

GEORGIA LANDS OCCUPIED BY THE CHEROKEE INDIANS.

REPORT OF A COMMITTEE,

AND

RESOLUTIONS OF THE LEGISLATURE

OF

THE STATE OF GEORGIA,

IN RELATION TO

CERTAIN LANDS OCCUPIED BY THE CHEROKEE INDIANS,

BELONGING TO THE SAID STATE.

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JANUARY 28, 1828.

Referred to the Committee on Indian Affairs.

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WASHINGTON :

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1828.



**REPORT.**

IN SENATE, DECEMBER 19, 1827.

*The Joint Committee upon the State of the Republic, to whom was referred so much of the late Governor's communication as regards the acquisition of the Georgia lands at present in the occupancy of the Cherokee Indians, and the absolute and jurisdictional right of the State to the same, report:*

That they have bestowed upon this momentous subject, the most mature and deliberate consideration, and although some of the positions which they feel warranted in occupying, may, at the first view, appear bold and novel, yet they cherish the hope, that, by adverting to the well ascertained and long established laws of nations, those positions will be found abundantly supported.

We are aware that our repeated appeals to the General Government upon this subject, so vitally interesting to the People of Georgia, have been looked upon as impertinent and obtrusive; but your committee believe that the State has been disposed to suffer in silence, so long as the evils under which she labored were sufferable; and that when her claims shall be fairly investigated, and it is seen how unreasonably they have been delayed, an enlightened and just community will pronounce the course she has pursued, to have been marked with great moderation and forbearance.

We propose, in the discharge of our present duty, to inquire, first, into the nature and present situation of our claim upon the General Government; and, second, to investigate the nature and extent of our title to the territory in question, considered abstractedly from our claim upon the General Government.

By the fourth section of the Articles of Agreement and Cession entered into on the 24th day of April, 1802, between the Commissioners of the United States, on the one part, and the Commissioners of the State of Georgia, on the other part, it was expressly stipulated and agreed, that the United States should, at their own expense, extinguish, for the use of Georgia, *as early as the same could be practicably obtained on reasonable terms*, the Indian title to all the lands within the State of Georgia.

It will hardly be contended, that this was a mere *naked promise*, and, therefore, to be violated at pleasure by the United States: for the contract imports, upon its face, a most ample and sufficient considera-

We are not ignorant of the fact, that the General Government, having the power in her own hands is disposed to put her own construction upon this promise, and to make herself the sole and exclusive judge of what may be considered "reasonable terms;" but we respectfully contend, that, if she designs to keep up *even the show* of justice, she will suffer this to be controlled by the same rule of construction applicable to all other contracts; that is to say, that the *words* used, shall be understood in that sense which is best calculated to effectuate the true intention of the contracting parties. The reciprocal objects intended to be accomplished by the United States and Georgia, by the contract in question, were few and simple. They intended that Georgia should cede to the United States a vast extent of territory therein described; that the United States should, at their own expense, and upon their own responsibility, extinguish, for the use of Georgia, whatever claim or title the Indians might have to the lands lying within her limits, and that this should be done "as early" as it could be, upon practicable and reasonable terms.

We consider it certain, from the terms of the contract itself, and particularly from the consideration which was paid, that it was the intention of both parties that the Indian title should *certainly*, at some time or other, be extinguished. The *time* was left indefinite and uncertain, not because it was contemplated that any circumstance should occur, or state of things exist, that should deprive Georgia of those lands; but because this State reposed such unbounded confidence in the justice and good faith of the General Government, as induced her confidently to believe that no opportunity would be permitted to escape, and that no fair and honorable exertion would be withheld, for the speedy and punctual fulfilment of the promise.

