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GRADUATE COLLEGE

# THE JUDICIAL HISTORY OF THE CHEROKEE NATION FROM 1721 TO 1835

A DISSERTATION

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BY

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# THE JUDICIAL HISTORY OF THE CHEROKEE NATION FROM 1721 TO 1835

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## CHAPTER I

## INTRODUCTION AND EARLY HISTORY OF THE CHEROKEES

The Indian tribes of North America for the most part operated under a simple, loose type of political association. Only the famous Iroquois Confederacy developed an elaborate government and permanent legal pattern. The Cherokees, located south of the Ohio, while never achieving the national unity of their northern cousins, did attain a remarkable level of law and government. Early trappers and explorers who journeyed among the southeastern tribes were deeply impressed with the Cherokees in this regard. Historians have paid high tribute to Cherokee political and legal achievements. Such regard finds expression in the words of Charles C. Royce:

> The Cherokee Nation has probably occupied a more prominent place in the affairs and history of what is now the United States . . . than any other tribe, nation, or confederacy of Indians, unless it be possible to except the powerful and warlike tribe of Iroquois or Six Nations of New York.[1]

Albert Bushnell Hart has added that they were a "conspicuous element in the history of North America and

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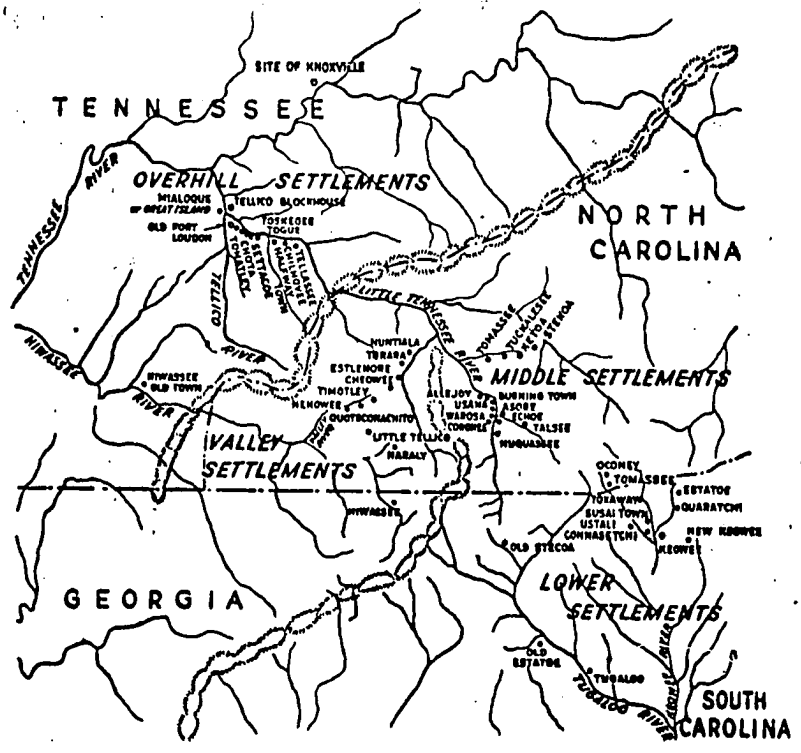
[1]Charles C. Royce, "The Cherokee Nation of Indians," Fifth Annual Report of the Bureau of American Ethnology (Washington: U. S. Government Printing Office, 1887), Part 2, p. 121.




Cherokee Settlements, 1762-1776
From The Eastern Cherokees by William H. Gilbert

were probably the largest single tribe in the eastern United States."[2] Certainly, their being recognized as a force in American history, and their determined and sustained maintenance of a national identity, despite the vicissitudes of white contact, were noteworthy achievements. A bulwark of Cherokee national identity was the tribal judicial system. The evolution of this system as it existed from 1721 to 1835 has been selected as a topic of study. In so doing, tribal law, council proceedings, both legislative and judicial, and clan relations will be examined.

During the early colonial period the Cherokee domain extended from the interlocking head-streams of the Kanawha and Tennessee Rivers southward, almost to the present site of Atlanta, Georgia, and from the Blue Ridge Mountains on the east, to the great Cumberland range on the west. Cherokee territory covered an area of about 40,000 square miles and included portions of the present states of Virginia, Tennessee, North Carolina, Georgia, and Alabama. Their principal towns were located along the entire length of the Little Tennessee; Cherokee settlements also were situated on the headwaters of the Savannah, Hiwassee, and Tuckasegee Rivers. Echota, commonly regarded as their national capital, was located on the south bank of the Tennessee a few miles above

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[2]Albert Bushnell Hart, Basis of American History (New York: Harper Brothers, 1906), 166.

the mouth of the Tellico River.[3]

Although it is likely that the Cherokees had occasional contacts with the French and Spaniards during the sixteenth and seventeenth centuries, their first substantial experience with the Europeans came from the English.

Itinerant traders from the English settlements trafficked among the Cherokees beginning about 1673. The first white trader to settle permanently in the Cherokee country was Eleazar Wiggan. Arriving there about 1711, he gained their confidence and within a short time, he was affectionately called "The Old Rabbit."[4]

The first record of the Cherokees signing away territory occurred in 1721 when Francis Nicholson, Governor of the Carolinas, apprehensive of French activities, invited the chiefs to Charlestown. Delegates from thirty-seven towns attended. After smoking the pipe of peace, the

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[3]James Mooney, "Myths of the Cherokee," Nineteenth Annual Report of the Bureau of American Ethnology, 1897-98 (Washington: Government Printing Office, 1900), Part I, p. 14; Walter H. Mohr, Federal Indian Relations 1774-1788 (Philadelphia: University of Pennsylvania Press, 1933), 3; see also U. B. Phillips, "Georgia and State Rights," Annual Report of the American Historical Association, II (1901), 66.

[4]Henry T. Malone, Cherokees of the Old South, A People In Transition (Athens, Georgia: University of Georgia Press, 1956) 6; earlier writers say that Cornelius Dougherty, an Irishman from Virginia, established himself as the first trader among the Cherokees in 1670 and spent the rest of his life with them. See John Haywood, The Natural and Aboriginal History of Tennessee up to the First Settlement Therein by the White People in the Year 1768 (Nashville: George Wilson, 1828), 233; Mooney, loc. cit., 31.

Governor distributed presents and agreed to define boundaries and appoint an agent for them.[5]

This meeting was important in Cherokee history not only because it marked the beginning of a long series of land cessions which ceased only after all of their ancestral homes were gone, but also because it marked the beginning of a nationwide tribal organization. Responding to Governor Nicholson's request, the delegates elected from among themselves a principal chief whom the Governor could look to personally as a representative of the entire nation.[6] This idea of a national chief was given further encouragement a decade later by Sir Alexander Cuming.

Cuming received a commission to visit the Cherokees in 1730. Leaving Charleston during March of that year, he traveled three hundred miles and arrived at Keowee, one of the lower towns on the Keowee River, about three weeks later. Going to the home of a Joseph Baker, a white trader, who lived in Keowee, he and his party met another trader Ludovic Grant, a Scotchman from Tellico, who had married a Cherokee woman and had lived in the nation for ten years. While in their company and, perhaps by their suggestion, a meeting was arranged with the chiefs from the nearby towns. In the course of the council, Cuming learned that Moytoy, leader of

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[5]Royce, op. cit., 144.

[6]Marion L. Starkey, The Cherokee Nation (New York: Alfred A. Knoff, 1946), 12; see also Malone, op. cit., 26.

the town of Tellico, located on the Tennessee River about a hundred and fifty miles north, was to be made head chief of the town.[7]

Being advised by Grant that it was a place of considerable size and centrally located in the nation, Cuming expressed a desire to attend the ceremonies. En route, Cuming spent each night in a different town, and from his own account of the matter he was very well received. He reported to the London Daily Mail that the coronation of Moytoy took place at Nequassie.[8] A list of the Cherokee towns prepared some thirty years later, shows the town of Nucasse to be closer in spelling to that of Nequassie than any other town on the list.[9] One writer, in commenting on the location, stated that Nequassie was located on the present site of Franklin in western North Carolina.[10] But whatever the location, it would be significant only in marking the spot where Cuming hoped to carry out his plan of making the Cherokee country into a national state by designating one of its chiefs as head executive. According to Cuming, Moytoy was crowned king of Tellico by having placed on his head an

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[7]Chapman J. Milling, Red Carolinians (Chapel Hill: The University of North Carolina Press, 1940), 275-276.

[8]Ibid.; see Samuel G. Drake, Aboriginal Races of North America (New York: John B. Alden, 1880), 367.

[9]Mark Van Doren (ed.), Travels of William Bartram (New York: Macy-Masius, 1928), 301.

[10]W. R. L. Smith, The Story of the Cherokees (Cleveland: Church of God Publishing House, 1928), 52.

opossum skin cap, dyed red and yellow.[11] Thereupon, Cuming, in the presence of twelve other Englishmen and with the consent and approval of the Cherokee delegates representing all parts of the nation, named Moytoy chief executive of the Cherokee Nation.[12] Several writers contended that the Cherokee village chiefs did not comprehend the legal or political connotation of the word king. In expressing himself on the subject one person wrote:

> I have often heard of Indian Kings, but never saw any.--How any term used by the Indians in their own tongue, for the chief man of a nation, could be rendered King, I know not. The chief of a nation is neither a supreme ruler, monarch or potentate.[13]

Yet, it doesn't seem reasonable that the Cherokee chiefs, once being made aware of such a high office as head man of the entire nation, whatever its legal or political connotation, would soon forget it. Moytoy and six other Cherokee chiefs accompanied Cuming to London and signed the first treaty of peace and commerce between England and the Cherokees, thus creating the fiction of Indian sovereignty which was to plague British and American administrators and jurists for the next two hundred years.[14]

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[11]Starr, op. cit., 26. [12]Drake, op. cit., 367.

[13]William M. Darlington (ed.), An Account of the Remarkable Occurrences in the Life and Travels of Col. James Smith, During His Captivity with the Indians in the Years 1755, 56, 57, 58, and 59 (Cincinnati: Robert Clarke and Company, 1870), 147.

[14]Smith, op. cit., 54.

Impetus to a national awareness among the Cherokees came in 1736, when Christian Gottlieb Priber, a German settler from Charleston, entered the Indian country and soon established himself in high regard among the Cherokees.[15] Adopting their language and customs, he urged the Cherokee chiefs to hold on to their lands, trade with the French as well as with the English, and centralize their government. By so doing, he assured the Cherokee leaders, their nation could become an empire and hold the balance of power between France and England. In keeping with this plan, he established himself at Tellico and named the town's leading man as emperor of the Cherokee Empire. His own modest title in this arrangement was "His Chief Secretary of State".

Priber's venture failed for he was arrested by the English, but his influence on the Cherokees was considerable. He was accused of having written a manuscript, found on his person at the time of capture, which purported to be a code of laws for Cherokees as well as "Rules of Government" for the Cherokee towns.[16] This manuscript was published as a "letter from Frederica" published in the South Carolina Gazette during his imprisonment at Frederica, Georgia.

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[15]Milling, op. cit., 278; see Mooney, loc. cit., 37.

[16]James Adair, History of the American Indians, ed. Samuel Cole Williams (Johnson City: Watauga Press, 1930), 252-253. See also Verner W. Crane, "A Last Utopia of the First American Frontier," Sewanee Review, XXVII (January, 1919), 48-61.

Priber's manuscript, if it did exist, may explain why some writers insist that Echota was the only place of refuge in the nation. The Frederica letter maintains that Priber's system of laws provided for a city of refuge where all "Criminals, Debtors and Slaves" could "fly thither from justice or their masters."[17] This could have referred to Echota, the traditional Cherokee capital, which in Adair's time,[18] a few years later, was regarded as a city of refuge to which criminals might go. Some authorities, however, report four refuge towns : the Cherokee Nation many years after Priber.

Encircled as they were by the mountains in the Great Cumberland and Tennessee Valleys, the Cherokees had almost ideal geographical surroundings for developing a strong, cohesive national state. Undoubtedly, the Cherokees used rivers and mountains to describe the outer limits of their domain, although in their primitive state they were never able to take full advantage of these natural boundaries to create a closely-knit confederacy. Commenting on this fact

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[17]The Frederica letter as it was reported by the South Carolina Gazette of August 15, 1743 is given in a rather lengthy footnote in Adair, Williams, ed., op. cit., 253. See Samuel Cole Williams, (ed.), Early Travels in the Tennessee Country 1540-1800 (Johnson City, Tennessee: Watauga Press, 1928), 154 and Mooney, loc. cit., 36.

[18]James Adair was a well-educated man of Scotch-Irish descent who first began to trade with the Cherokees and the Catawbas in 1735. He attained much fame among the Indians and traded with them for almost forty years. In 1775 he published in London a book entitled The History of the American Indians.

James Mooney wrote:

> Holding as they did the great mountain barrier between the English settlements on the coast and the French or Spanish garrisons along the Mississippi and the Ohio, their geographic position, no less than their superior number, would have given them the balance of power in the south but for a looseness of tribal organization . . . .[19]

Another writer in discussing the significance of their mountains, advanced the opinion that they created a situation not unlike that of the ancient Greek city-states in which particularium was favored above that of strong centralization. While both views are undoubtedly correct in that internal barriers tended to segment the tribe into autonomus pockets whereas outlying mountain ranges were conducive to giving form and shape to a national periphery.[20]

The Cherokees were no exception to the general rule that tribal geography followed no fixed lines. That is to say that Indian tribes in general did not erect man-made markers explicitly for the purpose of circumscribing and marking off political boundary lines. Undoubtedly, a warrior, trapper, or a person well versed in particular Indian practices, habits, and behavior could determine when he left one Indian domain and entered another; but to find some object, specifically built for the purpose of designating a tribal dividing would be extremely unlikely.

It would seem that tribal jurisdiction was

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[19]Mooney, loc. cit., 15. [20]Malone, op. cit., 24.

established and drawn by citing rocks, mountains, rivers, trees, or any unusual formation of nature which could be remembered and distinguished from its immediate surroundings. An analogy to such a method can be found in the feudal law practice where boundary lines, legal descriptions, and land transfers were reckoned by reference to "witness monuments" which included all the natural objects to which the American Indian used. Such a procedure was practiced in medieval Europe simply because vernacular writing had not come into use, and, in the absence of any recording facilities, the physiography of the earth was utilized because it was subject to little change and could be pointed out and seen. Undoubtedly, the first Americans made use of it for the same purpose.

The Cherokees, however, despite an infinite variety of natural barriers, seem to have done very little in the way of marking out and holding the outer limits of their vast territory. Unlike their Iroquois relatives who, with force and vigor, clearly defined their lands, the Cherokees had shifting frontiers which were continuously contested by the Creeks, Chickasaws, and Shawnees. In fact, as Charles C. Royce has pointed out, "they [Cherokees] had no definite and concurrent understanding with their surrounding savage neighbors where the possessions of the one left off and those of the other began. The strength of their title to any particular tract of country usually decreased in proportion to

the increase of the distance from their villages."[21]

As a natural consequence of ill-defined boundaries, neutral areas developed between the Cherokees and their neighbors. While both sides might and usually did lay claim to these buffers, it was generally understood and accepted that both could hunt there without provoking a war.[22]

The Cherokee domain, over which the emerging tribal political and legal system would have jurisdiction, was highly fluid in the eighteenth century. This was due, first, to Cherokee involvement in the colonial struggle between the French and British, this tribe allying with the latter. Second, the Cherokees joined the British against the colonists in the American War of Independence. This resulted in the Cherokees being forced to cede most of their lands in South Carolina, North Carolina, and Tennessee to the victorious Americans. This diminution of the Cherokee domain had the constructive effect of consolidating the tribesman in a smaller area. And this encouraged the development of a national consciousness, impossible in earlier tribes when the Cherokees were scattered in villages over a vast, sprawling domain.

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[21]Royce, loc. cit., 140. [22]Ibid.

## CHAPTER II

## CLANS AND TOWNS

Law to the eighteenth century Cherokee was little more than custom which, hardened by acquiescence and long usage, had become a compulsory set of rules. As defined by judicial construction a custom is a usage or a practice which, by common adoption, has acquired the force of a law with respect to the place or subject matter to which it relates.[1]

Basic to the study of the law and customs which prevailed among the colonial Cherokees is some understanding as to the theory and explanation for their existence. In that respect it need be noted that the Cherokees were divided into seven clans; their segregation into these units was complete when first discovered by the Europeans. Each clan was individualized by a separate name, sometimes by a separate dialect, by a clan council, and the possession of a communal tract of land which was located adjacent to every Cherokee town.[2] Each clan, through its clan council, selected a clan

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[1] King v. Shelton, (Tex. Civ. App.), 252 S.W. 194 (1903); see also Conahan v. Fisher, 124 N.E. 13, 15 (1913).

[2] William N. Fenton and John Gulick, (editors), Symposium on Cherokee and Iroquois Culture, Bureau of American

chief, and, by virtue of his selection, he was sent as a delegate to the national council which met in Echota, capital of the Over Hill Settlements. This council represented all seven clans in the nation.[3] Each clan also selected a war chief who, in time of war took on the attributes of a military judge and, like the civil clan counselor, was a delegate to the national war council which supervised the war effort and had jurisdiction over national war crimes.[4] Women also had their place in clan hierarchy as each clan council selected a woman to sit on the women's national clan council which had authority, in some instances, to act as appellate court with limited jurisdiction over certain

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Ethnology, Bulletin No. 180 (Washington: U. S. Printing Office, 1961), 115. Charles Hicks, a prominent Cherokee chief, stated in 1818 that the national council "is composed of chiefs from each clan, some sending more or less, regard being had to the population of each--though the number is not very definitely fixed. Each clan has its separate portion of land, which it holds in common right--the poorest man having the same right as the greatest." Quoted in Swanton, Indians of the Southeastern United States, 654. See also Lewis Hunt Morgan, Houses and the House-Life of the American Aborigines, Geographical and Geological Survey Contribution to North American Ethnology (Washington: U. S. Printing Office, 1881), IV, 18.

[3]Rachel G. Eaton, John Ross and the Cherokee Indians (Chicago: John Hill, 1921), 164.

[4]William H. Gilbert, The Eastern Cherokees, Bureau of American Ethnology, Anthropological Papers, No. 23, Bulletin 133 (Washington: Government Printing Office, 1943), 17-18. See also John P. Brown, Old Frontiers: The Story of the Cherokee Indians from Earliest Times to the Date of Their Removal to the West, 1838 (Kingsport, Tennessee: Southern Publishers, Inc., 1938), 17-18.

matters appealed from the national council.[5] They may have been permitted a voice in the decision for war, but it is clear that they had a major role in making peace and the disposition of war prisoners.[6]

Each clan practiced and claimed some family affinity.[7] That is to say, each clan was composed of several different families, but each family traced its ancestral lineage to a common genealogical branch. It is reported that all headmen in the clan or regional council were members of the historic ruling family which resided in the Overhill Settlements.[8]

Lewis Morgan, historian and legal advisor to the Iroquois Confederacy, in drawing a comparison between the Iroquois and Cherokee families, estimated that there were

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[5]Ibid.; see also Grace Steele Woodward, The Cherokees (Norman, University of Oklahoma Press, 1963), 43; Starkey, op. cit., 6-7.

[6]Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 92. See Brown, op. cit., 18.

[7]Keowee, located on the headwaters of the Little Tennessee, not far from the present Bryson City, North Carolina, was regarded by the Cherokees as the beginning of the first clan. For that reason, it was called "Beloved Town People" or "Kituwah People." The remaining six clans were: Ani-Waya, Wolf People; Ani-Kavi, Deer People; Ani-Tsiskwa, Bird People; Ani-Wadi, Paint People; Ani-Sahini, Blue People; and Ani-Gilahi, Long Hair People. Brown, op. cit., 18. There has been a variance as to the exact names and spelling of the seven clans. See Malone, op. cit., 24, and also Gilbert, loc. cit., 203-209.

[8]David H. Corkran, The Cherokee Frontier (Norman: University of Oklahoma Press, 1962), 4.

approximately one thousand families in the Cherokee Nation which on an average would break down to about one hundred and thirty families in each of the seven clans.[9] But whatever the number of families in a particular clan, the consanguinity of clan ties was strictly acknowledged as clan law provided that all children became possessed of their natural rights through clan affinity. Each clan member owed unswerving loyalty to one another. Should a member of the clan be killed by a member of some other clan, the clan members of the deceased were required by the custom to exact blood for blood, regardless of the circumstances of the killing.[10] Clan law also prohibited intermarriage within the clan by either the mother or the father, and the man, upon marriage, was expected to live in the clan of his wife; however, it is not clar how closely the law was enforced. One authority, stated that while residence tended to be"matrilocal," residence rules were not rigid.[11]

While some laxity in this matter may have been tolerated, it seems clear it was the exception rather than the rule. The importance of clan identity is illustrated by the following: when a husband and wife attended a council

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[9] Morgan, Houses and House-Life of the American Aborigines, 54.

[10] Fenton and Gulick, Symposium of Cherokee and Iroquois Culture, 91; for a more extended discussion see Gilbert, loc. cit;, 216-253.

[11] Ibid.

meeting, he sat with his clan. She and the children sat with her group.[12] The theory behind such a legal requirement seems to have been based on what was called "mother-in-avoidance," which meant simply that the mother-in-law was prohibited from speaking to her daughter's husband.[13] One writer reported that the clan law required that the husband farm his mother's household to the exclusion of his wife's group.[14]

Upon the death of his wife, the husband could remain in her clan, or at his option, return to his own, but there is no evidence that he was ever considered as having joined his wife's kin group.[15] Apparently, this would have been legally impossible since he would have had to renounce the jurisdictional rights derived from his own clan, which as a matter of law he could not do, as he would have had no other way to show that he had not been born in one of the clans. Should the marriage end in divorce, he was required by clan law to return to his own clan, leaving his children, if he

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[12]Woodward, op. cit., 44; Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 191.

[13]John R. Swanton, The Indians of the Southeastern United States, Bureau of American Ethnology, Bulletin No. 137 (Washington: U. S. Government Printing Press, 1946); see also Douglas L. Rights, The American Indian in North Carolina (2d ed. rev.; Winston-Salem, North Carolina: John F. Blair, 1957), 254.

[14]See footnote, Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 97.

[15]Ibid., see footnote, 91.

had any, in the custody of his wife.[16] The Cherokees, like many of their neighbors, traced descent through the mother.

This practice raises such questions as promiscuity prior to marriage. In this regard, Adair reported that not only were Cherokee women promiscuous, but that such conduct reflected high credit on their desirability and was regarded by a potential suitor as an outstanding quality. Adair observed that children born under such circumstances bore no social stigma.[17] Under such conditions, little explanation is needed to understand why the family line flowed from the mother. It may have been that the Cherokee father, like some of the recalcitrant fathers of the present day, found it more convenient to permit the mother to assume the role of a provider for the child. As one writer has observed:

> . . . A husband was attached to his wife's household more than he was a part of it. His primary roots were in his mother's household, and at times he seemed to be little more than a visitor in his wife's home.[18]

This arrangement occasioned an early eighteenth-century observer to note that "the women rule the rost and weres the britches and sometimes will beat thire husbands within an

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[16]Charles C. Jones, Jr., Antiquities of the Southern Indians, Particularly of the Georgia Tribes (New York: D. Appleton and Company, 1873), 66. For further treatment on the subject see Henry R. Schoolcraft, The Indian in His Wigam or Characteristics of the Red Race of America (Buffalo: Derby and Hewson Publishers, 1848), 73.

[17]Adair, Williams, op. cit., 74.

[18]Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 70.

inch of thire life. The man will not resist their spouse if the woman was to beat his brains out."[19]

Tracing descent through the mother brings up another interesting aspect of clanship, namely, that of the so-called "totemic bind" practiced by the Cherokees, Natchez, and Iroquois.[20] The "totemic bind" simply meant that each clan was bound together by the use of a particular totem, and that all persons in the clan were related, being able to trace their relationship back to a common family. The first family had selected some visible creation of nature as its progenitor and had placed its likeness on a totem. Thereafter, all heirs of the first family displayed their family ties by the use of the same picturegraph. The guardian spirit of the first family household was generally some four-legged animal, bird, or other object in the animal kingdom. When a person displayed such a totem, its picturegraph was regarded as evidence of consanguinity with the particular animal as well as a particular clan.[21]

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[19]Quoted in Corkran, op. cit., 9.

[20]Henry R. Schoolcraft, Information Respecting the History, Condition, and Prospects of the Indians Tribes of the United States, Bureau of Indian Affairs (Philadelphia: Lippincott, Grambo and Company, 1853) IV, p. 666.

[21]Ibid., II, 74. This is still true today of the band of Eastern Cherokees who remained in North Carolina following the removal in 1839. For an extended treatment of the matter see Fred Eggan (editor), Social Anthropology of North American Tribes (Chicago: University of Chicago Press, 1952), 286-291.

With regard to the totem, it was a very important means, corresponding in some measure to a written and legal document, by which the holder or bearer was entitled to receive whatever personal or community rights allowed him by his clan. Acting also as a further legal aid in descent and inheritance law, the clan totem was very helpful in determining the breakdown of the various family relationships. According to Morgan, the children of brothers were themselves brothers and sisters to each other, and the children of the latter were also brothers and sisters. The children of a brother and sister became cousins with that relationship also continuing indefinitely.[22] While Morgan had specific reference to member nations of the Iroquois Confederacy, the affinity, according to Fred Eggan, would have been the same with the Cherokees.[23] At any rate, great stress was placed on the idea that the totem was really the surname of the clan, and the person who could claim it was given status as a citizen which enabled him to claim protection under the laws of his clan and nation. Without such a relationship, he would be an alien and a person without legal protection. In such capacity he had no rights and could enter on tribal land only at the pleasure of clan or town. White men were permitted to live among the Cherokees only by

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[22]See footnote, Morgan, Houses and House-Life of the American Aborigines, 33.

[23]Eggan, op. cit., 296-297.

virtue of some treaty or benevolent tolerance. To alleviate this barren standing, many white traders were formally adopted by one of the clans. This was usually a prerequisite to taking a Cherokee wife.[24]

Another method by which an outsider could obtain clan protection was to be officially accepted as a "friend" by some individual clan member. While this differed from adoption in that he was not required to render service to his clan or take the vow to avenge clan blood, it did, nevertheless, enable the "friend" to receive the benefit of clan protection. It is not clear whether clan law required blood retaliation should he be killed as in the case of adoption, but it did give him some kind of clan status which his Cherokee friend could, at his election, demand recognition. As demonstrated by Little Carpenter in 1760 this might prove quite significant in that he invoked his particular phase of clan law to save the life of John Stuart.[25] The conduct of Ostenaco at a much earlier date can also be cited as to the force of the rule. Having at some previous time been officially accepted as Ostenaco's "friend," a trader named Judd

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[24]At a later date, marriage in itself, may have conferred full tribal status. This is to be seen in the statement made in 1812 that a certain Milo Hoyt married "an amicable and distinguished native convert, Lydia Lowry. And as, by this marriage, he has become entitled to all the privileges of a native Cherokee . . . ." Report of American Board of Commissioners for Foreign Missions (Boston: Samuel T. Armstrong, 1812), 36.

[25]Brown, op. cit., 103.

was saved from being burned at the stake when Ostenaco demanded his release.[26]

In the words of Schoolcraft, the "eyes of all the family sparkle as soon as the analogous totem is mentioned as if it disclosed bloodrelationship."[27] Adair reported that when a Cherokee spoke either of an individual or the habitations of any of his clan, he would say "he is of my house" or "it is my house . . . ." When they traveled about in their own country they would seek out a house of their own clan, and, if they found one, they would be kindly received. This would be true, though, they had never seen their hosts before.[28]

The clan members drew their totems on bark-scrolls, skins, and on trees. Whenever a hunting party stopped for relaxation or camp for the night, it frequently left its clan symbol carved on trees. Individual families marked the doors of their cabins with clan figures. It was worn as a distinctive headdress to indicate clan membership.[29] Every

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[26]Mary U. Rothrock, "Carolina Traders Among the Overhill Cherckees, 1690-1760," Tennessee Historical Review, II, (1925), 4-6.

[27]Schoolcraft, loc. cit., II, 74; see also Eggan, op. cit., 194.

[28]James Adair, History of the American Indians, Particularly Those Nations Adjoining to the Mississippi, East and West Florida, Georgia, South and North Carolina and Virginia (London: Edward and Charles Delly, 1775), 17.

[29]Schoolcraft, loc. cit., I, 335.

village, autonomous or not, was required by clan law to erect and maintain local totem poles. The poles were placed on some prominent eminence where they might stand and be seen. In addition to bearing the clan symbol, on each pole there was carved, spelled out in picture language, the names of individual clan members. Presumably, such a listing included all the inhabitants of the town. Answering in some fashion the purpose of our modern recording devices, the poles served to give official testimony to one's birth, clan, and family identity. Commenting on its function, Schoolcraft further observed:

> By this device, the early missionaries observed that the natives marked their division of a tribe into clans, and of a clan into families, and the distinction was thus very clearly preserved. Affinities were denoted and kept up, long after tradition had failed in its testimony. This distinction, which is marked with much of the certainty of heraldic bearings as known in the feudal system, was seen to mark the arms, the lodge, and the trophies of the North American chief and warrior. It was likewise employed to give identity to the clan of which he was a member, on his ad-je-da'-tig, or grave-post. This record went but little farther in communicating information; a few strokes or geometric devices were drawn on these simple monuments, to denote the number of men he had slain in battle.[30]

Thus it was very important to the individual that he maintain his clan identity. Subordinate to the clan in most aspects of law was the local protection afforded by the towns and provinces which, collectively, made up the component parts of the entire nation.

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[30] *Ibid.* See also Morgan, *loc. cit.*, 64.

Despite their secondary importance in terms of individual rights, towns occupied an important part in the judicial structure of the Cherokee Nation. Each town had its own court which was separate and apart from the town council. Such a court had final jurisdiction over criminal matters that related entirely to the town.[31] The number of persons sitting as judges was in direct proportion to the number of clans represented in the town.[32] In that respect the number could conceivably vary from one to seven, but it seems unlikely that a town would attempt to maintain its own court if all the clans were not represented in the town. Frequently, towns would have a regional seven-man council or court which had jurisdiction over matters related to the region. This practice, however, seemed to die out in the early half of the eighteenth century when attention was focused on Echota as a national capital.

In attempting to give form and meaning to these towns and their geographical divisions, considerable difficulty has been encountered, mainly, because writers on the

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[31]Gilbert, loc. cit., 323.

[32]See copy of a letter "Wolf King's Answer to a joint Talk from His Excellency James Wright Governor of Georgia and John Stuart, Esq., Superintendent of Indian Affairs," April 29, 1766. London Paper's File, Indian Affairs, (transcribed by Grant Foreman), (Oklahoma City: Oklahoma Historical Society, 1937), I, p. 81. Hereafter cited as London Paper's File. Wolf King stated that "Our Nation is all in Tribes, and the Murderers have some of their Tribe in our Town; whenever there is any Satisfaction demanded, the whole Tribe join to-gether . . . ."

subject have shown little or no consistency in applying names to them. One writer who has wrestled with the subject says that "one of the most tantalizing, and at the same time, crucial questions in the understanding of the Cherokee . . . local organizations is the extent to which . . . clans tend toward common residence within the local community."[33]

Another item, equally as confusing, has been the notion that each clan, embracing all the family towns, was circumscribed into one geographical area. That may have been true at one time, and it is a likely assumption that it was, but during the colonial period that was not the case. As outside forces came to exert pressure on the Cherokee frontier, old towns were abandoned and the families moved inland, locating, usually, but not always on land within their customary range. Also the marriage requirement which necessitated the husband to seek nuptial bliss in another clan tended to disperse the clans throughout the country.

Another factor which influenced the degree of unity was the variety of dialects. According to Douglas L. Rights, three dialects were spoken. This divided the Cherokees into three linguistic groups: the Lower, Middle, and Upper Settlements. These three divisions are the ones most commonly noticed by modern authorities.[34] The English,

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[33]Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 115.

[34]Rights, op. cit., 83.

while recognizing this classification, more frequently divided the Cherokee lands into four geographical groups. The Lower Settlements, located on the Keowee and Tugaloo rivers, were regarded as one group. The Upper Settlements were subdivided into three divisions: the towns on the upper Little Tennessee as the Middle Group, those immediately North of the Hiwassee as the Valley Settlements, and those on the lower Little Tennessee as the Overhills.[35] This corresponds to the view taken by Gilbert who divided the Cherokees into four major areas, three of which possessed distinctive, though mutually understandable, dialects. The Overhill and the Valley Settlements shared the same dialect and, together, constituted one of the three dialects spoken in the Cherokee Nation.[36]

In 1755 during the James Glen administration of South Carolina, the colonial authorities divided the Cherokee towns into six hunting districts, increasing the divisions in the Upper Group to five rather than three:

1. Over Hill Towns.--Great Tellico, Chatugee, Tennessee, Chote, Toqua, Sittiquo, and Talassee.
2. Valley Towns.--Euforsee, Conastee, Little Telliquo, Cotocanahut, Nayowee, Tomatly, and Chewohe.

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[35]John R. Alden, John Stuart and the Southern Colonial Frontier: A Study of Indian Relations, War, Trade, and Land Problems in the Southern Wilderness 1754-1775, ("History and Political Science;" Ann Arbor: The University of Michigan Press, 1944), XV, 6.

[36]Gilbert, loc. cit., 178-182.

3. Middle Towns.--Keowee, Tricentee, Echoee, Torsee, Cowee, Torsalia.

4. Keowee Towns.--Keowee, Tricantee, Echoee, Cowee, Torsalia, Coweeshee, and Elejoy.

5. Out Towns.--Tucharechee, Kittowa, Conontoroy, Steecoy, Oustanale, and Tuckasegee.

6. Lower Towns.--Tomassee, Oustestee, Cheowie, Estatoie, Tosawa.[37]

Twenty years later William Bartram traveled through the Cherokee country and, making a list of the towns, divided them into nine groups, giving their location but making no reference as to whether they were called Upper, Middle, or Lower towns.[38] James Adair, publishing his work on the American Indians in 1775, included a map showing the location of the various tribes. In locating the Cherokees, he listed only "Upper Cheeroke" and "Lower Cheeroke" making no mention to any other groups. This in line with his statement that the Cherokees themselves divided their country into two parts which they termed "Ayrate," meaning the low country,

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[37]Royce, Cherokee Nation of Indians, loc. cit., 142.

[38]William Bartram, Travels of William Bartram, edited by Mark Van Doren (New York: Macy-Masius, 1928), 301; two or three years before Bartram, Henry Mauzan made a map of the same area but included several towns of the Lower Cherokees not mentioned by Bartram. Among such towns were Turraran, Nayowee, Tetohe, Chagee, Tussee, Chicheroke, Echay, and Takwashnaw. All were located on the Tugaloo River. On the Keowee River, Mauzan enumerated three extra towns: New Keowee, Quacorestche, and Acounee; see Royce, op. cit., 143. For the best listing and present location sites of Cherokee towns see John R. Swanton, The Indian Tribes of North America Bureau of American Ethnology, Bulletin 145 (Washington: U. S. Government Printing Press, 1952), 216-221.

southern part, and "Otarre," signifying the northern or mountainous region.[39] Other evidence to support their idea of a regional awareness can be seen in the terms "pipemakers" and "frogeaters" by which the Lower Cherokees made reference to the Upper Group.[40]

Edmond Atkin, the first Imperial Indian Superintendent for the Southern District, writing in 1755, indicated two regions by saying "the upper and lower Cherokees differ from each other, as much almost as two different Nations." He added that "they seldom take part even in each others [sic] Wars." The Upper Group was "better governed . . . sober and [as] behaved as the others are debauched and insolent." In stressing the regional division, Atkin gave a forceful description of the mountain ranges dividing the nation by saying that "from the lower to the upper Towns, the passage through the Mountains is so narrow, that two Horses can scarce go abreast."[41]

Despite this variance of sectional classification, it seems that their forty or more villages were organized into three communities. West of the Blue Ridge Mountains in the upper Piedmont of South Carolina stood the five or six Lower Towns, ruled over by Keowee and Estatoe with

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[39]Royce, loc. cit., 142. [40]Rights, op. cit., 24.

[41]Wilbur Jacobs, ed., Indians of the Southern Colonial Frontier: The Edward Atkin Report and Plan of 1755 (Columbia, South Carolina University Press, 1954), 48-49.

Keowee, located on the Savannah River, being regarded as the capital of the area. Sixty miles west of the Lower Towns in the mountain valleys were the Middle Settlements consisting of a group of four village clusters located on the headwaters of the Little Tennessee, the Tuckasegee, Cheoah, and the Valley rivers. The farthest inland Cherokee towns were those of the Over Hill Settlements on the lower Little Tennessee.[42] Both Tellico and Echota, the two largest towns in the Over Hills were, at different times, considered to be the capital of the section. After Sir Alexander Cuming's coronation of Moytoy, the English romantically described this Indian as the "First Emperor," and Tellico, then Echota, was known as the capital of the entire nation.[43]

It appears there were forty or fifty towns located in three or four districts with the Overhill Settlements taking the lead in regional and national importance. With regard to law and government, each of the three levels claimed exclusive jurisdiction through their town, regional, and national clan councils. Alternating from their executive responsibilities to act as courts, their councils at all three levels heard cases and rendered final decisions in criminal matters which were brought before them. In that minor respect they were analogous to our idea of town, state, and federal courts but there the similarity stopped since

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[42]Corkran, op. cit., 3. [43]Ibid., 16-18.

each of the three levels was represented by all seven clans; and it was by the unanimous consent of all seven clans that a court decision could be made.

Population being unavoidably a part of law and government it need be pointed out that in terms of numbers the Cherokees fluctuated considerable in the eighteenth century. In 1709 Governor Robert Johnson of the Carolina Colony rendered an estimate of the "Chereky" Indians in which he reported that there were 5000 fighting men who lived in sixty towns.[44] Six years later, 1715, the proprietors instructed Governor Johnson to cause a census to be taken of all the Indian tribes with his jurisdiction.[45] It appears from his report there were sixty towns with an average of one hundred and eighty-seven persons to each town in the aggregate totaled 11,210 persons. Another census was made in 1721 which reported a population of 10,376 distributed in fifty-three towns.[46] In 1729 another estimate placed the number of towns as being sixty-four in number with a total population of 20,000.[47] In 1735 just prior to the first smallpox epidemic, Adair stated that the Cherokees had sixty-four towns

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[44]Williams, Early Travels, footnote, 67.

[45]Verner W. Crane, The Southern Frontier 1670-1732 (Ann Arbor: University of Michigan Press, 1956), 131.

[46]Mooney, Myths of the Cherokees, 34.

[47]John R. Swanton, The Indians of the Southeastern United States, 114.

and "upward of six thousand fighting men."[48] On the basis of these figures, one writer expressed the opinion that their population was somewhere between 16,000 and 17,000 persons with an average town population of two hundred and fifty-eight.[49]

For the next forty years, it appears that tribal population was greatly reduced. The ravages of small-pox, coupled with the losses sustained in the conflict with the whites and with neighboring tribes, reduced their numbers to the point that traders estimated the strength of their fighting men to be only 2,300.[50]

Assuming that the warrior class constituted approximately one-fourth of the total population, the figure of 9,200 persons can be attained. William Bartram compiled a list of forty-three towns in the mid 1770's, but he supplied no population data.[51] By dividing the number of towns he cited into the estimate figure of 9,200 persons, an average of 213 can be obtained as representing those persons who

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[48]Adair, op. cit., 238.

[49]Mooney, Myths of the Cherokees, 34.

[50]Malone, op. cit., 10; for a discussion of the Cherokee population during the years 1759-1779 see Thomas Jefferson, Notes on the State of Virginia (Brooklyn History Printing Club, Brooklyn, New York: Paul Liecister Ford, 1894), 200; also consult Mooney, Myths of the Cherokees, 34; Adair, American Indians, 227; Royce, Cherokee Nation of Indians, 142.

[51]Bartram, Van Doren, ed., op. cit., 301.

lived in each town.

