American Legal History – Russell

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PART VI.

OF THE LAW CONCERNING REAL PROPERTY.

LECTURE LI.

OF THE FOUNDATION OF TITLE TO LAND.

In passing from the subject of personal to that of real property, the student will immediately perceive that the latter is governed by rules of a distinct and peculiar character. The law concerning real property forms a technical and very artificial system; and though it has felt the influence of the free and commercial spirit of modern ages, it is still very much under the control of principles derived from the feudal policy. We have either never introduced into the jurisprudence of this country, or we have, in the course of improvements upon our municipal law, abolished all the essential badges of the law of feuds; but the deep traces of that policy are visible in every part of the doctrine of real estates, and the technical language, and may of the technical rules and fictions of that system, are still retained.

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(2.) The history and grounds of the claims **[*379]** of the European governments, and of the United States, to the lands on this continent, and to dominion over the Indian tribes, have been since more largely and fully considered. In discussing the rights and consequences attached by the international law of Europe to prior discovery, it was stated in *Johnson v. M^c^Intosh* [FN omitted], as an historical fact, that on the discovery of this continent by the nations of Europe, the discovery was

considered to have given to the government by whose subjects or authority it was made, a title to the country, and the sole right of acquiring the soil from the natives, as against all other European powers. Each nation claimed the right to regulate for itself, in exclusion of all others, the relation which was to subsist between the discoverer and the Indians. That relation necessarily impaired, to a considerable degree, the rights of the original inhabitants, and an ascendancy was asserted in consequence of the superior genius of the Europeans, founded on civilization and Christianity, and of their superiority in the means, and in the art of war. The European nations which respectively established colonies in America, assumed the ultimate dominion to be in themselves, and claimed the exclusive right to grant a title to the soil, subject only to the Indian right of occupancy. The natives 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, though not to dispose of the soil at their own will, except to the government claiming the right of pre-emption. The practice of Spain, France, **[*380]** Holland and England, proved the very general recognition of the claim and title to American territories given by discovery. The United States adopted the same principle, and their exclusive right to extinguish the Indian title by purchase or conquest, and to grant the soil, and exercise such a degree of sovereignty as circumstances required, has never been judicially questioned. The rights of the British government within the limits of the British colonies, passed to the United States by the force and effect of the act of independence; and the uniform assertion of those rights by the crown, by the colonial governments, by the individual states, and by the Union, is, no doubt, incompatible with an absolute title in the Indians. That title has been obliged to yield to the combined influence which military, intellectual and moral power gave to the claim of the European emigrants.

(3.) This assumed but qualified dominion over the Indian tribes, regarding them as enjoying no higher title to the soil than that founded on simple occupancy, and to be incompetent to transfer their title to any other power than the government which claims the jurisdiction of their territory by right of discovery, arose, in a great degree, from the necessity of the case. To leave the Indians in possession of the country was to leave the country a wilderness; and to govern them as a distinct people, or to mix with them, and admit them to an intercommunity of privileges, was impossible under the circumstances of their relative condition. The peculiar character and habits of the Indian nations, **[*381]** rendered them incapable of sustaining any other relation with the whites than that of dependence and pupilage. There was no other way of dealing with them than that of keeping them separate, subordinate and dependent, with a guardian care thrown around them for their protection. The rule that the Indian title was subordinate to the absolute, ultimate

title of the government of the European colonists, and that the Indians were to be considered as occupants, and entitled to protection in peace in that character only, and incapable of transferring their right to others, was the best one that could be adopted with safety. The weak and helpless condition in which we found the Indians, and the immeasurable superiority of their civilized neighbours, would not admit of the application of any more liberal and equal doctrine to the case of Indian lands and contracts. It was founded on the pretension of converting the discovery of the country into a conquest; and it is now too late to draw into discussion the validity of that pretension, or the restrictions which it imposes. It is established by numerous compacts, treaties, laws and ordinances, and founded on immemorial usage. The country has been colonized and settled, and is now held by that title. It is the law of the land, and no court of justice can permit the right to be disturbed by speculative reasonings on abstract rights.

This is the view of the subject which was taken by the Supreme Court, in the elaborate opinion to which I have referred. The same court has since been repeatedly called upon to discuss and decide great questions concerning Indian rights and title; and the subject has of late become exceedingly grave and momentous, affecting the faith and character, if not the tranquillity and safety, of the government of the United States.