We admit, that, after much anxiety and delay, Georgia is about to reap the full benefit of the contract in question, so far as it regards her lands situate within the Creek nation of Indians; but the *manner* in which this has been accomplished, compels us to say, that we are less indebted to the General Government for the result, than to the exertions of our late able and patriotic Governor. Although Georgia is about to obtain the last foot of Creek lands to which she is entitled, yet it must be remembered that there is still a considerable portion of *Cherokee* lands to which she has precisely the same title, in relation to which the General Government is under the same obligation, and which, nevertheless, still remains in the possession of the Indians. By what motive or reason the General Government can be influenced, in so pertinaciously and unjustly refusing entirely to redeem her pledged faith to Georgia, we are unable to perceive. The whole civilized world knows that Georgia acted a gallant and distinguished part, during the Revolutionary war, in achieving our liberty and independence; and our sister States will do us the justice to testify, that, since that time, Georgia has not withheld her treasure or her sword from the defence of our common country and national rights. We mention these things, not by way of boasting, or out of vain glory, but to show that Georgia has violated none of the obligations by which she was

bound to her sister States, and, therefore, that there is the less justice in their violating their obligations to her. It will be remembered, that the articles of agreement and cession were entered into in 1802, and that they imposed upon the United States the obligation of procuring the relinquishment of the Indian title, so soon as the same could be done "peaceably" and upon "reasonable terms." Immediately upon the ratification of these articles, it became the duty of the General Government to improve every opportunity that might present itself, and, with all her influence and energies faithfully applied, to have sought diligently for opportunities to effect such relinquishment: she did not do so, but, on the contrary, manifested so much indifference, and for so long a time, that Georgia became dissatisfied, and took occasion respectfully to call the attention of the General Government to this subject—a liberty that she has several times since found it necessary to exercise, but which has either been treated with silent contempt, or has subjected her to reproach and calumny. That the United States have violated, most palpably, their contract with Georgia, we think is made evident, when it is remembered, that, since the ratification of the articles of agreement and cession, the Indians have been removed entirely from Ohio, Kentucky, North and South Carolina, Tennessee, Missouri, and almost all Arkansaw; and that, since that time, five or six times as much land as belonged to Georgia, and was in the possession of the Indians, has been acquired in Alabama, for the use of the United States, and that, too, upon "peaceable and reasonable" terms, besides large cessions in Mississippi, Illinois, Michigan, and Florida. And it is a fact, so notorious, that we presume no one will venture to dispute it, that, upon the termination of the late war with Great Britain and the Indians, the United States had it completely in their power to procure, for the use of Georgia, the principal part of the lands to which she was entitled, not only upon "peaceable and reasonable terms," but upon just such terms as they might have pleased to prescribe. But this was not done, or attempted to be done; on the contrary, the United States, by negotiation, effected, for their own use and aggrandizement, large cessions of territory in another part of the nation, and thereby threw the Indians in greater numbers upon our own territory, and so circumscribed their limits, as greatly to diminish the prospect of their willingness to make further cessions, either for the benefit of Georgia, or for any other purpose. And since that time, it has been the constant and favorite policy of the United States, not to hold out inducements to the Indians to yield up the possession of the Georgia lands, but so to add to their comforts, and so instruct them in the business of husbandry, as to attach them to their comforts, and as to attach them so firmly to their country and to their homes, as almost to destroy the last ray of hope that they would ever consent to part with the Georgia lands. It is now alleged, we understand, that it is impossible for the United States to obtain the land in question, for the use of Georgia, upon "peaceable and reasonable terms," and, therefore, that they are under no obligation to obtain them at all. By whom, and in what way, we beg leave to inquire, has

this impossibility been produced? Surely by the United States, and by their policy, and that, too, against the consent and remonstrance of Georgia. And is it possible that the General Government will consent in this way to benefit herself, and to take advantage of her own acts, and that, too, to the injury and oppression of one of her own members? For the dignity and honor of our common country, we earnestly hope not. But although the General Government is under this obligation, and from which she cannot honorably release herself in any other way than by complying with it; yet, judging from our past experience, we can scarcely venture to hope that she will redress our injuries, and establish our rights. We are apprized that this subject engaged the attention of the last, [Legislature] that the resolutions which they adopted were submitted to the President of the United States, and we are glad that, in reply, he condescended to express to our Senators in Congress a "wish to gratify the State;" but we are sorry that he added, "negotiation" (with Indians) "was hopeless, and that he could not consent to apply force." We are at liberty to understand this answer no otherwise than as a distinct and formal determination to take no step to obtain for, and secure to, Georgia her long delayed rights. We have waited upon and trusted to the justice and liberality of the United States for upwards of the fourth of a century, and the result to us is disappointment, insult, and injury.

From this gloomy and almost hopeless prospect, we turn our attention to the second branch of our inquiry, and trust that we shall be able to establish in the State of Georgia, a good, legal, and perfect title to the lands in question, and that we have the right, by any means in our power, to possess ourselves of them.