In 1799 a list of fifty-one Cherokee towns was made for the distribution of federal annuities but no population figures were given.[52] Ten years later, however, a town-by-town census was made which recited a total population of 12,395. But, many Cherokees had by that time, emigrated west of the Mississippi.[53]

Assuming the average town population to be somewhere between two and three hundred, it can be seen that the docket of the town court was not overcrowded, and it is a likely assumption that the town clan council had no fixed session but resolved itself into a court whenever the need arose. Also operating within each town was the individual clan council or court which was made up of the elders from each of the families belonging to a single clan. While it may be stretching the point to call this council a court, it, nevertheless, functioned as one when it was deliberating the punishment for some injury which had been inflicted on one of its members. Described by Adair as a "lessor adjuratory" it heard evidence and assessed the penalty without ever bothering to notify the defendant.[54]

With respect to the eighteenth century Cherokee town,

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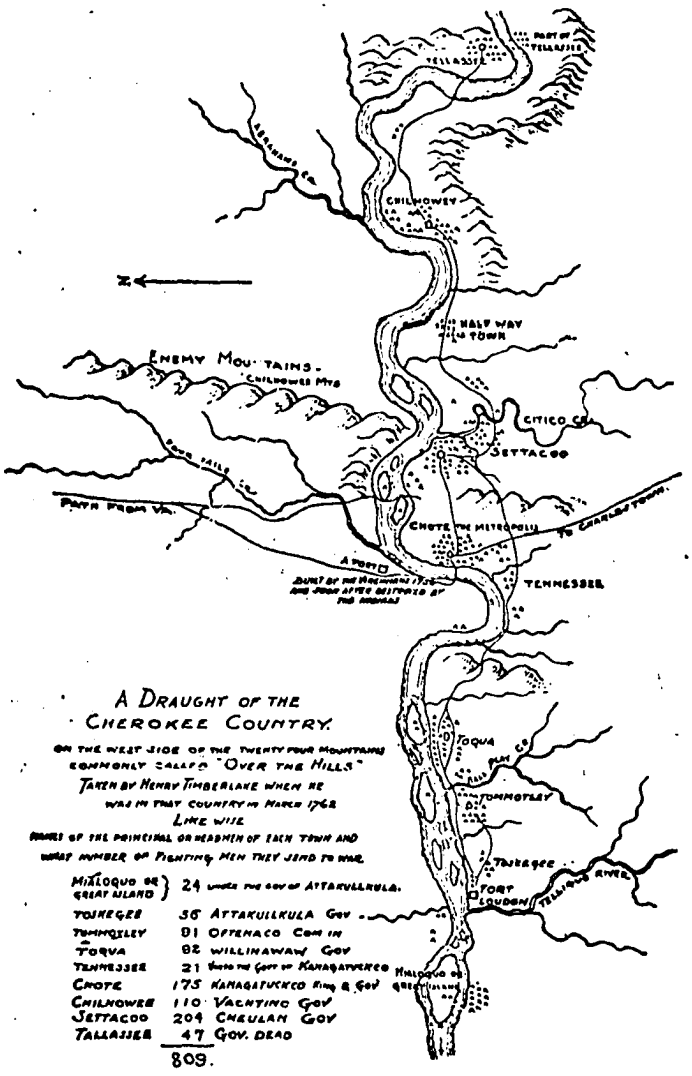
[52]Royce, loc. cit., 144.

[53]Swanton, Indians of the Southeastern United States, 114.

[54]Adair, Williams, ed., op. cit., 114.




TIMBERLAKE'S MAP OF THE OVERHILL COUNTRY, LONDON, 1765

The towns shown were along the Little Tennessee River, in the present Monroe County, Tenn. Scale, about one half inch to the mile. Taken from Williams, (ed.), Lieutenant Henry Timberlake's Memoirs.

the center was the town house which served both as a court room and a legislative chamber. The town house was a large earthen structure, circular or hexagonal in shape. In ancient days, the seven sides of the great building were made to accommodate each of the seven clans, as clan law required all members of a particular clan to sit together.[55] By the middle of the eighteenth century, the town house was round although the symbolism of the seven clans remained in that seven huge poles or pillars were mounted in the center in which supported the roof and surrounded the sacred fire.[56] The great domelike structure was perhaps fifty feet in diameter and fifteen feet high at the center smoke hole. The interior was illuminated only by the light entering the opening or at night by the central fire. Hugging the low wall around the inside circumference of the entire building were cane benches. On such benches and on the floor immediately in front of them could be seated almost all the populace of the town.[57] Within the circle formed by the seven great supporting timbers was the arena wherein the town's elders held court and debated the issues of the day.

Lieutenant Henry Timberlake, a young officer in the Virginia militia, made an official visit in 1762 to Chota.

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[55]Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 91.

[56]Woodward, op. cit., 44.

[57]Corkran, op. cit., 4-5.

He described the exterior of the town house as a small mountain with its top being covered with earth. "It is built in the form of a sugar loaf," he wrote in his Memoirs, "and [is] large enough to contain 500 persons."[58] William Bartram's description of the town house at Cowee, while mentioning that it could accommodate several hundred people, was more concerned with construction:

> The rotunda is constructed after the following manner: they first fix in the ground a circular range of posts or trunks of trees, about six feet high, at equal distances, which are notched at top, to receive into them, from one to another, a range of beams or wall plates; within this is another circular order of very large and strong pillars, above twelve feet high, notched in like manner at top, to receive another range of wall plates; and within this is yet another or third range of stronger and higher pillars but fewer in number, and standing at a greater distance from each other; and lastly, in the centre stands a very strong pillar, which forms the pinnacle of the building, and to which the rafters centre at top; these rafters are strengthened and bound together by cross beams and laths, which sustain the roof or covering, which is a layer of bark neatly placed, and tight enough to exclude the rain, and sometimes they cast a thin superficies of earth over all. There is but one large door, which serves at the same time to admit light from without and the smoak to escape when a fire is kindled; but as there is but a small fire kept, sufficient to give light at night, and that fed with dry small sound wood divested of its bark, there is but little smoak.[59]

The town house was never vacant for "on its benches reclined the retired ancients of the town, the patriarchs who had served their time in the offices of peace and war."[60]

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[58]Timberlake, Memoirs, op. cit., 59.

[59]Bartram, Van Doren, ed., op. cit., 297-298.

[60]Corkran, op. cit., 5.

Like the fast-disappearing small town courthouse, it was a place where old friends met, smoked their pipes, welcomed visiting strangers and instructed the young sons of the ruling family in the laws and traditions of their people. It also served as a meeting place as well as a place of lodging for widowers and men who had married into the community but had no share in the land because they belonged to families who were located elsewhere. Other structures associated with the town house complex were the summer pavilions and houses for important town officials and priests.[61] At a later date, council houses were made of logs.[62]

Adair states that every village contained a town house where public business was transacted.[63] This would be true where the town had a substantial population but in those cases where the villages were very small, it would appear that the town house was not a necessary adjunct. It is readily conceded that each aggregation of native citizens, whether fulfilling the descriptive requirement of a town or not, had a "headman" whose Anglo-Saxon counterpart was that of a village "elder," but to assume that every little cluster of Cherokee cabins maintained its own court and council

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[61]Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 91.

[62]Williams, Early Travels, 433-438.

[63]James Adair, History of American Indians, edited by Samuel Cole Williams (Johnson City, Tennessee: Watauga Press, 1930), 453.

is highly debatable. Such a conclusion is grounded on the idea that the presence of a town house meant exclusive autonomy for the particular settlement. To be more explicit, if the town was independent it would elect its own chief, council, and court, and authorize its chief to commit the town in matters entailing legal consequences. For example, in treaty negotiations, the validity of such proceedings was geared to the legal requirement that all independent towns in the entire Cherokee nation were parties to the contract. A quick look at the various treaties, agreed to by the Cherokees will bear this out as all such documents carry the signatures of the town chiefs.[64]

This concept of town sovereignty, particularly with reference to the transfer and alienation of national lands, resulted in innumerable controversies. Many towns, proclaiming independent status separate and apart from any national authority, maintained that they could be legally bound only by their duly elected chiefs. During the time in which the removal treaties were being enforced, the arguments against removal were tied to this historic concept of town sovereignty. Sir Alexander Cuming's Treaty of Dover may be taken as an example of the mechanics of municipal independence among the Cherokees. He persuaded seven Cherokee

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[64]Charles J. Kappler, Indian Affairs: Laws and Treaties, 58 Cong., 2 sess., Senate Document No. 319, (Washington: United Government Press, 1904) II, 194.

representatives to accompany him to England where the treaty was drawn up and signed. While Cuming may have observed all the legal ritual necessary to bind England, it is abundantly clear, despite such romantic language as the "chain of friendship . . . should never be broken,"[65] the Cherokee Nation was not obligated under any of the treaty stipulations. Chapman J. Milling, in commenting on the affair, observed rather forcefully "that the warriors who accepted this [the treaty] had no commission whatever from the Cherokee Council, and not the least authority as representatives of the tribe."[66] It would have been legally impossible for the Cherokee Nation to have finalized any agreement except through the duly appointed delegate from each town acting either collectively outside the National Council or through its agency at an officially convened session. In either instance the personnel would have been the same since all town chiefs were, by virtue of their positions, delegates to the National Council.

To conclude the question of town sovereignty, it can be said that each Cherokee town, possessing its own council and court, was regarded as sovereign. Every town in such a category was in reality a city state, separate and distinct

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[65]Crane, op. cit., 299; Crane gives an extended account of the entire trip including the grand reception accorded the chiefs by the King of England, 295-302.

[66]Milling, op. cit., 63.

in terms of power from its neighbor. Each town could legally declare war, conclude peace, make treaties, and do all things incident to a sovereign state. The Nation as a whole, could act only through its National Council which contained a delegation from every autonomous town. The Cherokee Nation, in terms of legal structure was really a confederacy, pure and simple, with its national character being compounded by independent towns. It is to be distinguished from the great Iroquois Confederacy and other Indian confederacies in that they derived their confederated status from being composed of different independent nations.

It seems certain that not all towns were independent. Several of the smaller towns, undoubtedly, because of their size, sought protection from some of their larger neighbors and agreed to come under their jurisdiction. In such instances the smaller towns maintained no council or court of their own, but sought protection from a larger town and acknowledged the authority of its chief. No statistics are available as to the number of such towns, but Timberlake, in drawing his map of the Overhill Settlements, listed nine independent towns and two as being under the government of a neighboring town. He listed "Tennepee," a small village lying in the environs of Echote, the national capital, as being governed by Kanagatuckco, principal chief of the nation

and governor of Echote.[67] "Tennepee" had been a larger town, supplying the name to what later became the state of Tennessee, but in 1762, at the time of Timberlake's map, it had dropped into insignificance.[68] Within the next few years, it disappeared completely. Mialaquo, the Great Island, was another town which Timberlake listed as being governed by a larger neighbor.

Sir Alexander Cuming reported that the nation was ruled over by seven "mother" towns. He also stated that each of the seven towns was ruled by a king; however, four of the towns were without kings as death had created vacancies and, at that time, they had not been filled. His reference to seven "mother" towns may have indicated either the oldest or the largest town in the area claimed by each clan, but in any case, it was the principal or capital city of a particular region or province. At one of these district towns all seven clans in the area would convene the regional council. With fifty or more delegates in attendance, this conclave was important only in that it was to be distinguished from the executive seven man council which also held its regional session at the district capital. This council, like the one at Echota, was really the high court of the entire area which had authority to decide criminal acts committed

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[67] Supra, see page 33 which contains a reproduction of the map made by Timberlake. See Timberlake, Memoirs.

[68] Timberlake, Memoirs, op. cit., 74.

against region. These executive clan councils were contemporary to the national council and had concurrent jurisdiction. While they continued to function throughout most of the eighteenth century, they lost their judicial character when emphasis was directed from particularism to nationalism.

As at Echota at a later date, a seven member women's council, representing each of the clans, frequently convened at the regional level to exercise appellate jurisdiction over captives taken in war.

In concluding this discussion, the general features of the Cherokee political structure may be summarized in the following propositions: The Cherokee Nation was a union of seven clans with each clan believing in a common ancestor which fostered the idea that the individual could look to his clan for redress and to obtain legal protection. Each clan possessed and acknowledged a ruling family within its own division from which were selected a clan chief and clan officials who were responsible for the executive and judicial administration of clan business both at the town, regional, and national level. Each clan owned and farmed communal lands with such tracts of land being located adjacent to the town or village. Clan members cultivated these fields. Clan members traced their descent, land titles, and other clan privileges or benefits through their mother.

Because of the law requiring marriage outside the clan, there was a mixture of the clans at the town level

which necessitated a town court as distinguished from the clan courts. The same requirement also had a tendency to produce a physical and linguistic likeness which helped to characterize the Cherokees into regions and, ultimately, into a nation which in turn necessitated regional and national courts to effectuate national sentiment. Clans differed in numbers and political importance in each town, with such importance being, apparently, in direct proportion to the size of the clan. Measured in terms of national guidance and leadership one or two of the clans, presumably the oldest or the largest, had some pre-eminence over and beyond the others in their legislative councils, but in their judiciary all clans were equal.

## CHAPTER III

## GOVERNMENT, CITIZENS AND COURTS

In attempting to give form and meaning to the judicial system that existed among the eighteenth century Cherokees, some understanding of their government is necessary. As defined by the Supreme Court of the United States, a government embraces that "whole class or body of office holders or functionaries considered in the aggregate, upon whom devolves the executive, judicial, legislative and administrative business of the state."[1]

In such respect the Cherokee Nation did not differ too greatly from that of the United States. Although the Cherokees thought their organic power as having originated from the "plain law of nature,"[2] the nation provided institutions by which its executive, legislative, and judicial responsibilities were achieved. Unlike the United States, however, there was no necessity to delineate their governmental branches into sharp profile. As a result, considerable difficulty is encountered when attempting to get a clear picture of their judiciary.

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[1] Stokes v. United States, 264 F. 18 (1912).

[2] Adair, Williams, ed., op. cit.

As to a generalization, it may be said that the government of the Cherokees was a gerontocracy or a government made up of old men. In citing appraisals made by contemporaries, Timberlake observed that their government "[had] neither laws or power to support it; it [was] mixed aristocracy and democracy . . . ."[3] Bartram described it as being "nothing more than the simple dictates of natural reason, plain to everyone" with the "supreme sovereign or executive power" resting in a "council of elderly chiefs, warriors and others, respected for wisdom, valour and virtue."[4] Colonel James Smith, a native of western Pennsylvania who was taken captive by the Indians during the French and Indian War, made the following general comment about the government of the southern Indians: "As they are illiterate, they consequently have no written code of laws. What they execute as laws, are either old customs, or the immediate result of new councils."[5] William Fyffe, a physician from Virginia who entered the Cherokee country during the French and Indian War, wrote to his brother in Scotland concerning the Cherokees. In his letter he stated that "their government is not supported by laws and punishments as among us. They believe ther've [sic] Old Men who tells them the customs of their

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[3]Timberlake, Memoirs, 93.

[4]Bartram, Van Doren, ed., op. cit., 388.

[5]Smith, Darlington, ed., op. cit., 147.

ancestors . . . ."[6]

It is clear from the preceding remarks that among the Cherokees, no highly developed judiciary could have been expected. In fact, the simplicity of their body politic was the very essence of their governmental structure. It was nothing more than a commonwealth, with no written laws but custom, and very little authority except custom and personal influence.

Despite this, the administration of the nation was conducted, at all levels, by men of experience and wisdom. They regarded it as folly to entrust young men without training or reputation with positions of responsibility. Great attention was given to the selection of leaders. Once a person had been elected to fill a high office, his tenure was for life; it being regarded as senseless to remove a man of ability; great time and deliberation had been spent in proffering his candidacy. His incumbency, however, rested on a continued demonstration of executive leadership.[7] Vacancies in office were not filled immediately. Caution was

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[6]William Fyffe to Brother John, February 1, 1761, original MS in the Thomas Gilcrease Institute, Tulsa, Oklahoma. Captain Raymond Demere, Commander of Fort Loudon, an English fort a few miles from Echota, wrote to Charles Town in 1757 and stated that the Cherokees are "an old and kind People, as there is no law nor subjection amongst them . . . ." Quoted in Frederick O. Gearing, "Cherokee Political Organization 1730-1775" (unpublished Ph.D. Dissertation, Dept. of History, University of Chicago, 1956), 54.

[7]B. B. Thatcher, Ancient Traits, Being of Sketches, Manners, Customs, and Character of North American Natives, New York: J. J. Harper Co., 1833), II, 64.

rigorously observed to insure the election of the best possible choice. Recalling Cuming's trip to Keawee, an example of that can be found in his statement that four of the seven towns had vacancies.[8]

The head chiefs and the war chiefs represented the top echelon of political dichotomy in the Cherokee Nation. They were, respectively, the White (Peace) and the Red (War) groups. In theory, the entire nation recognized the suzerainty of a White civil leader whose eminence became much more pronounced after Governor Nicholson pressured the Cherokees into naming a principal chief with whom he might deal. The person holding such a high office was variously known as "Uku," "Oakah," or "Ugutuyi." Although each town had a white chief of its own, the white chief of the Echota was regarded as the Principal Chief of the nation. His office was generally hereditary rather than elective, being transmitted to the son of his oldest sister.[9] Next to the high chief of the nation was his right-hand man or Deputy Chief. Immediately under the chief and his deputy were the seven

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[8]Drake, op. cit., 367; see also Alexander Hewatt, An Historical Account of the Rise and Progress of the Colonies of South Carolina and Georgia (London: n.p., 1779), II, 5.

[9]Ascott R. Hope, The Men of the Backwoods, True Stories and Sketches of the Indians and the Indian Fighters (New York: B. P. Dutton and Co., 1880), 350; Gilbert, loc. cit., 321; John R. Swanton, Indian Tribes of the Lower Mississippi Valley and Adjacent Coast of the Gulf of Mexico, Bureau of American Ethnology, Bulletin No. 43, (Washington: U. S. Government Press Office, 1911), 103; Rights, op. cit., 254.

"prime" counselors, who represented each of the seven clans and had been elected to their positions in regional clan meetings held for that purpose.[10] Next, in order of importance, was the Council of Elders. This body was composed of elder statesmen who represented each of the towns in the nation. It had no fixed membership but depended upon the number of representatives each town elected to send to the national capital. One of its own members was elected to serve as Chief Speaker.[11] Implementing the hierarchy of top officials were messengers, ceremonial officers, and religious attendants.[12]

When the "Uku" died, his right-hand man, acting on the advice of the national clan council, dispatched messengers to all the towns, notifying the local chiefs to come to Echota at a designated time to inaugurate a new principal chief. Each messenger carried a string of "hemp being braided into as many knots as there was nights previous to the meeting." Each town white chief, upon receipt of the information, immediately sent his own messenger to the "candidate of his choice asking that he accept the

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[10]Eaton, op. cit., 10; Gilbert, loc. cit., 321-322; Gearing, op. cit., 43. Gearing says that each village was aggregate of the seven clan segments.

[11]Chicken's Journal, loc. cit., 47. Chicken stated that the chiefs have "talk and decide who is going to be head speaker."

[12]Gilbert, loc. cit., 321.

appointment."[13] On the designated day the white chiefs, representing the various towns, assembled in the national capital and, after deciding who was to be the national "Uku," went to his home and informed him of the fact. If the latter accepted, he was to undergo a seven-day fast. At the end of his fast, he was formally inaugurated in the Council House in an elaborate ritual.[14]

Next to the white chief in importance were the seven clan counselors. These were the chief men of their clans, and they were all white or peace officials. In placing emphasis on the role of these seven men, it need be noted that they acted in an advisory, legislative, executive, and judicial capacity. Working in concert with the "Uku," they kept him advised as to sentiments within each of the respective clans; they also instructed him on matters of national interest and their advice and consent was usually required for any official act performed by him. They submitted issues to the Council of Elders in which case their views were almost legislative in nature in that they seldom failed to

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[13] Ibid., 322.

[14] Ibid.; a Presbyterian missionary, William Richardson, visited Echota in 1758, and he spoke of "the Prince of ye Former Year" and "The Chief Beloved Man, of ye present Year, W'm they call Prince . . . ." It seems that Richardson may have thought the "Uku" was elected for one year, but apparently, this was true of only some military leaders. William Richardson, "An account of the Presbyterian Mission to the Cherokees, 1757-1759," Tennessee Historical Magazine, I, (1931), No. 2, pp. 125-128.

be adopted. In their judicial capacity the seven counselors, along with the "Uku" and his "Second Man," constituted the highest court in the nation.[15] In that respect they had appellate jurisdiction[16] over the Council of Elders when the latter acted as a court in cases of treason or treaty violations. This was in keeping with the idea that all the clans had to agree that one of their number should be put to death; otherwise, it might constitute a crime for which the injured clan could retaliate.[17] It would seem, however, in those situations where the Council of Elders had found a man guilty of treason, the high court would readily acquiesce in the findings. Should the Council of Elders become dilatory or fail altogether in its responsibility to bring the guilty

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[15]Gilbert, loc. cit., 323. Gearing says that the Council of Elders were required to "communicate back to the" seven-man council on other matters. See Gearing, op. cit., 56.

[16]Jurisdiction is the power that is introduced for the public good. As defined by the Supreme Court of Michigan it is the authority, capacity, power or right to act. See Campbell v. City of Plymouth, 293 Mich. 84; 291 N.W. 231 (1918). It is also the power of him who has the right to judge. See Gliptis v. Fifteen Oil Co., 204 La. 896; 16 So. 2d 471, (1926). Jurisdiction also has reference to the subject matter and the person. See Stewart v. Sampson, 285 Ky. 447; 148 S.W. 2d 278, 280, 281 (1924).

[17]Gearing has elaborated on this point and concludes by saying that whenever a clan member kills a member of another clan, the clan to which the killer belongs is equally guilty until the death has been avenged. Gearing, op. cit., 43.

person to trial,[18] the clan council, having concurrent jurisdiction, could try the matter and decree judgment in which case it would be final and not subject to review.

As the high court of the Nation, the seven-man clan council had original jurisdiction over all crimes that envolved any type of sacrilege against the nation. Such offenses might range from stealing some item from the National Council House to walking on the wrong side of its great hall.[19]

Having no fixed terms, it remained in continuous sessions, resolving itself into a court whenever the need arose. In that regard it acted as the local or town court of Echota, exercising appellate jurisdiction over clan hearings and original jurisdiction over acts committed against the town.

Once in office, comparable in this particular to our present day federal judges, a counselor stayed for life. When one died, the remaining six and the Uku met and recommended a replacement who was usually a relative of the deceased. If the particular clan agreed on the recommendation, the Uku was notified. After this, the Uku dispatched messengers to notify all the white chiefs of the various towns to come to the national capital for the installation of the

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[18]William Fyffe was of the opinion that criminals were rarely punished "for they look[ed] on corporeal punishment as apt to blunt their warlike Despositions . . . ." Fyffe to Brother John, loc. cit.

[19]Gilbert, loc. cit., 323.

new counselor. Like the inauguration of the Principal Chief, there was much ritual, fasting, and speech making.[20] Along with his associates, this new counselor and judge enjoyed impunity for ordinary crimes, and it was considered a public offense should anyone shed blood or commit violence in his presence.

The second council, or Council of Elders, might, if the imagination can be stretched a little, be compared to the lower houses in the colonial assemblies. The members were made up of the oldest men in the nation who were the head chiefs and leaders of the White Party in their own towns and local regions. In addition to being the top civil dignitaries in their own local, they were required to be at least fifty-five years of age or possess a head of grey hair which would give testimony to their wisdom and longevity.[21] A chief speaker, well acclaimed for his oratorical ability, was elected from among them to preside over their

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[20] Ibid., 323. Most of the material dealing with the court system has been derived from Gilbert's Eastern Cherokees. Gilbert used as his source material found in the fourteen volumes of the John H. Payne Manuscripts which are in the Ayer Collection and are located in the Newberry Library, Chicago, Illinois. With specific reference to courts, he made use of volume four entitled "Traditions of the Cherokee Indians" by Daniel Sabin Butrick who, as a missionary, among the Cherokees before the removal, gathered much information concerning their habits and customs. As the manuscript has no page number, Gilbert cites section sixteen as his source for the information on their court system.

[21] Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 91-92. See also Gearing, op. cit., 37.

deliberations which were concluded, apparently, when a unanimity of decision had been reached on whatever issue that they had before them.[22]

The National Council differed from most of the colonial legislatures in that it met separately from the Executive Council when acting in a judicial capacity. As a court, it more correctly could be compared to a grand jury in that it was more concerned with bringing charges than it was in adjudicating them. As has been seen, its decision was subject to approval by all the clans through their counselors when capital punishment was imposed. In cases envolving disposition of property confiscated from the enemy and the fate of prisoners, the National Council decisions could be set aside.

While the Great "Uku" called the council into session just before the Green Corn Feast, he had no power, either while it was functioning as a court or as a legislature, to "adjourn, proroque, or dissolve [it], nor could he refuse his assent to its conclusions, or in any manner controul [sic] them _____."[23] Council decisions, judicial or otherwise, were generally unanimous and direct coercion or

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[22]Ibid.; see Gearing, op. cit., passim. See also John Gulick, "Problems of Cultural Communications--The Eastern Cherokees," American Indian, VIII, No. 1 (1958), 28-29.

[23]Smith, Darlington, ed., op. cit., 146.

pressure were met with little favor.[24] The antipathy to force and to compulsory law moved the Cherokees to develop the art of sensing and affecting the sentiments of others. This dislike for coercion motivated them to elevate the less aggressive men to positions of councilors and judges.

On the other hand, the Red or War organization in its responsibility to assume national leadership in time of war, was far more aggressive and more totalitarian in its view regarding its role in the nation. When war threatened, it came forward to assert its position as head of the nation, and it remained in power for the duration of the emergency. It also administered offensive war outside of the nation and served as a liaison in relations between the town and foreign powers.[25]

The ranking officer and the high justice of the Red regime was the "Great Red War Chief." This was an elected office earned by notable exploits as a warrior. The recipient of this high rank was much younger than the White Chief because it was made mandatory by military law that he stay always at the head of his men. He was also required to be the first to engage the enemy and never to retreat except

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[24]Gilbert, loc. cit., 319-325; see also Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 92.

[25]Ibid.; for further reading on this phase of political organization see Frederick O. Gearing, "Structural Poses of the Eighteenth Century Cherokee Villages," American Anthropology, Vol. 60 (1958), 1148-1157.

when his men carried him away with force. In addition, to being the chief strategist in war, he was also an inspirational leader and a rallying point in battle. He also took a paternalistic attitude toward the safety of his men and was legally charged with the responsibility of not exposing them to unnecessary danger.[26] In the mid-eighteenth century, Oconnestate, war chief of the Overhills, who was "famous for having in all his expeditions, taken such prudent measures as never to have lost a man . . .,"[27] was elected the Great War Chief of the Nation.

Like the White Chief, the Red commander had an assistant called the Great War Chief's Second who, during the absence of his superior, took command in the field and acted in his stead when presiding over the seven man war court.[28] With respect to the latter, the National War Counselors were persons who had been elected to their national offices by their respective clans because of their pre-eminence and ability in war. In addition to these legal duties while sitting on this military conclave, they were required to elect the Great War Chief, his deputy, and all other national

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[26]Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 92; see Adair, Williams, ed., op. cit., 416.

[27]Timberlake, Memoirs, 94.

[28]Gilbert, op. cit., 351.

military officers.[29] Presumably, such positions could be filled from among their own ranks or they could elect any person they regarded as competent to take over a military position. Their power to appoint, however, was subject to the approval of the White Chief. At least it was true in the case of the Great War Chief, and it seems reasonable to assume that it was true in the case of lesser officials.[30] Another top position in the military faction was that of the Chief Speaker or "Skalilaski" who, like the speaker of the White Council, was supposed to have a talent for rhetoric and a knowledge of military law.[31]

In addition to their power to make military appointments, the seven war counselors acted as a reviewing board over all military affairs. Like their White Party counterparts they had to agree on any punishment inflicted on fighting men and warriors from their respective clans. As the high tribunal of the army they had appellate jurisdiction over all infractions of the military code which envolved the death penalty and original and exclusive

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[29]Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 92.

[30]Gilbert, loc. cit., 356-357; see also Malone, op. cit., 26.

[31]For a good description of war as it was conducted by the southeastern tribes see Montigny de Dumont, Memoirs Historiques Sur la Louisiana, edited by Le Mascrier, n.a., quoted in Swanton, Indian Tribes of the Lower Mississippi Valley, 126-134.

jurisdiction in matters that concerned imcompetence of high war officials. They also had concurrent but not appellate jurisdiction with each of the town's war boards in matters that pertained to religious violations.

Although they constituted the highest level of military authority in time of war, they were subordinate to the rule of White officials in matters which were purely local. Analogous in that respect to our practices, they were forbidden to preempt the role of white officials even in time of war. While it was necessary that all war counselors, town or national, be consecrated as priests, neither their persons nor their clothing was regarded as sacred as were those of the White Priests in the White party class.[32]

Lesser war officials who may or may not have had judicial powers included a standard bearer or "Katata kanchi," a surgeon, "Dunikoti," who was accompanied by three assistants, a number of messengers, and several war priests who could recall war parties from the field when impunity omens became unfavorable.[33] This subject will be dealt with more extensively but suffice it to say now, they were extremely important to the success of a military mission.

In time of peace, the Red War Party remained in the background and exercised little if any judicial power. It

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[32]Adair, Williams, ed., op. cit., 110, 128.

[33]Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 91-92.

was the desire of the White Party to play down the role of the War Chiefs as much as possible because of their militarist propensities.[34] This may be the partial explanation for the rivalry which Timberlake reported that existed in the Overhill Settlements between Little Carpenter, the Principal White Chief and Oconnestate, the Great War Leader. According to Timberlake, "the Overhill Settlements by these two chiefs were divided into factions, between whom there [was] great animosity, and the leaders [were] sure to oppose one another in every measure taken."[35] One authority has expressed the view that the war chiefs, because of the frequency of their trading expeditions to Charleston in time of peace, were intentionally given the job so as to keep them away from the villages as much as possible due to their constant and insatiable desire for war.[36]

The Red War Party, however, did not remain idle during peace time. It engaged in hunting and took jurisdiction over those activities which were designed to keep the warriors physically fit. There is little doubt but what the ball games which were played between the various Cherokee towns were, in reality, war games which were sponsored and coordinated through a hierarchy of war ranks under the

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[34] Ibid., see footnote, 92.

[35] Timberlake, Memoirs, 94.

[36] Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 92.

command of a village war chief.[37] One of the names which the Cherokees applied to a ball game was translated "little war" and many elements of war ritual can, at the present time, still be seen in the ceremonialism of an Indian ball game.[38] Other evidence that the ball game was related to a stratagem of war is contained in the minutes of South Carolina's Board of Indian Trade dated May 4, 1714, which reads as follows:

> A man named Clea swears he has heard that "there was a design among the Cherikees to Cut off Chestowee 10 dayes before ye sd town was cut off and that ye Cherikees designed to invite the Euchees to a ball play in order to cut them off . . . ."[39]

In this particular, the Red War chiefs did have the authority through their military boards or courts to provide rules, regulations, and penalties for conducting their war games and any infractions which occurred.

Exceptional women also had a role in the Red military organization and bore such titles as "Pretty Women," and "War Women." Writers, in making hasty reference to their titles, have used them interchangeable with the rank "Beloved Woman." While it may be out of sequence to elaborate on the

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[37]For a detailed discussion as to how a ball game or racket was played by the Cherokees see Stewart Culin, "Games of the North American Indians," Twenty-Fourth Annual Report of the Bureau of American Ethnology 1902-1903 (Washington: U. S. Government Printing Office, 1907), 575-587.

[38]See footnote, Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 93.

[39]Quoted in Malone, op. cit., 31.

subject, some attempt should be made to unravel the various grades and ranks of both women and men. In that respect, it need be noted that the entire Cherokee nation rested on a military base. That is to say, that it was a militant society. All male children upon attaining maturity were expected to become fighting men. During the time that they were engaged in their military exploits, they might become a war priest or, in any event, they would become so familiar with the activities of the priesthood, that they might elect to undergo some special training with the local "shulman."[40] If such should occur, they, most likely, would discontinue their martial endeavors and devote full time to becoming a religious man. In the event that such was the case, they would become a member of the priesthood for as many years that they cared to take an active part. On the other hand, should they decide to remain in the military ranks, they would be compelled to relinquish their role as warriors after twenty-five or thirty years of service. This, they would voluntarily acquiesce in, knowing, that should they fail in some military venture because of age, they would be subject to ridicule and, possibly be stripped of their war titles by a Red War Court.[41] Retiring, then, from the great Red

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[40]Gilbert, loc. cit., 341-342; see also Swanton, Early History of the Creek Indians, 385. See also Swanton, Indian Tribes of the Lower Mississippi Valley, 177-181.

[41]Adair, Williams, ed., op. cit., 416. An Indian informant stated to D. S. Butrick in the 1820's that "warriors were under very strict rules; and one, by disobeying,

War Party, they would, as a matter of course, go over to the Whites. In their new party organization, they would take their places in the town and national councils and courts as peace makers and judges. If they had been great warriors in the nation and their bodies bore the scars of many battles they would, perhaps, at some time during the White Party status be given the title of "Beloved Headman."[42] Being given the rank, they would become eligible to serve first on the town's council of elders and second, as clan counselors on either the town or national court.

They would have arrived at this point in life, however, not so much by their past military performances but by the gradual accumulation of affection, brought on by a lifetime of patience, understanding, and a full cognizance of the sentiments of those around them.[43] According to one writer, the elders of the White class, "epitomized the good,

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and committing sin, caused God to leave them, so that they could not destroy their enemies." The informant further related to Butrick that such a person who disobeyed "was condemned to die." Quoted in Gearing, "Political Organization of the Cherokees," 64-65.

[42]See Timberlake;s comment on war women and warriors, Timberlake, Memoirs, 94. Ramsey related the story that near the Waya Gap in the Nantahalo Mountains a Cherokee woman was killed in battle, and that she was painted and armed like a warrior. J. H. M. Ramsey, The Annals of Tennessee to the End of the Eighteenth Century (Charleston, South Carolina: Walker and James Co., 1853), 164. Roosevelt also reported the incident. Theodore Roosevelt, The Winning of the West (New York: G. P. Putnam's Sons, 1889-96), I, p. 294.

[43]Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 130.

the Cherokee ideal; they enjoyed unmixed respect and were indeed, called the 'most beloved men'."[44] The requirement that the White party officials seek their positions through love and respect other than the announcement of some authoritarian program is vividly portrayed in an anecdote told by Bartram. According to the story, the chief was so old that his attendants had to help him take his place before the council fire. Before sitting down he addressed himself to his people by saying:

> You yet love me; what can I do now to merit your regard? Nothing; I am good for nothing; I cannot see to shoot the buck or hunt up the sturdy bear; I know I am but a burthen to you; I have lived long enough; now let my spirit go; I want to see the warriors of my youth in the country of spirits: (baring his breast) here is the hatchet, take it and strike. They answered with one united voice, We will not; we cannot; we want you here.[45]

In regard to "War Women," they may have become, for any one of several reasons, a soldier and a warrior. In short, however, they were career women who, undoubtedly, enjoyed the panegyrics associated with their martial success, plus the privileges attendant to their military standing. Lieutenant Timberlake, during his official stay at Echota, appeared somewhat shocked upon his first acquaintance with them. This is to be seen in his statement that, "the reader will not be a little surprised to find the story of Amazons not so great a fable as we imagined, many of the Indian

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[44] Ibid. [45] Bartram, Van Doren, ed., op. cit., 392.

women being famous in war, as powerful in council."[46] Adair, more familiar with their activities, quaintly observed that "they [Cherokees] have been considerable under petticoat government."[47]

Custom dictated that "War Women" be present at every war council. Seated in the "holy area," that being the floor in the center of town house, they gave advice as to the kind of military strategy to be employed.[48] They may, or may not, have had the privilege to vote on the issue of war,[49] but it is clear that they had a peace role since official war women accompanied many of the peace missions.[50] While there is no evidence that a white man ever heard a Cherokee woman speak in council, it seems fairly certain that they had a right to vote on a peace proposal and the suspension of hostilities.[51]

It is not clear what training, if any, was required of "War Women" to prepare them for their military careers. It has been said the origin of their class developed from

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[46]Timberlake, Memoirs, 94.

[47]Adair, Williams, ed., op. cit., 64.

[48]Mooney, in speaking of Nancy Ward, wife of a trader and sister of Atakullakulla, the Principal Chief of the nation, stated that she was entitled to speak in councils and was sent by the chiefs in 1780 to make peace with the whites. Mooney, Myths of the Cherokees, 204.

[49]Brown, op. cit., 18. [50]Corkran, op. cit., 8.

[51]Ibid.

the fact, that, at some time in the remote past, they accompanied war parties to perform the menial chores about the camp.[52] Most likely, the practice started, when young girls, much in love and faced with the possibility of being separated from their betrothed, were taken along after their entreaties had broken down the protests of their lovers, or, perhaps, wives, concerned about the safety of their husbands, obtained consent to accompany them in the field. That seemed to have been the case of Nancy Ward, as she first came into prominence at the Battle of Taliwa in 1755 by which the Creeks were defeated. She had accompanied her husband on the warpath. Upon his being killed during the fight, she took up his rifle and fought as a warrior in his place the rest of the battle. In recognition of her bravery she was given the title of "Pretty Woman" or "War Woman."[53]

As a "War Woman" became older, her role as a warrior ended; and, like her male comrade-in-arms, she moved into the ranks of the White Party Organization. In her capacity

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[52] Ibid.

[53] See footnote, Brown, op. cit., 221. In 1761 at a place called Fishing Creek near Lunsford, South Carolina, a small band of Cherokees attacked the home of Mrs. William McKenny. Some of the Cherokee War Women, seeing that Mrs. McKenny was alone, ran forward to her house, went inside, and protected her from the male warriors. Elizabeth F. Ellet, The Women of the American Revolution (New York: Charles Scribner, 1861), p. 89. This book is microfilmed and is included in the Draper Manuscript Collection which was prepared and collected by the State Historical Society of Wisconsin; Draper Mss ITT25.

as a retired soldier, being somewhat unique among her matronly sisters, she became eligible to be given the title "Beloved" by the town council. Reinforcing her candidacy, as in the case of Nancy Ward, would be the fact that, as a soldier, she had become affiliated with the priesthood. Thus, supported by the Red War Party and the priest class, the advancement from an "ex-War Woman" to a "Beloved Woman" followed almost as a matter of course. Her elevation to this high station did not, however, rest entirely on the fact that she had been a warrior. Without question, it was a great boon in the enhancement of her chances to become a "Beloved Woman," but it is assumed that any elderly woman in the village, regardless, of her background could be the recipient of the title should the town sages elect to so honor her. While information is scanty on the point, some basis for the belief is found in the practice that, upon the death of a town head chief, his wife might be called to take his place until a successor could be found,[54] provided that she had previously held, or at the time of his death was given the title "Beloved." This was in conformity with practice that "Beloved Women" occupied a place in the administrative and judicial structure of national and town government.[55]

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[54]Gilbert, loc. cit., 321; also see Corkran, op. cit., 8-9.

[55]In 1787, three Beloved Women of Echota, addressed a letter to the Governor of Pennsylvania in which they were asking that peace be maintained. The letter is as follows: Brother, I am in hopes that my Brothers & the Beloved Men

In each town as well as the national metropolis, there was a seven-member council made up of Beloved Women from each of the clans. Functioning as a kind of special court, these seven "Beloved Women" had final and appellate jurisdiction over the fate of war prisoners. Timberlake,

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near the water side will heare from me. This day I filled the pipes that they smoked in piece, and I am in hopes the smoake has Reached up to the skies above. I here send you a piece of the same Tabacco, and am in hopes you & your Beloved men will smoak it in Friendship--and I am glad in my heart that I am the mother of men that will smoak it in piece. Brother,

I am in hopes if you Rightly consider it that woman is the mother of All--and that woman Does not pull Children out of Trees or Stumps nor out of old Logs, but out of their Bodies, so that they ought to mind what a woman says, and look upon her as a mother--and I have Taken the privilege to Speak to you as my Children, & the same as if you had sucked my Breast--and I am in hopes that you have a beloved woman amongst you who will help to put her Children Right if they do wrong, and I shall do the same--the great men have all promised to Keep the path clear & straight, as my Children shall Keep the path clear & white so that the Messengers shall go & come in safety Between us--the old people is never done Talking to their Children--which makes me say so much as I do. The Talk you sent to me was to talk to my children, which I have done this day, and they all liked my Talk well, which I am in hopes you will heare from me Every now & then that I keep my Children in piece--tho' I am a woman giving you this Talk, I am in hopes that you and all the Beloved men in Congress will pay particular attention to it, as I am Delivering it to you from the Bottom of my heart, that they will lay this on the white stool in Congress, wishing them all well & success in all their undertakings--I hold fast the good Talk I Received from you my Brother, & thank you kindly for your good Talks, & your presents, & the kind usage you gave to my son. From, Katteuka, The Beloved Woman of Chota. Moses Price & Tom Ben, Linchesters. 8th Sept., 1787. Indorsed, From Kaattakee, Scolecutta and Kaattahee, Indian Women. His Excellency, Benjamin Franklin, Governor of the State of Pennsylvania. Pennsylvania Archives, Original Documents, Vol. XI of the First Series, edited by Samuel Hazard (12 Vols.; Philadelphia: Joseph Severns and Co., 1852-1856), 181.

somewhat shocked when he discovered the fact, reported that they could reverse a decision of the council after the "wretch" had been condemned and "already tied to the stake."[56]

Fourteen years after Timberlake had published his observations, Nancy Ward, a Cherokee mixed-blood, exemplified the dramatic truth of his concluding statement. Speaking in behalf of the women's national judiciary, the "Beloved Woman" exercised the prerogative to "wave [the] swan's wing" and saved the life of Mrs. William Bean who had been condemned to death and was already bound to the stake.[57]

The reason for such power was based on the notion that, through their high office, "Beloved Women" were communicating to the council the voice of the Great Spirit.[58] It was also true they were representing the wishes of their female constituents which helped to explain the theory behind such a practice. Based on the historical tenets of tribal law, women who had suffered the loss of husbands in war were

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[56]Timberlake, Memoirs, 94.

