Rights of the States.

A reply to,—and review of an opinion, of the Hon'ble. William Wirt, (herewith re-published) entitled,

Rights of the Indians,

UPON THE QUESTION,

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

BY A MEMBER OF,

THE MISSISSIPPI BAR.

WM. A. A. CHISHOLM.
Printer.

1830.
By a statute of the last session, the jurisdiction of our laws was extended over the Indian tribes residing within the State. The constitutionality of this enactment has been frequently questioned through the public journals of the day,—in the debates of Congress, and by the seemingly honest opinion of many of our own citizens. This statute by the indulgence of the public and its functionaries, has been suffered to remain inoperative; and the principles it involves, neither here or elsewhere, have yet passed a judicial review. A similar statute of the State of Georgia has engaged much public attention; and the Cherokee Indians upon whom it was designed to operate, have obtained and published an opinion upon that statute, of one of the most eminent Counsellors of our Country. This opinion (whether intended or not) in its publicity, is operating a political, rather than a legal effect, and it is perhaps not yielding it too much importance to say, that its consequences, may in some degree be yet felt, by the State of Mississippi.

We now partake in a general joy at the result of those treaties, which preliminarily have been just executed with the Indians of our State. But have we any assurance that these treaties will receive the sanction of the United States Senate, or a support (by supplies) of the House of Representatives? Nay, have we not direct assurance of their warm opposition, and perhaps defeat? Notwithstanding these probabilities, there are those among us, (and doubtless from purest motives) who desire the repeal of our Indian bill. But rather than a repeal, may not its present suspension be a questionable policy? It is yours to determine, whether we should now relinquish those measures which may tend to effectuate the consummation of those treaties; or failing of this object, may nevertheless, secure to the State, ultimate, permanent advantages.

The opinion is deemed sustainable, that had we levied a timely tax upon the Indians of our State, they might now have been enumerated among those upon whom our representation in Congress is apportioned: and the addition of their numbers, would probably have entitled us in the next apportionment, to three representatives in the national legislature. Shall we longer forego our rights?

Since the publication of Mr. Wirt's opinion against the validity of the statute of Georgia, I have devoted some attention to the investigation of the "rights of the states" to extend their jurisdiction over the Indians residing within their territorial limits: and have also made some examination of the views contained in that opinion, which denies this right. The result of my enquiries is, the firm conviction that Georgia and Mississippi possess the power they have asserted; and that the opinion of Mr. Wirt is radically erroneous.

I know not that my reflections on the subject can at present subserve any direct purpose of public utility; but with a humble hope, that they may contribute to vindicate the policy and validity of a controverted measure; they are herewith submitted to the consideration of the respective individuals composing your honorable body, and that public whom you represent.

Respectfully Yours, &c.,

A FELLOW-CITIZEN.

Woodville, November 8th, 1830.
RIGHTS OF THE STATES.

vs.

"RIGHTS OF THE INDIANS."

In re-examining this case, so elaborately investigated by Mr. Witt, I shall proceed first, to inquire, what are the rights which authorize the State of Georgia and Mississippi (who are equally involved in the question) to extend their legislation over the Indian tribes residing within their territorial limits? After deducing the conclusion which I may suppose warranted by the principles and authorities to be quoted; will then endeavour to point out the errors contained in the opinion recently published by the sanction of one so highly reputed for his integrity, and so formidable for his legal erudition, as the late Attorney General of the U.S.

The subject proposed, seems readily to present itself in three distinct propositions: which, whatever be the difference of opinion as to their several import, it will not be controverted but in their true extent, and appropriate application, they must contain a solution of the whole question. These are

First—What were the rights of property and dominion as asserted by the sovereignty of England in its discovery, jurisdiction, and government of the provinces which now constitute these U.S.? Second—To what rights of property and dominion within their territorial limits did the States respectively succeed by their declaration of independence in 1776, and the acknowledgments contained in the treaty with Great Britain in 1783. Third—What portion of these rights of property and dominion, especially those relating to the Indian tribes and their territorial possessions, have the original States ceded away by their national confederacy—their treaties, or other legal compacts of alienation: and under all these compacts, to what extent are the rights of sovereignty as belonging to the old states, abridged to the new states, beside those abridgments common to both.

I shall attempt no vindication of the measures pursued toward the aborigines of this continent by the nations of Europe in their primitive settlements; originating in what has been justified as their rights of discovery, against wandering tribes of barbarians. This ground is surrendered to the sympathies of the sentimental, and the animadversions of the moralist. Sufficent for me, that the claims I would establish, have been long since determined by the civilized nations of the world, and passed down with the history of our country, as politically right.

To the interrogatory implied in my first proposition I shall first re-

join, 'That the right of the sovereignty of England was an absolute unqualified right, both of property and dominion, in and over the country discovered.' I shall admit however, that the crown, and its grantees at an early period not unfrequently contracted with, and purchased of the Indians, their actual possession of the land; and that in few, if any instances was it attempted to subjugate the natives to the actual dominion of territorial laws. But I deny what is frequently inferred from the existence of these admitted facts; viz., that the discoverers only claimed right of property, subject to an admitted right of occupancy in the natives; and claimed no right of dominion over the Territory while the natives retained possession.

The character of the North American Savages—themselves fierce, their treachery, their ignorance and incapacity for any usefulness to the colonists in subjugating them to municipal dominion; is the only reason why such a right of dominion was not uniformly exercised. 8 Wheat. 590. The difficulties and dangers in its accomplishment would never have compensated the cost. And therefore when actual dominion of territory was proposed to be made, it was either obtained by purchase, or by forcible expulsion of the natives. Their expulsion was a more expedient mode of obtaining actual dominion, than that of subjugation. Wherefore, in practice the right of the crown and its grantees may be said to have been, an absolute right of property and dominion, with a right to expel the natives (when it was not chosen to conciliate them by purchase) to obtain actual dominion. 8 Wheat. 597.

The first charter granted by the crown of England, was obtained by Sir Humphrey Gilbert on the 11th June 1578, in which Queen Elizabeth authorized him, 'this heirs and assigns, to discover and take possession of such remote heathen and barbarous lands as were not actually possessed by any Christian Prince or people. She vests in him his heirs and assigns forever, the lands so to be discovered and possessed: with the rights, royalties and jurisdiction, &c, &c. with full power to dispose of to her majesty's subjects in fee simple, &c. &c. She grants him licence to expel all persons who without his especial permission shall attempt to inhabit said country, &c. &c. 1 Marshall's Life of Wash. page 9–10. It should be remembered this was 82 years after the commission to the Cabots, to make discovery and take possession, in the name of the King, of countries then unknown to Christian people; a period sufficiently long, to have deliberately ascertained the extent, to which the crown had a right to grant. A similar Patent was granted by Elizabeth to Sir Walter Raleigh. Idem page 12. The grant to the treasurer and company of adventurers of the City of London, for the first Colony in Virginia, was made in absolute property. Idem p. 43. The grant of Maryland to Lord Baltimore was also in absolute property. The Patent of James 1st to the Marquis of Buckingham and others of the Plymouth Colony, was in absolute property, and similar powers of jurisdiction as preceding. Idem. 96. Indeed all the grants, as of New York and New Jersey, to the Duke of York; the grant of Carolina to Lord Clarendon and others; not excepting the grant to William Penn, were all made in absolute property, and without any ac-
knowledge, or qualification, in favour of any right in the native inhabitants.

The foregoing will be deemed sufficient to show, that the pretensions of the discoverers were unqualified, to both property and dominion; and it would be superfluous to quote the history of our early settlements to prove, that no other title has ever been obtained, to a large portion of the Atlantic states, than a consummation of these grants and pretensions, by a forcible expulsion of the Indians. 8 Wheat. 588-9 590-1-2.

Chief Justice Marshall, in the case of Johnson vs. McIntosh, in commenting upon these titles of the United States, observes,—"They "(the U.S.) maintain as all others have maintained, that discovery "gave an exclusive right to extinguish the Indian title of occupancy, "either by purchase or by conquest; and gave also a right to such a "degree of sovereignty as the circumstances of the people would allow "them to exercise." 8 Wheat. 587.

It is however true, that subsequently to making these first grants and settlements, the actual occupancy of the Indians began to be regarded by the crown and colonists, with a semblance of right. It would seem probable, that the early practice, suggested alike by prudence and humanity, of purchasing possession by piecemeal, contributed to confer upon the tribes what ultimately became established, as an absolute right of occupancy to those lands, which under pacific arrangements, they held in possession by designated boundaries. This distinction of the Indians' "right of occupancy," having been a concession subsequent to the first grants and settlements of the colonies, is not perhaps particularly noticed by Chief Justice Marshall in the case of Johnson vs. McIntosh; yet it is maintained in effect by that opinion, as well as by the positive evidence of the Patents and Charters above referred to. 3 Wheat. 572-3.

We arrive then to the admission, that what was at first claimed as an absolute right of property, and frequently enforced as such; soon yielded to an acknowledged, permanent, incumbrance, of the Indian right of occupancy: but it is not perceived that the absolute right of dominion has been equally impaired by any concession or recognition, of the crown,—the colonists, or the states since their independence. That this latter right was claimed, is not more certain, from the express language of the charters before noticed, than from its repeated exercise. The extract from the case of Johnson and McIntosh above quoted, states, "that discovery gave also a right to such a degree of "sovereignty, as the circumstances of the people would allow them to "exercise:" and in the same case, p. 589, the court say, "the Brit­ish government, which was then our government, and whose rights "have passed to the U.S., asserted a title to all the lands occupied by "the Indians within the chartered limits of the British colonies." It as­serted also a limited sovereignty over them (the Indians) and the exclusive right of extinguishing their title, which occupancy gave to them.

The British government then, "asserted," (i.e. maintained) a "limited sovereignty" though they acknowledged a "right of occupancy.

