the commissioners having only allotted these lands to the Indians as their hunting grounds, the treaty doth not thereby annul the title of those who hold under our laws, but has clogged it in a manner different from the intentions of the legislature, and which does in effect suppose a right in the United States to interfere with our legislative rights, which is inadmissible.

Your committee, thereupon, recommend that the delegates of this state in Congress be instructed to state our rights to the lands in question to the United States of America, in Congress assembled, to obtain a disavowal of the treaties so far as they affect the same; and, if the same should be persisted in, which your committee cannot suppose, from the known rectitude and wisdom of Congress, that, finally, they formally protest against the same."

On the same day the following joint resolutions were adopted by both houses, viz.:

"Resolved, that this general assembly conceive the said treaty, as far as it relates to ceding to the Indians certain lands within the bounds or limits of this state, is ***298** clearly an infringement of the legislative and territorial rights of the

same, as set forth in the constitution of the state, and therefore cannot be conceded to.

****23** Resolved, that it is the sense of this general assembly that this state has an indefeasible right to a considerable part of the lands ceded by the said treaty to the Indians, which right was obtained by purchase from the natives; and that even Congress are not at liberty to dispose of any part of the same, by treaty, sale, or exchange.

Resolved, as the opinion of this general assembly, that the exclusive privilege granted by the confederation to the United States, in Congress, to decide on peace and war, was never meant or intended to authorize the cession of any part of the territory of the individual states in the Union, as described and ascertained by their several ancient charters. And whereas many of the citizens of this state have obtained from the same titles to lands on the waters of the Mississippi, and some of them already reside thereon, who must necessarily be greatly injured should they be compelled to remove with their families therefrom; and whereas, by the express words of the said treaty, they are declared out of the protection of the United States if they did not, in a limited time, leave their habitations and retire out of the ceded bounds; and whereas the said treaty, should it be carried into effect, would deprive the officers and soldiers of the late continental line of this state of a great part of the bounty of lands allowed them by the general assembly as a reward for military services in bringing about our glorious Revolution--it was promised to them, became a debt of justice and gratitude, and was almost the only recompense the state had to give to those hardy veterans who spent their time and shed their blood in the service of their country--the honor of the state was pledged to secure their rights, and it would be highly unjust to snatch the boon from them, when no equivalent is obtained from ***299** the United States; and whereas it is impracticable for many of the citizens of this state, who have settled themselves within the limits of the said cession, to remove agreeably to the tenor of the treaty, and must, therefore, be exposed to the cruelty and rage of the merciless savages--

Resolved, therefore, that the delegates from this state, in Congress, be instructed to oppose the ratification of the said treaty, in the most explicit and decided terms; and, in case the same should take effect (which, from the known rectitude and wisdom of Congress, cannot be supposed), to enter thereto the formal protest of this state."

It is holden in Worcester's Case, 6 Peters, 559, that the Indian Nations had always been considered as distinct, independent political communities, retaining their original natural rights with the single exception, imposed by irresistible power, excluding them from intercourse with the European nations. Of course they had the right to form treaties, like other independent nations. And the Constitution of the United States, by declaring all treaties made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian Nation.

****24** So the 2d article of the treaty of Tellico, made in October, 1798, with the Cherokees, stipulates that "the subsisting treaties between the present contracting parties are acknowledged to be in full and operating force; together with the construction and usages under their respective articles, and so to continue."

In construing the 9th article of the treaty of Hopewell, the Supreme Court of the United States (6 Peters, 554) declares a surrender of self-government was never intended by the Cherokees; and so to hold would be a perversion of the necessary meaning of the Indians. "Is it credible," says the court, "that they should have considered themselves as surrendering to the United States ***300** the right to dictate their future cessions, and the terms on which they should be made, or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they should have supposed themselves, by a phrase thus slipped into an article on another most interesting subject, to have divested themselves of the right of self-government, on subjects not connected with trade."

The foregoing assumption is a brief summing up of the argument of Mr. Wirt, in the Cherokee case, found between pages 74 and 84, where the extent of the rights claimed for the Cherokees, and sanctioned by the Supreme Court, may more at large be seen.

The commissioners at the treaty of Hopewell, held that the protection and guardianship of the rights of the Indians had been in the king of Great Britain, which guardianship, by the Revolution, devolved upon and was vested in the Congress of the United States.

The British king claimed the right of sovereignty, protection, and dominion, within the language of the proclamation of 1763, over all the territories and people there abiding, discovered by his subjects, and by force of the right of discovery. He had enforced his claim so set forth, so far as the safety of the colonists required or the situation of the Indians permitted, on all parts of this continent where there were British colonies controlled alone by his sovereign will and pleasure. Furthermore, in 1730, fifty-five years before the treaty at Hopewell, the Cherokees had surrendered all their political rights to the British crown, by the most solemn treaty known to the Indian history; first, to Sir Alexander Cumming, in the Cherokee Nation, and then, by a deputation of seven chiefs, again to the king in person, at London. "Being introduced to the king, they laid their crown and regalia at his feet, and by an authentic deed acknowledged themselves subject to his dominions, in the name of all their compatriots." 2 Smollett, 348. When the commissioners ***301** speak of the independence of the Indians, they refer principally to the right of the soil. This they claimed for Congress, as George III. had possessed it. Why should they have "slipped" into an article of the treaty a phrase imposing on the Cherokees that which, through illiterate ignorance, was not understood, when they came to a conquered people, with the rights of the conqueror devolved upon them by another conquest, dictating conditions of peace to allies of the British crown? Why allow the Cherokees to choose and send a deputy to Congress, if independent of Congress? The assumption to regulate their trade and manage all affairs with them, by acts of Congress, is, and ever has been, conclusive of their political condition.

****25** Notwithstanding the assumptions of federal power in the treaty of Hopewell, Congress, in the important ordinance passed 7th August, 1786, for forming Indian departments, appointing superintendents, etc., ordains "that, in all cases where transactions with any nation or tribe of Indians shall become necessary to the purposes of this ordinance, which cannot be done without interfering with the legislative rights of a state, the superintendent in whose district the same shall happen shall act in conjunction with the authority of such state."

In accordance with this ordinance, by another of the 26th October, 1789, it is resolved that the executive, or the legislature, if they be in session, in the states of North Carolina, South Carolina, and Georgia, be, and they are, authorized to appoint one commissioner each, who, in conjunction with the superintendent for southern Indian affairs, or, in his absence, by themselves, treat with the southern Indians, which treaties shall be conclusive.

On the 1st of September, 1788, a proclamation issued, ordering off the Cherokee lands certain obtruders within the limits of North Carolina, which concludes: "Provided that nothing contained in this proclamation shall be construed ***302** as affecting the territorial claims of North Carolina."

Thus stood the relations of North Carolina with the Cherokees and the federal government, up to the formation of the Constitution of the United States.

In 1790, April 2d, was ceded to the United States the soil and sovereignty of the western part of North Carolina, now forming the state of Tennessee, upon various conditions, subject to which the cession was accepted, the 4th of which declares "that the territory so ceded shall be laid out and formed into a state or states, containing a suitable extent of territory, the inhabitants of which shall enjoy all the privileges, benefits, and advantages set forth in the ordinance of the late Congress, for the government of the western territory of the United States."

The ordinance referred to had been passed in July, 1787. It provides that the territory of the United States northwest of the Ohio river should, for the purpose of temporary government, be one district. Until an assembly was organized, the governor and judges were to adopt any of the laws, civil or criminal, of the original states; thereafter the assembly was to make laws. The northern Indians claimed and possessed much the greater portion of the country; yet the ordinance declares, "for the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district; and for the execution of process, criminal and civil, the governor shall make proper divisions thereof;" and that the parts to which the Indian title has been extinguished shall be laid off into counties.

For the punishment of crimes, therefore, we had, by a compact with Congress, imposed, as a condition on which the country was ceded, jurisdiction over all parts of the territory, and the governor was to form it into divisions and counties for the execution of process. Nine-tenths of the country was within the Cherokee and Chickasaw ***303** boundaries, as prescribed

by the treaty of Hopewell. The territory, and state to be formed therein, was forever to remain part of the confederacy (art. 4); and, when it had sixty thousand free inhabitants, was to be admitted into the Union on an equal footing with the original states, and be permitted to form a permanent constitution and state government.

****26** In February, 1796, Tennessee formed her state constitution, in which she sets out lines of division between this state and North Carolina, as described in the cession act, and declares "that all the territory, lands, and waters lying west of said line, as before mentioned, and contained within the chartered limits of North Carolina, are within the boundaries and limits of this state, over which the people have the right of exercising sovereignty and the right of soil, so far as is consistent with the Constitution of the United States, recognizing the articles of confederation, the bill of rights, and constitution of North Carolina, the cession act of the said state, and the ordinance of the late Congress, for the government of the territory northwest of the Ohio." This ordinance reserved the Indian title: "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent, and in their property, rights, and liberty they shall never be invaded or disturbed, unless in just and lawful wars, authorized by Congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them."

So far as protection to occupy the soil is secured to the Indians, our constitution recognizes the ordinance of 1787; but it assumes general jurisdiction to exercise the right of sovereignty over the Indian country without restriction.

On the 1st of June, 1796, Congress admitted the state of Tennessee into the Union. Ch. 47. After reciting ***304** that Congress was bound to do so by the act of cession from North Carolina, it is declared the territory shall be one state, by the name of Tennessee, and be one of the United States, on an equal footing with the original states in all respects whatever.

It is the duty of the United States to guarantee to every state a republican form of government. (Art. 4, sec. 4.) Of course our constitution was submitted to, and received the sanction of, Congress, so that, "by common consent," in the language of the ordinance for the Northwest Territory, we assumed sovereignty over the country within the Indian boundary. If it be true, however, that "the Cherokee Nation is a distinct community, occupying its own territory, in which the laws of Tennessee can have no force," then it must be equally true that the constitution of 1796 fell a dead letter at the Indian boundary, just as much as if we had attempted to extend our jurisdiction beyond the Mississippi into the dominions of Spain. Such is the assumption in Worcester's case; a principle that it is impossible for the states to abide by, without partial distraction, and one that should be most solemnly reconsidered by the distinguished tribunal asserting it, before its enforcement is attempted upon the states of North Carolina, Georgia, Alabama, Mississippi, and Tennessee, all of whom have extended their laws over the Indians within their limits, as have Maine, New York, and Ohio.

****27** We next come to the treaty of Holstein, to the better understanding of which some previous circumstances need be noticed. Ten of the states having ratified the Constitution of the United States, it was adopted, and went into operation on the 4th of March, 1789. In July, 1788, North Carolina had called a convention to deliberate on the ratification. This convention resolved, by a majority of 184 to 84, that the most ambiguous and exceptionable parts of said Constitution of government ought to be laid before Congress, and a **convention of** the **states**, for amendment, previous to its ratification by North Carolina. A ***305** declaration of rights of twenty articles was proposed, and twenty-six amendments, the first of which is in these words: "That each state in the Union shall respectively retain every power, jurisdiction, and right which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government." The first amendment proposed by the minority is to the same effect.

It was resolved, unanimously, that the president of the convention transmit to Congress, and to the executive of the other twelve states, copies of the resolution and amendments proposed; and it was declared that the convention of North Carolina thought proper neither to ratify nor reject the Constitution, and it adjourned without day. Elliott's Debates, 217. Afterwards, amendments, now part of the Constitution, were proposed by Congress to the states, the 12th of which declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or the people." With this North Carolina felt satisfied, and on the 11th of January, 1790, she

was admitted into the Union. 4 Elliott, 222. Her senators, in April next after her admission, by deed, transferred the western territory to the United States. Still a considerable portion of North Carolina, not ceded, was within the Cherokee boundary. That she then believed she was not deprived of jurisdiction over it is attested by the foregoing transactions. How readily power passes from the weak to the strong, recent experience had taught her. The treaty of Hopewell had transferred to the Cherokees many of her people and half her territory, and, although no express power to authorize further encroachments on her jurisdiction was found in the Constitution, lurking powers were feared, and attempted to be guarded against. Had North Carolina believed that, by the treaties and by the acts of Congress, the United States could erect an independent Cherokee government within her ***306** limits, would she have ratified the Constitution? Did she intend to surrender her jurisdiction, as claimed undoubtedly since 1730, to legislate for her entire territory? That she did not is manifest. Even when ceding the western end of her state, it was made an express condition that the legislation of the territory should be co-extensive with its whole limits; that it should forthwith be laid off into districts for the execution of process within the Indian country.

****28** On the 11th of August, 1790, the president of the United States communicated to the senate that upwards of five hundred families had settled on the Cherokee lands within the boundaries prescribed by the treaty of Hopewell, exclusively of those settled between the fork of French Broad and Holstein, who had refused to remove therefrom; "and as the obstructions to a proper conduct of this matter have been removed since it was mentioned to the senate, the 22d of August, 1789, by the accession of North Carolina to the Union, and the cession of the land in question, I shall feel myself bound," says the president, "to execute the treaty of Hopewell, unless a new boundary can be arranged with the Cherokees, embracing the settlements. 1. Is it the judgment of the senate that overtures be made to arrange such boundary? 2. What shall be the compensation to the Cherokees? And, 3. Shall the United States stipulate solemnly to guarantee the new boundary which may be arranged?"

"1. Resolved, that the senate advise and consent to the arrangement of a new boundary, and compensation not exceeding one thousand dollars annually. 2. In case a new boundary be concluded, the senate do advise and consent solemnly to guaranty the same." Executive Journal, 60.

Wm. Blount, as governor of the Southwest Territory and superintendent of Indian affairs, proceeded to make the treaty of Holstein, concluded the 2d of July, 1791, fixing the new boundary, which excluded the white settlements; and, by the 7th article, "the United States solemnly guaranteed to the ***307** Cherokee Nation all their lands not thereby ceded." The Cherokee lands were not to be trespassed upon; the treaty only goes to secure the Indians in the quiet enjoyment of the soil, without reference to jurisdiction. But, by the 10th and 11th articles, it is stipulated, if any citizen of the United States shall commit any crime upon, or trespass against, the person or property of any friendly Indian or Indians, which, if committed within the jurisdiction of any state or territory, against a citizen or white inhabitant thereof, would be punishable by the laws of such state, such offender 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 to which he or they may belong. And if any Cherokee, or person residing among them, shall steal a horse from, or commit a robbery or murder or other capital crime on, any citizen or inhabitant of the United States, the Cherokee Nation shall be bound to deliver him up, to be punished according to the laws of the United States.

These provisions were in affirmance of the stipulations made by the 6th and 7th articles of the treaty of Hopewell. No subsequent treaty with the Cherokees directly assumes to confer jurisdiction of their country on Congress, or the United States courts; they only recognize former treaties, and require no critical examination.

****29** How far are these treaties binding? By the Constitution, "the president shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the consent of the senate shall appoint, ambassadors and other public ministers."

By the 9th article of the confederation, Congress had the power of sending and receiving ambassadors, and entering into treaties and alliance; but, by the 4th section, ***308** Congress could not enter into treaties or alliances unless nine states assented thereto.

It is notoriously true that commissioners for Indian affairs were not deemed ambassadors. Or did Congress, during the confederation, assume to deal with the Indians in virtue of the treaty-making power? Every resolve of that Congress, relating to Indian affairs, has been carefully examined, and are, together with the treaties or contracts to which they gave rise, unquestionably grounded upon the power conferred on Congress of regulating the trade and managing all affairs with Indians not members of any state. This was deemed to confer the rights the king had before the Revolution. Compacts with Indians never were ratified by Congress, either by nine states or a majority, but were deemed full and complete by the signature thereof. 1 Executive Journal, 27. Nor under the Constitution has a public minister, nominated to, and his appointment confirmed by, the senate, for the purpose of treating with an Indian tribe, been known to our country for thirty years, although the practice was adopted in some instances in the first administration of President Washington.

The history of requiring the advice and consent of the senate to a treaty with Indians is this: In September, 1789 (Ex. J. 26), the president, by message through the secretary at war, said to the senate: "It doubtles is important that all treaties and compacts formed by the United States with other nations, whether civilized or not, should be made with caution and executed with fidelity. It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers and commissioners, not to consider any treaty, negotiated and signed by such officer, as final and conclusive until ratified by the sovereign or government from whom they derive their powers. This is the practice adopted by the United States respecting their treaties with European nations, and I am inclined to think it would be advisable to observe it in the conduct of our ***309** treaties with the Indians; for though such treaties, being on their part made by their chiefs and rulers, need not be ratified by them, yet, being formed on our part by the agency of subordinate officers, it seems to be both prudent and reasonable that their acts should not be binding on the nation until approved and ratified by the government. It strikes me this point should be well considered and settled, so that our national proceedings in this respect may become uniform, and be directed by fixed and stable principles."

****30** He then states certain Indian treaties were laid before the senate on the 25th of May, and asks "whether those treaties were to be considered as perfected, and, consequently, as obligatory, without being ratified?"

The message was committed to Mr. Carroll, Mr. Reed, and Mr. King.

They reported "that the signature of the treaties with the Indian nations has ever been considered as a full completion thereof; and that such treaties have never been solemnly ratified by either of the contracting parties, as hath been commonly practised among the civilized nations of Europe; wherefore, the committee are of opinion that the formal ratification of the treaty concluded, etc., is not expedient or necessary."

At a future day it was moved to postpone the report, and substitute the following: "Resolved, that the senate do advise and consent that the president of the United States ratify the treaty concluded with the Wyandotts," etc., which passed.

