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ART. I.—*The Case of the Cherokee Indians against the State of Georgia.*—*Argued and determined at the Supreme Court of the United States, January Term, 1831.* By RICHARD PETERS, Counsellor at Law.

SINCE the organization of our government, few subjects have arisen which have agitated the public mind more violently or generally, than the controversy between the state of Georgia and the Cherokee Indians. The sufferings inflicted, and to be inflicted, upon this powerless and miserable race, their helpless condition and imploring appeals, have enlisted, in their behalf, the humanity and generous sympathy of the American people. Such a state of feeling is not very propitious to a candid consideration of the *law* and *reason* of the case, or to any discriminations which prevent or interrupt the protection and redress to which they seem to be entitled. It is difficult for any mind to abstract itself from the general character of a case, from its glaring and unquestionable oppression, to scan, with a cautious and cold examination, and limit, by technical rules, the practicability or expediency of the redress demanded for the injury. The heart springs, at once, from the wrong to the remedy, and passes, at a bound, over limits which the judgment must carefully mark and sacredly respect.

Actuated by feelings so natural and so honourable, the people of the United States, not immediately interested in the question between Georgia and the Indians, imagined that when the complaint of the latter was brought before the Supreme Court, an immediate and full protection would be extended to them; and the disappointment, on the dismissal of the bill of complaint, was

in proportion to the confidence and zeal with which a different result was expected. The decision of the Court has been frequently assailed, and found few, if any, defenders, in the press. Being ourselves entirely satisfied that the Court could have rendered no other judgment, regarding the restraints imposed upon it by the Constitution, than that which was rendered ; that to have granted the prayer of the Cherokee petition would have been an usurpation of authority ; and would, consequently, have involved the Court in a conflict with a State, in which the judiciary would not have been justified by the Constitution or sustained by the other departments of the government, we will venture upon the task, probably an unwelcome one to many of our readers, of vindicating the decree of the Court, by which the bill was dismissed on the ground of a defect of jurisdiction.

It is not our intention to discuss the questions of right and wrong between Georgia and the Indians ; on the contrary, it is necessary to keep them out of view, or we shall not be in a humour to do justice to the Court, which has refused to consider the complaint on the one side or the defence on the other. The question we have to examine is between the Court and the Constitution ; between the judges and the people of the United States, to whom they must answer for every act of power they assume, and be able to adduce their warrant for it by the grant of the people. It is not enough to show that a wrong has been done, however atrocious ; it is not enough to exhibit a case of oppression, however audacious and cruel ; it must be further shown that the tribunal appealed to for protection and redress, has the right and power to afford them ; and any attempt on the part of the Court to reach beyond that right, would be infinitely more disastrous to us all, than all the sufferings which Georgia has inflicted, or can inflict, upon the Indians who have arraigned her at the bar of the Supreme Court. It was not for this Court to know any thing in the case but that which came to them by and through the law of the land ; it was not for them to indulge, however they might respect, the general feeling for "a people once numerous, powerful, and truly independent ; found by our ancestors in the quiet and uncontroled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, who have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant the present application is made." Such is the touching and humane language of the Chief Justice, and he truly says—"if Courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined." We will not pursue this train of thought ; it may

unfit us for the sterner duty of inquiring into the power of the Court to entertain the complaint.

To such of our readers as have not given a professional or particular attention to this subject, we may be allowed to premise, that the powers of the Federal Court are not as extensive and universal as the demands of justice ; these powers are delegated and marked with great precision, and those to whom they are intrusted may not exercise any authority but in a strict pursuance of the terms and limits of their trust. This is what is meant by the jurisdiction of a Court, and is determined sometimes by the locality of the cause of action ; sometimes by the subject matter in dispute ; and sometimes by the character or description of the parties. If either of the parties be such as has not been subjected to the authority of the Court, it can pass no judgment on the case ; and before a Court looks into the merits of a cause, they must know that they have a right to decide it ; that the parties are bound to appear before them and to submit to their judgment. Thus, in the Cherokee case, it was the duty of the Court to see that they had *proper parties* before them ; such parties as they had a lawful authority over, and against whom they could rightfully enforce an obedience to their judgment.

To judge correctly of the opinion of the Supreme Court, it is necessary to know, with precision, what was the case before them, and what they have decided in relation to it ? who was the party complaining ? who was the party complained against ? what was the cause of complaint ? and what was the redress demanded or prayed for ? We shall be more particular in our exposition of some of these points than would be necessary if we could suppose that the report of the case, at the head of this article, has been in the hands of our readers ; but we presume that very few of them, comparatively, have had the opportunity of perusing it. We shall nevertheless be brief in our explanations, giving no more than we deem to be indispensable to a clear understanding of our views of the main question.

We beg our readers to bear in mind this undeniable principle : that before the Court could attend to the complaint made by the Cherokees against the state of Georgia, it was their duty to inquire and to know that the Cherokees were such a party as might lawfully bring the state of Georgia into that Court to answer that complaint—that Georgia was bound to respond to it and to submit to the judgment of the Court upon it. If this were not so, it would be worse than idle for the Court to hear and examine the proofs in support of the complaint, or to form or express any opinion respecting it. It is equally clear, that the bill of complaint must set out a case over which the power or jurisdiction of the Court extends. We therefore first turn to the bill for this purpose. It is drawn with great ability and circumspection ;

and if it be rather more argumentative and eloquent than is usual in such documents, it may be excused by the extraordinary importance and interest of the case.

On the 27th of December, 1830, a notice was served on the Governor and Attorney General of Georgia, stating that on the 5th of March, 1831, the Cherokee nation would move the Supreme Court of the United States for "an injunction to restrain the state of Georgia, the governor, attorney general, judges, justices of the peace, sheriffs, deputy sheriffs, constables, and all other officers, agents and servants of that state, from executing and enforcing the laws of Georgia, or any of those laws, or serving process, or doing any thing towards the execution and enforcement of those laws, within the Cherokee territory, as designated by treaty between the United States and the Cherokee nation."

On the day named, the motion was made for an injunction, as stated in the notice. The state of Georgia did not appear. The Cherokee nation then presented to the Court their bill of complaint. In the outset, as an indispensable qualification in their right to maintain their suit against Georgia before that tribunal, they described themselves as "the Cherokee nation of Indians, *a foreign state*, not owing allegiance to the United States," &c. They allege that they "have composed a sovereign and independent state"—that in their territory they are *the sole and exclusive masters*, and governed, of right, by no other laws, usages and customs, but such as they have themselves thought proper to ordain and appoint." They further aver, that they have made various treaties with the United States, "in all of which the Cherokee nation and other nations have been recognised as sovereign and independent states, possessing both the exclusive right to their territory and the *exclusive right to self-government within that territory*."

The Bill, which is drawn with great force and skill, and, occasionally, makes distressing appeals to our feelings as men and as Christians, sets forth a detail of the aggressions of Georgia upon the rights of the complainants, and the cruel and exterminating consequences of her proceedings against them. This history of the wrongs and suffering of this wretched remnant of a free and powerful people, must rouse an universal sympathy, and every heart will respond to the sentiment of the Chief Justice, that "if Courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined." But we repeat, that in the question which we purpose to discuss, these sympathies must be discarded—a higher object will demand our attention; no less than the adherence to and preservation of the compact or constitution which binds these states together, by which *we* compose a "sovereign and independent state," and on

which depends our own internal peace; our prosperity as a nation; our happiness as a people. By that Constitution, the powers of the people of the United States have been granted to the federal government, to be exercised in the manner and under the limitations therein prescribed. These powers have been wisely distributed to various departments, each of which is strictly bound and confined to keep and observe the limits marked out for it—one step over these boundaries leads to the destruction of the whole, and is the highest and most dangerous crime that can be committed against the people of these United States. By the 2d section of the 3d article of the Constitution, the “judicial power of the United States” is precisely set out and circumscribed: and, among other things, it is declared to extend to cases “between a state or the citizens thereof, and *foreign states*, citizens or subjects.” A subsequent amendment of this article excludes from the judicial power any suit “prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state,”—but it remains as before in respect to cases between a state and a state—or a state and a foreign state. We come thus directly to the question decided by the Court in the Cherokee case. Have the complainants maintained their allegation that they are a foreign state? Is the Cherokee nation of Indians, or tribe of Indians, or by whatever name they may be called, a *state*—a *foreign state*, within the true sense and meaning of these words, as they are found in the Constitution of the United States?