That only a "limited sovereignty" was "asserted," or maintained, where it is manifest by the charters, an absolute sovereignty was claimed and granted; is fully accounted for in the same opinion, by the Chief Justice, from the character of the savages, who seldom submitted but to arms; and whose unyielding spirit of resistance in some degree justified the policy, and practice, of enforcing dominion by forcible expul­sion. P. 589, 590, 591.

The right of occupancy having obtained recognition with the crown, and the colonies, it is insisted then, in no degree, militates against the original right of dominion; which, up to the period of the revolution was certainly never surrendered. And those who examine the subject, will scarcely doubt, that the true, and only reason has been assigned, why the Indians were not generally subjected to municipal government. Not because the British sovereignty disclaimed the right to do so, but because the character of the savages forbid any possible utility in such subjugation.

I consider too, that nothing can be predicated against the right of both property and dominion as at first claimed by the crown and its grantees, from the circumstance of the occasional purchases made of the Indians, of what was by inadvertent and careless phraseology, sometimes designated as "their lands." The contracts of Wm. Penn, Lord Baltimore, General Oglethorpe, and many others, prove little else than what in these particular instances was adjudged the better policy to get possession from the Indians: and can never prove, that if in the same instances, the Indians had been expelled by force; (as they then frequently were,) the title acquired would not have been equally perfect, and deemed so throughout the civilized world. Vat. L. N. B. 1. c. 7, s. 31. c. 18. s. 209.—8 Wheat. R. p. 587.

But it is not to be concealed under all that can be adduced, that the relation in which the Indians stood to the governments of the crown, was, (as has always been in their connection with the whites,) somewhat sui generis. They were not citizens,—they were not slaves—and it is demonstrably true they were not independent sovereignties. Their condition was truly, no more or less, than what the crown willed it to be: but what that was still engages inquiry. In the message of the late President Adams, in 1828, he says,—"In the practice of European states before our revolution, they (the Indians) had been considered as children to be governed; as tenants at discretion to be dispossessed as occasion might require; as hunters to be indemnified by trifling concessions for removal from the ground upon which their "game was extirpated." Be this, or whatever else, the relation we as­sign them, I deem thus much fully ascertained, that the crown or the colonies never relinquished their right of absolute dominion, which for a time they so frequently asserted by the strong and unequivocal acts of expulsion. That they always continued to assert such acts of sovereignty as the character and condition of the Indians "would allow them to exercise," and such as never admitted a right of sovereignty to the Indians. 8 Wheat. 574 & 575.

By the indulgence of the British Government the Indians were tol­
But judgment on, subject to getting

the...maintained its advantages, has in the like wilder extremes, than customs, private right, treaty, and public acts acknowledged. From the somewhat ve...motion to interference. I lost every term; Jaw of ultimate reliance, and...public acts, the whiteness of which was not unjustly described by Vattel, and may be ascribed to what he denominates, perpetual inhabitants. "Perpetual inhabitants are those who have received the right of perpetual residence. These are a kind of Citizens of an inferior order, and are united and subject to the society, without participating in all its advantages. Their children follow the condition of their fathers; and as the State has given to them the right of perpetual residence, their right "passes to their posterity." B. 1. c. 10. s. 213.

I should here rest the investigation of my first opposition, but for a common objection which claims more direct notice, and which in fact the premises it assumes, is consequent with deductions that by the law of nations would be deemed unanswerable: viz. "That the Indians who have retained their tribal character and customs, are independent sovereignties, and as such, cannot be amenable to the dominion, or jurisdiction, of another sovereignty." This objection with some diversity of form, is not wanting the ablest advocates; and has been partially maintained in a judicial opinion pronounced by one, whose juridical labors have reared to himself & his country a praise, enduring monument, of intellectual greatness. The Supreme Court of the State of New York in 1822 decided, "That the Indian Tribes within that State, were subject to the jurisdiction and laws of the State." That they were spot aliens, but citizens, owing allegiance to the government, and entitled to its protection. This decision was made on general principles; with but little reference to any legislation of the State. C. J. Spencer in giving the judgment of the Court, holds this language: "We do not mean to say that the condition of the Indian tribes at former and remote periods has been that of subjects or citizens of the "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." 20. J. R. 193.

It is unnecessary for my purpose, to insist on the correctness of this opinion in extenso. It is probable the Court may have gone too far, in determining the Indians to have become "citizens" by a silent and gradual change in their condition. But certainly to my belief, when this judgment was re-examined in the court of Errors, the late distinguished Chancellor in pronouncing the judgment of reversal, ran into much wilder extremes, than those with which he charged the court below.

From the somewhat indiscriminate use of the terms 'sovereignty,' 'dependent,' and 'independent,' it is not clearly perceived whether the Chancellor has any common standard, at which he would graduate as the nationality of all the several Indian tribes residing within the U. S. I understand him however to characterize the six nations of N. York, as dependent sovereignties. But in speaking of the Southern Indians, among whom he enumerates the Cherokees, he uses this confident language: "It would seem to me to be almost idle to contend in the face of such provisions, that these Indians were citizens or subjects of the U. S., and not alien and sovereign tribes." From his entire arguments it is inferable, he considers some of the tribes within the U. S., as dependent, and others as independent sovereignties. All must acknowledge the name of Chancellor Kent to be high authority for any opinion he would express. The assertion is nevertheless hazarded, that since the discovery of this continent, neither under the British or American governments, has it ever been conceded that any Indian tribe within the territorial limits of these governments, possessed the attributes of "independent sovereignties." If none such have been independent, neither can they now be dependent sovereignties: as the latter presupposes the former state of national existence, diminished by some voluntary concessions. That "sovereignty," in its true sense, has never belonged to the Indians within the pale of these governments, is obviously declared in the opinion of the Supreme Court of the U. S., in the case before quoted. "The Chief Justice says, the U. S. "Maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest: and gave also a right to such a degree of "sovereignty as the circumstances of the people would allow them to "exercise." If the sovereign power of the U. S. over the Indians, is only limited and defined by the "circumstances," and condition of these people; if their savage incapacity at once describes the boundaries of their rights, and the degree of their subjugation; why dignify their incessant state of brutal freedom, with the pompous distinction of "independent sovereignties"? As further proof on this point, let us examine what constitutes an independent sovereignty, and see if any of those tribes were ever permitted the exercise of these characteristic attributes. "Every nation that governs itself under what form soever, "without any dependence on foreign power, is a sovereign state," Vat. B. 1. c. 1. s. 4. Proceeding to remark upon the unequal alliances which such state may form, the same author adds, "But what­ever they are, provided the inferior ally reserves to itself the sovereignty, or the right of governing its own body, it ought to be considered "as an independent state that keeps correspondence with others under "the laws of nations." B. 1. c. 1. s. 5. "But a people that has "passed under the dominion of another, can no longer form a state, "and in a direct manner make use of the law of nations. Such were "the people and kingdoms which the Romans rendered subject to their "empire; the most even of those whom they honored with the name of "friends and allies, no longer formed states. Within themselves they "were governed by their own laws and magistrates; but without they "were in every thing, obliged to follow the orders of Rome; they dared "not of themselves make either war or an alliance, and could not treat "with nations. The laws of nations is the law of sovereigns. Vat. B. "I. c. 1. s. 11. 12. B.
It is thus seen, that for a people to be distinct in character, and styled, “friends & allies,” or to be governed within by “their own laws and magistrates,” does not constitute them a sovereignty. That the “law of nations is the law of sovereigns,” and a people who have so far passed “under the dominion of another,” as to be prohibited the use of this law in treating with nations, are not a sovereign state, either dependent or independent. Not is this throughout, and has it not been, the condition of the Indians in relation to the governments of Great Britain and of these U.S. History proves without a dissenting page, that from the first establishment of the British government here, the savages were so far subjected to the dominion of the crown, as to be at once shorn of these indispensables to sovereignty.

It is found in our diplomatic difficulties with Spain between the years 1790, & 1795, it was a cause of complaint by our Government, that the Spanish authorities in Louisiana had made pretensions to the right of forming alliances with certain Indian tribes within the U.S., and claiming to be heard in their behalf, in adjusting their terms of peace, and the settlement of boundaries between such Indians and the U.S. Government. This pretence of interfering in the affairs of those generally designated as “our Indians,” was promptly remonstrated against to the Court of Spain, and by them disclaimed and abandoned. Nor was this principle avowed by our government on the ground of any compacts, by which the Indians put themselves under our protection; for the complaint had reference to some tribes, who were then under no such compacts with the U.S. But the declaration was made and sustained on the broad principle, that the savage tribes within the territory of the U.S., were under their sovereign jurisdiction; and could not therefore contract foreign alliances. Marb. Hist. La. p. 345. But non coassert, if they were sovereign and independent nations. The civilized government of the new world have been uniform in the assertion of this principle; and have never allowed to the Indians within their limits, the prerogatives of sovereignty.

To say that the Indians have warred in long and bloody struggles against those claiming sovereignty over them, is but saying what was true also of the nations under the dominion of the Romans. But these strifes have been fruitless and unavailing, except to further their destruction. The repetition of these hostile conflicts, prove nothing in favour of Indian sovereignty; more than the many chivalrous efforts of the Irish, prove the establishment of theirs. I hence conclude, there are no facts, which authorize the inference, that the Indian tribes are sovereign nations.

My first proposition I deem maintained then, to this extent, viz., That the government of England at first asserted an absolute right both of property and dominion to the entirety of its territory, now included in these U.S. That anterior to the revolution, the crown had yielded to the Indians a right of occupancy to their possessions, with the reversion in fee to the crown or its grantees. That the right of the British government to absolute dominion, throughout its territorial limits, though but partially exercised, remained unquestioned, and unimpaired while the government continued.