[57]Mooney, Myths of the Cherokee, 204. Nancy Ward was the niece of Atakullakulla, the principal chief of the nation in 1760, which may have given her more influence than was normally allowed some other person with a similar title.

[58]Brown, op. cit., 17-18. According to Emmett Star "the life time distinction of [Beloved Woman] was bestowed as an extreme mark of valorous merit and carried with it the right to speak, vote and act in all the peace and war councils of the tribe." Emmett Star, History of the Cherokees (Oklahoma City: The Warden Company, 1921), 87.

permitted to replenish their vacancies by adoption. Adoption will be discussed more fully at a later time, but suffice it to say now that war captives were to be distinguished from slave captives in that slave captives were not regarded as enemies, having occasioned no deaths, and hence, their fate was not subject to the purview of the women. War captives, however, fell into a different category since they were held accountable for all casualties sustained by the nation. Upon being delivered to the village (the rule was inoperative in the field), the women through the agency of the special Beloved Women's Court had the exclusive right to adopt, decree them into slavery, or to dispose of them at the stake.[59] In the case of young warriors and women, they were usually adopted or declared to be slaves. The elder warriors who were toughened and seasoned to the art of war were condemned to death with the women, again by virtue of their widowhood, being privileged to satiate their revenge by carrying out the execution in any manner which would best suit their savage whim.[60]

It has been repeatedly stated that Cherokee women, in addition to their clan judiciary, had their own local and

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[59]Nathaniel Knowles, The Torture of Captives by Indians of the Eastern North America, Reprint from the Proceedings of the American Philosophical Society, No. 2, (Washington: n.p. 1940) Vol. 82, 216-217; see also Adair, Williams, ed., op. cit., 418-419.

[60]Ibid.

national councils. Evidence, however, seems unconvincing on the point. Apparently, the explanation lies in the fact that there has been the propensity to classify domestic women--women who didn't go to war--with warrior women. As has been seen, the latter, by virtue of their pursuits in war, were invited to attend the war councils and were also eligible for the same reason to attend some of the religious festivities. Domestic women did attend general council meetings, but it seems that they were spectators only. As spectators, however, they were not entirely passive. Should some problem arise which threatened the welfare of their homes and neighborhood they asserted themselves. It is in this respect that they probably met informally to crystalize their views and to agree on some method as to how to best express themselves.

While discussing political and military ranks it may be beneficial to explore the subject more fully at the town level. In that regard, Cherokee settlements had no schools in the Anglo-Saxon tradition. Yet, they provided educational facilities which were designed to bring out those qualities of leadership so essential in war and in civil administration. Village elders and war leaders, made education a community responsibility.

Every boy at a given age, physically capable of doing so, was obligated to avail himself for the various youth rites necessary to teach him the fundamentals of leadership

which, with some modification, consisted of being exposed to hunger and pain; to witness stoically the torture of war captives; and to listen courteously to chiefs and headmen who would recite to them their war deeds and the laws of their clan and nation. As one contemporary has put it, ". . . even old men who are past the trade [age] themselves use every method to stir up martial arduor in the youth."[61] Women also did their part to instill in their young men an ambition to emulate their forebearers in military greatness. At sixteen years of age, having passed the tests required of his elementary training, he was admitted into clan membership and given the distinguished rank of "bowman," or "Gunman."[62] One other aspect of his new status was his privilege to discard the name given to him at birth and take one of his own choosing.[63]

Upon the selection of this new name, he was entitled to carve it in picture language, on one of the town totems. Other evidence of his new rank was reflected in the fact he was permitted to attend some council meetings. His attendance at such functions was that of a spectator only as he was not permitted to vote or to take part in any of the

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[61]William Fyffe to Brother John, loc. cit.

[62]Rights, op. cit., 255; see also Brown, op. cit., 27-28.

[63]Timberlake, Memoirs, 93.

debates.[64] Despite the limited citizenship, he may have been eligible to enroll under a war chief and accompany him on some military venture, the successful completion of which would entitle him to take a new name more in keeping with his rise in the military class. Regardless, however, he would still be officially described as a "fighting man" as he could not attain warrior status until he was twenty-five years of age.[65] Age, however, qualified him only in that particular as he was still under an obligation to distinguish himself in some meritorious manner.

Assuming that he achieved recognition and he desired to continue his military career, the next level to which he could ascend was that of DAYUGI-DA-SKI or Slave Catcher which would signify that he had taken a captive.[66] Following that, came KOLNAH, the Raven, which was really a preliminary as well as a probationary title leading to Chiefdom. In his discussion of this particular rank, Adair has this to say:

> The "raven," is one of the Cheerake favourite war-names. Carolina and Georgia remember Quarinnah, "the raven," of Huwhasetown; he was one of the most daring warriors of the whole nation, and by far the most intelligent, and this name, or war-appellative, admirably suited his well-known character.[67]

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[64]Gearing, "Cherokee Political Organizations," 105.

[65]Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 93.

[66]Brown, op. cit., 28.

[67]Adair, Williams, ed., op. cit., 204.

The title was bestowed only upon those warriors who had displayed courage, vigilance and knowledge of military strategy. Many years might elapse before the warrior would receive the coveted rank. Once, having achieved such distinction, he could advance to OUTACITE or Man Killer provided he had fulfilled the requirement of killing an enemy.

Next, in the hierarchy of chiefs was YUN-GA-NU-WE-WE which was really the first permanent rank in chiefhood. TSI-OKOU-SKI, the Owl Person, followed, and the title indicated a full chief. At the pinnacle was the supreme position of D'ANAWA'-NU-GU-WE-A-SU, War Chief.[68]

Another avenue to success was through the priesthood. Like the military, training started at an early date and the "juniors" and "graduates"[69] worked their way up, serving first in the army as military priests; then at a given time, they went over to the white class. Becoming affiliated with the peace party, they became persons of great power and consequence. As one authority has described the average Indian conjuror, he "was something of a cross between a fortune-teller, a judge, an arbitrator, a consoler, and a general diagnostician." The Cherokee counterpart was no exception as tribal law required that he be present at every

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[68]Brown, op. cit., 28. For further information on war titles see Swanton, Indian Tribes of the Lower Mississippi Valley, 123-126.

[69]Bartram, Van Doren, ed., op. cit., 390.

council so as to prevent evil spirits from entering the town-house. His face covered with an animal or bird mask, the "Adawehis" officially advised the chief by signs, portents, and ancient formulas. Adair cynically reported that a conjuror of one of the lower Cherokee towns never informed the people that he was seeking rain until there was some promising sign of the change of the weather. Because of that, Adair noted, "he seldom failed of success, which highly increased his fame, and profits; for even when it rained at other times, they ascribed it to the intercession of their great beloved men."[70]

Giving comparable advice and acting in a similar capacity to the National Council was the "Great Conjuror" or national high priest. In the words of Old Hopp, the principal chief of the nation, "we do nothing without consulting our conjurors, and always abide by what they tell us."[71] Bartram reported that the people believed these seers had communion with invisible spirits who supervised human affairs. They foretold the coming of rain or drought, cured diseases, invoked and expelled evil spirits, and even assumed the "power of directing thunder and lightning."[72]

Their importance was their role as judges rather

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[70]Adair, American Indians, 87.

[71]Brown, op. cit., 30.

[72]Bartram, Van Doren, ed., op. cit., 390.

than in their ability to conjure. The town and national head priest--the Arch-magus--was called on to maintain domestic peace among his neighbors. In so doing, he acted the part of a civil judge in matters purely civil as the term is understood today. He had no power except that of persuasion to enforce his decisions.

As the head religious figure in his community, he could grant temporary asylum to persons envolved in criminal matters. He might make some attempt to plead before the town court when the defendant was compelled to appear and answer charges. By virtue of his religious affiliation he was not allowed to litigate any issue involving a sacrilege as that fell with the review of town criminal court. In short his role as a judge consisted of explaining the law and acting as a mediator in civil controversies.

Despite the lack of any real executive or judicial power, the priesthood had great influence. Cherokee leaders found it not only convenient but necessary to promote the class. This seemed to be particularly true of the local priest and his assistants who were called on to coordinate the actions of one village in harmony with another. Only one well trained and especially gifted to sense minute jealousies could nurture trust, form public sentiment, and produce a cohesive national sentiment. One author has made the following comment: "These men are able to move unthreateningly behind the territorywide consensus they help to create.

In the 1750's under such priests--first Old Hop, then Standing Turkey--the first Cherokee tribal state was formed."[73]

Assisting the priesthood in this move toward a unified nation were the Red Leaders. In the early 1760's the title "High Priest of War" was given to the Great War Chief in an attempt to bolster nationalism among the Cherokee towns by capitalizing on the influence of magic and religion.[74] Implementing this policy was a general overhauling of the role of both local and national priests. While there was little change in their judicial powers, they were brought more in line with the idea of punitive restraint for military infractions. This trend became explicit in their tough tribal policy toward young warriors who raided contrary to the dictates of the National Council of Elders. Jails were built and used to constrain the young hopefuls from their unauthorized military forays.[75]

In short his new coercion was built into the older organizational forms by allowing legitimate coercion on the part of the priests. By tradition, the spatial distribution

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[73]Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 132.

[74]Ibid., 133.

[75]Writing of the matter in 1761, Standing Turkey, one of the headmen in Echota stated that "we are now Building a Strong House, and the very first of our People, that does damage to the English, shall be put there until the English fetch them." The quote is from Gearing, "Political Organization of the Cherokees," 110.

of Cherokees required councils of state to be comprised of representatives of the several villages who traveled to the capital village. While unanimous agreements were usually achieved in the national council by those who were physically present, nevertheless, such agreements did not necessarily represent a crystallized tribal sentiment. While there might be a unanimity of opinion among the elders of a particular town, it might not percolate down to the level of its own citizens. In order, then, to generate a feeling of uniformity in the nation, the three classes, the White Peace group, the Red War group, and the priesthood, stressed the idea of each having jurisdictional limits and placed emphasis on the notion that they had power in their respective departments to enforce their decrees.

In so doing, the coalition was also able to develop the means by which a large measure of cohesive public sentiment was attained. This is the partial explanation for the existence of a war priest, the many religious and military relics, and the countless rituals and laws which were associated with the idea of success in war and national preservation.

## CHAPTER IV

## THE TOWN CHIEF AND COUNCIL

The principal white chief supervised all public and domestic affairs, and served as chief justice of the town. He received all visitors, entertained them, gave consideration to their mission, and laid their requests before the council.[1] It was his privilege as well as part of his official function to declare a general feast for his village.[2]

More in keeping with his capacity as judge, he had the responsibility of supervising the sowing and the planting of the community crops. While tribal law to such effect had a tendency to die out among other tribes, it was regarded as being very necessary for the Cherokees as they reportedly were such "idle people in their element."[3] Accordingly, it

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[1]Jones, op. cit., 14; see John Haywood, The Natural and Aboriginal History of Tennessee Up to the First Settlements Therein by the White People in the Year 1768. Edited by Mary U. Rothrock (Jackson, Tennessee: McCowat-Mercer Press, Inc., 1959), 254-257. For a comparison of the duties of a Cherokee chief to that of a Creek see Swanton, Early History of the Creek Indians, 371. For further comparison, Bartram need to be consulted. Bartram, Van Doren, ed., op. cit., 388-390. Jones, op. cit., 12. Additional information relative to the chiefs receiving foreign emissaries can be found in Daniel G. Brinton, Notes on the Floridian Peninsula, Its Literary History, Indian Tribes and Antiquities (Philadelphia: King & Baird, 1859), 121.

[2]Jones, op. cit., 12.

[3]Adair, Williams, ed., op. cit., 462.

became the chief's duty to announce the day of planting and to see to it that every able-bodied person was up and doing his share. Adair stated that "an old beloved man warns the inhabitants to be ready to plant on a prefixed day." At dawn of the designated time, the chief appointed an overseer to lead the workers to the fields. "About an hour after sunrise" as they are making ready to depart for the task, the chief, speaking in his judicial capacity, would admonish the group by telling them "that he who expects to eat must work, and that he who will not work, must expect to pay the fine according to the old custom, or leave the town, as they will not sweat themselves for an healthy idle waster."[4]

In addition to seeing that the crops were planted on time, the chief also had the legal responsibility for seeing that they were worked when needed. Martin Schneider, a Moravian missionary in traveling through some Cherokee towns in 1783, had an opportunity to observe this first hand. Being duly impressed with the activity, he rendered the following account:

> In the midst of every Town in . . . a round Tower of Earth about 20 Feet high . . . on which is a little House . . . Here the first Chief climbs up every Morning at the Time of the Work in the Field, & calls the People with a loud voice to-gether; these must come with their Indian-corn Hoes, & go together in proper order to work.[5]

Although the land was held in common by all,

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[4]Ibid., 436-437.

[5]Williams, Early Travels, 261.

individual tracts were marked off and worked separately,[6] enabling the more ambitious to profit by the ingenuity of his labor. In this respect, the chief was no exception to his own ruling as the abundance of his own food supply was in proportion to his own industry and the productivity of his garden. "The chief of a nation," as one writer expressed it, even with the consent of his assembly, or council, cannot raise one "shilling to tax off the citizens, but receive what they please to give as free and voluntary donations _____. They chief of a nation has to hunt for his living as any other citizen _____. . . ."[7] "The idea," wrote Ascott R. Hope, "of contributing to keep any member of the community in idleness and luxury was one utterly foreign to the Indian mind."[8]

It was also part of the chief's official and legal function, or perhaps it would be more accurate to say his paternal responsibility, to select the site of the public granary and to see that it was satisfactorily constructed so as to protect and preserve the food. In that particular, the food depositories were circular in shape and were usually built near streams or in some secluded spot which would

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[6]Bartram, Van Doren, ed., 400-401.

[7]Ascott R. Hope, The Men of the Backwoods, True Stories and Sketches of the Indians and the Indian Fighters (New York: B. P. Dutton and Co., 1880), 350; Haywood, Rothrock, ed., op. cit., 255.

[8]Ibid.

afford some protection from the heat.[9] As far as construction was concerned, here again it was a matter of joint effort on the part of the village, and here also, the chief supervised but at the same time, took his turn at working, assuming, of course, that he was still physically able to do so.[10] This also was true in the erection of all public buildings. Attakullakulla, the Principal Chief of the Cherokee Nation in the mid-eighteenth century, gave wide recognition to the rule by becoming so well-known for his adeptness at house-building, that he was familiarly known as "Little Carpenter."[11]

Associated with the Chief's duty of seeing that food crops were planted was the task of seeing them harvested, and the community share collected. In regard to the latter, he appointed officials to make individual assessments which, according to Adair, were made without the least interruption or exemption of any able person.[12] It was also part of the chief's role as high justice of the town to issue food from the public granary whenever the occasion required. In commenting on such a function, Bartram noted that while "every

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[9]Jones, op. cit., 12; see also Bartram, Van Doren, ed., op. cit., 400-401.

[10]Adair, Williams, ed., op. cit., 462; see also Jones, op. cit., 12.

[11]Timberlake, Memoirs, 94.

[12]Adair, Williams, ed., op. cit., 462.

citizen has the right of free and equal access, when his own private stores are consumed . . . this treasure is at the disposal of the king or mico; which is surely a royal attribute, to have an exclusive right and ability in a community to distribute comfort and blessing to the necessitors."[13]

As civil magistrate of the town, the chief presided over the town council which convened almost every afternoon or evening.[14] His presence was not required to formalize the official opening of the assembly or the legality of its act as his deputy chief could act in his place.[15] This had to be with the chief's knowledge and consent, or else the meeting had to be in the nature of such an emergency as to imply his permission. As a matter of practice, however, since the chief's position insured some measure of permanency, his house was usually located nearby and his coming to the townhouse every evening was merely a matter of habit.

Should some tragedy befall the village or should some crisis develop, it became the chief executive's prime task to call a special meeting of the council or to convoke

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[13]Bartram, Williams, ed., op. cit., 400-401.

[14]Jones, op. cit., 11. See also Haywood, Rothrock, ed., op. cit., 257.

[15]Ibid., 256. Haywood stated that "A Captain [Deputy Chief] is the chief's right hand. He must undertake every thing committed to him by the chief, even at the hazard of his life. In this consists his glory. If he is killed by the enemy, the whole nation unites in avenging his death." Haywood, Rothrock, ed., op. cit., 256.

a secret session of his seven clan counselors to consider the emergency.[16] In so doing he and the other members of the town's judiciary would examine the canons of their ancient law to see if these had been violated. If it was their weighed and legal opinion that a violation had occurred they then would make their decision known to the Council of Elders which then might result in a declaration of war.

Also as head magistrate of the town, the chief presided over all other judicial hearings. Should the crime be in the nature of some petty offense, the matter would be dealt with somewhat informally.[17] If the crime was murder, and the accused had appealed to the chief to hold a public hearing, it was the chief's duty to call his seven

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[16]When Colonel Chicken arrived in the Upper Settlements in 1725, he advised the chiefs of the five towns there that he would deliver his official talk to all the headmen of the entire nation. The headmen then met in secret and "Considered among themselv's" what to do about his request. Chicken's Journal, loc. cit., 21. Haywood says that sometimes the principal chief would pretend to his subordinate chiefs that "a spirit has come to him and delivered a bit of wampum, whispered in his ear, and again returned to his invisible abodes." Haywood was of the opinion that the fiction was not "discountenanced, because the good of the nation required secrecy and the chief was responsible only for the truth and importance of the subject . . . ." Haywood, Rothrock, ed., op. cit., 258.

[17]Fyffe stated in his letter to Brother John that the "Kings & Headmen are rather as Fathers than Magistrates . . . ." His explanation was that the terror of the barbarous Revenge commonly taken awes them." Fyffe continues by saying, however, that "some say that the [Indians in general] have no publick punishment, but the reverse is made by the chiefs of the Cherokees . . . ." William Fyffe to Brother John, loc. cit.

counselors together and to conduct an investigation of the charge. If the charge was treason, it fell to the head chief to report the issue to the National Council.

Turning now from his judicial duties to the responsibilities of state, it may be well to examine this phase of his office since he was called on to give interpretation to the rules whenever the need arose, which, to his successor, were binding and had the force of law. As head of state it was within his province to give audiences to ambassadors, deputies, and strangers.[18] In that regard, it fell upon him to present gifts, provide entertainment, food and lodging, and to play the part of an official host. Since the chief drew no salary,[19] was given no expense account, and was compelled to work and hunt for his living like the rest, he was sometimes hard put by such outlays. In fact, it was not too uncommon for him to be among the poorest of his tribe. Wealth, however, was not highly regarded since it was the custom of the Southern Indians, including the Cherokees, to throw away any old food provisions which were on

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[18]Jones, op. cit., 12. Haywood says that the "chief must be courteous, friendly, hospitable, affable and kind to all, and that his house must be open to all . . . . Even strangers who came upon business put up at the chief's house, and are accommodated with the best the house affords. The ambassadors of other nations must be lodged with the chief." Haywood, Rothrock, op. cit., 257.

[19]Elias Boudinot, Star of the West (Philadelphia: D. Fenton, S. Hutchinson, and D. Dunham, 1816), 161.

hand at the time the harvest was sanctified.[20]

But whatever the consequences of hospitality, the head chief entered into one of his most exalted and dramatic roles when entertaining a motion for peace presented to him by an emissary of hostile forces. While tribal law provided that it was within the sole prerogative of the Great War Chief to ask for a declaration of war,[21] it was also the law that it was within the office of the Principal Chief to receive overtures of peace.[22] It was he who officially accepted the great white wampum and presented it to the council. Whether the object of the foreign mission was to seek appeasement or atonement for some alleged injury which its nation had perpetrated, it was within the purview of the chief's legal power to accept or to reject any one of several belts as presents which might be proffered.[23] If he received them, and he usually did, he would direct that they be hung up on a line or displayed in such fashion that all could see them.[24] He, then would present the issue of peace as atonement to the council. If the council made a favorable response

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[20]Adair, Williams, ed., op. cit., 110. This was the Green Corn Dance which lasted for four days. The Missionary Herald, Prepared by the American Missionary Board for Foreign Missions, (Boston: Samuel T. Armstrong, 1818) XIV, 215.

[21]Jones, op. cit., 15. [22]Ibid.

[23]John Ling, Voyage and Travel 1768-1778, edited by Milo Milton Quaife (Chicago: R. R. Donnelly and Sons, 1922), 99; see also Hope, op. cit., 352-353.

[24]Hope, op. cit., 353-354.

after due deliberation, which might require several days,[25] the belts were retained as records of the event; and the chief, acting as his own law clerk, was responsible for their care and preservation.[26] This requirement was depicted in graphic fashion in the mid 1850's when the then Principal Chief displayed the great seven-foot peace belt which had ended the Cherokee-Iroquois War, it having been fought almost a hundred years before and, meanwhile, the Cherokee Nation having been compelled to migrate to an entirely new land.

In touching on this phase of the executive care, it is to be noted that there is a tendency to confuse holy relics with public document. A religious or ceremonious piece

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[25]Adair, Williams, ed., op. cit., 460.

[26]Ling, Quaife, ed., op. cit., 99; see also Hope, op. cit., 345. William Fyffe wrote to his brother and stated that "in all Treaties of Friendship the wampum or other Presents delivered are deposited in their Court House. By these they liken to our uses to retain the History of these Treaties." William Fyffe to Brother John, loc. cit. At a conference held at Charleston, South Carolina, on July 4, 1753 between colonial officials and representatives of the Cherokee Nation, Little Carpenter, after the Governor had made his speech, took a boy by the hand and introduced him to Governor Glen of South Carolina, saying: 'We, our wives and our children, are all children of the great King George; I have brought this child, that when he grows up he may remember our agreement on this day, and tell it to the next generation, that it may be known forever.' Quoted in John H. Logan, A History of the Upper Country of South Carolina from the Earliest Periods to the Close of the War of Independence (Charleston, South Carolina: S. G. Courtenay & Co., 1859), 498.

such as the stone, seven stemmed peace pipe,[27] the turtle drum, or the Cherokee war ark, was always in the care of a priest who was designated for that express purpose whereas a tribal memorial such as the peace belt, pictograph calendar, atonement offering, or war trophy was either entrusted to the care of a head chief or the Great War Chief.[28]

The head chief was a nominal ruler only, being seldom anything but presiding officer of a group of the most influential men of his tribe; that he had only so much voice in the management of public affairs as his own superior qualities gained for him; he had "neither influence or distinction but from his wisdom and prudence;" if he became negligent in his conduct, he might readily be deposed as "every unworthy action [was] unavoidably attoned by forfeiture of his commission."[29] He had no power to make war, "leagues or treaties;" he could not adjourn, prorogue or dissolve a general assembly, nor could he refuse his assent to their conclusions, or in any manner controul [sic] them."[30]

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[27]For an archaeologically discussion of these pipes see Frank M. Setzler and Jesse D. Jennings, Peachtree Mound and Village Site, Cherokee County, North Carolina, Bureau of American Ethnology, Bulletin 131 (Washington: U. S. Government Printing Office, 1941); 34-35.

[28]Haywood stated that on "the death of a chief, the wampum [was] carefully prescribed by the council, till a successor [was] elected." Haywood, Rothrock, ed., op. cit., 258.

[29]Boudinot, op. cit., 161.

[30]Smith, Darlington, op. cit., 147. The spelling in this quote has been modernized by changing the old letter "f" to "s" wherever it had been used as "s".

Little Carpenter, gave testimony to this fact in 1759 when he advised Governor Littleton of South Carolina that he try to keep peace with the English, but the chiefs "had no coercive authority one over the other."[31]

The local town chief as a civic official only was little more than an exponent of public opinion. When prompted by expressions of local sentiment, he felt strong and would express himself with boldness, and "frequently go in advance of, or concentrate, the public voice, in a manner to elicit approbation."[32] As the voice of his town, he tried to utter its views and to proclaim local or national sentiment by reminding the citizens that they were proud defenders of their forest domain and the resting place of their fathers. On all such subjects, the chief had a free range, and would make every effort to carry his listeners along with him. Let the topic, however, become involved with a land question, or a question of a division of any sort, and

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[31]Samuel G. Drake, The Book of the Indians; or Biography and History of the Indians of North America From Its Discovery to the Year 1841 (eighth ed.; Boston: n.p., 1841), 379. The lack of power was the cause of complaint as late as 1824. A missionary, writing to the American Missionary Board in Boston, stated that the Cherokees in Arkansas were in need of "judicious laws for the punishment of vice . . ." and, as the chiefs "possess little power," they cannot pass "authoritative measures." Missionary Herald, loc. cit., 78. John Filson in his Discovery, Settlement and Present State of Kentucke makes the generalization that chiefs had little power. John Filson, Discovery, Settlement, and Present State of Kentucke (Wilmington: Printed by James Adams, 1784), 106.

[32]Schoolcraft, op. cit., I, 249.

his power would come to an end. He would immediately disclaim the idea of trying to settle it without council help and would seek instruction from the warriors and the town as a whole. Only after he had been guided by their advice would he give expression to his thought.

By contrast, however, when conducting himself as a judge he and his seven-man court could, if all were of the same opinion, impose both negative and positive decrees either when giving opinions or issuing decisions in criminal matters.[33] A chief, however, had no title, judicial or civil which signified anything higher than a chieftain. Despite the insistent English labeling of "Emperor," "King," or even "General" for the Cherokee leaders, the Cherokee vocabulary contained no words which meant despotic or arbitrary power and, conversely, no language which expressed oppressed or obedient subjects.[34] As an eye witness observer

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[33]Alexander Hewat, An Historical Account of the Rise and Progress of the Colonies of South Carolina and Georgia, n.2, cited in Swanton, Early History of the Creek Indians, 76. Hewat stated "they have judges . . . . who have great weight among them . . . ." The entire concept of their law was grounded on the idea that punishment could be inflicted only with the consent of all the seven clans. This is implicit in the statement that the "terror of the barbarous Revenge commonly taken awes them." William Fyffe to Brother John, loc. cit. When a crime is committed, the person and his entire clan are held accountable until satisfaction has been made. Gearing, "Political Organization of the Cherokees," 43. Thus the fear of revenge plus the idea that all the clan is guilty, seem to be the basis of their criminal law.

[34]Adair, Williams, op. cit., 459.

summed it up, "the white people were formerly so fond of the name of kings, and so ignorant of their power, that they concluded the chief man of a nation must be a king." The contemporary continued his estimate by stating that "there is no such thing as hereditary succession, title or nobility or royal blood, even talked of _____ . . . ."[35] Gilbert, concluded that certain lineages appeared to have produced more chiefs than might be expected on the basis of chance alone.[36]

Aside from personal traits and qualifications,

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[35]Smith, Darlington, op. cit., 147. The practice of using the title king when making reference to the chief or principal headman of the town was followed to some extent by the members of the American Missionary Board in the early part of the nineteenth century. Scattered reference to chiefs being called kings can be found in the Missionary Herald, loc. cit., XIV, XV, XVIII, XIX, XX, XXI. One of the missionaries, in reporting conditions at the Brained Mission, related the fact that the "King and one of the principal chiefs" had paid them a visit. Missionary Herald, XV, 271. The various titles and ranks were rather confusing to colonial authorities. One of the leaders, Old Hop, had been a War Chief and, later, had become a Principal Chief. Oconostota, a contemporary of Old Hop, bore the title Great Warrior. The English insisted on calling them both Emperors and, apparently, encountered no end of difficulty in keeping them straight. This fact is indicated by Governor Robert Dinwiddie who wrote in 1754: "I always (till now) understood the Emporer was their Chief Man. If Old Hop is a greater man, I shall hereafter notice him as such." See footnote, Adair, Williams, ed., op. cit., 85. Sir Alexander Cuming, in writing of his visit to the Nequassie in 1730, described the various ranks and called the principal chief Oukah Ulah . . . and the second Warrior, otherwise Kettagustah, (or Prince Tathtawie . . . .)" Cuming's Journal is found in Williams, Early Travels, op. cit., 127.

[36]Gilbert, loc. cit., 552-553.

family background seemed to be extremely helpful in piloting a hopeful to chieftain. Principal head chiefs who had distinguished themselves for wisdom and good counsel had reason to expect that the office would be continued in their families; where the expectation was not particularly disappointing, or where the persumptive heir was the very embodiment of all that was required of a clan justice his election followed as a matter of course, and it was within the framework of these circumstances that his high office descended through the female line.[37] Should such occur, his successor would be his next brother or his sister's son to the exclusion of his own offspring--an arrangement which, in the terse language of early Indian chronicler, marked more for "regard for purity of birth than trust in purity of morals."[38] Schoolcraft, in discussing the matter as it

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[37]Schoolcraft, op. cit., I, 248-249; see also Hope, op. cit., 351. Haywood stated that there were "in almost every tribe, some families respected as hereditary chiefs, unless they forfeit their title by misconduct." He further stated that though the office of the "king" was "elective," it was common to elevate the sons of any of the dignitaries to the rank of their fathers." Haywood, Rothrock, ed., op. cit., 255.

[38]Hope, op. cit., 350. This policy, as explained by Father Le Petit, was founded on the "licentiousness of their women" . . . and they are not sure . . . that the children of the Chief's wife may be of the blood Royal, whereas the son of the sister of the Chief must be, at least on the side of the mother. Letter from Father Le Petit, Missionary, to Father D'Avaugour, Procurator of the Missions in North America, dated July 12, 1730, The Jesuit Relations and Allied Documents Travels and Explorations of the Jesuit Missionaries in North America 1610-1791. Edited by Edna Kenton, (New York: Albert & Charles Bori, 1925), 411.

related to the Iroquois, it having equal application to the Cherokees, made the following observation:

> There was another law, which, at the same time that it regulated, complicated descents. The descent of chiefs was in the female line. A chief's son did not succeed him, but his next brother--the right of sovereignty being entirely in his mother. When, however, the chief's wife had a right, his son would succeed him; not, indeed, in her husband's right, but in hers . . . . This law of descents has rendered it so difficult for Europeans to understand Iroquois descents, and led authors into such errors on the topic.[39]

Should, however, the nephews of the departed chief or his own son by his "wife's right" show no capacity for good counsel or had exemplified no knowledge of tribal law, they were bypassed, and the town councilors and the people looked elsewhere. While vacancies were not filled immediately, as previously noted, it was possible for the town to make a mistake in the selection of its chief magistrate. When the mistake was discovered, the office of the chief became nominal, and he exercised little influence or none at all. Should the situation advance to the point of being intolerable, and adverse public opinion mount to such a point that his rulings were no longer given any regard or deference, his

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[39]Schoolcraft, op. cit., V, 73. See Rights, op. cit., 254. Haywood stated that the "sons of the chief cannot inherit the father's dignity, as they are not the royal blood, or next of kin to the father. The son of the chief's eldest sister is generally the heir apparent. For it is a maxim with the Indians that the children are related only to the mother." Haywood, Rothrock, op. cit., 258. The Creeks and the Seminoles also followed the practice that descent was in the female. Swanton, Early History of the Creek Indians, 399.

office was considered vacated; a new leader would then be installed.[40]

As previously noted, the high priest was sometimes elevated to chief and high jurist of the town. Adair observed that "their old men, who could scarcely correct their transgressiving wives, much less go to war . . . are often promoted to pontifical dignity, and have great power over the people, by the pretended sanctity of their office."[41] Having ascended to this office, one with political adeptness might become first man of the town. Should this occur, the newly elevated chief would relinquish his religious office to his eldest son as it was the law of the Ishtohollo or the priestly order that it descend by inheritance to the oldest male in the family of the high priest.[42]

Whatever method used to become leader of his village, and despite the lack of any real power to enforce his executive views, the town chief, whether sitting as a judge

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[40]Schoolcraft, op. cit., I, 194.

[41]Adair, Williams, ed., 85.

[42]Ibid. For additional information concerning the priesthood see James Mooney and Frans M. Albrechts, The Swimmer Manuscript: Cherokee Sacred Formulas and Medicinal Prescription, Bureau of American Ethnology, Bulletin 99 (Washington: U. S. Government Printing Office, 1932), passim. Bartram, Williams, ed., 390, contains a short treatment of priest class. For various tales and myths circulated by the priests see John R. Swanton, Myths and Tales of the Southeastern Indians, Bureau of American Ethnology, Bulletin 88, (Washington: U. S. Government Printing Office, 1929). This is a collection of stories of most of the Indian tribes in the southeastern part of the United States.

or acting as civil head, was a person of tremendous influence. Malone has noted that his office was the most lasting institution of Cherokee local government as its "authority extended well into the period of the republic."[43]

Related to the office of the head chief of the town was the village Council of Elders. This was a civic and legislative body. While it did perform some judicial functions, it more correctly acted as a sounding board for public opinion.[44] In order, however, to differentiate between it and the executive town council or court some discussion of its general powers should be made. With regard to composition, it was made up of elderly men who had served their tenure as fighting men and had retired from the active ranks of the Red War Party. Because of the necessity to serve their country first as soldiers, they were usually well past fifty years of age when they became members of the town's governing body.[45] Elias Boudinot, famous for being the editor of the first Cherokee newspaper, observed that they admitted of no

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[43]Malone, op. cit., 119.

[44]Haywood stated that "all affairs of importance [were] laid before the grand council; and without its consent, no proposal can be put into execution." Haywood, Rothrock, ed., 257. For further treatment of its legislative power see Gearing, "Political Organization of the Cherokees," 41. Fyffe to Brother John stated that "they [the Cherokee people] have the greatest deference to the person of their old men, the young are all attentive Hearers . . . ." William Fyffe to Brother John, loc. cit.

[45]Gearing, "Political Organization of the Cherokees," 37.

equality among them but what was based on age or "great qualifications" which were obtained either through council deliberations or war.[46] Although leadership seems to have been selected purely on the basis of demonstrated competence in both "war" and "council," it appears that the same individuals rarely became prominent in both fields. While it was possible for any Cherokee to rise to leadership in either or both groups, the operation of the political system in a Cherokee village selected for high office "two kinds of men with two kinds of competence."[47] A leader in war rose from the ranks through success in military ventures which included not only killing enemies, but exercising diplomacy and tact within the military system. All young men were fighters and some became warriors, but the kind of man who emerged at the top was a strong, dominating person. While the village at large tendered respect to such men by formal honors and sometimes by material rewards, they, nevertheless, kept them at a distance and greeted them with "suspician and ambivolence."[48]

Civil leaders and judges, on the other hand, obtained

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[46]Boudinot, op. cit., 161. "In there public assymbles they've grave & cautious hearing opposite Proposals first & reserve discovering their own Sentiments till last . . . ." William Fyffe to Brother John, loc. cit.

[47]Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 130.

[48]Ibid.

their high offices through love, respect, and paternal devotion which in turn, motivated the citizenry to respect their opinions simply because they thought it proper to obey their commands and admonitions. As headmen of the town's general court, they were held accountable to see that all domestic and peacetime needs were looked after. In that respect, they had jurisdiction over public buildings, charity, agriculture, and certain peace celebrations, or any matter which would become so weighty as to exceed solution by a single family or clan. They also aided and advised the principal chief when the responsibilities of his office called for it. They spoke on, debated, and submitted all local welfare issues to the general council meetings in which the town's citizens were expected to voice themselves.

As "perfect republicans," they attempted to speak the opinions and sentiments of the town.[49] They would consult the priests, old men and young men alike as well as the warriors to learn their feelings on local issues. In speaking their views before the general council, their opinions were merely dictum. Until acted on by the voters of the town, they had no weight as law. When acting as a court and jury, however, they had the power to render a verdict without

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[49]Boudinot, op. cit., 161.

submitting it to the people.[50]

Since almost all trials took place in the council house, it may be of interest to contrast the seating arrangement of a legal proceeding to that of a general council meeting. While some mention has been made to the inside of a council house, it need be noted again that families attending a general meeting filed into the town house with the wife taking the children to that portion of the building assigned to her clan, leaving the husband to do the same thing. An explanation of this is hard to find. The best answer appears to be that clan affinity was so strong that individual members made the most of any opportunity to display to the public their kinship ties. Another reason may have been, that the mother-in-law was prohibited from either living with or speaking to her son-in-law.[51] Such a rule would appear hard to follow since the husband was obligated to live in a house and on land owned by his wife's clan.[52] However, the requirement may have been propounded for just such a reason and it might well be the explanation as to why

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[50]Schoolcraft, op. cit., I, 194. No clear cut statement has been found as what issues the Council of Elders submitted to the people and what issues they regarded as wholly within the province of the council. A calculated guess is that they would submit questions in which there was doubt in their minds as to its popular support.

[51]Rights, op. cit., 254. See also Swanton, Indians of the Southeastern United States, 705.

[52]Fenton and Gulick, Symposium on Cherokee and Iroquois Culture, 91.

families found it more convenient to sit apart at town meetings than run the risk of having an inquiring mother-in-law approach and create a public spectacle.

In trying to assign the correct seating order within each clan, more difficulty is encountered as eye witness observers appear to have been little concerned with this matter. The best evidence on the matter, however, seems to indicate that all grades of clan citizens, Beloved Men, Beloved Women, warriors, fighting men, women and children sat together in the space allotted to their own clan. Within such an area, however, the high clan dignitaries such as the "Beloved" white leaders and high persons in the Red class were pushed against the walls of the "emperial state house."[53] Adair observed that the couches were "above seven feet wide, and a little more in length, with a descent toward the wall, to secure them [the occupants] from falling off when asleep." Adair also observed that everyone who entered the "mountain house" took his seat according to his "reputed merit." Should he fail to do otherwise, he would have been ordered to his proper place amid shouts of laughter, a remonstrance which, in the mind of the culprit, brought the "vilest disgrace."[54]

The women, children, and persons not yet entitled to "speak" in the council, that being translated the right to

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[53]Adair, Williams, op. cit., 453. [54]Ibid., 104.

"acclaim" or vote, sat on the floor immediately in front and between the clan officials and the speaker's rostrum which was in the arena in the center of the auditorium. The arena contained the council fire and was surrounded by the seven great timbers which supported the roof and designated the location of a particular clan which was seated immediately behind it. The seventh pole was the sacred seventh post.[55]

This seating order with some variation was pretty much the same in all council houses depending upon the population and the importance of the town. In some townhouses such as the one described by Timberlake, the spectators' seats were built, one above the other in the fashion of an amphitheater, with the debating stage in the center.[56] It is to be remembered, however, that Timberlake had reference, to the national townhouse in Echota where it was expected that delegates and spectators from all the Cherokee towns, would come. Because of that, it is to be expected that its size and the ingenuity of its construction would exceed the public edifice at a town level. Bartram, however, in calling attention to the townhouse at Cowee stated that "all around the inside of the building, betwixt the second of the pillows and the wall, [was] a range of cabins or sophas, consisting of two or three steps, one above the other, in

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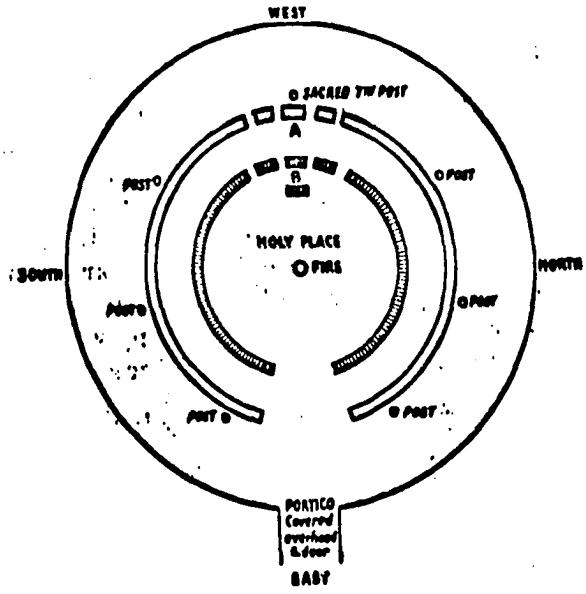
[55]Gilbert, loc. cit., 355. See the chart on the following page of this text.

[56]Timberlake, Memoirs, 59-61.