In the examination of this important and interesting question, we are necessarily carried back to the earliest history of this country. When the continent of America was first discovered, it was possessed and owned by various wandering tribes of savages, and the discoverers asserted successfully the right of occupying such parts as each discovered, and thereby they established their supreme command over it, asserting their claim both to *domain* and *empire*. By *domain* we mean that by "virtue of which a nation may use the country for the supply of its necessities, may dispose of it as it thinks proper, and derive from it every advantage it is capable of yielding;" and by "*empire*," we mean the rights of sovereign command, by which the nation directs and regulates, at its pleasure, every thing that passes in the country." Precisely in this way, and in no other, did Spain, France, England, Holland, and Portugal, obtain sovereignty over the portions of this country discovered by each. It may be contended, with much plausibility, that there is in these claims more of *force* than of *justice*; but they are claims which have been recognized and admitted by the whole civilized world; and it is unquestionably true, that, under such circumstances, *force* becomes right. This kind of title is not only good and valid, agreeably to the laws of nations, but is perfectly consistent with natural justice. The earth was certainly made for the benefit, comfort, and subsistence, of man, and should be so used

as to accommodate the greatest possible number of human beings. It was, therefore, perfectly in accordance with the design of nature, that the densely populated countries of Europe should possess themselves of the immense forests in America, which were used only as hunting grounds, and employ them in promoting the comforts and providing for the subsistence of their overflowing population. Acting, no doubt, upon these principles, Great Britain occupied and colonized the Province of Georgia, the limits of which, anterior to the Revolutionary war, were defined, and made to extend from the Atlantic coast to the Mississippi, and from the 31st to the 25th degrees of north latitude. The whole of this territory was made to form a Provincial Government; thus exercising the highest and most unequivocal acts of sovereignty. In this exercise, both of *domain* and *empire*, on the part of Great Britain, certain portions of territory were reserved for the *use* of the Indians, and the Indians themselves were declared to be under the protection of Great Britain; and the lands reserved were also under the sovereignty, protection, and dominion, of that Government. Thus it is seen, that the sovereignty of Great Britain over the whole of Georgia, was complete and perfect; that the absolute right to the soil was in her; that the Indians were under her *protection*; and that their possession was only permission. Things remained in this condition until the Revolutionary war, upon the termination of which, by the treaty of peace between the United States and the mother country, the sovereignty, to the full extent, as claimed, owned, and exercised, by Great Britain, over all the lands and Indians within the State of Georgia, passed to, and vested in, the People of this State. We have shewn, we trust, very clearly, that, at the end of the Revolutionary war, Georgia possessed, and had a right to exercise, absolute control and sovereignty over the whole of the territory lying within her then limits; that her claim to *domain* and *empire* was not disputed; that the absolute title to the soil was in her; that the Indians were under her *protection*; and that their possession was by her *permission*, as it had previously been by that of Great Britain. Thus far, we apprehend, the premises that we have established, and the conclusions that we have drawn, will not be disputed; for, if they are wrong, the very argument that proves them to be so, must defeat the title by which every foot of land in the United States is held: for they all derive title in the same way.

It now remains for us to shew, that, since the Revolutionary war, Georgia has done no act, and entered into no compact with her sister States, by which she has divested herself of any portion of her sovereignty, affecting her rights now in question. And this proposition will be supported, if we can shew that no such consequence can result from the Articles of Confederation, the Federal Constitution, or the Articles of Agreement and Cession of 1802. To show that the Articles of Confederation have divested Georgia of no portion of her sovereignty, it does not appear to us necessary to take any other ground than the very obvious one, that these Articles have been abrogated by the Federal Constitution, which was adopted in its place and