The second inquiry precludes discussion. As the theory of our general and state governments are now understood, I shall presume it an undisputed axiom; that after the open conflict of revolution, and the renunciation of British authority in 1776; the states respectively succeeded to all the rights of property and sovereignty, within their several limits; which before that period pertained to the colonial governments, or the British crown. I pass then to the third division of my subject, by briefly premising, that no change in the Prerogative of the states relating to the condition and circumstances of the Indians, was made or suffered, until the confederation in 1778; the articles of which so far as the subject demands, I proceed to examine.

That portion of this compact having the most direct bearing upon the matter under inquiry, is a part of the 4 sec. & Art., in which it is provided, that the U.S. in Congress, shall have the exclusive right and power of “regulating the trade and managing all affairs with the “Indians, not members of any of the states; provided that the legisla­tive right of any state within its own limits be not infringed or violated.”

I shall attempt no explicit exposition of this involved and complica­ted sentence. But leaving to others the task of reconciling its suppos­ed absurdities, will insist it clearly expresses two things, viz, that no power was conferred on Congress to regulate the trade or manage the affairs of such Indians as were “members of any of the states,” and secondly, that no power was conferred which should infringe or violate, “the legislative rights of any state within its own limits.” It is manifest then, if before this confederation it was the “legislative right” of a state, to exercise dominion and jurisdiction throughout its limits, as well over Indians “members” of the state, as others; that this right was still reserved to the state from aught that appears in the section above quoted. This inference is sustained also, by the 2nd Art. of that compact which reads thus, “Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this confederation expressly delegated to the U.S. in Con­gress assembled.” The right, power and jurisdiction in question not having been delegated as before seen, must necessarily under the confed­eracy of 1778, have remained with the states respectively.

Next in order we approach the Constitution of the U.S. which in 1787, superseded the old confederacy. The first of its provisions which arrests our present notice is contained in the 3 paragraph, 8 sec. Art. 1. “The congress shall have power to regulate commerce “with foreign nations, and among the several states and with the In­dian tribes.”

By comparing this paragraph with its correspondent in the old Arti­cles of Confederation, it is perceived that the grant of power in the second, is less comprehensive than that made in the first instance: the first, comprising the grant to “manage all affairs with the Indians,” which is withheld from the constitution, and the power limited alone, to regulating commerce with the Indians. With this marked indica­
tion to narrow, rather than extend the original grant, on this subject, may not be fairly maintained that in the second, as the first compact, the power ceded was only meant to extend to Indian tribes "not members of any of the states," and that it was not by this grant any more than by the first, that it should operate to infringe or violate any legislative right of the states? Such to my apprehension, is the clear construction of this grant. And it is the more reasonable also from the consideration, that before the adoption of the constitution, several of the states had ceded to the U. S. their wild and surplus territory, upon which resided a great proportion of the Indian tribes then within the limits of the U. S.; and upon whom, as I conceive, this power in the general government could alone properly operate. The same interpretation is warranted, by a critical examination of the sentence itself: by which the commerce of "the several states" is provided for, as well as the commerce of the "Indian tribes." But the state of N. York embraced within the state, six Indian tribes; and is not the commerce of the Indians of N. York as effectually provided for, in regulating the commerce of the state, as the commerce of the French, Spanish or Germans of N. York. There was probably more of these latter in N. Y., who were not citizens, than there were of the Indians. Are not then the "Indian tribes" designated in this section of the constitution, as much contradistinguished from the Indians, members or residents of a state; as the large and distinct bodies of French and German residing in the states, were contradistinguished from the "foreign nations" to which they were allied; but whose commerce was certainly provided for in regulating the commerce of the states in which they resided?

But the correctness of this construction is in no wise necessary to my argument. The utmost limit to which the power of congress can be extended as conferred by the constitution, is the power to "regulate commerce with the Indian tribes" without regard to the place of their residence. But the same power is given in relation to the several states and foreign nations.

It will surely not be urged that this right to regulate commerce with a foreign nation, in any degree affects the nation's right of internal dominion and municipal sovereignty. If it does not, no neither does the same provision in the constitution relative to the Indians and the states, in any degree abridge the right of dominion and municipal sovereignty which before belonged to the states. Any other than a literal and unlimited construction of this power to regulate commerce, will always prove too much; when the loose rule of interpretation urged in favour of the Indians, is applied to the states, and foreign nations.

Thus, I consider it fully established, that the old states on asserting their independence in 1776, had then the right of absolute dominium throughout their chartered limits. But if by this power of regulating commerce, they have conceded to the general government a power to deny the state a right of jurisdiction over the Indian territory within the state; then may the general government by the same grant of power, forbid the state to exercise her dominion and jurisdiction over any other portion of territory within her limits. Because every provision of the U. S. constitution, whether to make war, peace or treaties; or to regulate commerce, applies with equal force to a state as to an Indian tribe. And any dominion or jurisdiction which congress by the exercise of this power can assert or forbid in relation to the Indians; it may assert or forbid in relation to a state. Beside the monstrous usurpations which such a construction of this grant of power implies; it is stripped of the common appology for such usurpations; the plea of necessity. For suppose it were given congress to regulate the commerce of the Shakers in Ohio, Kentucky or N. York, or the "United brethren," in Pennsylvania. These are distinct bodies of people holding their property in common, and any of whom have more commerce than any Indian tribe in the U. S. In the most plenary exercise of this power, can any one imagine it would be necessary to effect the jurisdiction of the states in which they reside? In regulating their commerce, would it be necessary to forbid the state to subject these people to serve as jurors,—officiate as magistrates,—sustain the roads,—support their poor,—do military duty,—pay taxes, &c. &c.? Can men who reason, differ in an answer?

Having shown the utmost extent of the powers of congress on this subject, as derived from the states; it is perhaps unnecessary to add, that as well on the principles upon which the general government is organized, as by the explicit language of the 10. Art. of the amendments to the constitution, "the powers not delegated to the U. S. by the "constitution, nor prohibited by it to the states, are reserved to the "states respectively, or to the people."

Thus far the power to be claimed for the states respectively on the question in issue, is deemed fully sustained: and unless some furthercession of state sovereignty is discovered, the controversy is fairly at an end. But much difficulty has arisen from the powers assumed by congress, and the treaty making power of the U. S. The laws of congress making it penal for any citizen, or resident of the U. S. to pass the boundary of the Indian possessions without a passport, is displayed as an argument against the right of absolute sovereignty in the states to the extent of their territorial limits. Several provisions of treaties made by the U. S. with Indian tribes residing within the limits of a state, are also appealed to as proof that a state has not the right of jurisdiction commensurate with the boundaries of its charter. Suppose these laws and treaties to exist, and to extend in their application as contended for: would not the arguments, for the support of which they are exhibited, be presented with more force, and logical perspicuity; by showing the power in the government of the U. S. to make such laws and treaties?

To legislate for the territories beyond the limits of the states and within the U. S.; or to treat with the Indians relative to their retaining or surrendering possession of such territories, is the unquestionable province of the U. S. government. Con. U. S. Art. 4, s. 3. In the purchase of territory by the general government from France and Spain, and the cessions it has received from the several states; we find no difficulty in discovering to what purpose such power is derived. In its
exercise over these territories there is no ground for collision between
the general and state governments. The sphere of operations are dis-

\[
\textit{exercise,} \text{ and independent. But when this authority in all its diversity of operations, is asserted by the general government within the territory of a state, fraught with its multiplied inconveniences, and obnoxious restrictions upon the ordinary sovereignty of a state; it is right to enquire if the power be legitimately exercised, and a duty to resist it, if a usurpa-}
\]

\[
\textit{tion. I trust it has been shown, that the entire abatement from what was the original right of the old states on this subject, is at most, but a power conceded to the general government of regulating the commerce of the Indians, through domiciled within the limits of a state. May I not challenge all research to show more? If these be all, does not the deduction fairly follow, that when congress has regulated the commerce of the Indians, and the states have duly respected their right of occupancy; that all other, the ordinary powers and jurisdiction of the state, may be equally asserted throughout its territorial dominions, without violating any compact with the U.S., or infringing any acknowledged right of the Indians?}
\]

\[
\textit{It is perceived of course, that I do not pretend to reconcile what I claim to be the rights and prerogatives of the old states, relating to the Indians within their chartered limits, with all that may be found in the acts and treaties of the U.S. government, respecting such Indians. If correct in the grounds assumed, specific limits are ascertained defining the extent to which the U.S. government has a right to act upon the subject. And if any department of that government has transcended its powers, such errors should be amended; but the rights of the states must remain unimpaired.}
\]

\[
\textit{By the articles of cession and agreement between Georgia and the U.S. in 1802, the U.S. came under obligation to extinguish at "their own expense for the use of Georgia" the entire Indian title to the lands within in that state. But for this undertaking by the U.S., the state of Georgia who alone had the right and interest so to do, must have extinguished their Indian title of occupancy (whenever it should be done) at her own expense. The state of New York is so understood this point, and for the like purposes their legislature of 1813, authorised the governor to hold a treaty with the Indians of that state; which I believe had been done by the same authority on former occasions. Their legislation indeed, has been ample on this subject, and in direct opposition, to the pretensions of the general government as made in her treaties and legislation relative to Indian tribes resident in Georgia and some other states. See 19 J.R. 127, (and compare it with the Indian intercourse act.) New York and Georgia being of the old 13 states, possess alike an absolute right of dominion throughout their territorial limits; and the reversion in fee to all the lands in possession of their Indian tribes. In each state alike, the power of the U.S. relating to their Indians, in its utmost extent, is bat to regulate their commerce. This done, all other powers remain to these states respectively, as they existed before their confederation. N. York then construes her powers aight, and it is not}
\]