It cannot be denied that the complainants must support their allegation in this particular; that they must show themselves to be a foreign state, when they come into a Court of the United States to prosecute a suit against one of those states; if they cannot do this, whatever their rights and injuries may be, they have applied for redress to a power incompetent to afford it. If they have, by the proofs exhibited to the Court, maintained their allegations of independence and sovereignty, then indeed have they been unjustly dismissed; on the other hand, if they have failed to sustain the rank and character in which only they could be received in that Court as a suitor against Georgia, it can avail nothing that they are cruelly injured and oppressed.

We do not deem it to be of any importance to the question which now occupies us, to look back into the history of the Indians, in their relations with Great Britain or her colonies, prior to our Revolution; but we cannot forget, that from the first settlement of this country by the whites, the aborigines have gradually receded from, or been stripped of, their power and rights as independent nations; and that every successive curtailment has led the way to future encroachments, and reduced them to a shadow of what they were. The view we shall first take of our

subject, will be confined within a narrow space; it is but a single question, and we hope we shall be able to give it a satisfactory solution. We shall proceed upon conceded or unquestioned grounds. To maintain the jurisdiction of the Court, the Cherokee nation, or tribe or people, must be a *state*, and a *foreign state*, in their relations with the United States. Our first inquiry must be, are they a state? Have they the qualifications, the rights and powers, which are essential in the composition of a state? If they shall be found wanting in these, or in any of them; if they are not a state, we need not answer what they are, nor examine into the nature of their novel, peculiar, and, we may say, anomalous relations with the United States. Whether those relations be strictly domestic and subservient, or partaking, in some degree, of a separate and independent community, still they do not fulfil the provision of our Constitution, giving jurisdiction to the Court, unless they show themselves to be *substantially* a state, in the acceptation of the term among civilized nations, as expounded by writers of received authority. Georgia is not bound, by her compact with the other states of our Union, to answer, before the Judiciary of the United States, to any adversary of less dignity than a state. With feelings of true sympathy for these injured and wasting remains of "a people once numerous, powerful and truly independent;" with no disposition to justify the conduct or favour the pretensions of Georgia towards them, we have read with deep attention the report of the case argued and decided at the last sitting of the Supreme Court; and have been brought to the conclusion, to our minds exceedingly clear, that those Cherokee Indians cannot, with any regard to reason or authority, be held to be a state; and that they are still more remote from the character of a foreign state, as understood by the Constitution, or as can be understood by any correct interpretation of the phrase. We shall submit to our readers the reasons for this opinion.

We believe it is not enough to constitute these Indians a *state*, to say that they do not owe "*allegiance* to the United States, nor to any state of this Union, nor to any other prince, potentate or state;"—this is simply to say that they are not citizens or subjects of the United States or any other potentate. Allegiance binds the subject to his king; the citizen to his state; it is the duty which the subject or citizen owes to his government; it is the distinction between an alien and a citizen or subject. But, assuredly, an individual, or a number of individuals, may owe no allegiance to any state, and nevertheless not constitute a state themselves; nor be so admitted and received in the family of nations. Chancellor Kent admits that the reduced tribes of Indians which are found in several of our states, are not *states*; and yet it cannot be pretended that they are citizens of the United States, or owe allegiance to them. Much less will it serve

the purpose of the Cherokees to say that they are a separate people; that the United States have made contracts or treaties with them; nor that they are entitled to certain rights, privileges and immunities, guarantied to them by those treaties, and more especially if they hold and enjoy these rights as privileges granted to them by these treaties, as boons accorded to them at the will and by the pleasure of another state, and not in virtue of their own independence and sovereignty. All this may be, and yet the Cherokees shall not be a *state*; a sovereign, independent body politic. We think we stand on conceded, or at least, unquestioned ground, when we assert that it is an indispensable requisite, an essential property in the composition of a state, that, in the language of Vattel, "*it must govern itself by its own authority and laws.*" If it be not so, it is a glaring contradiction to call it sovereign and independent,—and no nation that is a sovereign state could treat with it as an equal. We agree that the *form* of its government is nothing, provided that it really *governs itself*, and has the management of its affairs in its own hands; subject to its own authority and will. On the other hand, if it be really governed by another, the form or manner in which it is done is of no consequence: the bitter draught of subjection and dependence may be softened by kind words and formal phrases of respect, but sovereignty and independence are gone; the *state* is annihilated. This principle is so undeniable, that the effort of the complainants has been to bring themselves within it. In their bill of complaint, they aver, that on their territory they "have ever been, and still are, the sole and exclusive masters, and governed, of right, by no other laws, usages, customs, but such as they have *themselves thought proper to ordain and enact.*" Again, they allege, that in all their treaties with the United States, they "have been recognised as sovereign and independent states, possessing both the exclusive right to their territory, and the *exclusive right of self-government* within their territory." Mr. Sergeant, in his concise and lawyer-like argument, assumes as vital to his case, that by our treaties with these Indians, the right of *self-government* within their own territory, is guarantied to them, and that their right to make and execute their own laws is exclusive and absolute. Mr. Wirt admits that the Cherokee nation has stipulated that the United States may regulate its trade, but he adds, "not among the members of its own community;" a limitation of the power, by the by, altogether gratuitous on the part of Mr. Wirt, and not in the stipulation, or any part of the treaty by which the United States have acquired the right to regulate this trade.

Mr. Justice Thompson, in delivering his dissenting opinion, in which Justice Story concurs, agrees, that for any people or community to be a *state*, to be "really sovereign and independent,"

they must have the management of their affairs and interests; they must be *solely and exclusively governed by their own laws*, claiming and exercising an absolute sovereignty and *self-government* within their territory. In the opinion of Chancellor Kent, referred to by Mr. Wirt, and published with the report of the case, that learned jurist and excellent man,—now in the perfect use and enjoyment of his high faculties and extraordinary attainments, the law of New-York to the contrary notwithstanding,—finds it necessary, in his argument for the Cherokees, to take the same ground, not attempting to support the jurisdiction of the Court, unless he could establish the Cherokees as a state, tested by their right of self-government. After a cursory review of the treaties and other proceedings between the United States and the Indians, the Chancellor proceeds—"I have now alluded to the principal documentary testimony, and from which I conclude that the Cherokee nation of Indians are an independent people, placed under the protection of the United States, and *entitled to the privileges of self-government*, within their own territory; except so far as those rights have been expressly surrendered or modified by treaty."

Although not exactly in our course, we will here remark, that this exception is most significant, and in truth, makes the whole difficulty of the case. If the Chancellor had given us a *retrospect* or tailed examination of some of the treaties he "alluded to," and had particularly turned his powerful and scrutinizing intellect to certain prominent stipulations in them, we should have had the benefit of his judgment upon what we consider to be the very matter now in issue, that is, whether the exception does not overthrow the proposition; whether these rights of self-government, of making and executing their own laws, as a sovereign and independent state may of right do, have not been so largely and expressly surrendered or restricted by treaty, as to leave the Cherokees no longer a sovereign state; whether they have not, with or without their consent, by the will of a conqueror, or by a voluntary compact or treaty, been stripped of the attributes of sovereignty; of the rights of self-government; of the power of free legislation, even within their own territory. No notice is taken, by the learned Chancellor, of the article in the Treaty of Hopewell, which bears directly upon this question; and Judge Thompson has also passed it with the same silence and neglect. Mr. Wirt has endeavoured to avoid its force and effect upon his clients; with what success, we shall inquire hereafter. In the total disregard of this pregnant article by Judge Thompson, we see the disadvantage of an *ex parte* trial; of an argument at the bar of one side only. If Georgia had appeared and been heard by her Counsel, we cannot doubt that a more full, exact and satisfactory investigation of the facts and principles of the case;

of the treaties and other proceedings with these Indians, would have been had. A Court, however able, are always materially assisted in their deliberations by the discussions of the bar; and especially when their attention is required to so many, so various, and such difficult subjects, as press upon the Supreme Court in every hour of their sittings.