In the case of *Cherokee Nation v. State of Georgia*, it was held by a majority of the court, that the Cherokee nation of Indians, dwelling within the jurisdictional limits of the United States, not a **[*382]** *foreign state* in the sense in which the term is used in the constitution, nor entitled as such to proceed in that court against the state of Georgia. But it was admitted that the Cherokees were *a state*, or distinct political society, capable of managing its own affairs, and governing itself, and that they had uniformly been treated as such since the settlement of our country. The numerous treaties made with them by the United States, recognise them as a people capable of maintaining the relations of peace and war, and responsible in their political capacity. Their relation to the United States was nevertheless peculiar. They were domestic dependent nations, and their relation to us resembled that of a ward to his guardian; and they had an unquestionable right to the lands they occupied, until that right should be extinguished by a voluntary cession to our government. The subject was again brought forward, and the great points which it involved reasoned upon and judicially determined, in the case of *Worcester v. State of Georgia*, which was another case arising out of the operation of the laws of Georgia.

The legislature of that state, in the years 1828, 1829, and 1830, passed several penal statutes, in reference to the Cherokee nation and territory. The purpose and effect of those laws was, to demolish the Cherokee government and institutions, and annihilate their political existence as a nation, and to divide their territory among the adjoining counties in Georgia, and extend the civil and criminal law of the state over the Indian territory. Those laws dealt with them as if they were alike destitute of civil and political privileges, and were mere tenants at sufferance, without any interest in the soil on which they dwelt, and which had been uninterruptedly claimed and enjoyed by them and their ancestors as a nation from time immemorial. Their lands had been guarantied to them as a nation, and the protection of the United States pledged to them in their national capacity; and their existence, competence and rights, as a distinct political society, recognised, by treaties made with them in the years 1785, 1791, 1798, 1805, 1806, 1816, 1817 and 1819, by the government of the United States, under all the forms and solemnities of treaty compacts. The statutes of Georgia, nevertheless, prohibited the Cherokees, under highly penal sanctions, from the exercise, within the territory they so occupied, of any political power whatever, legislative, executive or judicial. They were declared not to be competent witnesses in any court of the state to which a white person might be a party, unless such white person resided in the Cherokee nation; and they were also declared to be incompetent to contract with any white person. Their territory was divided into sections, and directed to be surveyed and subdivided into districts, and disposed of by lottery among the citizens of Georgia. Their gold mines were taken possession of by force, and the use of them by the Indians prohibited. They were, however, declared to be protected in the possession of their *improvements, until the legislature should enact to the contrary*, or the Indians should voluntarily abandon them.

The Supreme Court of the United States, *in the case of Worcester*, reviewed the whole ground of controversy, relative to the character and validity of Indian rights within the territorial dominions of the United States, and especially in reference to the Cherokee nation, within the territorial limits of Georgia. They declared that the right given by European discovery was the exclusive right to purchase, but this right was not founded on a denial of the right of the Indian possessor to sell. Though the right to the soil was claimed to be in the European governments, as a necessary consequence of the right of discovery and assumption of territorial jurisdiction, yet that right was only deemed such in reference to the whites; and in respect to the Indians, it was always understood to amount only to the exclusive right of purchasing such lands as the natives were willing to sell. The royal grants and charters asserted a title to the country against Europeans only, and they were considered as blank paper, so **[*384]** far as the rights of the natives were

concerned. The English, the French and the Spaniards, were equal competitors for the friendship and the aid of the Indian nations. The crown of England never attempted to interfere with the national affairs of the Indians, further than to keep out the agents of foreign powers, who might seduce them into foreign alliances. The English government purchased the alliance and dependence of the Indian nations by subsidies, and purchased their lands when they were willing to sell, at a price they were willing to take, but they never coerced a surrender of them. The English crown considered them as nations competent to maintain the relations of peace and war, and of governing themselves under her protection. The United States, who succeeded to the rights of the British crown in respect to the Indians, did the same, and no more; and the protection stipulated to be afforded to the Indians, and claimed by them, was understood by all parties, as only binding the Indians to the United States as dependent allies. A weak power does not surrender its independence and right to self-government, by associating with a stronger, and receiving its protection. This is the settled doctrine of the law of nations; and the court concluded and adjudged, that the Cherokee nation was a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia could not rightfully have any force, and into which the citizens of Georgia had no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The court accordingly considered the acts of Georgia which have been mentioned, to be repugnant to the constitution, treaties and laws of the United States, and consequently that they were, in judgment of law, null and void.