stead. But we contend, that, even prior to the adoption of that Constitution, they contained no provision, when properly construed, affecting the right in question. In the Articles of Confederation we find this provision : " Each State retains its *sovereignty*, freedom, and independence ; and every power, *jurisdiction*, and right, which is not, by the Confederation, *expressly* delegated to the United States, is reserved to the People of the States." We may search in vain, in the Articles of Confederation, for any *express* delegation of the right of sovereignty or jurisdiction, by Georgia to the United States, over the territory in controversy. No such express delegation was ever made. The consequence is obvious : it is reserved to the People of the State. Those who differ with us in opinion, may attempt to sustain themselves by one further provision in the Articles of Confederation. We allude to the power given the United States of regulating " trade" and managing all affairs with the Indians, not *members* of any particular State. But, by express provision, this power is, in no instance, to be exercised so as to infringe or violate the *legislative right* of any State within its own limits. We are by no means satisfied but that the Indians, resident within the limits of Georgia, may fairly be considered " *members*" of the State ; if so, the United States possess not the right to interfere with them, even so far as to " regulate trade." But, whether they be members of the State or not, the United States are expressly prohibited from interfering with them, in any way, so as to infringe or violate the legislative right of the State within her own limits. We think, therefore, that the Articles of Confederation have not affected our title in the least.

We next proceed to the inquiry, whether the State's title to, and rights of, sovereignty over the lands in controversy, have been affected by the Federal Constitution, and, if affected, to what extent ? We are not disposed to afford even the feeble aid of *our* example for frittering away the Constitution by *construction* ; we prefer to take that instrument *as it is*, and not to take from, or add to, its provisions. We have always believed, and yet do, that all powers, not expressly granted by that Constitution, or plainly *implied in*, and necessary and proper to the execution of the *expressly granted power*, are reserved to the States ; and we earnestly insist upon this rule of construction, so far as that instrument applies to the subject under consideration. In the third section of the fourth article of the Constitution we find this provision : " Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property *belonging to the United States* ; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State." We are unable to see what argument can be fairly drawn from this provision, to show that Georgia has surrendered up to the United States any portion of her rights, so as to affect the present question. This provision only gives to the United States the power to control or dispose of the territory or *property of the General Government* ; but it vests them with no power, whatever, to control or dispose of the territory or *property of any State* ; on the

contrary, it is expressly stipulated, that, in the exercise of this power, the claims of no particular State shall be prejudiced. It will not be contended, we apprehend, that, since the Articles of Agreement and Cession of 1802, the United States have the smallest shadow of title to the lands in controversy; and, if it were considered necessary, we could easily shew, that, even before that time, they had no well founded title. There is, therefore, nothing in this part of the Constitution, *expressly* or *impliedly*, divesting Georgia of the right of sovereignty in question; and, from the very fact that no such right was surrendered up into the hands of the United States, we are warranted in asserting that the right was retained by the State.

We understand that the power which the Constitution confers upon the President, by and with the advice and consent of the Senate, to make treaties, is claimed to have an influence upon the present question; but we are unable to discover any necessary connexion between this provision in the Constitution, and the question under consideration. This part of the Constitution, we have always understood, applied to *foreign affairs only*. We are apprized, however, that the United States have treated with various tribes of Indians at different times, and that those treaties have been submitted to the Senate for ratification; but, if we mistake not, since the adoption of the Constitution, Virginia, Ohio, New York, and Kentucky, have exercised the right of treating with the Indians residing within their limits; and their right to do so has not, so far as we know or believe, been disputed. But, upon this point, we feel no sort of solicitude: for it is sufficient for our purpose, that, in the constitutional provision now under review, there is no *express* or *plainly implied* surrender, on the part of Georgia, of the right of sovereignty to the territory in question. If there is any other provision in the Federal Constitution affecting this question, we are not apprized of it; and we consequently arrive at the conclusion, that the rights and powers of Georgia, in and to the lands in question, remain precisely where they stood immediately upon the conclusion of the Revolutionary war, with the exception that Georgia has, in common with all the other States, given up to the General Government a portion of her right of *empire*; but she has surrendered that right no farther, in relation to the territory in dispute, than she has in relation to all the rest of her territory. In aid of our opinion upon the question of title, we beg leave to refer to the decision made by the Supreme Court of the United States, in the famous case of Fletcher & Peck, which fully establishes the principle, that the "Legislature of Georgia, unless restrained by its own *Constitution*, possesses the power of disposing of the unappropriated lands within her own limits, in such manner as her own judgment may dictate." And the same case establishes the further principle, that "the Indian title is only permissive and temporary, and not at all inconsistent with a *seisin in fee* on the part of Georgia." We need only add, that this decision was made long subsequent to the adoption of the Federal Constitution.

