

# INDIAN TREATIES.

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THE editor of this work has considered it obligatory upon him to exhibit, as preliminary matter to the treaties between the United States and the Indian tribes, the general principles which have been recognised by the Supreme Court of the United States in relation to the Indian tribes, the Indian title to the lands occupied by them, and the effect of treaties with them upon their claims to these lands, or the claims of others under Indian grants.

In the case of *Johnson and Graham's Lessee v. William M'Intosh*, 8 Wheaton's Reports, 543; 5 Condensed Reports, 515, Mr. Chief Justice Marshall, who delivered the opinion of the Court, said:

The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain Indian tribes, constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognised in the courts of the United States?

The facts, as stated in the case agreed, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show, that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the courts of this country.

As the right of society, to prescribe those rules by which property may be acquired and preserved, is not and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

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The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate right to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

Spain did not rest her title solely on the grant of the pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title.

France, also, founded her title to the vast territories she claimed in America on discovery. However conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians. Her monarch claimed all Canada and Acadie, as colonies of France, at a time when the French population was very inconsiderable, and the Indians occupied almost the whole country. He also claimed Louisiana, comprehending the immense territories watered by the Mississippi, and the rivers which empty into it, by the title of discovery. The letters patent granted to the Sieur Demonts, in 1603, constitute him lieutenant-general, and the representative of the king in Acadie, which is described as stretching from the 40th to the 46th degree of north latitude; with authority to extend the power of the French over that country, and its inhabitants; to give laws to the people, to treat with the natives, and enforce the observance of treaties; and to parcel out and give title to lands, according to his own judgment.

The states of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe. They allege, as we are told by Smith, in his history of New York, that Henry Hudson, who sailed, as they say, under the orders of their East India Company, discovered the country from the Delaware to the Hudson, up which he sailed to the 43d degree of north latitude; and this country they claimed under the title acquired by this voyage. Their first object was commercial, as appears by a grant made to a company of merchants in 1614; but in 1621, the states-general made, as we are told by Mr. Smith, a grant of the country to the West India Company, by the name of New Netherlands.

The claim of the Dutch was always contested by the English; not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title. Their pretensions were finally decided by the sword.

No one of the powers of Europe gave its full assent to this principle more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission is confined to countries "then unknown to all Christian people;" and of those countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.

The same principle continued to be recognised. The charter granted to Sir Humphrey Gilbert, in 1578, authorizes him to discover and take possession of such remote, heathen, and barbarous lands as were not actually possessed by any Christian prince or people. This charter was afterwards renewed to Sir Walter Raleigh, in nearly the same terms.

By the charter of 1606, under which the first permanent English settlement on this continent was made, James I. granted to sir Thomas Gates and others, those territories in America lying on the sea-coast, between the 34th and 45th degrees of north latitude, and which either belonged to that monarch, or were not then possessed by any other Christian prince or people. The grantees were divided into two companies at their own request. The first, or southern colony, was directed to settle between the 34th and 41st degrees of north latitude; and the second, or northern colony, between the 38th and 45th degrees.

In 1609, after some expensive and not very successful attempts at settlement had been made, a new and more enlarged charter was given by the crown to the first colony, in which the king granted to the "Treasurer and Company of Adventurers of the city of London for the first colony in Virginia," in absolute property, the lands extending along the sea-coast four hundred miles, and into the land throughout from sea to sea. This charter, which is a part of the special verdict in this cause, was annulled, so far as respected the rights of the company, by the judgment of the court of king's bench on a writ of quo warranto; but the whole effect allowed to this judgment was, to invest in the crown the powers of government, and the title to the lands within its limits.

At the solicitation of those who held under the grant to the second or northern colony, a new and more enlarged charter was granted to the duke of Lenox and others, in 1620, who were denominated the Plymouth Company, conveying to them in absolute property all the lands between the 40th and 48th degrees of north latitude.

Under this patent, New England has been in a great measure settled. The company conveyed to Henry Rosewell and others, in 1627, that territory which is now Massachusetts; and in 1628, a charter of incorporation, comprehending the powers of government, was granted to the purchasers.

Great part of New England was granted by this company, which, at length, divided their remaining lands among themselves; and, in 1635, surrendered their charter to the crown. A patent was granted to Gorges for Maine, which was allotted to him in the division of property.

All the grants made by the Plymouth Company, so far as we can learn, have been respected. In pursuance of the same principle, the king, in 1664, granted to the duke of York the country of New England as far

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south as the Delaware bay. His royal highness transferred New Jersey to lord Berkeley and sir George Carteret.