We return to our argument.—This intelligible and decisive test of sovereignty, the right of making and executing its own laws; in a word, of *self-government*, was not adopted by the Counsel of the Cherokees, without an unavoidable conviction that they could not refuse it. They could look to no writer of reputation or authority, that did not demand it of them; they could invoke no principle or practice of national law that would relieve them from it. Reason and common sense brought them, irresistibly, to the same result. It was therefore a matter of necessity and compulsion to admit the principle, and get rid of its effects as well as they could. We nevertheless think it incumbent upon us to refer to the written law on this subject, that it may be understood with precision; generalities will not satisfy us or our readers on such a question. That we may not be tedious, we shall confine ourselves to the doctrines of Vattel; because of his acknowledged high authority; because he has examined the question with great minuteness and discrimination; and because his phrase is quoted and relied upon by the complainants. In the 1st Bk. of the 1st Bk. this author treats of the question what a nation or state is. His general proposition is, that “Every nation that *governs itself*, under what form soever, without any dependence on a foreign power, is a *sovereign state*.” Again he says, “it is sufficient if it be *really sovereign and independent*; that is, it must *govern itself by its own authority and laws*.” The author then proceeds to draw this general description of a state within more defined limits, by putting several cases in which there may be a restraint upon its sovereignty without destroying it; in which there may be some dependence on a foreign power, without annihilating it as a separate nation.—Thus it is with *unequal alliances*, in which “to the more powerful is given more honour, and to the weaker more assistance.” It is, however, added, that “the conditions of these unequal alliances may be infinitely varied. But whatever they are, *provided* the inferior ally reserves to itself its sovereignty, or *the right of governing its own body*, it ought to be considered as an independent state.” In like manner, if a weak state “places itself under the protection of a more powerful one, and from *gratitude* (we have not, and we deserve not much of this from the Indians,) enters into engagements to perform several offices equivalent to that protection, without *in the least* stripping itself of the right of *self-government and sovereignty*.” So of

tributary states; for, though "tribute paid to a foreign power diminishes the dignity of these states, yet it suffers their *sovereignty to subsist entire*." A weaker state may also be compelled to *do homage* to a stronger, and be nevertheless strictly sovereign, "when the homage leaves *independency and sovereign authority in the administration of the state*." Although we think there is nothing in history which affords an exact, or very similar prototype of the relation in which the Indians residing within the territory of the United States, by the mere title of occupancy, and under the restrictions, from time to time, imposed upon them, stand to the United States, yet the last case put by Vattel has a considerable resemblance to their condition in some important particulars.—He says, "But a people that has passed under the dominion of another, can no longer form a state. Such were the people and kingdoms which the Romans rendered subject to their empire; the most, even of those whom they honoured 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 other nations.*"

Have our Indians any power of self-government beyond this? have they so much? We shall see how this is, when we turn to the treaties they have made, or *submitted to*, with the United States. If they have been forced upon them, what is it but conquest? If freely made, the contract is the more binding, with all its consequences.

Having, we believe, fixed, with all necessary precision, the principle by which it is to be ascertained whether the Cherokee nation or people are to be considered and received *as a state*, waiving the further qualification of *foreign*, we may come to the application of this principle to their actual condition, as they have made it, or as it has been made for them by the power of the United States. The inquiry is, whether they, of *right*, and not by the forbearance or courtesy of a superior power, "govern themselves without any dependence on a foreign power"—whether they are "really sovereign and independent," making and executing their own laws by their own authority. Whether they have "stripped themselves of the right of government and sovereignty," whether they have retained and now possess, "independency and sovereign authority in the administration of the state." And, lastly, whether, granting that they are permitted "within themselves to be governed by their own laws and magistrates," they are not, "without, obliged to follow the orders" of the United States. Can they make war and *alliances* at their pleasure? Can they treat with other nations, as their interests

or inclinations may dictate? If they are deprived of these rights and privileges, inherent in and inseparable from a sovereign state, it is needless to inquire how they have lost them. If they are gone, the sovereignty of the people is gone with them; they have forfeited or surrendered their rank in the family of nations; they are no longer a sovereign, independent state. They are no longer a *state*.

We have said that we will not recur to the treaties entered into with these people prior to our Revolution, but rest principally upon the first treaty made with them after that event. We mean the treaty of *Hopewell*, concluded on the 28th of November 1785, between the commissioners of the United States, and the head men and warriors of the Cherokees. We must beg leave, in the outset, to discard all the argument, if it may be so called, which has been copiously drawn from the supposed force of this word, *Treaty*; as if in itself it imports that the parties to it must necessarily be sovereign and independent. We are told, again and again, that the United States have made *treaties* with these nations; and it is inferred that we have thereby acknowledged or admitted them to be independent states. We see no such conclusion. We would look, not at the *name* of the instrument made and executed by the parties, but to its *contents* and *stipulations*, to fix its character and effects. So far from the proof of sovereignty, it may, of itself, be decisive of the contrary. What is a treaty? Is it any thing more than a negotiation; a compact; a contract? and may not the United States negotiate and contract with a party, who has no pretensions to sovereignty? Have they not done so repeatedly? Not only in its strict sense, but in common parlance, this term, treaty, means just what we have stated, and no more. We speak of a treaty of marriage; of being in treaty for a house, &c. This point is settled by the 2d article of the treaty of Holston, in 1796, in which the Cherokees stipulate that they "will not hold any treaty with any foreign power, individual state, or with *individuals* of any state." There is, clearly, nothing in the circumstance that the United States have made *treaties* with the Indians. We must see what they are before we come to any such conclusion. If, indeed, it be said, that we have made treaties with them, *as with a sovereign state*, we reply, that is the thing to be proved, and must be decided by the stipulations of the contract, and not by the name which may be given to it. We willingly submit ourselves to this test.

The treaty of Hopewell, to which we shall principally direct our attention, is truly, as Mr. Sergeant declares, "at the present moment in full force." Every article, stipulation, and word in it, binds the parties now as it did in November 1785. It has, in no respect, been changed, or modified, or explained to mean more or less than its language imports, by any subsequent treaty or

proceeding between the parties. It is to be taken and construed by the plain and received meaning of the *words* and *phrases* by which the parties have chosen to express their intentions, and by which alone we can know or decide what ~~were~~ their intentions. This treaty "was negotiated," says Mr. Wirt, "immediately at the close of a war;" and that the war was a disastrous one to the Indians; that its conclusion was, in every thing but form, a conquest, may be inferred from the conditions of the peace which was "given" to the enemy, and the humiliating terms on which it was granted. It is true, the eloquent advocate, with admirable spirit, asks, "is this a treaty marked with *traits* of conquest?" We reply, without hesitation, yes—with strong traits of conquest. But Mr. Wirt, flying from his courage to his ingenuity, proceeds to modify his interrogative challenge, to avoid the answer he must have foreseen. "I do not speak," says he, "of single phrases as they have been *rendered in English*." Of what then does he or can he speak? What does he know about the treaty but from its phrases as they are rendered in English? We confess that we do speak of *single phrases*, provided they contain a complete stipulation and express a full meaning; and we do further speak of them, and understand them, and insist upon them, as they have been rendered in English, because we know nothing of them in any other language, or by any other means. We proceed to examine this treaty, and to give it the interpretation which properly belongs to the phrases by which it is conveyed to our understanding.