That the lands occupied by the Indians should continue in their occupancy until they consented to part with their use was the settled policy of the British crown, and had become the settled policy of the United States. They were claimed as crown lands--at least all lying west of the mountains, and west of what is now Georgia--pertaining to the states united, whose common blood and treasure had won them, as a general fund to pay the national revolutionary debt. Of course the extinguishment of the Indian title ***310** devolved on the United States as a common burden. The assent of the Indians to part with their title could only be obtained by compact. It was the interest and business of the United States to make the compact, and to pay for the cession. These treaties being formed by the agency, on our part, of subordinate officers, President Washington thought it to be both prudent and reasonable that their acts should not be binding on the national government, who had large sums of money to pay, until approved and ratified; and that the mode of approval should be the same as in case of treaties with European nations. This course was certainly prudent and just; but what evidence does it furnish that the Indian tribes thus contracted with were, as to the separate states, foreign, sovereign, and independent? What was the object of these compacts? The acquisition of the soil, the fee to which, lying under the Indian right to occupy, was in the United States, and the sovereignty over it in the individual states where the lands respectively lay. From the fact of our having treated with the Cherokees, is

inferred the other fact in Worcester's case, that the Cherokee Nation is a distinct community, foreign to Georgia, and in which her law can have no force. The origin of the practice, or its subsequent prosecution, warrants no such conclusion. Compacts and treaties are made with nations beyond our jurisdiction, and a law established where acts of Congress can have no force, and the good faith of the foreign power is relied upon to execute it within the foreign jurisdiction. Were the Indians ever deemed beyond the jurisdiction of Congress? In the partition of powers between the separate states and the United States the articles of confederation reserved the right to manage all affairs with Indians. These were managed partly by resolve and partly by compact. What has been the practice under the Constitution? To pass laws punishing every crime committed by a citizen against an Indian, or by an Indian on the person or property of a citizen, within the Indian limits. ***311** Such an assumption, in case of a foreign power, is unheard of. If Congress has jurisdiction to punish an Indian for a crime against one person, surely the same power can punish for all crimes, and against all persons; and it is only matter of discretion that it is not exercised. The first law passed assuming to punish crimes committed within the Indian limits was that of July, 1790, ch. 60. Afterwards were passed those of 1793, ch. 63; 1796, ch. 30; 1799, ch. 152; and the acts of 1802, ch. 13; and 1817, ch. 265, which are now in force, and under which Indians and whites have been punished, capitally and otherwise, for many years. The act of 1817 is general, extended to all crimes and all persons, and declares the punishment shall be death, or otherwise, as is provided by the laws of the United States for the like offences, if committed within any place or district of country under the sole and exclusive jurisdiction of the United States; provided, that nothing in the act shall be construed to extend to any offence committed by one Indian against another, within the Indian boundary. The superior courts of the territories of the United States, and the federal circuit courts, where the offender is first brought to trial, shall have jurisdiction to try him. This act proceeds on the principle of that of 1790, and every subsequent one on the subject; yet it is assumed in Worcester's case, as undeniably true, that "the Indian nations had always been considered as distinct and independent political communities, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any European potentate other than the first discoverer; and that the recognition of this right was evinced by our history, in every change through which we have passed. To this we answer, and we do it with unfeigned regret, that our political, legislative, executive, and judicial history, so far from proving the recognition of the sovereign independence of the Indian nations within our limits, with the single ***312** exception above, proves, and conclusively, directly the reverse. For more than forty years have we seen the Cherokees punished by virtue of acts of Congress for crimes committed in the Cherokee territory, and in the midst of their nation; and with this exercise of jurisdiction a majority of us rested content--our people were protected by it. But, at the October term, 1833, of the United States circuit court at Knoxville, in the cause of the United States v. Baily, the court pronounced the act of Congress of 1817 unconstitutional and void, because the power "to regulate commerce with the Indian tribes" did not authorize punishment for crime; and, on the 18th of November following, the state of Tennessee, as a matter of expediency, assumed jurisdiction, because it was believed the Indian government afforded no adequate protection to life or property, or the person of the female. Like Congress, we desired to suppress crimes, and a very few of the higher; yet we do not hold the heterodox of having jurisdiction by halves. If our legislative and judical powers extend to the country, they extend to all its inhabitants. To govern, we must have power over all. This we have, or we have it not.

****31** By the Constitution of the United States it is declared, "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding."

The Constitution has assumed that the government of the United States would, like other governments of the civilized world, have occasion to enter into treaties with other independent powers upon the various subjects involved in their national relations. The department of the government in which the capacity to make such treaties should be lodged was designated. No other department ***313** possesses any right to interpose. When made and ratified, a treaty is the supreme law--is binding as a judicial rule. 1 Cra. Rep. 110. The only question is as to the extent of the power conferred on the president and senate. To what end may it be exerted? The effect of the power, when exerted within its lawful sphere, is beyond controversy; but it has its limits. It cannot disregard and violate the Constitution of the United States. By treaty

with one nation we cannot declare war with a third, because Congress alone has the power to declare war. In the exercise of the treaty power reference must be had to the nature of our government. The country within is divided into distinct sovereignties, state and federal. The co-existing states are recognized by the Constitution--have reserved to them all the jurisdiction they had before its adoption, not delegated to the United States, which rights cannot be destroyed or impaired by a treaty or act of Congress. The rule is laid down accurately by Judge Story, 3 Com. 355. "A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and cannot supersede or interfere with any other of its fundamental provisions. Each is equally obligatory, and of paramount authority, within its scope; and no one embraces a right to annihilate any other. A treaty to change the organization of the government or annihilate its sovereignty, to overturn its republican form or to deprive it of its constitutional powers, would be void, because it would destroy what it was designed merely to fulfill--the will of the people."

In the great debate had in the Virginia convention, on the treaty-making power, Mr. Madison and Gov. Randolph denied that it involved a right of dismembering the Union; nor could the particular right of any state be affected by a treaty. 2 Elliott's Debates, 368, 371.

As early as 1793, Mr. Hamilton, preëminent as a statesman, had declared, in an official communication to ***314** President Washington, "that, the constitution having given power to the president and senate to make treaties, they might make a treaty of neutrality which should take from Congress the right to declare war in that particular case, and under the form of a treaty they might exercise any powers whatever, even those exclusively given by the Constitution to the house of representatives. Jeff. Cor. 489. Mr. Jefferson, also of the cabinet, dissented from the opinion, holding the president and senate, by treaty, were only authorized to carry into effect any powers they might constitutionally exercise; but in this opinion, it seems, he had not then matured confidence. Id. However, in 1803, on the French treaty ceding Louisiana being presented to him as President, he says: "I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by construction which would make our powers boundless. Our peculiar security is a written Constitution. Let us not make it a blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty-making power boundless. If it is, then we have no Constitution. If it has bounds, they can be no others than the definitions of the powers which that instrument gives." 4 Jeff. Cor. 3.

****32** Besides these constitutional limits, the treaty powers, like all others, has limits derived from its object and nature. It has for its object contracts with foreign nations, as the powers of Congress have for their object whatever can be done within our legislative jurisdiction without the consent of foreign nations. A treaty can never legitimately do that which can be done by law; and the converse of this, as a general, if not a universal, rule, must be true. The Constitution specifies the operations permitted to the federal government, and gives all the powers necessary to carry them into execution. Whatever of these enumerated objects is proper for a law, Congress may make the law; whatever is proper to be executed ***315** by way of treaty, the president and senate may enter into the treaty.

Admitting that the treaty power can be exerted to form international compacts with a people of our own country, and within the scope of the legislative power; and that Indian treaties are of higher dignity than mere contracts for the purchase of the Indian title to the lands they occupy (which I believe they are not), still, over the territory where the separate states had the power of legislation at the formation of the Constitution, neither Congress nor the treaty power can take jurisdiction, because it is reserved to the states and the people.

Testing the treaties of Hopewell and Holstein by these rules, and how was it possible for them, by agreement with the Indians, to create a jurisdiction in the United States--not under, but over, the Constitution--to punish crime within the limits of North Carolina? North Carolina came into the Union with the power to legislate for her whole territory. Tennessee was admitted with all the right of the original states, her constitution of 1796 expressly declaring the power of exercising sovereignty within limits accurately described by the instrument, and on which condition she was accepted as one of the United States by Congress.

To hold that the president and senate, by treaty with the Cherokees, could create a power to legislate for them, and that acts of Congress punishing all crimes committed by our citizens on the Indians, or by the latter on our citizens (as

does that of 1817), were warranted by the treaties, would be assuming that, by a combination of the two powers, new governments could be formed by an indirect and lurking authority in the Constitution, certainly never claimed for it by its early advocates in the state conventions called for its adoption.

But the understanding is, the United States assume to legislate for, and partially govern, the Indians, in virtue of the authority that "the Congress shall have power to ***316** regulate commerce with foreign nations, and among the several states, and with the Indian tribes." How the Constitution of the Union, or its laws, more than those of states, could extend beyond the Cherokee boundary, into "a distinct, independent political community with defined limits," we leave to others to explain when Worcester's case shall be reviewed; our immediate business is with the recited clause. To regulate commerce; what is its meaning? The Constitution is an instrument of enumeration, and not of definition. In order to ascertain the extent of the power conferred, it becomes necessary to determine the meaning of words. The power is to regulate--that is, to prescribe the rule by which the subject "commerce" is to be governed. It is not limited to traffic, to buying and selling, or the interchange of commodities. The words being general, so the sense must be general, and embrace all subjects comprehended under them, unless there be some limit in the nature of the power itself, or a repugnance to some other parts of the Constitution. Commerce is traffic, but it is more--it is intercourse between nations. In relation to foreign nations, and intercommunication by the coasting trade among the states, a main object was the government of navigation, and intercourse by this means.

****33** In the phrase "commerce among the several states," the word "among" means intermingled with. Commerce among the states cannot stop at the external boundary of each, but may be introduced into the interior; it means commerce which concerns more states than one--not mere internal regulation and traffic. Under a different construction, one state might load another with imposts and taxes on the passage of goods and persons, ruinous to the interior.

This being the admitted meaning of the sentence in its application to foreign nations and the states, it must carry the same meaning throughout the sentence. 9 Wheat. 194; 2 Story's Com. 510. Therefore, as to the ***317** Indian tribes, it includes intercourse and traffic that interests more than one--in which the United States and the Indians are both concerned. In the execution of this power, Congress has extended its legislation, not to the Indian boundary, but over the Indian Nation; assuming jurisdiction, not only over the regulation of commerce, but for the general punishment of crime.

Before the Revolution the British king claimed jurisdiction, and, so far as the circumstances of the people would permit, governed the Indians. The Congress of the Confederation claimed and exercised the same right within the territories claimed as crown lands, under the clause in the articles of confederation giving the power of regulating the trade and managing all affairs with Indians, and the same power is now claimed for Congress under the authority to regulate commerce.

By the Revolution, and the declaration of independence, the rights of sovereignty within the limits of each state, which belonged to the crown, devolved upon the state. With these powers the states stood clothed when the articles of confederation were superseded and the present Constitution adopted. They had "a right to such degree of sovereignty as the circumstances of the Indians would allow them to exercise," within the language of the Supreme Court of the United States, in Johnson v. McIntosh. 8 Wheat. Rep. This was sovereignty limited by discretion, and of course the right to its exertion was exclusively in the state. With part of this power--to regulate commerce-- Congress was vested and the states are divested; each is exclusive in its sphere. And whether this state has parted with the power to punish the crime of murder is the single question presented to us. "That Congress have not the power, is a proposition too clear for demonstration," says Mr. Justice McLean, in the case of the United States v. Bailey.

The same was holden in the cause of the United States against Jonathan Cisna, in the circuit court of ***318** Ohio, at the July term, 1835. The defendant had been indicted for horse-stealing within the reservation of the Wyandott tribe of Indians, in the state of Ohio, from Jacko, a friendly Indian. He demurred for want of jurisdiction to the indictment, and the demurrer was sustained; but the defendant was ordered to be delivered over, by the marshal, to the state authorities, to be indicted and punished in the state courts.

****34** The Wyandott tribe reside on twelve miles square, within the limits of Crawford county, Ohio. Various treaties have been made with them, commencing with the year 1785 and concluding with that of 1818, which are the same in political effect as the treaties made with the Cherokees. That the intercourse law of 1802 operates upon the Wyandotts admits of no doubt, says the court in Cisna's case. But was it constitutional, so far as it assumed to punish the crime of larceny? which was holden in the negative. No man in the United States has had the Indian question presented to him so often, and in so many aspects, as Mr. Justice McLean, and in a form to call forth the most thorough investigation, and the following is the result: "During the whole course of our connection with the Indian tribes we have recognized in them a power to make treaties, and certain political relations exist, growing out of treaties between the federal government and almost every distinct tribe of Indians within our national limits. These relations may be extended by treaties as far as sound policy, in the discretion of the treaty-making power, shall admit, where the Indians reside beyond the limits of a state; but within those limits neither the treaty-making power nor the legislative power can be exercised so as to abridge the rights of the state. Congress can exercise no power on this subject beyond the regulation of commerce with the Indian tribes."

With this position, as to fact and conclusion, I decidedly concur; and I take the law in this state to be that the government of the United States, neither by the power to regulate commerce nor by the treaty-making ***319** power, or by both combined, has authority to punish for the commission of crime within the Cherokee limits.

The Cherokees are overrun by the whites; their government is broken up and suppressed by Georgia; their few people within our limits are so scattered and feeble as not only to be incapable of self-government, but they are wholly incapable of protecting themselves, or the whites among them, against individual depredation upon persons or property. Theirs is, emphatically, a land without law, if our laws do not reach it, and so, to all appearance, it must remain.

If the federal power holds us out, and declares it has no right to enter, then there will be within the bounds of this Union a lawless territory where sanctuary is found for the murderer, the robber, and the thief, free from molestation. Such is now incontrovertibly the fact. That such a state of things cannot long be submitted to requires but a small portion of practical wisdom to foresee from the bench of justice, as well as from the halls of legislation, whatever may be supposed to the contrary. It is not with a case of speculative philosophy we have to do, but with a matter of expediency, having but one remedy in the nature and structure of our government, and that remedy the legislature of 1833 applied. The supposition, however, that the state has the right to assume jurisdiction because of necessity, although before such necessity arose she had no power, and the Cherokees were independent of her authority, is inadmissible. If the Cherokees from the beginning were independent of the state, they were, and now are, foreign to us as a sister state is, or as Louisiana before its acquisition was; and we cannot notice their feeble condition more than we could the condition of an adjoining state or foreign province. We have no power of conquest. Congress alone can only declare war with an independent nation, and the president and senate make peace. The power to make conquest, without the power to make war, will ***320** not be assumed; and the right to govern a foreign and independent people, without conquering them first, is equally untenable, nor have we any right to interfere in their domestic concerns. It is on the right of discovery and right of conquest pertaining to the British crown, and devolving on us by the American Revolution and on the conquest by that event, that our jurisdiction must rest, and to seek for it any other support would be idle, because useless. The theory of the jurisdiction is not open to question, and the practice upon it is of long standing--first in the colonies, and after in the states of Massachusetts, Maine, Rhode Island, Connecticut, New Jersey, Virginia, the Carolinas, and New York. 3 Kent's Com. 391, 395. And recently the states of North Carolina, Georgia, Tennessee, and Alabama have extended their laws over the Cherokees, Creeks, and Choctaws within their respective limits, as has Mississippi extended hers over the Chickasaws, and Ohio hers over the Wyandotts and other tribes. But the most remarkable instance of the kind occurred in New York, in 1822. An Indian of the Seneca tribe, named Soo-non-gise, or Tommy Jemmy, was indicted in the state court at Buffalo for the murder of C., an Indian woman. He pleaded to the jurisdiction of the court; that, before the foundation of the colony of New York, and before that state became free and independent, and ever since, the Seneca Nation of Indians was, and has been, and is, independent, exercising the powers and rights of sovereignty, and have had, and still have, power and authority to try their own people for crimes and offences committed on their own lands and against their people, and

particularly to exercise exclusive jurisdiction over their own people for the crime of murder; and that the power of trying and punishing the people of the Senaca Nation of Indians for the crime of murder so as aforesaid committed is and ought to be lawfully exercised exclusively by the councils of the chiefs, sachems, and warriors of the Senecas; that the prisoner ***321** was an Indian belonging to and residing with the Senecas, and that the Indian woman killed was then and there belonging to and residing with the Senecas, and that the acts of violence imputed to the prisoner were committed within the Buffalo reservation, and the offence cognizable before the councils of the chiefs, etc., of the Seneca Nation of Indians, and not before the court of oyer and terminer.

****35** A replication was put in, denying and traversing the material facts set up in the plea. A jury was empanelled to try this collateral issue, who, after hearing evidence, found that the facts set up in the plea were true.

The prisoner was brought before the supreme court of New York, on *habeas corpus,* and all the proceedings were removed into that court by *certiorari.* A motion was then made, by the attorney general, for judgment on the plea, the verdict notwithstanding. The question of law was elaborately argued on the part of the prisoner and the state, and the court took time for deliberation, and bailed the prisoner in the meantime. It did not proceed to judgment, but reported the facts to the governor, with the further fact that the Senecas had ever theretofore punished their own people for all crimes committed within their reservations, of which the courts of New York had not assumed jurisdiction, and that it was unfit and unjust to inflict punishment until the Senecas should be admonished by the state to desist from taking cognizance of crimes punishable with death, and a pardon was recommended.

But the court declare: "We are decidedly of opinion that it is competent to the legislature to pass a declaratory act, having a prospective operation, asserting in such cases the exclusive jurisdiction of the courts of the state. It would, we think, be a solecism to maintain that our jurisdiction extended over the whole state, and yet there were parts of it to which it did not extend. We believe ***322** the jurisdiction of our courts has never been denied where an Indian has killed one of our citizens within an Indian reservation. Such a case occurred some years since, and jurisdiction was assumed by our courts without a question being raised. Having, then, jurisdiction throughout the reservations, it would seem to us not material by whom or upon whom an offence was committed; for no principle is more clear than that all persons, of whatever nation, so long as they remain under the protection of the government, owe to it a temporary allegiance, and are amenable for crimes committed during the continuance of that allegiance. The case of the Indians within our borders is a peculiar one, but still we cannot perceive that they are not to be amenable for crimes. These considerations seem to require legislative interposition."

The governor communicated the report of the supreme court to the legislature, and the message and documents were referred to the committee of courts of justice.

The committee reported that they fully coincided with the views of the supreme court, and in the necessity of a declaratory act; and that, on consultation with the judges of the supreme court, the committee thought that it would not be expedient to allow to the Indians the right to punish their own people for a violation of the laws of the state, in any case, and had leave to bring in a bill, which recites: "Whereas the Seneca and other tribes of Indians residing within this state have assumed the power and authority of trying and punishing, and in some cases capitally, members of their respective tribes for supposed crimes by them done and committed in their respective reservations, and within this state; and whereas the sole and exclusive cognizance of all crimes and offences committed within this state belongs of right to the courts holden under the constitution and laws thereof, as a necessary attribute of sovereignty, except only crimes and offences cognizable in the courts deriving jurisdiction under the Constitution and laws of the United ***323** States; and whereas it has become necessary to make provision in the premises, therefore be it enacted that the sole and exclusive jurisdiction of trying and punishing all and every person of whatever nation or tribe, for crimes and offences committed within any part of this state, of right belongs to, and is exclusively vested in, the courts of justice of this state, organized under the constitution and laws thereof." Sess. Acts 1832, p. 202.

****36** By the 3d article of the constitution of New York, the governor, the chancellor, and the five justices of the supreme court are a council of revision of all bills about to be passed by the legislature. After a bill is passed by both houses, it must, before it becomes a law, be submitted to the governor and the

council of revision (two judges presiding with the governor being sufficient), and be approved by them or returned with their reasons, and passed by two-thirds of each house.

In 1822 DeWitt Clinton was governor, James Kent chancellor, Ambrose Spencer chief justice of the supreme court, with Willian W. Vanness, Joseph C. Yates, Jonas Platt, and John Woodworth associate justices.

New York caused to be revised her statutes, which, after years of study and correction, were reported to the legislature, in December, 1828, by John Duer, Benjamin F. Butler, and John C Spencer, the persons appointed for that purpose, with a provision conferring exclusive jurisdiction on the state courts to punish Indians, as well as others, for crimes and offences committed within the boundaries of that state, and which law was adopted as part of the revised code, and is now in force.

The statute of New York had the sanction of the executive, legislative, and judiciary departments of that government--and these filled with men standing high for legal and political learning to a very uncommon extent--and is entitled to great regard as an authority in favor of state jurisdiction.

The same position was maintained by the supreme ***324** court of New York, in Jackson v. Goodell, 20 Johns. R. 192-193, in which Chief Justice Spencer, in delivering the opinion of the court, says, and most truly: "I know of no half-way doctrine on this subject. We either have an exclusive jurisdiction, pervading every part of the state, including the territory held by the Indians, or we have no jurisdiction over their lands, or over them whilst acting within their reservations. It cannot be a divided empire; it must be exclusive as regards them or us."

This course of legislation has been sanctioned by the opinions of our most distinguished public men, when acting in official stations. Thus, in 1814, when treating with Great Britian at Ghent, the consideration of Indian independence was powerfully urged on our commissioners, Messrs. Adams, Bayard, Clay, and Russell. The second point presented for discussion was: "The Indian allies of Great Britian to be included in the pacification, and a boundary to be settled between the dominions of the Indians and those of the United States. Both parts of this point are considered by the British government as a *sine qua non* to the conclusion of a treaty." 9 Am. St. Papers, 327.