\[
\textit{denied by her champion for Indian sovereignty, but she may exercise them, to the same extent which Georgia now claims to do. 20 J.R. 717.}
\]

\[
\textit{Upon the foregoing exposition is rested the inquiry, so far as pertains to the rights and jurisdiction of the state of Georgia, as one of the old U.S. Viewing all the concessions the political history of our country records, from which a reduction of the original prerogatives of this state, relating to the question in issue can be inferred: I cannot entertain a doubt, that Georgia, retains her unqualified right of municipal jurisdiction throughout her territorial limits, over all persons residing therein. And that in asserting this right she violates no compact in letter or spirit, ever entered into by the sovereignty of that state.}
\]

\[
\textit{We have yet to prosecute this inquiry, to see how the question shall determine in regard to Mississippi, as one of the new states. Between the years 1780, & the adoption of the constitution in 1787, Massachusetts, N. York, Connecticut, & Virginia; who by the limits of their ancient charters, possessed large unsettled territories, made cessions to the U.S. (as did the Carolinas shortly afterwards) for the common benefit of all the states, of such surplus territory as they severally chose to lay off. At this juncture of our history, it is well to observe, that by these several cessions of territory, the U.S. became vested with the same rights and prerogatives over the ceded territory, to which the states were previously entitled, viz, an absolute right of property & dominion, subject to the Indian right of occupancy. 8. Wheat. 586. Or in other words, the rights of the Indians, whatever they were, remained the same and unaffected by the transfer. It would be useless labour to moot the point, whether or no the U.S. government after such transfer of territory, might not have entered upon the Indians residing therein, other and greater political rights, than what had previously belonged to them while connected with the several states. No enlargement of the Indians rights and privileges, was ever attempted or pretended.}
\]

\[
\textit{The first demonstration made by the general government relative to these territorial acquisitions, is found in the ordinance of 1787, for the government of the territory N. W. of the river Ohio: in which is embraced 6 Articles containing certain fundamental principles for the "constitutions & governments" which might be established in such territory; and which articles are declared to be "considered as articles of compact between the original states, and the people and states in said territory; and forever remain unalterable, except by common consent." The Indian tribes, these pretended sovereignties, were never consulted in the transfer which was made of them, nor in the principles of the governments about to be reared up within their territory. But the 3rd Art. of the ordinance provided, that "The utmost good faith shall be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights & liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them."}
\]
A part of Article 4, prescribes that "The legislature of these districts, or new states, shall never interfere with the primary disposal of the soil "by the U.S.," &c. &c. And also that "no tax shall be imposed on "lands the property of the U.S."

Art. 5. "And whenever any of the said states shall have 60,000 in- "habitants therein, such state shall be admitted by its delegates into the "congress of the U.S. on an equal footing with the original states in all "respects whatever; and shall be at liberty to form a permanent constitu- "tion and state government, &c. &c."

In the 5th Sec. of Art. 1, of the compact between Georgia and the U.S., in 1802, before noticed; it is stipulated that the Mississippi Territory ceded by Georgia, should form a state and be admitted into the Union, &c. &c. "on the same conditions and restrictions, with the "same privileges, and in the same manner as is provided in the ordinance" of 1787: which ordinance "in all its parts" is extended to the Mississippi territory, except the article which forbids slavery.

The act of congress, March, 1817, authorised the inhabitants of the western part of the Mississippi territory, to form a state government conforming to the ordinance of 1787, and some other restrictions specified in said act.

In 1817, the people of Mississippi formed their constitution, and consented to become a member of the confederacy, on terms of "forever dis- claiming all right or title to the "waste and unappropriated lands lying "within the state," &c. and that they would not tax the lands of the U. S. nor those sold by the U.S. till 5 years afterwards.

By the resolution of congress, Dec. 1817, the constitution of Missis- sippi was approved in all things, and the state declared to be "admitted "into the union, on an equal footing with the original states in all re- spect whatever."

The preceding extracts are believed to comprise all that has a pertinent application to our question: and except so far as these may make the difference, the rights of Mississippi will be found equal, and the same as those of Georgia. In what respect, and to what extent then, is Mississippi prejudiced, by these several provisions? Is it in what had been to Georgia, her right of property, or her right of dominion; or both?

It is admitted unquestionable, that by the preceding provisions, Mississippi was wholly deprived of what might otherwise have been her rights, in succession to Georgia, to the soil occupied by the Indians. And it is considered to be equally apparent, that every right of sovereignty and dominion throughout her chartered limits, to which Georgia or any "original state" was entitled under the U.S. constitution; was permitted, and preserved to Mississippi, without qualification.

The resolution of congress in Dec. 1817, by which Mississippi was admitted into the union, is so explicit, as to almost forbid illustration. She is received on an "equal footing"—standing on the same political "basis, and invested with the same sovereign prerogatives as the "original states, in all respects whatever."

It is only upon the 3rd Art. of the Ord. of 1787, that the most fas- tidious caviller has ever questioned this conclusion. Upon clear, legal

and constitutional principles, we might be relieved from the necessity of insisting that the power claimed for Mississippi, is in strict conformity with that Article. We might promptly object, that the ord. of 1787, is not the existing charter of the rights and powers of this state; and if it was found to contain provisions more restrictive than our state constitution, and the terms on which we were admitted into the union; we are discharged from those restrictions. This ord. was made directory to the people of this territory in forming their constitution: that constitution was submitted to the inspection of congress and its conformity to that ord. declared satisfactory to the power from whom the ordinance emanated. And if it were true, that we were admitted on better terms than those the ord. would have imposed; the gain is a benefit, honestly ours. It was a new compact, superceding the old, and imposed some restrictions the old did not contain: if then it released us from any formerly imposed, the consideration is a good one, and the advantage fairly obtained.

But I disclaim the argument as furnished by this objection, and shall meet the ordinance of 1787, as if its obligations were acknowledged, and in full force in this state.

This 3rd Art. of the ordinance declares nothing more in effect, than that whatever was, the property, rights and liberties of the Indians; when the U.S. became seized of the territory they occupied: they should remain without invasion or disturbance in all good faith. It cannot be tortured, from the language of this Art., that any new right, civil, political, or of property; was attempted or pretended to be conferred by the U.S. upon the Indians. It was neither meant to give the Indians a fee simple in the soil, nor to relieve them from any civil or political disability, or sub- jection, to which they were amenable in their relative condition to the sovereignty of the whites. But in all these they were to remain the same; and in all their rights and liberties, to be sustained and protected in good faith. What was their property in the soil, and what the extent of their civil and political rights; has been previously shown. And it has been shown also, that these rights and liberties never exempted them from the ordinary jurisdiction of the sovereignty, within whose limits they resided. As no change in the condition of the Indians is found to have taken place from the period of the cession by Georgia to the U.S., until the admission of Mississippi into the union; it follows, that the mu- nicipal rights of Mississippi throughout her territorial boundaries, remain the same, as they would have been to Georgia, had no such cession ever been made. If therefore it has been established (as my belief is) that Georgia has the right to extend her civil jurisdiction over all persons within her chartered limits; it is established also, that the like sovereign authority, equally belongs to the state of Mississippi.

It remains now to examine, what are the effects in the premises and arguments of Mr. Wirt, from which he infers the opinion, that the state of Georgia has no right to extend her laws over the Cherokee Indians, residing within that state. In pointing out these errors, it is not design- ed to exhibit at length, all the reasons and authorities to prove them so: but where the direct point has been sufficiently canvassed in my
The very outset of Mr. Wirt's argument assumes an hypothesis so palpably wrong, that we are little surprised at his erroneous conclusions. He says, that "if they (the Cherokees) are citizens of that state, residing within her jurisdiction, they are unquestionably subject to her laws; if not, it is just as clear that the state of Georgia has no authority "to extend her laws over them."

He then argues that the Indians in their origin were a sovereign people; that they were not affected in their condition by the discovery of the Europeans, only in regard to their lands,—that their political rights remained unchanged; that Great Britain treated them with them as a "sovereign people," and that such rights only as the English claimed, passed to the U.S. by the revolution. That the treaties of the U.S. admit the Indians are not "citizens" of the U.S., and therefore cannot be citizens of any one of the states,—that those treaties admit the sovereignty of the Indians, and hence excludes the idea of their being citizens of the U.S., or of any one of the states.

Now the question of "citizen" or no citizen, furnishes no solution whatever, to the inquiry as to the jurisdiction of a state. Because the sovereignty of a state is co-extensive with its territorial limits, and operates as well on perpetual inhabitants and strangers, as citizens. Val. B. 1. c. 16, sec. 211, 212, 213. To prove therefore that the Cherokees are not citizens of Georgia, secures them no right of exemption from her laws, while residing within the pale of her dominion.

Another obvious mistake is contained in the argument above quoted; on a point of the utmost importance. Mr. Wirt assumes that the governmental rights of G. Britain, whatever they were, by the revolution passed to the United States, (as I understand him) in their confederated character. Whereas in truth, they passed to the states respectively. The distinction is of the greatest consequence. For if these rights and powers passed to the states individually, the states severally possess all those which have not imparted to the U.S. But if to the U.S. collectively, the converse of the rule applies. It is presumed politicians can never differ as to which of these is the correct theory of the derivative powers of the general and state governments. 8 Wheat. 584-5. And yet, the most obvious fallacy on this point, is used by Mr. Wirt with much effect throughout his whole argument. For by its assumption, he confidently establishes the rights of the Cherokees, from what he says is contained in the admissions and stipulations of the general government, in their laws and treaties: without ever troubling himself to prove that the U.S. had the right and power to make such recognitions and stipulations in favour of Indians residing within a state. Indeed, he seems never to distrust the right and power of the general government, to do whatsoever they will.