The introductory paragraph declares that the commissioners of the United States *give peace* to all the Cherokees, and *receive* them into the favour and protection of the United States of America, on the following *conditions*. It will be difficult to find such a beginning to a treaty between two sovereign and independent states. But this is thought to be too nice; and mere verbal criticism. Let us see if the threatening rigour of the front, will be softened by the expression of the features; if the conditions thus sternly exacted are more favourable to the sovereignty of the Cherokees. They stipulate that they will be "under the protection of the United States,"—is this all? "and of no other sovereign whatsoever." This is a pretty considerable curtailment of sovereignty, which always claims a right to make alliances, and treat with other nations as their interests or inclinations may require. To remove any doubt upon this point, it is stipulated, in the subsequent treaty of Holston, that the Cherokees shall "not hold any treaty with any foreign power,"—nor even with any "individual."

There follows, in the treaty of Hopewell, an allotment to the Cherokees of their hunting grounds; in which they are *permitted* to have nothing but a mere right of occupancy; and in a sort

of cruel mockery, it is declared, that the United States solemnly guaranty to the Cherokee nation all *their lands* not thereby ceded. Not an acre, not a foot of land belongs to them in the proper sense of ownership. They are allowed the occupancy of a described portion of their lands, by the *grant of the United States*; but beyond that use they have no right or property whatever in them. The fee, the real ownership of the soil, is in the United States; and so admitted to be by this treaty of peace. Is there no trait of conquest in this? If these Indians were offered millions for what is called *their lands*, they could not part with an acre; not even with their acknowledged right of occupancy; their guarantied possessions. Is it possible to imagine that a sovereign and independent nation holds its country by such a tenure? a sovereign people without a foot of territory! an independent state which has nothing but an untransferrable occupancy in the soil, on which and by which they live; where their bones are to be buried; although notwithstanding the solemn guaranty, neither the nation, nor an individual in it, is the true owner of ground enough for a grave. Was such a sovereign state ever before heard of? It is too ridiculous even for a jest. There is much reliance to be placed on the common sense and general opinion of men on any subject. We ask, if the question were to be put to the people of the United States, whether they have ever considered, or do now consider, the Indian tribes who inhabit our territories, and hunt and wander there, as sovereign states; as foreign, sovereign states; on a footing, in this respect, with England, or France, or Russia, or in any conceivable meaning of the terms; we believe the interrogator would seldom receive a civil answer to a question so preposterous on its face.

We proceed with the treaty, and every step brings us more certainly to the conviction, that by its provisions and stipulations, in the only sense that can rationally be given to them, the Cherokees have abandoned, in exchange for the peace and protection afforded to them, every attribute of sovereignty; every pretension to the rank and character of an independent state. We call the attention of our readers to the 9th article of the treaty of Hopewell, and to every word of it. It runs thus. "For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of citizens or *Indians*, the United States, in Congress assembled, shall have the *sole and exclusive* right of regulating the trade with the Indians, and *managing all their affairs in such manner as they* shall think proper." Whatever may be the declared reason, motive, or object of these stipulations; whether for the benefit and protection of the Indians, or for the aggrandizement of their conquerors, the effect of them upon the independence of the Cherokees must be the same. If they have found it unavoidable to surrender

their sovereignty ; to break up as a *state* "for the prevention of injuries and oppressions" from any quarter, the reason may be good or bad ; of that they were to judge ; but if they have made the sacrifice, or have been sacrificed, under the belief or the pretence that it was for their "benefit and comfort ;" the deed is done, and they must abide by it. In our view, this article of the treaty of 1785, were there nothing more, is absolutely and irresistibly decisive of the whole question ; and unless it can be removed or explained away, and shall be found to mean nothing, or not to mean what it purports to mean, it is utterly impossible, after the ratification of that treaty, to consider the Cherokee Indians as holding a place in the society of nations, as a sovereign state ; much less as a state foreign to the United States. The Congress of the United States have the sole and exclusive right, (even of the Cherokees themselves) of regulating the trade with the Indians. Nor does it stop here ; Congress are not only to regulate the trade, but to *manage* "*all their affairs* in such manner as *they shall think proper.*" Can any surrender of self-government be more unlimited—more absolute—more universal ? Is there a vestige, a shadow of sovereignty left ? Is there any portion of self-government ; any power of making laws for themselves, by virtue of their own authority, remaining in these people ? It is contended by Mr. Wirt that the regulation of the trade is intended only to be applied to the trade between them and our citizens. How is this consistent with the declared object of the stipulation, that it is to prevent injuries and oppressions on the part of the citizens or *Indians* ? But we are willing to concede this ; and rest on the concluding clause of the stipulation. And we would here ask, what was the intention of conferring on them the privilege "to send a deputy of their own choice to Congress?" It was, because having assumed the right of managing all their affairs ; of legislating for them as we do for one of our territories, we were willing to hear them, by a deputy or delegate, as we do a territory. Whatever the reason of this provision may have been, it is an extraordinary and unprecedented representation of a *foreign state* on the floor of Congress. But we mainly rely upon the stipulations above recited, of the 9th article ; and do insist, that while they remain in force, *as they are written and recorded*, it is impossible, by any effort of ingenuity, to hold these Indians as a sovereign, foreign state ; we go further—as a *state*.

We will briefly, but with candour, examine the arguments offered by Mr. Wirt, to turn aside the pressure of this article on his case. If he has failed to overcome this obstacle to victory, his march is arrested, and his cause hopeless. The plain and obvious meaning of the language of the article is clearly against him. His attempt has, therefore, been, by ingenious reasoning ; by

forced constructions ; by a reference to other documents, to narrow down the interpretation of the expressions of the treaty—to modify and reduce them, so as to bring them within the scope of his argument. The eloquent, but hard pressed advocate says, that these words, “and of managing all their affairs,” are to be compared with the introductory part of the article. We have done this already ; and think it manifest that nothing can be gained for the argument by it. We are also required to compare them “with the other stipulations of the treaty ; with the practical exposition given to the article by Congress ; and with the whole train of subsequent treaties made with the same nation down to the year 1829 ; and it will be manifest that those words, *however general*, were not intended or understood.” Now I pray the reader to mark the conclusion of this Briareus-like sentence ; of these many-headed premises. What will be manifest when we have done all that is required of us ? That these general words “were not intended or understood as surrendering the nation into the hands of Congress in the light of a conquered people, to deal with them as they pleased.” Is this the question between us ? Is this the point for which we are contending ? We apprehend not ; but it is, whether by this stipulation the Cherokees have not so far surrendered the right of self-government ; of regulating their affairs by their own authority and laws ; that they can no longer be held as an independent state. We have compared these general words with the other stipulations of the treaty, and have found nothing in them incongruous with the meaning which properly belongs to the general words ; if the ingenious counsellor perceived any such incongruity, he should have pointed it out. In like manner, we think it was incumbent on him to show in what parts, and to what extent, the practical exposition of Congress, and the whole train of subsequent treaties, have modified this article in the manner he contends for. The allegation is broad and confident enough, but stands self supported, and unaccompanied by any proof or illustration whatever. As to the effect of subsequent treaties upon the condition of the Indians, we would make this remark—if by the wars between the United States and the Cherokees, *before the adoption of our Constitution*, by the consequences of those wars, and the termination of hostilities by treaties of peace, *given to them*, the stipulations of which were such as to deprive them of the indispensable powers of an independent people, it cannot be pretended that any recognitions, express or implied, by the Executive of the Federal Government, or of all its departments, could bring the Cherokees back to the rank and rights of a sovereign state, in derogation or diminution of the sovereign territorial rights of a state of the Union.