The decision of the Supreme Court of the United States was not the promulgation of any new doctrine: for the several local governments, before and since our revolution, never regarded the Indian nations **[*385]** within their territorial domains as subjects, or members of the body politic, and amenable individually to their jurisdiction. They treated the Indians within their respective territories as free and independent tribes, governed by their own laws and usages, under their own chiefs, and competent to act in a national character, and exercise self-government, and while residing within their own territories, owing no allegiance to the municipal laws of the whites. The judicial decisions in New-York and Tennessee, in 1810 and 1823, correspond with those more recently pronounced in the Supreme Court of the Union, and they explicitly recognised this historical fact and declared this doctrine. The original Indian nations were regarded and dealt with as proprietors of the soil which they claimed and occupied, but without the power of alienation, except to the governments which protected them, and had thrown over them and beyond them their assumed patented domains. Those governments asserted and enforced the exclusive right to extinguish Indian titles to lands,

enclosed within the exterior lines of their jurisdictions, by fair purchase, under the sanction of treaties; and they held all individual purchases from the Indians, whether made with them individually or collectively as tribes, to be absolutely null and void. The only power that could lawfully acquire the Indian title was the state, and a government grant was the only lawful source of title admitted in the courts of justice. The colonial and state governments, and the government of the United States, uniformly dealt upon these principles with the Indian nations dwelling within their territorial limits. The Indian **[*386]** tribes placed themselves under the protection of the whites, and they were cherished as dependent allies, but subject to such restraints and qualified control in their national capacity, as was considered by the whites to be indispensable to their own safety, and requisite to the due discharge of the duty of that protection.

(4.) There has been considerable diversity of opinion and much ingenious speculation, on the claim of right to this country by the Europeans, founded on the title by discovery. We have seen that with respect to the English colonists in America, the claim was modified, and much of this extravagance destroyed, by conceding to the native tribes their political rights and privileges, as dependent allies, and their qualified title to the soil. As far as Indian rights and territories were defined and acknowledged by the whites by treaty, there was no question in the case, for the whites were bound by the moral and national obligations of contract and good faith; and as far as Indian nations had formed themselves into regular organized governments, within reasonable and definite limits necessary for the hunter state, there would seem also to be no ground to deny the absolute nature of their territorial and political rights. But beyond these points our colonial ancestors were not willing to go. They seem to have deemed it to be unreasonable, and a perversion of the duties and design of the human race, to bar the Europeans, with their implements of husbandry and the arts, with their laws, their learning, their liberty and their religion, from all entrance into this mighty continent, lest they might trespass upon some part of the interminable forests, deserts and hunting grounds of an uncivilized, erratic and savage race of men. Nor could they be brought to entertain much respect for the loose and attenuated claim of such occupants, to the exclusive use of a country evidently fitted and intended by Providence to be subdued and cultivated, and to become the residence of civilized nations.

It was part of the original destiny and duty of the human race to *subdue the earth and till the* **[*387]** *ground from whence they were taken*. The white race of men, as Governor Ponall observed, have been "land-workers from the beginning;" and if unsettled and sparsely scattered tribes of hunters and fishermen show no

disposition or capacity to emerge from the savage to the agricultural and civilized state of man, their right to keep some of the fairest portions of the earth a mere wilderness, filled with wild beasts, for the sake of hunting, becomes utterly inconsistent with the civilization and moral improvement of mankind. Vattel did not place much value on the territorial rights of erratic races of people, who sparsely inhabited immense regions, and suffered them to remain a wilderness, because their occupation was war, and their subsistence drawn chiefly from the forest. He observed that the cultivation of the soil was an obligation imposed by nature upon mankind, and that the human race could not well subsist, or greatly multiply, if rude tribes, which had not advanced from the hunter state, were entitled to claim and retain all the boundless regions through which they might wander. If such a people will usurp more territory than they can subdue and cultivate, they have no right to complain, if a nation of cultivators puts in a claim for a part, and confines the natives within narrower limits. He alluded to the establishment of the French and English colonies in North America, as being, in his opinion, entirely lawful; and he extolled the moderation if William Penn, and of the first settlers in New-England, who are understood to have fairly purchased of the natives, from time to time, the lands they wished to colonize.