Great Britain actually refused to treat unless an Indian sovereignty, extending from New York west along the whole line of the lakes, was recognized by the treaty. Our commissioners rejected, as wholly inadmissible, the assumption that the Indian tribes residing within our limits could be treated with as independent powers. The British commissioners charged: "That the American government has now for the first time, in effect, declared that all Indian nations within its limits of demarcation are its subjects, living there upon sufferance, on lands which it also claims the exclusive right of acquiring, thereby menacing the final extinction of those nations." Id. 390.

****37** To this charge our commissioners reply that, had the United States so asserted, far from being the first in making that assertion, they would only have followed the principles ***325** uniformly and invariably asserted in substance, and frequently avowed in express terms, by the British government itself. It is asked what was the meaning of all the colonial charters granted by the British monarchy, from that of Virginia, by Elizabeth, to that of Georgia, by George II., if the Indians were the sovereigns and proprietors of the lands bestowed by those charters? What was the meaning of the article in the treaty of Utrecht, by which the five nations were described, in terms, as subject to the dominion of Great Britian, or that with the Cherokees, by which it was declared that the king of Great Britian granted them the privilege to live where they pleased, if those subjects were independent sovereigns, and if these tenants at the license of the British king were the rightful lords of the lands where he granted them permission to live? "What was the meaning of that proclamation of his present Britannic majesty, issued in 1763, declaring all purchases of lands from Indians null and void unless made by treaties held under the sanction of his majesty's government, if the Indians have the right to sell their lands to whom they pleased?"

Other similar treaty stipulations with European powers were referred to as evidence that Great Britain, whilst in possession of this country, treated the Indians as subjects and claimed the right of soil; and it was maintained that we only claimed the right devolved on us by the revolution of government, and which we exercised in a much milder form than Great Britain had. That the principles assumed by Great Britain and the

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United States had been uniformly recognized by the Indians themselves, not only by the treaty of Greenville, made by General Wayne, in 1795, but in all other previous, as well as subsequent, treaties between them and the United States. That the treaty of Greenville was declaratory of the public law in relation to the parties, founded on principles previously and universally recognized. It left the United States the right of exercising sovereignty and of acquiring soil, ***326** whereas the proposition of Great Britain required the abandonment of both.

The government of the northwestern territory had been extended by the United States over the whole country claimed by Great Britain for her Indian allies, as early as 1787, which had been in full exercise for twenty-five years before the country was claimed to be independent, which claim extended from the Ohio to the lakes, and northwest indefinitely. 9 Am. St. Papers, 394, 396; 1 Acts Cong. 398, 475, ed. of 1815. It included, in 1814, an hundred thousand citizens of the United States.

After Mr. Gallatin was added to our commission, the proposition of fixing an Indian boundary, and recognizing by the treaty of peace an Indian sovereignty intermediate between the provinces of Canada and the United States, was still insisted upon as a *sine qua non* on the part of Great Britain, and was again brought into anxious discussion. The negotiation had been in progress almost exclusively on this single point for two months, and had been deeply considered by men the most eminent for research and ability, when by a note it was declared: "The United States cannot consent that Indians residing within their boundaries, as acknowledged by Great Britain, shall be included in the treaty of peace in any manner which will recognize them as independent nations whom Great Britain, having obtained this recognition, would hereafter have the right to consider in every respect as such;" that such a recognition would take from the United States, and transfer to those Indians, all the rights of soil and sovereignty over the territory they inhabit, and that it was not perceived in what respect such a provision would differ from an absolute cession by the United States of the extensive t??erritory in question (409); that the right of protection claimed by Great Britain before the Revolution, and by the United States since, over the ??Indians within our limits, was a right of sovereignty ***327** which ??needed no Indian treaty to confer, and which the abrogation of no ??Indian treaty could divest--Great Britain asserting that the treaty of Greenville had been abrogated by the war; that a similar assumption on the part of France had been rejected on this express ground by the elder Pitt, in the negotiation which resulted in the treaty of 1763; that the Indians could only be treated for on principles by which amnesties are stipulated in favor of disaffected persons who, in times of war and invasion, coöperate with the enemy of the nation to which they belong; that they (our commission) had no instructions to treat of such matters, nor would they ask for any such instructions. The British commission, feeling the conclusive weight of the argument, in reply submitted, as an ultimatum, that the peace concluded should extend to the Indian allies of Great Britain, and they be restored to all the possessions, rights, and privileges they enjoyed before the war. This was an utter abandonment of the assumption pressed as a *sine qua non* for the first two months after the negotiation opened, nor was there the slightest objection to the ultimate proposition on our part, and which of course was accepted. Id. 421.

****38** But suppose our commissioners had replied to those of Great Britain that the northern nations of Indians had always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which restrained their intercourse with foreign nations; that this right was all the British crown had, or was transferred to us by the treaty of 1783, in the language of the Supreme Court in Worcester's case, and had admitted the consequent conclusion (one that no statesman dare deny on the assumed facts) that the treaty of Greenville, and every other treaty with the northern nations of Indians engaged in the war against us, was abrogated by the war; and suppose that new boundaries had been fixed ***328** by the treaty of peace of 1814, for these independent communities, and they recognized as distinct from the United States; what would have been the consequence? An instant and unanimous rejection of the treaty, beyond doubt. Our commissioners were not so wanting to their own characters as statesmen as to expose themselves to the odium, at home, of inserting an unauthorized article in the treaty, which even threw a shade of doubt on our claim to sovereignty. They say to those of Great Britain: "But to surrender both rights of sovereignty and of soil over nearly one-third of the territorial dominions of the United States, and to a number of Indians not probably exceeding twenty thousand, the undersigned are so far from being instructed or authorized that they assure the British commissioners that

any arrangement for that purpose would be instantaneously rejected by their government." Id. 380.

From the proceedings in Congress of 1830, when it was proposed by the message of the President that provision be made for the removal of the Indian tribes within any of the states and territories, and for their permanent settlement west of the river Mississippi, much information may be obtained, and of a highly authoritative character.

In 1824, during Mr. Monroe's administration, the secretary of war, Mr. Calhoun, informed the Cherokees through their delegation: "You must be sensible that it will be impossible for you to remain for any length of time in your present situation, as a distinct society or nation, within the limits of Georgia or any other state. Such a community is incompatible with our system, and must yield to it. This truth is too striking and obvious not to be seen by all of you. Surrounded as you are by the people of the several states, you must either cease to be a distinct community, and become at no distant period a part of the state within whose limits you are, or remove beyond the limits of any state.

***329** During the last years of Mr. Monroe's administration, and through that of Mr. Adams, reports to Congress from the executive department were made favorable to removing the Indians residing within the states and territories to beyond their limits, but no definite step was taken upon the subject. The foregoing letter states the leading ground for the policy. President Jackson, in his first message to Congress, in December, 1829, urges the same policy, and among other reasons for it states: "A portion of the southern tribes, having mingled much with the whites and made some progress in the arts of civilized life, have lately attempted to erect an independent government within the limits of Georgia and Alabama. These states, claiming to be the only sovereigns within their territories, extended their laws over the Indians, which induced the latter to call upon the United States for protection. Under these circumstances the question presented was whether the general government had a right to sustain those people in their pretensions.

****39** The Constitution declares that 'no new state shall be formed or erected within the jurisdiction of any other state,' without the consent of the legislature. If the general government is not permitted to tolerate the erection of a confederate state within the territory of one of the members of this Union, against her consent, much less could it allow a foreign and independent government to establish itself there. Georgia became a member of the confederacy which eventuated in our federal Union, as a sovereign state, always asserting her claim to certain limits; which, having been originally defined in the colonial charter, and subsequently recognized in the treaty of peace, she has ever since continued to enjoy, except as they have been circumscribed by her own voluntary transfer of a portion of her territory to the United States, in the articles of cession of 1802. Alabama was admitted into the Union on the same footing with the original states, with boundaries which were prescribed by Congress. ***330** There is no constitutional, conventional, or legal provision which allows them less power over the Indians within their borders than is possessed by Maine or New York. Would the people of Maine permit the Penobscot tribe to erect an independent government within their state? And, unless they did, would it not be the duty of the general government to support them in resisting such a measure? Would the people of New York permit each remnant of the Six Nations within her borders to declare itself an independent people, under the protection of the United States? Could the Indians establish a separate government on each of their reservations in Ohio? And, if they were so disposed, would it be the duty of the government to protect them in the attempt? If the principles involved in the obvious answer to these questions be abandoned, it will follow that the objects of this government are reversed, and that it has become a part of its duty to aid in destroying the states which it was established to protect. Actuated by this view of the subject, I informed the Indians inhabiting parts of Georgia and Alabama that their attempt to establish an independent government would not be countenanced by the executive of the United States, and advised them to emigrate beyond the Mississippi or submit to the laws of those states."

This part of the president's message was referred to the respective committees on Indian affairs in the senate and house of representatives of the United States.

The committee of the senate declined to express an opinion, directly, upon the validity of the conflicting claims of Georgia and Alabama and the Indians; yet the attention of the senate is called to some of the leading facts and main points upon which the controversy depends. "The title of the Cherokees, it is said, must rest upon their original right of occupancy and the treaties formed with the United States. As to the

first--their title by occupancy--the answer would be, when the country was discovered ***331** they were savages, and that this discovery, of itself, gave the discoverers a right to form settlements and to exclude other nations; that it conferred upon the nation of the discoverer and settler the right to acquire the usufructuary interest the natives had. It would be added that at a very early period the Cherokees formed a treaty with Great Britain, by which they gave up their independence, and put themselves under the protection of his Britannic majesty; that they took part with the British crown in the war of the Revolution; that the American arms were employed against them, and they conquered, when independence was acknowledged and the treaty o?? peace made with Great Britain; that this conquest conferred upon the?? respective states, within whose limits they were, all the rights and gave them all the powers which the crown had prior to the Revolution; that this right still continued in the states, and was never yielded to the United States."

****40** The committee of the house reported that the Indians had been indulged in the practice of their ancient habits and usages, and exempted from the ordinary burdens of the state, so that the action of the government upon them was only palpable to the observation of the public in the trials, and sometimes in the executions that followed, for the breach of criminal laws. That these circumstances of their situation appear to have led some to suppose that a portion of the ancient independence of these tribes still remained, which the states in the exercise of their jurisdiction could not affect. The committee, upon this point, concur in the opinion of the supreme court of New York, expressed in a cause in which this question incidentally arose, and in which the distinguished judge who delivered the opinion of the court declared that he "knew of no half-way doctrine on this subject. A state either has jurisdiction or it has not. The authority which can rightfully punish offences against the peace and morals, and wrest from Indian tribes the exercise of a part of their ancient ***332** usages, is competent to abolish the whole. The principle upon which this jurisdiction is assumed does not admit of division." And a bill was reported. A greater portion of these reports would be given but for their extensive circulation and recent date. A majority of Congress concurred in them, and grounded thereon the most important measure--that for the removal of the Indians west of the Mississippi--known to the history of our Indian relations.

In a question almost purely political in its character the official and deeply-considered acts of the federal power, executive and legislative, ought to have great weight with the courts of justice, so that conflict between the departments of the government may be avoided.

Contrary to my usual habit, it has been deemed expedient in this cause to set forth in something of detail the authorities by which my mind has been brought to the conclusion that the act of 1833 is constitutional. The subject is amongst the most complicated and difficult ever presented for judicial decision--involving the fate of a people. We are asserting a principle covered up under the history of near four centuries; resting in the depths of a papal supremacy once wonderful and overpowering to an extent hardly within the compass of belief at this day--to which kings and emperors bowed with the humblest submission; requiring for its establishment historical proof, rather than inductive argument; a principle which asserts the law of force as the rule of right, established so long that we cannot recede from it. We dare not say the unconverted heathen was not a perpetual enemy to the christian, or that he had political rights independent of us, without saying to the red man of this continent: "Take your own, we are your subjects; the country is yours, and the right to govern it is yours;" without saying to the enslaved black man of Africa: "Go in peace! You was enslaved by superstition and fraud, and are free as we are."

****41** The principle that the monarch of the first christian discoverer of a heathen land was the sovereign lord of that ***333** land, and that all unconverted savages found there were without rights, and subject to the jurisdiction of the country of the discoverer, comes in conflict with our religion and with our best convictions of a refined and sound morality; yet it is necessary boldly and firmly to assert and support it. Our individual titles to lands from the Atlantic to the western Missouri line depend upon its firm and unquailing support, regardless of its origin. The title of every slave in America, North and South, rests on no better or different foundation. Time and necessity have lent it their sanction. It is the law of the land. History of Columbus, by Irving, 391.

In the argument of this cause some stress was laid upon expressions used by this court in the causes of Cornet v. Winton, and Pathkiller v. Blair, in 2 Yerg. 150, 411. The court was proving that which no one will at this day controvert--that the Cherokees had the exclusive right to enjoy their own

territory; but they are declared to be a conquered people with this acknowledged right. So, again, in Pathkiller's case, when treating of the influence of the act of 1783 on the Indian title, the court says the Cherokees were a dependent people, but governed by laws of their own, and having a country of their own, and that North Carolina had not and could not legislate upon their title until she incorporated them into the state government; but that she had the right to do so is most forcibly implied.

In Holland v. Pack, Peck, 151, it was adjudged "that an Indian residing within the bounds of the Cherokee country, beyond the treaty line, was not subject to be sued, under our laws, for a default as an innkeeper, being governed by the laws of the Cherokees." How could it be decided otherwise? Our laws had not been extended to the Cherokee country in 1815, when the transaction took place, and had no force there. This is the whole case, and it matters little what language the court used in the opinion, given at a time and place where aid ***334** from not a single book on the subject was had. This cause is strongly relied on to sustain the assumption that the Cherokees are an independent nation, but with very little reason. The great cause of Johnson v. McIntosh is in the face of all loose expressions tending to sustain Indian sovereignties, and as an authority to the contrary is confidently believed to be of unequalled merit. There was not the least necessity in Worcester's case to contradict a single principle assumed in that of Johnson against McIntosh. By the act of 1830, of Georgia, it is provided that all white persons residing within the limits of the Cherokee Nation after the 1st of March, 1831, without a license or permit from the governor of Georgia or his authorized agent, and without having taken an oath to support the constitution and laws of Georgia, shall, o?? conviction, be confined in the penitentiary not less than four years--with the exception of Indian agents of the United States, women, and minors. Worcester was indicted for residing in the nation withou?? having taken the prescribed oath. He pleaded, among other things, tha?? he entered the Cherokee Nation in the capacity of a missionary, unde?? the authority of the president of the United States, and had continued?? there under such authority; that he had been engaged in preaching the?? gospel to the Cherokee Indians and in translating the sacred scriptures?? into their language, with the permission and approval of the Cheroke?? Nation, and in accordance with the humane policy of the government o?? the United States for the civilization and improvement of the Indians?? and that his residence there for this purpose is the residence charged i?? the indictment.

****42** The plea was declared no defence, and overruled. By the act o?? Congress of 1819 the president of the United States is authorized, with?? the consent of the Indians, to introduce among them the means to civil??ize and instruct them, and to employ fit and capable persons to teac?? the Indians agriculture and their children reading, writing, and ***335** arithmetic, "and for performing such other duties as may be enjoine?? by the instructions of the president." To execute this policy the sum?? of ten thousand dollars annually is appropriated. That the residence o?? Worcester was within the sanction of the act of 1819 is not open to?? question.

The power to regulate commerce with the Indian tribes is in Congress. It extends to personal intercourse. The mode of intercourse?? was prescribed by the act cited. This is the supreme law, and that o?? Georgia is void so far as it comes in conflict with it. The correctness,?? therefore, of the judgment ordering Worcester to be discharged from the penitentiary of Georgia is not called in question; far from it. But?? the controlling and conclusive position assumed as the basis of tha?? judgment--that the Indian Nations were distinct and sovereign political communities, independent of the states--is confidently believed to be incorrect, and that sooner or later it must be abandoned.

From the foregoing facts and arguments have been drawn the following conclusions:

1st. That the right to subdue and govern infidel savages found in countries newly-discovered by christians pertained to the first christian ??discoverer. By this rule the Indians found on this continent, the Cherokees inclusive, were allowed no political rights, save at the discretion of the European power that colonized the country. Such is the international law as declared by papal authority, such is the common and national law as declared in Calvin's case, and such the only possible rule that could be observed by our ancestors; that the colonial charter of Charles II. rightfully conferred sovereign power to govern all the people abiding within its limits, and which the courts of the colony would not disregard in cases of Indian culprits, and refuse to punish those charged with crimes; that the royal government, after 1729, had, and exercised ***336** at discretion, the same authority, and by the Revolution it devolved on the state of North Carolina.

2d. But, waiving this ground, we have the right at our election to exercise sovereign power over the Cherokee country, and to govern all residing there, by the right of conquest. This is evidenced by the treaty of 1730, by that of 1783 with Great Britian, but especially by the treaty of Hopewell. We won the sovereignty from Great Britian and from her ally, the Cherokees, when the country was conquered to the east bank of the Mississippi in the war of the Revolution. This right devolved on North Carolina, and, after our separation from the mother state, remained an unimpaired power, by compact, in the Southwest Territory, and then in the state of Tennessee.

****43** 3d. The treaty-making power, as exercised with Indian tribes, cannot deprive a state of a part of the jurisdiction it once possessed. The power is not over, but under, the Constitution, and, like others, restrained by the instrument giving it existence. It cannot, in times of peace, cede away to a people independent of the state a part of its territory and sovereignty. If a part could be ceded the whole might, and the state be extinguished. The right to destroy one state would be equal as to all. The states are emphatically the basis of the Union and federal Constitution; to extinguish them is to extinguish the Constitution -- to leave it nothing to operate upon.

4th. Congress has no power to make a new state of the Union, of parts of other states, without the consent of the legislature of the states concerned; it has no power to erect an independent sovereignty not of the Union, of parts of states, with or without their assent; and to maintain the Cherokee government in its independent form by acts of Congress would be the establishment of a form of government unknown to the Constitution and in violation thereof, because no conferred power authorizes legislation that dissevers the states. Nor can the treaty power and the power to legislate combined do the same thing. If ***337** the treaty of Hopewell or of Holstein authorizes Congress to legislate excluding the jurisdiction of the states from the Indian territory, then the treaty is a constitution as between the Cherokee Nation and the federal government, to which the states of the Union are no parties; the treaty, and acts of Congress grounded on its authority, are superior to, and destructive of, the Constitution, so far as this guarantees to every state a republican form of government, and sovereignty to the whole extent of its limits. Congress can have no created authority aside from the Constitution.

5th. Congress has power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. Grounded on this power laws have been passed to punish every grade of crime committed within the Indian limits, operating equally on whites and Indians. If authority exist for the exercise of this highest of jurisdictions, it must for all purposes and to every extent, at discretion; and, as the same construction must run through the sentence, if the power to regulate commerce authorizes legislation for the punishment of all crimes, and the assumption of general jurisdiction over Indian nations, by the same clause may the same jurisdiction be exercised over every state of the Union at the discretion of Congress. There is no escape from this conclusion. That no such power exists in reference to the states will be admitted, and that none such exists in relation to the Indians follows.

GREEN, J.

The act of the legislature of 1833, referred to, extends the laws of the state over the Cherokee territory only so far as to punish the crimes of murder, rape, and larceny; leaving the Indians in the exercise of their own customs and subject to their own laws in all other respects.