By the Articles of Agreement and Cession, of eighteen hundred and

two, Georgia parted with, and gave up, all her claims and rights, both of *domain* and empire, to the territory thereby ceded to the United States ; but these articles contain no *formal* and *express* surrender of any such rights to the territory reserved. We are aware that such surrender is claimed to be implied from the term “ Indian title,” as there used. But, when the subject is properly understood, we contend that this conclusion does not necessarily result from the premises. This term was not intended, and cannot be understood, as building up, and vesting in the Indians, any kind of title to the lands in controversy ; nor was it intended to add to, or detract from, the title which they already had. It was only used as a term descriptive of that title. We have already seen what that title was ; that it was a mere possessory one ; and that they had so little interest in the soil, that their possession was not inconsistent with a *seisin* in fee on the part of Georgia. But it is contended that, by the Articles of Agreement and Cession, a *consideration* was contemplated to be paid by the United States to the Indians for their relinquishment of this title, and, therefore, that it was such of a character as was entitled to respect, and as could not be taken from them, unless by their consent. We are of a different opinion. We have already seen the fragile tenure by which they held, and do yet hold, those lands ; but however slender it may have been, yet some act was necessary to be done by the United States, or Georgia, in order to oust them of possession. This act must necessarily have been of either a warlike or pacific character. If of a warlike character, no consideration of a pecuniary nature could be necessary ; but if of a pacific character, then this object was to be accomplished by negotiation, and a consideration would necessarily be the result. Whenever it has been necessary to accomplish a similar act with the Cherokees, or any other nation of Indians, by either of the means just mentioned, from obvious motives of policy, as well as humanity, the United States have preferred resorting to negotiation and presents. In all such instances, the United States were, by no means, *bound* to resort to such measures ; they did so from *choice*. This custom was well known to the contracting parties to the Articles of Agreement and Cession, at the time it was entered into, and the relinquishment of the Indian title was intended to be effected in the same way ; and the provision in question was simply intended to make the United States sustain all the expense of negotiation, presents, and consideration, which otherwise would have fallen upon Georgia, had she proceeded to the accomplishment of the same object by *pacific means*. But there is nothing in this provision which *prevents* the United States or Georgia from resorting to *force* ; on the contrary, this right seems to be admitted, although the United States would not *bind* themselves to use it. At all events, it is evident that if Georgia possessed this right before entering into those articles, she possesses it yet : for a surrender of it is no where to be found. Before Georgia became a party to the Articles of Agreement and Cession, she could rightfully have possessed herself of those lands, either by negotiation with the Indians, or by *force* ; and she had determined, in one of the two ways, to do so ; but, by this con-

tract, she made it the duty of the United States to sustain the expense, of obtaining for her the possession ; provided it could be done upon reasonable terms, and by negotiation. But, in case it should become necessary to resort to *force*, this contract with the United States makes no provision ; the consequence is, that Georgia is left untrammelled and at full liberty to prosecute her rights in that point of view, according to her own discretion, and as though no contract had been made. Your committee, therefore, arrive at this conclusion, that, anterior to the Revolutionary war, the lands in question belonged to Great Britain ; that the right of sovereignty, both as to *domain* and *empire*, was complete and perfect in her ; that the possession of the Indians was permissive ; that they were under the protection of that Government ; that their title was temporary ; that they were mere tenants at will ; and that such tenancy might have been determined at any moment, either by negotiation or force, at the pleasure of Great Britain : That, upon the termination of the Revolutionary war, and by the treaty of peace, Georgia assumed all the rights and powers, in relation to the lands and Indians in question, which theretofore belonged to Great Britain ; that, since that time, she has not divested herself of any right or power in relation to the lands now in question, further than she has in relation to all the balance of her territory ; and that she is now at full liberty, and has the power and right, to possess herself, by any means she may choose to employ, of the lands in dispute, and to extend over them her authority and laws. Although your committee believe that the absolute title to the lands in controversy is in Georgia, and that she may rightfully possess herself of them, when and by what means she pleases, yet they would not recommend an exercise of that right till all other means fail. We are aware that the Cherokee Indians talk extravagantly of their devotion to the land of their fathers, and of their attachment to their homes ; and that they have gone very far towards convincing the General Government that negotiation with them, with the view of procuring their relinquishment of title to the Georgia lands, will be "hopeless ;" yet we do confidently believe that they have been induced to assume this lofty bearing, by the protection and encouragement which has been afforded them by the United States, and that they will speak a totally different language, if the General Government will change its policy towards them, and apprise them of the nature and extent of the Georgia title to their lands, and what will be the probable consequence of their remaining refractory.

