From the Athenian

JUDGE CLAYTON'S OPINION.

We present to our readers to day the decision of Judge Clayton, in the case of the State vs. John Saunders, and others, Indians. We have been struck with the similarity of reasoning upon several points, in this opinion, with that of the report of Mr. Bell in the House of Representatives, and we consider it due to Judge Clayton to state, that his opinion was delivered before the report of Mr. Bell had come to hand.

This decision will be taken up to the Supreme Court, by a Writ of Error—When the question will, for the first time, so far as Georgia is concerned, undergo a solemn adjudication.

HALL SUPERIOR COURT.

The State,	}	
vs.	}	*Indictment,*
John Saunders,	}	*False Imprisonment, and Assault and Battery*
and others, *Indians.*	}	

Plea to the jurisdiction of the Court.

The following facts in the case, are submitted: One Jesse Stansell, a white man and a resident Citizen of Habersham county, in this State, was arrested by an officer of the Cherokee Nation, for the crime of horse stealing, and brought before an authorised Magistrate *and a jury of said nation empannelled for the purpose* of trying said case. That the defendants constituted the Court, and the officers necessary to the execution of its sentence, and the evidence exhibited before said court, proved that the said Jesse Stansell, had hired a horse to ride about two miles, and that after riding that distance, he had taken the liberty, with out permission from the owner, to ride his horse six teen or eighteen miles, and *that he had declared his intention to ride the horse out of the nation, and thus make him his own property,* but had not carried that *intention* into effect. In view of this evidence, the jury declared the said Jesse Stansell to be guilty of *horse stealing,* which according to the laws of the nation, subjected him to a punishment not exceeding one hundred lashes. And accordingly the said Jesse Stansell was bound, stript, and received fifty lashes *on his bare back.*

The case founded upon the above facts, is *substantially* this, that the Cherokee nation of Indians is an independent government, and entirely separate and distinct from that of the State of Georgia. That they have the right to establish laws and regulations different from those of Georgia, and that by one of their laws, they had the right to do what is charged against them, that the offence alledged was committed within the nation, and is no crime by the laws of their government; and that the Courts of Georgia have no right to entertain jurisdiction of said case.

The law of Georgia under which the case is brought into this Court, was passed on the 21st of December, 1822, and after attaching certain portions of the Cherokee nation to the adjoining frontier counties of this State, and particularly that part of it to Hall county, in which the offence is said to have been committed, has the following provision, viz: "all offences committed within the said tracts of unlocated territory against the state, and all crimes committed by persons citizens of this state or of the United States, and entitled to the privileges aforesaid, or against any of the citizens of this state or the United States, shall be tried and punished in the county to which the territory, in which the said crimes and offences shall be committed, is hereby added and annexed, in the same manner as if said crimes or offences were committed within the limits of any of the organized counties of this State."

It is obvious that the object of the above law was to extend the *criminal* laws of the state over the Cherokee nation, in a limited degree. The jurisdiction was not intended to reach to cases where Indians alone were concerned, but only to those offences committed *by or against* citizens. If a crime was perpetrated *by* a citizen *against* an Indian, or *by* an Indian *against* a citizen, the offender became immediately amenable to our Courts of justice. And the only enquiry would be, upon the commission of an offence, could our Courts take cognizance of the same, provided it had been committed within the limits of an organized county? Let us apply this rule to the case at bar. Suppose the defendants, or indeed the same number of white men with no other authority, had arrested, tried and punished a citizen in the same *manner in the town of Gainesville,* would any one dispute this Court's jurisdiction over the case?

But it is denied to the state of Georgia, the right to extend her laws over the Cherokee nation. This brings us to the consideration of a subject that seems to have created much more excitement abroad than at home, and although it might seem that this is not the proper place to notice any thing foreign to the immediate question before us, yet as the whole character of the state, including its Courts of justice, have undergone the severest imputations, a sense of self respect, requires that a full investigation of this subject should be had, if not to disabuse public opinion, at least to repel unjust charges against the civil institutions of the country. Nothing I trust shall escape me, unbecoming the moderation due to the station I fill; nor is it intended to offer any thing from this place, disrespectful to the opinions of others; it is earnestly desired, that whatever is said beyond what is absolutely necessary to a decision of the legal question, may be received in a spirit of candid enquiry, and considered altogether defensive.

I proceed by laying down the following principles: That when *the states declared themselves* independent of Great Britain, each possessed precisely the same rights, sovereignty and territory which they held under, or belonged to that nation, except what ever may have been delegated to the confederation.

That no part of the territory, or the jurisdiction over it, was relinquished by the states, in the articles of confederation, but on the contrary was *expressly* refused. (See 1 vol Secret Journal of Convention, pages 74, 295, 310, 362, 369, 378, 437, 440)

That at the recognition of the Independence of the States by Great Britain, each state still held its separate territory, jurisdiction and sovereignty in as full, ample, and complete a manner, as it it had remained attached to said government, or had been *alone* detached from it.