It is asked by Mr. Wirt, and the argument involved in the

question is used with considerable dexterity, "to what branch of our government does it belong, under our Constitution, to decide the question, of *foreign state, or not a foreign state?*" He answers, that it has been repeatedly decided by this Court, "that it belongs exclusively to that branch of the government to which the conduct of our foreign relations has been intrusted by the Constitution—the Executive branch." Certainly this is true in regard to foreign nations or states, in the ordinary meaning of the terms, and in the cases to which the Court has applied the doctrine, that is, to states which are external to the United States, and have no dependence or relations with them other than such as are usual among independent nations. Such are the instances, put by Mr. Wirt, of "the revolutions in the Colonies of France and Spain," in which it was well decided, that, however severed from the mother country the revolted colonies might seem to be, or were, in fact, "this Court could recognise none of these governments as *states*, until they had been recognised as such by our own Executive, to whom the question exclusively belongs." We cannot, however, go on with Mr. Wirt to the conclusion of his reasoning, that "it follows, by necessary consequence, that this Court cannot refuse to *recognise, as foreign states, those* whom our Executive has recognised as such." Adhering to our opinion, that the treaties made by the United States with the Indians, which are the recognitions relied upon, do not recognise them as foreign states, but the contrary; we protest altogether against the conclusion to which Mr. Wirt has brought his argument, unless it be limited to cases similar in their character and circumstances to those he has cited, that is, to a people, or country, foreign, in every sense, to the United States; external to our territory, and having nothing in common with us that they have not, or might not have, with all the world. But assuredly no recognition by our Federal Executive, can raise up a foreign, independent state in the heart of one of the states of the Union, either "by making a public treaty with them," or by any other means. It would be very extraordinary, if the Executive, or the whole Federal Government, by making a treaty with a German county, or an Irish county—and both exist in Pennsylvania—or any other county or district, could thereby create a foreign, independent state, and make it obligatory upon the Courts of the United States, to recognise them as such, and give them all the rights and immunities of an independent people. Yet such is the argument on the unqualified manner in which it is urged upon us. Has such a case, or any case of a people residing *on* and *within* the territory of a state of our Union, any resemblance to a revolting colony, which has been able to shake off the dominion of the mother country; and become, to every intent and purpose, separate and independent, in the rights of self-government, in

the soil they occupy, and in every attribute of a sovereign nation? Are the obligations and duties, the rights and powers, which subsist between the United States and the several states which compose them, defined by the same law, with those which exist between the United States and the states or governments of Europe? In the latter case, our Courts may look to the Federal Executive for their guide; but in the other, we trust, they will turn to the Constitution for instruction. Every state has a sovereign right of legislation over its own territory, and all within it, except so far as it has been surrendered or limited by the grants of power, in virtue of the adoption of the Federal Constitution, or by some other act of the state; and no recognition or act of the Federal Executive can determine or affect the condition of a people inhabiting the territory of a state, unless the right to do so be found in the Constitution of the United States, or in some act or proceeding of the state. If, therefore, the Executive, without a right derived from these sources, should, in the most express and unequivocal manner, recognise, as independent and foreign, any class or portion of the people residing within the territory of a state, the Court, so far from being bound to follow and adopt such a recognition, would find it to be their solemn duty to reject and annul it, and protect the state against the Executive encroachment upon its rights. In questions between the government of the United States, and that of France or Spain, our Courts will look only to their own government; they have nothing to do with any other; they owe no responsibility to any other: but of the question between the Federal and a State government, the case is very different; both have a common instrument and compact to refer to, which binds both, and secures to each its stipulated and proper rights and protection.

An expectation seems to be indulged, more than once, that the effect of the stipulations of this 9th article may be destroyed or weakened by the circumstance that it is given to us "in English words;"—and Mr. Wirt assures us that "we cannot know how they could have been interpreted by the Cherokees." We wish that this insinuation or argument had been more clearly and decidedly expressed. Are we to take it as an intimation that the Cherokees have been duped and defrauded by the use of terms which were not fully and honestly interpreted to them; as fully and honestly as any other part of the treaty? This certainly goes to the very root and essence of the obligation of the contract. Although it has been in operation and force for more than forty-five years, it has never been thus impeached before. The suggestion is new in relation to this or any other Indian treaty. It has always been considered to express truly the contract of the parties, as intended and understood by both, according to the import of the "English words" by which it is expressed; and for

nothing more or less. We protest against this sort of argument, as altogether unsound and inadmissible. It is too much to say that "it is impossible that the Cherokees could have understood these words as giving Congress any right to interfere with that independence and sovereignty which were so dear to them;" provided that "these words" have that consequence and effect; if they have not, we have nothing to dispute about. If we are not to collect the intention and understanding of the parties to this contract according to the proper and ordinary sense of the words used by them to express and record their meaning, the whole treaty, and not this article alone, is thrown into confusion and uncertainty;—we cannot say what it was then, what it is now, or may be construed to be hereafter. Even now, in the multiplicity of Mr. Wirt's objections, limitations, and references, we cannot distinctly discern what meaning or interpretation he would give to these "English words." He is copious enough in his endeavours to show what they do not mean; but is wholly deficient in informing us what we may understand by them. We shall think ourselves safe, very safe, in standing by this treaty, and all and every of its articles and stipulations, as they are written, and with the sense and interpretation of the language in which they are written. We may be allowed to add, that after Mr. Wirt has applied, so diligently, the pruning knife of construction to this obnoxious phrase; after he has pressed and screwed it to its smallest possible dimensions, by comparisons, analogies, probabilities, and possibilities, has he been able to bring it down so low in its meaning, that it leaves the Cherokees invested with the attributes of sovereignty, and the rights of an independent state? Are they not yet too bare of power; too much restricted in their self-government, to be entitled to that character? Are they in a better condition; do they stand higher than the people and kingdoms which the Romans subjected; whom they honoured with the *names* of friends and allies, but who "no longer formed states?" If we grant all that seems to be asked for them, that "within themselves they are governed by their own laws and magistrates; but *without* they are obliged to follow the orders of" the United States—"they dare not make either war or alliances, and cannot treat with other nations or individuals." As to making alliances, and treating with other nations, they are expressly surrendered by subsequent treaties, if not by these "general words."

Having presented to our readers what we conceive to be the most important views of this case, we hasten to conclude our remarks. Much reliance has been placed on the allegation that the Cherokees have the right of making war and peace; and that war has been waged against them by the United States. In the 8th article of the treaty of Hopewell, it is provided, that there shall

be no retaliation, "except when there is a manifest violation of the treaty; and that then it shall be preceded first by a demand of justice, and if refused, then by a *declaration of hostilities*." This is all that is to be found to sustain the sovereign right contended for of making war. Have they ever made a declaration of hostilities against us? But we have made war, or prosecuted hostilities upon them. And how has this been done? Has it been as we would have done, and must have done, against a sovereign, independent, foreign, state; according to the forms and usages among civilized, independent nations? Do we publish a manifesto to justify ourselves to the world; or issue proclamations to give notice of the intended hostilities? These forms may not be obligatory upon us, or suitable to the case. What then do we say to the law of our Constitution? If we look there, *Congress* alone has the right and power to *declare war*. Is this thought necessary in regard to hostilities against the Indians? Never. But whenever it is conceived by the Executive that they have offended or violated a treaty, so as to merit chastisement, he orders a military force to march upon them, and slaughter them at pleasure. But we also make peace with them. And what is this peace? we agree to stop cutting their throats, and burning their towns and crops, on condition that they will cede to us a few millions of acres, to which we have taken a fancy. This is generally the beginning and end of an Indian war. And this is called making war and peace with them as a sovereign, independent nation. If they are so, our Constitution has been fatally violated by every war we have had with them. As to the provision in the treaty, that they may declare hostilities, in certain cases, against us, what is it but to admit that they are not citizens of the United States; that they owe us no allegiance, and cannot, for such hostilities, be held and dealt with as rebels and traitors. The reduced tribes mentioned by Judge Kent have the same immunity, although it is conceded that they are not states.

We will barely recall the recollection of our readers, without dilating upon it, to the argument of the Chief Justice upon the clause in the Constitution, which gives power to Congress to regulate commerce with foreign nations, *and with the Indian tribes*; drawing a marked distinction between them; and dealing in mere surplusage, if the Indian tribes were included in the description of foreign nations. The attempts to shake off the weight of this argument, appear to us to have wholly failed.

