

[From the fourth page.]

still more important, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection, only what was beneficial to themselves—an engagement to punish aggressions on them. It involved practically no claim to their lands, or dominion over their persons. It merely bound the nation to the British crown as a dependent, claiming the protection of a powerful friend and neighbor, and reaping the advantages of that protection, without involving a surrender of their national character.

This is the true meaning of the stipulation, and is undoubtedly the sense in which it was made. Neither the British government, nor the Cherokee, ever understood it otherwise.

The same stipulation, entered into with the United States, is undoubtedly to be construed in the same manner. They receive the Cherokee nation into their favor and protection. The Cherokee acknowledge themselves to be under the protection of the United States, and of no other Power. Protection does not imply the destruction of the protected.—The manner in which this stipulation was understood by the American government, is explained by the language and acts of our first President.

The fourth article draws the boundary between the Indians and the citizens of the United States. But, in describing this boundary, the term "settled," and the term "hunting ground," are used.

Is it reasonable to suppose, that the Indians who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word "settled" from the words "marked out." The actual subject of contention was the dividing line between the two nations, and their attention may very well be supposed to have been confined to that subject. When, in fact, they were ceding lands to the United States, and describing the extent of their cession, it may very well be supposed that they might not understand the term employed, as indicating that instead of granting they would a part of no other significance, which is not conceded, being misinterpreted so apparently, results necessarily from the whole transaction that it must, we think, be taken in the sense in which it was most obviously used.

So far, with respect to the words "hunting grounds." Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved.

To the United States, it could be a matter of no concern, whether their whole territory was devoted to hunting grounds, or whether an occasional corn field, interrupted, and gave some variety to the scene.

These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government.

The 5th article withdraws the protection of the United States from any citizen who has settled in a still settlement on the lands allotted to the Indians for their hunting grounds; and stipulates that, if he shall not remove within six months, the Indians may punish him.

The 6th and 7th articles stipulate for the punishment of the citizens of either country, who may commit offenses on or against the citizens of the other. The only inference to be drawn from them is, that the United States considered the Cherokee as a nation.

The 8th article is in these words, "For the benefit of the inhabitants of the United States, and for the prevention of insults or oppressions on the part of the citizens or Indians, the United States, in Congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians,

and managing all their affairs, as they think proper."

To construe this expression "managing all their affairs," into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction, which has been uniformly put on them. The great subject of the article is the Indian trade. The influence it gave, made it desirable that Congress should possess it. The Commissioners brought forward the claim, with the profession that their motive was, "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true, as respects the management of all their affairs. The most important of these, is the cession of their lands, and security against intruders on them. Is it credible, that they could have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase so slipp'd into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and comfort," or "for the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognize the right of the Cherokee, to declare hostilities, and to make war. It would convert a treaty of peace, converted into an act, annihilating the political existence of one of the parties. Had such a cession been intended, it would have been openly avowed.

This treaty contains a few terms capable of being used in a sense which could not have been intended at the time, and which is consistent with the practical construction which has always been put upon them; but its essential articles treat the Cherokee as a nation capable of maintaining the relations of peace and war; and ascertain the boundaries between them and the United States.

We have estimated the "old" reasons to accommodate the difference still existing between the State of Georgia and the Cherokee nation, in July of Holston, was negotiated, in July 1791. The existing Constitution of the United States had been then adopted, and the Government, having more intrinsic capacity to enforce its just claims, was perhaps less inclined to haggle, squabbling expression denied.

To the general pledged of protection have been added several specific pledges deemed valuable by the Indians. Some of those restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.

From the commencement of our Government, Congress passed acts to regulate the trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within these boundaries, which is not only acknowledged, but guaranteed by the United States.

In 1819, Congress passed an act for promoting those humane designs of civilizing the neighboring Indians, which had long been cherished by the Executive. It enacts, "that for the purpose of providing against the further decline and final extinction of the Indian tribes adjoining to the frontier settlement of the United States, and for introducing among them the habits and arts of civilization; the President of the United States shall, and he is hereby authorized in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced, with their own consent, to employ capable persons of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic; and for performing such other instruction and rules as the President may give and prescribe for the reg-

ulation of their conduct in the discharge of their duties."

The 7th article contains a perfectly express stipulation for the surrender of prisoners.

The 8th article declares, that "the boundary between the United States and the Cherokee nation shall be as follows: Beginning" &c. We bear no more of "allotments" or of "hunting grounds." A boundary is described, between nation and nation, by mutual consent. The national character each, the ability of each, to establish this boundary, is acknowledged by the other. To provide for disputes it is agreed that it should plainly mark'd by commissioners, to be appointed by each party; and in order to extinguish forever all claim of the Cherokee to the ceded lands, an additional consideration is to be paid by the United States.

For this additional consideration the Cherokee release all right to the ceded land, forever.

Is this the rightful exercise of power, or is it usurpation?

While these States were colonies, their powers, as in its utmost extent, was admitted to reside in the crown. By the sixth article it is agreed, on the part of the Cherokee, that the United States shall have the sole and exclusive right of regulating their trade. No claim is made to the management of all their affairs. The stipulation has already been explained. The observation may be repeated, that the stipulation is itself an admission of their right to make an admission of their right to make or to refuse it.

