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contracts for the transmission of money, free of charge, to those posts where the United States should designate it to be put. Such a power in the Secretary of the Treasury is a necessary one for the transaction of the business of the Government, pervading, as it does, every part of the country. The exercise of it, however, requires great care and caution in the selection of agents for such a purpose, and no authority short of the most certain should be taken to establish the representative character of any one for a private company or corporation to enter into such a contract with the Secretary.

The United States, as plaintiff in this action, has failed to establish the contract which it alleges in its declaration had been made with the City Bank of Columbus, for the transmission of money; and we direct the judgment given in the court below to be affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK, EX REL. ASA CUTLER, JOHN UNDERHILL, JUN., AND ARZA UNDERHILL, PLAINTIFFS IN ERROR, *v.* EDGAR C. DIBBLE, COUNTY JUDGE OF GENESEE COUNTY.

A statute of the State of New York, making it unlawful for any persons other than Indians to settle or reside upon any lands belonging to or occupied by any nation or tribe of Indians within that State, and providing for the summary ejectment of such persons, is not in conflict with the Constitution of the United States, or any treaty, or act of Congress, and the proceedings under it did not deprive the persons thus removed of property or rights secured to them by any treaty or act of Congress.

THIS case was brought up from the Supreme Court of the State of New York by a writ of error issued under the 25th section of the judiciary act.

The case is stated in the opinion of the court, and is reported in the New York State courts, in 18 Barb., 412, and 2d vol. of Smith's Reports of the Court of Appeals, 203, being 16 New York Reports.

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It was argued by *Mr. Brown* and *Mr. Gillet* for the plaintiffs in error, and by *Mr. Martindale* for the defendant.

The only question in this court was, whether the statute of 1821 was in conflict with the Constitution of the United States, or any treaty, or act of Congress, and whether the proceeding under it had deprived the relators of property or rights secured to them by any treaty or act of Congress.

The counsel for the plaintiffs in error contended that the Constitution of the United States had given to Congress power to regulate commerce with the Indian tribes; that this power had been exercised by the passage of the act of 1802, (2 Stat. at L., 139;) that the act of 1834 (4 Stat. at L., 729) repealed so much of this act as applied to the Indians west of the Mississippi, but left it operative upon the Indians east of the Mississippi; that the law of New York was repugnant to this act of Congress; that by the treaty of 1794 (7 Stat. at L., 45, art. 2) the President of the United States was made the exclusive judge of the force and measures necessary to remove intruders upon these very Indians; that both these enactments could not stand, and if so, the State law must give way; and that there were reservations in New York where no treaties were in force upon which the State law could properly operate. It was also contended, that even if the New York law of 1821 was not invalid at the time of its passage, it had been superseded and annulled by the treaties which the United States had made with the Indians in question in 1838 and 1842, so far at least that Ogden and Fellows could enjoy the rights which those treaties secured to them.

In support of the views first mentioned, the counsel referred to the well-known cases of *Sturges v. Crowninshield*, and *Gibbons v. Ogden*, and also to 5 Howard, 410; 14 Peters, 540; 3 Cowen, 714; 7 Howard, 283.

The counsel for the defendant in error contended that the act of Congress of 1802 had no application to the New York Indians; that, from the earliest history of the colony of New

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York, the Indians, and especially the Senecas, had been under the protection of her laws, and that such protection had been continued from the time of the Revolution; that the pre-emptive right to the Indian lands within the State of New York belonged to the State, and was never ceded to the United States; that, consequently, the power given to Congress to regulate commerce, did not apply to such tribes; that the United States by their measures had been the means of breaking up the tribe of Seneca Indians into small and detached bands or reservations, which were necessarily placed under the police regulations of the State, made to protect the public peace. With respect to the alleged treaties, the counsel contended that the Tonawandas had never executed them, but constantly and unanimously refused to be bound by them; that they have never received any portion of the consideration moneys provided in said deeds; that the land upon which they now lived had always been occupied by them, and that neither Congress nor the treaty-making power could arbitrarily take away their property.

Mr. Justice GRIER delivered the opinion of the court.

This case is brought before us by a writ of error to the Supreme Court of New York, under the 25th section of the judiciary act. It had its origin in a proceeding before the county judge of Genesee county, instituted by the district attorney against Asa Cutler, John Underhill, and Arza Underhill, the relators, pursuant to the provisions of an act of Assembly entitled "An act respecting intrusion on Indian lands," passed March 31, 1821.

This act made it unlawful for any persons other than Indians to settle and reside upon lands belonging to or occupied by any tribe of Indians, and declared void all contracts made by any Indians, whereby any other than Indians should be permitted to reside on such lands; and if any persons should settle or reside on any such lands contrary to the act, it was made the duty of any judge of any county court where such lands were situated, on complaint made to him, and due proof of such residence or settlement, to issue his warrant, directed to the sheriff, commanding him to remove such persons.