The next ground taken by Mr. Wirt is, that the Cherokees are not within the territory of Georgia. His proof or reason is, that the Indians have a perpetual right of occupancy, which makes it their territory, "subject to no other restriction than that they can alienate only to the United States of America." "The territory which the Cherokees occupy is not at present therefore the territory of Georgia, considered as property."

It is complimenting Mr. Wirt's integrity, at the expense of his judgment, to regard this as an argument against the jurisdiction claimed by the state of Georgia. For who can know better than Mr. Wirt, that it is not necessary, a state should own the soil, to entitle it to dominion? If the Indians had a "fee simple" in the land they occupy, it would of itself, no more exonerate them from the dominion of the state, than the same title does that of any alien, or citizen, or body corporate, residing within the state of Georgia. The jurisdiction, or municipal sovereignty of that state in "nomine" depends upon her being entitled to the ultimate fee of the soil in possession of the Cherokees: nor is her jurisdiction diminished, that Indians rather than any other body of people, hold a perpetual tenancy in common within the limits of her sovereignty.

Another exceptional principle recognized by Mr. Wirt in the quotation last above, merits some notice; because it instances an undue pretension claimed in behalf of the U.S., in derogation of the peculiar rights of the states individually. The right of the Cherokees to alienate or not, he says, is, "subject to no other restriction, than that they can alienate only to the United States of America." I have noticed in my affirmative argument, that the U.S. by their compact with Georgia in 1802, incurred the expense and responsibility of obtaining for Georgia the entire Indian title (of course including the Cherokees) within that state. In doing this, the U.S. do not exercise an ordinary right or privilege; but discharge an obligation. And but for this compact with Georgia, the U.S. would not have the right, to treat with the Cherokees for their title. I am fully advised with Mr. Wirt, that if this right claimed for the U.S. depended upon their assumptions, or was evidenced by the language used in their treaties: my position would be untenable. For it is quite impossible to perceive, that the measures of the general government, as found in its legislation and treaties, regarding the Indian tribes located within the limits of the old states: have gone to an extent unwarranted by the constitution. From the independence of this country until the present controversy, the rights of the states on this subject have been frequently pre-termined; and multiplied cases have arisen inviting enquiry which might have led to settled and defined rules of action for the governments respectively; but which have passed off in a succession of acts and decisions, involving principles and pretensions, the most unharmonious.

This remark is applicable to many provisions contained in the Indian intercourse acts, so far as congress intended these laws to operate within the chartered limits of the old states. Congress shall have power to "regulate commerce with the Indian tribes." Does this power authorize congress to pass a law to operate within a state, restraining its citizens under a penalty, from travelling through the territory occupied by Indians within the same state; unless bearing a passport from "the governor of some one of the U.S."—or from some U.S. military officer. Or, does it authorize a treaty with the Cherokees, by the U.S. contain-
I might here once for all, anticipate the argument of Mr. Wirt, in which he contends the legislature and treaties of the U. S. are obligatory upon Georgia, and that she is "estopped" from denying their validity; because she had a voice in their adoption, by her representation in congress. He urges too, that if the law of Georgia be repugnant to the latter are transcend their powers in approving a law or treaty; I might here once for all anticipate the argument of Mr. Wirt, in which he contends the legislature and treaties of the U. S. are obligatory upon Georgia, and that she is "estopped" from denying their validity; because she had a voice in their adoption, by her representation in congress. He urges too, that if the law of Georgia be repugnant to the treaty of the U. S., the constitution has determined the former must yield; because the latter are declared to be the "supreme law of the land." I recognize the constitution of the U. S. to be the "supreme law of the land;" as also the laws of the U. S. made "in pursuance thereof," and all treaties made "under the authority of the U. S." But laws of congress not made in "pursuance" of the constitution; or treaties made above or without the "authority" of the U. S., are not to be regarded as having any validity whatever. I admit the ultimate test of their validity may be the decision of the U. S. Supreme Court. But any state or individual, conceiving a treaty, or legislative act, to be made without authority; has a right at peril so to regard it, and abide a judicial determination of such opinion.

That a state is "estopped" by an unauthorised act of its agent, is a doctrine also to which I can never subscribe. A state can impart nothing of its sovereignty, but by the voice and approbation of the sovereign (whether Prince or people) expressed in that way the sovereignty may appear. We have written constitutions of the general and state governments. The rights and powers of each are defined; and the powers and duties of a senator, and representative in congress, particularly specified. If these latter transcend their powers in approving a law or treaty; I should, but for so respectable an authority as Mr. Wirt to the contrary, have deemed the idea of an "estoppel" against the state, as approaching the ridiculous. 2 T. R. 171.

As a second point in Mr. Wirt's opinion, he puts the main question, whether or not the Cherokee territory lie within the jurisdiction of Georgia. He concludes it is not, 1st, because the language of the treaty with the Cherokees admits it is not; 2dly, that though it may lie within the chartered limits of Georgia; yet the British monarch's by the charter of Georgia or otherwise, nor the grantees under the charter; ever assumed the power now claimed for Georgia; or supposed such power to be conferred, or to exist. I shall not further reply, to such proof as is comprised in the treaties of the U. S. with the Cherokees; but to the second species of Mr. Wirt's testimony, it is proper to answer, he is much mistaken in his facts.

The charter of Georgia by George 2d, granted to general Oglethorp and others "in free and common socage" all those lands, countries "and territories situate, &c., together with all the soils, grounds, havens, "bays, mines, minerals, woods, rivers, waters, fishing, jurisdiction, "franchises, privileges and pre-eminentis within the said territory. "If there be any reservations in this grant, in favour of any persons, of either property or jurisdiction; it escapes my detection. But Mr. Wirt says the king nor his grantees did not construe this charter, as containing a grant of the jurisdiction now asserted by Georgia. But I have shown in my preceeding argument that the crown and its grantees did interpret the language of this, or similar charters, literally; and frequently did literally enforce them by expelling the Indians from their possessions; and that the titles thus acquired, have, by the crown and our governments succeeding, been adjudged good and valid. 8 Wheat. 587. 8. 9. In the same case of Johnson & McIntosh the Chief Justice says, "The states having within their chartered limits, different portions of territory covered by Indians, ceded that territory generally in the U. S., on conditions expressed in "their deeds of cession, which demonstrate the opinion, that they "ceded the soil as well as jurisdiction." 8 Wheat. 588. But the states transferred no better right than they possessed; and according to Mr. Wirt's opinion they could neither cede the soil ("as property") or jurisdiction. Yet in this, to my apprehension, Mr. Wirt can only be correct, by conceding him right in his more egregious error of the Indian tribes being sovereign nations. In that event these transfers would certainly be void, as an attempt by a state to make what, of "independent sovereignties" by the dozen, without their consent.

The Indian right of occupancy, has always been acknowledged and respected by the state of Georgia; and her present pretensions go only to the right of jurisdiction. Most of Mr. Wirt's authorities have no other application than to establish this right of occupancy which Georgia does not contest. The purchase he cites as made by Genl Ogletorh was simply of this, "then questionable right; but not the right of jurisdiction." That the English did not assert jurisdiction over the Indians is only true to a limited extent: and that the exercise
of their sovereignty was not more complete, arose from the character of the savages, but from no defect of right. 8 Wheat. 587.

This claim of British sovereignty, is established by every charter, and other evidence of their rights and powers, on record. Hence, Mr. Wirt's presumptions, that the Georgia charter has not "put forth new rights within the last few years," by process of a "new vegetation," are wholly gratuitous. Georgia does not even insist for all the "first fruits" of her charter. These, were the entire country, land and water, in free and common soccage; with all the jurisdictions, franchises, privileges and pre-eminences, within the said country. From out of these, Georgia cedes the Indians a right of perpetual occupancy; it is unwilling to surrender her "jurisdiction and pre-eminence within her chartered limits.

Mr. Wirt's argument upon a "government within a government" may be well enough in its way, but with all due respect for the ingenuity of the gentleman; in this, in my conception, he broke his lance against a wind-mill. It is a plain proposition, that the Cherokee has an established government within the chartered limits of the state of Georgia; and which the people of Georgia insist is a violation of the sovereign jurisdiction of that state. If Mr. Wirt's argument upon "a government within a government" has sufficient of the virtues ascribed to the system of the Bishop of Clonje, to transform these stubborn facts, to mere ideal imaginings: if the substantial evil of which Georgia complains, has been thereby removed; then indeed has this proved the most effective part of his opinion. But ex nihilo, nihil fit.

He argues, also, that the pretensions of Georgia are not sustained, on the ground that the "ultimate domain belongs to the state." I know not that any one contends for such conclusions on this ground. But to repel the right of jurisdiction asserted by Georgia, he puts the case of the District of Columbia as affording a parallel; whereas, I perceive no similitude of principle in the two cases whatever.

The 17th paragraph of sec. 8, Art. 1. O. U.S., provides, that Congress shall have power, "To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the U.S.; and to exercise like authority over all 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." This provision so far from being against, supplies only the exceptions, to the general rule for which we insist. Because it becomes clearly evident, that without the grant of jurisdiction by the states, their jurisdiction would have extended as effectually over a fort or dockyard, within their limits, as any other part of the state; and this, notwithstanding the U.S. might have purchased the fee.

The cases of Fletcher & Peck, and Johnson & McIntosh, says Mr. Wirt, establish, that the states "cannot interfere with the possession" of the Indians, "without their consent." Now then, he asks, can they

"parcel out the Indian lands among the co-terminous counties for the purpose of government." "How can they tax the land?" &c. &c.