We pursue the subject no further.—We are unshaken in the opinion, that the treaty of Hopewell put an end to Cherokee sovereignty forever, and blotted them out from the list of states; and subsequent treaties have but made them more insignificant. We cannot consider them as a state—as a foreign state, entitled, under our Constitution, to entertain a suit in the Courts of the

United States against the state of Georgia. If this result of our investigation may be thought to be more doubtful than we can imagine it to be, we think the Court was right in its decision. The jurisdiction in such a case ought to be clear before it is assumed; where it may well be questioned, the Court should abstain from it. In this case we would not adopt the maxim—*Boni judicis est, ampliare jurisdictionem*," but rather submit to the less questionable principle—"Cujus est dare, illius est disponere." A Court of the United States should have a clear authority before it undertakes to obstruct and interfere with the legislative authority of a state, within its own territory. The right of the Court to control such an authority is a high power; but if it expects obedience to its commands, it must be scrupulous never to step an inch beyond its constitutional bounds; its delegated authority. Within these, every state has consented to be controlled by the judiciary; and is bound to yield a submission to it; but no further. On the other hand, while the judiciary keeps within these limits, it should firmly and fearlessly assert its rights, regardless of the pride or passions of the state who may be affected by it.

We are not unmindful of our promise, to direct our discussion only to the technical question of jurisdiction decided by the Court; but, that the whole case may be in the view of our readers, we will give them, in a summary way, the leading causes of complaint, on the part of the Cherokees, which, whether they should be visited on the state of Georgia, or on the government of the United States, present a most afflicting picture of injustice and distress.

It cannot be questioned, that, before the arrival of the Europeans on this continent, the Cherokees, with the other Indian nations who inhabited it, were the sole owners of the soil which they severally occupied. They had all the title to the land which, in that state of the country, could exist in any body or community. Whether, after the predominancy of the white population, this title became reduced to a mere right of possession, by the arbitrary, but irresistible policy of civilized nations, or by virtue of contracts and treaties between the aborigines and their new neighbours, is no longer of any importance. That the Indian rights in the soil, we mean the rights of property, are thus reduced, at least within the United States, must be taken to be settled and determined by the decisions of the Supreme Court. This, however, by no means implies a right of jurisdiction over them, a right to govern them, to make laws for them, or to execute our laws within their territory, or the territory to which they still retain the title of occupancy or possession. If they have lost the authority of self-government, and it has become vested in another power, as we have endeavoured to show, it is not be-

cause of their restricted or imperfect right in the land they occupy, but by virtue of their own voluntary grants and acts. Their right of a clear and *undisturbed possession* is unquestionable; and, as the Chief Justice says, has been "heretofore unquestioned." We agree with Mr. Justice Thompson:—"that they are entitled to such occupancy so long as they choose quietly and peaceably to remain upon the land, cannot be questioned." It is equally true that the United States, by every form of promise, contract, or treaty; by the most unequivocal stipulations made with the Cherokees, and for which a rich and adequate consideration was given by the Cherokees, have pledged their faith to guaranty, to protect, to secure to the Cherokees, the enjoyment of this possession against all invasions, and every invader, without reserve or limitation, whether the disturber shall be a lawless individual, or a company of such individuals; a foreign state or a state of our Union. The Indians have consented to draw themselves within certain described boundaries; have ceded to the United States all the land beyond them, and we have assumed their entire protection within them. If the United States have undertaken more than they have the power to perform; if the rights of Georgia are, in this respect, paramount to those of the United States, and Georgia refuses to yield them, it must be confessed that the situation of the Federal Government is a very novel and embarrassing one. If Georgia had and has the jurisdiction or right of legislation over the territory occupied by the Cherokees, being within her chartered limits, and she has never ceded and will not cede this right, and has never in any manner authorized the United States to relinquish it, a shocking, but unintended injury has been done, which the United States are bound to repair to the whole extent of their power and resources, and which, in a similar case, an individual would be compelled to repair by the laws and justice of the country. This can be done only by making such arrangements with Georgia as shall induce her to affirm the engagements of the United States, or by making such compensation, for the breach of them, to the Indians, as *they shall deem to be satisfactory and are willing to receive.* Any compulsion or force; any oppression or violence practised, or allowed to be practised upon them, will be a scandalous violation of the public faith, a deep dishonour to our name and country. The difficulty has been created by the acts and undertakings of the United States, and by the confidence reposed in them by the Cherokees, who, therefore, must not be the victims, if the United States have miscalculated their power, and Georgia shall refuse to submit to it. If, to use a legal phrase, a specific performance of our contract has become impossible by unforeseen circumstances, the substitute or commutation should repair the breach as entirely and effectually as is practicable; and this should

be regulated, not by the will and power of the wrong doer, but by the estimate and wishes of the injured party, unless they would go from one impossible thing to another.

The complaints of the Cherokees are distinctly set forth in their bill. They assert their independence and sovereignty within the boundaries adjusted between them and the United States, upon which we have already offered our remarks. They represent that the United States, from their earliest intercourse with them, evinced a desire to induce them to relinquish their original hunter state, and to become herdsmen and cultivators. Many of them were desirous to fulfil these humane intentions, and, in 1808, they sent a deputation to Washington, to inform the President of their wish "to engage in the pursuits of civilized life, *in the country they then occupied*;" and also to inform him, that a part of their nation would not unite with them in this effort, and to desire a division between the upper and the lower towns. The deputies from the lower towns, who preferred to remain in the hunter state, agreed to this division, and requested to remove across the Mississippi river, on some vacant lands of the United States. These propositions were favourably received by the President, who answered the deputies, "that those who chose to remain for the purpose of engaging in the pursuits of agricultural and civilized life, *in the country they then occupied*, might be assured of the *patronage, aid, and good neighbourhood of the United States*." In consequence of this arrangement, a part of these Indians did remove across the Mississippi, and the larger portion remained to engage in the pursuits of agriculture and civilized life. A formal treaty was afterwards made "for the purpose of carrying into effect the before recited promises with good faith;" and by this treaty, the Cherokees made a large cession of lands to the United States, in return for their promised "patronage, aid, and good neighbourhood," and on the faith that the stipulations made on the part of the United States would be fully and faithfully performed. With these bright prospects and powerful support, these Cherokees entered zealously upon the business of agriculture and the arts, and establishments of civilization. They founded schools and provided funds to maintain them; they made a constitution or form of government; a code of laws, civil and criminal; erected courts to administer their laws, and organized an executive department. They have churches in which the Christian religion is taught, and, finally, they say, "they have abandoned the hunter state, and become agriculturists, mechanics, and herdsmen;" and that "they have observed, with fidelity, all their engagements with the United States."

It is impossible to view this picture of the change in the condition of a wild and savage race, to such comforts and blessings,

without the deepest admiration and interest, and the most painful regret, if, by any circumstance, their progress shall be interrupted, their great design defeated, at the very moment of its complete accomplishment. With a mixture of becoming candour and manly confidence, they confess that they do not mean to allege that they have all become perfectly civilized, nor all public professors of Christianity, nor all agriculturists; but in all these respects they are willing that a comparison shall be instituted between them and their white brethren around them, and they are very little apprehensive of suffering by such comparison. They have a printing-press, and the publications that have repeatedly issued from it, particularly on the subject of their injuries, would be honourable both in style, sentiment, and argument, to the intellect and education of any race of men. "We asked them to become civilized, and they became so. They assumed our dress, copied our names, pursued our course of education, adopted our form of government, embraced our religion, and have been proud to imitate us in every thing in their power. They have even adopted our resentments."

Such being the situation of the Cherokees, and their rights and securities under treaties made with the United States, for which they gave full consideration by large cessions of valuable lands, no question of doubt or difficulty could have arisen in the case, if there were no parties in it but the United States and the Cherokees. But another party appears, claiming rights altogether inconsistent with, and destructive of, the contracts and treaties we have alluded to. It is against the pretensions and proceedings of Georgia that the complaint is directed; and the complainants come into a Court of the United States, to claim the protection and aid guarantied to them by the United States.