****44** ***338** Several important questions are involved in the consideration of this case, in relation to which I shall proceed to state my views.

The relations which exist between the civilized states of America and the savage tribes which border upon them, or are included within their boundaries, are very peculiar. From the nature of the case these relations must be, in many respects, dissimilar from anything that exists among the civilized states of Europe. In order to be properly understood they must be considered partly in reference to the natural rights of nations and partly in reference to the character of the parties, the necessities of the case, and the policy which dictated the attitude originally taken and the course since pursued by the parties respectively.

I will first consider what originally were the rights of the rude nations that were found by our ancestors upon this continent, in reference to the civilized nations by whom it was discovered.

8 Yer. 256

We know that the principle is well settled "that discovery gave an exclusive right to extinguish the aboriginal right of occupation, either by conquest or purchase, and to assume such jurisdiction over the savages as circumstances might require." 8 Wheat.

But in relation to whom is it laid down that this right exists? Not in relation to the aborigines themselves, surely, for it is impossible that one nation can address to another which it is about to conquer the language of justification, and say, "We have a right to do this." Right and wrong must be predicated by some rule, in reference to which we determine the quality of the act. It never can be true, in reference to A and B alone, that the one has a right to conquer the other. The very idea of the necessity of the conquest presupposes resistance, and excludes the existence of right. The law of nature does not give one man a right to subdue another to his authority. Nor does the law of nations authorize one nation to ***339** make war upon another without just cause, and merely for the purpose of subduing that other to its dominion. But as against others I may have a right to exercise dominion over my slave. So as it regards other civilized nations, the discovering country has a "right to extinguish the aboriginal right of occupation, either by conquest or purchase." Although, therefore, our ancestors, by discovery, obtained, as against other civilized nations of Europe, a right to conquer the Indian tribes and subdue them under the jurisdiction and authority of the government they were about to establish here, yet such subjugation would have been a wrong to the Indians, and wholly unauthorized by any principle of international law.

France might properly say to England: "So far as we are concerned, or our rights are to be affected, you have a right to conquer the savage tribes who inhabit the country you have discovered." But France could not say to England: "The savage nations who inhabit the country you have discovered have no rights, and you may justly extend your conquests over them and bring them in subjection to your authority." This would be going further than any writer on public law, so far as I know, ??as gone. But on the contrary, "they had natural rights, which even ??the strong hand of power should respect and acknowledge," among ?? which was the right to a space of country amply sufficient to maintain ??hem by actual cultivation of the soil," and, I will add, they had the ??ight of self-government according to their own usages.

****45** But, although I think the principles above laid down are undeniably ?? rue, yet it does not follow that the people of the United States have no ??egal and perfect right to the lands they inhabit. The fact that the ??mmense regions now composing the United States were inhabited by ?? andering tribes of savages; that they traversed the forest in the chase ??nd wandered up and down the streams in their fishing excursions, and ??hat they had temporary habitations from which they removed as occa??ion ***340** required, could not be taken for a true and legal possession ??f all that vast extent of country. Vattel, b. 1, ch. 19, sec. 209.

The earth was created for the general benefit of its inhabitants, and it ?? ordained that man shall live by the sweat of his face. In order to sus??in its vast population the earth must be cultivated; and it is manifestly unjust that a comparatively small number of its inhabitants should claim an exclusive right to a large portion of its surface merely because they have wandered over it in the chase, or beheld it from some mountain peak to which they may have ascended in pursuit of game. Vattel, b. 1, sec. 81.

These tribes were in no want of the forests through which they wandered. If they had pursued honest labor for a support, instead of the idle life of hunting and fishing, a very small proportion of the extensive territories they usurped would have been amply sufficient for them. If, therefore, the people of Europe, too closely pent up, found land of which these tribes were in no particular want, and of which they made and were likely to make no actual or constant use, they might lawfully possess it. Vattel, b. 1, ch. 19, sec. 209.

The conclusion, therefore, from these principles is that, if, when the discoverers came here to possess a portion of the extensive territory which the Indians did not need, they had been resisted and opposed by those tribes, it would have been lawful to have used force to repel such resistance.

Although it is an admitted principle that civilized nations have a right to settle and plant colonies in new-discovered countries inhabited by erratic tribes, yet it does not follow as a consequence that the discovering country has a right to exercise jurisdiction over such nations. The principle from which this right to settle and plant colonies in such countries (as has already been shown) is derived is founded upon the fac?? that the inhabitants ***341** have not the right to usurp such extensiv?? territories for the mere purpose of fishing and

hunting, and that consequently the discovering country has a right to circumscribe the?? within narrower bounds, and take a part of such territory for the purpose of cultivation. But, most clearly, the discovering country has no?? the right to appropriate the entire extent of the country discovered t?? its own use. If that were so there would be no force in the argumen?? by which the right to appropriate a part of it is maintained.

When it is said by Vattel, b. 1, sec. 81, "that those who still retai?? this idle life usurp more extensive territories than they would hav?? occasion for were they to use honest labor, and have, therefore, no rea?? son to complain if other nations, more laborious, came to possess ?? part," the writer states the principle upon which the right of those t?? take a part is founded; and this statement also implies, if it mean any?? thing, that those others have no right to take the whole, and that the?? would have a right to take none if the possessors held no more tha?? they would have occasion for in the use of honest labor. But it is tru?? that, if land enough be left for the barbarous tribe, and if a portion ?? its people choose to live within the bounds prescribed by the civilize?? state, in such case jurisdiction over their persons would be the necessar?? consequence. But here I do not mean the boundary which the discovering state prescribed, within which it intends that no other civilized nation shall exercise any right, but such bounds as may be prescribed between the civilized state and the barbarous tribe.

****46** For we have already seen that in relation to the country discovered the discoverer may have rights, in reference to civilized nations, which do not exist in relation to those inhabiting the discovered country.

It was upon the foregoing principle that our ancestors acted, and upon which our government has continued to act up to this time, in reference to the Indian tribes. ***342** The charters of the crown of England conferred upon those to whom they were granted the exclusive right to all the country included in them, as against all other civilized nations. But if one of those charters had included the whole territory which any given tribe could lawfully possess, it would not have conferred the right to drive them out by force, or to reduce them by force to the dominion and jurisdiction of the colony. But still the charters were not mere blank paper in reference to the Indians; for, as the king of England had a right to take possession, for his subjects, of so much of the discovered country as the barbarous tribes had no provision for, his charters communicated the entire right to such part, and the fee simple to the remainder, subject to the Indian possessory title. While, therefore, it is true that the "United States maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title, by purchase or conquest" (8 Wheat. 587), it is equally true that the inhabitants of one quarter of the globe have no rightful original claims of dominion or property over the inhabitants of the other, nor could the discovery of a country give the discoverer rights which annulled the preëxisting rights of the ancient possessors. Worcester v. Georgia.

The right to purchase would exist in all nations, but for the exclusion of that right in consequence of the superior rights of the discoverer. So any nation might conquer the country and thereby acquire dominion; but as the discoverer, by the discovery, acquires the entire right to the country, except that which exists in the ancient possessors, it is clear that whenever their right ceases the discoverer acquires it. Therefore, although conquest may give right to the soil and to dominion over the inhabitants, yet such rights cannot vest in another than the discovering nation, because of its preëxisting rights.

Both the right of conquest and of purchase, in the ***343** sense in which the court use the expression in the case of Johnson v. McIntosh, are rights which exist in reference to other civilized nations, and not rights which exist in reference to the rude tribes that are discovered. By the right to purchase cannot be intended the acquisition of such portions of the territory as the rude and idle tribes have no occasion for, because, as I understand the principle, "the more laborious" nations have a right to come and possess such part without paying for it, and even against the will of such tribes. The idea of a purchase can only be predicated upon the existence of an agreement to sell as well as to buy. But as no one can be rightfully compelled to consent to sell, therefore the right to purchase can only mean an exclusive right to acquire the title whenever the possessors may wish to relinquish it. No other nation has a right to purchase from them; consequently, if a sale be made at all, the discovering nation only has a right to purchase. This exclusive right to purchase, therefore, is not founded upon a denial of the right of the possessor to sell, but upon a denial of the right of any other to become the purchaser. It is like the

right of conquest--a right which exists solely in the discoverer as against all other civilized nations.

****47** These principles, which seem to me to be incontrovertibly established, have been recognized and acted on from the earliest discovery of North America.

The charters of the king of England were never regarded as giving right to the soil to the whole extent of the boundaries designated in them, to the subversion of the Indian possessory title. For the doctrines avowed in the bulls of the pope to the Spanish and Portuguese discoverers, and which were practised upon in the settlement of South America, were never maintained by the English monarchs, nor practised upon by the colonists from that country, but have been condemned by all protestant writers as alike subversive of justice, and abhorrent to humanity. Dr. Robertson, in his History of ***344** South America (p. 56), says that Pope Alexander VI., who gave that country to Spain, was "a pontiff infamous for every crime which disgraces humanity." But while the discoverers of North America claimed an exclusive right to acquire the Indian possessory title, and as a consequence claimed the fee-simple of the soil as being vested in them, yet the Indian right of occupancy was always acknowledged to exist to such portions of the country as were designated by the treaties for their hunting grounds. Within these limits they have exercised the right of self-government, and all the attributes of sovereignty not relinquished in their partial submissions. Even the right to take part of the territory and appropriate it to their own use was not always enforced by the colonists. In some instances the lands upon which the first settlements were made were taken possession of with the consent of the Indians and by virtue of a purchase from them. This was the case in the settlement of New England by the puritans, and afterwards in the settlement of Pennsylvania by William Penn and his followers. But this course was rather the dictate of a humane and benevolent feeling, desirous of cultivating friendship with the Indians, than the result of any obligation imposed by the principles of public law in reference to those people. But after a boundary between the colonists and Indians had once been fixed and established by treaty, the Indians could not lawfully have been deprived of any of the lands designated therein for them, without their consent. Consequently it was the constant practice to treat with them for additional cessions of land.

True, their lands might have been acquired by conquest. For although one nation cannot justly or lawfully make war upon another for the mere purpose of subduing it to the dominion of the invader, yet it is settled (8 Wheat. 543) that "conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim which has been successfully asserted."

Where a just and necessary war is provoked, those who provoke it may lawfully be subdued to the dominion of the other nation, should it conquer, and be dispossessed of the soil at the pleasure of the conqueror. But all the wars in which we were engaged with the Cherokees terminated in treaties of peace, in which each party stipulated with the other as an independent power. I am not aware of any fact in the history of that tribe from which we can infer that they ever were conquered. Neither the submission in 1730 nor the language used in the treaty of Hopewell establish any such fact. No argument can, therefore, be drawn in favor of our jurisdiction from the principles of national law arising from a supposed conquest. "The colonial authorities uniformly negotiated with them, and made and observed treaties with them, as sovereign communities exercising the right of free deliberation and action." Although a tribe may have been included within the boundaries of a charter, and the ultimate fee to the soil may have been in the colony, and the tribe, in a national capacity, may have been considered as owing a qualified subjection to the British crown, yet, in an individual capacity, the Indians were never regarded as owing subjection to the government of the colony, but, within the boundaries assigned them, they were recognized as having a right to exercise a sovereign authority. Many of the tribes placed themselves under the British protection and were considered as dependent allies. Of this character was the submission of the Cherokees to Sir Alexander Cumming, and the like submission of the six deputies of that tribe to the king of England in 1730. Report Com. House Rep., Feb. 24, 1830. This is proved to have been the understanding of the parties, by the manner in which they afterwards treated each other, and the relations which were mutually recognized as existing between them. They did not surrender the right to govern themselves, and therefore their partial submission did not destroy their character as a sovereign community. "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, secs. 5 and 6, if it reserves to itself the right of governing its own body, it ought to be considered as an independent state. There are several kinds of submission, says this same jurist (b. 1, ch. 16, sec. 196); "the submission may leave the inferior nation a part of its sovereignty, restraining it only in certain respects, or it may totally abolish it, or the lesser may be incorporated with the greater power so as to form one single state, in which all the citizens will have equal privileges." Goodell v. Jackson, 20 Jh. Rep. 711.

****48** It is apparent from the whole history of the Cherokees that their submission was of the former kind, and that as an inferior nation they were restrained of their sovereignty in certain respects only. In the treaty of Hopewell the Cherokees are treated as a nation, and throughout that instrument their distinctive character as a separate political community is kept up and clearly acknowledged. The treaty of Holstein, made in 1791, recognizes them as a nation, calls their people citizens, abandons citizens of the United States, settling on Cherokee lands, to be punished or not at the option of the Cherokees, provides that reprisals for injuries (an attribute of sovereignty) shall not be made by either party until satisfaction shall have been demanded of the party of which the aggressor is, and guarantees the Cherokees all their lands not thereby ceded. All the subsequent treaties recognize and acknowledge the operative force of these treaties. "The United States," says Chancellor Kent ***345** (Goodell v. Jackson, 20 Jh. Rep. 714), "have never dealt with these people within our national limits as if they were extinguished sovereignties. They have constantly treated with them as dependent nations, governed by their own usages and possessing governments competent to make and maintain treaties. They have considered them as public enemies in war, and allied friends in peace."

In the view I have taken of this question I concur with the sentiment expressed by our commissioners at Ghent, where they say: "The treaty of Greenville neither took from the Indians the right, which they had not, of selling lands within the jurisdiction of the United States to foreign governments or subjects, nor ceded to them the right of exercising exclusive jurisdiction within the boundary line assigned. It was merely declaratory of the public law in relation to the parties, founded on principles previously and universally recognized."

In like manner I consider the treaties of Hopewell and Holstein, in their principal provisions, as only declaratory of the public law in relation to the parties, founded on principles growing out of their peculiar character. The attributes of sovereignty and the right to the soil there recognized did in fact exist before, and were not conferred by those treaties. The provision, in the 12th article of the treaty of 1791, that ??eprisals for injuries shall not be made until satisfaction shall have been ??demanded of the party of which the aggressor is, while it recognizes the ??urisdiction of the Cherokees as a nation, and their right to avenge inju??ies done to any of their people, does not confer that right It existed ??efore the treaty, and this stipulation is only an acknowledgment of it. ??The guaranty to the Cherokees, in the 7th article of that treaty, of all ??their lands not thereby ceded did not confer upon them any new right ??n relation to their lands. They had a possessory right before the treaty, ??nd having circumscribed themselves, by voluntary stipulations, within ***346** reasonable bounds, they could not lawfully have been deprived of the possession of those lands, without their consent, independently of the provisions of this treaty. The guaranty is only a recognition of t??heir right, and an undertaking to defend them in the enjoyment of it.

****49** It is upon this same principle that the American commissioners at ?? Ghent assert that the treaty of Greenville did not take away from the ??ndians the right of selling lands within the jurisdiction of the United ??States to foreign governments or subjects. This right they had not ??efore the treaty. Discovery, as heretofore stated, gave to the discover??rs the exclusive right to extinguish the aboriginal right of occupation. ??The United States, after the Revolution, succeeded to all the rights of ??he British government upon this subject, and consequently had the ??xclusive right to extinguish the Indian title. It follows that the ??ndians could not sell to another nation, nor could such nation lawfully ??uy land of them. Therefore the treaty of Greenville was only declara??ory of this well-settled principle.

From the preceding discussion it will be seen that, in my opinion, ??lthough the European discoverers of this continent had a right to share ??ith the wandering tribes they found here in a part of the immense ??erritory of which those tribes were in no peculiar want, yet they did ??ot have the right to take the whole from them, nor could they have ??ightfully reduced the inhabitants to submission to their jurisdiction, ??xcept such of them as chose to remain within the limits of the civilized ??

ation after leaving the barbarous tribe sufficient territory for their sub??istence. This being the condition in which the principles of public law ??s applicable to these people placed them, the practice of the country, ??rom its discovery through all the successive changes of government, has ??ontinued to treat them as standing in the same condition, and has ?? espected their rights as distinct political communities except so far as ??heir peculiar character and the ***347** changes of their condition have ?? made it necessary to abridge them. I have not examined the relative ??uthority and jurisdiction of the state and federal governments upon ??his subject, because no one pretends that the states have any more power ?? n relation to it than the colonial governments possessed; and if I have ??hown, as I think I have, that as against those governments the Indian tribes retained a possessory right to the soil within their limits, and the right of self-government, it follows that they have not lost those rights by the changes in our form of government, and that they still retain them except where the assumption of jurisdiction has become necessary. This necessity, I say, has grown out of their peculiar character and condition. The acknowledged exclusive right in the discoverer "to extinguish the aboriginal right of occupation" made it indispensably necessary, for the preservation and enforcement of this right, to assume to some extent a jurisdiction over them. They were, therefore, restrained from trading with or selling lands to other civilized nations o?? their subjects. If this restraint had not been imposed other nations would have purchased from them, and thus have acquired territory and?? jurisdiction within the very heart of the United States. The preservation of our exclusive right to acquire their lands, as well as the protection of our people from the hostilities of such nations as would hav?? purchased from them, and who would have excited the savages in th?? bosom of our country to massacre our women and children, alike demanded that we should abridge some of their natural rights of sover?? eignty, and hold them in a qualified subjection, in a national capacity?? to our government. This was done by the British government, an?? through all the successive changes up to this time the government o?? this country has continued so to regard them. As a compensation?? however, for this abridgment of their natural rights, the protection an?? guardianship of our government has been extended to them. Bu?? although, from the ***348** necessity of the case, the qualified subjectio?? in a national capacity has existed, yet they have rightfully been subject?? personally, only to their own customs and laws, except where a lik?? necessity may have impelled the assumption of a partial, or, as the cas?? may be, an entire, jurisdiction over them.

****50** One peculiar fact in relation to their history is that their numbers an?? consequence uniformly diminish upon the approach of a civilized population. It is manifest that a principle which might very properly b?? applied to a warlike and powerful tribe of rude and uncultivated sav?? ages, situated at a distance from the residence of a civilized population?? would be very inapplicable to a remnant of that same tribe, when it sha?? have been overwhelmed by a surrounding civilized population whos?? influence enters largely into its domestic concerns. When thus su?? rounded, and become so impotent as to be incapable of self-governmen?? the government of the country by whose population they may be thu?? surrounded, upon a principle of necessity, may subject them to it?? jurisdiction so far as the necessity of the case may require it. Va??

Necessity, "that irresistible law," as Vattel (b. 1, sec. 202) calls i?? imposes it as a duty, and creates the right to interpose such authority?? How else can a state fulfil its duties to itself and its citizens? Upo?? this principle the criminal jurisdiction of the courts of New York was extended over the Oneidas, numbering at that time upwards of six thousand souls. This both the supreme court and the court of errors held to be justifiable; Chancellor Kent, who delivered the opinion of the court of errors, justifying it upon the ground that it was necessary in order to put a stop to the practice of retaliation and the atrocities to which it led. Nor is such partial jurisdiction, according to the same able judge (20 Johns. Rep. 17), inconsistent with the distinct national character of such tribe.

It is holden by Judge McLean, in the case of the ***349** United States v. Jonathan Cisna (Nat. Int., 22d Aug., 1835), that the state of Ohio had a right to extend its jurisdiction over the Wyandott reserve in that state. The Wyandott tribe once owned an extensive tract of fertile country; but treaties of cession have been made until their territory is restricted to twelve miles square. Thus reduced and surrounded by the white population, the preservation of order and punishment of offences committed within the reserve made it indispensable that the law should authorize the state courts to take jurisdiction of offences. "The exercise of this power," says the judge, "by a state, would not be incompatible with the

exercise of the power vested in the federal government." That power extends only to the regulating their trade.