In 1663, the crown granted to lord Clarendon and others, the country lying between the thirty-sixth degree of north latitude and the river St. Mathes; and, in 1666, the proprietors obtained from the crown a new charter, granting to them that province in the king's dominions in North America which lies from thirty-six degrees thirty minutes north latitude to the twenty-ninth degree, and from the Atlantic ocean to the South sea. Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government, the king claimed and exercised the right of granting lands, and of dismembering the government at his will. The grants made out of the two original colonies, after the resumption of their charters by the crown, are examples of this. The governments of New England, New York, New Jersey, Pennsylvania, Maryland, and a part of Carolina, were thus created. In all of them, the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants. In some instances, the soil was conveyed by the crown unaccompanied by the powers of government, as in the case of the northern neck of Virginia. It has never been objected to this, or to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only, would never contain words expressly granting the land, the soil and the waters. Some of them purport to convey the soil alone; and in those cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed; and, in some instances, even after the powers of government were vested in the crown, the title of the proprietors to the soil was respected.

Charles II. was extremely anxious to acquire the property of Maine, but the grantees sold it to Massachusetts, and he did not venture to contest the right of that colony to the soil. The Carolinas were originally proprietary governments. In 1721 a revolution was effected by the people, who shook off their obedience to the proprietors, and declared their dependence immediately on the crown. The king, however, purchased the title of those who were disposed to sell. One of them, lord Carteret, surrendered his interest in the government, but retained his title to the soil. That title was respected till the revolution, when it was forfeited by the laws of war.

Further proofs of the extent to which this principle has been recognised, will be found in the history of the wars, negotiations and treaties, which the different nations, claiming territory in America, have carried on, and held with each other.

The contests between the cabinets of Versailles and Madrid, respecting the territory on the northern coast of the gulf of Mexico, were fierce and bloody: and continued, until the establishment of a Bourbon on the throne of Spain produced such amicable dispositions in the two crowns, as to suspend or terminate them.

Between France and Great Britain, whose discoveries as well as settlements were nearly contemporaneous, contests for the country actually covered by the Indians, began as soon as their settlements approached

each other, and were continued until finally settled in the year 1763, by the treaty of Paris.

Each nation had granted and partially settled the country, denominated by the French, Acadie, and by the English, Nova Scotia. By the twelfth article of the treaty of Utrecht, made in 1703, his most Christian majesty ceded to the Queen of Great Britain, "all Nova Scotia or Acadie, with its ancient boundaries." A great part of the ceded territory was in the possession of the Indians, and the extent of the cession could not be adjusted by the commissioners to whom it was to be referred.

The treaty of Aix la Chapelle, which was made on the principle of the status ante bellum, did not remove this subject of controversy. Commissioners for its adjustment were appointed, whose very able and elaborate, though unsuccessful arguments, in favour of the title of their respective sovereigns, show how entirely each relied on the title given by discovery to lands remaining in the possession of Indians.

After the termination of this fruitless discussion, the subject was transferred to Europe, and taken up by the cabinets of Versailles and London. This controversy embraced not only the boundaries of New England, Nova Scotia, and that part of Canada which adjoined those colonies, but embraced our whole western country also. France contended not only that the St. Lawrence was to be considered as the centre of Canada, but that the Ohio was within that colony. She founded this claim on discovery, and on having used that river for the transportation of troops, in a war with some southern Indians.

This river was comprehended in the chartered limits of Virginia; but, though the right of England to a reasonable extent of country, in virtue of her discovery of the seacoast, and of the settlements she made on it, was not to be questioned; her claim of all the lands to the Pacific ocean, because she had discovered the country washed by the Atlantic, might, without derogating from the principle recognised by all, be deemed extravagant. It interfered, too, with the claims of France, founded on the same principle. She therefore sought to strengthen her original title to the lands in controversy, by insisting that it had been acknowledged by France in the fifteenth article of the treaty of Utrecht. The dispute respecting the construction of that article, has no tendency to impair the principle, that discovery gave a title to lands still remaining in the possession of the Indians. Whichever title prevailed, it was still a title to lands occupied by the Indians, whose right of occupancy neither controverted, and neither had then extinguished.

These conflicting claims produced a long and bloody war, which was terminated by the conquest of the whole country east of the Mississippi. In the treaty of 1763, France ceded and guaranteed to Great Britain, all Nova Scotia or Acadie, and Canada, with their dependencies; and it was agreed, that the boundaries between the territories of the two nations, in America, should be irrevocably fixed by a line drawn from the source of the Mississippi, through the middle of that river and the lakes Maurepas and Ponchartrain, to the sea. This treaty expressly cedes, and has always been understood to cede, the whole country, on the English side of the dividing line, between the two nations, although a great and valuable part of it was occupied by the Indians. Great Britain, on her part, surrendered to France all her pretensions to the country west of the Mississippi. It has never been supposed that she surrendered nothing, although she was not in actual possession of a foot of land. She surrendered all right to acquire the country; and any after attempt to purchase it from the Indians, would have been considered and treated as an invasion of the territories of France.

