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AN EXAMINATION OF THE CHEROKEE QUESTION.

[CONCLUDED.]

To justify all the scenes of cruelty and oppression, which have marked the progress of the Europeans and their descendants in this hemisphere, is equally uncalled for by humanity and justice, and by the defence of the principles which they assumed and too often abused. Still he, who regards human nature as it is, and looks abroad upon all that intelligence and industry have done and are doing, will scarcely regret the great change, which has been effected, nor wish that the right of ignorance and oppression yet rested upon all this fair prospect. That the Genoese navigator had yielded to the importunities and menaces of his crew, and left one half of the world unknown to the other.

From this general review of the doctrine, the commentaries and the practice, these conclusions may be deduced.

1. That civilized communities have a right to take possession of a county inhabited by barbarous tribes, to assume jurisdiction over them, and "to combine within narrow limits," or in other words, to appropriate to their own use, such portion of the territory as they think proper.

2. That in the exercise of this right, such communities are the judges of the extent of the jurisdiction to be assumed, and of territory to be acquired.

In the preceding investigation, the attempt has been made to show, that the rights of jurisdiction and soil, with such modifications as circumstances might require, were the necessary results of the discovery and settlement of America. The proposition embraces the power over persons and things, because these subjects are closely connected in the elementary discussions, and in the historical review, and because the consideration of both was convenient for the course of the argument.

But this union is not necessary for any purpose which has required the present examination. And in its further progress, the connexion will be dissolved, and enquiry will be confined to the question of political superiority. It will be conceded, that the Indians are entitled, *sub modo*, to all their rights of property, and cannot be divested of these without their own consent.

But in the application of the general principles to the United States, and to the Indians in contact with them, a preliminary question arises, resulting from the peculiar form of Government established in this country.

Is the general controlling authority over the Indians vested in the federal government, or in the respective States?

It is obvious, that in the resolution of this question, the Indians have no concern. Their rights, whatever these may be, whether natural or conventional, are wholly independent of this enquiry. It is one, which affects the parties to our government, and is to be decided by the Constitution which they have established. And whether that portion of sovereign power, which regulates the rights and duties of the Indians, reside in the members of this Union, or in the united body itself, the relation which the two parties bear to one another, will remain unchanged

It may be observed in the investigation of this subject, that this attribute of sovereignty once belonged to the several States, and still belongs to them, unless they have ceded it to the general Government. In the Constitution of the latter therefore, this evidence of cession must be found, before the power itself can be exercised.

There are but three provisions in that instrument, which have the remotest connexion with this subject.

1. The power to dispose of, and make all needful rules and regulations respecting the Territory or other property of the United States.

This clause evidently refers to territorial rights. To the power to control and regulate these, and not to the exercise of jurisdiction over Indians, living within the country claimed by them. It is, at all events, inapplicable to the Cherokee country in Georgia, to which the United States have relinquished all their pretensions. Under this clause of the Constitution, Congress pass laws to prevent intrusions upon the public lands; while, at the same time, the intruders are subject to the ordinary jurisdiction of the States, within which such lands are situated. The power to dispose of, and make needful rules and regulations respecting the property of the United States, and the power to exercise general jurisdiction over persons upon it, are essentially different and independent. The former is general, and is given in the clause referred to. The latter is special, and is given in another clause, and confined to the federal district, and to "places purchased by consent of the legislature of the State, in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings.

2. The power "to regulate commerce *with* foreign nations, and *among* the several States, and *with* the Indian tribes."

It will be recollected, that the subject of the present branch of the enquiry is, where the ultimate jurisdiction over the Indian tribes resides. Is it given to the United States by this clause? Certainly not. This is a power to regulate commerce, and not to exercise jurisdiction. There is no necessary connexion between the two subjects. And the effort in this instance to unite them, leads to the one or the other of two absudities. Either that Congress have jurisdiction over foreign nations, or that entirely different meanings are to be given to the same words in the same sentence. The power granted, is to regulate commerce With whom? *With* foreign nations and *with* the Indian tribes, and *among* the several States. Can any reasonable version be given to this sentence, by which it shall in fact read—Congress shall have power to prescribe the mode in which commerce shall be carried on with foreign nations, and among the several States, and with the Indian tribes, and shall have jurisdiction over the Indian tribes. The greatest latitudinarian in the construction of the Constitution will scarcely contend for this interpretation. We need not stop to investigate the meaning of the word "regulate." Whether it give more or less power over the subject matter, or over the white persons engaged in the trade, it gives none over the Indians themselves, unless it also gives power over the Englishman and the Frenchman, with whose countries our commerce may be regulated by Congress. But this will not be contended; and the conclusion is inevitable, that this "regulation," whether by treaty or by law, can give no political power, and no rightful jurisdiction. It must be confined to the object, to which it is limited by the Constitution.