That if there had never been any Union, each state would have asserted and retained, without any question, all these rights.

That neither of these rights has ever been relinquished by the states to the General Government, in the Federal Constitution, but on the contrary was *expressly* refused. (See Journal of Federal Convention *pages* 70, 277, 309, 310)

That so far as Georgia is concerned, they have never been relinquished by any convention or treaty made by the General Government with her, and if made with any other power on those subjects, is void.

That the Indians have never been considered, or treated by any of the states or the General Government as citizens, or entitled to the privileges of citizens, nor have they been permitted any where in the United States or its territories, to set up for themselves independent Governments. As a people, they have been denied the rights of suffrage and representation in any of the States, Territories or the Federal Government, and the states within whose limits they fall have the exclusive jurisdiction and control over them, except in such cases as the constitution of the United States has declared otherwise.

From the foregoing, it is confidently maintained that Georgia, within her chartered limits, so far as relates to territory, jurisdiction and sovereignty, is *supreme,* and no other power whatever, has any right to question it, only so far as she has parted with either by express instrument.

And it is most positively denied that *any instrument* exists by which Georgia has transferred to any state, or the General Government (except as to a part of her territory, and sites for Forts and Arsenals) any part of the aforesaid rights, and that none can be produced. And the fact that a part of her Territory and sites for Forts and Arsenals, have been purchased by the General Government from the state, is a clear recognition of the above rights.

I am aware that it is claimed for the General Government to protect the Indians within the limits of States, from two sources, 1st, from the Federal Constitution, and 2dly, from *treaties.*

Let us impartially consider both grounds. I have already stated, that when the Federal Constitution was under consideration, the very subject we are *now discussing,* was *distinctly* brought to the view of the Convention, as is indisputably attested by the journal of that body, and was most unquivocally denied to the General Government. If the journals of deliberative assemblies, are taken for any thing, it is inconceivable how such a pretension is set up for that government, and if they are not to be regarded as evidence of motives or intention, why are they preserved? Why recorded and published? Better by far to destroy them, and let the instrument, whose history and consummation they purport to give, speak for itself, and then we should be spared the mortification of witnessing the exercise of power, falsified by solemn and notorious facts.

But to this end, let us resort to the *instrument* itself. In no part of it from the beginning to the end, can the word Indian, or any thing relating to that name, be found, except in *one* solitary place, and that is the following, "the Congress shall have power to

regulate commerce with foreign nations, and among the several states, and with the *Indian* tribes." Now I ask, can it be seriously contended that from the power to *regulate commerce* with the *Indian tribes*, the states have surrendered the right to extend their criminal laws over such tribes as may be found within their limits? If such a doctrine be maintained, what will be the consequence? Is it not perceived to what an absurd conclusion it leads? In the very same clause is conferred the right to *regulate commerce* among the several states; will it be asserted that this power gives the right *to protect* the people of the states, from the criminal laws of their respective Legislatures? And why not if the other argument be sound? But extending this idea still farther, from this power to *regulate commerce* "with foreign nations," who is so bold as to affirm that the General Government has the right *to protect* all the rest of the world, from the force of their own penal laws? Tho' this self same power, to the dismay of the states, has opened upon *their rights* a most destroying flood, it has not yet quite reached such an illimitable expansion

So far then as this clause parts with the right of Georgia to territory, jurisdiction or sovereignty, over the people red, black or white, citizen or alien, found within its acknowledged limits, I think I may safely say, she is safe, and as to any other grant of power to that effect, *in that instrument*, I say, and speak advisedly, none can be found.

But the strong ground assumed for the General Government, and *in which the whole force of argument* and ingenuity is arrayed and spent, is, that by treaties, it has promissed *protection* to the Indians within the limits of states, and that under this clause of the Federal Constitution, viz: "the President shall have power, by and with the advice and consent of the Senate, to make treaties," said government *had* a right to make such treaties. Now let us consider this ground also.

I again lay down these principles.

That all governments, whether with, or without a constitution, must act within some limited powers, so as at least, to respect the rights of others, and that treaties bind only the contracting parties, and no two nations can treat away the rights of another, but by the law of the strongest arm.

That the General Government is a strictly limited Government, and has not a single power without its well known boundary, and that the power to make treaties is not *unlimited* but must be confined within the sphere of the other powers conferred upon that government. If this is not admitted, then the President and Senate, the two functions of Government *farthest removed from the people, can do more than* all the rest of the political machinery besides! Can do what Congress dare not, dispose of states and their rights at pleasure; indeed, maugre all the studied restrictions thrown around the government, through this power is let in the power to do EVERY THING— Such according to Mr Jefferson, was never intended

That the General Government *is limited* in the power of making treaties to the sphere of its other delegated powers; it has no right to make treaties with Indians residing within the limits of States, but upon the single subject of *commerce*, because "to regulate commerce with Indian tribes," is the only power they have in relation to that people; if any thing more is contended for, it was in vain to have a *written constitution*.