Having established, as I think, that the Cherokees once possessed a distinct national existence, having a right to exercise a sovereign jurisdiction over the territory within the bounds assigned them, except so far as their dependent condition induced a partial surrender of their sovereignty to the United States; and having shown that a nation or tribe possessing these rights may, by the change of circumstances, become reduced to such a condition as to authorize a state within whose limits it is situated to assume additional jurisdiction, it becomes a question of great delicacy and difficulty whether the legislature of this state had the right to extend the jurisdiction of our courts over that part of the Cherokee country within our limits, as was done by the act of 1833. That act subjects all persons, both natives and others, to the punishment which our laws inflict for murder, rape, and larceny, as well when committed within the Indian territory as if perpetrated elsewhere.

****51** The condition of the Cherokees has undergone a very great change within the last ten years. The territory claimed by them is situated in the states of North Carolina, Georgia, Alabama, and Tennessee. A comparatively small proportion of it, containing but a few hundred ***350** inhabitants, lies in Tennessee. The Cherokees have made considerable advances in the arts of civilization. The hunter life has been almost entirely abandoned. Many of them are intelligent, living in good houses, and have improved farms.

Ten years ago they were governed by a code of wholesome written laws, administered by regular judicial tribunals, and order was well preserved, and justice correctly administered.

But this state of things has undergone a very great change. Georgia, within whose chartered limits the principal part of the Cherokee territory is situated, several years ago extended its laws, civil and criminal, over the Indian country, and disposed of their lands to the citizens of the state. All government and authority among the Indians was by this proceeding broken within that state. The rigorous execution of the Georgia laws produced a general state of confusion among the Indians. Their appeal to the government of the United States was answered by a declaration that that government had no authority to interpose its power to prevent the execution of the Georgia laws. Soon after this the legislature of Alabama in like manner extended its laws over that part of the Indian territory within that state. In this state of things a natural consequence occurred. The authority of the Indians has been broken down, the white population crowded into the Indian territory. Taking into view the confusion and exasperation of the Indians, and the fierce and unprincipled character of many of those who lived near them and had settled among them, it was almost certain that crimes of every description would be of frequent occurrence. How were they to be punished? The state of disorder among the Indians, and the imbecility of their authority, alike precluded any just expectation that they could or would preserve order and suppress crime. In the language of Chancellor Kent, "was such a state of things to be tolerated in the neighborhood and under ***351** the eye of a civilized and christian people? Under the circumstances in which we are placed in relation to those Indians, as their guardians and protectors, have we not a right to avail ourselves of the superiority of our situation and interpose our authority" and jurisdiction for the preservation of order, and for the protection of the Indians themselves as well as of our own border citizens? I cannot say we have not. Certain it is that whenever such a people become surrounded by a stronger nation, and they become too imbecile to govern and preserve order, it is the right and duty of the stronger to interpose its authority. Whether this state of things existed at the time of the passage of the act under consideration, or at this time, in that part of the Cherokee country within our borders, I have had no means of judging except from the newspaper publications of the day. From these I understand the state of things to be such as I have described it; and, if this be true, then it was a question for the wisdom of the legislature to determine. Indeed, it may admit of doubt whether this is properly a judicial question. The change of some of the Indian tribes from that state, in which they were clearly entitled to the character of a sovereign community, to that in which they were as clearly liable to be subjected to the jurisdiction of the state, has been so gradual that probably the precise time when this authority might rightfully have been extended over them could not be designated so that different persons, possessing the same general views of the subject, would be agreed upon it. After all, it probably must depend upon the sound discretion of the legislature. At least the difficulty of determining with precision upon the subject should induce the courts to sustain the act of the legislature, unless that act is plainly unauthorized. When the legislature pass a law, the presumption is in favor of its constitutionality; and, before the courts can be called upon to declare it void, it must clearly

appear to ***352** have been passed without authority. This cannot be said of the act of 1833.

****52** It has been said that the right of this state to extend its jurisdiction over the Cherokees within our limits being dependent upon the state of things produced by the Georgia legislation, in extending that jurisdiction we take advantage of our own wrong. Admitting that the Georgia legislation was unauthorized, and that the consequences of that legislation produced the necessity for the act of 1833, still we are guilty of no wrong, for we had no control over Georgia, and could not have prevented what she did. In truth, we are only to look at the actual state of things, and, if we find them such as to demand the interposition of our jurisdiction, however produced, we ought not to be deterred by abstract theories, but, like practical men, act upon the necessities of the case as they exist.

Upon the whole, I am of opinion--

1st. That our ancestors, by discovery, had a right to take, occupy, and exclusively enjoy a part of the extensive territories of which the Indians were in no particular want.

2d. That they had not the right to deprive the Indians of all the lands they inhabited, nor to subdue them to their authority and jurisdiction, otherwise than as hereinafter stated.

3d. That they acquired, by discovery, an exclusive right to extinguish the aboriginal right of occupancy to the whole extent of the country discovered.

4th. That this exclusive right to extinguish the Indian right of occupancy, together with the right (growing out of the former) to the fee simple of the soil, authorized, from the necessity of the case, the exertion of a partial control of, and jurisdiction over, the Indian tribes, in a national capacity, so as to prevent them from trading with, or selling lands to, other civilized nations or their subjects.

5th. That after a treaty had been made with an Indian ***353** tribe, and a boundary prescribed for them, the lands within that boundary could not rightfully be acquired but by a voluntary cession from them, or as the result of a conquest over them produced by a just and necessary war provoked by them.

6th. That jurisdiction over them personally cannot be rightfully assumed, unless their peculiar condition shall render it necessary for the preservation of order and the suppression of crime, and then to such extent only as the necessity of the case may require.

7th. That such necessity exists at this time for the operation of the act of 1833.

I am, therefore, of opinion the judgment ought to be reversed, and the prisoner remanded to be tried upon the merits of the case.

PECK, J., dissenting.

****52** Foreman was indicted in the circuit court of McMinn county, for the murder of John Walker. They were both natives of the Cherokee Nation, and resided within the bounds allotted to that nation by the treaties entered into between the United States and Cherokees. Foreman pleads to the jurisdiction of the court; avers that it belongs to Cherokees to try him for the crime, the same having been committed within that jurisdiction and beyond the rightful jurisdiction of the state of Tennessee, and pleads and relies upon the several treaties now in force. There was a demurrer to the plea. The circuit court overruled the demurrer and allowed the plea, from which judgment of the court the state brought the case by appeal into the supreme court.

****53** Seven years ago the question before us would not have been considered one of difficulty. Having in all previous time conceded to the Cherokees the right to govern themselves as a nation, there was no plea urged from any quarter that treaties should have new constructions, or the repose of that people be disturbed. The construction of ***354** the federal Constitution, so far as it relates to the Indian tribes, was had at an early day after its adoption, in the passage of the intercourse act of Congress. Subsequently the views that our wisest and best legislators had upon the subject, as seen in the acts of Congress, were sustained and carried out by the federal judiciary. Some, highly esteemed for wisdom, honesty, and patriotism, were of opinion that the nation had the right even to change her code of laws, and make nearer approaches to the rules and forms of the surrounding white community. This was then thought to be in accordance with the spirit of treaties, in one of which we have the language

of our present chief magistrate, adopting the language of the then president of the United States, addressed to the Cherokees, then divided in opinion on the policy of removing to the West. "The United States, my children, are the friends of both parties, and, as far as can be reasonably asked, they are willing to satisfy the wishes of both. Those who remain may be assured of our patronage, our aid, and good neighborhood. Those who remove, when established in their new settlement, we shall still consider as our children, give them the benefit of exchanging their peltries for what they will want at our factories, and always hold them firmly by the hand. And whereas the Cherokees, relying on the promises of the president of the United States," etc. Treaty of 1817. The spirit of all the treaties with the Cherokees, as taken in connection from 1785 up to the present time, may safely be thus summed up: Perpetual peace; restoration of prisoners; grant of lands by the nation; express designation of boundaries; to abstain from commission of crimes against the whites; restoration of property stolen or compensation therefor; to give up offenders taking refuge amongst them; the retaliation shall cease; the exclusion of the whites from the lands retained by the Indian nation; acknowledgment of the protection of the United States, and of no other sovereign whatever; ***355** that Congress shall have the sole and exclusive right of regulating trade with the Indians, and managing all their affairs in such a manner as that body shall think proper (treaty of 1785); relying upon the justice of the United States, shall have a deputy at Congress; the right to construct and pass certain roads through the nation, granted by provision in the treaties; a solemn guaranty to the Cherokees of all their lands not ceded; that it shall be against the law for white men to settle on such lands, and such intruders to be punished as the Indians may think proper; none shall go into their territory without a passport; ??one hunt upon their grounds; that the United States will assist the Cherokees in the arts of civilization, that they may become herdsmen and cultivators, rather than remain hunters; the grant of annuities as part of the consideration for the lands ceded.

****54** Taking it for granted that these stipulations have been entered into by powers competent to make them--that they are to stand unbroken on either side-- can the act of assembly before us, extending the jurisdiction of our courts over these people within the bounds of Tennessee, be construed to stand and be consistent with them?

We are to consider, also, that the nation claiming under these treaties exemption from our laws has not lost its character by diminution of its numbers, or by non-user of the rights formerly guaranteed. No new ??reaty has abrogated the former--so far from it, they are recognized as ??n full force by act of Congress, 1834, and we are to suppose the United States, true to the engagements on her part, by parental care has made the nation wiser in counsel, and even more tenacious of her rights, in proportion as that nation has become the richer in goods. Of course the right to govern touching that property, the security of life, and their liberty, has become dearer to them now than when hunters.

We are, therefore, to view them in all other respects as they were when the treaties were made--a people ***356** unpractised in our language or our laws. Did such a nation, from the premises before us, anticipate, when signing such treaties, one object of which was protection against encroachment--a protection guaranteed by the power that controlled the surrounding communities--that they were to surrender up at the pleasure of these communities; that all their rights of government were to depart; and that, without the right of representation, unlettere?? and unskilled in our language, they were, through their interpreters, t?? ask for information touching the new rules that fixed their destiny? I?? is impossible; the very suggestion of it, before the signing, would hav?? produced the rejection of the whole. The encroachments of the sur?? rounding states produced the animosities which made treaties necessary?? The Indian was the last that even dreamed of being thus taken by surprise; and, at the day of signing the last treaty in the series, it would?? had it been named, have been no less startling to the white man. If?? upon general principles, we should find but little difficulty in the solution of the question, it will become less difficult when the subject shal?? be examined more in detail, and, more directly with a view to thos?? clauses in the treaties having a bearing upon the question, compare?? with the Constitution of the United States.

An argument from some unknown hand, which has gone its round in?? the papers, and from which most of the debates in favor of state rights?? in this particular, have been based, assumes that, because the Constitution of the United States extends no farther than to give power to Congress to regulate ""commerce" with the Indian tribes, this grant o?? power does not include within it the grant of power to exercise jurisdiction over those tribes, and therefore the act of Congress which

regulates the "intercourse" with them is not authorized by the Constitution.

****55** Although I think, for myself, that there is in the argument some refinement upon the meaning of the terms "commerce" and "inter??ourse," still the whole assumed ***357** may be admitted, and yet i?? will not be difficult to show that the argument does not reach the case before us. For it may be true that the clause, "Congress shall have power to regulate commerce with foreign nations and among the severa?? states, and with Indian tribes," will, of itself, not communicate the power to pass a law giving to the federal judiciary jurisdiction. Yet i?? may be true that the power may be communicated under the clause,?? "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." I am aware it has been denied that the treaty of Hopewell is in force, for it is assumed that the treaty of Hopewell was abrogated by the war which succeeded it; still, if in subsequent treaties i?? was recognized, or any part of it, for so much it would be revived an?? kept in force.

I assume that the treaties with the Cherokees are treaties within the meaning of the federal Constitution. When made they are ratified as other treaties. We call them so in our courts of justice because they bear that impress upon their face. When they give us title or right we so treat and speak of them, and it would be ungracious to deny them the name or character when the parties on the other side demand a right secured by them. Scarce a year passes but we hear of the ratification of an Indian treaty, and perhaps more frequently hear of a decision in some court, state or federal, on points growing out of these compacts.

Being treaties, what do they contain upon the point before us? I will cite a few clauses. Treaty of Hopewell, article 3d: "The said Indians, for themselves and their respective tribes and towns, do acknowledge all the Cherokees to be under protection of the United ***358** States of America, and of no other sovereign whatever."

Article 9th: "For the benefit and comfort of the Indians, and for the prevention of injuries or oppression on the part of our citizens on Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper."

Treaty of Holstein, article 2d: "The undersigned chiefs and warriors, for themselves and all parts of the Cherokee Nation, do acknowledge themselves and the said nation to be under the protection of the United States of America, and of no other sovereign whatever; and they also stipulate that the said Cherokee Nation will not hold any treaty with any foreign power, individual state, or with individuals of any state."

****56** Article 6th: "It is agreed, on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade."

Article 7th: "The United States solemnly guarantee to the Cherokee Nation all their land not hereby ceded."

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

Article 1st, of the treaty of 1794, declares the treaty of Holstein in full force, and binding in all respects.

Article 2d, treaty of 1798: "The treaties subsisting between the present contracting parties are acknowledged to be in full and operating force, together with the construction and usage under their respective articles, and so to continue."

Article 10th: "And lastly, this treaty and the several articles it contains shall be considered as additional to, and forming a part of, the treaties already subsisting between the United States and the Cherokee Nation, and shall be ***359** carried into effect on both sides, with all good faith, as soon as approved and ratified," etc.

From these quotations it is clear that at a time when Tennessee was part of the territory south of Ohio, and, consequently, when the territory was under the jurisdiction of the United States, before the state had its name or political existence, by treaty, with the authority competent to make it, the Indians put themselves under the protection of the United States, and

by express terms excluded the exercise of any control by any sovereignty.

There is certainly much of meaning in the terms used in many of the articles I have repeated. From 1785, at Hopewell, down through successive treaties, the same determined spirit on the part of the Cherokees has been evinced--to resist every authority except that of the United States. No one acquainted with the history of the origin of the war between this nation and the whites can help seeing the reason why the nation preferred relying upon the good faith, justice, and magnanimity of the general government to protect them, rather than commit that guardianship to any other community or body politic.

North Carolina had granted portions of her land beyond the treaty boundary. The grantees desired possession. Encroachment had its origin under many pretexts. The doctrine that we, being civilized, should take from the Indian, by the sword, what land was wanted for cultivation was put forward forty years ago, just as it is now, so that the jurist of the present day should not be vain of what he deems new discoveries in the law of nations, deducible from Marten, Vattel, and others; either our fathers had read the books upon this subject, or they knew as much, intuitively, as our lawyers have acquired by the aid of Puffendorf, his contemporaries, or followers. They not only assumed the right of intrusion, but they exercised it. The memory of hundreds reach back to the fact that our fathers did, against the express letter of the treaty of Hopewell, overrun the Indian country; and that south of ***360** French Broad and Holstein was settled as early as 1789-1790. It was the cause of the war which the treaty of 1791 terminated, and was that which caused the guaranty of the Indian lands to be inserted in that treaty. These are facts not forgotten, and we need not the labors of the historian, yet, to treasure them up for us. General Washington, under the treaty of '91, felt himself authorized, and did keep off intruders by military force; the garrison at Southwest Point was built and manned with a view to see the treaty enforced. Mr. Jefferson followed the same course of policy. These were bright examples, set by men whose names we venerate, and whose examples it should be our pride to copy. These statesmen found in the treaties ample authority to resist every encroachment, both before and after Tennessee became a state. The question might safely be asked, what president has not enforced these treaties? They all have, and none more effectually than Mr. Madison, than whom we have not had a superior as a civilian. And the fact being, as I assume it, that the intrusion of the whites upon the Indian lands produced the war of 1789, it makes for the Indians a very strong plea that the treaty of 1785 should be considered in force. Nay, if the fault was on the part of the whites, the plea is irresistible. Most of the treaties, upon their face, are a renewal of former friendships rather than new treaties consequent upon intervening wars. Viewing the subject, therefore, as I am bound to do, I see nothing which restrains me from declaring the treaty of Hopewell in force. Taking it to be in force, the language is strong and clear to the question of jurisdiction, and, indeed, to all points. Article 9th acknowledges the Indians to be under the protection of the United States, and, for the benefit and comfort of the Indians, the United States, in Congress assembled, shall have "the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper." Language ***361** more strong or more pertinent could not have been used.

****57** Subsequent treaties, though they want the latter expressions, "exclusive right to manage all the affairs of the Indians," certainly retain the spirit of the clause. The treaty of Holstein, article 2d, declares the Indians under the protection of the United States, and of no other sovereign whatever; that the nation will treat with no other foreign power, or state, or with individuals of any other state.

By this treaty intrusion is provided against, and the Cherokees at liberty to punish such as may intrude, at pleasure. All treaties, by the 2d article of 1798, are to continue in force, together with the construction and usages, under their respective articles. Usages, in this connection, can mean nothing less than their unwritten laws--their customs. If this is not the construction, why, in another clause of the treaty, authorize the Indians to punish intruders as they please? Their laws being authorized against whites, for a stronger reason are authorized against their own people.

These provisions, when taken in connection, leave no doubt, upon the mind of the dispassionate, of who is to have the whole controlling power over the Cherokees. As it must be admitted that a nation may put itself under the protection of another power, and as it is positive the Indians have done so, it follows that none other has the right to interfere. With other powers it would be cause of war. It is the more unreasonable that any of the states should do so, seeing that

they, by their senators, have ratified the stipulation in all its parts. The senate, as a body, acts for all the states, and as we settle difficulties by majorities, even if the senators of an individual state have remonstrated, the act of the others would be binding. But it is not pretended that the senators of Tennessee ever did dissent or remonstrate against any article in any treaty; so far from it, Tennessee asked for treaties, ***362** received them, they were ratified by her senators, and her citizens have derived benefits therefrom. Being the last political body that ought to complain, having made the act in effect her own, and derived benefit, she should present a strong case indeed to ensure a hearing at the expense of her own treaties.

But, it is said, Tennessee is a sovereign and independent state; that she has by the federal Constitution guaranteed to her a republican form of government; that, being sovereign and republican, she may pass any law not forbidden by the Constitution of the United States, or by her own constitution. Admit it; still it will be difficult to show that, by the passage of the act of assembly in question, the Constitution of the United States is violated. The treaty-making power is vested in the president and senate. When a treaty is made and ratified by that body it becomes, by the express letter of the federal Constitution, as much a supreme law of the land as the Constitution itself. With the Constitution before him, no man can think or speak of a treaty but with some reverence, and pay to it the same homage he would to the Constitution itself, because that instrument puts the treaty upon the same footing, and all judges are commanded to obey it.

****58** Therefore, though I think there is much in the clause which vests Congress with power to regulate commerce with the Indian tribes, and that commerce and intercourse, in legal parlance, mean the same thing, there is certainly everything wanted in the clause declaring the effect of treaties when made. The moment it is conceded that the instruments before us are treaties, the clauses found in them foreclose argument. But an argument pressed with great zeal is that, so soon as Congress admits a state into the Union, she will no longer interfere in her questions of jurisdiction. And for this is cited the language of Congress, 1783, “that the preceding measures of Congress, relative to Indian affairs, shall not be construed ***363** to affect the territorial claims of any of the states, of their legislative rights, within their respective limits.” Take this language to mean everything the gentlemen contend for, it can at best apply to the states then in being. When our Constitution was framed, most of the treaties we are considering existed in full force. Those who framed the Constitution were the last who contemplated that it would have the effect of annulling any clause in any treaty, or abridging a single Indian right. That instrument, the workmanship of the hands of our fathers, provides against the passage of laws impairing the obligation of contracts; and this was one. The schedule to the Constitution provides in general terms that existing contracts shall continue in force. True, this latter provision was no doubt intended to apply between citizen and citizen; still, the terms used are broad enough to cover all contracts. We had so recently felt the scourge of Indian warfare that few felt a disposition to do any act calculated to revive hostilities. But it is fair to infer that a moving consideration with our convention was respect for the treaties and compacts--acts emanating from a high source, commanding respect from the manner they are directed to be considered by the federal Constitution.