And still further, if the idea of general jurisdiction be included in the terms, "regulating commerce," the General Government may annihilate the whole State laws, and bring within its own authority all the people and property of the country. Constructive powers can scarcely go beyond this.

After recapitulating certain provisions of the Constitution, which cede to the General Government rights, incompatible with the absolute sovereignty of the States, Mr. Justice McLean asks, "has not the power been as expressly conferred on the Federal Government, to regulate *intercourse* with the Indians, as any of the powers above enumerated? There being no exception to the power, (that of regulating the intercourse,) it must operate on all communities of Indians, exercising the right of self government, and consequently include those who reside within the limits of a State, as well as others."

To the question here put, we answer, *no*. If such a provision can be found in the constitution, we will agree to abandon the whole argument. There is indeed a provision for regulating commerce with the Indian tribes, but we need scarcely undertake to shew, that between *commerce* and *intercourse*, there is a wide difference. Far too wide, to render them convertible terms in the investigation of the delicate question of conflicting jurisdiction. To speak logically, the former is a species, and the latter a genus. One, existing at all times, in a greater or less degree, both in peace and war; the other, like the spirit of laws, becomes, silent amid arms. Intercourse includes commerce, but it includes also many other relations, political and personal, of which commerce forms no part.

The Chief Justice also remarks, that "the whole intercourse between the United States and this nation, (the Cherokees,) is, by our constitution and laws, vested in the government of the United States." "They," speaking of the Acts of Georgia, "interfere forcibly with the relations, established between the United States and the Cherokee nation. The regulation of which, according to the settled principles of our constitution is committed exclusively to the government of the United States."

This, as it appears to us, is assuming the very point, upon which the controversy turns. We can find in the constitution no clause, giving the United States the right to regulate the *intercourse* or *relations* with the Indian tribes. We ask for that clause. It is not to be found. We then ask for the fair deduction of that power from some express grant, and we are met by the opinion, that the exclusive control of the intercourse and relations with the Indians, is given to the general government.

If this opinion is founded upon a belief, that *intercourse* and *relations* and *commerce* are synonimous, the conclusion would still involve us in inextricable difficulties This regulation of commerce or intercourse, if it give the United States "exclusive jurisdiction over the Indians, gives, as we have said, exclusive jurisdiction over all foreign nations, and over the whole American people. We surely need not pursue this subject farther.

Were such an enquiry useful, it would not be difficult to shew that there were very sufficient reasons for granting to the general government this power to regulate commerce, arising out of the situation of the various tribes, some of them extending into several States, and all of them powerfully affected by the influence of the traders, and by the supplies rendered necessary to their comfort and subsistence. But it is an investigation, into which we need not now enter.

3. The power of Congress to declare war, and the power to make peace furnish the only remaining authority, by virtue of which this jurisdiction can be assumed and exercised.

As no war has ever been declared by Congress against an Indian tribe, and as all our wars against these people have been prosecuted by Executive authority, it is unnecessary at present to embarrass the discussion with any observations upon the war making power.

The treaty making power includes within it the power to make peace. It is vested by the Constitution in the President and Senate.

Treaties in national law, are compacts made between sovereigns. In monarchical governments, the power to conclude them is generally a branch of the royal prerogative. It is so in England. No treaty, in this acceptation of the term, was ever negotiated with an Indian tribe living under the dominion of the English Crown. No Ministers were ever appointed to conduct such a negotiation, no instrument was ever submitted for the sovereign's approbation, nor were any ratifications ever exchanged. All these proceedings are essential to the constitution of a treaty, without which, according to modern practice, no compact can assume that high character, nor be construed to be a recognition of mutual independence. And even if they were waived, still the express assent of the sovereign is indispensable.