By the 20th article of the same treaty, Spain ceded Florida, with its dependencies, and all the countries she claimed east or south-east of the Mississippi, to Great Britain. Great part of this territory also was in possession of the Indians.

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By a secret treaty, which was executed about the same time, France ceded Louisiana to Spain; and Spain has since retroceded the same country to France. At the time both of its cession and retrocession, it was occupied, chiefly, by the Indians.

Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?

By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the "propriety and territorial rights of the United States," whose boundaries were fixed in the second article. By this treaty the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these states. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted, that either the United States, or the several states, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.

Virginia, particularly within those chartered limits the land in controversy lay, passed an act, in the year 1779, declaring her "exclusive right of pre-emption from the Indians, of all the lands within the limits of her own chartered territory, and that no person or persons whatsoever, have, or ever had, a right to purchase any lands within the same, from any Indian nation, except only persons duly authorized to make such purchase; formerly for the use and benefit of the colony, and lately for the commonwealth." The act then proceeds to annul all deeds made by Indians to individuals, for the private use of the purchasers.

Without ascribing to this act the power of annulling vested rights, or admitting it to countervail the testimony furnished by the marginal note opposite to the title of the law, forbidding purchases from the Indians, in the revisals of the Virginia statutes, stating that law to be repealed, it may safely be considered as an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained, that the exclusive right to purchase from the Indians resided in the government.

In pursuance of the same idea, Virginia proceeded, at the same session, to open her land office for the sale of that country which now constitutes Kentucky, a country every acre of which was then claimed and possessed by Indians, who maintained their title with as much persevering courage as was ever manifested by any people.

The states, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country north-west of the river Ohio. This grant contained reservations and stipulations, which could only be made by the owners of the soil; and concluded with a stipulation, that "all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become members of the confederation," &c., "according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever."

The ceded territory was occupied by numerous and warlike tribes of

Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.

After these states became independent, a controversy subsisted between them and Spain respecting boundary. By the treaty of 1795, this controversy was adjusted, and Spain ceded to the United States the territory in question. This territory, though claimed by both nations, was chiefly in the actual occupation of Indians.

The magnificent purchase of Louisiana, was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are in fact independent. Yet, any attempt of others to intrude into that country, would be considered as an aggression which would justify war.

Our late acquisitions from Spain are of the same character, and the negotiations which preceded those acquisitions, recognise and elucidate the principle which has been received as the foundation of all European title in America.

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the govern-

ment with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.

It was doubted whether a state can be seised in fee of lands subject to the Indian title, and whether a decision that they were seised in fee, might



not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title. The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts until it be legitimately extinguished, is not such as to be absolutely repugnant to a seisin in fee on the part of the state. *Fletcher v. Peck*, 6 Cranch, 87; 2 Cond. Rep. 308.

The act of the 30th of March, 1802, having described what should be considered as the Indian country at that time, as well as at any future time when purchases of territory should be made of the Indians; the carrying of spirituous liquors into a territory so purchased, after March, 1802, although the same should be at the time frequented and inhabited exclusively by Indians; would not be an offence within the meaning of the beforementioned acts of congress, so as to subject the goods of the trader, found in company with those liquors, to seizure and forfeiture. *American Fur Company v. The United States*, 2 Peters, 368.

The condition of the Indians, in relation to the United States, is perhaps unlike that of any other two people in existence. In general, nations not owing a common allegiance, are foreign to each other. The term foreign nation, is with strict propriety applicable by either to the other. But the relation of the Indians to the United States, is marked by peculiar and cardinal distinctions, which exist nowhere else. *The Cherokee Nation v. The State of Georgia*, 5 Peters, 1.