Seating in the Cherokee Council House
From The Eastern Cherokees by William H. Gilbert.

theatrical order, where the assembly sit or lean down."[57]

Despite any difference in construction, it is believed that such a seating order took place when a meeting was convened to discuss purely local or domestic problems or whenever the town was engaging in some type of community entertainment. In the more legal meetings, which were called to render some definite judicial decision, all persons being eligible to speak and take part in the council deliberations moved near the speaking area. In this concentric formation the active participators would seat themselves on the heavily, hemp-carpeted floor,[58] on individual stools, or share with each other large benches brought forward for just such an occasion. Included in this group would be the qualified citizens or voters consisting of warriors over twenty-five years of age, Beloved Men, Beloved Women, War Women who met the age requirements, and all other persons, excluding the priesthood, having a voice in the proceedings.

While no attempt was made to retain clan cohesion in such a grouping, all persons associated with either the Red War Party or the White Peace Party would sit together on opposite sides of the speaking arena. Behind them, in the event the council hearing was public, would be the wives, children, and fighting men under twenty-five, who had not

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[57]Bartram, Van Doren, op. cit., 298.

[58]Adair, Williams, ed., op. cit., 105.

yet attained warrior status.[59] Placed in the center of the arena or the space allotted for the speakers would be the white and red "imperial" seats of the civil chief and the war chief.

Flanking the pontifical chairs, one to each chair, was a huge white painted eagle carved from "poplar wood." Immediately in front of the five foot statues and mounted on the same base would be the smaller clay figurines of a man with buffalo horns and a panther, one to each of the wooden eagles, respectively.[60] Attention is diverted to these painted relics because through them, in their symbolism of superstition and religious mysticism, the leaders in the town "synhedria" were able to give impression to the solemnity and authority of their high legal office.

When the Principal Chief seated himself he would have always on his immediate right the second head man of the town. Behind the first and second chief and on their side of the building would be the beloved men and the beloved women of the tribe. On the opposite side of the great

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[59]Haywood, Rothrock, ed., op. cit., 255.

[60]Adair, Williams, ed., op. cit., 453. This practice appears to have been wide spread among the southern Indian tribes. David Bushnell comments on the custom and stated that it was the opinion of one writer that the figures were "likened to the May poles in England." David I. Bushnell, Native Villages and Village Sites East of the Mississippi Bureau of American Ethnology, Bulletin 69, (Washington: U. S. Government Printing Office, 1919), 100-101.

room, sitting together in like proximity to the Great Warrior, would be the second head warrior and, behind him, the principal warriors of the town.[61] Such then was the arrangement and atmosphere when the council was deliberating as a tribunal.

As a legislative body, it is assumed that its proceedings were much more relaxed even though there was little change in the seating arrangement of the council members and spectators. Evidence is so meager on the point that it is difficult to show much differentiation. Schoolcraft, in compiling his voluminous works on the American Indians described the formalities being then observed among the Creeks during their council meetings. In reciting their ritual and protocol, he mentioned that they "paid respect to ancient ceremonies."[62] Assuming that to be true, a case in point may well be found between their council proceedings and that of the Cherokees in the eighteenth century. According to Schoolcraft, the principal chiefs entered the town house first and took their seats. The next in order would then enter and address themselves to those who are already there by saying: "Are you all present, my friends?" They then would take their seats. The White civil chief would then get up from his chair and extend to his deputy chief some of

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[61]Jones, op. cit., 11.

[62]Schoolcraft, op. cit., I, 276.

his tobacco; this interchange took place throughout the whole assembly, after which they would get down to business.[63] Timberlake complained of the strong addiction to the use of tobacco at the national council in Echota and reported that he was proffered over one hundred and seventy pipes as they made their way around the assembly circle.[64]

As a legislative body, this local conclave bore a sharp resemblance to the type of pure democracy exhibited by the early New England town meetings in that all citizens took their civic responsibilities seriously and regularly expressed themselves at all community deliberations. According to Adair, every "father of a family" had "due weight in every public affair" as it concerned his welfare.[65] Despite such high expressions, however, the council, whether functioning as an assembly of the people or as a court, was clearly patriarchal.

When vacancies occurred, the city councilors called for an election with such taking place at a general council

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[63] Ibid. [64] Timberlake, Memoirs, 59-61.

[65] Adair, Williams, ed., op. cit., 460. Haywood stated that only members of the council were permitted to speak. Haywood, Rothrock, ed., op. cit., 256. John Stuart, in giving advice to one of the chiefs in the Creek Nation, makes the statement that "they [the fighting men and warriors] should hearken to the Talks of the Beloved Men, who alone have a right to give Talks." John Stuart to Topoye, alias the Fighter, small Medal Chief, and Chief of the Coossados. March 23, 1766. London Public Records File, Oklahoma Historical Society.

meeting.[66] It is not clear what procedure was followed. Presumably, the council would submit the names of those persons whom they regarded as fitting candidates for the office of councilor, and invite the people to indicate their choice. Whether the individual council member, in submitting the name of a likely candidate or the council as a body, would officially abstain from supporting one candidacy over that of another is not clear. It is believed, however, that the council, if it regarded a prospective member to have superior qualifications, would give such vigorous support to his candidacy that it would be almost equivalent to his election.

Such a practice, it is believed, was followed to the extent that it was almost deemed hereditary from father to son unless, of course, a rogue and rascal appeared in the person of the son. Such a person would be one who had rejected all the groomings of law and government and had sought fame and glory in the warrior class.[67] In commenting

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[66]B. B. Thatcher, Indian Traits Being of Sketches, Manners, Customs, and Characters (New York: J. and J. Harper Co., 1833), II, 89; see also Thomas L. McKenney and James Hall, History of the Indian Tribes of North America (Philadelphia: Lippincott, Grambo Co., 1855), 376. McKenney and Hall were of the view that the council could fill vacancies in their own body at will. This may have been true in the transitional period, or that time in which the Cherokees were attempting to set up a government along the lines of the United States from 1790 to 1810, but it seems unlikely at an earlier time.

[67]Beloved Men and certain speakers of the white class who were "best versed in the history" of their country were required to teach the younger men and "hand down" to them the laws of their clan and country "for they [knew] nothing of writing." William Fyffe to Brother John, loc. cit.

on this curious situation, it seems to have been a general rule that sons of chiefs attempted to distinguish themselves in roles exactly opposite of that of their fathers.[68] Clan identity may also have been significant in influencing their decisions as to whether they desired to become lawmakers or warriors. Such would appear to be true where their own clan--their mother's relatives--could boast of a great leader in the opposite category of that of the father. A case in point is that of Little Carpenter and his son. Little Carpenter was principal civil head of the entire Cherokee Nation, whereas his son, Dragging Canoe, became the most bitter and vindictive leader in the Red military class, and who, ultimately led a segment of more militant of the Cherokees out of the nation.

The Council may have had power to exclude its own members or to refuse to seat one if he did not measure up to the high standards that were expected of them. There is the story that in 1794, Major Ridge, then a young man and quite poor, was temporarily excluded from the National Clan Council at Echota because he presented such a poor appearance. It being reported that his colleagues felt it within the

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[68]Haywood states that "sons of chiefs" cannot inherit because they are related only to the mother." Yet, Haywood further notes that it "was common to elevate the sons of any of the dignitaries to the rank of their fathers." Haywood, Rothrock, ed., op. cit., 255. The rule seems to be that sons could step into their father's position other than that of chief.

keeping of their station to display much wealth such as horses, trinkets, weapons, and trophies of warfare and hunting--a requirement which Ridge was not able to fulfill, or at least at the time.[69] Most likely no valid analogy can be made between the National Clan Council of seven members and the town Council of Elders except to note that should a member of the village governing body display ill-respect, criticism, or conduct himself entirely out of harmony with the established usage and decorum associated with the council, he, in all likelihood, would be given a quick remonstrance or ignored to such a degree that it would be equivalent to expulsion.

Such then were the general features and proceedings of the town council. Whether sitting as a general court or council, it was the most important institution in Cherokee society. Unlike the present day practice of legislative bodies delegating judicial prerogatives by creating special courts and quasi-judicial bodies, the Cherokee towns never became so complex but what they could not solve problems through their town councils. The general council rendered final judgment as to whether or not a treaty violation had occurred even though the executive council, acting as a court, had proffered an adverse legal view.[70] Frequently the town

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[69]Thomas McKenney and James Hall, The Indian Tribes of North America 1795-1859, edited by Frederick W. Hodge, (Edinburgh, Scotland: John Grant, 1933) I, 376.

[70]This would be true with respect to a declaration of war as the Council of Elders was the only instrumentality

council was called on to exercise judicial responsibility over some controversy which the seven-member clan court could not reach a unanimous decision. While this was usually limited to civil issues, it, undoubtedly, was obligated to render some kind of appellate judgment in criminal matters in those cases where some clan member sitting on the town court refused to agree that his kinsman was guilty. In this particular, it is to be emphasized that the council could take jurisdiction only when all members of the town court could not agree. Unless secrecy was required, the proceedings of the town council were public, but the young and the undistinguished members of the tribe were present only as spectators.[71]

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in the nation that could declare war. While the Chief Warrior could request war, only the Elders could make the official declaration. Should a treaty violation occur on the part of the Cherokee Nation, the seven-man clan council, operating as a court, could decree punishment for the individual Cherokee who had perpetrated the breech. Gearing reported the situation in which a Cherokee had killed a trader in violation of an existing treaty. The clan council was convened and it rendered judgment that the Indian be shot. Gearing, "Political Organization of the Cherokees," 91. Colonel Chicken reported that during his short stay with the Cherokees in 1725 that near the town "Terriquo" Tellico a man and a woman crossed the nearby river "to geather some herbs to make Salt . . . ." While there, the woman was kidnapped by the "Enemy," the man having left the Woman for some small time in Order to go Shoot a Turkey . . . ." Chicken does not report what action, if any, was taken by the Council of Elders, but it was a situation in which both the Elders and the clan councellors could have had jurisdiction over the matter. See Colonel Chicken's Journal as reported in Williams, Early Travels, op. cit., 101.

[71]Secret meetings were held in those cases when the War Chief called a meeting of his head warriors to discuss the possibility of requesting the council to declare war or

The fact that only those with experience and practice in tribal law were entitled to speak and act for the tribe, had a tendency to give the town some aspects of an aristocracy. Adair defended this feature of their government by saying that they were bound together by "natural law" which, of necessity, precluded weak and inexperienced persons from responsibility.[72] As a result, the councils were mainly composed of old men of the tribe who had gained a reputation for wisdom and the art of "palavering" as one writer described it.[73]

The Cherokee counselors and jurists were men of words as well as deeds, and enjoyed, in the fullest meaning

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to examine some current military problem; they were also called by the Principal Chief so that he and his "Beloved Head Men" might elaborate on some village problem before submitting it to a full vote of the council. Any number of situations could arise which would be the occasion for a secret "cabinet" meeting of the heads of state. Haywood reported that after foreign officials have given speeches, the head chiefs would meet in secret and discuss what has been said. Haywood, Rothrock, ed., 256. In response to a speech made to the Over Hill towns, Chicken reported that the "Head Men having Considered among themselv's of what I had said to them made Answer . . . ." "Chicken's Journal," Williams, ed., Early Travels, 98. In addition to civil and military matters, there were several religious rites which were required to be carried out in secret. All secret discussions, whatever nature, took place in the winter house or "hot-house" which was a small, circular shaped building annexed to the main council house. Timberlake said it was a "little hut joined to the house in which a fire [was] continually kept, and the heat . . . so great, that clothes [were] not to be borne the coldest day in winter." See Timberlake, Williams, ed., op. cit., 61.

[72]Adair, Williams, ed., op. cit., 459.

[73]Hope, op. cit., 351.

of the word, community respect and patience while deliberating on legal matters. No question was answered in a hurry; decisions were never made on impulse. With regard to communications or requests made by strangers to their village, several nights might elapse before a response would be made.[74] Being unable to employ modern methods of recording verbal communications, council members relied on each other to remember parts of a speech made by some visiting dignitary. Sometimes, later, out of the presence of the spokesman, they would convene, usually informally, and go over what he said. Each council member being able to remember certain portions of the talk, they could put them all together and get the "correct speech" as they called it.[75]

Legal views and speeches were prepared beforehand, and the opinion to be adopted was discussed in informal meetings before being openly brought forward.[76] Holding fame in oratory was second only to that of war, and the person who had such a proclivity might sometimes be caught rehearsing for his appearance before the court and council by giving forth great bursts of eloquence in some lonely thicket.[77]

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[74]Adair, Williams, ed., op. cit., 460.

[75]Turner, op. cit., 90.

[76]Hope, op. cit., 351. See footnote, 72, infra this text.

[77]Ibid. Haywood has described such speeches as being "precision of sentiment, metaphoric boldness or expression, vehemence or gesture" and given with "propriety of manner." Haywood, Rothrock, ed., op. cit., 256.

Before opening any legislative or judicial proceeding, the head chief would usually call for the Black-Drink, a decoction of leaves and tender twigs. Called Cusseena[78] by the Cherokees, it was a powerful diuretic and its purgative influences were invoked to free the bodies of the council members from all hinderance of thought.[79]

When this beloved liquid or "holy drink" was fully prepared and ready to be consumed, one of the priests would deliver two large consecrated conch-shells into the hands of two religious attendants who, after a short ceremony, would

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[78]The Black-Drink was made from the leaves of the cassine shrub of the holly family. During the Colonial period it grew abundantly along the sea-coast of the two Carolinas and Georgia, and the Cherokees, along with other Indian tribes, transplanted it to their own fields. At the proper time, they would clip the young shoots and boil them over a fire producing a white froth and a strong liquor almost as black as molasses. If the liquor was taken with sugar, it tasted like tea. Many whites made a type of tea from it called "Carolina" or "Appalachian tea." With the possible exception of rum, there was no liquor which the Cherokees liked so well. The drink repeated caused a sweating which was supposed to purify, physically and morally. The caffeine in the plant produced stimulation and the conjurers told the warriors that it would purify them from all sin and that it gave them an invincible powers in war. The Cherokees really believed that the Great Spirit had communicated its virtues to them, and that he had bestowed a peculiar blessing on his chosen people. Therefore, no higher compliment could be paid to a friend then to invite him to drink of the holy fluid. It was used on state occasions and in most religious solemnities. No one, however, could drink it in council unless he had proved himself a brave warrior. When a religious ceremony was being performed, no woman or child, could participate unless they had accompanied the holy ark on some military mission. For further details see Schoolcraft, op. cit., II, 267. See also Adair, History of American Indians, 48-49.

[79]Jones, op. cit., 11.

fill them with the sanctifying fluid. That, in turn, was followed by a more extended ritual of knee bending by the cupbearers. Stopping their exercises suddenly, they, in a bent position, would approach the principal and second counselor and hand them the two filled shells. The two high justices would then raise the cups to their mouths but would abstain from drinking until the signal was given. Seeing that the two chiefs were ready, the cup bearers would then step back and give the O-he-wak,[80] the black-drink note. The "great men" placed the cups to their mouths and were obligated to drink during the aspirated intonation of the two cup-bearers who retreated backward, faced each other, bowed their heads, half closed their eyes, and sang the "awful monosyllable O, for the space of one minute."[81] After the long aspiration, they went to the majestic he, and then the strong "mysterious sound, wak at the end of which they receive the cups from the two chiefs and pass them to others of inferior rank.

It was generally served around in this fashion three times at every meeting and during the recess of serving it, the counselors and elders sat in their chairs and amused themselves "by smoking, talking, exchanging tobacco, and in

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[80]Schoolcraft, op. cit., II, 266-267; Schoolcraft gives one of the best descriptions of the black-drink. He calls the black-drink Yohullah whereas Adair said it was Ohewah; see Adair, Williams, ed., op. cit., 49.

[81]Schoolcraft, op. cit., II, 266-267.

disgorging what black-drink they had previously swallowed."[82]

While general councils were called to determine public policy or to adjudicate some offense committed against the town or clan together with the proper means of redress, the great theme of council debates was foreign affairs, especially war.[83] A declaration of war was usually preceded by some injury inflicted on the town or nation as a whole. Adair stated that the Cherokees were not "fond of waging war with each other, unless prompted by some of the traders" and that they examined very careful all the attending circumstances before going into war.[84]

The usual cause for military action was to respond to some wrong or injury inflicted on the town or nation such as a treaty violation, an encroachment on tribal hunting grounds, the plundering of communal farm crops, or to revenge some crime perpetrated against members of their nation. An example of that occurred in 1760 when the Cherokees declared war on the English, it being determined by the town and national clan counselors that tribal law required revenge

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[82]Ibid. [83]Turner, op. cit., 63-64.

[84]Adair, Williams, op. cit., 407. Prior to 1730 several traders attempted to negotiate peace between the Cherokees and the Tuscaroras but were told by the Cherokees that they could not live without war. Haywood made the observation that "there have been but few intervals in the history of the Cherokees, when they have permitted themselves to sink into the inglorious arms of peace . . . ." Haywood, Rothrock, ed., op. cit., 222-223.

or atonement.[85] Should no atonement be proffered by the wrong doer, or if made an unacceptable to the council, the Principal Chief would direct the Great War Chief to call a War Council.[86]

The Great War Chief would then assemble his head warriors and they would deliberate the matter in secret.[87] If their decision was war, the Great War Chief would upon appearing in the general council ask for a declaration of war. There was no set and binding rule, however, that the War Chief was compelled to hold a secret meeting of his staff or go through the formality of having the Principal Chief request that he prepare such a course to the council since all matters related to fighting was by tribal law, entrusted to him. The war chief alone had the sole prerogative of asking the council to go to war.[88]

Once the issue was submitted to the council, the Great War Chief, whose turn was usually to speak first, would either advise against war, or if he was of a contrary

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[85]Muriel Wright, A Guide to the Indian Tribes of Oklahoma (Norman: University of Oklahoma Press, 1951), 59.

[86]Jones, op. cit., 15. [87]Ibid.

[88]Ibid. See also Hope, op. cit., 353. The principal chief would open the debate by submitting to it the issue of war or peace, and then ask the War Chief to express his views on the subject. The War Chief would use "figurative language" showing the use of metaphors that the "veins of his country's enemies as opened; the victims of war are at the stake, the fagots are collected, and the fire kindled; the tomahawk and scalping knife are invoked . . . ." Haywood, Rothrock, ed., op. cit., 257.

opinion, he would lift the red war hatchet of the tribe.[89] If he elected to follow the second course, his conduct would constitute a formal request for war, he being, it will be recalled, the only one who could put the motion before the assembly. While still holding the axe, he then might break forth with a harangue in which he denounced the enemy and urged his fellow council members to vote for war. He then would return to his war seat, and the warrior next to him would rise and express his views, and so on around the council, until all persons, beloved men and warriors, had expressed their views. When anyone addressed the council, he would out of deference to his listeners, always stand. A failure to do so was regarded as the height of impropriety[90] In return, his audience was bound by the law of silence not to interrupt him while he had the floor.[91] Adair said there was not the least passionate expression "among them and they behaved with the greatest civility to each other."[92] As a generalization, that is quite likely true, but it seems improbable that their faces revealed no degree of acquiescence when a warrior, highly regarded for his wisdom and courage, spoke the sentiment of the majority and seasoned his comments

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[89]Timberlake, Memoirs, 60.

[90]Adair, Williams, ed., op. cit., 460.

[91]Hope, op. cit., 352; see also Adair, Williams, ed., op. cit., 460. Haywood, Rothrock, ed., op. cit., 257.

[92]Adair, Williams, ed., op. cit., 460.

with a lively pantomime in which he depicted death to their enemies or touched on some other issue dear to their hearts.

Once debate had ended and the bond of brotherhood had been observed by smoking the tribal pipe,[93] the Council of Elders was required to meditate the matter. After a sufficient time had elapsed, the Principal Chief put the issue of war or peace to a vote by lighting the foreign peace pipe, it being presented to him under circumstances already described, and submitting it to his fellow meditators.[94] The recipient of the pipe would indicate his vote for peace by smoking it. If he, however, favored going to war, he merely passed the pipe along to the next person, but his conduct, at this juncture, might not be completely passive since it was very frequent for one of the Elders to explain why he thought it necessary that he vote for war.[95]

After the pipe had made its circuit, the Principal Chief took note of the result based on the majority votes, and, regardless of whether he agreed with it or not, communicated it to the council.[96] In cases where the voting was close or where no clear majority prevailed, two rival groups might form around their favorite leaders and press their sentiments in that fashion. When such a deadlock occurred,

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[93]Timberlake, Memoirs, 60.

[94]Hope, op. cit., 353. [95]Ibid.

[96]Thatcher, op. cit., 89.

there being no established rule to follow, the outcome would depend upon the influence and persuasive powers of the individual chiefs. Generally, in such a situation, the minority leaders would subsequently agree with the majority. If not, they would retire and refuse to accept any responsibility for decision.[97]

These formalities applied to a situation in which an enemy offered the alternative course of war or appeasement, but the procedure for declaring war in the first instance would be the same except in the use of the peace pipe. When a hostile tribe desired peace or atonement and sent its own pipe to signify its good faith, tribal law required that the question be resolved by smoking or refusing to smoke its pipe. If, however, a treaty was violated and its breach was the occasion for a formal vote on the matter, the lifting of a war hatchet or any instrument of battle by a council member could signify a vote for war.[98] However, in this

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[97]John Gulick stated: "Group decisions were reached aboriginally by unanimous decision. Any person who found it impossible to go along simply withdrew, releasing himself from any responsibility for, or participation in, the consequences of the decision. This was consistent with the Indian form of individualism, and it maintained the harmony principle by the voluntary removal of irreconcilably dissident individuals from the group. John Gulick, "Problems of Cultural Communication--The Eastern Cherokees," American Anthropology, (1958), VIII, p. 28. Bartram, in speaking of the Creeks, stated that he did not know whether or not their "ultimate decisions required unanimity, or only a majority of voices . . . ." He was of the opinion, however, that "where there [was] a majority, the minority voluntarily accede[d]." Bartram, Van Doren, ed., op. cit., 389.

[98]Timberlake, Memoirs, 60.

situation, applicable only to treaty violations, the vote for war was always conditional, namely in that, once the issue has been submitted, and it was resolved to seek redress by military force, the enemy's former peace belt, pipes, and other memorials were returned. If the enemy returned the same or similar items, a state of war existed as a matter of course.[99] This practice was followed in 1759 when the Cherokees returned a wampum belt to the Chickasaws.[100]

If, however, no treaty violation was involved and the council decided war in the first instance, custom required that a club, "something in the form of a cricket-bat," having engraved on it "their warlike exploits," be sent into the country of their enemy. If the enemy accepted the "defiance," he brought the war club back and left it where it could be found.[101]

Another way of making known a public declaration of war was to plant arrows all along the pathway leading to one of the principal villages of the enemy. Still another method of advising their enemies that a state of war existed, was to shoot burning arrows into some of their towns.[102] In the

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[99]Ling, Quaife, ed., op. cit., 99.

[100]Gentleman's Magazine, XXX, (1760), 45.

[101]See footnote, Timberlake, Memoirs, 82.

[102]Jones, op. cit., 18.

latter instance it would appear that it would constitute an attack without warning and lie outside the sanction of tribal law.

The ceremonies for peace treaty negotiations were heralded by the appearance of representatives of the adversary nation who brought with them as a flag of truce a long-stemmed peace pipe appropriately decked with feathers and other finery. As bearers of such an item, law as it existed among Indian nations of the eighteenth century required that they be scrupulously respected in their character as ambassadors.[103] Serving as credentials of their mission would be a white peace belt, several feet long and three or four inches wide, being composed of small white and black beads with the black located in the center so as to represent a particular hieroglyphic design.[104]

The ambassador, upon appearing before the Principal White Chief and, more especially when presenting his bid for peace before the council, held aloft the white wampum and ended each clause of his peace message with the formula, "this belt confirms my words."[105]

After several hours or even several days of debate on the proposal, and after the issue was ultimately put to a vote, a special seven-stemmed, white peace pipe was brought forward by one of the priests whose special job was to act

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[103]Hope, op. cit., 353. [104]Ibid. [105]Ibid.

as its custodian.[106] If, after the pipe had made its official circuit around the council, the outcome was the acceptance of peace, the pipe of the former enemy was then lit, and everyone took his turn smoking it. The emissaries were invited to take part and, as a token of honor, were placed on the white seat.[107] Food was presented to them, Aesseena was called for, the Yo-He-Wak given, and the dance of the eagle tails commenced. The eagle tails dance was performed by a half dozen of the most active and expert young warriors who carried eagle tail fans in their hands, covered their heads with "swan-feather" caps, and painted their bodies with "white clay." Upon approaching the principal foreign dignitary, they waved the eagle tails back and forth over his head. In the words of Adair: "The Indians cannot shew greater honour to the greatest potentate on earth, than to place him in the white seat,--invoke Yo-He-Wak, while he is drinking the Cusseena, and dance before him with the eagles

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[106]Mooney, op. cit., 503; Mooney was writing in the late 1880's and reports a statement that the ancient seven-stem peace pipe was carved from white stone which was procured from a quarry located near Knoxville, Tennessee; Mooney also mentioned that in (1880) there were many spurious Indian pipes which were manufactured in western North Carolina, carved from soapstone and having three to half a dozen stem-holes encircling the bowl. Jones also reported that the Cherokees sold such pipes. Jones, op. cit., 400.

[107]Adair, Williams, ed., op. cit., 176, when the Cherokees were disaffected or intended to declare war, they would not allow any of the party against whom they had hostile views to approach the white seat or any of their religious relics. See Adair's footnote to the above citation.

tails."[108]

The dance concluded the first phase of celebrating. This was followed by a round of speeches. In reports made of most of these proceedings, it is difficult to know how well the words have been correctly translated. Timberlake, it will be recalled, attended the Cherokee National Council at Echota and took part in the negotiations which resulted in the Cherokees making peace with the English in 1762. He reported a speech made by Ostenaco, a popular chief from the Overhill Settlements, which may serve as a fair example of Cherokee oratory. Portions of the speech, including the sententious metaphor to bury the war hatchet, is set out below:

> The bloody tommahawke, so long lifted against our brethren the English, must now be buried deep, deep in the ground, never to be raised again; and whoever shall act contrary to any of these articles, must expect a punishment equal to his offense. Should a strict observance of them be neglected, a war must necessarily follow,

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[108] Ibid. While performing the dance, which was a religious rite, the participants would bow, then raise themselves erect, turn their faces upward, and wave the eagle tail fan toward heaven with their right hand. With their left hand they would touch their chests with a stick at the end of which was attached a small callabash containing some pebbles. This touch motion was done in rhythm to the wave of the eagle tails and a Yo, Yo song; for the Cherokee's use of eagle's tails in the reception of Sir Alexander Cuming (1730) see Williams, Early Travels in the Tennessee Country, 126; and for Timberlake's account of the eagle-tail dance: Memoirs, 107; also Mooney, Myths, 281, 491-3. Charles Hicks, the second chief of the Nation, stated in 1818 that the Eagle-tail dance was still performed "among the Cherokees." He further noted that it was "as a token of friendship in making peace among red people." Missionary Herald, loc. cit., XIV, 216.

> and a second peace may not be so easily obtained. I therefore once more recommend to you to take particular care of your behavior towards the English, whom we must now look upon as ourselves.[109]

With respect to the procedure followed in the National Council it is assumed that, as to form, very little difference existed between its deliberations and those of the town councils. As has been noted the national White Chief presided over both the Council of Elders and the Executive Clan Council, and like his counterpart at the town level, functioned as Chief Justice as well as the Chief Executive.

The choice for this office seemed to go to a chief in the Overhill area which gives rise to the inference that a "favorite son" in the provinces would have had a rough time of it had he desired national prominence. The explanation appears to lie in the fact that the delegations to National Council included all members from each of local councils,[110] and larger towns were able to muster more votes for their candidate.

The Cherokee nation had been described as a "loose" confederacy which indeed it was. This arose from the fact that each town, either through a scrupulous regard for its own identity or a lack of far-sighted citizens, submitted to no form of native federal authority.

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[109]Timberlake, Williams, ed., op. cit., 59-61.

[110]Eaton, op. cit., 10. See also Gilbert, loc. cit., 321-322.

The National Council's power was permissive and not mandatory. It can best be described as a place where the town delegates convened, talked, and attempted to implant their views by oratory and eloquence on the nation as a whole. Persuasive power, not delegated power, was the medium through which its proceedings were conducted.

While towns frequently agreed on a course of action beforehand and would instruct their principal and beloved men to urge the National Council to adopt such a course, no coercive machinery existed which required the minority to accept the proposal. As an agent of the Cherokee city-states, it could declare war, conduct peace negotiations, ratify trade agreements, and dispose of public lands, but all such activities and performances were subject to the requirement that the towns had to be unanimous in their views. Even after joint action had been agreed on, a town could withdraw its approval. This was particularly true either in the case of declaring war or making peace.

This in part helps to explain why no clearly profiled national or local judiciary could exist. The enforcement of criminal laws and any corresponding punishment could come only from the clans and then, only after they were in an unanimous accord that it be carried out.

## CHAPTER V

## CHARITY, MARRIAGE AND PROPERTY

As previously noted, Cherokee town law made it mandatory on every adult male citizen to join in community planting, pay his annual crop assessment, and participate in the erection of public buildings. "They [had] not," in the words of Adair, "the least trace of any other old compulsive law among them; and they did not stand in need of any other in their state."[1]

Thus, it would appear that the forest towns of the Cherokees displayed some concern and responsibility for the public welfare. Crop assessment and the donation of labor on public projects were not too far removed from the type of taxation imposed by the colonial assemblies.

Public charity was practiced by the Cherokees. In the case of widows, orphans, invalids, and old people who were no longer able to make their own livelihood, the Principal Chief would, from time to time, call for a charity war dance. Since most of the able-bodied citizens were regarded as fighting men, this included nearly all the male inhabitants. This dance differed from other dances, not only in

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[1]Adair, Williams, ed., op. cit., 462.

the purpose but in form, in that only one person danced at a time. At the conclusion of the individual dance exhibition, the performer would place his offering which consisted of whatever he could spare such as a string of wampum, a piece of plate, wire, paint or some other similar item on a large skin which had been spread for that purpose. He was then followed by another dancer until all warriors had performed and had made their donation. After paying the musicians, the remainder was divided up among the poor.[2]

In calling attention to this type of state welfare, it seems that it would work very well when food was abundant as there would be little hesitation to exchange it for some desired trinket which had been donated, but in times of food scarcity, it would appear that it would be of no great help. Schoolcraft, in commenting on the problem in general, stated that the old and the infirm suffered whenever there was a shortage of food, and that the indigent had to appeal to relatives. If there were no relatives, they went to the Principal Chief and he would do what he could.[3]

One writer was critical of the manner in which the Southern Indians divided their food. In his words, the practice was "hurtful to the public weal." He did acknowledge that the dividing of meat might answer a good purpose,

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[2]Timberlake, Memoirs, 92.

[3]Schoolcraft, op. cit., IV, 56.

"as one family [might] have success one day, and the other the next; but their carrying this custom to the town, or to agriculture, [was] striking at the root of induftry [sic], as industrious persons ought to be rewarded, and the lazy suffer for their indolence."[4]

But whatever welfare and care was undertaken by the community, immediate responsibility of needy persons fell to their nearest relatives, that being particularly true in the case of orphans and illegitimate children.[5] In the case of illegitimate children, indiscriminate behavior prior to marriage, as noted earlier, resulted in no social stigma either to the mother or the child as children born under such circumstances were readily adopted by the clan and town.[6] Simple fornication being no crime, the sexes indulged in their propensities unrestrained by law or custom and, apparently, without secrecy or shame.[7] Because of such promiscuity, many young women became pregnant before marriage. Should a young woman become pregnant by a fellow whom she expected to marry and was disappointed, that is, he did not

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[4]Smith, Darlington, ed., op. cit., 149.

[5]Schoolcraft, op. cit., IV, 56. [6]Ibid., IV, 272.

[7]Ibid. This seemed to be true of most of the southern Indians. See Swanton, Indian Tribes of the Lower Mississippi Valley, 94. This was an item of concern among the first missionaries. See The Jesuit Relations and Allied Documents Travels and Explorations of the Jesuit Missionaries in New France 1610-1791, edited by Reuben Gold Thwaites (Cleveland: The Burrows Brothers Company, 1896-1901) LXV, 131-135.

marry her, she was permitted by the custom of the country as well as clan law to destroy the infant at birth either by leaving it to perish in the woods or by drowning it in a stream.[8] Schoolcraft noted that it was not uncommon in families which had grown so large as to be supported with difficulty, for the practice to be observed with the "mutual consent of the clan and parents and without remorse."[9]

By having few inhibitions against pre-marital relations, it is perhaps understandable why one authority was prompted to say, that among the Southern Indians in general, "marriage was considered only a temporary convenience . . . ."[10] While such a statement is undoubtedly correct, it should not be overlooked that many marriages lasted until death. According to Schoolcraft, girls became eligible for

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[8]Schoolcraft, op. cit., IV, 56. This practice was also common among the southern Indians. See Pierre Margy, Decouvertes et establissements des Francais dans l'Ouest it dan le Sud de l'Amerique septentrionale (1614-1754), Vol. V, n.d., cited by Swanton, Indian Tribes of the Lower Mississippi Valley, 94.

[9]Schoolcraft, op. cit., IV, 56. It was Haywood's opinion that Cherokee women did this because of the "barbarous treatment" they received from their husbands. Haywood, Rothrock, ed., op. cit., 262.

[10]Schoolcraft, op. cit., IV, 56. One writer defended this by saying that "marriage among the savages [was] not the most serious affair of life. If there [were] some laws, they [were] very accommodating." Quoted in Swanton, Indian Tribes of the Lower Mississippi Valley, 95.

marriage between the ages of ten and twenty,[11] and that it was not unusual for an elderly man to wed a young girl or even a child since "she was capable of receiving good impressions in that tender state."[12] Bartram observed that it was common among the Creeks for a great man . . . who has already half a dozen wives, if he sees a child of eight or nine years of age, who pleases him, and he can agree with her parents or guardians, to marry her and take her into his house at that age.[13]

The Cherokees practiced two types of marriages. The first, that of proxy and deputation, was usually conducted by someone of note such as a warrior or a chief. The second method was an outright purchase. In the first instance the intended bridegroom, the suitor would ask his mother or some female relative to take a blanket, a yard of cloth, or a pair of leggings to the mother or to the nearest relative of the intended bride.[14] If the mother disapproved she would pass it on to her brother or her oldest son who would make known

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[11]Schoolcraft, op. cit., IV, 272; see also Gilbert, Eastern Cherokees, 256; Smith, Darlington, ed., op. cit., 148.

[12]Adair, Williams, ed., op. cit., 145.

[13]Bartram, Van Doren, ed., op. cit., 403.

[14]Anon., Border Incidents, 109-110; see also Adair, Williams, ed., op. cit., 148; Swanton, Indians of the Southeastern United States, loc. cit., 704; Bartram, Williams, ed., op. cit., 402. Haywood, Rothrock, ed., op. cit., 261.

her refusal.[15] If the mother or relative accepted the presents, they then had to prevail on the intended bride as her consent was required to make the contract binding.[16] The general procedure, however, seems to have been as follows:

> The young cople [couple] that is to be married goes and tells one other and promises to Each other that: If they like [each other] they acquaint the auld [old] people with it. The father and mother of the young man sonds [sends] for the parants [parents] of the young woman and consult about the matter.[17]

If, however, the price was too small or if the prospective spouse refused to give her consent, tribal law

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[15]Thomas Nuttall, A Journal of Travels into the Arkansas Territory, Reuben Gold Thwaites, editor, Early Western Travels 1748-1846 (Cleveland: The Burrows Brothers Company, 1904-7), 188-189.

[16]Adair, Williams, ed., op. cit., 148; Gilbert says generally there was a previous attachment between the couples, it was very often that neither the bride or groom was consulted. This would mean that parents had much to do with marriage arrangements. See Gilbert, Eastern Cherokees, loc. cit., 339; see also Swanton, Indians of the Southeastern United States, 703; see also Armand Mondot, Historie des Indiens des Etats - Unis faite D'apres Les Statistiques et Les Rapports Officiels Que Le Congres a Publies en 1851 (Paris: Durand Librarie, Rue des Gres--Sorbonne, 7 Pres le Pantheon, 1858), 168. Mondot said that the consent of the parties was necessary; see also Anon., Border Incidents, 109-110. Haywood stated that the woman did not have the "power of refusing" since the marriage contract was a purchase. He further stated that the price was usually wearing apparel; and on appearance of the bridegroom, the bride was stripped of her new clothes by her relatives and presented to him. Haywood, Rothrock, ed., 261.

[17]Alexander Longe, "A Small Postscript to the Ways and Manners of the Nashon of Indians Called Cherikees," Ms in the papers of the Society for the Propagation of the Gospel. Miscellaneous Documents of South Carolina (1710-1851), Library of Congress, Division of Manuscripts, Washington, D. C. Hereafter cited as SPG Papers.

obligated the return of the presents.[18] If, however, it was a question of price, the suitor might send a second more expensive gift, or he might authorize his agent to ask for credit if the girl's relatives placed the ante too high. In some instances, credit was extended, if the suitor was of the type who gave promise of payment.[19] In those cases where the prospective bride had married and divorced but still had a living husband, the suitor was required to make his presents in twice the amount to the former husband provided the interval of separation had been long enough for him to escape the laws of adultery.[20] In either case if his proposal was accepted, the intended bride would wait three

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[18]Adair, Williams, ed., op. cit., 148.

[19]Rights, op. cit., 254; see also Swanton, Indians of the Southeastern United States, loc. cit., 703. Swanton says that wives were passed from hand to hand very freely upon payment of the original purchase price. Haywood stated that suitor would devote his service to the parents by hunting for them, or assisting them in making canoes. Haywood, Rothrock, ed., 261.

[20]Rights, op. cit., 254. Haywood states that whoever takes an "abandoned wife must pay the price of her to her former husband." Haywood, Rothrock, ed., 212. This requirement is in line with the idea that her first husband has had to give consideration to her parents which is retained by them. Should the marriage end in divorce the wife, while she could legally take possession of whatever property that was available, was under no obligation to see that her original purchase price was returned. For this reason the suitor to any divorced woman must pay the original purchase price to her former husband since the husband would have no other means to recover it. To discourage the practice of buying another's wife for whatever was originally paid, the amount was doubled and such a law had application, apparently, as long as the former husband lived. If dead, the wife could collect whatever price, if any, she desired.

or four weeks, presumably by request of her mother to make sure that the purchase contract was being fulfilled.[21] If value had been received to the satisfaction of all concerned, she would go to his house one or two hours before daylight and sleep with him the remainder of the night.[22] As reported by an eye witness, the time interval of a few hours might not be enough to convince the couple that they were making the right choice. If not, they would live together several days. If, at the end of that time they were still undecided, the law allowed them without penalty of punishment or shame to seek the pleasure of other company. As explained by the narrator:

> [They] leaves one the other in 8 or 10 days of with of totale [to take] comparsons [comparisons] if they never had known one the other. The man gone [goes] and tooks [takes] on other wife and the woman an other husband. The profe [proof] giving for one that they had better be . . . [apart] then [than] together if they doe [do] not love one and the other. but live for stripes and confushan [confusion].[23]

After sufficient time, if such a trial proved agreeable to both, they would then announce their intentions to undergo the nuptial ceremony.[24] If, however, the practice marriage was found to be unsatisfactory, the courtship

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[21]Adair, Williams, ed., op. cit., 145.

[22]Ibid.; see Swanton, Indians of the Southeastern United States, loc. cit., 705-706; see also Bartram, Van Doren, ed., op. cit., 402.

[23]Longe, SPG Papers, loc. cit.

[24]Adair, Williams, ed., op. cit., 148.

stopped, and it is assumed, as no evidence was found to show otherwise, that the purchase contract was declared void and whatever had been paid, if any, was remitted to the suitor.

Assuming, however, that the couple had found great felicity in their experience, the girl's mother through her son or brother would negotiate with the groom's relatives in settling what other preliminaries were required.[25] At this point, the marriage law required that the couple consult the white chief to divine the future course of their marriage. This they would do but if the omens were bad, he could forbid the marriage. This was done by observing the movements of two beads held in his hand which, by involuntary twitching, would move closer or further apart from each other. If they moved in the latter direction, it was an unfavorable omen that the couple wouldn't live together and hence, the chief called off the match.[26] Should all the tests, however, indicate a good marriage, "the next morning the young man takes his ax and goes and cuts a cording of wood and brings it and lays it at the young woman[s] dore [door]:"

> If the young woman comes and teaks [takes] of the wood and moaks [makes] a fire therewith and cals [calls] him in and gives vitales [victuals] to eat; the marige [marriage] is confirmed. If one of the parents of the man hears thereof they sond [send] for all thire family . . . [and] cuts . . . quanties of food and brings it to the brid [bride]. Fore and there is pronised [promised]

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[25]Cephas Washington, Reminiscences of the Indians, (ed.) Hugh Park (Van Buren, Arkansas: Press-Argus, 1955) 167.