It is clear, from what has been before stated, that as we recede from the period of the discovery, the practice, if not the doctrine of the Europeans, in their intercourse with the Indians, becomes meliorated, and humanity asserts her claims in favor of the latter. At first, all rights of persons and property and jurisdiction were disregarded. But by degrees the principles of intercommunication were investigated and acknowledged, and the civilized governments found, that as much land should be assigned to the primitive people, as was necessary for their comfortable subsistence, and that the jurisdiction to be exercised should depend upon their situation, disposition and other circumstances.

In the Spanish Laws of the Indies, it is provided, that "the Indians shall be left in the possession of their lands, hereditaments and pastures, in such a manner that they shall not stand in need of the necessaries of life, and shall be allowed all the aid and facilities for the sustenance of their household and families."

Massachusetts, in 1633, declared, "that the Indians had the best right in such lands as they had actually *subdued and cultivated*"

In 1657, the governments of Massachusetts and Connecticut are desired by the Commissioners of the United Colonies, "to take care that the Pequots be accommodated with lands, convenient for their subsistence, without prejudice to the English plantations."

And Virginia, in 1618, provided, "that *for the future*, no lands should be patented, until fifty acres had been first set apart to each warrior, or head of a family, belonging to any tribe of Indians in the neighborhood."

These are historical steps in the progress of this affair, & shew that at an early day it became evident, some check should be interposed to prevent the universal seizure of land. Not because the government had no power to acquire it, but because they deemed it expedient that their citizens should be restrained within just limits, as well to prevent fraud or force, and the eventual dissatisfaction of the Indians, as "the necessity," in the words of an ancient statute of Virginia, "of allotting to them new lands and possessions."

It, therefore, became a practice with the Colonial Governments, to cause Councils to be held with the Indians, at which cessions were, from time to time, made, and the arrangements, entered into at these Councils, were designated as "treaties." They were very economically conducted Until 1722, the expense of "treaties and other Indian affairs" in Pennsylvania, was limited by law to fifty pounds per annum. And the whole expense of the treaty concluded by Penn with the Indians in 1733, was £436 0s 8½d In conformity with this, is the remark of Franklin. "It is much cheaper to purchase of them than to take and maintain the possession by force: for they are generally very reasonable in their demands for lands."

Another consideration led to this mode of acquisition. In the long contest between the French and British for superiority upon this Continent, the services of the Indians were found useful to both parties; and each was desirous of securing their friendship and alliance. In effecting this, it became necessary to remove many causes of complaint; among which none was more powerful, than the facility with which Indian lands were claimed and occupied.

Such was the state of things at the period of the Revolution. The struggling colonists found themselves engaged in a desperate conflict, which required the united wisdom, strength and resources of all. The British called the Indians to their aid, and, true to their character and institutions, they came upon the summons To resist both was a common object, and to sever the alliance, was the obvious dictate of prudence. Hostilities were therefore prosecuted, negotiations conducted, and conventional arrangements made with them, by the central government But all this was done as a matter of necessary defence, and not by virtue of any sovereign rights over the Indians, for these rights are expressly reserved in the Articles of confederation, which declare, "that Congress shall have the sole and exclusive right of regulating the trade and managaging all the affairs with the Indians not members of any of the States Provided, that the legislative power of any State within its own limits be not infringed or violated."

Upon the dissolution of the Confederation, one of the first objects of the new government was to conciliate or subdue the Indian tribes. The whole inland frontier, from the Lakes to the St. Mary's, was exposed to their incursions and depredations, and a crisis had evidently arrived, demanding the most vigorous measures. Many of the tribes were in open hostilities, and the power of the Union could alone successfully contend with them. "To provide for the common welfare" was one of the great objects, for the accomplishment of which the new government was instituted. In the execution of this paramount duty, important relations necessarily arose between them and the Indians. Hostilities were continued or commenced, and it was not until the decisive victory of General Wayne in 1794, that the power of the savages was broken, and the "common defence" secured — As a necessary incident to the power of "defence" is the right to make peace, bringing into action the treaty-making authority, and a special jurisdiction over all matters fairly connected therewith, as far as they are actually required for the purposes of safety, and as long as the General Government is responsible for that safety; that is, till the various tribes are so reduced in strength, or so improved in morals and habits, that the respective States may safely assume jurisdiction over them, without calling upon Congress to "provide for the common defence. When the *posse comitatus* may be substituted for a military force, and when citizens, venturing to engage in hostilities, will become traitors.