It is certainly surprising why Mr. Wirt should seem to puzzle himself with questions like these; as if they negatived the right which Georgia claims to exercise. Has Mr. Wirt yet to learn, that the "possession" of all lands in Georgia, whether held by the Indian or white man,—in severity or in common; is duly protected by the laws of that state? And then is it new to him, that however sacredly a state regards the possession of land, it is not the privilege of the possessor, to extinguish it by within his survey, and complain that his possession is violated, by a tax-gatherer or other civil officer, who may enter his enclosures in the ordinary execution of the laws of the state? Is there any thing peculiar in the title of "occupancy," which gives to the possessor any special exemption from such legal visitations, more than pertains to the Tenant in fee? Nor can I discover any greater difficulty the state of Georgia would have to tax the persons or possessions of the Cherokees; than the state of Indiana has encountered in taxing the "Harmonites" on the Wabash. The numbers of the people, or their joint interest in the lands occupied, in either case; present no obstacles that should alarm the most timid legislator.

Mr. Wirt next assumes that it "cannot be maintained," the Cherokees were ever a conquered people, either by Great Britain, or the states within whose territory they now reside. Whether they were ever actually conquered or not, is in no wise essential to establish the jurisdiction asserted by Georgia. The U.S. "Maintain as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest; and gave also a title to such a degree of sovereignty, as the circumstances of the 'people would allow them to exercise." 8 Wheat. 587. Upon the authority of Chief Justice Marshall, if we were objecting to the Indian right of occupancy, and were claiming for Georgia the possession; it might be necessary to show we had extinguished the title of occupancy, by purchase "or by conquest." But as we are only insisting for "such a degree of sovereignty as the circumstances of the Cherokees will allow Georgia, to exercise," it is unnecessary for this purpose, to show an actual conquest. The fact, is nevertheless believed to be easy of proof.

As early as 1715, while Georgia was yet embraced in Carolina, the Yamassee, Creeks, Appalacheans, Congarees, Catawbas, & Cherokees, in combination; were totally defeated by Gov. C Raven of Carolina, who pursued them (perhaps the Yamassee only) into their own country from whence he expelled them, and drove them over the Savannah river. 1 Mar. Wash. p. 309. 10. 11.

In 1761, Col. Grant marched to the Cherokee Towns, encountered and defeated them in battle,—burnt the Town of Etchoo and other villages,—destroyed their houses and cornfields, and laid the whole country waste. "Reduced to the last extremity, they sued sincerely for peace." 1 Mar. Wash. p. 447. If these were not a conquered peo-
ple in the last instance, what short of annihilation is necessary to a conquest?

A further idea suggested by Mr. Wirt is, that the United States might make themselves, an available conquest of the Cherokee territory; and if at any time they have done so, yet as conquerors, in the plentitude of their power, they have acknowledged the sovereignty of the Cherokees, and that the "territory in their possession belongs to them." What absurdities has Mr. Wirt been compelled to approve, in order to sustain a groundless argument. Who so great a novice in the theory of our political system, as not to know, that all conquests which could be made by the arms of the U. S. in conflict with insurgent Indians residing within an old State; whether to the partial, or total, expulsion of the tribe from their possessions; must enure to the exclusive benefit of the state in whose chartered limits the conquest is made? Were it otherwise, the United States in their treaties of peace with such Indians, might indeed grant them a free simple in their possessions,—acknowledge them an independent sovereignty, and establish a "new state" within the jurisdiction of a state, by a specious display of liberty in setting "limits to their own rights of compact."

By the U. S. Art. 1. it is the duty of the U. S. to "supress insurrections & repel invasions," and the laws of nations, of nature, and humanity, prescribe reasonable rules of discretion to the conquerors; in the terms exacted of those whose invasion or insurrection has been suppressed or repelled by subjugation or defeat. In relation to Indian tribes residing within an old state, these terms have certain constitutional restrictions and consequences which the U. S. cannot transcend or disregard. They can acquire nothing to themselves of the territory by conquest, nor can they by treaty secure to the Indians any greater right to their territory than they previously possessed, or release them from any jurisdiction of the state in which their territory is situated; to which, they were before amenable. If these limitations be transcended, the state is not bound by the compact.

Mr. Wirt next argues upon the sovereignty of the Cherokees, and their ability to treat as nations, &c. &c.

I should probably be justified in forbearing further discussion on this point. But when so distinguished a Jurist as Mr. Wirt, and so specially celebrated for his profound reading in the political history and constitutional lore of his country, has declared it as his opinion that the Cherokee Indians are a "sovereign nation," it is but properly respectful the declaration should command some further attention.

The first ground on which he predicates his opinion, is, that the Cherokees are not a conquered people; but which I have before shown, is not true in fact. His further reasons are, that they have ever enjoyed their own customs,—have been recognized as a party to treaties of peace, and to compacts for the sale of their possessory title to lands. These, he contends, prove their sovereignty. But were these acknowledgments to prove their sovereignty when the direct question was agitated in our negotiations at Ghent? They were not. Were these considerations admitted to prove the sovereignty of the Indians in our negotiations with Spain between 1795 & 1796, when we objected to the right of Spain to form any alliances with any tribes residing within the boundaries of the U. S.? They were not. Do these things prove their sovereignty, according to that perspicuous compiler of the law of nations, who is quoted by Mr. Wirt for that purpose? This author responds too in the negative. And Mr. Wirt's quotation from him, but for his limiting the extract to part of a sentence, would have refuted the doctrine he has used him to establish.

Though a weak state (says Mr. Wirt) in order to provide for its safety should place itself under the protection of a more powerful one, yet according to Vattel, B. 1. c. 1. s. 5. 6. "it reserves to itself the "right of governing its own body it ought to be considered an independant state, (here Mr. Wirt makes a period; the sentence proceeds) "that keeps up correspondence with others under the authority of the law of nations."

The entire sentence then explains the principle that while ever a nation retains the right of correspondence with other nations, under the authority of the law of nations, it is sovereign. But whenever a nation so far passes under the dominion of another as to lose this right; it has lost its sovereignty; though governed within themselves by their own laws and magistrates." Vat. B. 1. c. 1. s. 5. 6. 11. 12.

With this marked indication of Sovereignty before us, is not the assertion warranted, that at no period since the discovery of this continent, neither by the Dutch, French, Spanish, Portuguese or English, have the Indian tribes residing within the countries claimed by these nations respectively; ever been regarded as independant sovereignties? It has never been permitted the Indians, by either of these European nations, to hold any political intercourse with other civilized nations than those claiming supreme dominion over them. This principle has been uniformly declared; and not unfrequently maintained by arms. The Cherokees, so far as regards their political condition; stands in the same common rank with other Indian tribes: and cannot be at present, an independant sovereignty.

It may be objected, that the rule advanced for deciding the sovereignty of a nation, would prove the states of this union were not sovereign. Not so. The states of this confederacy do hold intercourse with other nations under the laws of nations, through their common Senate, and hence retain their sovereignty. Vat. B. 1. c. 1. s. 10. But the Indians have no part or lot in the law of nations directly or indirectly, and therefore are not sovereign.

I shall notice but one other—an excursive argument of Mr. Wirt, upon the unreasonableness of the unfitting policy, and seeming inconsistency, in the claim of Georgia to extend her laws over the Cherokees. He thinks it harsh and cruel that we should have laboured to civilize those Indians and fix them for an enlightened government, and then profer the objection against them that "no new state shall be formed or erected within the jurisdiction of any other state." Con. U. S. Art. 4. s. 3. It is true, that the state of Georgia ought not to contemplate this "new state" within their jurisdiction as such a monstrosity, if they fi-
the last half century have been encumbered with two or three "independent nations" upon their backs. But they have not heretofore so considered of this subject though they begin now to perceive that such things may be, if they do not assert their rights.

How does Mr. Wirt contemplate the idea, that this little "sovereign nation" should become enlightened, great, and powerful; with extensive commerce, and a policy and government, altogether dissimilar in interest and character to that of these states perhaps; and yet established within the bosom of a state. So far from such consequences having been contemplated in our efforts to civilize these people, President Adams in his message of 1828 says, "That the ultimate design was to incorporate in our own institution that portion of them which could be converted to civilization." To effect the same object of their civilization and incorporation with the whites, Secretary Crawford, recommended intermarriages. How can the sensibilities of Mr. Wirt find so much cause for commiseration, and a "smell to Heaven" in the exercise of a policy like this? Mr. Adams further remarks that "when we have had the misfortune of teaching them the arts of civilization and the doctrines of Christianity, we have unexpectedly found them forming in the midst of our own communities claiming to be independent of ours and rivals of sovereignty within the territories of the members of our Union. This state of things requires that a remedy should be provided. A remedy which while it shall do justice to those unfortunate children of nature; may secure to the members of our confederacy the rights of sovereignty and of soil."

The state of Georgia can have no solicitude the Cherokees should remain within her territory; but if they choose to do so, she claims as her right, their unqualified submission to her sovereignty. It is with Georgia to prescribe to the Cherokees the extent of their civil privileges, and her late statute so much condemned by Mr. Wirt, is in all respects as liberal as the condition of the Indians will yet justify. And as Judge Clayton of that state has recently declared, so I doubt not will be the case; that this statute will be administered with impartial justice.

If the Cherokees are becoming intelligent and wealthy, the greater the reason why they should contribute to support the government of the state in which they live. And as they occupy a territory to the exclusion of white men, it is but mete and proper they should be so far incorporated with the body politic, as to be enumerated among those upon whom the state apportionment of representation in congress is made. In regulating this apportionment the C. U. S. Art. 1, s. 2, has provided, that three fifths of the Indians of a state who are taxed shall be counted in the basis of representation. And it is unreasonable that a state having a large number of these people within her territory, occupying extensive portions of her soil to the exclusion of more useful inhabitants, should not avail itself of this poor privilege. And if they may do thus, it is another argument in favour of the validity of the statute of Georgia; for unless the Indians be taxed, they cannot be thus accounted.