By the seventh article, the United States solemnly grant to the Cherokee nation all their lands not hereby ceded.

The eighth article relinquishes to the Cherokee any citizens of the United States who may settle on their lands, and the ninth forbids any citizen of the United States to hunt on their lands, or to enter their country without a passport.

The remaining articles are equal, and contain stipulations which would be made only with a nation admitted to be capable of managing itself.

This treaty, thus explicitly recognizing the national character of the Cherokee, and their right of self-government, thus guaranteeing their lands, assuming the duty of protection to the United States, but protection of course pledging the faith of the several Courts of Europe, offered to negotiate treaties with them, and did actually negotiate treaties with France. Even the same necessity, and on the same principle, Congress assumed the management of Indian affairs; first in the name of those United Colonies, and afterwards in the name of the United States. Early attempts were made, negotiation, and to regulate trade with them. These not proving successful, war was carried on under the direction and with the forces of the United States, and the efforts to make peace by treaty were evaded and incessant. The Confederation found Congress in the exercise of the same powers of negotiation, and war, in our relations with Indian nations, as with those of Europe. Such was the state of things, when the confederation was adopted. That instrument surrendered the powers of peace and war to Congress, and prohibited them to the States, respectively, unless a State had actually invaded, "or shall have received certain advice of a resolution before formed by some nation, of Indians in a State, to invade such a State, and the danger is so imminent, as not to admit of delay till the United States in congress assembled can be consulted." This instrument also gave the right of regulating the trade and managing all the affairs with the Indians not members of any of the States: *Provided*, that the legislative power of any State within its own limits be not infringed or violated."

The ambiguous phrases which follow the grant of power to the United States, was so so construed by the States of North Carolina and Georgia, as to annul the power itself. The discontents and confusion resulting from these conflicting claims, produced representations to Congress, which were referred to a Committee, who made their report in 1787. The report does not assent to the construction of the two States, but recommends an recompensation, by liberal cessions of territory, or by an admission on their part, of the powers claimed by Congress. The correct exposition of this article is rendered unnecessary by the adoption of our existing construction. That instrument confers on Congress the powers and war of peace; of making

treaties and of regulating commerce with foreign nations, and among the several States, and the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power in the confederation, are discarded.

This act avowedly contemplates the preservation of the Indians as an object sought by the United States, & proposes to effect this object by civilizing and converting them from hunters into agriculturists.—Though the Cherokee had already made considerable progress in this improvement, it cannot be doubted that the general words of the act comprehended them. Their advance in the habits of civilization, is acknowledged by the other.

To provide for disputes it is agreed that it should plainly mark'd by commissioners, to be appointed by each party; and in order to extinguish forever all claim of the Cherokee to the ceded lands, an additional consideration is to be paid by the United States.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of any States; and provide that all intercourse with them shall be carried on exclusively by the Government of the Union.

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Georgia, herself, has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister States, and by the Government of the United States. Various acts of her Legislature have been cited in the argument, including the compact of cession made in the year 1802, attempting to prove her original and universal conviction, that the Indians possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent; that their territory was separated from that of any State, with whose charter or limits they might reside, by a boundary established by treaties within the boundaries of their possessed rights with which no State could interfere; and that the whole power of regulating the intercourse with them, was vested in the United States. A review of those acts, in the part of Georgia, which occupy much time, and is the less necessary, because they have been accurately detailed in the argument of the bar. Her new series of laws, manifesting her abandonment of these opinions, appears to have commenced in December 1825.

In opposition to this original right possessed by the undisputed occupants of every country, to this recognition of that right, which is evidenced by our history, in every change through which we have passed, is placed the charter granted by the monarch of a distant and distinct region, partitioning out a territory in possession of others, whom he could not remove, and did not attempt to remove, and the cessions made of this claim by the treaty of peace.

The actual state of things at the time, and all history, since, explain these charters; and the King of Great Britain, at the treaty of peace, could decide only what belonged to his crown. These newly ascertained titles, derive their title from the articles so often repeated in Indian treaties, extending to them, first the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self-government.

The very fact of repeated treaties with them recognizing it, and the settled doctrine of the law of nations is, that a weaker power does not infringe a stronger's independence—its right to self-government, by associating with a stronger and taking its protection. A weak state, in order to provide for its safety, may place its power, *sic*, without stripping itself of the right of government, and ceasing to be a State. Examples of this kind are not wanting in Europe. "Tributary and feudatory States, (says Vattel,) do not thereby cease to be sovereign and

independent governments, and authorise the regulation of their internal government, and protection of their citizens."

The Cherokee, in their original territory, were independent of Georgia, which the majority of the Cherokee uniformly acquiesced in the acts of the United States, and this in laws, of the United States.

The act under which they prosecute the judges, is unconstitutional.

If the legislature of Georgia, in their original territory, had declared Cherokee to be independent of Georgia, they would have been entitled to the protection of the United States, and this in laws, of the United States.

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