This is the only real and visible foundation, upon which the power of the General Government to conclude a treaty with an Indian tribe, living within the boundaries of a State, can rest. Except so far as the process may be thought expedient in the purchase of their possessory right by the United States, and where the United States have the *ultimate domain*, and consequently, the right to make "needful rules and regulations respecting" it. And also, in the "regulation of commerce" with the Indians, if it is necessary and proper that this regulation should be made by conventional arrangements. And, in either case, the extent of the power must be limited by the objects to be attained. Neither of these have any connexion with civil or criminal jurisdiction, and can therefore neither confer it upon the Indians, if they have it not: nor take it from the States, if it is vested in them.

We must, however, carefully separate the treaty making power "to regulate commerce with the Indian tribes." The former is given to the President and Senate, and the latter belongs to Congress. The authority therefore to make treaties with the Indian tribes, whatever this may be, derives no support from the power to "regulate commerce," but exists independently of it.

To prevent misconception we may add, that without the boundaries of the respective States, and within the boundaries of the Republic, the United States have a general jurisdiction over the Indian tribes, as a necessary attribute of sovereignty, and in conformity with acknowledged principles of the laws of nations.

Conceding now, what however is not required, that under the Constitution, and for the purposes of defence and security, the general government has a control over the Indians, that control must of course be limited by a just construction of the grant of power, and by the duties of the government. It is not essential to its existence or exercise, that it should include every "attribute of sovereignty," and it will cease when danger is no longer to be apprehended, and when the ordinary civil power of the community is sufficient to govern and restrain the Indians. And the States must necessarily judge when this period has arrived. When the relative strength of the parties, and the circumstances and improvement of the Indians render such a measure proper. The portion of jurisdiction, till that time entrusted to the General Government, may then be assumed, and the whole subject left to the State authorities.

This gradual change has taken place in almost all the orginal States. And the principles, connected with it, are not only obviously just, and such as will alone reconcile the difficulties of the subject, but are supported by respectable authorities.

"We do not mean to say," observe the Supreme Court of New York, "that the condition of the Indian tribes, at former and remote periods, has been that of subjects or citizens of this State. Their condition has been gradually changing, until they have lost every attribute of sovereignty, and become entirely dependent upon and subject to, our government."

At the time this opinion was delivered, there were probably 6000 Indians in New York.—How many there were at the termination of the "former and remote periods," when they retained their quasi independence, there are no materials at hand for ascertaining. No doubt, the number was then double. But the strength of the tribes constitutes only one of the elements, for the determination of the question of incorporation. Of that, and of the others, each State has judged and must judge

"The condition of the Indians" says the Abbe Raynal "has not always been the same. At first they were seized, sold in the markets and made to work like slaves upon the plantations."

"In some of the old States," says Mr. Justice McLean, Massachusetts, Connecticut, Rhode Island and others, where small remnants of tribes remain, surrounded by white population, and who by their reduced numbers had lost the power of self government, the laws of the State have been extended over them, for the protection of their persons and property."

It is obvious, that the limitation of the power of self-government, here alluded to, must depend upon the opinion of the State, and not upon numbers merely, for numbers are not essential to self government, and we may add, are unimportant, except so far as relates to their necessary defence And it is equally obvious, that the *argumentum ab inconvenienti* cannot operate to divest from the General Government and confer upon any of the States, an authority given to the former, and particularly when such authority, if necessary, may be as well exercised by the one, as by the other. If under the constitution, the United States alone have jurisdiction over these tribes, and if, in consequence of reduced numbers or other circumstances, the tribes become unable to exercise that portion of jurisdiction entrusted to them, it is for the United States to provide a remedy, and not for a third party who, upon the principles assumed, have ceded all legitimate authority over the persons and objects. Certainly no claim of State jurisdiction can rest upon this foundation.