The original English emigrants came to this country with no slight confidence in the solidity of such doctrines, and in their right to possess, subdue and cultivate the American wilderness, as being, by the law of nature and the gift of Providence, open and common to **[*388]** the first occupants in the character of cultivators of the earth. The great patent of New-England, which was the foundation of the subsequent titles and subordinate charters in that country, and the opinions of grave and learned men, tended to confirm that confidence. According to Chalmers, the practice of the European world had constituted a law of nations which sternly disregarded the possession of the aborigines, because they had not been admitted into the society **[*389]** of nations. But whatever loose opinions might have been entertained, or latitudinary doctrines inculcated, in favour of the abstract right to possess and colonize America, it is certain that in point of fact the colonists were not satisfied, or did not deem it expedient to settle the country without the consent of the aborigines, procured by fair purchase, under the sanction of the civil authorities. The pretensions of the patent of King James were not relied on, and the prior Indian right to the soil of the country was generally, if not uniformly, recognised and respected by the New-England Puritans. They always negotiated with the Indian nations as distinct and independent powers; and neither the right of pre-emption, **[*390]** which was uniformly claimed and exercised, nor the state of dependence and pupilage under which the Indian tribes within their territorial limits were necessarily placed, were carried so far as to destroy the existence of the

Indians as self-governing communities. The manner in which the people of this country, through all periods of their colonial history, treated and dealt with the Indians, is a subject of deep interest, and well worthy of the thorough and accurate examination of every person conversant with our laws and history, and whose bosom glows with a generous warmth for the honour and welfare of his country.

(5.) The settlement of that part of America now composing the United States, has been attended with as little violence and aggression, on the part of the whites, in a national point of view, as were compatible with the fact of the entry of a race of civilized men into the territory of savages, and with the power and **[*391]** the determination to reclaim and occupy it. The colony of Massachusetts, in 1633, prohibited the purchase of lands from the natives, without license from the government; and the colony of Plymouth, in 1643, passed a similar law. Very strong and authentic evidence of the distinguished moderation and equity of the New-England governments towards the Indians, is to be found in the letter of Governor Winslow, of the Plymouth colony, of the 1st May, 1676, in which he states, that before King Philip's war, the English did not possess one foot of land in that colony but what was fairly obtained, by honest purchase from the Indian proprietors, and with the knowledge and allowance of the general court. The New-England annals abound with proofs of a just dealing with the Indians in respect to their lands. The people of all the New-England colonies settled their towns upon the basis of a title procured by fair purchase from the Indians with the consent of government, except in the few instances of lands acquired by conquest, after a war deemed to have been just and necessary. Instances are to be met with in the early annals of New-England, of regular and exemplary punishment of white persons, for acts of injustice and violence towards the Indians. The Massachusetts Legislature, in 1633, threw the protection of its government over the Indians in the enjoyment of their improved lands, hunting grounds and fishing places, by declaring that they should have relief **[*392]** in any of the courts as the English have.

The government of the colony of New-York has a claim equally fair with that of any part of America, to a policy uniformly just, temperate and pacific towards the Indians within the limits of its jurisdiction. While the Dutch held and governed the colony, the Indian titles were always respected, and extinguished by fair means, and with the consent of the natives. This policy was continued by their conquerors; and on the first settlement of the English at New-York, in 1665, it was ordained, that no purchase of lands from the Indians should be valid without the governor's license, and the execution of the purchase in his presence; and this salutary check to fraud and injustice was essentially continued. Regulations of that kind have been