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On notice to the relators of the institution of this proceeding, they appeared before the judge and pleaded to his jurisdiction, on the ground that they had entered and occupied the lands, claiming title under a written instrument adversely to the Seneca nation of Indians, and therefore, by the Constitution and laws of the State, they were entitled to a trial by jury, according to the course of the common law, and could not thus be removed by summary proceedings under this act.

This plea was overruled by the judge. The relators then pleaded that this tract of 12,800 acres, called the Tonawanda reservation, was not owned by the Seneca Indians; that by a treaty made with the United States on the 20th of May, 1842, the Seneca nation of Indians had by indenture set forth in the treaty conveyed to Thomas Ludlow Ogden and Joseph Fellows this tract of land, with others; that this grant was duly confirmed by the State of Massachusetts, pursuant to the provisions of the act of cession made between that State and the State of New York, on the 16th of December, 1786; that the whole amount of the consideration stipulated by the treaty and deed had been paid by said Ogden and Fellows; and that relators were in possession under said Ogden and Fellows, and adversely to the Indians. They therefore denied the power and authority of the judge to determine their right to the lands in their possession, or to remove them, under the powers conferred by the act of Assembly of New York.

After hearing the parties, the judge decided against the relators, who removed the proceedings by *certiorari* to the Supreme Court.

The record contains the testimony on both sides, and numerous documents concerning the treaty with the Seneca Indians, and also the subsequent proceedings by the officers of the Government. It will not be necessary to a clear apprehension of our decision in this case to state them particularly, nor is it material to our inquiry whether the judge may have erred in his decision, that "the Seneca nation had not duly granted and conveyed the reserve in question to Ogden and Fellows."

The Supreme Court and Court of Appeals of New York have decided, "that the provisions of this act respecting intrusions

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on Indian lands, which authorize the summary removal of persons, other than Indians, who settle or reside upon lands belonging to or occupied by any nation or tribe of Indians, are constitutional, and that a citizen who enters upon their land before their title has been extinguished, and they have removed, or have been removed by the act of the Government, can acquire no such right of property or possession as is within the protection of the provisions of the Constitution which secure a trial by jury." They therefore affirmed the judgment of the county judge.

The only question which this court can be called on to decide is, whether this law is in conflict with the Constitution of the United States, or any treaty or act of Congress, and whether this proceeding under it has deprived the relators of property or rights secured to them by any treaty or act of Congress.

The statute in question is a police regulation for the protection of the Indians from intrusion of the white people, and to preserve the peace. It is the dictate of a prudent and just policy. Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered. The act is therefore not contrary to the Constitution of the United States.

Nor is this statute in conflict with any act of Congress, as no law of Congress can be found which authorizes white men to intrude on the possessions of Indians.

Is it in conflict with rights acquired by Ogden and Fellows, under the treaty, and contract making a part of it? If the treaty of 1842 had been executed; if the United States, in their character of sovereign guardian of this nation, had delivered up the possession to these purchasers, then this statute of New York, when applied to them, would clearly be in conflict with their rights acquired under the treaty. But, by the case, it is admitted that the Indians have not been removed by the Uni-



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ted States. The Tonawanda band is in peaceable possession of its reserve, and has hitherto refused to surrender it. Unless, therefore, these persons claiming under Ogden and Fellows have by the treaty a right of entry into these lands, and, as a consequence, to forcibly oust the possessors or turn them out by action of ejectment, they cannot allege that this summary removal by authority of the statute of New York is in conflict with the treaty, or any rights secured to the purchasers under it. This proceeding does not affect their title. The question of the validity of this treaty to bind the Tonawanda band is one to be decided, not by the courts, but by the political power which acted for and with the Indians. So far as the statute of New York is concerned, it only requires that the Indians be in possession; they are not bound to show that they are owners. They may invoke the aid of the statute against all white intruders, so long as they remain in the peaceable possession of their lands.

The relators cannot claim the protection of the treaty, unless they have a right of entry given them by it, before the Indians are removed by the Government. This court have decided, in the case of *Fellows v. Blacksmith*, (19 Howard, 366,) that this treaty has made no provision as to the mode or manner in which the removal of the Indians or the surrender of their reservations was to take place; that it can be carried into execution only by the authority or power of the Government which was a party to it. The Indians are to be removed to their new homes by their guardians, the United States, and cannot be expelled by irregular force or violence of the individuals who claim to have purchased their lands, nor even by the intervention of the courts of justice. Until such removal and surrender of possession by the intervention of the Government of the United States, the Indians and their possessions are protected, by the laws of New York, from the intrusion of their white neighbors.

We are of opinion, therefore, that this statute and the proceeding in this case are not in conflict with the treaty in question, or with any act of Congress, or with the Constitution of the United States. The judgment of the Court of Appeals of New York is therefore affirmed, with costs.