Nor can the exercise of that portion of jurisdiction arising out of the duty of general defence, will also terminate the power of regulating commerce.—That power, it will be recollected, is to regulate commerce with the Indian *tribes*, and not with the Indians. They will then cease to be "tribes," or to take the definition instead of the term, will cease to be, in the language of the American lexicographer, "a body of rude people, united under one leader or government; as the tribes of the Six Nations, the Senaca tribe, in America; and will become citizens, with such "privileges and disabilities as the laws of the respective States may provide."

Having endeavored to shew the general nature of the jurisdiction over the Indian tribes, and that in the United States, that jurisdiction belongs to the several State governments, whensoever, and howsoever they may choose to exercise it, it is nececessary now to enquire how far the exercise of this right by the State of Georgia is controlled or prohibited by any Conventional arrangements, made with the Cherokee Indians. If the General Government have entered into engagements inconsistent with this right, and if such engagements were within the scope of its legitimate authority, nothing remains but to regret these stipulations and to execute them; even if they perpetuate the inconveniences, which must attend the permanent establishment of the Indians in their present places of residence. If, on the other hand, the United States have contracted obligations which they cannot fulfil without a violation of preceding and paramount duties, they must then compensate the Indians, who are the injured party, to their full satisfaction, unless their demand is, upon the face of it, exorbitant and unreasonable. If it is, the commutation should be measured by the party, thus involved in contradictory obligations, in a spirit of liberality, and tendered with a full explanation of the circumstances. We think however, it will be found, that neither of these alternatives is before us; but that all the compacts made with the Indians may be executed, fairly and in good faith, and consistently with the jurisdictional authority of the State of Georgia.

The extension of the laws of the respective States over the Indians involves their personal and political rights The former under any state of things, will no doubt be amply secured, and all proper rights and remedies extended to them. How far they shall participate in political privileges, must depend on their advancement in improvement and knowledge. While passing through that probationary situation, which their previous habits and circumstances have rendered necessary, they must remain in the state of "pupilage," described by Judge Kent. And without suffering the question to be influenced by preconceived notions, not applicable to the relations of the parties, nor by those romantic delineations of Indian character and condition, more creditable to the heart than the judgement, which have misled many worthy men, let us enquire what must be the actual effect of subjecting to the ordinary jurisdiction of the laws of those tribes, which have already commenced the great career of improvement, and made, as is represented, such progress, as to qualify them for the task of self government. To one, who is ignorant of the controversy, which has recently arisen out of this subject, the answer will appear disproportioned to the fearful consequences which, it is apprehended or alledged, will result from this change. These half civilized Indians will become subject to the common law of England, with such temporary disabilities as the respective State Legislatures may impose, till they are prepared by education and habits for its full enjoyment.—And is not this preferable to their present system of polity? All history teaches, that no free government can exist among half civilized people. It must become a despotism, ruled by one or a few.- And, if we are not wholly misinformed, the experience of our own Indian tribes confirms the general lesson. If the Southern Indians have made those advances in improvement, which many so confidently assert and believe, they cannot be injured by the operation of just laws. If they have not, they are unfit for the task of self-government, and to become the founders of an independent State.

We are induced to transcribe from the able and interesting Report of the Committee or Indian Affairs in the House of Representatives, made February 24, 1830, the account of an incident in the history of the Cherokees, not unworthy of notice at the present time.

"In 1730, the Cherokees made a more formal and ceremonious relinquishment of their sovereignty, than any recorded in the history of this country. Besides the ceremony of submission, which took place in a general Council of all the Chiefs of the tribe, to Sir Alexander Cumming, as the Representative of the King, six of the principal Chiefs were selected, who actually went to London, and laid the Crown of the Cherokee nation at the feet of the King, and acknowledged themselves subject to him, in the same manner their white brethren of South Carolina were."

In endeavoring to investigate the effects of the various treaties, that have been concluded with the Cherokees, upon the relative rights of that people and the State of Georgia, we are met, at the threshhold by an objection which, if valid, terminates and forever, the whole controversy. It is said that the form of these instruments, and the descriptive epithet "nation," applied to the Indians, are a full recognition of their independent position, and that we are now precluded from denying the legitimate consequences, flowing from our own admissions.