the invariable American policy. The king, by proclamation, soon after the peace of 1763, prohibited purchases of Indian lands, unless at a public assembly of the Indians, and in the name of the crown, and under the superintendence of his colonial authorities. A prohibition of individual purchases of Indian lands, without the consent of government, has since been made a constitutional provision in New-York, Virginia and North Carolina. The colonists of New-York settled in the neighbourhood of the most formidable Indian confederacy know **[*393]** to the country, and came in contact with their possessions. But the Six Nations of Indians, of which the Mohawks were the head, placed themselves and their lands under the protection of the government of New-York, from the earliest periods of the colony administration. They were considered and treated as separate but dependent nations, and the friendship which subsisted between them and the Dutch, and their successors, the English, was cemented by treaties, alliances and kind offices. It continued unshaken from the first settlement of the Dutch on the shores of the Hudson and the Mohawk, down to the period of the American war; and the fidelity of that friendship is shown by the most honourable and the most undoubted attestations. And when we consider the long and distressing wars in which the Six Nations were involved, on our account, with the Canadian French, and the artful means which were used from time to time to detach them from our alliance, it must be granted, that the faith of treaties has no where, and at no time, been better observed, or maintained with a more intrepid spirit, than by those generous barbarians.

In New-Jersey, the proprietaries very early secured all their titles by Indian purchases; and all purchased to be made, without the consent of the **[*395]** government, were, by a law, in 1682, declared to be void. In west New-Jersey, in 1676, the liberality of the Quaker influence went so far as to provide by law, that in all trials where Indians, being natives, of the province, were concerned, the jury was to consist of six persons of the neighbourhood and six Indians. In 1758, the Indians, at a treaty at Easton, released, for a valuable consideration, all claims to lands in New-Jersey; and the legislature of Pennsylvania, in 1783, asserted it to have been their uniform practice, to extinguish Indian titles by fair purchase. The **[*396]** justice and equity of the original Indian purchases by William Penn, the founder of Pennsylvania, particularly at his memorable treaty of 1682, were known and celebrated throughout Europe. So, Governor Calvert, in 1633, planted Maryland, after fair purchases from the Indians; and in 1644, all Indian purchases, without the consent of the propriety of the province, were declared, by law, to be illegal and void. There were also repeated proofs upon record, of purchases from Indians, which covered a considerable part of the lower country of Virginia; and Mr. Jefferson says, that the upper country was acquired by purchases made in the

most unexceptionable form. The cases of unauthorized intrusions upon Indian lands happened in the early settlement of Virginia; for laws were very soon made in Virginia to protect Indians in their territorial possessions and rights from the frauds of the whites. Georgia was settled under similar good auspices; and Savannah, with a considerable tract of land, was purchased from the Creek Indians by Governor Oglethorpe, in 1733 and 1738, under the sanction of solemn treaties. In 1763, a large cession of lands in Georgia was also made by the Creeks, Cherokees and other nations of Indians.

The historical facts and documents to which we have referred, relative to the acquisition of the Indian lands in this country, are sufficient to vindicate the justice and moderation of our colonial ancestors. But wars with the natives resulted, almost inevitably, from the intrusion of the whites. The origin of those wars is not imputable to any general spirit of unkindness or injustice on the part of the colonial authorities, though they sometimes exhibited signal and severe proofs of the display of superior power and cruel retaliation. There were also, at times, acts of fraud and violence committed by individual colonists, prompted by cupidity and a consciousness of superior skill and power, and springing from a very blunt sense of the rights of savages. The causes of war with the Indians were inherent in the nature of the case. They arose from Indian jealousy of the presence and location of white people, for the Indians had the sagacity to perceive, what the subsequent history of this country has abundantly verified, that the destruction of their race must be the consequence of the settlements of the English, and their extension over the country. And **[*398]** if wars with them were never unjustly provoked by the colonial governments or people, yet they were, no doubt, stimulated on the part of the Indians, by the consciousness of impending danger, the suggestions of patriotism, and the influence of a fierce and lofty spirit of national independence. In all their wars with the whites, the means and the power of the parties were extremely unequal, and the Indians were sure to come out of the contest with great loss of numbers and territory, if not with almost total extermination. There was always much in the Indian character, in its earlier and better state, to excite admiration, as there was, and still is, in their sufferings, to excite sympathy.