In those days there existed no spirit abroad to stir up conflict between single states and the general government. Then the bonds of union were more strong, love of country prevailed, and men were willing to sacrifice much of opinion for the sake of that harmony among sister communities which ought to be our pride and boast so long as we wish to exist as a nation acknowledging one general head.

If we can cut off from the general government the right of jurisdiction because we are sovereign and independent, why not by force of that sovereignty and independence also cut off the regulation of commerce? It is difficult to perceive why that clause of the federal Constitution ***364** shall not yield as readily as the other, declaring the force and effect of treaties.

Under the treaties with the Cherokees, for near fifty years we have conceded to them their usages and customs; the unwritten laws were amply sufficient for the nation when stronger in numbers and more rude in manners. And at this day, for the first time, we have made it a question of state pride that for a few specified crimes we shall take into our hands the right of trial and punishment. I will not take it upon myself to judge how much the measure is calculated to exalt us by becoming the hangmen or jailers of the Indians. At all times the task of inflicting punishment is not an enviable office; necessity alone justifies it, and the care, toil, and costs we incur with our own offending people is sufficient cause of complaint. But arguments touching what is convenient I shall

leave to others. It is enough for me to know that the Cherokees are protected by treaty stipulation in the exercise of their usages and customs, and against intrusion upon the territory allotted them. It is impossible to tolerate the enforcement of an act of assembly, by our mandates and officers, beyond those limits, without violating the treaties we have been considering.

****59** It is urged that, unless we enforce the act, offenders will go unpunished; that a necessity now exists for the enforcement of a law of the state extending jurisdiction. Certainly the question viewed in this aspect is a delicate one; delicate because it is rather political than legal--rather depending upon facts than upon law.

The legislature have in effect said, by the passage of the act, that such a law is necessary. The Cherokee, with his own law in one hand and the treaty in the other, opposes the measure as an innovation uncalled for in fact, and expressly prohibited by treaty. While I bow with the utmost respect to constitutional law, and will enforce it, how am I to sustain this act of the legislature? Am I to take the act passed as conclusive of the fact of necessity ***365** existing? The act does not declare so in express terms. Then I am to take it by implication, and that, too, against the express terms of treaty stipulation--against facts every day passing upon our borders. We know the fact to be that the agent of the Cherokees was at his post in the nation at the time the act in question was passed, and has been so continued ever since. If I did not personally know this fact, the acts of Congress of 1834, ch. 131 (sec. 29, proviso), ch. 162, sec. 4, admonish me the fact must be so; for by these the agency is recognized and the intercourse law in force. The morning gun of the military upon the Indian border gives warning that the flag of the Union there waves, and that the intruder must beware. I am bound to presume that the president of the United States has performed his duty by appointing the agent, and executing the laws of Congress which protect the rights of these people, for his oath compels him.

Against all these the newspaper publications weigh not a feather in the scale. Political notions of expediency, about which honest men may differ, weigh as little; for there are high and prominent marks at which we are compelled to look. The first obligation of every man is to observe and regard the Constitution; with the judge it is emphatically so. The tyrant's plea, that of necessity, wherever advanced, should be watched with caution. If I even knew the fact of existing necessity, to which of the mandates shall I confine myself? It is said, to the act of assembly. My answer is that between conflicting mandates the treaty is the highest, and the act, being subordinate, must yield; and certainly it becomes the stronger when consistent with the fact.

The examples of other states are quoted upon me. It is urged that Alabama, Georgia, and North Carolina have severally passed such laws, and the judges of these states will enforce them. My answer is that I will not sin if others do. Again, it is said New York and Ohio have done the same thing, and that their laws have been enforced. ***366** What the terms of the treaties with the tribes there are I know not, neither do I know the exigencies that produced their laws; they may have been superinduced by the Indians themselves.

****60** It is enough for me to know that the treaties we are considering oust me of jurisdiction where the Indian urges the plea, and, where I have no power to act myself, it were useless to enquire into the power of others, thereby to seek an excuse for acting for myself. If I have not the power, the first named states had not, and there is an end of the question.

In arguing the case before us, any one viewing the grounds occupied will find much room for amplification and illustration; but, the very point having been before the federal judiciary, to whom, in my opinion, it belongs to decide it, our own courts, in the case of Winton and Cornet, and in Mrs. Pack's case, having gone in accordance with the Supreme Court of the United States in the cases against Georgia, and the circuit judge in this case having followed all these, if I doubted, I would not reverse the opinion he has given. But I do not doubt it.

With me the supposed discrepancies between the cases of Tassals, etc., and Georgia, and the case of McIntosh, weigh nothing. In the latter case the question was on the ultimate right of domain; in this case, as in that of Tassals, the question is one of jurisdiction.

Originally the Indian may have had no right; discovery and conquest, aided by the gifts of the popes or crowned heads, may have swept them all away (if gentlemen will have it so, which is not admitted), still, if by treaty the nation acquired rights by the concessions of their conquerors, such rights must be protected, even if the concessions had their origin in our

generosity. So long as we, as a people, profess to be governed by written compacts rather than by the sword or the strong arm of power, so long will treaties, even with the red man, be our ***369** guide, and it will be a matter of pride and boast that we are just even to the weak.

But, to the act of assembly itself. We have often held that acts of assembly unequal in their operation, and partial in their effect are unconstitutional and void. This law is partial and unequal in its operation. If the Cherokees are to be considered part of our own community and subject to our laws, why has it been extended only to three specified offences, and close there? On this ground it is a partial law, for it stops short of carrying forward the penal code, including only murder, rape, and larceny. It is unequal because the law does not open the courts as auxiliary to the attainment of justice on part of the Indians, in the innumerable cases of right and wrong which in the nature of things must arise. By our bill of rights, "courts shall be open, and every man, for an injury done him, shall have redress by due course of law." If the Indian living in his nation, as a man, had a right to have the courts open to him, and redress for injury by due course of the laws of Tennessee, then the act contains a useless provision. But the legislation upon those isolated subjects proves that the general laws of the state do not so apply. In other words, the lengthening the arm of our officers beyond the limits of what was formerly our acknowledged jurisdiction, only to reach three specified offences committed beyond that jurisdiction, is a partial law. And to leave the arm of the officer powerless when the Indian in his nation asks redress makes the provision unequal. But, above all, the act carries upon its face the antidote to its effect. It recognizes the operating force of all the treaties. Acknowledging, as it thereby does, a controlling letter, it is *felo de se,* and void.

****61** I give the foregoing as the result of my most serious deliberations upon this vexed question. Upon the points raised I could not say less, and my convictions forbid that I should declare otherwise. The constituted authorities of my country I bow to with reverence; but as all ***370** authority emanates from the constitutions, state and federal, I make them the basis of my argument rather than recur to the law of nations, knowing that where we have the rule at home, that must govern rather than transatlantic learning, much of it growing out of feudal systems, and governing the relations of foreign states and empires, but which, if resorted to, would sustain me both in the letter and spirit.

I am for affirming the judgment by sustaining the plea.

Judgment reversed. [1]

***542** (FURNISHED BY REQUEST OF THE COURT.)

***543** The defendant was indicted in the circuit court of McMinn county for the murder of John Walker. He pleaded that he was a Cherokee native and a member of the tribe; that the crime with which he was charged, if committed at all, was committed within the limits of the Cherokee Nation; and that the act of the legislature of Tennessee, passed in 1833, extending the jurisdiction of the state over the country now in the occupancy of the Cherokee tribe of Indians, was unconstitutional and void. The plea was demurred to. The circuit court overruled the demurrer and sustained the plea.

By the act referred to in the plea the legislature declared the jurisdiction of the state to extend to her southern limits, and over that tract of country now occupied by the Cherokees. The act, among others, contains the following proviso: "Provided always that nothing herein contained shall be construed to authorize the courts of this state to take jurisdiction of any criminal offence committed within the territory aforesaid, by any Cherokee Indian residing therein, except for murder, rape, and larceny, And the usages and customs of said Cherokee Indians, in all other respects, are hereby allowed them within the territory over which, by this act, the jurisdiction of this state is extended, until such time as it may ***544** be deemed necessary and proper further to abridge or abrogate them."

The act also exempts the Cherokees from taxation, and secures to them the free and unmolested enjoyment of their property. It allows them their usages and customs in all other respects. It also prohibits the whites from settling upon, or entering, or appropriating any of the lands contained within the limits of the Cherokees.

The defendant, by his counsel, contends that this act is unconstitutional and void; that the Cherokee tribe of Indians is a "state" or "nation," possessing rights of sovereignty and jurisdiction over the territory occupied by and secured to them by different treaties or compacts made with the government of

the United States; and that they never were, and are not now, subject to the jurisdiction and laws of Tennessee; and he relies upon the case of Worcester v. Georgia, 6 Peters' Reports, as having conclusively settled these principles in his favor.

****62** The question raised in this case is one of the greatest magnitude. It involves not only the rights of Cherokees, but those of a state, sovereign in all respects except so far as she has by the federal Constitution surrendered a portion of her sovereignty to the United States. It also embraces other important considerations, affecting the morals and well-being of the community in which we reside. The federal tribunals have declared that section of the act of Congress of 1802, vesting the courts of the United States with jurisdiction in cases of murder committed within the Indian territory, unconstitutional and void. See Judge McLean's opinion delivered at Knoxville. And, if it should be finally settled that the state courts have no jurisdiction, then the melancholy fact must be admitted that we have within the bosom of our state a small portion of territory in which crimes of all kinds may be perpetrated with impunity, and the powerful arm of the law fall nerveless in the mighty presence of "Cherokee sovereignty."

***545** But, whatever may be the opinion of this court upon principle, it is strenuously urged that the decision of the Supreme Court of the United States in Worcester v. Georgia is conclusive, and that it settles the case under consideration beyond the possibility of dispute.

I will endeavor to show, first, that the principles upon which the decision in that case is based are incorrect and erroneous; that they conflict with those recognized and acted upon by the same court in prior determinations; and that according to the prior adjudications of the court, as well as the settled principles of the law of nations, Tennessee has the power to extend her jurisdiction over the Cherokees. And, secondly, that however correct in the result the decision in that case may be, the very point adjudicated is not embraced in the present case.

To understand correctly the question presented by this record we must ascertain, first, what were the rights of the states, by the law of nations, prior to the formation of the federal Constitution; and, secondly, whether by that instrument, or any other, the right now asserted and exercised by Tennessee was surrendered to the federal government.

When this continent was first discovered it was inhabited by wandering and erratic tribes of Indians. These tribes had no fixed or permanent places of abode; no distinct boundaries or landmarks; no known or settled rules of property. Their only occupations were war, fishing, and hunting. The soil was not subdued or cultivated; they were, in fact, completely in a state of nature, wholly destitute of a national existence and of the arts and sciences. They knew of no law but that of retaliation, the execution of which each individual took into his own hands.

By the law of nature what rights did they possess? Had they a right or title (to the exclusion of the rest of mankind) to all the vast and extensive territory over which they may have passed in their hunting migrations? Can it be seriously contended that the right of soil and jurisdiction ***546** to a whole continent belonged to tribes or hordes of wandering savages? Had they the right, by the laws of nature, "to shut out the light of civilization, to doom an immense region of country to the eternal silence of desolation, to exclude other members of the human family from enjoying the bounties which a beneficent providence had extended to his creatures?" This surely will not be pretended. But that they had natural rights which even the strong hand of power should respect and acknowledge is not, nor ever has been, denied; that they have a right to a space of country amply sufficient to maintain them by actual cultivation of the soil, and also to those things which by their personal labor they have, as it were, annexed to their persons, is undeniable. Further than this, it is believed, no respectable writer or jurist previous to the Revolution has ever gone.

****63** Vattel, book 1, sec. 81, says: "The whole earth is appropriated for the nourishment of its inhabitants, but it would be incapable of doing it were it uncultivated."

Again, he says: "Those people, like the ancient Germans and modern Tartars, who, having fertile countries, disdain to cultivate the earth, and choose rather to live by rapine, are wanting to themselves, and deserve to be exterminated as savage beasts. There are others who, to avoid agriculture, would live only by hunting and their flocks; this might, doubtless, be allowed in the first ages of the world, when the earth without cultivation produced more than was sufficient to feed its few inhabitants. But at present, when the human race is so greatly multiplied, it could not subsist if all nations resolved to live in that manner. Those who still

retain this idle life usurp more extensive territories than they would have occasion for were they to use honest labor, and have, therefore, no reason to complain if other nations more laborious come to possess a part."

From the condition of the savage tribes when this continent was first discovered, the natives of Europe were obliged, ***547** from necessity, either to abandon it altogether or to establish some principle which should be not only a governing rule between themselves, but which should, to a certain extent, be considered as operative between the discoverers and the natives, and which, if necessary, would be enforced at the point of the sword. The principle established, and until recently universally acknowledged, was "that discovery gave an exclusive right to extinguish the aboriginal right of occupation, either by conquest or purchase, and to assume such jurisdiction over the savages as circumstances might require." 8 Wheaton's Rep., Johnson v. McIntosh.

The right of dominion over the country discovered, to such extent as the circumstances of the colonists and the policy of the sovereign whose subjects made the discovery required, was a principle almost coeval with the discovery of America.

Vattel, book 1, ch. 19, sec. 209, speaking of the Indian tribes, says: "Their removing their habitations through these immense regions cannot be taken for a true and legal possession, and the people of Europe, too closely pent up, finding land of which these nations are in no particular want, and of which they make no actual or constant use, may lawfully possess it and establish colonies there."

And, again, sec. 201, he says: "When a nation takes possession of a distant country and settles a colony there, that country, though separated from the mother country, naturally becomes a part of the state, equally with its ancient possessions." If it becomes a part of the mother country, equally with her ancient possessions, does it not irresistibly follow that the country of which it is part has the right of jurisdiction to the extent of the colonial limits?

Martin, in his Law of Nations, pages 67, 69, says: "From the moment a nation has taken possession of a ***548** territory, in right of first discoverer, it becomes the absolute and sole proprietor of it and all it contains," etc.

****64** Robertson, in his History of America, Chalmers, in his Annals, and the Abbe Raynal, in his History of India, all agree in the above principle. Chalmers says: "The validity of this title had been recognized by the approbation of the European world, and was confirmed by the laws of nations, which sternly disregarded the title of the aborigines because they never were admitted into the society of nations."

In the negotiations at Ghent our ministers refused to treat or stipulate anything in relation to the rights of the Indians to distinct sovereignty. They claimed the right of jurisdiction in the states, to its full extent, over them, and asserted that Great Britain always so considered it. See 7 Niles' Register, 224, 225, 228, 229, 230.

This doctrine was acted upon by the colonies, as is evidenced by numerous acts of the colonial legislatures. They made treaties or conventions with them, it is true, but these were resorted to as a means of governing wild and uncivilized tribes, over whose savage nature civilized legislation could have no effect, and because it was necessary and proper, and more in accordance with the dictates of humanity, to pursue this course than to compel them to submission at the point of the bayonet.

An explicit assertion of this right is found in the old articles of confederation. Art. 9, sec. 4: "Congress shall have the power of regulating the trade and managing all affairs with the Indians, not members of the states; provided, that the legislative right of any state within its own limits be not infringed or violated."

North Carolina always asserted the right. She protested against the treaty of Hopewell, in 1785. In 1783 she set up for sale the lands within those bounds which she herself prescribed to the Indians.

The charters of the British crown all convey not only ***549** soil, but political power and jurisdiction, as is distinctly shown by the court in 8 Wheaton.

The royal proclamation of 1763 asserted to its full extent this right of jurisdiction and sovereignty of the British crown over the Indian tribes, and that the Indians were subjects under the protection of Great Britian, and that the right to appropriate the Indian lands was in the crown. See Report of Committee on Indian Affairs, in House of Representatives, 1829.

The tribes or nations of Indians inhabiting the continent have, in fact, at no period since its discovery been recognized as sovereign communities; writers on national law have never so considered them. See 8 Wheaton, 567. Mr. Justice Johnson, in the Cherokee Case, 5 Peters, 24, says: "It is clear that as a state they are known to nobody on earth but ourselves, if to us. How, then, can they be said to be recognized as members of the community of nations? Would any nation on earth treat with them as such? Suppose, when they occupied the banks of the Mississippi or the seacoast of Florida, they had declared war and issued letters of marque and reprisal against us, or Great Britain, would their commissioners be respected?"

****65** Again, page 26, he says: "When this country was first appropriated or conquered by the crown of Great Britain they certainly were not known as members of the community of nations, and, if they had been, Great Britain from that time blotted them out from among the race of sovereigns. She considered them as her subjects, whenever she chose to claim their allegiance, and their country as hers both in soil and sovereignty. All the forbearance exercised toward them was voluntary, and, as their trade was more valuable to her than their territory, for that reason, and not for any supposed want of right to extend her laws over them, did she abstain from doing so." See, also, the opinion of Mr. Justice Baldwin in the same case.

***550** The right of eminent domain, to sell or grant public property, belongs to all sovereign powers. Vattel, book??--, sec. 244, 247. If they were considered sovereign communities, possessing and exercising sovereign powers, their grants of land would pass the absolute title in fee to the grantee; yet in the case of Johnson v. McIntosh, one of the most elaborately investigated cases in our Reports, it was solemnly decided that the Indian national grant passed no title. And why? Because, by the laws of civilized nations, they could only alienate or surrender their title to the sovereign who exercised dominion and jurisdiction over them.

Jurisdiction over them necessarily results from the admitted principle that civilized nations have the right to settle and plant colonies in new-discovered countries inhabited by erratic and nomade nations not acknowledged as sovereignties. Jurisdiction is incident to sovereignty. The savage is not compelled to live within the limits or bounds prescribed by his civilized neighbor. Land enough is left for them. But, if they choose to remain, jurisdiction over their persons is the necessary and inevitable consequence. Jurisdiction proceeds from residence; it extends to persons, whether they are citizens or strangers, residing or abiding temporarily within the dominions of the sovereign. The Indians, strictly speaking, are not citizens; they are denied many of the rights essential to citizenship; still, as will hereafter be more particularly shown, they are subject to the laws of the sovereign within whose dominions they are.

Independent of all these considerations they may be considered a conquered people, and subject in many respects to the dominion of the conqueror. "War and conquest give rights which are admitted by all nations. The justice or injustice of the war is to be judged by the sovereign who makes it." Acknowledge that they once possessed a distinct political existence, "yet, if they have passed under the dominion of another, they can no longer ***551** form a state, and in direct manner make use of the law of nations," except so far as is voluntarily permitted by their conqueror. Vattel, book 1, ch. 1, sec. 11. "Such were the people and kingdoms which the Romans rendered subject to their empire. The most of even those whom they honored with the name of friends and allies no longer formed states; within themselves they were governed by their own laws, but without they were obliged to follow in every thing the orders of Rome; they dared not of themselves make either war or an alliance, and could not treat with nations." Id.