For many years the Cherokees held and enjoyed the territory assigned to them without molestation. They went on with their improvements in their own way, founding their institutions, making and executing their own laws, civil and criminal, without question or interruption from any quarter. They advanced rapidly in their scheme of civilization; the rights of person and property were understood and secured; education was encouraged; in short, every thing promised a full success to the humane and interesting effort to convert a lawless and savage people to the condition of an intelligent, instructed, and well-organized society. Such were the honourable and useful pursuits of this humble and peaceable community, when Georgia broke in upon them with claims and aggressions which must prostrate all their plans of improvement, and annihilate the rights they had deemed to be sacred and inviolable. Absolutely impotent themselves against such a power, what could they do but fly to the powerful friend whose aid and protection they had purchased at a high price,

and which was promised and plighted to them, again and again, in the most solemn forms of contract. "They have," says the Chief Justice, "yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue."

The first act of Georgia complained of, was passed in December 1828, and a second in December 1829; the titles and objects of which were, to annex the territory lying within the chartered limits of Georgia, in the occupancy of the Cherokee Indians, to certain designated counties of the state; to extend the laws of the state over the same; to annul all the laws and ordinances made by the Cherokee nation, and to provide for the compensation of officers serving legal processes in the said territory, and to regulate the testimony of Indians. These acts contain various enactments alike destructive to the Cherokees as a nation, and degrading to them as men; stripping them at once of all their national rights under the laws and treaties of the United States, and of all consideration and respect as freemen. No Indian shall be deemed a competent witness in any Court of Georgia, in which a white person may be a party, except such white person resides in their nation. Thus, not only their property but their persons, to the whole extent of murder and robbery, are laid bare, protected neither by their own laws, which are annulled, nor by the laws of Georgia, unless a white witness can testify to them. What is this but the most abject degradation? It is truly and forcibly said, by Mr. Sergeant, that these violations of the rights of the Cherokees go "to the whole extent of their total destruction and extinction. The legislature of Georgia proposes to annihilate them, as its end and aim. The laws of Georgia profess no other object; they are effectually conceived for this. If those laws be fully executed, there will be no Cherokee boundary, no Cherokee nation, no Cherokee lands, no Cherokee treaties, no laws of the United States in the case. They will be swept out of existence together, leaving nothing but the monuments in our history of the enormous injustice that has been practised towards a friendly nation."

In the year 1830, Georgia moved on, with unrelenting sternness and extraordinary rapidity, in her design to force the Cherokees from their territory, and to appropriate it to her own uses, assuming as full and absolute a jurisdiction over it as she enjoyed over any other part of the state. She authorized the survey and disposition of the lands; her governor was empowered to call out a military force to protect the surveyors; to punish any person who should interfere with them; saving only the Indian improvements, and lots on which they were situated. The lands, when thus laid off into districts and sections, are to be *distributed by lottery among the people of Georgia*. Various other acts of the legislature were passed, all of the same character and tendency, increasing in violence and injustice. Among

others, one to authorize the Governor to take possession of the gold, silver, and other mines, lying and being in that section of the limits of Georgia, *commonly called* the Cherokee country, and for punishing any person who may be found trespassing upon the mines.

Most assuredly, a more entire annihilation of every right, and shadow of right, in the Cherokees, to the territory, the occupancy and use of which have been guaranteed to them by the United States, cannot be conceived. Nothing remains for them but their miserable, impoverished, and destitute persons, beset by penalties created by Georgia laws, while the same laws afford them no protection against the most atrocious wrongs, unless they can be proved by a white witness.

We shall not have a full view of this case, without noticing a circumstance much relied upon by the complainants. In 1802, Georgia ceded to the United States a large body of lands, alleged to be within her chartered limits, upon several conditions, one of which was, that the United States would extinguish, for the use of Georgia, the Indian title to the lands within her remaining limits, "as soon as it could be done peaceably and on reasonable terms;"—the state of Georgia, say the Cherokees, "thus admitting that the Indian title was a subsisting title, and that it could be properly extinguished, only *peaceably* and on reasonable terms, *by the United States.*" This argument would lead us to the conclusion that Georgia has agreed not to interfere with the Indian title herself, but to wait for its extinguishment on the pleasure of the United States; and that the United States have agreed not to extinguish it until it can be done peaceably and on reasonable terms. The Cherokees allege that Presidents Monroe and Adams, on this construction of the agreement with Georgia, refused to apply force to the complainants, or to permit it to be applied by Georgia; and avowed their determination to protect them by force if necessary, and to fulfil the guarantee given by the treaties. They further state, that they "have applied to the present Chief Magistrate of the United States, to make good the protection and guarantee pledged to them by treaty with the United States, but, to their great surprise and regret, have received for answer from the Chief Magistrate, that the President of the United States has no power to protect them against the laws of Georgia."

There is a part of the proceedings of the United States with these Indians and with Georgia, which, we confess, we are unable to explain or understand. The Cherokees aver, that from their earliest intercourse with the United States, the latter have evinced an anxious desire to lead them to a greater degree of civilization, and to induce them to become herdsmen and cultivators. We have seen, that in 1808 measures were taken by the

President to carry this purpose into effect, by removing a part of the Cherokees, opposed to the design, over the Mississippi, and promising his patronage and aid to those who should remain. The obvious consequence of this change in their mode of living, would be the recognition of the rights of separate property ; the enclosing and cultivation of the land in convenient parcels ; the erection of dwellings, towns, &c. ; the encouragement of trade ; of the mechanic arts ; in short, of every thing which creates in every individual a deep and permanent interest in the soil, and fixes a connexion between the country and its inhabitants of the most dear and indissoluble character ; such a one as neither party could anticipate would be voluntarily relinquished. How shall we reconcile such designs and proceedings with the compact made in 1802 by the United States with Georgia, by which the latter ceded to the former a large body of lands, upon a condition that the United States would extinguish, for the use of Georgia, the Indian title to the lands within her remaining limits, the same lands the Cherokees were invited and urged to cultivate and improve by all the knowledge and arts of civilized man ? There is here an implied undertaking with Georgia, that the Indian title, or right of occupancy, should be extinguished, and the territory delivered over to Georgia, at some time and in some way, but in a peaceable manner. Six years after making this stipulation, *the same President* of the United States makes arrangements with the Indians inhabiting this territory, to induce them to remain upon it in perpetuity, and to place them in a situation which would render it morally impossible that they should ever consent to surrender their title to it, and abandon their possession ; and, of course, which would put it out of the power of the United States to perform the condition on which they received the lands ceded by Georgia. If in 1808 the President had recollected his engagements with Georgia in 1802, it may be, that the whole Cherokee nation might then have been induced, "peaceably and on reasonable terms," to remove over the Mississippi.

The complainants reply with much acumen to the late act of Congress, "to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the Mississippi." They allege, that "it would be enough for them to say, that they do not choose to make the proposed exchange ;" but they add, that as the proposition has been held up as an evidence of great humanity, to save them from the extinction they are fated to experience from the approach of the "good neighbourhood" of white population, and they do not wish to be considered to be blind to their own interests, or so contumacious as to resist them, through mere obstinacy, they proceed to state their motives for declining the offer. They draw a lively and interesting picture of their present happy condition,

and happier prospects, in their improvements; their buildings, public and private; their cultivated fields; their salubrious climate; their convenient commerce and intercourse, suited to a civilized people, composed of farmers, planters, mechanics and herdsmen. They dwell upon the schools for the education of their children, furnished with instructors from the United States; upon their places of worship supplied with pastors in the same manner, and they plead, with a pathetic simplicity, that "they have learned to relish the manners and pursuits of civilized life." They then touch a more noble and affecting theme. They say that their country is "endeared to them by the great and multifarious benefits which they have already received, and are still receiving, from it; is consecrated in their affections, from having been immemorially the property and residence of their ancestors, and from containing now the graves of their fathers, relatives and friends." They contrast this state of existence with that which must await them in the country to which it is proposed to remove them. The soil is said to be barren and the climate sickly—destitute, for the greater part, of wood and water, and far removed from all intercourse with the ports and markets of the United States. "But," say they, "the worst feature of the country is yet to come. It is surrounded and infested with fierce and powerful nations of Indians, in the wildest state of savage barbarity, who claim that country as their own, and wage a war of extermination on all new tribes who enter it, and whom they consider as intruders." They conclude this appalling prospect thus—"Such is the region of country to which these complainants have been invited, and such the *repose and blessings* which they have to anticipate from such an exchange. The only consequences which they could anticipate from it, as inevitable, would be, first, their relapse into all the habits of savage life in their own defence; and finally and speedily, the dissolution and extinguishment of their whole nation."