Your committee would recommend that one other, and the last, appeal be made to the General Government, with a view to open a negotiation with the Cherokee Indians upon this subject ; that the United States do instruct their commissioners to submit this report to the said Indians ; that if no such negotiation is opened, or if it is, and it proves to be unsuccessful, that, then, the next Legislature is recommended to take into consideration the propriety of using the most efficient measures for taking possession of, and extending our authority and laws over the whole of the lands in controversy. Your

committee, in the true spirit of liberality, and for the alone purpose of avoiding any difficulty or misunderstanding with either the General Government or the Cherokee Indians, would recommend to the People of Georgia to accept any treaty that may be made between the United States and those Indians, securing to this State so much of the lands in question as may remain, after making reserves, for a term of years, for life, or even in fee simple, to the use of particular Indians, not to exceed, in the aggregate, one-sixth part of the whole territory. But, if all this will not do; if the United States will not redeem her pledged honor; and if the Indians continue to turn a deaf ear to the voice of reason and of friendship; we now solemnly warn them of the consequence. The lands in question *belong* to Georgia—she *must* and she *will* have them. Influenced by the foregoing considerations, your committee beg leave to offer the following resolutions:

*Resolved*, That the United States, in failing to procure the lands in controversy "as early" as the same could be done upon "peaceable" and "reasonable terms," have palpably violated their contract with Georgia, and are now bound, at all hazards, and without regard to terms, to procure said lands for the use of Georgia.

*Resolved*, That the policy which has been pursued by the United States towards the Cherokee Indians, has not been in good faith toward Georgia; and that, as all the difficulties which now exist to an extinguishment of the Indian title, have resulted from the acts of policy of the United States, it would be unjust and dishonorable in them to take shelter behind those difficulties.

*Resolved*, That all the lands appropriated and unappropriated, which lie within the conventional limits of Georgia, belong to her absolutely; that the title is in her; that the Indians are tenants at her will; that she may, at any time she pleases, determine that tenancy by taking possession of the premises: and that Georgia has the right to extend her authority and laws over the whole territory, and to coerce obedience to them, from all descriptions of people, be they white, red, or black, who reside within her limits.

*Resolved*, That Georgia entertains for the General Government so high a regard, and is so solicitous to do no act that can disturb, or tend to disturb, the public tranquillity, that she will not attempt to enforce her rights by violence, until all other means of redress fail.

*Resolved*, That, to avoid a catastrophe which none would more sincerely deplore than ourselves, we make this solemn appeal to the President of the United States, that he take such steps as are usual, and as he may deem expedient and proper for the purpose of, and preparatory to, the holding of a treaty with the Cherokee Indians, the object of which shall be the extinguishment of their title to all the lands now in their possession within the limits of Georgia.

*Resolved*, That, if such treaty be held, the President be respectfully requested to instruct the Commissioners to lay a copy of this report before the Indians in Convention, with such comments as may be considered just and proper, upon the nature and extent of the Georgia title to the lands in controversy, and the probable consequences that

would result from a continued refusal upon the part of the Indians to part with those lands.

*Resolved*, That His Excellency the Governor be requested to forward a copy of the foregoing report and resolutions to the President of the United States, and one to our Senators and Representatives in Congress, with a request that they use their best exertions to obtain the object therein expressed.

*Resolved*, That the late proceedings of the Cherokee Indians in framing a Constitution for their Nation, and preparing to establish a Government independent of Georgia, is inconsistent with the rights of the said State, and therefore not recognized by this Government, and ought to be decidedly discountenanced by the General Government.

Read and agreed to.

THOMAS STOCKS, *Pres'd't.*

Attest—WM. Y. HANSELL, *Sec'y.*

In the House of Representatives, 24th December, 1827—Read and concurred in.

IRBY HUDSON, *Speaker.*

Attest—WM. C. DAWSON, *Clerk.*

Resolutions approved, December 27, 1827.

JOHN FORSYTH, *Governor.*