****66** This is literally the present condition of the Indians. The chairman of the committee on Indian affairs in the house of representatives says: "If a formal surrender of political sovereignty by an Indian tribe can safely be relied on in any case, or if it would strengthen a claim of jurisdiction founded on such surrender to add to it the title of a conqueror, one of the southern tribes would have as little claim to independence as any within the United States. In 1739 the Cherokees made a more formal and ceremonious relinquishment of their sovereignty than any recorded in the history of the country," etc. See Report No. 227, of Committee on Indian Affairs, in 1829, p. 10. They admitted themselves conquered; and although at different periods, up to the Revolutionary War, they were engaged in wars with the whites, yet they served but to confirm and rivet more closely their political thraldom. See same book and page.

"Conquest," says the court, 8 Wheaton, 543, "gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim which has been successfully asserted," etc.

These positions were most clearly asserted by numerous acts and ordinances of the Continental Congress, some of which will be adverted to hereafter, and were also acknowledged by the United States by receiving cessions of ***552** territory from the different states. The deeds and acts evidencing these cessions of territory all purported to convey both soil and jurisdiction, as will be shown hereafter.

Upon principles of abstract justice the positions I have endeavored to demonstrate might be defended. The situation of the country, the habits of the Indians, their savage state, their utter want of self-government, the preservation of civilized communities settled among them, all conspired to render their adoption essentially necessary.

But if a certain and fixed rule is once established, and one upon which titles and property depend, its abstract justice cannot be enquired into. The rule may have been promulgated at the point of the sword; it may first have been known by the thunder of European cannon; the weak and ignorant may have been oppressed in its establishment; causes which required it to be adopted and enforced may have long since ceased to exist; but still the rule, so far as rights personal and political have been acquired under it, must be adhered to and respected. A rule which was considered just and proper, and suitable to the times or generation in which it was adopted, may be deemed very unjust and oppressive in a succeeding age, and to decide rights which accrued under a rule by considerations of its original justice and propriety would unhinge society and produce interminable confusion.

Under these rules a large portion of the property we now enjoy is held. Chief Justice Marshall, 8 Wheat., says: "However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle had been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of a great mass of the community originates in it, it becomes the law of the land and it cannot be questioned;" "and however opposed," says he (same page), "this restriction may be ***553** to natural right and the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice."

****67** For the full acknowledgment and adoption of the principles I have advocated I refer to the case already mentioned, of Johnson v. McIntosh, which principles are wholly at war with those assumed in Worcester v. Georgia, as will more fully be shown when I compare those cases. They are also fully admitted and acknowledged by Chancellor Kent. 3 Com. 308, 309, etc.

They have also been repeatedly acknowledged and decided upon by the supreme court of New York. Jackson v. Wood, 7 John. 290; St. Regis Indians v. Drum, 19 John. 127; 3 John. Rep. 375.

A law similar to the one under consideration was passed by the legislature of New York. The statute not only asserts sovereignty and jurisdiction in the state, but negatives any jurisdiction in the Indian tribes. These tribes were as powerful, and exercised the same jurisdiction, as the Cherokees. See 20 John. Rep. 192. "I know," says Chief Justice Spencer, "no half-way doctrine upon this subject. We either have an exclusive jurisdiction pervading every part of the state, including the territory of the Indians, or we have no jurisdiction over their lands, or over them whilst acting within their reservations. It cannot be a divided empire; it must be exclusive, as regards them or us, and the act referred to, as well as the actual state and condition of the Indian tribes within this state, shows that the jurisdiction is in this state." Id. 193.

In the same case, upon appeal, the chancellor, in delivering his opinion in the court of errors, although he dissents from the position that they are citizens, and asserts that they are dependent communities or tribes under the protection of New York, yet, upon the point of jurisdiction, ***554** says (p. 717): "Though this act--*i. e.,* the act asserting jurisdiction over the Indians--may have gone a step beyond any former proceeding in respect to Indian sovereignty, yet it only restrained its exercise in one particular mode, and claimed that jurisdiction

over our own territory, which is perfectly consistent with the alienage, and distinct national character, of the Indians."

But it is argued that these principles, so long known and admitted by European nations, so repeatedly recognized by the statesmen and jurists of this country, and enforced, when necessary, by the states collectively and individually, have been virtually abrogated and overturned by the decision in the case of Worcester v. Georgia. I admit that the court, in the course of its reasoning in that case, have endeavored to qualify and restrict the positions above assumed, to an extent which virtually denies that they ever existed. Not only the point adjudicated, but the reasons for that adjudication are now pressed upon this court as conclusive and binding authority. It will not be denied that the decisions (*i. e.,* matters actually decided by the Supreme Court of the United States) involving the construction of the federal Constitution, and the laws and treaties made under its authority, are, as a general rule, to be followed by the state tribunals. But cases may occur when, in the given cause, a state tribunal would not be justified in yielding its own opinion to the authority of a single case, though that case may be decided by the Supreme Court of the United States. When the decision involved a political as well as a legal question, and was made at a time when high political excitement prevailed; when a particular right or power, always claimed, and denied to be surrendered by the states, is impaired or restricted by the decision; when the case was heard upon an *ex parte* argument; when its positions conflict with the previous determination of the same court; when it is at variance with the opinion of the most respectable jurists and statesmen for two hundred years before; when it deprives ***555** a state of one of its principal attributes of sovereignty, and affects the rights of millions of freemen; when the decision has been assailed by many of the ablest politicians and legal characters of the age, and never has been acquiesced in by that portion of the Union whose political rights and privileges it affects, and when it is a single, isolated case, to follow which, and decide in conformity with it, would forever prevent it from being again examined and its errors corrected by the same tribunal who made it, these considerations are surely sufficient for this court (if it differed in opinion) to adhere to that opinion, and thus let the matter be again examined by the Supreme Court of the United States when it can be fully and fairly argued.

****68** But, surely, when the point decided is not the same--when the result of the decision relied upon may perhaps be correct, but the reasoning in coming to that result is deemed or believed unsound--this court is certainly bound by no principle, known to our laws, to adopt the reasoning and *dicta* of the court as points adjudicated.

This may probably turn out to be the fact in relation to the case of Worcester v. Georgia, as applicable to the case now under consideration.

That the case, or positions assumed in it, are contrary to the universally received opinions of the most eminent legal writers and best authorities upon the subject, the remarks I have before made, I think, conclusively prove. I will now endeavor to prove that the principles stated in it conflict with those recognized and admitted in prior determinations of the same court.

In Worcester v. Georgia, 543, the court says: "It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion or property over the inhabitants of the other, or that discovery could give the discoverer rights which annulled the preëxisting rights of its ancient possessors." The same court, in ***556** Johnson v. McIntosh, 8 Wheaton, 587, says that "the United States maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title, by purchase or conquest, and gave a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise."

And again, in the latter case, page 589: "Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them." Why should the court think an excuse or justification necessary, if the principle was, as is stated in Worcester v. Georgia, only an exclusive right in the first discoverer to purchase the Indian lands, and did not annul the rights of those who had not agreed to it? Surely, if such were the extent of the rule, it would need no excuse.

Again, in Johnson v. McIntosh, 595, the court says: "If the discovery be made and possession taken, it is well settled that the discovery is made for the whole nation, and that the country became a part of the nation;" and, on the succeeding

page, they say "the king had the right to grant the title in fee, subject only to the right of occupancy of the Indians."

Whatever difficulty, then, there may be to comprehend the proposition that European nations could have rightful dominion over the inhabitants or property of the North American Indians, it is very clear that the European nations asserted the proposition, and maintained it from the discovery of America to the War of the Revolution, and the principle or right is distinctly admitted and enforced by the supreme court in the above case, as the above extracts and numerous other parts of the same learned opinion prove.

****69** In Worcester v. Georgia, 544, it is said that discovery regulated the right of the purchaser only between ***557** European nations, "but could not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the possessor to sell;" and "could not annul the right of those who had not agreed to it." And yet the same court solemnly determined, in the case of Johnson v. McIntosh that the Indians had no right to sell; that their grants passed no title and could not be acknowledged in the courts of the country. And in Fletcher v. Peck, 6 Cranch's Rep., they decide that the seisin in fee of lands covered by the Indian claim was in the state of Georgia. If they were the owners by virtue of their original occupancy, if as nations or distinct communities they were the possessors of the soil, if their rights were not affected or annulled, the law of nations gave them the right to sell to whom they pleased, and no known rule of international law could abridge or destroy this right. It is distinctly admitted, in Johnson v. McIntosh, that, although the rule established in regard to them did not entirely disregard their rights, yet they were to "a considerable extent impaired."

Again, in Worcester v. Georgia, the court says (p. 545): "They (the charters) were well understood to convey only the exclusive right of purchasing such lands as the natives were willing to sell. And at page 546 the court says: ""Their (*i. e.,* the Europeans') motives for planting the new colony are incompatible with the lofty ideas of granting the soil and all its inhabitants from sea to sea. They demonstrate the truth that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned." And yet, strange as it may appear, the same court says (8 Wheaton, 574): "While the different nations of Europe respected the right of the natives as occupants, they asserted the ultimate right to be in ***558** themselves, and claimed and exercised, as a consequence of this, a power to grant the soil while yet in the possession of the natives." France, says the same opinion, asserted her right of dominion over a great extent of country not actually settled by Frenchmen. The states of Holland asserted the same principle. And again: "No one of the powers gave its full assent to this principle more unequivocally than England."

And again: "Thus has our whole country been granted by the crown, while in the possession of the Indians. These grants purport to convey the soil, as well as the right of dominion, to the grantees." And again: "These various patents cannot be considered as nullities, nor can they be limited to a mere grant of the powers of government," etc. See page 580. And again: "The states having within their chartered limits territory covered by Indians, ceded that territory generally to the United States, on conditions expressed therein which demonstrate the opinion that they ceded the soil as well as jurisdiction." And at page 535 the court says: "The exclusive right of the United States to extinguish their titles and grant the soil has never, we believe, been doubted." At page 536 the court says: "The validity of these titles has never been questioned in our courts. The power has been uniformly exercised over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist at the same time in different governments. An absolute must be an exclusive title," etc.

****70** Many more discrepancies might be shown, and it is believed that no person can read these two opinions and say the principles advocated by the same court in them are not in conflict. They are as diametrically opposed to each other as light is to darkness. Need I ask the court which of these cases is supported by authority, and long and immemorial usage among civilized nations? If ***559** any should doubt, I point to the argument, and irresistible evidence furnished by it, in Johnson v. McIntosh, and to the opinions of Justices Johnson and Baldwin in the Cherokee case. I point to the towns and cities, the smiling fields and cultivated farms of this great and growing republic, nearly all of which, if the argument in Worcester v. Georgia is carried to its extent, and the charters are merely "blank paper," now in justice belong

to the Indians. I cannot assent to the positions assumed in this latter case; they are not sanctioned by former authority or precedent, and, as I have shown, are wholly incompatible with previous determinations of the same tribunal.

Thus it appears that during the colonial state the right of jurisdiction and dominion was claimed and exercised by the king of Great Britain over the Indian tribes; that the extent of this jurisdiction depended on the circumstances or necessity there was to enforce it; that the Indian tribes were substantially conquered; that the exercise of their customs was voluntarily permitted to them, because they suited their savage condition better than the laws of civilized society, and that all the rights of sovereignty and jurisdiction of Great Britain passed and vested in the states by the Revolution, and the treaty of 1783.

The states, then, in 1789, when the federal Constitution took effect, severally, and as distinct sovereignties, possessed the power to extend such jurisdiction over the Indian tribes within their limits as the condition of the Indians, and other circumstances, might require. This right of jurisdiction was not limited or restricted, but was coextensive with their chartered limits. Vattel, 226. To what extent this right should be carried involved political considerations. As a matter of policy they permitted them, although a conquered people, to be governed by their own laws and customs, as were those conquered nations subject to the jurisdiction of Rome. Vattel, 59, sec. 11.

***560** The question now occurs, has the federal Constitution deprived the states of this power?

It is assumed that the treaties made with the Indians not only guarantee their lands, but that, in effect, by treating with them, their natural capacity is admitted, and that jurisdiction over their own territory is incident to their ""admitted sovereignty;" and that these treaties, by art. 6, sec. 3, of the Constitution, are the supreme law of the land.

The treaty of Hopewell was made with the Cherokees prior to the adoption of the Constitution and during the confederacy; that treaty, so far from acknowledging them independent of the states, or the United States, asserts directly the reverse. They, in effect, admit themselves a conquered people; they acknowledge their dependence on the United States; their lands are ""allotted" or "given" to them by Congress; and, by the 9th article, the jurisdiction of Congress over them is explicitly acknowledged and admitted, for it says "Congress shall have the power of regulating their trade" and managing all their affairs as it thinks proper. This treaty was made by virtue of the 4th section, 9th article of the Confederation, which article gave to Congress the power of regulating and managing all the affairs of the Indians, not members of any of the states, provided the legislative rights of the several states should not be impaired.

****71** But a treaty, or the subject-matter of a treaty, is only the supreme law of the land when it is made in pursuance of the Constitution. The states, by empowering the executive, with the advice and consent of the senate, to make treaties, did not surrender into their hands a power which could annihilate the states; for if by a treaty with the Indians, or any other nation, the treaty-making power can deprive the states of one attribute of sovereignty (not expressly surrendered), it can deprive them of all; and if jurisdiction, in express terms, were guaranteed to the Indians, and the right taken from the states, by the ***561** treaty, it would be void, because the exercise of this branch of jurisdiction is not one of the enumerated powers parted with by the states, but is, in fact, reserved to them by the 9th and 10th amendments to the Constitution.

A treaty the subject-matter of which violates the Constitution, or surrenders to other powers the individual and reserved rights of the states, is a nullity. If it is not, the president and senate have the power of completely altering, amending, or changing the federal Constitution. The treaty-making power, it is true, is vested in the president and the senate; but, if the mere fact of making a treaty makes it and all it contains the law of the land, then the president and senate may by treaty violate the Constitution by depriving themselves of this power, and vesting it in the president or in the senate alone. The Constitution prohibits the states from granting titles of nobility. By treaty with Great Britain the president and senate may stipulate that hereafter titles of nobility may be granted. The Constitution prohibits the states from coining money, or passing *ex post facto* laws; it prohibits Congress from erecting new states within another state, without its consent; it requires all senators to be thirty years old, and prohibits any but a natural-born subject from being president. All these may be changed by a treaty, for it may be stipulated that titles of nobility shall be granted, money be coined by the states, that the king of England's youngest son may be president, that a senator shall only be twenty-one years old, that new states may be established within the old ones, and that Tennessee

may be governed by the laws of the Hindoos or Persians. But because these things are found in a treaty, which has all the forms and solemnities required by the Constitution, does it therefore follow that "they are the law of the land?" By no means; a treaty cannot cede away any attribute of sovereignty reserved by the states; and, if it does, it cannot be regarded or enforced.

***562** The jurisdiction of the states was coextensive with their chartered limits; they possessed all the powers of the British Parliament, so far as they were applicable to the country, as well as those of the executive department. See 4 Wheaton, 451. The states retain all individual sovereignty not surrendered, and with respect to their municipal regulations are to each other foreign. 2 Pet. Rep. 591. Hence it follows that the states must have, so far as municipal regulations are concerned, the power which is incident to all governments, to extend and enforce obedience to their laws over not only a part, but all their territory; and it is confidently asserted that the power of extending their criminal jurisdiction over the Indians is nowhere surrendered in the Constitution, excepting so far as the regulation of their commerce is concerned--of which I will treat hereafter--and consequently such surrender, by treaty made by the United States, is void.

****72** But the Supreme Court, in Worcester v. Georgia, 6 Peters, 659, says: "The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties;" and that the words ""treaty" and "nation" have been applied by us to the Indian tribes "as other nations."

Let us for a moment examine this position. "Nation" and "state" are synonymous. A state is a nation or body politic. Vattel, ch. 1, sec. 1. And every nation which governs itself, under what form soever, is a "sovereign state." Vattel, 8, sec. 54.

A treaty is a compact made between superior or sovereign powers, and relates to the public welfare. Vat. 255, sec. 153.

If, from the customary law of nations, from the acts and ordinances of Congress (which will be hereafter referred ***563** to), from the generally received opinion and understanding of the states at the period the Constitution was adopted, the Indians were not considered or acknowledged by civilized nations as sovereign states; if they could be subjected to our jurisdiction; if treaties, or rather conventions were made with them--not because they were ""distinct sovereignties," but because it was found the best method of controlling and governing their turbulence--then, surely, it cannot be contended that this clause in the Constitution applied to treaties made with them, except so far as they were authorized by other parts of the Constitution. The Constitution, when speaking of them, draws a distinction between them and """"nations" or sovereignties. It calls them "tribes," as contradistinguished from "nations." Why was the power given to "Congress to regulate commerce among the Indian tribes" if they were embraced or within the purview of the treaty-making power? How is Congress to regulate commerce among them? By passing a law without their consent? If so, this implies full power over them. Or was it to be regulated by passing a law with their assent? If so, how was their assent to be obtained? By treaty with them--that is, by convention or compact. But who was to make it on the part of the United States? Congress, not the president and senate. Commerce between sovereignties is regulated by treaty, yet by the Constitution the power to regulate their commerce is in express words given to Congress, thereby negativing its exercise by the treaty-making power, and consequently denying their claim to sovereignty.

If the treaty-making power embraced the Indian tribes, its power extends to everything which could be the subject-matter of a treaty. Suppose Congress regulated the commerce among Indians, by law, and the president and senate, by a treaty with them, annul the regulation made by Congress; which shall have effect under the Constitution? If the former, it at once annihilates the idea that ***564** they are "sovereign states or nations," because, if they are, they certainly would have the right to regulate their own commerce. Here, both houses of Congress lay down one rule as to their trade, and the president and senate lay down a different and inconsistent rule. Both cannot stand; and, as the express power is given to Congress, it is virtually denied to the other, and consequently the rule adopted by Congress must prevail.

****73** When, therefore, the Constitution is speaking of treaties, it means treaties made by the United States with such states as by the laws of nations were admitted to possess the power of treating as "sovereignties," or such "states" as were received into the community of nations. Chief Justice

Marshall (5 Pet. 17) says: "In all our intercourse with foreign nations, in our commercial regulations, etc., they, the Indian tribes, are considered within the jurisdictional limits of the United States, subject to many of those restraints which are imposed on our own citizens." He says (page 18): "They are clearly contradistinguished by a name appropriate to themselves, in the Constitution" (*i. e.,* tribes). And again, same page: "We cannot assume that the distinction" (*i. e.,* between "tribes" and "foreign nations") "was lost in framing a subsequent article, unless there be something in its language to authorize the assumption." Upon this point I particularly refer to the opinions of the chief justice, and Justices Johnson and Baldwin, in the Cherokee case.