[26]Gilbert, Eastern Cherokees, 325.

> for them . . . by the brids [brides] relations of the best vitols [victuals] that the country can aford [afford] . . . .[27]

Should it be the white chief of the town who was anticipating marriage, his prospective wife had to be passed on by the seven clan counselors as to her unblemished character. If all the signs were good, the groom, being either a chief or a warrior, would alert his kinsmen who upon the receipt of the glad tidings, would undertake the task of killing deer and buffalo for the marriage feast which was to take place in the afternoon.[28]

Prior to the ceremony, the groom would feast with his male companions in a lodge a short distance from the council house. The bride and her comrades feasted a little way from the council house on the opposite side.[29] In the meantime, old men and old women entered the council house and took seats opposite each other high on each side of the building. Then came the married men and married women who took their seats respectively below that of the old men and women. At a given signal the groom was escorted to one end of the open space in the center of the council hall and the bride was brought to the other side. They then walked to each other and, after exchanging presents, their blankets

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[27]Longe, SPG Papers, loc. cit.

[28]Adair, Williams, ed., op. cit., 148.

[29]Gilbert, Eastern Cherokees, 339.

were considered united.[30]

Should the groom be of lesser rank, or if it was his second or third marriage, it was generally conducted with as little ceremony as possible. In that regard, the couple would appear before the town chief and in the presence of two witnesses, undergo the formalities necessary to make the binding.[31] In so doing, he would break an ear of corn, retain one half for himself and give the other half to his expected bride. She in turn, would present him with some bread cakes, thus, symbolizing the notion that she was grateful for his support and, at the same time, agreeing to look after her domestic responsibilities. When this short ceremony was concluded they could go to bed like an "honest couple" but as a matter of convention, he was not permitted

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[30] Ibid., see also Mondot, op. cit., 168. Washington, Park, ed., op. cit., 167. Washington appears to have given the best description of a Cherokee Marriage ceremony. For comparison to a wedding among the Natchez Indians see Kenton, Jesuit Relations and Allied Documents, 414. A very good account of a marriage ceremony among the Creeks is given by Swanton. See Swanton, Early History of the Creek Indians, 44. For additional information see Swanton, Indian Tribes of the Lower Mississippi Valley, 94-99.

[31] Anon., Events in Indian History (N.T., G. Hill and Co., 1841) 116. Mondot says the marriage was conducted without a priest or a magistrat and that it was not necessary to have the assistance of their parents but custom or national policy required some formality. See Mondot, op. cit., 168. Swanton, quoting from Francisco of Chicara, stated that witnesses were present when the gifts were offered and announced the fact "just as notories might do in Europe." Swanton, Early History of the Creek Indians, 44.

to talk with her until nightfall.[32] In the meantime, in the event that it was the man's first marriage, the White Chief would announce, upon the recommendation of the Council of Elders, that a "new habitation" be constructed for the accommodation of the new family. In this, every man in town would join in the work, and by nightfall the house was finished.[33]

A couple married under either of the above circumstances was considered more binding than any other type, but to make the wife subject to the laws of adultery, the husband was first required to bring home a supply of meat such as bear or deer meat--something adequate, not a mere token--and deposit it at her door. This was done as soon as possible as it was regarded, not only by the Cherokees, but by other Indians that before the bridegroom could exercise any legal power over the bride, he first had to demonstrate that he was fulfilling his marriage agreement.[34] Benjamin Hawkins, in making reference to the Creeks, reported in 1799:

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[32]Adair, Williams, ed., op. cit., 146; see also Mondot, op. cit., 168. Bartram stated that among the Creeks there was an exchange of needs which "are laid by as certificates of marriages." Bartram, Van Doren, op. cit., 402. See Swanton, Indian Tribes of the Lower Mississippi, 94-99.

[33]Bartram, Van Doren, ed., op. cit., 402.

[34]Adair, Williams, ed., op. cit., 147; see also Gilbert, Eastern Cherokees, loc. cit., 340; see John R. Swanton, Religious Beliefs and Medical Practices of the Creek Indians, Forty-Second Annual Report, Bureau of American Ethnology, (Washington: United States Government Printing Office, 1925), 225-228.

> To constitute a legal marriage a man must build a house, make his crop and gather it in; then make his hunt and bring home the meat; putting all this in the possession of his wife. This ends the ceremony and they are married, or as the Indians express it, the bound is bound, and not before.[35]

There is some authority to the effect that she could at this late date, refuse to accept and prepare any of the proffered food and thus extricate herself from any commitment implicit in the marriage vows. If, however, she prepared the meat, and he ate some of it before witnesses she would become his lawful wife, subject to any penalty of an adultress that might be in force.[36] In that particular, however, the Cherokees appear to have been an exception to other neighboring tribes in that they had almost no laws against adultery. Unlike the Chickasaws, Creeks, and the other tribes who imposed severe penalties on either the wayward wife or the seducer, the Cherokees either ignored it or left it to the discretion of the injured husband. Adair, during his long stay with the Cherokees, related that he could recall only one occasion in which the adultress suffered punishment which, while it was intensely severe, it

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[35]"Letters of Benjamin Hawkins 1796-1806," Collections of the Georgia Historical Society (Savannah, Georgia: Printed by the Morning News, 1916) IX, 170.

[36]Adair, Williams, ed., op. cit., 147; see also Gilbert, Eastern Cherokees, 340. Swanton, Indian Tribes of the Lower Mississippi, 96, quoting from Margy's Decouvertes et establishements des Francais dan l'Quest . . . ., n.b., states that the husband can repudiate his wife until she has a child.

did not involve facial disfigurement as was practiced by the Chickasaws. Adair, in reporting the event, stated that a number of warriors who were related to the family of the injured husband, followed her into a woods a short distance from town, being informed of her whereabouts by spies, and in his words, "stretched her on the ground, with her hands tied to a stake, and her feet also extended, where upwards of fifty of them lay with her, having a blanket for a covering."[37] This incident, however, appears to have been motivated by personal revenge on the part of the aggrieved husband and not the result of established or general law on the matter.

While infidelity, as a crime, generally went unpunished except under circumstances related above, it was, nevertheless one of the grounds for divorce and, like some of our present laws on the subject, it operated only against the wife.[38] In many instances, however, the husband was a forgiving soul, and, unless the extra-marital exploits of his wife were well-known, he might do nothing. On the other hand, if her activities had become a matter of common knowledge, he might still elect to hold on to her but felt compelled to gratify public opinion by disciplining her in some manner. If such was the case, he most likely would crop her

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[37]Adair, Williams, ed., op. cit., 153.

[38]Gilbert, Eastern Cherokees, 340; see Adair, Williams, ed., op. cit., 153.

hair, that being the highest form of female disgrace.[39]

But whatever the cause, divorce could be achieved through mutual consent of both parties;[40] however, clan law required some justification for the wife when a recalcitrant husband refused to give his consent. An example of that can be found in the practice employed by refractory husbands who, no longer living with their legal spouse, would nevertheless, lay fresh game at her door at the end of the winter's hunt such being regarded as a sufficient annual tie to obviate any claim of abandonment on her part.[41]

From this, it seems that only women were required to show grounds for divorce, namely abandonment. Men, however, fell into a different category and could issue their own divorce decrees, with or without cause,[42] but to do so without some kind of vindication, would, it seems, expose the husband to the possibility of being regarded as a philanderer,

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[39]John McIntosh, Origin of the American Indian (2d ed.; New York: Sheldon and Co., 1859), 119; the husband may, in addition, give his wife a severe whipping in public if, as one writer has stated, he "judged [her] unfaithful to the marriage bed." See Anon., Border Incidents, 110. According to Haywood, the Cherokee husband had in all cases the right to correct the wife, "by stripes, at his pleasure." Haywood, Rothrock, ed., op. cit., 259. This is also confirmed by Longe, SPG Papers, loc. cit.

[40]Jones, op. cit., 66; see also Timberlake, Williams, ed., op. cit., 87-89.

[41]Adair, Williams, ed., op. cit., 141.

[42]Henry R. Schoolcraft, The Indian in His Wigwam or Characteristics of the Red Race of Americans (Buffalo: Derby and Hewson Publishers, 1848), 73.

despite the lackadaisical regard towards divorce. As a general rule, the husband would charge his wife with being indolent, quarrelsome, inattentive, and disobedient.[43] He could however, bring more serious complaints against her such as a violation of the law of purity which might not only get him his divorce but might involve his wife in serious trouble. Adultery was of course grounds for divorce which, if proved, enabled the husband to keep the house, all her possessions, and turn her out in the cold if he so elected.[44]

Apparently, however, neither the wife or the husband encountered much difficulty in terminating their marriage. Timberlake noted that they were as "little binding" as were the courtship and marriage which taken to-gether "required no more than one half hour in time" and that it was common for a person to change three or four times a year.[45] Adair confirms this by saying that their marriages were ill-observed, and of short continuance . . . ." The women, he compared to Amazons, since they divorced "their fighting bed-fellows at their pleasure, and fail[ed] not to execute

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[43]Swanton, Indians of the Southeastern United States, 705; Mondot says one of the more frequent causes of divorce was a plurality of wives as "polygamy introduced jealousy and disorder." See Mondot, op. cit., 168.

[44]Haywood, Rothrock, ed., op. cit., 259; confirmed by Gilbert, Eastern Cherokees, 340.

[45]Timberlake, Memoirs, 89. One writer was sharply critical of this practice because in his words "their frequent changing of partners prevents propagation, creates disturbances, and often occasions murder and bloodshed." See Smith, Darlington, ed., op. cit., 148.

their authority, when their fancy direct[ed] them to a more agreeable choice."[46]

Regardless of the frequency of estranging themselves, couples were required by necessity to undergo some type of public notice in order to legally terminate their marriage. Although no court proceeding was called for since the man was under no compulsion to show grounds, and the wife was limited to her single plea of abandonment, a fact, which if true, would be well known by the community. Nevertheless, the very nature of marriage imposed the need to make known its termination. In the absence of domestic bickering the couple could notify the two or more witnesses who had been present at the marriage ritual and request that they again avail themselves to bear testimony that the marriage was over. Such notification was usually done a few days prior to the appointed time and place so that the witnesses could make arrangements to be there. The proceedings usually occurred in the home of the wife, at which time, she and her estranged companion threw into the fire some physical objects, relics of their marriage which, as in the initial ceremony, served to symbolize the fact that she was no longer obligated to prepare his meals and he was no longer accountable to support her household with fresh meat.[47] The use of

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[46]Adair, Williams, ed., 153.

[47]Anon., Events in Indian History, 116.

the same witnesses bears comparison to the present legal requirement that, in order to get a divorce, it is necessary to show that marriage took place in the first instance. If it was otherwise, the court would be performing an empty function. It was likewise true with the Indians. If there had been no marriage, there was no need for a divorce. In cases where the original witnesses to the marriage were gone, deceased, or for some other reason were unavailable, it is assumed, in the absence of any information on the point, that any two or more reputable citizens of the village could be substituted that being, it would appear, particularly true in marriages of long standing.

In those instances in which the wife was abandoned either because her husband refused to display any concern for her welfare or else, and it was a known and common fact that he was living and was in some other town or place, it is to be again assumed in the absence of any definite information, that she obtained a divorce on her own. That is to say, she could appear in public in the presence of witnesses and announce that she no longer regarded herself married. To give truth to her words, she would most likely throw some object into the fire. It is to be noted, however, in cases of abandonment, unlike those of mutual consent, there was a time interval of one year required.[48] This was designed,

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[48]This would be true because the husband would have the right to bring meat to his wife's home after the winter's hunt, and she would not know he had abandoned her until after

apparently to give the neglectful husband every opportunity to carry out his responsibilities.

With regard to community property, the Cherokees appear to have been a little in advance of their Anglo-Saxon neighbors who followed common law with all its medieval trapping of dowry. The Indian wife, faced with the rigors of new shelter, invoked the privilege of retaining the house, its appurtenances, and the household furnishings.[49] Her husband, on the other hand, was permitted to take with him his personal items, war and hunt trophies, or whatever he regarded as his individual possessions. It is to be remembered that the house, having been erected by members of his wife's clan and erected on clan property, gave the wife first claim to which the husband could make little protest. As a matter of practice, the husband and wife, in those cases where their relations were amicable, would agree in advance and, as part of their divorce ritual, would divide up their personal belongings in the presence of the two witnesses. If their relations were not friendly and the man was the

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that time. According to Adair this had been a "universal custom among the native Americans; but . . . like every other usage of theirs [was] wearing out apace." See Adair, Williams, ed., 146.

[49]Jones, op. cit., 66; see also Brown, op. cit., 17-18; Haywood, Rothrock, op. cit., 259. Clark Wissler stated the house, furniture and all the food was the property of the woman. Clark Wissler, The American Indian: An Introduction to the Anthropology of the New World (London: Oxford University Press, 1938), 186.

complaining party, he most likely would take what the law allowed and give the rest to his rejected spouse.

In the event the unhappy couple had children, tribal law provided that they were to remain with the mother. This was in keeping with the "invariable custom" that women kept and reared all the children, maintaining control over them until they were able to provide for themselves.[50] This was also in line with the practice that the children traced their ancestry through their mother's clan. The father, having little care for his children, other than that reflected by his supply from the hunt, was under no obligation to give child support once the marriage union had ended. Neither was he held accountable for his ex-wife's welfare in the form of any type of modern day alimony. Once the divorce became official, both were at liberty to remarry immediately--subject only to the exception that in cases of adultery and abandonment, the wife was required to wait until the end of the Green Corn Dance that being the beginning of the official Cherokee year. There was no "cooling off period" or time limit between marriages and as a matter of practice, it

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[50]Haywood states that the mother had a right to punish her children for any offense--even death, but that the father was punished by his wife's clan should he kill the child. Haywood, Rothrock, op. cit., 259. See also Jones, op. cit., 66; Brown, op. cit., 17-18; Schoolcraft, op. cit., IV, 273. Longe stated that the sons went with the father and the girls remained with their mother. Longe, SPG Papers, loc. cit. This would appear to be the exception rather than the rule because the children were of the mother's clan.

appeared that no time was wasted by either party.[51]

The custom of frequently throwing away old wives, and taking new ones was, on one authority, well adapted to their mode of life. Thus a sizeable portion of the old and the middle-aged men, by "frequently changing, had many wives." and their children were scattered around the country "unknown to them." Schoolcraft stated:

> By a confused intermixture of blood, a whole tribe become uncles, aunts, brothers, sisters and cousins to each other; and as some members of each clan commonly wander abroad, and intermarry in distant towns, and others from those towns come in and supply their places, the whole body of the people have become connected by the ties of blood and hospitality, and are really but one great family of relations--whose ceremonies, manners, and habits are nearly alike, though their language differs considerably.[52]

As can be seen, no social stigma impeded the Cherokees of the colonial period from marrying and divorcing as many times as their dictates directed. Neither was there anything incompatible with public policy in having more than one wife at a time as a plurality of wives met with no public condemnation.

If a man felt he was able to support more than one wife,[53] the practice ran counter to no social mores. In that

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[51]See Longe's comment on this practice. Longe, SPG Papers, loc. cit.

[52]Schoolcraft, op. cit., IV, 273.

[53]Adair, in his discussion of polygamy, made reference to the fact that an Indian, if he felt he could not afford a second wife would say: 'I shall not buy a woman . . . for indeed I am poor . . . .'; Adair, Williams, op. cit., 147.

respect, it was not uncommon for a man to marry sisters, or a mother and two daughters as it was felt that a sister or mother and daughter relationship would be more harmonious than wives from different families.

This was the second kind of marriage practiced by the Cherokees and, as in the first there was the sending of gifts and presents;[54] however, a second or a subordinate wife, could only be obtained with the consent of the first wife. If the husband acted contrary to her wishes, he and his new spouse would be exposed to the danger of severe punishment from her family. That would be true if he brought her into the home of his first wife since it was her clan that had a possessory right to the land on which his house stood. This is a partial explanation as why a man married sisters but even then, a subordinate wife could live in the house of the first wife only if she had her consent. In some measure this arrangement gives meaning to an old adage "that several wives who were sisters might live in the same yard, but not the same house, but those who were not sisters would not live even in the same yard."[55] On the authority of one who had seen it with "his own eyes," a man might marry a woman belonging to the clan of his first wife "counting them thire proper sisters." A husband could take a second wife

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[54]Swanton, Indians of the Southeastern United States, 703.

[55]Ibid., 706.

belonging to another clan without his first wife's consent, provided that she lived in another town. This did not breech the marriage law since the second home was located on land claimed by another clan.[56]

According to Adair, an Indian always differentiated between his proper wife and a second wife by saying of the first, Che - Awalas, 'I shall marry you.' Of the second, he would merely describe her as a purchased wife or sensual wife, speaking of his market marriage as having bought a woman.[57] Sometimes widows whose property, being a greater selling point than their charm, would gladly accept purchase money to become a second wife.[58] It seems in this respect that a woman, having previously married at which time all presents and property were turned over to her family, was now entitled to receive as her own any compensation proffered for her second marriage. It was also apparently true that a husband when "buying" a second wife if it were her first time up, had to first satisfy her relatives as if a "proper marriage."

Before concluding the subject of marriages and divorces, one other item, widowhood, seems worthy of mention. Unlike a wife whose marriage ended in divorce, a widow was

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[56]Longe, SPG Papers, loc. cit.

[57]Adair, Williams, ed., 147.

[58]Swanton, Indians of the Southeastern United States, 706.

required by tribal law to wait three years after the death of her husband before becoming eligible to re-marry. Such a period of mourning was apparently required to show deference to the relatives of her deceased husband as it was within their power and discretion to release her from such an obligation. This was done by the older brother of the deceased publicly proclaiming that he had "lain with her," or in the event of no older brother, the acknowledged leader of the family.[59] It is not clear whether such practice occurred with great frequency or not, but it is assumed that in those instances where the wife had been faithful to her husband and there had been no impropriety with reference to family honor, that it was done with little hesitation.

It was also permissible for the clan of her deceased husband to offer to her a man of their choice within the three year period. Should this be done she was at liberty to refuse or to accept him. In either case the claims of her husband's clan were satisfied, and they had no more control over her.[60] Should the clan of her deceased husband elect to hold her to the three year period of mourning there was very little she could do to extemuate her plight. She was compelled by clan law to remain in her home as much as possible, generally attired in unkempt clothing with

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[59]Boudinot, op. cit., 184-185.

[60]Swanton, Indians of the Southeastern United States, 705-706.

disheveled hair, and to keep aloof from any festivities until her three years were up.[61] Knowing her particular circumstances, men in the village gave her a wide berth. It has been said that should a man wade into water upstream from her or ask her for a drink of water from a pitcher, both he and she might be accused of violating the law of widowhood.[62] Should such an unfortunate event occur, and it was the decision of the offended clan that the act had constituted a crime, both widow and the man might find themselves under sentence before they could obtain a hearing by the town chief and council.[63]

Because of the rigidity of the law governing widowhood, the woman was constantly watched and was under suspicion at all times by the relatives of her departed spouse. The particular job of surveillance was usually entrusted to the sister of her deceased husband. Frequently, the sister would take pity on her and arrange a marriage between the widow and her brother which would obviate the need for further mourning since no impropriety would follow if she remarried into the clan.[64] This was evidently based on the idea that the clan had acquired a property right in the woman. The regulations governing the behavior of a widower was

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[61] Ibid. [62] Adair, Williams, ed., op. cit., 150.

[63] Swanton, Indians of the Southeastern United States, 705-706.

[64] Ibid.

almost the same except that he was allowed to remarry in four months after the death of his wife.[65] Because of the clan notion that it had obtained some legal hold or right to the person of the surviving wife or husband, the punishment for any adulterous behavior on the part of the survivor during the time fixed for mourning was very severe.

Turning now from the complexities of marriage to ownership of land, the Cherokee tribal domain was held and owned by the tribe in common. Individual ownership, with the right to sell and convey in fee-simple to any other person, was unknown to them.[66] No Cherokee could obtain absolute title to land, since it was vested by custom in the tribe as one body. The individual had no conception of what was implied by a legal title in severalty with power to sell and convey the fee. But a Cherokee could reduce unoccupied land to possession by cultivation, and so long as he thus used it he had a possessory right to its enjoyment which was recognized and respected by his tribe. The town would plant a common field, but the part or share of each clan was separated from the "next adjoining, by a narrow strip, or verge of grass, or any other natural or artificial boundary." Gardens, lots, houses, and, at a later day, orchards of fruit were thus held by persons and by families. Occupation and use gave possessory right and full enjoyment. As explained by a white man who was held captive by the Cherokees

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[65] Ibid. [66] Morgan, op. cit., 79.

in the 1750's, "they allow that all men have an equal right to the soil, except what they improve--and that only during the time they occupy it." In the case of improvements:

> When a family builds a house and improves a piece of land, and aftwards remove to another town (which they frequently do) the first that comes, takes possession of the house and improvements without any interruption. If the right owner returns within a year or town, restore his house and field to him, without any contention.[67]

A person might transfer or donate his rights to other persons of the same tribe, and they also passed by inheritance to his children.[68]

This was subject to the exception, comparable to modern homestead law, that the wife, at the death of her husband, could not, by inheritance, be deprived of the house, food, and furniture. This belonged to her as a matter of right, and it was only after her death or in the case of two or more wives, after the death of the last survivor, that such property could descend to the children, not *per stirpes* but to the oldest unmarried daughter of the first wife. In the event there was no unmarried daughter, the property would then pass to the oldest son.[69]

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[67]John McCullough, *Incidents of Border Life, Illustrations of the Times and Conditions of the First Settlements in Parts of the Middle and Western States* (Lancaster, Pennsylvania: J. Hunt, 1841), 111-112.

[68]Morgan, *op. cit.*, 79.

[69]This is implied by the rule that the house and garden cannot be taken from her since it is located on land possessed by her clan. Also it was the law, other than in cases of adultery, that the wife retained the house. See Wissler, *op. cit.*, 186.

With respect to personalty, most personal valuables belonging to the deceased were buried with him. This included guns, tommahawks, powder, lead, silverware, wampum, and tobacco. His other possessions were destroyed, and it was regarded as the "worst of crimes" to keep anything belonging to the dead.[70]

Timberlake expressed the opinion that the requirement was made to prevent avarice and hereditary acquisitions, making merit the sole means of acquiring "power, honor, and riches." Because of this requirement, wives had separate personal property to sustain them as survivors.[71]

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[70]Timberlake, Memoirs, 90.

[71]According to Alexander Longe, the Cherokees believed that presents were needed to give to a departed relative in the "other world" least his spirit would return before it was consumed as it only stayed where "riches" were. Longe also pointed out that the burying of the husband's goods was a great advantage to the merchants and traders of South Carolina. Longe, SPG Papers, loc. cit.

## CHAPTER VI

## ADOPTION AND WAR

The Cherokee rule of adoption was based on the principle that a captive taken in war had forfeited his life, and that his life thereafter belonged to his captors to do with as they pleased.[1] If the person was young and had acquired no reputation as a great warrior, he usually was adopted.[2] If among captives brought in from a successful military mission, he was usually adopted by the women to replace a son, husband, or brother in which capacity he was thereafter treated.[3]

The law governing adoption was quite rigid and all the steps which were legal and necessary were not to be taken lightly. As has been seen, adoption carried with it all the rights of citizenship, and the clan into which the person was adopted was bound by all the precedents of the time to give him or her the same protection as if a blood

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[1]Williams, ed., "Journal of Antoine Bonnefoy 1741-1742," Early Travels in the Tennessee Country, 152; see also Knowles, op. cit., 216-217.

[2]Adair, Williams, ed., op. cit., 418; see also Swanton, Indians of the Southeastern United States, loc. cit., 695.

[3]Timberlake, Memoirs, 82.

kinsman.

Before the ceremony of adoption took place, the captives were usually kept outside of town at least a night before being brought into some Cherokee family. While there, they were tied to a war-post which had been fixed in the middle of a large square plot of ground which was carefully guarded and patrolled.[4] In the meantime, the town council, acting as a community court, would debate their fate with the seven member women's council remaining in the background ready to assert appellate jurisdiction should it elect to decree adoption rather than death.[5] While much has been said about Nancy Ward saving the life of Mrs. Bean, it seems likely that such incidents were the exception rather than the rule. However, it is clear that the town's seven Beloved Women had the legal power to demand the adoption of a particular captive regardless of the circumstances. As "the mother of all"[6] they used their power without hesitation when they felt the need to gratify the wishes of their

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[4]Adair, Williams, ed., op. cit., 417.

[5]Timberlake, Memoirs, 93-96.

[6]This was a common expression used by Beloved Women, and it may be a partial answer as to why they were given so much power over life and death. In 1787 the Beloved Woman, Katteuha, of Echota and three other Beloved Women wrote a letter to the Governor of Pennsylvania in which they described themselves as "mother of all" and requested that he engage in no war with the Cherokees. "Cherokee Indian Women to President Franklin," Pennsylvania Archives, First Series, XI, 181.

female constituents. However, it is not clear what investigation, if any, was made by the women in order to arrive at their decisions. Undoubtedly, they were on hand when the war-party returned to see if any ill had befallen the male members of their household. If such was the case, they most likely would look for replacements among the younger prisoners, at the same time pouring invectives on the older captives.[7] Too, in the council debates that followed, they probably would make inquiries, but whatever the criterion used, once the women officially expressed their decisions with regard to war captives, they were respected.

William Fyffe, in writing to his Brother John, reported that the Council of Elders held court to decide who would be eligible for adoption and who would not. In addition, an investigation was made "among the Relations of those who [were] killed, every family getting an offer of one or more according to the Number they've lost in the War."[8] As described by Fyffe:

> The Person who took the prisoner--takes him to the door of person--who wants to adopt & offers a string of wampum. The family views the Prisoner and if he's ugly, weakly, or they thirst for more revenge they reject the Prisoner by throwing away the string of wampum. This is the Sentence of Death, or rather of Torture on Him for

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[7]Adair, Williams, ed., op. cit., 418-419.

[8]William Fyffe to Brother John, loc. cit.

after this there's no saving.[9]

Antoine Bonnefoy, a Frenchman, from New Orleans was captured by the "Cherakis," along with four companions, in 1741 when their piroque was surrounded by a Cherokee party on the Ohio River. Six weeks later, "at the beginning of January," they were "adopted by men of prominence in the party." Bonnefoy stated that he was adopted as a brother by an Indian who bought him from the Cherokee who had claimed him as a captive by promising him a "quantity of merchandise." The others were adopted as nephews or cousins.[10]

This kind of adoption was not official as they were required to undergo formal recognition by the National Council of Elders. Arriving at Echota a month later, Bonnefoy and his companions were taken to a place outside of town. As part of the "ceremony common among" the nation, their clothes were removed, and a stock was made for each of them. Bonnefoy related, however, that they were not placed in the enclosure but were required to wear "slave-collars." Thereafter, according to Bonnefoy:

> . . . the savages, putting in each one's hand a white stick and a rattle, told us that we must sing, which we

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[9]Ibid. Fyffe's letter contains one of the best descriptions found as to how the Cherokees tortured their victims. Samuel Cole Williams has stated that it is believed that Adair's description is the best. However, it is unlikely that Williams has seen the description given by Fyffe. See Adair, Williams, ed., 418-419.

[10]Williams, Early Travels, 152-153.

> did for the space of more than three hours at different times, singing both French and Indian songs, after which they gave us to eat different sorts, sagamite (corn porridge), buffalo meat, bear meat, rabbit, sweet potatoes, and grawmons.[11]

Having eaten, nothing else took place during the day, and they spent the night outside of town. The next morning, the Cherokees, according to custom, painted the upper bodies of their prisoners as they were permitted to wear "nothing but their breeches." The Indians then lines up in ranks of four and, with their prisoners in the center, marched into town. Thereafter, and also as part of legal ritual, the prisoners were instructed, two being tied together, to march around a large tree. At the base of the tree, the Indians buried a parcel of hair taken from each of the prisoners which had been preserved for that purpose.[12] Having completed that phase of the ceremony, they were then taken before the council house, and in the presence of the Council of Elders were again instructed to sing. At this stage of the proceedings, however, they were told to sing only four songs, at the conclusion of which, they were washed and fed. Thereafter, having washed away their impurities as required by law, they were considered as brothers and were taken home by their new relatives.[13]

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[11] Ibid.

[12] Ibid. See Knowles, op. cit., 216-217. Knowles may have used Bonnefoy as a source.

[13] Williams, Early Travels, 152-153; Knowles, op. cit., 217.

Adoption is to be distinguished from slavery in that a slave was a captive who had been kidnapped or apprehended in some fashion other than in war. Because of that, tribal law decreed that he was a special find of his captor. In that light, the relationship between owner and slave was a possessory concept of finder and keeper. The slave was not expected to substitute himself for any departed member of the household or to acquire any legal rights or social standing in the community. He was as the word implies, nothing more than a mere chattel.[14]

Being closely related to adoption and war captives was war itself. While considerable attention has been devoted to causes and the method of declaring war, little attempt has been made to show how the war effort, once hostilities were declared, was conducted. Every able-bodied adult male and some women were warriors which was in accord with highest expression of public policy on the matter of war. Every warrior held his honor and his love of country in such high esteem that he preferred it to "life" and would

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[14]Williams, Early Travels, 152. One writer, in attempting to compute the number of slaves to the number of adoptions, came to the conclusion that before the year 1760, adoptions far exceeded the number of slaves. However, this same writer found, that after that year, the Cherokees had about the same number of slaves as they did prisoners of war. Knowles, op. cit., 217. Undoubtedly, this change of ratio was brought about by the fact that North Carolina, in 1760, as an inducement to raise the troops to fight against the Cherokees, enacted into law a provision that anyone who captured "an enemy Indian" could hold him as a slave. South Carolina, Statutes at Large, II, pp. 322-325.

suffer the most exquisite tortures rather than denounce it.[15]

Such being the teaching and philosophy of the Cherokees, there was little need for the state to impose compulsory enlistment or any kind of military conscription since every adult regarded fighting not only a high public duty, but also the only means to fame and renown. Although the Cherokee towns found it unnecessary to subscribe to compulsion in filling their military ranks, the rules and laws which regulated their warfare were rigid. As an index to their military code which, by usage and custom, had become hardened into an unalterable body of law, attention need be directed to formation of a war party. Assuming the "clear and white" path of peace had been darkened by the news of a declaration of war which national messengers had brought to all the towns, the next step was to assemble a fighting force.

A war captain, usually one who had enough rank and prestige to instill confidence in a venture of his undertaking, would beat a drum three times around his house while at the same time carrying a flag painted with large strokes of black--the "grand war signal of blood and death." He might alternate the flag for a war club, painted with vermilion to

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[15]Adair, Williams, op. cit., 406.

symbolize blood.[16] If he was entitled to wear a pair of buffalo horns, he would put them on and shout the triumphal war song with some animal's tail sticking up behind him.[17] His song would be brief, wildly repetitious of sentiments of heroic deeds and military ardor.[18] His song and expressions would be accompanied by a drum and rattle. His words would be repeated slowly with a measured cadence to which the "most exact time" would be kept. He would periodically stamp the ground as though to shake the "universe and utter his piercing war-cry." Schoolcraft has given a classic description of a war-leader calling for volunteers, which is set out in the following quote:

> Physical excitement has absorbed his energies. He is in no mood for calm and collected descriptions of battle-scenes. He has no stores of measured rhymes to fall back on. All he can do is to utter brief and often highly symbolic expressions of courage, of defiance, or indomitable rage. His feet stamp the ground as if he would shake it to its centre. The inspiring drum and mystic rattle communicate new energy to every step, while they serve, by the observance of the most exact time, to concentrate his energy. His very looks depict the spirit of rage; and his yells, uttered quick, sharp, and cut off by the application of the hand to the mouth, are startling and horrific.[19]

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[16]Schoolcraft, op. cit., II, 59. See also Haywood, Rothrock, op. cit., 231.

[17]Adair, Williams, op. cit., 33.

[18]Haywood, Rothrock, op. cit., 231. Haywood states that he is relying on Adair and even though their ceremonies were less perfect in his (Haywood's time) than in the time of Adair, there still remained (in 1823) enough of their customs to show "that in ancient times they were generally as precisely as Mr. Adair represents."

[19]Schoolcraft, op. cit., II, 59-60.

In response to this heated display of patriotism, warriors and young fighting men convened before the performing war-leader; if swayed by his oratory and reputation, they would fall in behind him. Other warriors would follow suit until the number was sufficient to make a war party. Another contemporary account explained:

> When the war king has amind to goe to war with aney strang [strong] nashon he sends for all his warriors. When assembled he speaks to them. One this wayes [one of the ways is to] tell you that ar [are] willing to goe with me to war and gaine honer for your selves and revenge the death of y'r [your] countrymen that has been killed. By such a reashon [reason] you most [must] give me yar names and nomber.[20]

Each warrior who joined a war dance became a volunteer for the trip. Once he had come forward, he could not, under the laws of the nation, change his mind and withdraw or desert subject to the exceptions to be noted.[21] To do so would subject him to the penalty of shame, public degradation, or even death if it was believed and proved that his defection or cowardly conduct subsequently caused defeat or the loss of some of his companions.

War leaders themselves were mindful of the dire consequences which might result in the failure of their mission

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[20]Longe, SPG Papers, loc. cit.

[21]Schoolcraft, op. cit., II, 60; Swanton says this was only true when they engaged in actual battle. See Swanton, Indians of the United States, 691.

or a high death toll of their companions.[22] While they might escape a type of court martial, they, nevertheless, were demoted in rank by their military peers. That is to say, their warrior names were taken from them, and they were reduced to the names of their childhood which, in effect, exposed them to such ridicule that all confidence in their capacity as a leader and a warrior was destroyed.[23] Such a reduction in rank might come in the form of a decree of the high military tribunal of the nation consisting of the military counselors from all the seven clans, or it might come from the person's own town war council. In some cases, there might be no formal hearing of any kind. Rather, the dark whisperings of followers would cause a war leader to lose face which would be as detrimental as an official hearing.

On the other hand should a war leader or a fighting man display such negligence in battle as to bring death to members of his party, it might constitute murder in which case either the relatives of the slain warriors or great Red War Court might decree death to the offender. Adair was of the opinion that "this penal law contribute[d] in a good

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[22]Gearing, in his study of the Cherokees, reported a situation in which the man was condemned to die. The explanation given by Gearing was that the man had disobeyed and, hence, had sinned causing God to leave the group. Gearing, "Political Organization of the Cherokees," 64-65.

[23]Schoolcraft, op. cit., II, 60.

measure, to make them so exceedingly cautious and adverse to bold attempts at war, and they [were] usually satisfied with two or three scalps and a prisoner."[24] With regard to desertion, Adair further stated, in discussing Indians in general, that it was unknown to them so great was their love of battle and military glory.[25] Without laboring the point, it would seem that it could have occurred. However, if it did take place within the modern meaning of the word, it most likely was regarded as cowardliness and fell within the scope of punishment previously described.

Such then was the method of enlistment and its possible consequences. The state, that is the Cherokee town and nation assumed no responsibility to supply its fighting men with anything other than leadership. Each warrior armed himself and carried for his "war stores," his own small bag of parched corn-flour.[26] Neither did the state enact provisions to compensate the individual members of its military forces other than by bestowing on them titles of honor

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[24]Adair, Williams, ed., op. cit., 416.

[25]Ibid., 406. In April of 1757 Aganstata, The Great Warrior of Echota, wrote to Captain Raymond Demere who was in command of Fort Loudon and asked that he be lenient to soldiers who had deserted. Gearing, "Political Organization of the Cherokees," 56.

[26]Gilbert, Eastern Cherokees, 351. Gilbert states that the war chief appointed certain women to prepare rations which consisted of corn meal and corn bread cakes about six inches long. Each town prepared its own provisions. See also Jones, op. cit., 17.

and an unrestrained license to plunder and loot which, with the exception of prisoners, was regarded as the personal property of the taker.[27] Neither was there any attempt made to stratify military society other than by merit which imposed no formalized officer caste system. They were all equal; the only precedence for gain was superior virtue and prowess in hunt and war. "The equality among them" and the just rewards conferred on merit were the "only motive that warm[ed] their hearts with a strong and permanent love to their country."[28]

Closely allied to their strong love of country was their "intense love of martial glory"[29] and, despite Adair's high expression of love of country, it appeared to be a stronger inducement to join a war party than either zealous patriotism or the elequence of a war leader. But whatever the motivation, the war party, once formed, was required under the military code to go inside the winter house or "in the place appointed by the town" for the purpose of purifying itself so that it might win the favor of the "guardian angels" to protect it from harm.[30]

There, as provided under the rules of war, the party would remain, separated from the rest of the town, for three

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[27]Knowles, op. cit., 216-217.

[28]Adair, Williams, op. cit., 406-407. [29]Ibid., 167.

[30]Ibid., 408; see Longe, SPG Papers, loc. cit.

days and nights.[31] During the course of the time, the warriors and fighting men were compelled by strict military law to abstain from eating any food until sunset of each day in order that they might be purified by the holy water which they consumed in large quantities. The holy water, so called, was water heated over the eternal fire, and embittered with the addition of "butter-rattle-snake-root."[32] This purifying decoction was a familiar item to the warriors as they frequently sprinkled it on their bodies after a bath or while they were in the field on a war hunt. It was regarded as essential to health and to success in battle. They were such strict observers of this law of purification that during the three day period, all the young men were watched very closely to see that they didn't succumb to the temptation to eat something before sunset. Should any of them succumb to temptation and take solid foods, the salutary effects of the purification would have been destroyed, not only to the individual, but to the entire group. For that reason, all persons without war titles were subject to almost constant surveillance, even to the extent that when they left the building to respond to natural needs, they were attended by

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[31] Ibid. Longe stated that the time was four days. Adair said three. Adair, Williams, ed., op. cit., 167.

[32] Longe stated that the war captain prepared this "war medicine." Longe, SPG Papers, loc. cit.; see also Haywood, Rothrock, op. cit., 251.

one or more of their experienced elders.[33] It is not known what the penalty would be should a person violate the rule. Presumably, it might be death depending upon the circumstances of the infraction.

Not only was everyone required to abstain from eating, but it was also against the rules to sit down during the day.[34] Undoubtedly, this latter requirement was designed to serve a very practical purpose in that, not only would it enable the war-leader to test the discipline of a young recruit, but it would also inure the young hopeful to fatiguing task of being on his feet for long periods of time.

Timberlake, in speaking of some aspects of their military law, observed that many of them were very practical but to insure compliance, they were "wisely" made part of a religious ceremony.[35] This principal, with regard to practical aspects, is perhaps more explicitly revealed in the requirement that while undergoing the rites of purification, the warriors were to avoid the pleasure and company of women. As reported by Longe, the war leader warned his men that "you shall in noe wayes come anigh a woman. If you doe [do] you must expect to be either be dead or wounded at

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[33]Adair, Williams, ed., op. cit., 408-409; see Swanton, Indians of the Southeastern United States, 694.

[34]Adair, Williams, ed., 408.

[35]Timberlake, Memoirs, 92-93.

war."[36] The married men were no exception as they were compelled to "religiously abstain from any kind of intercourse even with their own wives."[37]

This practice, in part, explains why women, taken prisoners during the French and Indian War, were not subject to the loss of virtue during their immediate captivity in the field and during the purgation period after they were taken to the village of their captors. As explained to one of the unfortunate women by her captor, such depravity on the part of a warrior, would have offended his God.[38] While undoubtedly true, such an explanation is hard to reconcile to the disparity of torture and death inflicted on both sexes, young and old, when such persons were unfortunate enough to fall into the hands of an unsanctified war party.

But whatever the law which prohibited licentiousness during the period of purification and despite an absence of reference, discretionary or otherwise, on the subject in the captive stories which became popular in the late nineteenth century, it seems unlikely that women captives continued to remain unmolested after the waiting period was up despite their "pressing entreaties and tears."[39]

Before leaving the subject of purification rites,

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[36]Longe, SPG Papers, loc. cit. This was true of many other Indian tribes. See Schoolcraft, op. cit., IV, 63.

[37]Adair, Williams, ed., op. cit., 171.

[38]Ibid., 172. [39]Ibid.

one other item, directly related to being consecrated in the hothouse and already briefly referred to, was that of "devoting" any war prisoner, regardless of sex or age, who had not been ceremoniously adopted. Any unclaimed captive, faced burning at the stake.[40] Whatever power, Beloved Women might, at a later date, be able to exercise through their judicial offices with regard to the fate of prisoners, it was meaningless and void of legal significance at this time. The war-leader, in his responsibility to give immunity to his men and to protect the town from the "burning wrath of holy fire,"[41] was privileged in his descretion and upon the advice of his followers to devote any enemy prisoner to torture and death at the stake, anytime during their three day sojourn in the winterhouse, or immediately upon embarking on their mission. As a matter of practice, it usually climaxed the end of the party's three day seclusion and was performed shortly before it departed. But that was by no means the end of it, as the leader, urged on by his men, might devote anyone they chanced to meet in "certain woods or paths, to be killed there, except their own people." This religious privilege occasioned the "cowardly Cheerake in the year 1753, to kill two white men on the Chikkasah warpath, which leads from the country of the country of

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[40] Ibid., 161; see also Swanton, Indians of the Southeastern United States, 695.