In the examination of this topic, we consider it wholly unnecessery to enter into any verbal criticism respecting the insulated meaning of words. Whether the compacts are called "treaties" or "conventions," or, as in some of the New York arrangements, "contracts;" whether the parties are termed "nations," "tribes," hords, kraals or "cantons," whether the interest secured to them is denominated "lands," "possessions," "hunting grounds," or "country," and held by "assignment" "allotment," or "guarantee;" all this is, in our view, altogether immaterial.—An Indian camp, with its duties and confusion and dangers, is not a favovrable place for cautiously weighing the precise meaning of words nor is it possible to translate them literally and exactly into any Indian tongue. Our language and the aboriginal ones are radically different; and as Mr. Duponceau has well observed, the plans of ideas are different.—This difference is not one of idiom merely, but it enters into the whole frame of their society, and into all their thoughts and their modes of expressing them. We look therefore to the spirit and objects of these instruments, and to the subsisting between the parties. And we construe them as they were intended to be understood and were in fact understood.

Our sovereignty over the Indians is distinctly admitted. When therefore a stipulation, expressing that sovereignty is inserted in an Indian treaty, it is merely declaratory, not auxiliary. The right existed before the treaty, and it extends to tribes, with whom we have not yet formed treaties. And so of the power to regulate trade, to punish crimes, committed in their country, or by their people in ours, and to establish military posts, wherever we think proper. All other governments have done these things, and much more; and the Indians fully comprehended the obligations they impose.

If they have universally been supposed by themselves, by us, and by others, to be under our general supervisory authority, if their right to the lands where they hunt and fish, has always been considered a possessory one merely, and if many of the most important relations subsisting with them have without hesitation, been controlled by our government and acquiesced in by them; whatever compacts may be formed with them must be expounded with all the necessary limitations, arising from this state of things, unless these are evidently designed to change them.

It is remarked by Chief Justice Marshall, that "this treaty," speaking of a treaty with the Delawares, "in its language and in its provisions is formed, as near as may be, on the model of treaties between the crowned heads of Europe." And farther, "the third article, alluding to the treaty of Holston, "contains a perfectly equal stipulation for the surrender of prisoners." And again, "a boundary is described between nation and nation." "The words "treaty and nation," are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense."

We certainly distrust ourselves, when differing from this most able and venerable man who has expounded and illustrated the jurisprudence of his country by a series of decisions, no less remarkable for their legal acumen, than for their depth of research, and the admirable powers of generalisation they display. But this point is so essential to the progress of the discussion, that we could not pass it over in silence.

We do not investigate the nature of these instruments, with a view to ascertain their validity. This we admit. Fully and fearlessly But to prevent the *exclusion of a conclusion* — To prevent any inference from their *forms*, which would in effect destroy the existing relations of the parties. Relations whose practical operation is undisputed, and which have stood the test of two centuries of intercourse.

We cannot express the true doctrine as well as it was expressed at Ghent, where this very objection was urged and pertinaciously repeated "The treaty of Greenville," say the American Commissioners, "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 recognised.*

The position of the Indians is no doubt, anomalous. Europe presents nothing similar. To demand that the principles of intercourse, which have been adopted, shall be reconciled with the received maxims of public law, which govern the relations of civilized and independent nations, is to reject the universal practice of all governments, who have founded colonies in the new world, and is to sacrifice the true interests of society to a definition and a deduction. We are not now called upon to discuss abstract rights, but to investigate the actual state of things. Compacts have, for a century, been formed with the Indians, for the purchase of their possessory rights. At first, the equivalent given scarcely deserved the name of a consideration. Dr. Franklin says, as Kalm, the Swedish traveller, states, that Rhode Island was purchased with a pair of spectacles. And an examination of most of these bargains before the revolution, will show, that the presents usually given, for there was in fact, no actual price arranged, were entirely disproportioned to the value of the land. To the United States belongs the credit of having introduced the system of annual payments, calculated, if wisely applied, by the Indians, to relieve their wants for an indefinite period These compacts were termed treaties, not in that acceptation of the word, by which it is applied to the adjustment of differences between independent nations, but in its more general meaning, which extends to all arrangements for "forming agreements" between parties, as we say, a treaty is on the carpet, a treaty of marriage, &c; and as the treaty of Holston uses the word, when it says, the Cherokees "shall not hold any treaty" with "individuals of any State." It is clear from the Constitution of the British Empire, as has been already explained, that these compacts, formed by the Colonial Governors or Commissioners, and never submitted for the ratification of the Crown, could not be *treaties*, in the diplomatic sense of the term. The practice came down to us from them, and it is equally clear, that under the United States, neither the form of these contracts nor *the* process of ratification, conferred, by mere implication, rights, inconsistent with the whole tenor of our intercourse with the Indians, at variance with the numerous provisions of our own statute book, and irreconcileable with the form and substance of the stipulations in the instruments themselves.