That no authority *wrongfully* acquired, can be *rightfully* exercised after it is discovered to be unfounded, and it is to be hoped the General Government would disdain to contend for a contrary principle.

With these principles constantly in view, I proceed *to the following statement.* After the Federal Government went into operation, there were very many of its principles and powers but little understood, and required to be drawn out in practice before their proper tendencies could be fairly tested. Those principles have been developing ever since, and new powers or rather strange lights are making their appearance every hour, in the national firmament. It was not wonderful then, that many acts of the General Government, while the states were young and inexperienced, should be done without a strict scrutiny into their legitimate consequences, and having full confidence in the integrity of a government, founded upon the best affections of the states, consecrated by common dangers, sufferings and distress, it could not be believed, that if such a government should be found to have transcended its bounds, it would for one moment hesitate to retrace its steps and repair the injury. This is the precise situation of Georgia. Many treaties were made between the General Government and the Indians, to which she was *no party*, within her limits, and though the *very first* was objected to, yet *that* and all the rest have been acquiesced in, as *much from filial duty and respect, as from any thing* else; but this cannot make that *right*, which was fundamentally *wrong*. But there was another circumstance which kept the state *respectfully silent* on this subject. No state in the Union has suffered more from Indian depredation than Georgia, and such was the constant scene of savage butcheries, and *desolating* conflagrations on her frontiers in the days of those first treaties, that she was willing to have peace on *any terms*, and submitted to whatever the General Government, in her parental solicitude, might impose, for the sake of any respite from those horrid massacres to which she was daily exposed. And if these treaties imposed any obligations, are they to be *alone* binding on Georgia, *who was really no party to them*, while one of the contracting parties has violated them from time to time, in the carnage of our women and children, and the rapine of our frontiers in an extent of four hundred miles? It is not too much to say, nor is it said in the spirit of reproach, that the bones of many of our people, can at this day be pointed to which have been bleaching upon the naked earth, and scattered from the unburied bodies of many who were *tortured and murdered long since the last treaty of peace* with that unfortunate race. Who does not know that war puts an end to all treaties between the beligerents, and who does not know, that there have been repeated wars and ravaging incursions by the Indians, since any treaty where the tranquility of Georgia was concerned, and in which the faith of the General Government has been pledged to protect them within her limits? But aside from all these considerations, the time is come when we stand upon our rights as secured to us by the constitution. If the General Government has bound itself to perform an act which will violate the rights of a state, will it enforce that act, contrary to the remonstrance of that State?

Are the rights of Georgia less to be respected than the supposed rights of the Indians? We say the General Government could make no treaty with the Indians, within the limits of Georgia, other than such as regulated commerce, and *that* precisely in the way the same object was effected among the several states, and any stipulations, either in TREATIES or LAWS, beyond this single point, are void so far as *Georgia is concerned. And the very case before us* proves, as I said before, that the period has arrived when the error must be corrected, for we must govern the Indians or they will govern us, and this is a question that admits of no debate.

They are within our jurisdiction and our territory, and the Federal Court has so determined: (See 6 Cranch 140.) Even Judge Johnson who dissented from the above opinion declared, in his usual strong and forcible manner, that the right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To *part* with it is to commit a species of political suicide. In fact, a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as to a natural person." We have never *parted* with it to the General Government, much less to the Indians. Does any one believe that Georgia would ever have entered into the Union, if it has been required of her to acknowledge the independence of the Indians, then occupying fourfifths of that very territory which she had conquered from Great Britain and her indian allies, and which, as I have shown, was more than once refused to the General Government? Impossible! If Georgia would not grant this right directly to the Indians, and such an application coming from them would have been supremely ridiculous, surely no one can imagine, and be honest with his understanding, *that she has indirectly given* to the General Government the right to do this very thing, to set them up for themselves, in the very heart of the state?

Let us examine some of the consequences of *this doctrine. We have a frontier of something* like two hundred miles in length, separated, in some places, by only an imaginary line, from the Cherokee nation. On this line there are five counties, and four of them by far the most populous of any in the state. Besides this there is necessarily much travelling through the nation in order to reach the Western states. If the Cherokee nation is erected into an independent government, what ensues? The case at bar affords the answer. The moment a white man is caught within the nation and ac-

cused of a crime, (and how easy to prefer a charge) he is arrested and a most summary trial takes place. An Indian officer speedily collects four or five Indians, organizes them into a court without regard to time or place, far from the friends or witnesses of the accused, often understanding nothing of their language, and in a few moments he receives the sentence of the court to be scourged in the most cruel manner, and it is as quickly executed. And thus the well earned reputation of a life may in an instant be blasted. This kind of treatment too may extend to the taking of life or limb; and this is not all, he is subjected to punishment twice for the same offence, for our laws will punish citizens for crimes committed against Indians, and there are now men suffering in the Penitentiary on that very account, who when they come out, if caught in the nation, may be punished again for the same offence.