The government of the United States, since the period of our independence, has pursued a steady system of pacific, just and paternal policy towards the Indians within their wide-spread territories. It has never insisted upon any other claim to the Indian lands, than the right of pre-emption, upon fair terms; and the plan of permanent annuities, which the United States, and the state of New-York, among others, have adopted, as one main ingredient in the consideration of purchases, has been attended with beneficial effects. The efforts of the national government to

protect the Indians from wars with each other, from their own propensity to intemperance, from the frauds and injustice of the **[*399]** whites, and to impart to them some of the essential blessings of civilization, have been steady and judicious, and reflect lustre on our national character. This affords some consolation under a view of the melancholy contrast between the original character of the Indians, when the Europeans first visited them and their present condition. We then found them a numerous, enterprising and proud-spirited race; and we now find them a feeble and degraded remnant, rapidly hastening to annihilation. The neighbourhood of the whites seems, hitherto, to have had an immoral influence upon Indian manners and habits, and to have destroyed all that was noble and elevated in the Indian character. They have generally, and with some very limited exceptions, been unable to share in the enjoyments, or to exist in the presence of civilization; and judging from their past history, the Indians of this continent appear to be destined, at no very distant period of time, to disappear with those vast forests which once covered the country, and the existence of which seems essential to their own.

[*399n.b] An able and well instructed writer in the *North American Review*, N.S. vol. xiii. (1826,) art. 5, has satisfactorily shown that the intentions of the government of the United States, in their treatment of the Indians, and in all their intercourse with them, have been uniformly just and benevolent. This was the case down to the year 1829. But under the administration of President Jackson, the policy and course of conduct of the government of the United States, in respect to the Indian tribes on the east side of the Mississippi, and south of the Ohio and the Potomac, was essentially changed. The act of Congress of May 28th, 1830, c. 148, first gave legislative sanction to the policy and plan of exchanging the Indian lands, within the limits of the individual states, for portions of the unoccupied territory of the United States west of the Mississippi, and for causing the Indian tribes or nations east of the Mississippi to be removed and established in that western territory. The plan was further matured by the act of Congress of July 14th, 1832, c. 228, and the execution of it became the systematic and settled policy of the administration of President Jackson. The protection which was directed to be afforded to the Indians, under the act of Congress of 30th March, 1802, and which was stipulated, by treaties, to be granted to them, has been withdrawn; and the Cherokees, in particular, have been left in a defenceless state, to the penal laws of the state of Georgia. The President, by his message to Congress of the 15th of February, 1832, declared his conviction, "that the destiny of the Indians within the settled portion of the United States, depends upon their entire and speedy migration to the country west of the Mississippi," and that if any of the Indians repel the offer of removal, they must remain "with such privileges and disabilities as the

respective states, within whose jurisdiction they be, my prescribe." He said again, in his message to Congress of December 7th, 1835, that "the plan of removing the aboriginal people, who yet remain within the settled portions of the United States, to the country west of the Mississippi, ought to be persisted in till the object is accomplished, and prosecuted with as much vigour as a just regard to their circumstances will permit, and as fast as their consent can be obtained. All preceding experiments for the improvement of the Indians have failed. They cannot live in contact with a civilized community and prosper."

The case of the southern Indians is one which appears to be in **[*400]** every view replete with difficulty and danger; and especially when we consider the different and conflicting views which have been taken of their rights by the supreme executive and judicial authorities of the Union.

Since the preceding part of this note was written, and in 1838, those Indians have finally been expelled, by military force, from the southern states, and transported across the Mississippi. President Van Buren, in his message to Congress of the 4th December, 1838, entered into an elaborate vindication of the policy of the Federal Government in the removal of the Indian nations from the east to the west side of the Mississippi, and held that a mixed occupancy of the same territory by the white and red man, was incompatible with the safety and happiness of either, and that their removal was dictated by necessity. He stated that the exclusive and peaceable possession of their new territory, west of any of the states, was guarantied to them by the United States; and that since the 4th of March, 1829, the Indian title to upwards of one hundred and sixteen millions of acres of land had been acquired, and that the United States had paid upwards of seventy-two millions of dollars to and on behalf of the Indians, in permanent annuities, lands, reservations, and the necessary expense of removal and settlement of them.