But do these treaties, in fact, recognize them as distinct nations, possessing rights of sovereignty and jurisdiction inconsistent with the sovereignty and jurisdiction of the states within whose limits they are? If the state possessed the right before, and the Indians did not, what article or clause in any of the treaties gives it to them? Their rights of property are guaranteed by the treaties; so are the rights of property of the whites guaranteed by our Constitution. Jurisdiction is distinct from property. ***565** When the states, by the articles of confederation, gave Congress power to regulate trade with the Indians, the power was given with the proviso that it should not interfere with state jurisdiction. When Congress, under this power, made a treaty in 1785 with the Cherokees, did they intend, in face of the proviso, to restrict state jurisdiction when necessary to be asserted? Surely not. If they did, and the effect of the treaty was to restrict state jurisdiction, they went beyond their power, and the treaty, for so much, was absolutely void for want of power or authority in Congress to bind the states in this particular. If, then, it was void for so much of it as restricted the jurisdiction of the states, as I have before proved, did the Constitution, by declaring treaties already made the law of the land, mean that a treaty which had been made, but was, before the adoption of the Constitution, a nullity for want of power in the maker, was the law of the land? Surely not. The clause meant, and so the states understood it, that valid treaties made by the authority of the United States should be the law of the land. Did the states which protested against the treaty of Hopewell suppose they were restricting their jurisdiction over the Indians when they adopted the federal compact? It surely will not be contended they did.

****74** The treaties, before and after the Constitution was formed, gave them no rights of jurisdiction they did not previously possess, nor do they in words or effect deprive the states of the right of dominion over their whole territory, whether possessed by Indians or whites. These views are strengthened by other parts of the Constitution. The United States guarantees to the states a republican government, and stipulates no new state shall be formed within the limits of another without its consent. Can the United States form by treaty, or can they by treating with a tribe of Indians form it into a state or body politic within a state without its consent? Can they guarantee a republican government, if the will of a majority ***566** is not to govern within its bounds, etc.? See on this point the report of Judge White, as chairman of the committee on Indian affairs, 2 Senate Documents, 61.

I come now to that provision in the Constitution which authorizes Congress to regulate commerce with the Indian tribes. Does this power expressly, or by implication, take away or surrender the rights of jurisdiction claimed by the states?

To understand this clause we must not only advert to the generally understood opinions of the day in relation to this matter, but also to other parts of the Constitution, and to some of the ordinances, acts, and proclamations of the Continental Congress.

The 1st article and 3d clause of the Constitution regulates direct taxes "among the several states, according to their respective numbers, excluding Indians not taxed." This clause is a direct admission of the power of the states to tax the Indians; for the converse follows, that Indians taxed shall be included in the enumeration. "If," says Mr. Justice Baldwin (3 Peters), "this clause had not been inserted, or should be stricken out, the whole free Indian population of all the states would be included in the federal numbers, coextensively with the boundaries of all the states."

So in relation to the territories. The 2d clause of the 3d section of the 4th article says: "Congress shall have power to dispose of and make all needful regulations and rules respecting the territory of the United States."

This power is unlimited, and gives to Congress ample dominion over all within their territory; for the "power to

regulate" implies full and uncontrolled power over the thing to be regulated. Gibbons v. Ogden, 9 Wheat. Rep. 209.

These clauses show, to some extent, what was the opinion of the convention in relation to Indian rights of sovereignty and dominion.

***567** In 1782 a committee of Congress, recommending Congress to accept the country of the Six Nations, proposed to be ceded by New York, says "that the country of the Six Nations is appended to New York; that it has been so recognized and admitted by Massachusetts, Pennsylvania, Maryland, and Virginia; and that, by accepting the cession, the jurisdiction of the whole western territory and their tributaries will be vested in the United States, greatly to the advantage of the Union." 1 Laws of the United States, 606.

****75** The recommendation and report of the committee were concurred in, the proposed cession accepted, and the jurisdiction of the United States over the whole western country (then covered with Indian tribes) unequivocally asserted and claimed.

In the different cessions of territory from the states of Virginia, North and South Carolina, Massachusetts, and Connecticut, jurisdiction over the territory, as well as the soil, is expressly ceded. See Laws of United States, 467, 472, 482, 484, 486; 2 Hay. and Cobbs, 8.

In these cessions the states not only asserted, but the United States by accepting the territory distinctly admitted, the right of jurisdiction and dominion over the tribes within the ceded territories.

By the proclamation of 1783 Congress, after resolving that a convention ought to be held with the Indians, for the purpose of regulating their trade, etc., says "that the preceding measures of Congress, relative to Indian affairs, shall not be construed to affect the territorial claims of any of the states, or their legislative rights within their respective limits." 1 Laws of United States, 608. What more conclusive proof is wanting that, prior to the adoption of the Constitution, the states in Congress assembled believed that trade with the Indians could be regulated by Congress," and yet the legislative rights of the states be not impaired.

In 1789 Congress passed an ordinance in which they ***568** assumed the government of the northwestern territory. In this ordinance they asserted jurisdiction and full dominion, without regard to Indian rights; authorizing the passage of all laws "which, for the prevention of crimes and injuries, shall have force in all parts of the district." 1 Laws of the United States, 477.

The ordinance of 1786 closes with a direction "that, in all cases where transactions with any tribe or nation of Indians shall become necessary for the purpose of the ordinance, which cannot be done without interfering with the legislative rights of the state, the superintendent in whose district this shall happen shall act in conjunction with the authority of the state." 1 Laws of United States, 616.

I have adverted to the above ordinances, acts, and proclamations of Congress to show that at that time the right of jurisdiction in the states was assented to; that, in all the regulations and acts of Congress before and after the articles of confederation, Congress never pretended they had any power, when regulating their trade, to interfere with the legislative rights of the states, which legislative rights were admitted to be fully and amply sufficient to subject the Indians to the criminal jurisdiction of the states.

With this understanding of the rights of the states in regard to Indian jurisdiction, let us examine the force and effect of the "power to regulate commerce among the Indian tribes."

If the views I have presented be correct, the individual states (independent of voluntary restriction on their part) had the power of regulating trade among the tribes within their limits. Admitting, then, that the grant of this power to Congress applies to tribes within state jurisdiction, what is its extent? Does it give to Congress the right to assume jurisdiction, or vest it in the Indian tribes in any matter or thing unconnected with trade or commerce, ***569** or does it deprive the states of any right other than that specifically parted with?

****76** If this clause in the Constitution gives to Congress the plenary power contended for, if it is virtually a surrender of all jurisdiction over the Indian tribes within state limits, then the same clause gives to Congress power (whenever it may choose to use it) to control state jurisdiction in all respects; for the clause is, "Congress shall have power to regulate commerce with foreign states, among the several states, and

with the Indian tribes." If the words "Congress shall have power to regulate commerce with the Indian tribes" mean that Congress shall have jurisdiction in all other respects, the same words applied to the states must necessarily give the same power over the states. The Supreme Court of the United States, in Gibbons v. Ogden, 5 Pet. Con. Rep. 569, has decided this point. They say, speaking of the word """""commerce" in the clause: "If this be the admitted meaning of the word, in its application to "foreign nations," it must carry the same meaning throughout the sentence, unless there is some plain, intelligible clause which alters it." If, then, the word "commerce" gives the power to assume jurisdiction in other respects, in one part of the clause, according to this decision "it must carry the same meaning throughout," and inevitably confers the same power in relation to the states that it does in relation to the Indian tribes. If this be so, the states only exist in name. Congress may, whenever it thinks proper, under and by virtue of this power deprive the states of all jurisdiction and power; it may consolidate the states, and thus at once prostrate their individual existence.

But this never has nor ever will be pretended in relation to the states, and it conclusively proves the unsoundness of the position that the power to regulate commerce gives the right of transferring or admitting, expressly ***570** or impliedly, jurisdictional rights in the Indians, at variance with those claimed and asserted by the states.

But we are not without authority as to the extent of this power. In the case of Gibbons v. Ogden, before referred to, the court decided "that it only extended to every species of commercial intercourse." "Commerce," they say, is not limited to traffic, to buying and selling, to the interchange of commodities, but it comprehends navigation; it means, in a word, all kinds of """""commercial intercourse."

And they again say, "the power granted is to prescribe the rule by which commerce is to be regulated." This decision confines the operation of this power to regulating all kinds of trade or commercial intercourse, including navigation, and decides that the power to regulate it means to make a rule by which all kinds of commercial intercourse shall be governed; and this being the meaning of the power as applied to the states, "carries the same meaning throughout the clause."

If this be so, how can it be seriously argued that the states have parted with the jurisdiction in other respects over the Indians within their limits.

****77** If the tribes become extinct, or if by the extension of state jurisdiction over them altogether, or by their emigration, or if their permitted existence ""as a tribe" in any other way is annihilated, then there will be no subject-matter for this clause of the Constitution to operate upon (within the states). But so long as they are permitted to exist as a tribe, although state jurisdiction is partially extended over them, still, so far as commerce or trade is concerned, Congress, and not the states, have the power of regulating it, nor can the states interfere with the exercise of this right.

The meaning, then, of the power is in substance this: The convention believed, so long as the states permitted them from motives of policy to exist as a tribe (although ***571** within their chartered limits), so long as they permitted to them the exercise of their usages and customs generally, although jurisdiction in relation to crimes might be partially extended over them, it was necessary for the benefit of all that the power to regulate their trade should be vested in Congress. It never was contemplated that the grant of this power spoke them into existence as distinct sovereignties, over whom the states could exercise no rights of dominion whatever. Indeed, it has seriously been contended that the power never was intended to embrace Indian tribes within the states; but, from the view I have taken of this matter, it is unnecessary to rely on this position. The progress and final adoption of the clause, its various amendments, etc., may be seen, however, by reference to the Journal of Convention, pages 260, 277, 318, 320, 324, and 325.

It is admitted that Congress, having the power to "regulate their commerce," has also the power to choose the means by which it may be exercised. This may be done by law, or through the medium of conventions or treaties, and these treaties, when made, could not be objected to by the states (except so far as the power granted was exceeded), because they were a means of enforcing the power actually granted to Congress. And although Congress had the right, either by convention, compact, treaty, or law, to regulate their commerce, they had no power to entrench upon, or prevent the exercise of, any other right possessed by the states and not surrendered by the Constitution. Congress, then, had the power to guarantee the rights of possession to their lands,

because this was an admitted right. It had power to prevent the intrusion or settlement of the whites upon their territory; otherwise it could not regulate commerce with them (the word commerce embraced personal intercourse). It had the power of inflicting penalties for the violation of its commercial regulations; otherwise their adoption would be fruitless. It had the power to give the federal courts jurisdiction in ***572** relation to all violations of commercial restrictions; otherwise it could not have "full power over the thing to be regulated." But further than this Congress cannot go. It cannot confer jurisdiction upon the courts of the United States for crimes committed, other than those committed against its own commercial restrictions. Hence Judge McLean decided at Knoxville, in the case I before referred to, that the circuit court of the United States had no jurisdiction to punish for murder committed within the Indian territory, and that the section of the act of 1802 giving this jurisdiction was unconstitutional and void.

****78** But it has been strenuously urged in this case that, prior to the admission of Tennessee into the Union, North Carolina parted with the right of soil and jurisdiction to all the territory now within the limits of Tennessee, including the Cherokee land, and vested them in the United States; that by the treaties of 1791 and 1794, made with the Cherokees, the right of possession to the soil, and jurisdiction, within the boundaries allotted to the Cherokees, passed to them; or, in other words, that the United States, by "making treaties" with them, parted with and transferred her right of jurisdiction to the Indians, and that Tennessee was bound by the previous obligations and treaties made by the government.

To this it might be answered that the treaties only guaranteed to the Indians their rights of occupancy and property, and these rights are untouched by the law under consideration; and it is believed, as before remarked, that a careful examination of these treaties will convince any unprejudiced mind that jurisdiction or dominion is not given, or pretended to be given, by them to the Indians, nor is the power to subject them to their criminal jurisdiction denied to the states.

It might again be answered that whatever rights of jurisdiction, if any, the Indians acquired by the treaties ***573** of 1791 and 1794 were forfeited by them between the date of those treaties and the admission of Tennessee into the Union. Where a treaty is made, and one of the parties to it breaks it or does not perform his promise or stipulation, the other may declare and treat it as a nullity and consider it no longer obligatory. Vattel, b. 1, ch. 16, sec. 196, 197; Id., b. 2, ch. 13, sec. 200.

It is well known that, between the treaties of 1791, 1794, and the year 1796, the Cherokees were engaged in continual hostilities with the whites. In 1792 Buchanan's Station was attacked. In 1793 the settlements on the Holstein were invaded by twelve or fifteen thousand Indians, and these hostilities were continued, at intervals, up to 1796. All their rights, therefore, under these treaties were forfeited, and before they were again recognized Tennessee was admitted as a state of the Union, with all the rights and powers which belonged to the old states.

But a more conclusive answer to the argument is that the United States, before the treaties of 1791 and 1794, had contracted obligations with North Carolina which were paramount to any obligation she was under to the Indians by virtue of these treaties. And it is a settled principle of international law that a state already bound by a treaty or stipulation cannot make another contrary to the first, for the thing or matter is no longer at its disposal. Vattel, b. 2, ch. 12, sec. 165.

What were the obligations of the United States to North Carolina?

Prior to the cession of territory now composing Tennessee, by North Carolina, Congress, on the 6th September, 1780, recommended to the several states having waste and unappropriated lands in the western country a liberal cession of a portion of the same to the United States, for the common benefit of the Union. 1 Laws United States, 472. And on the 10th of October, 1780, during ***574** the same session, Congress passed the following resolutions:

****79** "Resolved, that the unappropriated lands that may be ceded or relinquished to the United States by any particular state, pursuant to the recommendation of Congress of 6th September last, shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states, which shall become members of the federal Union, and have the same rights of sovereignty, freedom, and independence as the other states," etc. 1 Laws U. S. 475, note.

With this recommendation and resolution before her, North Carolina, in 1789, made the cession of her territory before alluded to (now Tennessee) to the United States. When this cession of territory was accepted by the United States, what was her obligation by virtue of this resolution? That the territory ceded should be formed into a republican state, with the same rights of sovereignty that the old states possessed. One of these rights of sovereignty was the power to extend their criminal jurisdiction to their utmost limits, and over the Indians within their boundary, whenever circumstances or policy required that it should be done. But this resolution, however conclusive, is not all. One of the terms or conditions upon which the territory was ceded by North Carolina was "that the territory so ceded shall be laid out and formed into a state or states, the inhabitants of which shall be entitled to all the privileges, benefits, and advantages set forth in the ordinance of the late Congress for the government of the western territory," etc.

By the ordinance alluded to, Congress resolved (1 Laws of U. S. 478) that, "for extending the fundamental principles of civil and religious liberty," etc., and "for the establishment of states, and for their admission," etc., "upon an equal footing with the original states, etc., it is ordained and declared, etc., among other things, that the territory shall be admitted, when it shall have ***575** sixty thousand inhabitants, into the Federal Union, on an equal footing with the original states in all respects whatever. See page 480.

By these stipulations the United States obligated herself to admit the state of Tennessee into the Union, with "all the rights of sovereignty," and "upon an equal footing in all respects" with the old states." If the right of extending, when necessary, their jurisdiction over the Indians within their limits was a right possessed by the old states, which I have shown it was, then the United States covenanted that Tennessee should enjoy the same power, and by the law of nations no subsequent treaty with the Indians could annul this obligation.

The remaining enquiry is, has the United States complied with her obligations? By reference to the act of Congress admitting Tennessee into the Union (Ingersoll's Digest, 820), it will be seen she has. Tennessee, by that act, is admitted "upon an equal footing, in all respects whatever, with the original states."

****80** In the decision in Worcester v. Georgia, it seems to me, a proper distinction was not drawn between "rights of property" and the right of dominion; and the court base the conclusion they arrived at, in that case, upon the fact that the Indians never were subject to the jurisdiction of the states; that the different treaties with them recognized them as sovereignties; admitted in effect their right of jurisdiction, and negatived that of the states.

These positions I have, I hope, demonstrated do not in fact exist. In support of the principles I have advocated I would refer to the reports of Mr. Bell and Judge White--the former, chairman of the committee on Indian affairs in the house of representatives; the latter, chairman of the committee in the senate. I also refer to the opinions of Judges Johnson and Baldwin in the Cherokee case, 5 Peters, 1; and to Pathkiller's Case and Cornet's Lessee against Winton, 2 Yerg. Rep., where the ***576** principles laid down in Johnson v. McIntosh were recognized.

It is not denied that, so far as the regulation of commerce and trade is concerned, the law of Congress would be paramount (so long as the tribe exists) to the state law in conflict with it. But in relation to murder and matters of criminal jurisdiction, and which are not legitimately embraced in the power to ""regulate commerce," the exercise of jurisdiction upon the part of the states, where the civil and political state of the tribe, in connection with the white settlements around it, are such as imperiously require it, is not inconsistent with the action of Congress, when that action is confined to its proper sphere. Neither is it denied that a state law inflicting punishment upon persons within the Indian boundary, or within any portion of the state, for not doing or complying with certain requisitions, the enforcing of which requisitions is denied to the states, is unconstitutional. And on this ground mainly the opinion of Judge McLean, in his opinion in the case of Worcester v. Georgia, is based. His reasoning as to the effect of the treaties is founded principally upon the fact that the law of Georgia annulled the commercial regulations of Congress as to intercourse with the Indians. He says (page 590) "that Georgia did not reserve the right to regulate intercourse with the Indians when she sanctioned the Constitution," thereby admitting the right of Georgia prior to that time; and this power, he says (page 592) is as exclusively given to Congress as that on any other subject. True, other parts of the opinion

are more general, but it is evident, taking it altogether, that it is bottomed upon the fact that the Georgia law violated Indian rights of property, and was in conflict with the commercial restrictions adopted by the act of 1802. In fact, he admits that when the Indians, from political or other causes, cannot maintain their assumed security, or when the situation ***577** of the state, etc., imperiously requires it, it may be done.

****81** In this point of view the result of the decision in Worcester v. Georgia may perhaps be supported. The law of Georgia, under which Worcester was indicted, inflicted punishment for being or residing upon the Indian territory without a license from the governor, and without having taken an oath to support the constitution and laws of Georgia. The Constitution and laws of the United States are paramount to the constitution and laws of Georgia, where they are in conflict, and no state law can compel any man to swear he will support and maintain her constitution and laws, "without annexing to the oath this qualification," except when the laws of the state are in collision with the Constitution.

In every point of view in which this question has been presented to my mind my clear convictions are that the act of 1833 is not inconsistent with any obligation which Tennessee is under to the federal government. Tennessee, by its passage, has violated no right ever recognized in the Indian tribes. Their rights of property, both real and personal, and their full and ample enjoyment is secured and protected. No pledge on the part of the state has been forfeited. Tennessee only asserts the privilege of punishing for the commission of crimes the most shocking to our nature, when committed within sight of her temples of justice. She cannot consent to see her citizens and others robbed and murdered, whilst the robber and murderer laugh to scorn the power of her laws, and, pointing to that sacred bond of our union, the Federal Constitution, claim it as a mantle of protection for the perpetration of crimes at which our nature recoils. Unless the act of 1833 is most clearly and manifestly a violation of the federal compact (which I have shown it is not), every principle of policy, and, I might add, of ***578** humanity to the Indians, requires that it should be sustained. [1]

NOTE.--The decision in this case was made by two judges against one, each of the judges constituting the majority assigning different reasons for his faith. "The case," says Mr. Meigs, Dig. § 450, "may be read with profit by any one who desires to acquaint himself with the history and progress of legislation in reference to the Indian tribes, the former masters of the country."--[ED.

All Citations

16 Tenn. 256, 1835 WL 945, 8 Yer. 256

Footnotes

1 The argument, furnished the court at their request, by Geo. S. Yerger, will be found in the Appendix.

1 I would also refer the court to a very clear and able opinion which was delivered by Judge McLean upon an indictment for stealing a horse within the Wyandotte reserve, Ohio. See National Intelligencer of 22d August, 1835, in which the principles here??