It cannot be expected that such a state of things will be suffered to exist. In vain may Georgia attempt to ameliorate her penal code and soften the rigor of cruel and bloody punishments, if the savages in her very bosom, are allowed to tear open the wounds, it has been the anxious effort of twenty years to heal.

Government at best is a state of restraint, and made for the benefit of the many over the few, and no one will deny that it is better for a savage, to be under the government of a civilized people, than for the latter to be subject to the horrid irregularities of the former. The *same laws that govern us, will govern them*, with no other exceptions than such as their peculiar situation will naturally require. At all events they will not be more severe, they will be treated with humanity. Their rights have *always been respected* by the state government; witness the number of white persons who have been rigorously prosecuted and punished for a violation of their persons and property—Witness the successful issue of the case of their reserves, than which none could have met with more violent opposition—Witness how few of them have ever been punished by our courts. Have they ever come among us without receiving our ready charity, and kind hospitality? The reproaches against Georgia for her unjust treatment of the Indians, to say the least of it, is undeserved, and could our northern brethren know the truth of this matter, we should have been spared their unkind censures.

It is true they are deprived of many privileges that belong to the citizen, but their condition is precisely the same in the rest of the states. They have never been put upon the same footing *any where*, and it is a great act of insincerity towards Georgia, & a fatal delusion to the Indians to attempt to inspire such a belief. And it cannot be expected that Georgia will submit to any thing to which other states have not submitted. It is true we have said they shall not be witnesses against white men, this is a municipal regulation and it *is entirely* of our own concern, subject to no other scrutiny than that which refers to the wisdom of any other regulation; we may be censured for our folly but we usurp no power. The same an *theories that exclude slaves, infidels, convicts* and idiots, from giving testimony in courts of justice, on account of a defect of moral principle, can do the same thing towards any other class of persons, whom they, in their judgement, *may deem to be laboring* under the same disability, and we are answerable to no one but ourselves. With regard to other privileges, the Indians cannot expect to be placed upon the same footing with our own citizens; we do not allow that to enlighten foreigners, much less to wandring savages, and I beg to be considered as not using this term here or elsewhere reproachfully. This is a prerogative that belongs to all governments, & must be exercised under that sound discretion which is supposed to rest in every well regulated society. That power in government which prescribes five years to an alien before he shall be entitled to the rights of a citizen, could place a limit of fifty years to the same privilege, nay they could deny it altogether, and where is the greater injustice in exercising a precisely similar power in relation to the Indians, a people much less entitled to such a right, either from moral improvement or intellectual elevation. No! the truth is, whenever they deserve it they will receive it, but this must always be left, as is every other social rule, to our own best judgement.

A case has been presented, in this state, which serves to illustrate the *principle of exclusive* jurisdiction as contended for in the foregoing remarks. Some years ago the Indian title to a portion of the Cherokee nation was extinguished, leaving however in different parts a *number of Reserves, of one mile square*, to which their *title was not extinguished*, and these fell into separate organized counties of the state, and were occupied by the Indians for whose benefit they were reserved, like very many similar Reserves, in other states. Now will it be contended that these Indians and these Reservations constituted independent territories within the counties where they were situate, and that the laws of the state could not extend into them? That their inhabitants were beyond any control from state jurisdiction so long as they kept in their own bounds, and that within those limits, they might commit what crimes they pleased? In favor of such a doctrine, I humbly conceive, no one can be found.

Then what is the difference, between one Indian on one mile square and 5000 Indians on two hundred miles, both being within the acknowledged chartered limits of Georgia? This subject considered in reference to the first case is perfectly within the comprehension of the narrowest capacity, but increase the numbers and enlarge the limits, and a principle, before as plain as noonday, vanishes into doubt, and all at once becomes a question of "very delicate" speculation!!

I cannot conclude without greatly commending the forbearance and dignified moderation of the people of Georgia, under the late multiplied insults they have received from various parts of the Union. Time will dissipate the error that lies at the foundation of such gratuitous unkindness. But if contrary to all reasonable hope this just expectation should not be *realized*, and our adversaries abroad, by their sickly solicitude, should cause an invasion of a now settled and decided right, they will not only have to contend against the force of an ENRIVIDED PEOPLE, but they *may* find, behind that very moderation and forbearance, which they so much affect to contemn, all the resolution united to any ALTERNATIVE which a graceless intrusion may provoke.

The Plea Overruled.