The political humbug contained in a part of Mr. Wirt's reflections, importing that the people of Georgia are about to make a common sacrifice of the Cherokees; can answer no legitimate purpose in a legal argument; and has not sufficient facts to give it countenance. These Indians to a great extent, must necessarily remain a distinct people; and though subject to the laws of Georgia, will doubtless be protected in all their common rights of property.

Having finished the review of Mr. Wirt's argument, my conclusions are the opposite of his in every essential particular involved in the case. I am of opinion,

1st. That the Cherokees are not a sovereign nation.
2nd. That the Territory of the Cherokees is within the jurisdiction of the State of Georgia.
3rd. That consequently the State of Georgia has a right to extend her laws over that territory.
4th. That the law of Georgia is valid.—1st, Because it is in conformity with the C. U. S.—2nd, Because it is in conformity with the Constitution of Georgia.—3rd, Because it is in conformity with all her rights of sovereignty as acquired by her independence.—4th, Because it violates no legal compact to which Georgia is a party.

RIGHTS OF THE INDIANS.

OPINION of the Hon. Wm. Wirt, on the following question submitted to him by the Cherokee nation, viz—

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

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

The European held that the title of the Indians to their lands underwent a change by force of that discovery; that is to say, that the particular Power of Europe which made the first discovery acquired the right to purchase these lands of the Indians, in preference to and in exclusion of all other discoverers. But this change of the Indian title to their lands was not considered by the powers of Europe as altering the political condition of these people. With regard to their lands, they were admitted says chief Justice Marshall, in the case of Johnston and McIntosh, "to be rightful occupants of the soil, with a legal as well as just claim to retain the pos-
session of it, and to use it according to their own discretion; and with regard to their political condition, Great Britain, the prior discoverer of this part of the continent, continually treated these people as a sovereign people, and acknowledged, in practice as well as theory, their exclusive right to govern themselves by their own laws, usages and customs, upon the territory of which they held the inherent right of possession, and which they and their heirs forever were entitled to hold, exclusively, until they chose to surrender it by treaty. The same right which had been held by Great Britain, and no other, passed in the United States by the revolution, and the same rights and no others have been uniformly asserted by the United States. The views of the United States, in the Declaration of Independence, have been set forth in the Declaration of Independence, in which the state of Georgia as one of the United States, a party, contains the most unequivocal admissions that these people are not citizens of the United States, and therefore cannot be citizens of any one of the states; that the territory within which they are situated, and to which they belong, and which they are the sovereign and only law-givers, and these territories exhibit them clothed with attributes of sovereignty utterly irreconcilable with the idea of being citizens of the United States, or of any one of the states. Such, for example, as the right of declaring war against the United States on a demand of relief from the state of Georgia.

The state of Georgia, it has been said, has a right to legislate over all people within her territory. But the Cherokee Indians are not people within her territory. The territory which they occupy is not, at present, a part of the territory of Georgia. Her title is that of the ultimate domain, after it shall have been extinguished by the Indians. At present, it is the territory of the Indians. They are the rightful occupants of the soil, with a legal as well as just claim to retain the possession, and to use it according to their discretion. And although their right is not disputed by the Indians, and yet it is to be remembered that it is an exclusive right of occupancy, a right which exists solely by the treaty, and that is the state of Georgia, as one of the United States, is a party to it, and is stopped to deny what she has thus solemnly admitted. The fact that the territory occupied by the Cherokees lies within the territory of Georgia, establishes nothing with regard to the question under consideration. They are not the owners of the soil, nor of the mineral riches thereof; and neither himself nor his grantees considered it as conferring any right to take from the Indians their lands, by force, much less to abolish their laws, usage and customs, and to extend the British laws compulsively over them. The importance of the state of Georgia was, as the British monarchy, or rather British colonies, in -the discovery of Cabot, including the particular monarch, who gave the charter of Georgia, George the II, with regard to their relations to those people and their lands, has been already stated. They considered the Indians as the present owners of the land, and that these lands could be rightfully acquired no other way than by their consent. By the peace, or rather British war, the Indians, and the treaty was made with them as sovereigns possessed of the exclusive government. They style them their Indian allies and friends; and yet in any case, was an attempt made, on their own initiative, by any British monarch, to abolish their own laws, and substitute, by compulsion, those of Great Britain. So much for the understanding of the monarchy who gave the charter of Georgia, and of all its predecessors and his successors, with regard to the rights and authority of the British Crown, over the Indians and their lands. Now let us look to the understanding of the original grantees of that charter, on this same subject. Governor Oglethorpe led the first colony into Georgia under that charter. He arrived at the present site of Savannah, in 1733, and how did he proceed? Did he consider his charter as conferring a right to expel the Indians from their possessions by force, or to abolish their own laws among themselves and enforce the British laws upon them? Far from it, 'we treaty was held with the Creek Indians, to whom the lands were allowed to belong, and the cession of a considerable tract was obtained from them,' Let us turn to Governor Oglethorpe's own words. He says: 'I, by this charter, by the original grantees, was an admission that those lands belonged to the Indians, and were to be gained only by cession; and was a practical admission of the sovereignty of the Indians, by the act of treating with them as sovereigns, and, of necessity, was an admission that they had not sovereignty, for they could not exercise sovereignty without such right. Will it be said that these admissions were wrong from the infant colony by their want of physical strength to assert their rights against the vice major of the Indians? But the same admissions continued to be made after the colony had acquired maturity and power to assert all their rights and duties. The British Colonial Governments, no doubt, acknowledged some respect for their own character, and for the opinion of the world. So anxious were they to avoid every appearance of taking an unfair advantage of the ignorance of their Indian allies and friends, that, in a treaty, of cession made shortly before the American revolution, they took care to declare on the face of the treaty, that it was made in consideration of the relinquishment of the Indians themselves, who wished to raise money for the payment of their debts. Such was the practical construction of the British monarch who gave this charter, and of the grantees under it, prior to the American revolution, and the same, as has been shown, has been the practical construction by the United States (Georgia included), since the revolution.

The charter, it is presumed, has not experienced any new modification, and put forth new rights, within the last few years. The position of Georgia, herself, is that she took all the rights of British colonists under that charter. With these rights were granted by the original charter, and shown by the construction of the British colonies themselves, that they had no right to dispose of the Indians, by force, or to interfere with their right of self-government.

Although this territory, then, lies within the charter limits of Georgia, I am of the opinion that the people of Georgia have the right to disturb the Indian possession of this land, and to interfere with their government, as the United States stand pledged by the solemn guaranty of a subsisting treaty, twice sanctioned by the Senate of the United States, to protect the possession of the Indians. By the same treaty, it is stipulated that no citizen of the United States shall ever enter into the Indian boundary, without a passport first obtained from the Governor of one of the states or territorial districts, or such other person as the President shall appoint. In a writ from a court, or a warrant from a magistrate of Georgia such a passport from the Governor is the treaty contemplated? Or is the service of such process upon the Indians, within their own territory, under authority of the state of Georgia, such a writ, and a passport, as the treaty manifestly contemplated? Shall the inviolability of the Indian territory have been consecrated by the treaty, against even a peremptory visit, without a passport, and can, and be believed to have been within the contemplation of the parties, that the state of Georgia should be at liberty to disturb the Indians, and to send her officers, as the treaty manifestly contemplated? Shall the inviolability of the Indian territory have been consecrated by the treaty, against even a peremptory visit, without a passport? And can it be believed to have been within the contemplation of the parties, that the state of Georgia should be at liberty to disturb the Indians, and to send her officers, as the treaty manifestly contemplated? Shall the inviolability of the Indian territory have been consecrated by the treaty, against even a peremptory visit, without a passport? And can it be believed to have been within the contemplation of the parties, that the state of Georgia should be at liberty to disturb the Indians, and to send her officers, as the treaty manifestly contemplated? Shall the inviolability of the Indian territory have been consecrated by the treaty, against even a peremptory visit, without a passport?
Government within a government, in the sense of the political axioms to which the objection alludes. The absurdity which the axiom repels is that of two distinct and equal sovereignties acting to operate, at the same time, upon the same portion of territory. But that is not the case, here; for the Cherokee do not pretend to any right of government beyond the limits of the territory whose exclusive possession they hold, under the guaranty of the United States; and as long as the neighboring states respect that guaranty, they have no government within the Indian limits; for they cannot exercise the power of government, there, without a direct and continued violation of the Indian right of possession. It is only by begging the question and assuming the right of the neighboring states to govern the Indians by State laws within the Indian possessions, that the political selectivity of a government within a government is supposed to be proved. Instead of proving the right of the states to overlap the guaranty of the treaty, this right is assumed; and having thus foothold within the Indian limits, the exclusive right of government is part of the states is again maintained on account of a political selectivity created solely by this unwarranted assumption. It is manifest that so long as the Indians confine their government within their own limits, and the states operate on the territory exterior to those limits, there is no conflict of laws, no political paradox, no impertinence in imperio; each moves in its own separate sphere, without the slightest collision with the other.

If, by a government within a government, it is meant that the territory around the Indians is under the government of several of the states, this is no political paradox, and is not at all the meaning of the axiom in question. It is a thing of every day's occurrence, for a small state to be surrounded by the territories of another sovereignty. It was the condition of all the small republics in Europe: of Venice, of Florence, of the Hanse Towns, of Switzerland, and is now the condition of every district, arsenal, dockyard, fort, and hospital under the exclusive government of the United States. I see not why the government of Congress, within the District of Columbia, should not also be considered a government within a government, as surrounded by the state authorities of Virginia and Maryland, and that the self-government of the Cherokee within their limits, should be considered a government within a government, because surrounded by the state authorities of Georgia, Alabama, and Tennessee. In both cases, it is a matter of compact; and so long as the compact is respected, there is no collision of authorities, but the policy that the ultimate right of the parties are as separate and distinct, and the action harmonious, as if they were parted by oceans. The mutual annoyance resulting from the neighborhood of the parties is a consideration of mere expediency, and does not touch the question of right; it is to the last, alone, that my opinion is confined. But on this objection of expediency, it may be observed that, in our own society, the inconveniences of bad neighborhood are often severely felt; yet they are not considered as authorizing the stronger of the two to expel his neighbor, or to strip him of his legal rights, in order to get rid of his vicinage.