[41] Adair, Williams, ed., 409-418.

the Muskohge."[42]

It should be noted that the killing of war prisoners under these conditions was part of the purification ceremony and was in no way related to revenge, atonement, or anything of that nature and was carried out entirely by the members of the particular military command. On the other hand, when war captives were put to the stake at the conclusion of a campaign, the motivation was solely for revenge; and the unfortunate victims, because of that reason, were usually turned over to the women.

The war-ark was significant in military affairs. In making reference to this holiest of the holiest to which earlier writers consistently have used as evidence to support the theory that the Cherokees were one of the last tribes of Israel, it may be of interest to recite a few general facts relating to its appearance and importance. It had four sides, three of which were depressed in the middle. That is, each of the three sides had an oblong dent running lengthwise of its surface so that when it was placed on a person's back, the curvature of the particular side would fit smugly in place. The ark was covered with hickory splinters being placed very close together; and it supposedly contained some consecrated items which had been made by the more talented

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[42] Ibid., 162-163.

women of the village.[43] In that particular, one may surmise that it must have been quite an honor and a high tribute to a woman in the community to have accepted from her, some object of her handiwork to be placed in the holy box. The quality of her skill and dexterity must, however, have depended, in a large measure, upon the person making the appraisal as the contents of the ark were a closely guarded secret as is evidenced by the report made to Adair which, because of its descriptive language, is set out below:

> A gentleman who was at the Ohio, in the year 1756, assured me he saw a stranger there very importunate to view the inside of the Cheerake ark, which was covered with a drest deer-skin, and placed on a couple of short blocks. An Indian centinel watched it, armed with a hiccory bow, and brass-pointed barbed arrows, and he was faithful to his trust; for finding the stranger obtruding to pollute the supposed sacred vehicle, he drew an arrow to the head, and would have shot him through the body, had he not suddenly withdrawn; the interpreter, when asked by the gentleman what it contained, told him there was nothing in it but a bundle of conjuring traps.[44]

Irrespective of its contents and appearance, the ark was the most sacred of all Cherokee religious pieces. For that reason the law was very explicit that no warrior, sanctified or not, was allowed to touch it for fear of bringing great evil to the parties. Only the leader and his

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[43]Adair, Williams, ed., op. cit., 168-169. Adair said that the ark was never placed on the ground but on rocks or short logs. See also Swanton, Indians of the Southeastern United States, loc. cit., 695. Haywood gives a description of this war relic, but apparently, he is quoting Adair. Haywood, Rothrock, ed., op. cit., 231-232.

[44]See footnote, Adair, Williams, ed., op. cit., 170.

ever-present Hetissu were permitted to assume the risk, and this was done, only after they had been strongly fortified by an extra quantity of holy water.[45]

It is assumed that each town because of its sovereign identity had its own individual holy box and that there was no such thing as a national ark unless it be the one belonging to Echota, but it is not clear whether or not this was true. Evidence contrary to such an assumption is to be found in the fact that many priests among the Cherokees ascribed the degeneracy of the people in the middle part of the eighteenth century to the earlier capture of their holy ark and national religious piece by the Delawares.[46] Such views, however, may have been motivated by a didactic impulse rather than having specific reference to the holy relic being a singular and national object of devotion. Certainly, the loss of this great religious piece did not preclude the Cherokees from finding another one to which they continued to regard with adoration and profound respect, and it is a fairly safe guess that each of the larger villages kept one

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[45]Ibid., 169; see also Swanton, Religious Beliefs and Medical Practices of the Creek Indians, 412; see also Gilbert, Eastern Cherokees, 353.

[46]See footnote, Adair, Williams, ed., op. cit., 168; see also Washburn, op. cit., 161, 191; and Mooney, Myths of the Cherokees, 503, who quotes Washburn. See also Boudinot, op. cit., 176. Washington stated that an very old Cherokee priest, Dick Justice, related to him the loss of the Ark. The priest was a boy at the time. Washington expressed the opinion that when he talked to Justice in the 1820's that he was about 120 years of age.

on hand to accompany its own local military leaders in the field.[47] But without laboring the point further as to whether there was one or many, there is little doubt but the oral tradition associated with the historic relic played an important role in the establishment of their military law.

Once all the requirements needed to insure a successful undertaking had been met such as sanctification, sacrifice of captives, a favorable response from the high priest as to result of the expedition, rations and equipment collected, the war party would then take its departure from the village amidst weather, "fair or foul."[48] The leader, striking up the "terrible" war chant, would take the lead, making sure that the holy ark was securely tied in place on his back. The rest would follow in single file at a distance of about three or four feet apart and whooping and

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[47]Swanton, Indians of the Southeastern United States, 692. Swanton says regardless of how many arks, they were all treated in the same manner. Gilbert, Eastern Cherokees, 353, says that there were two national arks, and that one always remained in the national town house at Echota whereas the other one, made out of clay, was the one that was carried to war since it was used to hold the sacred fire. This is confirmed by Longe who stated that "they kendle thire war fire when the 4 days are ended [and] the war king teaks [takes] the fire and puts it in a Red Clay pot and karries [carries] it to war with them." Longe, SPG Papers, loc. cit. Should the fire go out while on the way to fight the enemy, everyone would return home. Should the fire go out while they are fighting the enemy, they will "all rone [run] away." When they engage thire enemy and all the while they are engaged The war kinge sits down and keeps ablowing the fire--assuring his warriors that while he keeps a blowing the fire that they will have the beter [better] of thire enemies."

[48]Adair, Williams, ed., op. cit., 409.

"hallooing" and thus would make their way out of town.

Upon coming to a site previously designated by the war captain, the troop would remove their ceremonial war clothes and don their battle dress which had been brought to them by the women of the town.[49] Being thus attired in breechcloths, they headed for the next village "like a string of geese."[50] Upon arriving at the neighboring town, they joined forces with its war party, and the two bands then constituted a company which was placed under the command of officers who had been selected by the seven national war leaders. Each of the two town parties, however, was commanded by its own war captain who took the lead and was followed by his own seven war counselors.[51] Included among the local town justices were the first and second speaker. Next, would be the assistants, doctors and cooks with the drummers marching somewhere near the center.[52] Being thus assembled the company would then march to the rendezvous where the town companies from all over the nation would convene. There, three national officers of equal power, would take command of the entire army. Having been required by

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[49]Woodward, op. cit., 41.

[50]William Fyffe to Brother John, loc. cit.

[51]Gilbert, Eastern Cherokees, 351. It is not clear what jurisdiction these seven local judges exercised. It is assumed, however, that they heard complaints rendered against local officers.

[52]Ibid.

military law to look at the sun for a certain period of time, these officials reportedly had the power to track the enemy by night as well as day, fly, handle coals of fire, disappear should the enemy approach, and were immune to any bullet fired by their foe.[53]

Although of equal legal power, the three positions differed slightly in rank, with the first being the "Raven," Skayagusta, who was the captain since he carried a raven skin fastened about his neck. The second was Ranehi, the Flag Warrior, who carried the red war pole which bore on its end a flag of red cloth or a deerskin painted red. The next man in the triumvirate was Skatilaski, "the Great Speaker," who addressed the army when the occasion arose.[54]

On the first day the army assembled, it would bathe in a nearby river and undergo further purification. That night, having made and raised its war pole and flag, it would celebrate with a war dance. Shortly before dawn all the fighting men, as proclaimed by the military code, would again go to the river and plunge in seven times after which the red war priest would throw deer's tongue on the sacred fire. If the meat burned brightly and was consumed, they were destined

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[53] Ibid.

[54] Ibid., 352. Father LePetit reported that the old Natchez, war-chiefs distributed names according to the merit of the warriors; and when a person understood the Natchez language, he could understand that the title explained the warrior's exploits. Kenton, ed., The Jesuit Relations and Allied Documents, 417. See also Longe, SPG Papers, loc. cit.

to conquer the enemy. If all the meat was not consumed or if the meat "popped west," defeat was in store for them.[55]

If the test was good, the war priest was by law required to seek additional divination with the use of beads. Holding a bead in each hand between his thumb and forefinger, he held them aloft and prayed to the seven heavens. If they were to conquer the enemy, the bead in his right hand would move.

If all went well, that is if the bead in the right hand moved, there was still more testing to follow. A magic crystal was mounted on the red war pole, and all were compelled to walk before. If it did not sparkle in the sunlight as the person walked by, he was marked for death and was sent home. However, there were still other means by which the outcome, as provided for under their law, was to be checked. The priest was to examine the crystal again. If blood flowed from the left side of the magic stone, they would be conquered. If from the right side, victory would await them. Even if some of the omens were unfavorable, the law allowed the war chief, in his discretion to undertake the mission.

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[55]Gilbert, Eastern Cherokees, 352-353. This was a common ritual to determine the favorable or unfavorable results of most undertakings. The meat was always deer meat, and four pieces were cut from the freshly killed deer which had been ordered by a priest. The holy meat was never eaten at this time, and the four pieces represented the four directions. When the cooking of the meat gave some indication that it favored northern direction, the sign was very favorable. Longe, SPG Papers, loc. cit.

Such being his intention, he would assemble the men and ask the company "speaker" to encourage them not to be afraid. Having done what he could, the Great War Chief would then give the command to march, followed by a war whoop, and the company moved out.[56]

Once out of encampment, four scouts would take their positions in front, back, and to the flank of the army wearing the animal skins which gave them their names, the "Raven," "the Owl," "the Wolf," and the "Fox." It will be recalled that it was the "Raven," the Great Warrior, who watched for the enemy and kept the company captains informed.

Refraining from any attempt to give a romantic description of their activities while on the march, it is, perhaps of interest to point out, that all members of the party were prohibited from leaning against a tree or displaying any signs of fatigue even though they might become very tired and exhausted before a day's sojourn was completed. Neither were they permitted toalleviate the rigors of the trip by taking a day's rest or to refresh themselves by killing and roasting fresh meat. In the field, as in town, the younger members of the party were closely watched to detect any signs of giving way to temptation, for any infraction of the

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[56]Father LePetit stated that a Natchez war party marched in single file with four or five men, who were the best walkers, keeping a quarter of a league in advance of the army so as to give immediate notice should something be detected. Kenton, ed., The Jesuit Relations and Allied Documents, 416.

prescribed tenets would invalidate the holy spell of immunity and expose the entire command to death by the enemy.[57] So demanding was this requirement that, at night or at stated intervals, the beloved waiter, Hetissu, would feed each of the warriors by "an exact and stated rule" and would even give them water to drink from his own hands.[58] Should some person, other than members of their own immediate group, elect to accompany them on their military venture, he was compelled to camp and sleep by himself since he was to them "as an impure and dangerous animal." The leader, however, could correct this situation by sprinkling such a person with the beloved holy water or by instructing the Hetissu to prepare a drink made from the sacred fluid and have him drink it.[59]

Thus, the practice of mixing military discipline with religious superstition seemed to work well up to a point, but it appeared, also, at some levels of its application to have its drawbacks. That is to be seen in the belief that if a certain "small uncommon bird came near the camp and sang, it was an oracle of bad news." Should it perch

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[57]Adair, Williams, ed., op. cit., 408.

[58]Ibid., 168; see also Haywood, Rothrock, ed., op. cit., 232. For an extended treatment of how the Southern Indians conducted war, see Swanton, Indians of the Lower Mississippi Valley, 123-138. Most of Swanton's material consist of long quotations taken from writers who have discussed the subject.

[59]Adair, Williams, ed., op. cit., 168.

itself on some tree branch directly over the camp, the event would be regarded as such a frightful portend, that the party would "speedily" break camp and return home.[60] As noted by Alexander Longe, this was "a small burd [bird] in the woods called by the Charrikes chigelile and [an] english wran:"

> If these small bords [birds] comes anigh thire campe and keeps a chirping they stand on thire gard [guard], saying that these wrans are fore roners of the enemies and there foe . . . they lok [look] out Every moment for the enemies; and when in the town if these wrans come anigh the house the first that heares them brings the news thereof to the temple and the war king sonds [sends] one of his warriors [to warn] all the towns therewith and tells them not to goe any way out in the woods for the Enemies are one [on] the borders of the towns.[61]

There were other signs and omens which served to give caution to the war-captain and his men. Should the war leader or any member of his command experience some unusual type of dream, it was usually regarded as an admonition from the protective deities that some ill was to befall the mission.[62] In such an event, the captain might still wish to continue the venture, but should anyone else desire to turn back, he was at liberty to do so without invoking the least censure from either his companions in the field or the people of his town. So strong was the desire to give obedience to

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[60] Ibid., 409. [61] Longe, SPG Papers, loc. cit.

[62] Ibid.; see also Pierre F. X. deCharlevoix, Journal of a Voyage to North America, Vol. 68 of Jesuit Relations and Allied Documents. Travels and Explorations of the Jesuit Missionaries in New France 1610-1791, ed., Ruben Gold Thwaites (Cleveland: The Burrows Brothers Company, 1896-1901), 145-149.

such a divine impulse that it was seldom, if ever, questioned, it being "reckoned that their readiness to serve their country should not be subservient to their own knowledge or wish."[63]

Commendable as this practice may have been, it would appear that such a liberty of decision would play havoc with a war party, and, undoubtedly it helps to explain, in part, why small parties were the rule rather than the exception. It also gives rise to the almost inescapable inference that it may have been used as a device to conceal fear or even cowardice. Military leaders may have regarded it better psychology to permit such a basic emotion as fear to be explained away in that fashion rather than to stigmatize the individual or individuals with a charge of cowardice. It should also be kept in mind that a war-captain had no real power to enforce his orders. Unlike his contemporary English brother who was commissioned by the crown, the leader of a Cherokee war party was a volunteer, being bound by no oath of allegiance and appointed by no one. His position as a military leader depended on his skill, wisdom, experience, and the confidence that he could inspire in members of his troop. He was, however, far more than his English counterpart, amendable to public opinion.

Assuming, however, that there had been no warning signs of impending ill and all had gone well. The enemy had

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[63]Adair, Williams, ed., op. cit., 409.

been encountered, sufficient scalps[64] had been taken to expiate for all those who had been victims of the original act which had occasioned the campaign, the band would then give its triumphal song of Yo - He - Wah and make preparations to return home. With respect to friends and relatives killed in battle, or death for any cause for that matter, the Cherokees firmly believed that their spirits would haunt the houses of the village to which they belonged unless the "kindred duty of retaliation was justly executed" and an equal number of the foe was killed. It was only after that, that the "craving ghosts" of their deceased relatives would get immediate relief and "fly away."[65] This law of retaliation applied only to those persons who were killed, either in battle or in some other fashion since the ghosts of those who had died from natural causes could be frightened away by

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[64]For evidence that the Cherokees took scalps see Gilbert, Eastern Cherokees, 354; SPG Papers, loc. cit.

[65]Ibid., 158. The Cherokees believed that four days after the body was buried, the soul would leave the body and go "toward the sone [sun] rising . . . tile [till] none [noon] or mid day." This may be the explanation as to why the Cherokees believed that the spirit went West after death because it always came from that direction toward the East. On the way back from the West toward the rising sun, the path divided with one path going directly to the sun whereas the other path meandered in the heavens. The good people--those who "doe [do] not steal, nor lays with their many wives, nor tells lies, nor causes quarrels, nor bloodshed among neighbors, nor speaks ile [evil?] of thire sponsor as the king [of] the beloved kingdom and war generals and war captains"--takes the right path. Longe, SPG Papers, loc. cit.

firing guns or making some other appropriate noise.[66] Human nature, moulded into tradition, taught the Cherokee warrior that man, not being conceived in a state of war, would become impure by taking human lives. Therefore, after the initial encounter with the enemy, if full revenge and restitution had been obtained, the purity created by the three days in the hot-house would come to an end, and a war party, being thus both impure and unprotected, would refuse to shed blood unless in self-defense. Killing in self-defense was justified on the theory that it was better to kill and stay alive than to do nothing and be killed while in a state of impurity.

For that reason, a Cherokee war party after a successful raid against the foe, was always anxious to return home so that it might again undergo the purification rites necessary to cleanse itself from the sins of war and killing.[67] When the war party came within a day's march of its village, the leader would send a runner ahead to announce the glad tidings and make sure that the hot house would be clean and ready as soon as they arrived. It was the usual practice for the women of the village to sweep and clean the

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[66] Ibid., see also Swanton, Indians of the Southeastern United States, 701.

[67] When a band of Cherokees had killed an enemy or had brushed against the body of an enemy, dead or living, "they reckon Themselves poluted and all thire war instroms [instruments]." Longe, SPG Papers, loc. cit.

house after the party had left but, being afraid to touch and perhaps profane the holy things that were scattered about and, at the same time, not knowing what was sacred and what wasn't they would put their sweepings in a heap behind the door and leave them there until the messenger arrived telling them of the party's approaching return.[68]

Upon the arrival and under his supervision, they then would remove the collected debris, re-sweep the place, and upon leaving, remove every utensil which had been used in the housecleaning for fear that in some manner, should they do otherwise, they might pollute the anticipated ritual.[69]

If all went well, the party would arrive the following day as planned with their entry into the village being quite an occasion. The warriors were painted black and red. Affixed to their swandown headgears were new white feathers attesting to the success of their mission. It is to be noted that everyone, regardless of whether he had taken a scalp or not, was entitled by virtue of having participated in a successful venture, to wear one new feather.[70]

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[68] Ibid. See also Adair, Williams, ed., 173 and Gilbert, Eastern Cherokees, 354.

[69] Adair, Williams, op. cit., 173.

[70] Ibid. For additional information pertaining to his new status, see Swanton, Indian Tribes of the Lower Mississippi Valley and Adjacent Coast of the Gulf of Mexico, 124-125.

In that regard, several young men would don feathers for the first time and, even though they could display but one, they did so with great glee since it indicated that they had moved into the ranks of combat veterans. In those instances where scalps had been taken, the person or persons being given official credit for the deed was privileged under their code of warfare to deck his headgear with extra feathers, undoubtedly, becoming the basis for the statement still made today, "more feathers in your cap."[71]

Upon approaching the hot house, the leader would move out ahead of his command, walk around the edifice, contrary to the course of the sun, and chant the Yo He Wah. He would then be followed by members of his company who, in unison, repeated three times the sacred notes.[72]

After having completed the ritual of circling the house, they then assembled around the warpole, located a short distance away and immediately in front of the door. There, within the circle, the ever-faithful Hetissu rested the sacred ark on two blocks of wood, after which they seated themselves on the ground. Remaining thus in that fashion for some length, they then, upon command of their leader, resumed their standing position, walked around the war pole, and again sang the Yo He Wah three times.[73] This concluded

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[71] Ibid. [72] Adair, Williams, ed., op. cit., 174.

[73] Ibid.

the outside performance. The warriors moved in single file by order of rank into the hot house where they remained, separate and apart from the rest of the people for four days and nights, purifying themselves with warm lotions and the "emblematical butter-rattlesnake-root" without food between sunrise and sunset.[74]

In the meantime, the female relations of each of the company, having bathed, anointed, and dressed themselves in their finest clothes, would stand outside, in two rows, one on each side of the door, facing each other and sing continuously for the first day. Unless some emergency demanded their attention elsewhere the rules required that they remain there throughout the night, standing erect and in the same place observing profound silence. The rules also precluded them from having communications with their husbands. No seasoning was permitted in their foods such as salt as it was believed that any kind of ingredient which tended to make their eating more palatable would destroy the cleansing effect of the rites and hence fail to absolve the fighting men from the impurities of war and bloodshed.[75]

In the meanwhile, the leader, at stated times would

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[74]Longe, SPG Papers, loc. cit., Longe reported that the war leader took the "war fire" and threw it on the fire in the hot house which was necessary to purify the water which they were heating. Gilbert states that the length of their stay in the house might extend to twenty-four days. Gilbert, Eastern Cherokees, 354.

[75]Longe, SPG Papers, loc. cit.

bring his troop out of the winter-house and circle the red painted war pole, holding up small branches of pine on which were fastened the enemy scalps.[76] This practice continued throughout the four day period, at the end of which both men and women took part in the scalp dance.[77] As part of the preparation they took a bath and annointed their bodies with animal oil. Having frolicked separately in the river, they convened in front of the winter house. The scalps were then taken to the Red War Chief and presented to him, with each of the warriors who had a scalp to offer, saying: "I present to you in token of my valor at war." The war leader, and all the town then cried out in a "loud" voice: "We thank you." The war leader then gave each of the persons a war name. Thereafter the war priest sacrificed the deer's tongue and consulted his crystal ball.[78] The omens being favorable for lasting peace, the scalp dance started by a certain note made by the musician. The women danced first in one big circle. Upon the second signal given by the musician, they moved in close around the fire and, in stooped positions, performed the snake dance. At this point the men joined in, paired off with the women and, holding scalps above their heads, climaxed the event.[79]

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[76]Adair, Williams, ed., op. cit., 174-178.

[77]Gilbert, Eastern Cherokees, 354.

[78]William Fyffe to Brother John, loc. cit.

[79]Gilbert, Eastern Cherokees, 354.

Next the celebrants formed a solemn procession in which the war chief took the lead, followed by his religious attendant, warriors, fighting men, and then the women. Thus they preceded to those houses which had sustained a loss of life without revenge of blood. On the top of each such house, they mounted a pine branch to which was tied a small piece of one of the scalps which had been taken. By adherring to this traditional law of their land, they would appease the souls of their departed neighbors which would not, thereafter, reappear in a ghost-like apparition to cry out for revenge.[80] As summed up by an elderly chief: "The red men require their [enemies] blood to appease the spirits of their slain relatives; they have entrusted us with the guardianship of our laws and rights, we cannot betray them."[81]

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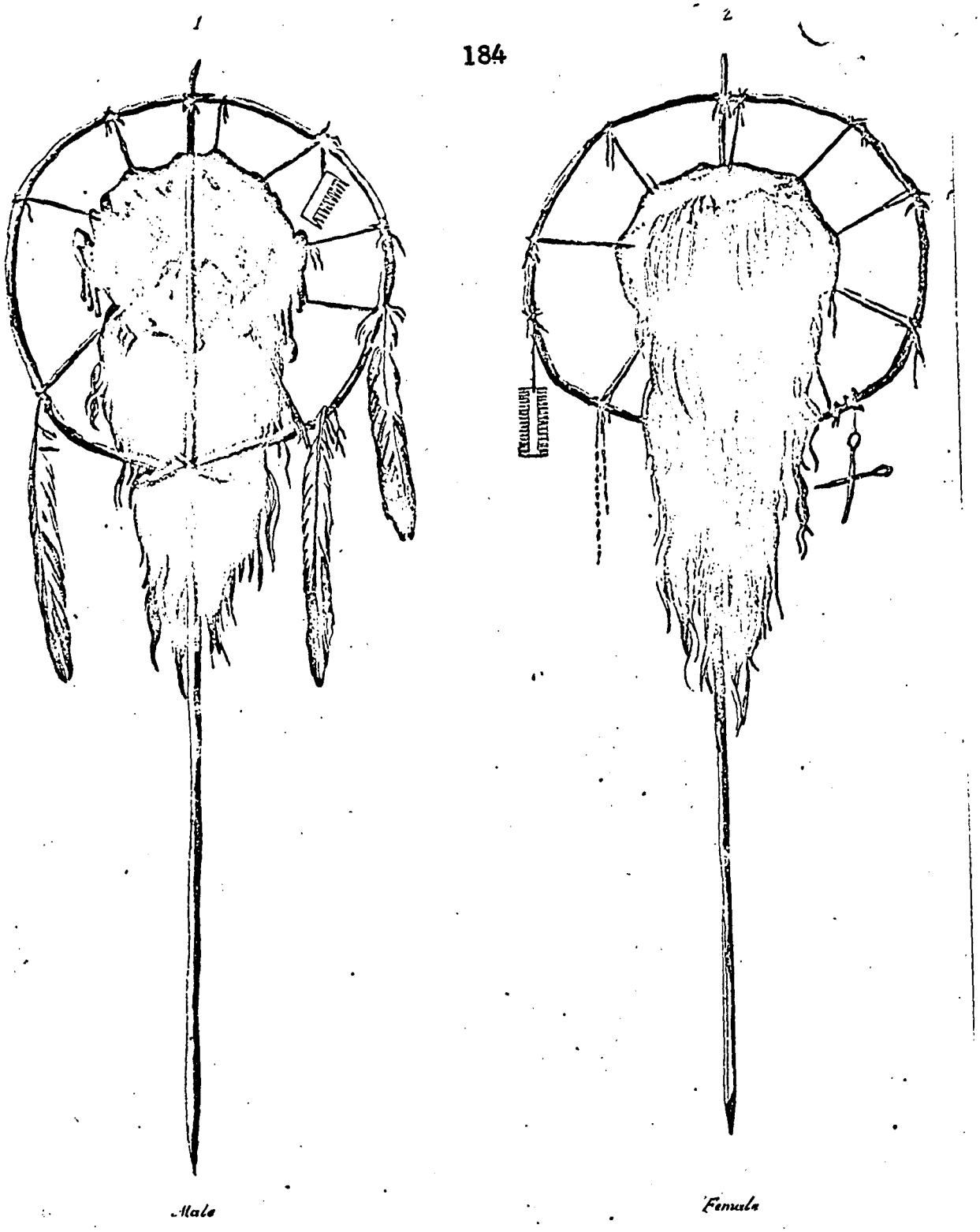
[80]Adair, Williams, ed., op. cit., 175.

[81]Bartram, Van Doren, ed., op. cit., 384.




Mounted Scalps taken from Henry R. Schoolcraft's Information Respecting the History, Conditions, and Prospects of the Indian Tribes of the United States.

## CHAPTER VII

## BLOOD REVENGE: LEX TALIONIS

Cherokee criminal law in the eighteenth century, bore only a slight resemblance to English theory and practice. While Cherokee views regarding government and war embraced the idea that it was done for the benefit of the common good, the commission of a criminal or tortuous act, perpetrated by one individual on that of another, was the concern of the injured party and not that of the state. Such an act might be either criminal or civil but if committed by one citizen against another, as distinguished from that committed by an outsider, which, as previously seen, might be the occasion for war, the settlement of the matter was the concern of the parties.

Restitution, therefore, in whatever form, was obtained through the efforts of the individual and his family and clan which in most instances, appeared to have been a sufficient deterrent to hold in check all but the more aggravated conditions. It was also the case, as was and is true of most all tribal societies, that in the absence of great individual wealth, personal or real, the need for a complex state legal system was lacking. Cultural conditions, measured in terms of literacy and communication were also absent

which in themselves would have precluded the application and use of a judiciary comparable to that used by more advanced societies. The old legal axiom that "ignorance of the law was no excuse" would have had little meaning except in those instances wherein custom and traditions had become so well established that everyone would be held accountable in the knowledge of such particulars.

One writer, contemporary to the period, commenting on Indian laws in general, observed, that their failure to prescribe punishments for certain types of conduct was not as "unjust and cruel as were the bloody penal laws of England, which we have so long shamefully practised . . . ." On the contrary, the writer further observed, that there were many advantages, attendant to a legal system which contained no extensive criminal code and no common law criterion. Indian citizens were not, in his words, "oppressed or perplexed with expensive litigation--They [were] not injured by legal robbery--They [had] no splendid villains that [made] themselves grand and great on other people's labor."[1] While the observation was typical of frontier reaction to lawyers, it was equally shared by the Cherokees as it was one of their major objections to the white man's law. To the Cherokee, according to Adair, lawyers and legislators made the law so difficult that a poor, honest man could not understand

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[1]Smith, Darlington, ed., op. cit., 149.

it, and hence, having no money to hire "artful speakers" would always be the loser. It was, therefore, unjust to "compel or tempt people to buy justice."[2]

The Cherokees also had a low opinion of that principal of common law which relied on a fixed precedent to determine the decision of an existing controversy. To their minds, not entirely foreign to our views regarding the matter, conditions might change over a period of time and what was the law yesterday, might not be the law today. In other words, the law must be flexible so that a precedent, when need be, could be "erased from the old court books and profit by the foibles of the old, the wise and the good."[3] It was, also, equally difficult for the Cherokee to accept and understand the inequality of a system which imposed monetary fines on the rich and prison confinements on the poor.

Law, according to the philosophy of the colonial Cherokee, should be clear, simple, and brief so that all

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[2]Adair, Williams, ed., 466. According to one of the Cherokee legends, God had met the leader of the Cherokees on a high mountain and had given him a code of laws. These laws were written on a smooth white stone because God did not want them to be lost. George B. Foster in his book, Literature of the Cherokees, stated that Red Bird, an old Cherokee, related the story that in times past a white post had been erected near the council house, on the top of which, was fastened a white skin. This white skin was placed there to remind everyone to keep their hearts white and to remember that the code of laws, although lost, had once been given to their forbearers. George B. Foster, Literature of the Cherokees (Ithica, New York: Office of the Democrat: Muskogee Indian Territory, Phoenix Publishing House, 1889), 8-9.

[3]Adair, Williams, ed., op. cit., 466.

might become aware of its existence, its meaning, and its application. Such a plain law of nature, however, was already in Adair's time, encountering difficulty in the preservation of peace and harmony. It was Adair's opinion that the Cherokees were degenerating so fast that only "new laws, designed to terrify them from committing new crimes," would save the day.[4]

With regard to crime and punishment, the Cherokees, in common with other neighboring tribes, thought of it as being the concern and responsibility of the individual and not the state. If the crime of murder was committed, whether accidental or deliberate, the family or clan against whom the homicide had been perpetrated was required under the primitive law of their ancestors to retaliate in kind against the offender. James Oglethorpe, in touching on the subject of blood revenge among the Creeks, stated that they believed that they were "forced to kill the Man who had injured them, in order to prevent others from doing the like . . . ." Oglethorpe further noted that the Creeks thought of murder as a most "abominable crime" and the "next in Blood [was] obliged to kill the Murderer, or else he [was] looked upon as infamous in the Nation where he live[d] . . . ."[5] In condoning the Mosaic law of retaliation which

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[4] Ibid., 462.

[5] James Oglethorpe, "Weekly Essays in August," Gentlemen's Magazine, 111, (1733), 414.

Adair stated that no set of people pursued with such a "fixt eagerness as these Americans,"[6] Oglethorpe stated that the "Weakness of the executive Power [was] such, that there [was] no way other way of Punishment but by the Revenger of Blood as the Scripture calls it."[7] To cite his views on the manner, the following quote is set out:

> For there is no coercive Power in any of their Nations. Their Kings can do no more than persuade. All the Power that they have is no more than to call their old Men and their Captains together, and to propound to them without Interruption, the Measures, they think proper.[8]

Timberlake reported that the Cherokee chiefs in the Overhill Settlements could inflict no punishment except that if a man committed a crime in the violation of a treaty he might be delivered over to the enemy.[9] Charles Hicks, a prominent chief of the Cherokees stated in 1818 that if murder was committed by a person of one clan on one of another, the murderer was always punished with death by the offended clan. Hicks elaborated further by saying that if both the murderer and the victim came from the same clan, the clan would frequently intercede with the head chief of the nation

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[6]Adair, Williams, ed., op. cit., 157.

[7]Oglethorpe, loc. cit.

[8]Ibid.

[9]Timberlake, Memoirs, 60.

and obtain a pardon.[10] On this point, William Fyffe advised his brother that "death was sometimes inflicted on them if a murder kills one of the same cabin or Family by the Head of the Cabin if the offender is of a different cabin."[11]

Adair, in his remarks concerning murder where it was committed by a kinsman, maintained that only the "eldest" son could redeem.[12] Such would coincide with the view taken by Haywood that the father of the family could not punish any of his children since they were of a different clan, or for that matter, any member of his wife's clan. If he should kill them, he would be subject to clan revenge on the part of his wife's clan.[13] In all matters of blood revenge, regardless of whether it was in or out of the clan, the victim's oldest brother together with the mother's brother exercised more authority over the clan than did the father.[14]

This law, comparable to that used and described by the ancient Babylonians, as lex talionis, or the law of equivalent retaliation, contained all its harsh extremes

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[10]Missionary Herald, loc. cit., XIV, 215. Hick's statement is also quoted in Swanton, Indians of the Southeastern United States, 731. For additional information concerning blood revenge see Washington, Park ed., op. cit., 170; Haywood, Rothrock, op. cit., 259-260; Filson, op. cit., 106.

[11]William Fyffe to Brother John, loc. cit.

[12]Adair, Williams, op. cit., 156-157.

[13]Haywood, Rothrock, op. cit., 259.

[14]Washington, Park, op. cit., 161.

save one, namely that of drunkness was a defense.[15] Whether this reflected some advanced legal rationale on the part of the Cherokees, or whether it points up the possibility that drunkenness was widespread and a common occurrence among them is not known. Most likely it was the latter, since their own law at a later date, in line with federal and state law, strictly prohibited the sale of intoxicants. But whatever the significance of the rule, if death was inflicted while the murderer was in a state of intoxication, his drunken condition was a sufficient excuse to absolve him of the crime in the eyes of the community, and the survivors of the deceased were under no duty-bound obligation to kill him. A white observer summed it up by characterizing the Cherokees when intoxicated as being "furious beyond drunkards of civilized nations totally regardless of consequences."[16] In 1802 Agent Return Meigs, in his report to the Secretary of War, told of a fight between a Cherokee and a white man in which the Indian was killed. Both persons were drinking, related Meigs, and "since no previous malice or ill will existed on either side of the parties, the Indian's death was therefore considered accidental."[17] The idea that drunkness

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[15]Smith, Darlington, ed., op. cit., 148; see also Adair, Williams, ed., op. cit., 164.

[16]Missionary Herald, loc. cit., XIV, 178.

[17]This material consists of microfilm publications from the Bureau of Indian Affairs, Records of the Cherokee Indian Agency in Tennessee 1801-1835, National Archives,

should obviate the crime continued to find support in the Cherokee Nation as late as 1818. In that year, the treasurer of the Brainer Mission wrote to his missionary board that if the Cherokees should perpetrate any wickedness, while in a state of intoxication, they say that whiskey did it, and not they; and though they regret it, they do not take any blame to themselves.[18]

That the Cherokees did not always hold a drunk Indian blameless for his acts is to be found in the decision of several chiefs that a drunk Indian who had killed a young child on the Georgia frontier got what he deserved when he was killed a short time later by the child's father.[19] Neither could it always be accepted as an established fact that relatives of the slain man would hold themselves in check and abstain from having their revenge even though convention in cases of drunkness imposed no necessity on them to do so. In many cases, so many in fact that it may have been the rule rather than the exception, some male relatives of the victim would, himself, embark on a drinking spree, in the course of

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Washington. They consist of letters and miscellaneous records and are reproduced in approximate chronological order; the citations will show date of document and microfilm number rather than the pagination of the series which is imperfect. They are located in the Manuscript Division, University of Oklahoma. Letter of Return Meigs to Secretary of War, September 8, 1802. Hereafter cited as BIA, No. 208.

[18]Missionary Herald, loc. cit., XIV, 178.

[19]Letter of Return Meigs to Secretary of War, BIA, No. 208.

which he would seek out the killer, secretly or otherwise, and dispose of him as his revengeful passion might prescribe.[20] Such an act would, of course, breach clan law, and the relatives of the killer in the first instance could exact like vengence, which most likely they did, until the vicious circle had run its course.

Domestic difficulties arising out of a plurality of wives might also lead to murder. If so, several persons might be killed. Longe claimed the women had an "uncontrolable temper;" and sometimes would kill their husbands while in jealous rage. When such occurred, the husband's parents "assembled" and killed the wife. No mourning was allowed for them that "kills one of their own nathon," as a "life for a life" was the law of the land. When such things happened, Longe further noted, "thire are more then [than] 8 or 9 and sometimes twonty [twenty] goos [goes] to pot about it if it is not loked [looked] unto by . . . the king and to the nation." Frequently, in the course of these domestic squabbles, the second wife would pour scalding water on her husband. Under such circumstances it was not uncommon for the first wife to come to his defense which might result in the death of either one of the two women. Should that occur, the blood feud started.[21]

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[20]Adair, Williams, op. cit., 164.

[21]Longe, SPG Papers, loc. cit.

In the absence of any immediate, surviving male relatives of a deceased, the oldest female member of the family might solicit the services of a third person. Should such person respond favorably to her request, he would then be adopted by her as her son, and he would be required to seek out the guilty and put him to death. On the other hand, should the woman be unable to procure the help of such a person, she could, at her election, adopt as her husband, the perpetrator of the offense with, or without, his consent.[22] Should this be the case, the responsibility of seeing that he took his obligation seriously, shifted from the individual, thus converting the idea of revenge to that of welfare, and would become the joint concern of the entire community. Should such a forced marriage of this type occur, it would seem, unlike those in which the parties had voluntarily made and to which they had such frivolous regard, the adopted husband could extricate himself only at the expense of exposing himself to being killed on sight by any member of the village which would include the members of his own immediate family. Here again information appears to be very meager on the matter, but it is assumed that if a situation of this type did arise, it would be preceded by negotiations on both sides so as to give some assurance that it would minimize rather than aggravate more bloodshed. In

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[22]Turner, op. cit., 74-81.

commenting on this phase of the law governing the crime of murder, it is hard to resist the temptation to observe that, while the motive behind the law of forced marriage was far more wholesome than revenge which placed the burden on the particular clan for the maintenance of order, a matrimonial relationship for life with a spouse other than your own choosing might be a stronger deterrent to murder than certain death at the hands of the avengers.

Be that as it may, in those instances where the murderer had escaped and a reasonable effort had been made to ascertain his whereabouts but to no avail, "his nearest kinsman, either real or adopted, or if he [had] none there, his friend according to their rigorous law, was answerable for the fact."[23] This feature of their old blood law was an absolute right, and it could be transferred at the option of the injured clan or family.[24] As one writer has noted, "many a white man has expiated a murder which he never heard

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[23]McKenney, op. cit., 379; see also Adair, Williams, op. cit., 156-157. Shortly after the turn of the nineteenth century, a man was killed by another Cherokee. The murderer left the country and the family of the deceased demanded the life of his brother. Ward was sent to Major Ridge, and he immediately said that he would kill the person who carried out such a plan. It was this stand taken by Ridge that marked the beginning of the policy to stop substituting a relative in place of an escaped homicide. McKenney, op. cit., 379. Mooney also comments on substituting a relative in place of the murderer. Mooney, Myths of the Cherokees, 522-528.

[24]Swanton, Indians of the Southeastern United States, 731.

of."[25] After the Cherokees had killed two white people, John Stuart, in commenting on the affair, stated that it was not to be "imagined that Savages, possessing no coercive authority" would do otherwise when Virginia made no attempt to punish white men who had killed "nine Indians in cold blood."[26]

When one clan fell into ill-will with another clan because of bloodshed, it was no extraordinary effort of patriotism for a person to come forward and suffer as a voluntary substitute so his clan might be cleared of guilt. Apparently, such did occasionally happen. George Turner related the story that among the Choctaws, a young man had killed another. The injured family demanded satisfaction, but the murderer left the country. To prevent further bloodshed, the mother of the guilty party came forward and substituted herself for that of her son. Upon learning what had happened, the young criminal killed himself because he could not endure the stigma of being a coward as well as having the knowledge that he had been responsible for the death

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[25]Hope, op. cit., 357; see McKenney, op. cit., 379. On July 4, 1753, Little Carpenter and his head men from Echota met with Governor James Glen of South Carolina. Little Carpenter asked Governor not to punish the Savannah Indians because "the path [would] be made bloody, and no white man [would] be able to come to our country . . . many a straggling white man [would] lose his life." Quote taken from Logan, op. cit., 478.

[26]Copy of a Letter of John Stuart addressed to My Lords, July 10, 1766, London Papers File, Oklahoma Historical Society, I, 60.

of his mother.[27]

Thomas Nuttal, in speaking of the Cherokees, was of the opinion that the brothers of a murderer, for fear that he would escape, would often dispose of him in order to save one of themselves from blood revenge.[28] One other writer in his appraisal of the subject was much more positive by maintaining that the entire clan was responsible for the crime of one of its members and that there was no exceptions.[29]

Clan law provided that each of the seven clans was held sacredly bound to administer the principle of blood for blood within its own jurisdiction and to afford facilities for its execution when the "aggressor fled from one tribe to another."[30] Similar to modern extradition, representatives of the aggrieved family or clan were usually alerted to the fugitive's new surroundings and, apparently, thought little of traveling several hundred miles to obtain

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[27]Turner, op. cit., 74-81.