The condition of the Indian tribes in the northwestern part of the United States, is also deplorably wretched. They have outlived, in a great degree, the means of subsistence in the hunter state, and the tribes west of Lake Michigan, and on the waters of the Upper Mississippi, are unable to procure the requisite food and clothing. They perish from diseases incident to savage life, and arising from scanty and unwholesome food, listless indolence, intemperance, and the want of every comfort. These causes operate as fatally as wasteful wars with each other. See observations of General Lincoln, in *Mass. Historical Collections*, vol. v. 6, and of the Rev. Dr. Kirland, *ibid*. vol. iv. 67. *Governor Clinton's Discourse* before the New-York Historical Society, in the *Collections of the New-York Historical Society*, vol. ii. 37. *Memoir of Governor Cass, of the Michigan Territory,*

addressed to the Secretary of War, in October, 1821. *Major Long's Expedition to the Source of St. Peter's River*, in 1823, vol. ii. *passim*. Messrs. *Clark & Cass*, in the *Report to Congress*, in 1829. The Indians consider their country lost to them by encroachment and oppression, and they are irreclaimably jealous of their white neighbours. The restless and enterprising population on their borders, are exempt, no doubt, from much sympathy with Indian sufferings, and they are penetrated with perfect contempt of Indian rights. If it were not for the frontier garrisons and troops of the United States, officered by correct and discreet men, there would probably be a state of constant hostility between the Indians and the white borderers and hunters. They covet the Indian hunting grounds, and they will have them; and the Indians will finally be compelled by circumstances, annoyed as they are from without, and with a constantly and rapidly diminishing population, and with increasing poverty and misery, to recede from all the habitable parts of the Mississippi Valley and its tributary streams, until they become essentially extinguished, or lost to the eye of the civilized world.

In June, 1834, a bill was introduced into the House or Representatives of the Congress of the United States, for establishing an *Indian Territory* west of the Mississippi, extending from the Platte River on the north, and the state of Missouri and the Arkansas Territory on the east, to the Spanish Possessions south and west; and it was the favourite policy of the government to persuade all the Indian tribes, east of the Mississippi, to migrate and settle, as a confederacy of tribes, on that territory. The bill provided a government for the confederacy, to be established, with the free consent of all the Indian chiefs, and to be governed by Indian chiefs, under the control and patronage of the government of the United States; and it provided that the Indian confederacy might send a delegate to Congress. But the bill met with so much opposition in the house, that it was laid upon the table and never called up. An act of Congress was, however, passed on the 30th June, 1834, c. 161, consolidating many of the former provisions in the laws since the year 1800, and altering others, and establishing a new Indian code. It provided that the part of the United States west of the river Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also the part of the United States east of the Mississippi, and not within any state to which the Indian title has not been extinguished, should be taken and deemed to be the *Indian Country*. There was to be no trade with any of the Indians therein, without a license from , and under the regulations of, the general superintendent of the Indian affairs, or some agent thereof, and which licenses were subject to recall; no trader was to reside, or attempt to reside therein, without a license, nor must any foreigner to into the Indian country without a passport; no barter, except between Indians; and no persons other than Indians, are to hunt, trap, take or destroy any poultry or game

within the limits of any tribes with whom the United States have treaties. No person is to drive or convey horses, mules or cattle, to range or feed on any Indian lands, without the consent of the tribe to whom the lands belong. The superintendent and agents of Indian affairs are authorized to remove from the Indian country all persons found there contrary to law, and the President of the United States may employ military force for that purpose. All persons making a settlement on any lands belonging, secured or granted, by treaty with the United States, to any Indian tribe, or surveying, or attempting to survey the same, or to designate boundaries, are liable to a penalty, and to be removed by military force. All purchases from any Indian nation or tribe must be by treaty authorized by law. It is made penal to interfere by message, talk or correspondence with any Indian nation, tribe, chief or individual, with intent to violate any treaty of law; or to sell, give or dispose of to any Indian in the Indian country, spirituous liquors or wine. The criminal laws of the United States are declared to be in force in the Indian country; but they are not to extend to crimes committed by one Indian against the person or property of another Indian. In the repeal of most of the former statute provisions since 1800, relative to the Indians, the Intercourse Act of March 30th, 1802, is excepted, so far as respects the Indian tribes residing east of the Mississippi. By act of Congress of March 3d, 1847, the act of 1834 was amended, with more efficient protection to the Indians against the introduction of spirituous liquors and wine, and for the more safe appropriation to the Indians of the annuities, monies and goods paid or furnished by the United States to the Indian tribes. The character of this Indian territory came into discussion in the case of the United States v. Rogers, 4 *Howard's U.S. Rep.* 567; and it was adjudged that the Indian tribes residing within the territorial limits of the United States, (and this Indian territory is within such limits,)