We approach now the material enquiry in the case. Do the treaties, which have been formed with the Cherokees, contain stipulations incompatible with the exercise of jurisdiction by the State of Georgia over these Indians? That they establish boundaries of possessions, and secure or "allot" to the Indians their "hunting grounds," "lands," &c.; or in other words, all those usufructuary rights, necessary to their subsistence in their usual mode of life, so far as the relative obligations of the United States and Georgia permitted the former to establish and secure them, will not be disputed. It is the jurisdiction over persons, and not the disposition of property, which we are now investigating.

A succinct review of the treaties with the Cherokees becomes necessary, but in making it, we place out of view the treaty of Hopewell, negotiated in 1785.

It never established a peace, nor in fact, was it executed. It was succeeded by open hostilities, which continued with various success, whereas the treaty, which it alludes. The treaty of Holston of 1791, was evidently intended as a substitute for the previous treaty of Hopewell. The latter is not mentioned nor alluded to. It is clearly taken for granted, that its stipulations have ceased, and such of them, as are acceptable to the parties, are incorporated into the new compact. This will appear by a comparison of the two treaties.

Treaty of Hopewell.	*Treaty of Holston.*
Preamble. Gives peace.	Art. 1. Establishes peace.
Art. 1 and 2. Provide for the restoration of prisoners.	Art. 3. Provides for the restoration of prisoners.
Art. 3. Placed under the protection of the U. States.	Art. Placed under the protection of the U. States.
Art. 4. Boundary.	Art. 4. Boundary; being the same, with slight variations, as that established the treaty of Hopewell.
Art. 5. Provision for the removal of intruders.	Art. 8. Provision for the removal of intruders.
Art. 6. Provision for the delivery of offenders residing among the Indians.	Art. 19. Provision for the delivery of offenders, residing among the Indians.
Art. 7. Provision for the punishment of persons injuring the Cherokees.	Art. 11. Provision for the punishment of persons injuring the Cherokees.
Art. 8. Retaliation abolished.	Art. 12. Retaliation abolished.
Art. 9. Congress may regulate trade with the Cherokees.	Congress may regulate trade with the Cherokees.
Art. 10. A supplement to the 9th Article.	Omitted.
Art. 11. Cherokees to give notice of designs against the United States.	Art. 13. Cherokees to give notice against the United States.
Art. 12. Allowed to send a Delegate to Congress.	Omitted.
Art. 15. Peace and friendship re established.	Art. 15. Peace and friendship re-established.
	Art. 5. Provision for a road.
	Art. 7. Guarantee of lands.
	Art. 1. No hunting on Cherokee lands.
	Art. 14. Implements of agriculture to be furnished——Interpreters to be provided, &c.
	Art. 16. To be ratified.

Can any doubt exist, but that the latter treaty, (that of Holston) which was made "to remove causes of war;" which "establishes perpetual peace and friendship;" which provides for the surrender of persons "now in captivity," on both sides; which puts an end to "all animosities for past grievances;" and which was negotiated after some years of continued war, was a treaty of peace, and that all the obligations between the parties, not renewed or confirmed by it, were considered as annulled? It is expressly termed a "treaty of peace" by Mr. Justice McLean, and if so, it recognizes a pre-existing state of war, with the consequences properly resulting therefrom. It is

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