[28]Thomas Nuttall, Journal of Travels into the Arkansas Territory, XVIII of Early Western Travels 1748-1846, ed. Reuben Gold Thwaites (Cleveland: Arthur H. Clarke Publishing Company, 1904-1907), 189. Gearing, "Political Organization of the Cherokees," 43, Gearing was of the view that all the clan was guilty until the murder was avenged.

[29]Josiah Gregg, Commerce of the Prairies, XX of Early Western Travels 1748-1846, ed. Reuben Gold Thwaites (Cleveland: Arthur H. Clarke Publishing Company, 1904-1907), 311. See Washington, Park, ed., op. cit., 161-170; Gearing, "Political Organization of the Cherokees," loc. cit., 43.

[30]McKenney, op. cit., 379. Filson, op. cit., 106, gives some indication of this by saying that the murderer was delivered up to friends to do as they pleased.

satisfaction. As explained to John Stuart by one of the chiefs, "our nation is all in Tribes, and the Murderers have some of their Tribe in Our Town; whenever there is any Satisfaction demanded, the whole Tribe join together . . . to see that it is done.[31]

This rule of substitution and return was promulgated, undoubtedly, for the purpose of discouraging family help in affecting the offender to get away, which most likely was effective since the next in line was duly aware that he would be the recipient of whatever punishment had been prescribed. But at the same time, the rule clearly stamps such a practice as being designed not to punish, not to preserve life, but solely to avenge, pure and simple. Further evidence of this idea of revenge can be seen perhaps even a little more clearly in the fact that it made no difference whether the homicide was deliberately planned, whether it took place in the midst of heat and anger, or whether it was done quite accidentally without regard to intent. Fyffe complained that the Cherokees killed their enemies while they were asleep, and that they accounted revenge a virtue of the stronger sex.[32] The idea of revenge is perhaps best summarized in a statement made by a warrior of the Creek Nation:

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[31]Wolf King's answer to a joint Talk received from His Excellency James Wright Governor of Georgia and John Stuart, Esq., April 29, 1766, London Papers File, Oklahoma Historical Society, I, 81.

[32]William Fyffe to Brother John, loc. cit.

"Since they [the enemy] killed one of Us . . . we have killed One of them."[33]

The Cherokee, in conformity with practices prevailing among his neighbors, did not equate the act of killing to any degree of emotion, intent, or provocation on the part of either the victim or the murderer. Defense of one's property, one's relatives, or one's own person constituted no valid reason for which the aggrieved family was compelled to accept. Unlike the legal defense propounded in Anglo-Saxon law which exonerated the offender and estopped the state from assessing a penalty, family honor, as construed by the Cherokees, demanded a life for a life as its price of atonement.

This principal is tragically revealed in an incident reported by Adair. A white trader from South Carolina was attacked in the woods by a small group of drunken Cherokees. The trader, however, was able, by physical force alone, to protect himself and his property. One of the Indians, apparently, was suffering from pleurisy during the time of the encounter and subsequently died as a result of the condition. Thereafter, the heads of the decedent's family held court and condemned the trader to be shot to death. The trader, unaware of what had happened, continued his journey to the next town where his executioners, appropriately painted red and

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[33]Answer to Governor Johnson's Talk to the Upper Creek Nation, May 16, 1766, London Papers File, Oklahoma Historical Society, I, 18.

black for the occasion, carried out the sentence.[34] It is difficult to say anything which will mitigate the practice wherein the victim had been killed while in the act of either taking property or the life of another. It is even more difficult in those instances in which his death had been due to some unavoidable accident or negligence on his part. In those cases where the person was killed accidentally but through the negligence of another, a very faint analogy can be made between the idea of some kind of recrimination and the present day lawsuit for damages. The first year law student, is trying to associate fact and theory in tort law, is plagued with innumerable cases wherein the relatives of a deceased are seeking monetary compensation from a person or company associated with the death of their kinsman on the grounds that he would not have died "but for" the negligence of the defendant. The law student is still further mystified by such expressions as "proximate course," "intervening cause," "last clear chance doctrine," "contributory negligence," "punitive damages," "negligence per se," and other terminology which, collectively, point up the fact that a person when injured or killed by the negligent act

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[34]Adair, Williams, ed., op. cit., 156. Alexander Cameron, a former Indian Deputy of the British Crown, was killed in the early 1790's under the blood for blood law. For a vigorous denunciation of the principle see Clarence B. Carter (ed.), The Territory South of the River, 1790-1796 (Vol. IV, The Territorial Papers of the United States, Washington, United States Printing Office, 1936), 211-212.

of another is entitled to collect damages either on his own behalf or, if deceased, his survivor. Such a cause of action is, of course, based on the theory that the injury or death would not have occurred in the absence of negligence. If no negligence, the accident was unavoidable and hence the fault of none.

Some states graduate negligence into degrees by erecting different levels of due care. That is, a person is supposed to exercise greater caution in some situations than in others. In the event of a lawsuit, the person claiming injury, will seek damages based on which level of due care the defendant failed to exercise. In such a case, he may ask for compensatory damages, that is, damages which he actually sustained and punitive damages or damages which are designed to penalize the defendant over and beyond actual damages.[35] The Cherokee lawmaker, however, certainly visualized no such shades of negligence, and he made no attempt to distinguish the causes of death as between that which was intentionally done and that which occurred as a result of an unavoidable act. The only unavoidable act of which the Cherokee was familiar was an act caused by nature. However, he did think that an accidental death, other than that caused by an act of nature or the fault of the deceased, was caused

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[35]For a general but very excellent treatment of negligence as it is applied under modern tort law see William L. Prosser, Handbook of the Law of Torts, St. Paul: West Publishing Co., 1941) 170-210, 311-373.

by a lack of due care, and that it would not have occurred in the absence of negligence. This is to be seen in the statement made by Adair that an "unruly horse belonging to a white man, should by chance to be tied at a trading house and kill one of the Indians, either the owner, or the person who tied the beast there" should bear the responsibility.[36] In the mind of the Indian, the horse was "unruly" and hence dangerous. Therefore, either the owner or the person who brought the animal to a place where he might inflict harm, should have foreseen the possible consequences. By failing to do so, they were negligent and thus accountable to the family of the unfortunate victim.

However, in their decision to retaliate in blood or to accept payment for the loss of a life, the Cherokees gave some concern to the circumstances surrounding the killing as well as the person's frame of mind when he committed the act. If the defendant could show that he had no purposeful intent, he might buy his way out. That is, the killing had occurred accidentally, either because, or in the absence of negligence, but in any event, it was not the result of a premeditated design.[37] The defendant might also be able to persuade the aggrieved clan to let him off short of his life, by showing that, while he had intended to kill, it was a justifiable

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[36]Adair, Williams, ed., op. cit., 156.

[37]Gilbert, Eastern Cherokees, 324.

homicide. In this situation the clan might be inclined to accept some kind of restitution other than blood. This is not to say, however, that the clan would do was compelled to recognize any degrees of murder but the circumstances of the killing might be the basis for the clan to mitigate the crime and reduce the penalty of blood revenge to monetary revenge.

Adair, in reporting on the subject, contrary to his usual preciseness, displays some evidence of inconsistency by saying that the memory of a murdered relative was transmitted from one generation to another, but that it was possible for the family to accept monetary redemption.[38] Most likely the explanation lies in the fact that the clan, in cases of accidental or justifiable death as previously explained, could be satisfied by presents, or the killing of some enemy in the field, or any captive who might be around. Fyffe, on this particular point, wrote to his brother that "death is sometimes inflicted . . . [but] the common way is for the Murder to abscond & his Friends goes to the Friends of the Deceased & makes them Presents. If the Presents are accepted, the Difference is made up."[39] John Stuart stated that the "Relations of the deceased are satisfied by having

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[38]Adair, Williams, ed., op. cit., 165.

[39]William Fyffe to Brother John, loc. cit.

the murdered executed or by some valuable consideration."[40]

Hewat, in his treatment of the matter, stated that in cases where the wife of the murderer and "aged men of weight and influence" interceded for the aggressor, satisfaction was possible by way of compensation. Should it be refused, which the family of the deceased could do, "the murderer, however high his rank be, must be delivered . . . to prevent the quarrel spreading wider through the nation . . . ."[41]

If the death of a kinsman had occurred as the result of a wilful or a premeditated design, coupled with the intent to kill, clan revenge could not very easily be satisfied with money, goods, or the death of any enemy or captive if the killer could be found.[42] In this, they may have thought more in terms of punishment to the guilty person than maintaining family honor and status by revenge. This may have been so, not because they were more civic minded in discriminating between the degrees of murder but for fear that the deceased, having met death at the hands of a wilful

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[40]Copy of a Letter of John Stuart addressed to My Lords, July 10, 1766, London Papers File, Oklahoma Historical Society, I, 55.

[41]Alexander Hewat, An Historical Account of the Rise and Progress of the Colonies of South Carolina and Georgia, II, n. 1, quoted Swanton, Early History of the Creek Indians, 77.

[42]Swanton, Indians of the Southeastern United States, 731.

murder, would show a greater propensity to return from the "place out West" and haunt his relatives.[43] In this respect it need be stated that the Cherokees believed that at death, the soul left the body and became a ghost. Seven days later the ghost would arrive in the Night Land, located somewhere west of the mountains. To alleviate the harshness of loneliness, the ghost would return, reincarnate itself in the body of a man-killer or witch and, at the first opportunity, would cause its relatives to become sick and die so they might join it in Ghost Land.[44] The living, not quite bent to this mode of love and affection, would leave no means untried to escape from the ghost's influence. In those cases where the relative had died of natural causes, they could scare their spirits away with loud noises.[45] In cases where the relative had been killed before the expiration of his

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[43]Mooney and Olbrechts, Swimmer Manuscripts, Cherokee Sacred Formulas (Washington: Government Printing Office, 1932), 26. Longe stated that on the four day after the soul arrived in land out West, that it would start back toward the rising sun. Both Mooney and Longe appear to agree that the soul would make the return trip only if the body had been killed or had died a premature death. If the person was quite old when he died, his body would be "consumed" and his spirit would then seek rest. Longe, SPG Papers, loc. cit.

[44]Mooney and Olbrechts, Swimmer Manuscript, 26. In 1818 an American Board missionary asked a full-blood Cherokee woman "Where she thought her spirit would be when she died?" In response to the question, she stated "She did not know that it would be anywhere." Missionary Herald, loc. cit., XIV, 214.

[45]Adair, Williams, ed., op. cit., 158.

alloted time, his death, like an animal might be only temporary and the body took shape again from the blood drops and was reanimated by the spirit called tali continuing until the end of the predestined period when his body finally dissolved and his liberated spirit took up its journey to the Night Land.[46] If they did believe this, as in the case of animals, it may help to explain why they regarded it so essential to punish the person who had maliciously taken the life of a kinsman so that the departed relative, reanimated by the tali, being in a much more favorable position than a mere ghost, would not punish them for omitting to carry out justice in his behalf.

But regardless of what motivated blood for blood, Adair reported that in particular cases, the man slayer could extenuate the offense with gifts. Such cases most likely had reference to a situation where a white man killed an Indian, and it was regarded the better policy to accept some type of restitution rather than to demand blood for blood since the insistence of such might bring down the wrath of the English. In support of this conclusion, Mooney tells a story credited to Adair that a trader killed an Indian while in the protection of his property and then took refuge in Echota, the national asylum to which attention will shortly be directed. After remaining there several

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[46]Mooney and Olbrechts, Swimmer Manuscript, 27.

months, he prepared to return to his trading post which was just a short distance away, but the chiefs assured him that he would be killed should he venture outside of town. Accordingly, he was obliged to remain until, in the words of Mooney, "the tears of the bereaved relatives had been wiped away with presents."[47]

Should a killing occur, the killer although well aware that he might expiate the offense by some kind of purchase, might also be in no mood to speculate as to what attitude the clan would take.[48] Therefore, short of leaving the country, he had one or two courses left open to him. First, he could try to make it to Echota, where he could not be apprehended.[49] Secondly, if he felt that his chances of reaching Echota were pretty slim, he would attempt to get

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[47]Mooney, Myths of the Cherokees, 207. There may have been the possibility that a third person--someone not associated with either of the two families--could ransom the life of the murder. No evidence has been found to support this. However, it has been reported that traders would ransom the life of a prisoner condemned to die at the stake. John Rogers, great grandfather of Will Rogers, lived in town of Chichamuga (Chattonooga) and saved two people from the stake by buying them with his own goods. See footnote, J. P. Brown, "Eastern Cherokee Chiefs," Chronicles of Oklahoma, XVI (March-December, 1938), 30.

[48]Fyffe said that the "Head of the Cabin" of the deceased made the decision as to position the family took on the matter. William Fyffe to Brother John, loc. cit. Gilbert, Eastern Cherokees.

[49]Echota as a refuge town is reported in Adair, Williams, op. cit., 165; Mooney, Myths of the Cherokees, 207, and Gilbert, Eastern Cherokees, 324. Gilbert stated there were four refuge towns.

within sight of a white chief or within his yard and appeal to the chief to save him. The latter, acting on his own judgment, would follow one of two courses. He would either send his messenger to blow his trumpet to call the entire town together and, if in his opinion the killing was justified, he would declare the man acquitted in their presence. On the other hand, if there was some doubt in his mind, he would hold a regular court to examine the facts of the matter.[50]

Court practice and theory will be dealt with in the next chapter, but, in concluding, it need be emphasized that blood recrimination rested on something more than religious myth, superstition, and ignorance. The explanation that the spirit of the victim would haunt the homes of his surviving kinsmen unless a like reprisal was made seems only partially true. Revenge, retaliation and clan pride were the moving forces behind the custom. This is to be seen in a story, again related by Adair, that two young boys were hunting

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[50] Ibid. Fyffe spoke of the "Heads of the Nation" acting as "Judges" but it is not clear whether he had reference to town or national judges. He did state "these cases [murder] don't often happen." William Fyffe to Brother John, loc. cit. In this respect, he and Longe disagree as to frequency of murders committed. Longe stated they happened often. Both Longe and Fyffe were writing about the same time; although, Fyffe was a well educated man and Longe was not, it would seem that Longe had the better case of it as he lived with the Cherokees, apparently, for quite a while. Fyffe, on the other hand, based most of his observations while he was physician in the Virginia militia when it invaded the Overhill Settlements in 1760 during the French and Indian War.

together and in the course of their joint venture, one accidentally shot the other and wounded him slightly. Thereafter, the "young vindictive fox, was excited by custom to watch his ways with utmost earnestness, till the wound was returned in an equal manner as could be expected." Once he had inflicted a like wound on that of his hunting companion, "all was straight" and they "sported" together as before.[51]

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[51]Adair, Williams, ed., op. cit., 157.

## CHAPTER VIII

## THEORY, TRIAL PRACTICE AND CLAN JURISDICTION

It would appear that the sole purpose of a Cherokee trial, if it can be described as such, was to review all the facts associated with the crime so as to mitigate the punishment whenever possible. In this situation the court would act only in an appellate capacity being empowered to inflict no punishment since the offense was committed against the clan and not the town. The court could, however, and apparently this was its sole purpose, prescribe, or more correctly, reduce punishment at its discretion in line with any extenuating facts brought out in the course of its hearing. Assuming, however, the defendant was claiming no mitigating circumstances, and was not throwing himself on the mercy of the court. Conversely, he was doing the exact opposite. He was professing complete innocence and was placing the burden of proof on the clan to prove his guilt. Should he elect to follow this course, it would appear that he was asking for something more than just a mere review by the chief and council. In substance, he would be seeking a new trial--a trial de novo--which, if granted, would place his offense under the jurisdiction of the town. In other words since there could be no excuse or defense whatever for

killing as stated previously, the single issue before the tribunal would be to find out if the family of the deceased had picked the right man. Under such conditions it would seem that a person familiar with such rules, would not bother to ask for a hearing unless he was completely innocent or that he felt that the commission of the crime had been so perfect that his duplicity could never be proved.

At the expense of extending the discussion on the matter and, at the same time, abstaining as much as possible from theory and conjecture, it does appear worthwhile to attempt to distinguish between a situation where the defendant, kinsman of the clan or not, had killed a man, accidentally or otherwise, and no question of his guilt, to that situation where the accused was proclaiming his innocence. In the first instance, as has been shown, the chief or council, or both, would merely pass on the degree and the kind of sentence.[1] In the second, however, they would be called on to act out in full capacity, the role and the obligations of judge and jury. To equate it to two kinds of power, familiar to our theory of government, the first would fall within the sphere of executive responsibility or the

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[1]Alexander Hewat stated that "they have judges and conjurers, whom they called Beloved Men, who have great weight among them; none of whom have indeed any coercive authority, yet all are tolerably well obeyed." Alexander Hewat, An Historical Account of the Rise and Progress of the Colonies of South Carolina and Georgia, II, N. 2, quoted in Swanton, Early History of the Creek Indians, 76.

pardoning power, whereas the second would come under the judicial function.

To elaborate, let it be assumed that the person was totally innocent of the killing in that it was a case of mistaken identity or it was a situation in which some article of clothing or some other item belonging to the accused had been found on or near the body of the victim. In brief, it was a situation in which the decedant's family was relying on either hearsay or circumstantial evidence to arrive at their decision as to the guilt of the offender. In the meanwhile, the unfortunate defendant might go on about his business being unconcerned about the entire matter, there being no way that he might know that he was being tried in absentia. On the other hand he may have heard some vague rumor as to what was taking place, or he might even have had some information related to the crime that would prompt him to realize that he was under suspicion.[2] But whatever were his thoughts, they were most likely soon forgotten once he

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[2]Bartram reported a situation in which the crime of adultery had been perpetrated. "Upon information of the affair . . . the kindred resolved to exact legal satisfaction . . . [by] the most secret and effectual methods . . . ." Bartram, Van Doren, ed., op. cit., 355. Logan, in commenting on the affair, related that a council of the chiefs of the town (the seven-man clan court) had convened, deliberated on the affair, and that their final determination was that the accused must lose his ears. Logan, I, op. cit., 295. William Fyffe noted where presents had been rejected in those cases where a killing had occurred, "the offender must be very cautious or he will be murdered . . . ." William Fyffe to Brother John, loc. cit.

learned that the family of the murdered man was holding him accountable. If he discovered the fact in time, that is, if he were not ambushed or killed before he could elude his pursuers he would seek out the town chief as in those cases where he desired to have him mitigate the punishment or grant a pardon.[3] If his entreaties of innocence inspired confidence and belief, the chief, in all likelihood, would call a hearing or trial to see if the surviving members of the dead man's family were correct in their verdict of guilt.[4]

Unlike either the proceeding where the defendant had confessed guilt, or a trial in which a public enemy was being tried by the town, the instant case would necessitate the clan to come forward and establish the guilt of the defendant. In its responsibility to "carry the burden," it would act as the state with the oldest brother or the uncle of the murdered man assuming the role of the prosecutor, it being remembered that the father was of a different clan. The chief's second or right hand man, normally the prosecutor in criminal cases where the town had the burden of proof,[5]

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[3]Charles Hicks reported that such a pardon was "published in the National Council [Council of Elders] when it convened." Missionary Herald, XIV, 215.

[4]Longe was of the opinion that the chief had to do something like this; otherwise, several people might be killed before the affair was settled. Longe SPG Papers, loc. cit.

[5]Gilbert, Eastern Cherokees, 323.

would reverse his position to act as defense counselor for the accused. Helping him in the job as public defender would be every member of the council and the white chief who might feel the need to further cross-examine a witness should some point be omitted or passed over lightly which they regarded as relevant or important in determining the guilt or innocence of the defendant. In their interrogations they would "dispassionately examine things" to find the "naked truth."[6]

With respect to relevancy and the admissibility of evidence, despite the lack of any formal legal knowledge, the chief would most likely follow rules similar to those used in colonial courts. For example, he would probably exclude opinion evidence, not because of any formal training, but because it would become clear as the trial unfolded, that a conclusion drawn by a witness had no place in such a proceeding. The mere expression that the witness "thought or believed" the defendant had committed the alleged act would not be enough, in the absence of positive testimony, to convict.

Hearsay testimony, likewise was, undoubtedly, excluded, not because the council and chief were familiar with the "best evidence rule" but because it would be a matter of common sense to bring the person before the bar who had

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[6]Adair, Williams, ed., op. cit., 468.

actually seen the crime committed rather than someone who could testify only to what he had heard. It would also seem as a matter of good judgment to give little weight to testimony that was obviously prejudiced. It is to be remembered that Adair complained of the admissibility of testimony made by "foolish children" and the number of witnesses required to convict a person in adultery cases.[7] While Adair was more concerned with the weakness of rules than he was in giving a discourse on criminal procedure, his comments do indicate that certain procedural concepts did exist. For example, it is to be seen in his statement that testimony from a "well grown boy or girl" was regarded as good and sufficient in an adultery hearing case.[8]

By implication then, their testimony would be excluded in other trials which gives support to the idea that witnesses were required to be of a certain age or possess sufficient maturity to know what they were saying. In that

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[7]See footnote, Adair, Williams, ed., op. cit., 151. Logan discusses this aspect of trial procedure and like Adair, who he is quoting, is very critical of their rules which permit children to testify because too many "valuable, innocent British subjects" had been murdered at pleasure. Logan, op. cit., 293.

[8]Adair, Williams, op. cit., 149. Bartram in speaking of adultery cases, stated after "the fact was confirmed" punishment would then be carried out. He does not relate how the "fact" was determined, what kind of testimony was admitted, or what were the ages of the witnesses. Bartram, however, was discussing a trial held by the injured clan, and not by the town in which instance, the procedural rules were, undoubtedly, very much relaxed. Bartram, Van Doren, ed., op. cit., 357.

connection the court relied greatly on demeanor evidence. It was believed and apparently practiced that the chief and council could, by looking at a man's face and hearing his testimony, detect when he was telling the truth as "people can as easily distinguish it from falshood [sic], as light from darkness, or clear and wholesome water from that which is turbid and hurtful . . . ."[9] Being unaware of any theory of procedural or constitutional due process, a defendant fell heavily within the rule and was compelled to take the stand and testify against himself if such were the wish of judge and jury. This he was required to do without the aid of "hired speakers" who used their "squint eyes and forked tongues like the chieftains of snakes . . . ."[10]

So zealously did the chief and council guard their judicial prerogatives, it would appear they would reject any professional help, analagous to an amicus curiae or friend of the courts.[11] Undoubtedly, the Cherokees shared the same ill opinion of colonial courts as did some Chickasaw headmen who, with interpreters, had an opportunity to visit one. On their return home, they said that "two or three of their old

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[9]Adair, Williams, ed., op. cit., 468.

[10]Ibid.

[11]An amicus curiae or friend of the court is a bystander who may or may not be a lawyer, but, in any event, he is a person who volunteers information upon some matter of law in regard to which the judge is doubtful or mistaken.

women would have brought in a quicker, and honester verdict."[12]

The clan having rested its case, and the defendant, having "defended [himself] the best [he] could," the court would announce its judgment.[13] In pronouncing the defendant guilty, the court would have arrived at its decision after "the examination showed the guilt of the defendant was clear . . . ."[14] The yardstick used to measure the guilt of the accused would correspond with some modification to the familiar rule that the defendant could be convicted only if no "reasonable doubt existed as to his guilt."[15] So it would appear, compared in terms of theory and practice that the Cherokee jurists followed many procedural rules which have found sanction and use in our own courts with the difference being more in degree than in kind.

In passing sentence, the court would decree that the condemned man be taken away and privately executed by the family of the murdered man by being shot to death with

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[12]Adair, Williams, ed., op. cit., 468.

[13]Gilbert, Eastern Cherokees, 323. [14]Ibid.

[15]LePage DuPratz in his History of Louisiana states, as among the Natchez Indians, there "were no need of judges" as everyone followed the "law of nature." DuPratz is quoted in Swanton, Indian Tribes of the Lower Mississippi, 87. The Cherokees also followed the law of nature, but it seems that all Indian Nations had some kind of court system regardless of their adherence to natural law. This penchant to say the Indians followed the "law of nature" is relevant only in that it may be some evidence that Indian judges exercised due care in arriving at their decisions of guilt.

arrows.[16] There is some authority, to the effect that the chief or judge might specify that the family, entitled to exact blood for blood, give the defendant an opportunity to die fighting. If such were the case, most likely, the defendant would be supplied with some type of weapon and be compelled to fight for his life against any or all members of the offended family. Adair indicates that the family of the accused was notified as to the time and place of execution so they might be present to afford him whatever comfort they could. However, if the circumstances attending the murder be "peculiar and shocking to nature," though the murdered person be an "old woman" and the murderer, a close relative, he would be "condemned to die like a sinner, without any one to mourn for him, as in the case of suicide."[17] One other explanation for the absence of the defendant's family and perhaps more to the point would be that the defendant, in all probability, would be put to death in the same manner as he had killed his victim; and if it had been particularly unpleasant, the family would be spared the sight.

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[16]Gilbert, Eastern Cherokees, 324. Gearing reported that an Indian, upon conviction by the National Clan Council, was executed by shooting. Gearing, "Political Organization of the Cherokees," loc. cit., 91. Haywood, Rothrock, ed., op. cit., 213. Haywood stated that "the infliction of punishment for offences is often left by their kings to the nearest relation of the deceased . . . ."

[17]Adair, Williams, op. cit., 156-157.

As a part of trial procedure, the Cherokees swore by the sun, it being a symbol of Hianequo, the holy spirit of fire,[18] and employed three methods of adjuring a witness. In cases which were of minor importance, such being determined, it is assumed like our own method of defining misdemeanor and felonies, by the amount in controversy or the severity of the crime, the chief would admonish the witness less severely than he would in capital cases to tell the truth. Quoting Adair, the judge, who might or might not be the Principal Chief but at any rate an elderly headman of the village, would merely ask the witness after he had completed his testimony, "Cheeakohga (Sho?), Do you lie?" In response, the witness would answer," Ansa-Kai-e-koh-ga, I do not lie."[19]

Such would be the form and procedure used in testing the truth or falsity of testimony given in minor cases. In those matters which involved something of "material consequence," presumably, stealing a horse would fit such a description, the judge would adjure the witness to speak the "naked truth." After the witness had given his testimony,

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[18]For an extended treatment of the spiritual meaning of the sun as explained by an eye-witness, see Alexander Longe's "Law of the Temples" which is found in SPG Papers, loc. cit. This is very difficult to read because of poor spelling and poor punctuation, but it is believed that Longe's explanation is one of the best made by a contemporary of this period.

[19]Adair, Williams, ed., op. cit., 51-52.

allegedly, the "naked truth," the judge, as a further means of checking the veracity of his statements and, most likely, to make him more acutely aware of what he had said, would have him swear a religious oath that it was true by answering "OEA" or Yes.[20] This oath, while it was administered in the name of the "great self-existent God," was not nearly as long or complex as the next and third oath which was required of persons when giving testimony in disputes of "very great importance." Cases and controversies which came under this lofty classification pertained to problems of the community and to situations where the death penalty was rendered. Under such circumstances the presiding chief would ask the witness upon the completion of his testimony to assert the truth of his statements by answering "OEA-YAH." Translated this would mean "Yes, God," I do swear."[21]

This third method required the witness to utter the word God whereas in the first and second he did not. That the understanding of these oaths was not always clear to the white man is seen in Agent Meig's comment shortly after he was called on to adjudicate some Cherokee claims against the United States. Writing in 1801, he noted that "as our laws know nothing about the oaths of Indians, no legal examination

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[20] Ibid.

[21] The term God is equated to the Great Spirit, whose evidence of being was the sun and the wind.

can be held in many cases where Indian claims are made . . . ."[22] He acknowledged in the same letter, however, that he was compelled to rely on the Cherokee mode of giving evidence where no other evidence of their claims could be found.

Presumably, all crimes which were regarded as being private in nature and fell within the jurisdiction of the injured clan could, in theory, run the procedural gamut as in the case of murder. In order of their severity, the next crime to which the clan gave great concern was the law of widowhood. It was one of which, should it be shown that the accused had violated it, might call for the death sentence. Here again, as in the case of murder, it was associated with the principal that some injury had been inflicted on the clan to which the clan was required to take due notice.[23]

In the case of adultery, it will be recalled that the Cherokees had no established set of laws prohibiting the practice when it occurred while the husband or wife was living but anytime within three years after the death of the husband and within four months after the death of the wife, any deviation which would constitute adultery when both were alive would constitute a crime against the clan of the

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[22]Letter from Return Meigs to Governor Romey, January 30, 1802, BIA, No. 204.

[23]Swanton, Indians of the Southeastern United States, 704.

survivor.[24] According to Swanton, the same prescription was given to a widow or widower as was given an adulterer or an adulteress should they either marry or engage in sexual gratification during the fixed time of mourning.[25] Assuming that to be the case, attention need be directed to the crime of adultery as it existed among the tribes living in proximity to the Cherokees.

Oglethorpe observed that among the Creeks adultery was punishable by "cutting off the Ears of the Adulterer." If the offender was "too sturdy and strong to submit" to the carrying out of the sentence, then he could be killed at the first safe opportunity. Under clan law, such a killing could be done with impunity as it would not violate the principal of blood revenge as will be discussed later.[26] Bartram also noted that death and ear cropping awaited the adulterer should he be caught and could find no means to make monetary restitution for his transgression. Bartram defined ear cropping as "cutting off both ears of the delinquent, close to the head . . . ."[27]

Apparently, this was done even though the guilty

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[24]Boudinot, op. cit., 184-185; see also Swanton, Indians of the Southeastern United States, 704.

[25]Swanton, Indians of the Southeastern United States, 704.

[26]Oglethorpe, loc. cit., 414.

[27]Bartram, Van Doren, ed., op. cit., 355.

person had been killed as Bartram, in reciting a case of adultery, reported that after the victim had been "stripped to his skin" and it was assumed beaten to death with "knotty bludgeons," the executioner drew out his knife with the intention of taking off his ears." Believing him to be dead, however, viligance was momentarily relaxed, during which time the adulterous criminal, "instantly sprang up, ran off, leaped the fence, and had the good fortune to get into a dark swamp . . . ."[28]

Adair, in his discussion of the law which prohibited adultery among the Muskogee Indians, reported that the husband, upon having the "chilling news first whispered in his ear" would take his witness to his kinsmen and ask their help to revenge his injury.[29] If the criminal was of his same clan, the offended husband would confide in his nearest relatives. After the witness has asserted to the immediate family or the clan elders "the truth of his evidence by a strong asseveration," the husband and the members of his party would go to the town of the alleged adulterer, arriving there in the dusk of the evening. Finding the guilty person still in the town, the husband and his helpers would attempt to take him by surprise after it was dark. Should they be successful in their mission, they would give him a

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[28]Ibid., 356. This is commented on by Logan, I, op. cit., 295.

[29]Adair, Williams, ed., op. cit., 150.

severe beating with small hooppoles, having knobs one half inch long and spaced at fixed intervals on the hoop. In this particular, clan law decreed the size, length, and spacing of these "sinner's" clubs. Having administered the whipping, they then would cut off his ears.[30]

With reference to the adulteress, clan law required that she be given a like punishment. Should she be excused or in some way escape the penalty, those who had carried out the sentence on her paramour would become liable for the same treatment and in like manner in which they had inflicted on him. There was a gradation of punishment according to the criminality of the woman as well as the man. If it was her first offense, her ears and hair were cropped which proclaimed "her to be a whore, or Hakse Kaneha . . . ." Should either she or the man repeat the same crime with any other married persons, their noses and upper lips were cut off. For the third offense, the town chief or chiefs were required, after due deliberation of the town council, to decree their death by having them shot which was "accordingly executed."[31]

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[30] Ibid., 151. Logan, I, op. cit., 294. Hewat, quoted in Swanton, stated that the injured husband would kill the adulterer at the first opportunity that he could do it without danger to his clan. Swanton, Early History of the Creeks, 78.

[31] Adair, Williams, ed., op. cit., 151-152. Logan reported a case of adultery among the Cherokees in which he stated that the "guilty parties were arraigned," and that the "judges" decreed a penalty "too horrible to relate." Logan quotes Adair as his source, but an investigation of Adair's work doesn't reveal the case that Logan had reference to. Logan, op. cit., I, 292.

Should the adulteress mend her ways and avoid being shot, she was under the penalty of the severest law not to be free with any man for a period of four months following her conviction.[32]

Should either she or her partner in crime manage to elude the injured husband and get their case brought before the town council their chances of acquittal seemed to be quite remote. The testimony made by one person was enough to convict. Adair was sharply critical of this practice. In his words, "the trading people's ears [were] often in danger by the sharpness of this law, and their suborning fake witnesses, or admitting foolish children as legal evidence."[33] The testimony given by one witness, if from a "well grown boy or girl," was deemed good and sufficient "because of the heinousness of the crime, and the difficulty of discovering it in their thick forests."[34] Two white traders, one a former pirate of Black Beard and another, an agent of the Governor of Georgia ran afoul of the law of adultery and upon conviction by a Muskogee town council lost their ears "under the hands of those Jewish clippers . . . ."[35]

Du Pratz, in commenting on the punishment for

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[32]Adair, Williams, ed., op. cit., 154.

[33]Logan, op. cit., I, 293; see footnote, Adair, Williams, ed., op. cit., 151.

[34]Ibid., 149. [35]Ibid.; see footnote, 151.

adultery as practiced among the Choctaws, stated that if a woman committed an infidelity, "she must pass through the meadow, i.e., all the young men, and sometimes, the old ones, satisfy their brutality on her by turns."[36] The Choctaws, in describing such a female delinquent, used the Cherokee word, Ahowwe Ishto, meaning a deer, to describe her.[37] The Cherokees sometimes resorted to this method of punishing a widow who had deviated from the straight and narrow while still in her official bereavement.

Despite Swanton's statement that widows and widowers got the same dose during their fixed period of mourning as an adulteress or an adulterer, it is not too clear what their exact punishment would be. It would seem in view of the foregoing statements that it might be any number of things. To venture a generalization, it would seem that the Cherokees were much less severe on widows and widowers, outside the Choctaws, than were their neighbors. Like the Choctaws, the Cherokees did not apply the harsh law of adultery; apparently, because they had a political desire to continue and increase their number.[38] Also wantonness and licentiousness had become so common during their immerable wars in the last half of the nineteenth century that infidelity had become almost common place. Despite that, however, anything

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[36]LePage Du Pratz, History of Louisiana, quoted in Adair, Williams, ed., op. cit., 153.

[37]Ibid.; 153. [38]Ibid.

which tended to bring discredit to a particular clan was dealt with sharply. In that respect, it would seem that a widower or widow who deviated from the long established tenets of tribal law might run the risk of being whipped in public, losing their hair or ears, or both, or being banished from the town or put to death.

The crime of rape may have been punishable by death and possibly by ear cropping. With respect to the latter, a strong suggestion that it was practiced, is to be found in the 1820 Cherokee criminal code which provided ear cropping for the first and second offense and death for the third conviction.[39]

Infanticide was optional with the mother as has been noted, but it had to occur one month after birth, else it would constitute murder. The punishment of blood revenge would, of course, depend upon the whim of the mother's own relatives and clan.[40]

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[39] Laws of the Cherokee Nation (Tahlequah, Cherokee Nation: Cherokee Advocate Office, 1852), 24.

[40] Swanton, Indians of the Southeastern United States, 732. Hewat reported that it was common among the Creek women, "if with child" to take herbs to procure an abortion--an operation that killed many of them. Hewat is quoted in Swanton, Early History of the Creek Indians, 77. Mooney and Olbrechts stated that they asked some of the Cherokees living in North Carolina in the 1880's if they knew anything about abortion. Their response was that the Cherokees had never heard of it. Mooney and Olbrechts, Swimmer Manuscript . . . . .,117. See H. B. Cushman, A History of the Choctaw, Chickasaw, and Natchez edited by Angie Debo, (Stillwater, Oklahoma, Redlands Press, 1962), 88. Cushman stated that sometimes Choctaw women killed their infants but where a man and his wife killed the infant, they would be tried and whipped.

Ordinary fornication, constituted no crime, but incest, if between near relatives, brought down the death penalty.[41] One report tells "that if a man was known to be guilty of incest of a near relative, even a first cousin, that he ought to be put to death."[42] The explanation for such a strong sentiment is to be found in definition of relatives. According to the Cherokee notion of what constituted relatives, all members of a certain clan were brothers and sisters to each other. Speaking of the relationship, a Cherokee priest in the 1740's, stated that all members of the same clan were of "one flesh," and should a man marry into his own clan, "he had as good be married to his own mother and sister."[43]

When a child was born, he immediately became a brother, not only to his real brothers and sisters, but to all members of his mother's clan.[44] In this particular, it was the responsibility of the mother to explain to him the rights and duties incumbent on him through his membership in her clan. In so doing she was to impress on him the idea that he was never to engage in any familiarities with her

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[41] Ibid. [42] McCullough, op. cit., 110.

[43] Longe, SPG Papers, loc. cit.

[44] William H. Gilbert, Jr., The Cherokees of North Carolina: Living Memorials of the Past, Annual Report of the Board of Regents of the Smithsonian Institution, Publication 4272 (Washington: U. S. Government Printing Press, 1957), 538.

generation and that he was to behave with great circumspection toward his own sister and her children. Further, she was to instill in him the notion that he would be compelled to marry someone outside of her own clan as well as someone outside the immediate generation of his father's clan. To state it another way, he could marry anyone except members of his mother's clan and first cousins on his father's side. Should he fail to do this, not only would he breach clan law which prohibited marrying within his own clan, but he might, in addition be guilty of incest if he married his first cousin either on his mother's or his father's side.[45] If the affair took place within the limits just stated, both the man and the woman would suffer death with the only distinction being to burn the man and cast his ashes in the river.[46] If, however, the prohibited marriage or sexual intimacy took place between relatives more remote, punishment for both persons would be a long scratch, or deep incision from neck to foot.[47]

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[45] Ibid.

[46] Swanton, Indians of the Southeastern United States, 731-732.

[47] Ibid. There were two kinds of skin scratching. One, the dry-scratch, was performed with snake teeth mounted on a long stick. This instrument, called kanuga, was used on adults and in those instances in which severe pain was intended. No water was allowed to soften the skin when the kanuga was used. The second method, also called dry-scratching, was used on both children and adults but was performed with warm water and small fish teeth. Logan compared this method of punishment to the Turkish bastinado and stated

Public crimes as distinguished from individual crimes, fell into two classes. The first, comparable in some particular to our views regarding a federal violation, was the concern of the Cherokee Nation. The second, more akin to some breech of municipal, county, or state law, fell within the police power of the town. In this respect it envolved an infraction of the rules which had been prescribed for the health and welfare of a particular community. A witch or wizard fell into this category and was treated like a murderer and suffered the same penalty.[48] However, the execution of a witch was more in the nature of a public service than it was punishment for any one particular offense. That is to be seen in the belief that a witch was, allegedly, some male or female, who had, as a rule, been trained and brought up in the witchcraft profession.[49] Special education, however, was not an absolute prerequisite to becoming one. Any child, if his or her parents neglected to follow the prescribed ritual necessary to protect it from the

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that "no infliction upon the naked skin can be conceived more horrible." As an after thought, Logan added that it had not been used enough, however, because the "corrupt remissness of the ancient Cherokee mother, reared in her Nation a generation of truce--breakers and moral vipers . . . ." Logan, op. cit., I, 287. See Mooney, Sacred Formulas of the Cherokees, 335, 379. For the use of scratching in ball games, see Culin, Games of the North American Indians, 575-588. See also Mooney, Sacred Formulas of the Cherokees, 335, 379.

[48] Ibid.

[49] Mooney and Olbrechts, The Swimmer Manuscript . . . ., 30.

black art, might someday end up by making his or her nightly witch hunt through the town. On becoming a full fledged demon of the darkness, a certain kind of metamorphasis took place whereby the person would become invisible which prevented anyone from knowing his or her real identity.[50] In such a capacity, a witch was then ready to go to work and ply his trade on the local citizenry. Cephas Washington, apparently, relying on information supplied him in the 1820's by Dick Justice, an aged Cherokee priest, stated that witchcraft came under the law of blood revenge, and the family who had sustained a loss because of the work of some alleged witch was entitled to exact blood for blood. A witch was a dangerous person and could be killed by any member of his clan if his identity was discovered. Washington related the case where an uncle was killed because he had bewitched the food of his nephew.[51]

A witch was to be distinguished from a "man killer" in that a man killer sought to inflict harm and punishment as a just revenge which had gone unattended such as the failure to atone for the death of a relative.[52] A witch, on the other hand, sought to harm simply because it was an "inherent trait of his or her wicked nature."[53] Victims were more

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[50] Ibid. [51] Washington, Park, ed., 110.

[52] Mooney and Olbrechts, The Swimmer Manuscript . . . ., 33.

[53] Ibid., 30.

frequently feeble and decrepit or else very ill and near the point of death. Women in labor and newly born infants were also likely prospects of the witch's evil power. Knowing such to be the case, friends and relatives would come to the aid of such persons and maintain a night long vigilance to ward off the nocturnal approach of the invisible wizard.