The right of the states to govern the Cherokee within their borders, is vested in the states, only, and that, as soon as these lands shall be evacuated by the Indians, the possession will fall to the states, the same is equally true of the District of Columbia; for that district shall then be evacuated by Congress, there is no doubt that the several states are as separate and distinct, and the action as harmonious, as if they were parted by oceans. But this future contingent consequence cannot impair the present authority of Congress to govern the District, while it remains in their occupancy, nor does it, in the meantime, incommode, in the slightest degree, the actions of the several governments around them.

It is evident that the ultimate dominion of the lands, now possessed by the Cherokee, belongs to these states, and that, as soon as these lands shall be evacuated by the Indians, the possession will fall to the states, the same is equally true of the District of Columbia; for the district shall then be evacuated by Congress, as there is no doubt that the several states are as separate and distinct, and the action as harmonious, as if they were parted by oceans. But this future contingent consequence cannot impair the present authority of Congress to govern the District, while it remains in their occupancy, nor does it, in the meantime, incommode, in the slightest degree, the actions of the several governments around them.

It is evident that the ultimate dominion of the lands, now possessed by the Cherokee, belongs to these states, and that, as soon as these lands shall be evacuated by the Indians, the possession will fall to the states, the same is equally true of the District of Columbia; for the district shall then be evacuated by Congress, as there is no doubt that the several states are as separate and distinct, and the action as harmonious, as if they were parted by oceans. But this future contingent consequence cannot impair the present authority of Congress to govern the District, while it remains in their occupancy, nor does it, in the meantime, incommode, in the slightest degree, the actions of the several governments around them.

In resisting the right of an individual to acquire a title to these lands by a purchase from the Indians, they say—"If an individual might extinguish the Indian title for his own benefit, or in other words might purchase it, he could acquire only that title. Admitting their power to change their laws or usage, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in sevens, still it is a part of their terriory, and is held under them by a title dependent on their own laws. The grant derives its efficiency from their will; and if they choose to resume it, and make a different disposition of the land, the courts cannot interfere for the protection of the title. The person who purchases land from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title, under their protection, subject to their laws. If they annul the grant, we know not how the title can be restored."

If the right of the neighboring states to extend their laws into the Cherokee nation be defended upon the notion that they are a conquered people, in the first place the fact of such a conquest either by Great Britain or by those states cannot be maintained; and the fact of such a conquest by the United States is denied. If there ever was a conquest by the United States, it was by the Indian, or by the conquered people, and not by the conqueror; and the right of the conqueror, to say how far he will extend the rights and powers of conquest. Conquered nations have often been left in the undisturbed possession of their lands and of their own laws: and if the conqueror chooses so to leave them, what other power shall compute his will? This has been done in the present instance. It was done by the treaty of Hopewell in 1785, and by that of Holston in 1791. The provisions of these treaties have been already detailed, and it has been shown by that detail that the United States acknowledge the Cherokee to be a sovereign nation, clothed with attributes of sovereignty, to use and dispose of its territory, as they see fit. It has been shown for argument, that there was such a conquest by the United States; it is for the conqueror alone to say how far he will extend the rights and powers of conquest. Conquered nations have often been left in the undisturbed possession of their lands and of their own laws: and if the conqueror chooses so to leave them, what other power shall compute his will? This has been done in the present instance. It was done by the treaty of Hopewell in 1785, and by that of Holston in 1791. The provisions of these treaties have been already detailed, and it has been shown by that detail that the United States acknowledge the Cherokee to be a sovereign nation, clothed with attributes of sovereignty, to use and dispose of its territory, as they see fit.
Justice on conquest have aid, has never been pretended to acquire the title of the aborigines in preference to and in exclusion of all other discoverers, be a right against the Indians themselves. Did they lose their sovereignty by conquest? Great Britain has maintained such a pretension. On the contrary, she treated with them as sovereigns, and left them in the undisputed possession of their laws, and the right of self-government. But, under our constitution, who is judge of the sovereignty of a Nation, with regard to its capacity to enter into a treaty? The treaty-making power is lodged with the President and Senate of the United States. The power of Treaty-making involves, necessarily, the power of deciding on the sovereignty capacity of the other party to enter into such a pact. But, in the present instance, this has been decided, again and again, by the President and Senate of the United States, the only tribunal to which our constitution refers the decision of this question. They have decided it by making and confirming many treaties with these people; treaties of peace at the close of their war—treaties of cession—treaties regulating the intercourse between the contracting parties—treaties, on the faith of which, those States, who were parties to them through their regularly constituted organs, have derived vast and most valuable acquisitions of territory. If these compact do not treaties, what are they? What name can be given to them which will authorize either the United States, or the States, individually, to violate them, at pleasure, consistently with the faith, justice and honor of this country?

But the right of conquest be still the ground of this pretension, is this the time to enforce the exercise of the Union of the party to assess the just value of the territory taken by them? Nor have conquests long since closed by treaties of peace and amity: On the faith of these treaties, the Cherokee Nation is now in profound peace with the United States, the only war-making power under our constitution: and, by these treaties, they are left and unharmed in the possession of their remaining lands and their self-government. What is the right of conquest? Has there been a great war? None is pretended. What ground is there, then, for the pretensions of any new right of conquest? What offence has been given by the Cherokee people to call up such a question? They have, it seems, framed a Constitution modelled a form of Government, and made laws for themselves. But what offence is there in this? Their right of self-government was never before disputed: their mode of doing it, is, consequently, a question for themselves, alone. Why is it more offensive in them to have a written, rational constitution and laws than to have them unwritten, barbarous and resting in tradition, which they have had heretofore, and which they have constantly enforced without any objection from the state of Georgia? But there is something even yet more unjust and inhuman in this objection. We have been laboring, ever since the adoption of our Constitution to civilize these people. All the States, represented in the Federal Government, have pushed this subject of civilization, with all their power and at great expense. Yet while, this is the avowed motive of our bounty to them, they are unfriendly to the neighboring whites. We have, in this case, so far succeeded that they have adopted our manners, our dress, our agricultural and mechanical pursuits. They have imitated one form of Government and our laws, and Christianity it is said has made considerable progress among them. But, while they have quarreled with our own success, and fallen out with us for yielding to our solicitations. For how was the civilization, which we have been so long and so strenuously urging forward, to show itself, otherwise than by the very fruits it has borne, and at which we now take offence? Is it a crime or offence in them to yield to our own extortions to civilize them? If be a crime or offence in them, and fur-
the poorest and commonest privileges of the humblest citizens of Georgia, that of giving evidence, in a court of Justice against their oppressors? If these things are to be permitted, what becomes of the stipulations of protection and guarantee under the second and seventh articles of the treaty of Holstein? Again: One of the conditions on which the State of Georgia ceded her western lands to the United States in 1802, was that the latter would extinguish the Indian title to the lands within their remaining limits, "as soon as it could be done peaceably and on reasonable terms." Here is an admission of the existing title of these Indians, and an agreement that it is to be extinguished by the United States on reasonable terms: that is to say that no force is to be employed in the cause: The Indians are, therefore, to be at liberty to cede these lands or not, at their pleasure: and if they choose to cede them, the terms shall be such as shall receive their assent. The United States have gone on to redeem this pledge as fast as the Indians have been disposed to cede. The people are now disposed to cede no more of their lands, but to retain such as are yet left to them. Can the State of Georgia require the United States to compel these Indians to relinquish their lands? Certainly not; for the express stipulation is, that the extinguishment of title shall be peaceably made, and on reasonable terms. Does it accord with the title of the Indians, thus admitted, that the State of Georgia, herself, shall enter forcibly on their possessions and drive them out at the point of the bayonet, or, what is the same thing, potentially, that she shall put it to their option either to remove or to remain and live in subjectship and slavery to Georgia, so much of their own lands as she shall please to assign them? This question can admit of but one answer.

It has been said that several other States of the Union have legislated over the tribes of Indians within their chartered limits; and it is insisted that the State of Georgia and the other States within whose boundaries the Cherokee dwell, have the same right of legislation with regard to them. Before the authority of these precedents can be allowed to establish the right of legislation in the present instance, it will be necessary to inquire—

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

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

3. To what extent the legislation of the states was extended over them? Whether it went to annihilate their own laws, usages & institutions altogether, and to subject them to the whole mass of State laws, civil & criminal, to extinguish their existence as a separate nation, and to blend them, by force, completely with the whites, under the degrading disability of giving evidence in a court of justice? In the State of New-York, one of the States whose example has been quoted, all this has been disavowed. In a recent case in that State (Goodell vs. Jackson, 20 Johnson's Reports 503—decided in 1802), the highest court of that State have, with one accord, pronounced the Indian tribes within the State to be a separate people, alien and sovereign tribes and not citizens of the United States, not born within the allegiance of the state nor owing it allegiance; but owing allegiance only to their own tribes.

4. But what is more important than all, it must be inquired whether the question of the right of these States to legislate over the tribes within their chartered limits, has been ever raised and decided by a competent tribunal, in favor of that right; or whether these ignorant and comparatively impotent people (the Indians) have assented to this legislation, because unable to resist it, or too poor and ignorant of their rights to submit it for discussion to an impartial and enlightened court of Judicature? The fact of the exercise of a power is no proof of its right. Instances of usurpation, by the strong over the weak, have abounded in every age and every nation; but they have never been considered as establishing the right of the usurper, or justifying, by the precedent, a right of usurpation in others.