The Indians are acknowledged to have an unquestionable, and heretofore an unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to the government. It may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States, can with strict accuracy be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title, independent of their will, which must take effect in point of possession, when their right of possession ceases; meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. *Ibid.*

The treaties and laws of the United States, contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. *Worcester v. The State of Georgia*, 6 Peters, 515.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate, than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves; having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense. *Ibid.*

One uniform rule seems to have prevailed in the British provinces in America, by which Indian lands were held and sold, from their first settlement, as appears by their laws; that friendly Indians were protected in

the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Subject to this right of possession, the ultimate fee was in the crown, and its grantees; which could be granted by the crown or colonial legislatures, while the lands remained in possession of the Indians; though possession could not be taken without their consent. *United States v. Clark, 9 Peters, 168.*

Individuals could not purchase Indian lands without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such license, or in conformity with the local laws: and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete. *Ibid.*

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession, as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way, and for their own purposes, were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case their rights became extinct, the lands could be granted disencumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians. Such was the tenure of Indian lands by the laws of Massachusetts, Connecticut, Rhode Island, New Hampshire, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina and Georgia. *Ibid.*

Grants made by the Indians at public councils, since the treaty at Fort Stanwick's, have been made directly to the purchasers, or to the state in which the land lies, in trust for them, or with directions to convey to them; of which there are many instances of large tracts so sold and held; especially in New York. *Ibid.*

It was an universal rule, that purchases made at Indian treaties, in the presence, and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands; it prevailed under the laws of the states after the revolution, and yet continues in those where the right to the ultimate fee is owned by the states, or their grantees. It has been adopted by the United States, and purchases made at treaties held by their authority, have been always held good by the ratification of the treaty, without any patent to the purchasers from the United States. This rule in the colonies was founded on a settled rule of the law of England, that by his prerogative, the king was the universal occupant of all vacant lands in his dominions, and had the right to grant them at his pleasure, or by his authorized officers. *Ibid.*

When the United States acquired and took possession of the Floridas, the treaties which had been made with the Indian tribes, before the acquisition of the territory by Spain and Great Britain, remained in force over all the ceded territory, as the laws which regulated the relations with all the Indians who were parties to them, and were binding on the United States, by the obligation they had assumed by the Louisiana treaty, as a supreme law of the land, which was inviolable by the power of congress. They were also binding as the fundamental law of Indian rights; acknowledged by royal orders, and municipal regulations of the province, as the laws and ordinances of Spain in the ceded provinces, which were declared to continue in force by the proclamation of the governor in taking possession of the provinces; and by the acts of congress, which assured all the inhabitants of protection in their property. It would be an unwarranted construction of these treaties, laws, ordinances and municipal regulations, to decide that the Indians were not to be maintained in the enjoyment of all the rights which they could have enjoyed under either, had the provinces remained under the dominion of Spain. It would be rather a

perversion of their spirit, meaning and terms, contrary to the injunction of the law under which the court acts, which makes the stipulations of any treaty, the laws and ordinances of Spain, and these acts of congress, so far as either apply to this case, the standard rules for its decision. *Ibid.*

The treaties with Spain and England, before the acquisition of Florida by the United States, which guaranteed to the Seminole Indians their lands according to the right of property with which they possessed them, were adopted by the United States; who thus became the protectors of all the rights they had previously enjoyed, or could of right enjoy under Great Britain or Spain, as individuals or nations, by any treaty, to which the United States thus became parties in 1803. *Ibid.*

The Indian right to the lands as property, was not merely of possession, that of alienation was concomitant; both were equally secured, protected and guaranteed by Great Britain and Spain, subject only to ratification and confirmation by the license, charter or deed from the governor representing the king. Such purchases enabled the Indians to pay their debts, compensate for their depredations on the traders resident among them to provide for their wants; while they were available to the purchasers as payment of the considerations which at their expense had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property in the power of the Indians, to suffer the latter to contract debts, and when willing to pay them by the only means in their power, a cession of their lands, withhold an assent to the purchase, which, by their laws or municipal regulations, was necessary to vest a title. Such a course was never adopted by Great Britain, in any of her colonies, nor by Spain in Louisiana or Florida. *Ibid.*

The laws made it necessary, when the Indians sold their lands, to have the deeds presented to the governor for confirmation. The sales by the Indians transferred the kind of right which they possessed; the ratification of the sale by the governor, must be regarded as a relinquishment of the title of the crown to the purchaser; and no instance is known where permission to sell has been "refused, or the rejection of an Indian sale." *Ibid.*

The colonial charters, a great portion of the individual grants by the proprietary and royal governments, and a still greater portion by the states of the Union after the revolution, were made for lands within the Indian hunting-grounds. North Carolina and Virginia to a great extent paid their officers and soldiers of the revolutionary war by such grants, and extinguished the arrears due the army by similar means. It was one of the great resources which sustained the war, not only by those states, but by other states. The ultimate fee, encumbered with the right of Indian occupancy, was in the crown previous to the revolution, and in the states of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power, and respected by the courts, until extinguished, when the patentee took the encumbered fee. So the supreme court and the state courts have uniformly held. *Clark v. Smith*, 13 Peters, 195.