Such of our readers as have not had the opportunity of perusing the printed report of this case, will find the summary we have given of it interesting and necessary to the understanding of the matters in issue; and we hope it will not be found tedious by those who have seen it more at large. Every one will now perceive, that two things which have been so frequently blended and confounded, are essentially different; that is, the jurisdiction of the Court, and the justice of the complaints of the Cherokees. The first is governed by limits and restraints imposed upon it by the Constitution; the latter depends upon the eternal principles of right and wrong between man and man. The judges may feel and acknowledge the barbarity of the injuries inflicted upon their humble suppliants, while they pronounce their inability to afford them redress. Although the arm of the Court is bound, and may

not move in their defence, the hearts of the *judges* must have sorrowed with a sacred sympathy in dismissing from their bar these dejected and ruined suitors, disappointed in their best, perhaps their last hope.

The inquiry presses upon us—what has prompted Georgia, after so many years of acquiescence in the exercise of self-government by these Indians, within the prescribed boundaries of their territory, during which, no attempt was made to subject them to the jurisdiction of her laws and government; after her admission of their title of occupancy, until it should be extinguished, not by Georgia, but by the *United States*, what, we ask, so changed her opinions and policy, as to have produced the enactment of seven or eight laws, in quick succession, for the purpose of obtaining an immediate possession of this country, and extinguishing the Cherokees and their title together? She is not driven to these measures by any lack of land for the support of her own population; for, as the complainants allege, Georgia “already possesses millions of acres more than her people can cultivate.” She cannot find her apology in the fact by which Vattel justifies the European discoverers for appropriating to themselves the vast countries on which they raise a flag staff, or mark a stone, (their only title deeds,) that is, that they are “too closely pent up, and finding lands of which the possessors were in no *particular want*, (who was to judge of this?) and of which they make an actual and constant use.” No part of this *civilized* justification of invasion, robbery and exterminating wars upon unoffending nations, can be brought into the service of Georgia in her present proceedings. The vindication of Vattel, even in the cases to which he applies it, seems to us to be the argument of superior power, which may satisfy the conscience of the spoiler, but will hardly reconcile her victims to the loss of their country and the extirpation of their race. Before the Europeans dispossess an independent people, the original and natural lords of the soil, of their “ample domain,” on the plea of being themselves “too closely pent up,” they should bring into “actual and constant use,” the millions of acres of waste land which they have at home; and begin the practice of this system of ethics upon their own kings and nobles, who hold unmeasured tracts of excellent land, for their hunting, their parks, their pride and folly. Nothing can be more shameless and shallow; more destitute of candour and truth, than this pretence for seizing upon rich islands and vast continents, and destroying or expelling from them the proprietors who have had, for unknown centuries, the quiet and uncontrouled possession of them. Treachery and violence have marked the course of European policy over their discovered countries. While they were too weak to contend with the natives, they deceived their ignorance by liberal promi-

ses and a gentle demeanour; but as soon as the balance of strength was turned in their favour, they became insatiate butchers, and cut the throats of their kind and simple hosts, to obtain all that they had not before cheated them of.

We are prompted, in this place, to introduce a passage from the debate, on the Seminole war, in the Congress of the United States in 1819. "I presume," said one of the speakers, "the origin of this war is the same with all our other Indian wars. It lies deep, beyond the power of eradication, in the mighty wrongs we have heaped upon the miserable nations of these lands. Reflect upon what they were; and look at them as they are. Great nations dwindled down into wandering tribes; and powerful kings degraded to beggarly chiefs. Once the sole possessors of immeasurable wilds, it could not have entered into their imagination, that there was a force on earth to disturb their possessions, and overthrow their power. It came not to their dreams, that from beyond the great water, which to them was an impassable limit, there would come a race of beings, to despoil them of their inheritance, and sweep them from the earth. Three hundred years have rolled into the bosom of eternity, since the white man put his foot on these silent shores; and every day, every hour, has been marked with some act of cruelty and oppression. Imposing on the credulity or the ignorance of the aborigines, or overawing their fears by the use of instruments of death, of incalculable terror, the strangers gradually established themselves, increasing the work of destruction with the increase of their strength. The tide of civilization, for so we call it, fed from its inexhaustible sources in Europe, as well as by its own means of augmentation, swells rapidly and presses on the savage. He retreats from forest to forest; from mountain to mountain; hoping, at every remove, he has left enough for his invader, and may enjoy in peace the new abode. But in vain; it is only in the grave, the last retreat of man, that he will find repose. He recedes before the swelling waters; the cry of his complaint becomes more distant and feeble, and soon will be heard no more. *He must perish.* The decree of extermination has long since gone forth, and the execution of it is in rapid progress. Avarice has counted their acres, and Power their force; and Avarice and Power march on together to their destruction."

The case of the Cherokees is profoundly distressing—whoever may be the wrong-doer; whether the United States, in promising what they are unable to perform, but retaining the consideration and price of the promise; or Georgia, in usurping a power to which she is not entitled, and maintaining it by mere strength; or both are associated and combined in the guilt—it is a truth not to be shaken or impaired by any argument or sophistry, that a ruinous wrong is done to an innocent party, who has been faith-

ful in all their engagements; an oppression and injustice that has scarcely a parallel in the history of civilized, *Christian* man; of any people regarding their plighted faith and honour. These wrongs cry to every ear, and knock at every heart for redress, whomsoever it may be that is bound to afford it. "They are," says the fervent advocate of the complainants, "in the last extremity; and with them must perish forever the honour of the American name. The faith of our nation is fatally linked with their existence. * * * We have promised them, and they trusted us. They have trusted us; shall they be deceived?"

ART. II.—*De L'Opera en France*. Par M. CASTIL BLAZE.
Deuxième Edition. Paris: 2 vols. 8vo. pp. 454, 412.

IN an early number of this journal, we presented to our readers a brief sketch of the rise and progress of dramatic music in Italy, founded principally on information derived from an interesting work on that subject, which had issued a short time previous from the Parisian press. Convinced as we are that music constitutes a theme of peculiar interest to a considerable number of the readers of this publication, and flattered at the kind reception which our former articles have received from several, in whose taste and judgment, in the polite arts, we place much reliance, we would be willing, did the time and the materials at our command permit, to pass in review, in successive numbers, the history of dramatic music in the various sections of continental Europe. Whether or not we shall ever have it in our power to follow up this plan to the extent that might be desired or expected, is a question we shall not pretend to answer in this place. But in pursuance of that object, we must be allowed to occupy a few pages of the present number, with a sketch of the origin and progressive improvements of the Opera in France. We select this subject, not from any decided preference, on our part, of the musical school of France, over that of other portions of Europe; though, as was stated in a preceding, and as will be seen in the present article, we are prepared to concede more credit to it than the English critics generally are willing to do; but simply because we cannot resist the temptation of availing ourselves, without further delay, of the researches of M. Castil Blaze, the title of whose work we have placed at the head of this article.

To those who are acquainted with French musical literature, the name and reputation of M. Castil Blaze must be familiar. After receiving a classical education, and going through the studies requisite for admission to the practice of the law, he