Witches were considered a plague to society, and it became everyone's moral and legal duty to exterminate them whenever possible. Such an understanding was not done without some element of risk and two or more persons, acting either voluntarily or, possibly by assignment, took on the task of executing them. Since the witch was invisible while on his nightly peregrination, it was necessary for the executioners to fast seven days and to drink a potion made of the same root to which the witches owed their power.[54] On the seventh day, being able to see the witch in human form they would seek him or her out, making sure that their gun powder contained a certain kind of medicinal admixture and that a human hair had been wound around their bullets. Being thus fortified and with primed guns, they would go to the place where they believed the witch would appear. Upon first seeing the witch take human form, which of course they could see by virtue of the fact that they had taken the magic dose, they started firing. Should the witch survive

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[54] Ibid., 31.

the gunblast and make his escape he would still die within four days if his pursuers had recognized him.[55]

Such then was the mode and means by which witches were punished. Evidence is totally lacking as to how many persons were killed for being witches, but the number might exceed the high record established by the Puritans during their witch hunting days. The last reported case of a witch being killed occurred in 1812 when an entire Cherokee family was executed for the "supposed crime of witchcraft."[56] In 1824, the Cherokee National Council enacted a statute which made it a crime to kill anyone accused of being a witch.[57]

Another crime, punishable by death in some cases, was a violation of the law of purity. After a woman attained the age of puberty she was required to separate herself from her household during her menstrual period. During such time she was required "to stay at the risque [sic]" of her life in a small hut, some distance from her dwelling house, which had been erected for that purpose.[58] Such a separation was necessary because of the belief that they would convey "a horrid and dangerous pollution to those who touch, or go

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[55] Ibid., 31-32.

[56] Missionary Herald, loc. cit., XVIII, 301.

[57] Washington, Park, ed., op. cit., 111-112.

[58] Adair, Williams, ed., op. cit., 130; see also Mooney, Myths of the Cherokees, 469. Additional information on the subject can be found in Boudinot, op. cit., 277.

near them, or walk any where within the circle of their retreats."[59] Also a failure to abide by the rule might spoil the "supposed purity and power of their holy ark, which they always carry to war." Should it be discovered that a woman had violated this "ancient law, [she] must answer for every misfortune that befalls any of the people . . . ."[60] Adair commented on the punishment by saying:

> Should any of the Indian women violate this law of purity, they would be censured, and suffer for any sudden sickness, or death that might happen among the people, as the necessary effect of devine anger for their polluting sin . . . .[61]

It is not clear from such language what the punishment would be in all cases, but Adair equates the crime to murder by saying "the non-observance of this separation . . . and murder they esteem the most capital crimes." Presumably, a woman who was found guilty of having broken this law would be given punishment commensurate to whatever incident that she allegedly caused. Age, most likely, was also a factor that was given consideration in the assessment of the penalty. For example, if she were a full grown and mature woman, and it was believed that her infraction had

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[59]Mooney and Olbrechts, The Swimmer Manuscript . . . ., 34. The period is fixed at seven days and her food is brought to her. The person bringing the food is very careful not to touch her nor the food but uses a sharpened stick to carry it.

[60]Adair, Williams, ed., op. cit., 130.

[61]Ibid.; see also Swanton, Indians of the Southeastern United States, 732.

accounted for the failure of some military mission and, perhaps, the loss of many warriors, she, undoubtedly, would be put to death. On the other hand, if she were a young girl and the event which she allegedly had brought on was minor, she might, accordingly, get off pretty light. As has been seen, the non-observance of this law by a married woman was grounds for divorce which, if acted on by the husband, might be considered additional punishment.

With respect to married women, they also had to be concerned about rules governing pregnancy as pregnant women were considered only slightly less dangerous than that of the menstruantes.[62] While there were countless taboos and injunctions associated with a pregnant woman, such as the requirement that she could eat no squirrel, nuts, no crawfish, and couldn't look upon a corpse, nevertheless, she was constantly alerted to the fact that whatever she touched, any path she traveled, or whatever food she cooked might cause a "painful and obstinate malady."[63] As a protection against this, she would, starting with the fifth month of her conception, go down to the river to pray and to bathe. Accompanying her on her trip would be the town priest, his

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[62]Mooney and Olbrechts, The Swimmer Manuscript . . . ., 35. See also Frederick W. Hodge, Handbook of American Indians North of Mexico; Bureau of American Ethnology, Bulletin 30 (Washington: U. S. Government Printing Office, 1905), 973.

[63]Mooney and Olbrechts, The Swimmer Manuscript . . . ., 120.

attendant, and, possibly, one of her female relatives. It was necessary for the priest to be there, not only to administer the ceremony of prayer which was done with two white beads, but also to act as a witness that she was complying with the law.[64] She thus "took to the water" every new moon for four months to insure the protection of herself, the child to be born, and the town.[65] A failure to do this, as in the case of a woman during her catamenial period, might subject her to the same punishment.

Also coming under the law of pollution were wounded warriors and other sick persons. As in the case of women, every person, wounded or sick, was required to be separated from the rest of the town, being placed in a small building to himself. Here, each was required to remain, separate and apart from each other, for a period of four months for fear that they might, in some manner, carry their pollution to each other.[66] During the process of administrating medical care, each patient was allowed one woman nurse who had been purified by the priest. This "superannuated woman" was well past the temptation of sinning with men. Should it be otherwise, she might "seduce him to folly," or if still within the catamenial age, conceivably, pollute him for having failed to observe "her appointed time of living apart from

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[64] Ibid., 34. [65] Ibid., 119.

[66] Adair, Williams, ed., op. cit., 131.

the rest . . ." such being unknown to everyone except herself. To give double assurance that no polluted woman or man visited the patient, the priest, or more correctly, the attending medicine man[67] would require everyone, prior to any visitation to assert by a "double affirmative" that they were not polluted. This was expected even of the younger medicine men who acted as his attendants.[68]

Presumably, it was amid the framework of these conditions that the crime of pollution could be perpetrated. It could be done by seduction where the patient transmitted his pollution to the woman in which instance, he would be the guilty party and subject to the penalty, or the woman, by being unclean as noted, could commit the offense by transmitting her pollution to the sick man. Also any person who took the oath that he was pure and, subsequently, the patient died within a short time after his visit, might find himself facing a charge of pollution. The head doctor or medicine man had to be equally concerned when one of his patients died, lest he forget to undergo purification rites.

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[67]A priest was one who generally presided at the various ceremonies whereas a medicine man administered the need of the sick. See Mooney and Olbrechts, The Swimmer Manuscript, 84-85.

[68]Adair, Williams, ed., op. cit., 131. Charles Hicks, reported in 1818 that cures were to last seven nights and that a "Doctor [was] remarkably strict to keep out of the house where the patient [was]" because "such persons as have been handling a dead body, or have any other ceremonial uncleaness" was polluted. Missionary Herald, loc. cit., XIV, 26.

Should he fail to do so, he might be indicted for the defilement of some other person.

Swanton stated that it was not infrequent for a doctor who had lost his patient to be killed.[69] Such a statement coincides with conditions above enumerated, and it is believed that where death was traceable to some kind of physical defilement, either of the kind just discussed or those which were associated with the purification rites attendant to making war, the punishment would be death.

Still another crime for which a person might suffer the death penalty was that of forceably viewing the nakedness of a person who suffered from some physical deformity. In 1746, some English traders while in a state of intoxication or in the timely parlance of the narrator, "in their cups," undressed, against her will, a Muskogee woman who was rumored to have been an hermaphrodite.[70] "According to one of their old laws against crimes of that kind," the men were on the point of being put to death when they were rescued from their "just demerits."[71] No doubt, the Cherokees took the same

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[69]Swanton, Indians of the Southeastern United States, 793.

[70]Adair, Williams, ed., op. cit., 25.

[71]Ibid. Dumont de Montigny in his Memoires Historiques sur la Louisiane stated that among the Natchez a hermaphrodite was a male cuncubine and was called the 'chief of the women.' Dumont asserted that he was "really a man, he has the same dress and the same occupations as the women . . . when a party of warriors . . . go to war . . . they always carry with them this man dressed as a woman . . . to

narrow view toward such libidinous curiosity "notwithstanding they [were] all degenerating apace, on account of their great intercourse with foreigners, and other concurring causes."[72]

Another violation for which the delinquent might receive the sentence of death was that of breaking in on a religious ceremony, particularly one associated with war and the holy war ark. All women, except war women who had accompanied the ark on one or more war missions, were entirely excluded from all temples and townhouses by this ancient law, "except six old beloved women who [were] admitted to sing, dance, and rejoice in the time of their annual expiation of sins, and then retire."[73]

In writing of the "Charikees" concerning the "Law of thire Temples" Alexander Longe noted that it was a crime for anyone to "karie" [carry] the holy fire out of the "Temple." So strict was the rule that anyone smoking a pipe inside the temple had to, before leaving, take the pipe out of his mouth

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provide . . . all the needs of the household as well as a woman might do." Dumont is quoted in Swanton, Indian Tribes of the Lower Mississippi River, 100.

[72]Adair, Williams, ed., op. cit., 25.

[73]Ibid., 127; see also Bartram, Van Doren, ed., op. cit., 357. Mary U. Rothrock states that both Adair and Haywood, who apparently quoted Adair were wrong when using the number six. Rather, according to Rothrock, there were seven beloved women who took part in the ritual, and they represented the seven Cherokee clans. See Haywood, Rothrock, ed., op. cit., footnote 426.

and put out the fire in its bowl. It seems from Longe's account that he had forgotten the rule, and, as he was preparing to leave the temple, he was stopped by a priest who took his pipe away from him and put out the burning tobacco. So exact were they in "thire laws," according to Longe that they would not "suffer" the ashes to be carried out of the Temple but once a year; then, only, after the person had made offerings and had drunk Holy Water. The ashes were taken to a place assigned by the priests. Such a place was called Ikoana and "noe body, young or auld could aproch that place but them that [were] apointed to goe there." Should children, forgetting the requirement, go by the holy place, the priests would send for them and have "them scratched on the lower part of thire body . . . ." For them the "law must be fullfilled, there is noe goeing back." Longe stated that he "earnestly inquired . . . about all these matters" and was told that there "can be noe law," if dread was not put on the young people to make them believe in it.[74]

There were many lesser crimes to which the town gave its concern. Enumerated among such minor offenses was the failure to work in the community planting and harvesting of crops. If found guilty of the offense, the delinquent was assessed produce from his own separate patch in an amount

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[74]Longe, SPG Papers, loc. cit.

"according to his neglect."[75] If he persisted in his idleness, he was banished.[76] Likewise, a refusal to help in the construction of public buildings, might end up in his being asked to leave town. A failure to engage in the spring and fall hunts, if done too often and without sufficient reason, might also be the occasion for banishment. A refusal to contribute his just amount to the public granary would equally envolve him in difficulty.[77] Another matter of community concern was the "feast of the first fruits." They were "soe strict and exact in that," that from the first time that the corn was in the shocks, the people were warned that to eat it before it was sanctified would result in their pollution. Should any adult violate the law of the first fruits, his punishment was severe. Of this, Longe has recorded:

> If it be a man or woman that eates thereof before the time apointed [sic], he and all his house where he

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[75]Adair, Williams, ed., op. cit., 462.

[76]Ibid., 436-437; see also Bartram, Van Doren, ed., op. cit., 400-401. Martin Schneider has corroborated this; see Williams, Early Travels, 261.

[77]Bartram and Adair appear to disagree on this point with Bartram saying that "previous to their carrying off their crops from the field, there is a large crib or granary, erected in the plantation, which is called the king's crib; and to this each family comes and deposits a certain quantity, according to his ability or inclination, or none at all if he so chooses . . . ." Bartram, Van Doren, ed., op. cit., 400-401. Bartram may have had reference to the Creeks whereas Adair was speaking of the Cherokees and the Muskogees when he said that proper appointed officers collected the assessment and that no able-bodied person was exempt. See Adair, Williams, ed., op. cit., 462.

> belongs shall be whipt [sic] and ale they have in the world shall be forfited [sic] to the publick store [public granary] and their land taken from them and thire house burned down and they driven out of town . . . .[78]

Children also fell within the law and mothers were warned by the White Chief and priests to restrain "Yor children from shucking the green coron stalks, or from eating anything of the first." The women were further admonished that should they "hapen to see them suck it, you shall bring them up to the high place [council house] and have them scratched all over thire bodies with fish teeth . . . ." The law encompassed everyone. Even babies at their mother's breast were included. Should it be discovered that one of [the] "sucking children chance to chaw" a piece of green corn, mothers were told to bring them to the priests so that they "may receive punishment."[79]

Another requirement which enjoyed official cognizance was that of attending the celebration of the annual expiation of sins.[80] A failure to attend this state function was

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[78]Longe, SPG Papers, loc. cit.

[79]Ibid. That this law and belief continued to persist can be seen by the fact that in 1822 a woman died after she had had a sweat bath and a plunge in the river, and her neighbors were of the opinion that she had eaten green beans before she sanctified them. Also in the same year, a white man by the name of Reece, not knowing of the custom, ate some green corn and beans, in the presence of some Cherokees without sanctifying them. The "natives" (Cherokees) accused him of sacrilegious, and many of those who were working for him left. Missionary Herald, loc. cit., XVIII, 307.

[80]Swanton, Indians of the Southeastern United States, 732.

punishable by fine, most likely, in proportion to the amount of sin the culprit needed to have expiated.

Still another offense which might bring down the wrath of the community was stealing from the dead. Prior to the acceptance of inheritance laws, "this was considered the worst of crimes."[81]

With reference to morals the law of nakedness, or to put it more precisely, the law of indecent exposure may have had some place in their criminal code. Adair is silent on the subject except to say that the men, when purifying themselves in the open rivers, modestly forbade the exposure of their women at the same time.[82] On the authority of Bartram, however, Cherokee maidens seemed to be innocently indifferent to what they were wearing, if anything, when picking strawberries, "disclosing their beauties to the fluttering breeze, and bathing their limbs in the cool, flitting streams."[83] He may have had reference to young girls in their early teens, and, most likely, he did as all Cherokee children went unclad until the age of puberty at which time, they made haste to remove from their bodies any new evidence of their biological change, or as one reporter felt the need to write, "the men have no Hair on their chins or lips &

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[81]Timberlake, Williams, ed., op. cit.; see also Longe, SPG Papers, loc. cit.

[82]Adair, Williams, ed., op. cit., 127.

[83]Bartram, Van Doren, ed., 289.

both sexes shave it off their privities."[84]

With reference to older men and women, it being particularly true in the case of women, it would seem that there were no hard and fast rules which regulated the wearing of clothes. Social usage, more than likely, established the criterion as to what was permissable and what was prohibited, unless of course, women who were compelled to resort to prostitution, felt the need to display their wares to prospective clients. This may have been the explanation for prompting one white observer to remark that the women, despite the increasing use of calicoe, still wore short deerskin skirts which were designed to display their pretty legs.[85] Bartram noted that the women never painted or used cosmetics "except those of a particular class, when disposed to grant certain favours to the other sex."[86]

Undoubtedly, however, some kind of law, analagous in some measure to the sumptuary laws of the early colonies, must have been in operation. Adair supports this idea by saying that the "virtue of their young women [did] not allow them to bear the least regard to any of the young men, on

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[84]William Fyffe to Brother John, loc. cit. Bartram stated that among the Creeks, the females, as soon as before they can walk, wear a jacket, flap, or buckskin; "whereas the male youth go perfectly naked until they are twelve or fifteen years of age." Bartram, Van Doren, op. cit., 395.

[85]Cockran, op. cit., 6.

[86]Bartram, Van Doren, ed., op. cit., 395.

account of their glittering clothes . . . ." Should the country "unhappily produce so contemptible an animal" as the overdressed male, neither the warriors "nor their laws [would] allow it."[87]

Other laws may have been passed having as their purpose, not to regulate the amount or kind of clothing but rather to prevent persons from masquerading either as a priest, a medicine man, certain officials in the military ranks, or perhaps a head chief. This might fall within the category of criminal fraud or criminal misrepresentation. For example, the seven red war counselors were distinguished by being privileged to wear "a small round object wrought of two small eagle feathers painted red and attached to the tuft of hair left on the crown and head."[88] It would seem, should a person attempt to pass himself off as a war counselor and was caught, the penalty would be rather severe. Another example might be where a warrior, in order to add greater fame than he deserved, fraudulently caused to have tattooed on his chest or some other part of his body a hieroglyphic design which was supposed to commemorate the accomplishment of some brave deed, which in fact, he never performed. Should such falsification be discovered, the punishment, if no more than mere removal as was reportedly

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[87]Adair, Williams, ed., op. cit., 466.

[88]Gilbert, Eastern Cherokees, 380.

practiced by the Chickasaws, might be exceedingly painful and a sufficient punishment in itself.[89]

It was said that sodomy and male concubinage were common and went unpunished among the Chickasaws and other neighboring tribes,[90] but an investigation of the matter with reference to the Cherokees has yielded nothing. Apparently, if such did occur and it was discovered, it would be the occasion for a severe whipping. On the authority of an eye witness, "a lusty young fellow, who was charged with being more effeminate than a warrior; and with acting contrary to their old religious rites and customs" was severely bastinadoed with a thick whip, at the hands of an old head man.[91]

Prostitution existed among the Cherokees but apparently ran counter to no injunctions or penalties.[92] Fyffe wrote that the Cherokee men "indulge or at least wink at their young women in whoredom partly to treat strangers." Fyffe further added that the Cherokees gave food and their

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[89]Adair, Williams, ed., op. cit., 417. For further treatment dealing with tattooing see Swanton, Indian Tribes of the Lower Mississippi Valley, 57. Bartram also should be consulted. Bartram, Van Doren, ed., op. cit., 394.

[90]Swanton, Indians of the Southeastern United States, 731-732. See also Swanton, Indian Tribes of the Lower Mississippi Valley, 100.

[91]Adair, Williams, ed., op. cit., 163.

[92]Swanton, Indians of the Southeastern United States, 731-732.

"choice young women" to the officers of "our Fort" that being no blot on the women.[93] Women engaging in such activities were probably those who had violated the law of widowhood or who had been publicly shamed and divorced for infidelity. Implementing their ranks were young women who hoped to become second wives or objects of "sensual marriages" which was the classification given to the buying of a woman.[94]

Failure to take the morning bath was regarded as a very grave offense by the Cherokees. This was so even if the river was frozen and it was necessary to break the ice. The ablution was required to purge "away the impurities of the preceding day . . .," and the neglect of this bath been deemed so serious an offense that officials raked the legs and arms of the delinquent with snake's teeth, not allowing warm water to relax the stiffened skin. Because of this unusual method of administering punishment, the following quote is set out:

> This is called dry-scratching; for their method of bleeding consists in scratching the legs and arms with goir-fish teeth, when the skin has been well loosened by warm water. The criminals, through a fake imitation of true martial virtue, scorn to move themselves in the least out of their erect posture, be the pain ever so intolerable;

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[93]William Fyffe to Brother John, loc. cit. Robert Beverly reported that the Indian women in Virginia would prostitute their bodies for wampum belts, runtees, and beads. Beverly, Wright, ed., op. cit., 170.

[94]Adair, Williams, ed., op. cit., 147.

> if they did, they would be laughed at, even by their own relatives -- . . . .[95]

Swanton is of the opinion that dry scratching was the punishment usually reserved for children and adults who failed to take their daily plunge, but it could be put to use on other occasions.[96] In 1759 when unauthorized raiding parties from the Lower Towns were attacking the whites, a chief from one of the Overhill Settlements, upon learning that two of his men had engaged in the activities, caused them to be "scratched from head to foot."[97]

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[95] Ibid., 126-127.

[96] Swanton, Indians of the Southeastern United States, 731.

[97] Corkran, op. cit., 174. This is supported by Fyffe's statement that the "chiefs of the Cherokees . . . have dryscratched some of their rash young fellows who went out to murder the whites." William Fyffe to Brother John, loc. cit.

## CHAPTER IX

## TREASON, THEFT, AND AMNESTY

Treason to the Cherokees meant about the same as it has meant the world over. Any act detrimental to public welfare, as distinguished from an act which was inimical only to the individual, was treason. When such an act occurred, the Cherokee National Council convened to act as court and to inquire into charge.

It seems that the most treasonable act committed in both the eighteenth and nineteenth centuries among the Cherokees was the unauthorized selling of tribal lands. One of the earliest known treason trials took place in 1730 upon the return of the Cherokee delegation from London where the members signed the Treaty of Dover.

In this case, while entertaining the Cherokee delegation, the King of England made a speech in which he claimed not only all of the Cherokee lands as his right and property but all other lands which bordered their domain.[1] In the confusion and excitement which followed His Majesty's comments, the Cherokee interpreter and one of the seven chiefs,

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[1]Adair, Williams, ed., op. cit., 53. The interpreter was Eleazar Wiggan whom the Cherokees gave the name Cheestoo Kaichre (Old Rabbit). "Journal of Alexander Cuming," Early Travels in the Tennessee Country, footnote, 20, p. 128.

because of the difficulty of understanding what he said, gave acquiescence to the royal assertion. In so doing, it was understood that they were speaking for the nation. Later, while still in London, it was discovered what they had agreed to, and the chiefs debated the issue as to whether they should kill the interpreter on the spot or wait until their return to America.[2]

Deciding on the latter, they brought charges of treason against the interpreter and one of the chiefs. The pair was tried before the National Council on the charge of having betrayed the public faith by selling the land and sovereignty of their country for an acknowledged value amounting to a certain quantity of goods and a decaying belt or white wampum. After long deliberation, the two were "honorably" acquitted, it being decided that there was no intention on their part to perpetrate such a crime.[3] This verdict was reached because it was decided that the interpreter had merely translated into English what his chief had said, such being his duty and obligation to do so. The chief, for his part, having been excited, was merely

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[2]Adair, Williams, ed., op. cit., 53. The Answer of the Indian Chiefs to King George's Articles of Friendship and Commerce, dated September 9, 1730, is found in Williams, Early Travels, 142. Sir Alexander Cuming reported to the Daily Journal, September 30, 1730, that the Cherokees had delayed signing the Articles of Friendship with England because he had not been consulted. See Williams, Early Travels, footnote, 56, p. 143.

[3]Adair, Williams, ed., op. cit., 53.

attempting to be courteous and polite, and it was not his intention to agree with the King. The interpreter also testified in behalf of his co-defendant that he had advised all the chiefs not to call His Majesty a liar to his face.[4]

In discussing treason trials, available information appears to be extremely scanty as to what formal procedure, if any, was followed. In the absence of such, resort will have to be made to whatever can be deduced by comparing them to other council hearings.

First, contrary to the custom of having a public hearing and a large audience, a treason trial was held in secret, it having as its purpose not to punish by humiliation as in the case of theft, but rather to put an end to the accused should the facts reveal that he had wronged his nation. Second, the National Council, unlike the local council of village headmen who convened merely to impose a negative sanction in the event they were convinced of the innocence of the accused, assumed full power to pass judgment and to decree the means whereby it was to be executed. The assumption of this jurisdictional prerogative was brought on by the fact that one of the parties before the tribunal

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[4] Ibid. Logan, giving credit to Adair, repeated the story and stated that the chief, in response to the King's speech, had answered toluhad which meant "it was true." Logan, op. cit., 401. Williams in a footnote stated that an Indian by the name of Oukayula was appointed speaker; and, apparently, he was the one who had made the answer. Williams, Early Travels, 142.

was the Cherokee Nation. As a moving party, the state (i.e. the Cherokee people) was compelled to accept the burden of proving the guilt of the defendant. Such a responsibility, it appears, would necessitate the employment of a person closely akin to our present day prosecutor in that the Council would look to him to bring forth whatever information available to aid the tribunal in rendering its decision. The second head man of the nation, in keeping with the practice followed at the town level,[5] would probably assume the role, or if he were unavailable, the Uku would appoint someone. Partial confirmation of this is to be found in a report made by Baron Christopher de Graffenried. In September in 1711 the Baron had an occasion to be among those engaged on a scouting expedition on the shores of the Neuse River in North Carolina when they were captured by some Indians. In his account of the affair, the Baron related that they were taken before the Council at which time the presiding chief appointed one of the younger members of the forum to "represent and defend the interest of the council and the Indian nation."[6] Unlike the procedure, followed in most state courts, the head justice of the court, according to Baron de Graffenried, interrogated the witness and proposed the

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[5]Gilbert, Eastern Cherokees, 323.

[6]Thomas P. de Graffenried, "History of the De Graffenried Family Including the Langraves Own Story," Colonial Records of North Carolina, I, 929-932.

issues to be examined by the council which, in his words, were "vigorously debated."[7]

This can be accepted as a fair sample of how an eighteenth-century Indian trial was conducted. In that respect, it is to be seen that the council acted both in the capacity of a court as well as a jury and to that extent, paralleled the function of a town court when reviewing a clan murder charge. Beyond this point, however, much of the similarity ceased since the National Council was of its own volition and not by the request of the defendant seeking to find the truth of the charges. Being impeded by no scruples concerning indictment, notice of charges, confrontation of accusing witnesses, and public trial, the defendant could be tried and stand convicted without ever knowing it. The death of a Chickamauga chief in 1805 exemplifies this principle as he was tried, found guilty *in absentia*, and killed "in compliance with the ancient law of treason."[8] If the

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[7] *Ibid.*

[8] Wright, *op. cit.*, 63. This chief was Doublehead and he was killed August 9, 1807. Return Meigs conducted an investigation as to the cause of his death. J. L. Phillips testified at the hearing that he had heard one, David MacEnnelly, make the statement that Doublehead's death had been "previously determined on, and that a man called Ridge was appointed to Execute the Busnyts [Boudinots?]. Phillips concluded his testimony by stating that he was convinced that it was an accidental death as the man who killed Doublehead had only intended to scare him. Phillips had based his opinion on the fact that Doublehead, immediately prior to being killed, had thrown away the primer to his own pistol. "Colonel L. A. Phillips Testimony Relating to the Death of Doublehead," August, 1807, BIA, Cherokee Agency, 1801-1807, No. 204.

defendant had been apprehended before the proceeding and taken before the court it is not clear at what point he would have been compelled to testify. It is a calculated guess that he would have, mainly because the council would have no way to force him, against his will, to talk unless he was tortured. While such was certainly possible, and it is not intended to maintain that it was never done, it is to be noted that no evidence has been found that the Cherokees tortured a defendant solely, because they wanted him to confess to having committed some injury. They tortured, yes, but for an entirely different reason.

In arriving at its decision as to the defendant's guilt or innocence, it seems, that in all likelihood, the vote would be unanimous or very close to it. Otherwise, discord and dissension would break out among the members of the forum and very little could be accomplished. Unlike the situation when the Council of Elders declared war which was more in the nature of a political question, logic and reason would dictate to the seven man clan council that, when setting as a court, all would have to accept whatever verdict it decided. Most likely such a requirement was agreed on before the proceeding got under way since it was a principle of tribal law that each of the seven clans had to agree to any judgment rendered against a member of its own clan.

Once the trial had started, the National Court remained in continuous session until a verdict had been

reached, extending itself, if necessary, well into the night, or if need be, well into the next day. During such time, the jurists were interrupted only to partake of the Black Drink.[9] As soon as the council resolved the issue, assuming that the verdict was guilty, the presiding chief appointed someone to carry out the sentence, or as an alternative, he would ask the Great Warrior to arrange for the execution of judgment leaving it to his discretion as to time and manner.[10] Jones, in his Antiquities, reconstructs from a painting by De Bry a blood-curdling scene depicting the victim as kneeling in the center of a semicircle and the executioner, with his foot on the back of the traitor, preparing to "split the skull" with a wooden, "paddle-shaped club."[11] By the eighteenth century, guns had become fairly common among the Cherokees, and there is a strong likelihood that the poor wretch was shot to death for his seditious behavior. Baron de Graffenried, however, in recounting his woeful experience before the council, makes reference to the use of the ax. In calling attention to the fact, he said:

> A little farther in front stood an Indian in the most dignified and terrible posture that can be imagined.

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[9]Jones, op. cit., 15.

[10]Ibid. Logan reports the story where the victim, after sentence, "was cut to pieces with a hatchet, having first chopped off his hands." Logan, op. cit., 457. Graffenried stated that the Indians would keep the execution secret. North Carolina Colonial Records, I, 932.

[11]Jones, op. cit., 15.

> He did not leave the place. Ax in hand, he looked to be the executioner.[12]

Gilbert stated that in addition to being killed with some kind of weapon, public criminals were stoned to death. Some were taken to a high precipice with elbows and feet tied behind, and cast over to be dashed to pieces on the rocks below.[13]

Whatever method employed, it would seem that it would make little difference to the condemned man as one system was equally as effective as the other. A criminal of the nation was never tortured. He was put to death in the most expeditious fashion immediately after his guilt was clearly established. Death by torture fell into a different category, and the theory behind it was much different from that of disposing of a criminal.

Torture was inflicted on foreign enemies, either during purification rites or whenever they were undesirable for adoption. Death by fire and torture was a means and a method whereby the captors, while satiating their sadistic fondness for revenge, could watch for some display of weakness in the demeanor of the poor victim. Should he, "by constancy of mind derived from habit"[14] be able to exhibit courage until a blow from a tomahawk ended his frightful

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[12]Graffenried, North Carolina Records, I, 930.

[13]Gilbert, Eastern Cherokees, 323.

[14]Adair, Williams, ed., op. cit., 418-419.

ordeal, it was not an uncommon practice for his executioners, both men and women to then eat portions of his body, it being believed that by so doing, some of his prowess might be passed on to them.[15] Also by engaging in this kind of cannibalism, they could genetically transfer his courage to their unborn sons.[16] Death by torture then was reserved for foreign enemies not domestic criminals and traitors who were put to death as quickly as possible.

Another crime over which the National Clan Council had jurisdiction was that of treaty violations. By the terms of the Treaty of Dover, signed in England in 1730, the "Nation of Cherokees" agreed, "on their Part to take Care to keep the Trading Path Clean . . . [and] if an Indian kills an Englishmen, the Indian who did it shall be deliver'd up to the Governor, and be punish'd by the same English Law as if he were an Englishmen."[17] The Cherokees may have had a tendency to forget the exact wording of the above stipulations, but in 1751 an Englishman, "a pack-horseman of indifferent character" was killed by "a very great man" of the Cherokees.

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[15]Corkran, op. cit., 24. William Fyffe to Brother John contains a very good description of how Cherokees burned their victims at the stake.

[16]Adair, Williams, ed., op. cit., 125.

[17]For the text of the Treaty of Dover see "Journal of Sir Alexander Cuming," Early Travels, Williams, ed., 138-141.

Governor Robert Glen of South Carolina insisted on "satisfaction" under the terms of the Dover Treaty. The Council of Elders sitting jointly with the National Clan Council, convened and after rejecting the argument that the murderer was a man of high station and the Englishman only a poor "pack-horseman," ordered the Indian delivered up by his town. The town refused and the national council "resolved to reduce the town to ashes and massacre its people if they did not yield up the murderer, or put him to death themselves." The town obeyed and killed the murderer and 'left his body lie above ground that the English might see how faithful they were to their engagements.'[18]

At the end of the French and Indian War, the Cherokees having signed treaties with Virginia and South Carolina to "keep the path clean" attempted to live up to their commitments by having treaty violations tried by the National Clan Council.[19] Warned by Ostenaco in a speech delivered before the Council of Elders in Echota in 1761, that any Cherokee who should act 'contrary to any of these articles, must expect a punishment equal to his offence.'[20] Several charges of treaty violations were brought before the high court and sentences, ranging from dry-scratching to

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[18]This is reported in Logan, op. cit., 457-458.

[19]For a discussion of the material provisions in these treaties, see Royce, op. cit., 144-146.

[20]Timberlake, Memoirs, 59-61.

imprisonment, were rendered. Fyffe reported that the "rash young fellows who went out to murder the whites" were dry-scratched;[21] and Standing Turkey, an Overhill chief, wrote in 1761 that "we are now Building a Strong House, and the very first of our People, that doe damage to the English shall be put in there, untill the English fetch them."[22]

At the end of the Revolutionary War, the Cherokees were again compelled to enter into treaty negotiations--this time the United States. As in the case with Great Britain, the Cherokees agreed to relinquish jurisdiction over those Cherokees who had committed crimes against the whites. The United States, in return, stipulated that any citizen of the United States who settled on Cherokee lands forfeited the protection of the United States and were to be punished as the Indians saw fit.[23] Despite the reciprocity feature, the following years saw the decline of the National Clan Council as a national court. Its weakness and loss of power was an object of complaint by United States officials. Writing to the Secretary of War in 1792, William Blount, Governor of the territory of South of the Ohio, stated:

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[21]William Fyffe to Brother John, loc. cit.

[22]Gearing, "Political Structure of the Cherokee Nation," 110.

[23]For relevant provisions of the treaty see Royce, op. cit., 158-159. For the full text, see Carter, ed., Territorial Papers, IV, 63. See also A Compilation of All Treaties Between the United States and the Indian Tribes Now in Force (Washington: Government Printing Press, 1873), 31-32.

> The want of Government both of the Creeks and Cherokees is such that all the chiefs in either nation can neither restrain nor punish the most worthless fellow in either nation nor for a violation of existing treaties . . . nor if demanded by the United States dare they deliver him up to be punished . . . .[24]

Blount's explanation for poor government was that, nationalism having declined in the Cherokee Nation, each clan protected itself. He explained that there was a "law among them that each clan shall protect and take satisfaction for all injuries offered to the person of each individual whatever he offenses may be . . . ."[25] Little Turkey, becoming Principal Chief in 1792, promised that his nation would do better. In a letter, dated July 7, 1801, and addressed to the Secretary of War, he stated that "all persons who shall offend against the treaties, or against the laws made for your protection shall be brought to justice, or if that should be impracticable, that a remuneration shall be made to you."[26] Evidence that the United States held Little Turkey to his word is seen in an abstract of administration dated October 28, 1801, rendered by Agent Meigs to the Secretary of War in which three hundred dollars was held out of

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[24]William Blount to Secretary of War, November 8, 1792, Carter, ed., Territorial Papers, IV, 210.

[25]Ibid.

[26]Little Turkey to the Secretary of War, July 7, 1801, Cherokee Documents, Collected Treaties, House, Senate and Executive Documents (Talequah, Oklahoma, Bound by Northeastern State College, n.d.) No. 18.

an annuity payment for horses that had been stolen.[27]

Much to the credit of President Jefferson, he did his best to honor treaty obligations to the Cherokees. In August, 1801, an Indian woman was murdered near the Georgia-Cherokee boundary at a place called Stock Creek. With no information forthcoming, concerning the affair, Agent Meigs hired Nicholas Byers to investigate. Charging nine dollars for himself and one Indian guide, Byers worked two days and was unable to find any evidence as to who had killed the woman.[28] In an attempt to solve the crime, President Jefferson, on December 2, 1801, issued an executive proclamation in which he offered a reward of one thousand dollars leading to the arrest and conviction of the principle and fifteen hundred dollars for the accessory.[29] While nothing came of it, the Cherokee Nation regarded Jefferson as a champion of their rights. Despite such attempts to maintain harmony, jurisdictional strife continued to be one of the problems between the United States and the Cherokee Nation. That this was so is seen in the following letter, dated February 5, 1802, and addressed to Return Meigs, Agent of the Cherokees:

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[27]United States Abstract of Administration, BIA, Cherokee Agency, 1801-1807, No. 208.

[28]Ibid. Nichols Byer's Statement to Agent Meigs, dated August 29, 1801.

[29]Ibid. President Jefferson's Executive Proclamation, dated December 2, 1801.

> We the headmen of Costesnatey (Rabbittrape) & Cuswattea, have talk concerning the Indian fellow wish [which] is confined in Cumberland, and had him there this long time, and we desire that he should be sent to you as you are the agent of our Nation from the United States and we will send some of our Headmen to West Point and if he has done anything amiss, he may have a Trial at West Point, and shall have his punishment according to the Law of this country . . . .[30]

Conditions did not improve as Cherokee law was one thing and the white man's law another. Writing in 1804, Meigs expressed regret that the United States was unable to punish a white man for killing a Cherokee. "It is really much to be regretted, Meigs complained, "that in not one single Instance can we yet punish a white man for committing murder on a Cherokee . . . ." "Could there be one Instance of punishment for these murderers," Meigs added, "it would have a good effect & would remove these objections to any requests that are made to them . . . ."[31] Small wonder then, that the Cherokee National Council ceased making any attempt to punish Cherokee treaty violators.

Leaving now the subject of treaties and turning to that of theft, it need be repeated, that any crime, other than that which was directed against the community, was regarded as a private matter. The concept of state, being in

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[30] Ibid. Castesnatey and Cuswattea Headmen to Col. Return Meigs, February 5, 1802. West Point was the place where Meigs had his agency.

[31] Letter of Return Meigs to Governor John Siever of Kentucky, February 23, 1804, BIA, Cherokee Agency, 1801-1807, No. 204.

its modern sense, a legal fiction, created by the people in their own image, i.e., a legal entity or person, and acting as their agent for their benefit and welfare, was something that, at this time, was entirely beyond comprehension by the Cherokees. This is not to say that they could and did not think and act collectively as matters of national concern by and through their chiefs, but they did not visualize an invisible structure of state, being but a counterpart of themselves, and existing solely for their benefit. That being true, they did not and could not think in terms of a criminal act as being directed against the "peace and dignity of the state." Neither did they think of a state as an agency of themselves to which they could take their grievances and controversies for settlement. Therefore, the explanation and reason for a legal system as embodied in the legal codes of the colonies was lacking among the eighteen-century Cherokees. As a corollary to such philosophy, the responsibility for the settlement of personal matters, civil or criminal, fell to the individual.

That is not to say, however, that the person against whom the offense had been made could not go to the principal chief and seek an adjudication of the matter with regard to some relief other than the infliction of a penalty. If, for example, a horse was stolen or there was some question as to its ownership, the owner was at liberty to recover it when

and wherever he found it.[32] Acting as his own policeman, prosecutor, and judge, he was free to take possession of the property and inflict on the thief whatever punishment short of murder that he was in a position to carry out. Most likely, however, he did nothing except re-claim his possessions, assuming that he could, and depart from the scene as quickly as possible. In so doing, he contented himself with the knowledge that he had recovered his property and that a thief, once discovered, carried with him a stigma far greater than any punishment he might inflict on his person. Theft, among the Cherokees, was regarded as being among the worst of crimes.[33] Like the connotation given it by modern standards, it involved a breach of moral turpitude, and it stamped the guilty person as being a cheat and a man unworthy of any reliance.

Assuming, however, that the thief refused to surrender the stolen horse, and the rightful owner had been unsuccessful by his own efforts to recover it, he, the owner, would then, most likely, take his problem to the Principal Chief. The chief, after hearing the complaint and, if he believed the story, would probably send word to the accused,

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[32]Anon., Incidents of Border Life, 111-112.

[33]Timberlake, Memoirs, 90. This seemed to be true only as among the Cherokees as it was regarded as no crime to steal from a white man. Logan, attributes this to the unscrupulous conduct of the traders. Logan, op. cit., passium.

requesting him to appear before the council. The thief, upon the receipt of the request, would most likely, appear. However, he was under no legal compulsion to do so in the sense that his failure to appear would be in contempt of court. The chief had no express or implied power to act as an agent of the state. He had no means by which he could compel obedience to his order. He was merely a mediator.

In this type of hearing, unlike the reviewing trial, the treason trial, or the town trial of a public enemy, it combined in a curious admixture the functions of both a criminal and civil court. Yet it exercised no coercive power. Comparable to an arbitration board, its strength rested in its power to persuade and to popularize the crime or the inequity of the defendant's conduct. Coming within its jurisdiction would be petty crimes and civil controversies which could be further denied as being behavior inimical to certain persons and clans.

But regardless of whether the defendant did or did not appear, the chief, along with his Beloved Men, would, in all probability, conduct an investigation of the matter. In so doing, they would ask various persons who might have some special knowledge, over and above the general gossip of the town, to come forward and relate what they knew of the matter. Here again, as in the case of the defendant, the witnesses could not be forced to appear since the council, unlike state-created courts, had no power to subpoena. Despite

that, in all likelihood, few persons would exhibit recalcitrance to give testimony to the council. A failure to do so would stamp them, along with the defendant and for the same reason, as having something to hide and hence dishonest.

No formal vote was taken by the council to determine the guilt or innocence of the accused but should the evidence against him be of sufficient weight, his guilt most likely would be assumed. In which case several members of the tribunal would eulogize his past virtue for honesty and, at the same time, compare it to his present crime of theft, thus attempting to penalize him with public embarrassment, shame, and humili ation.[34] In the course of their analytic reprimand, the Beloved Headmen would make reference to the most minor circumstances of the crime and caustically find an antithesis for them in some past conduct of the defendant. Adair, speaking from personal knowledge said: "I have known them [councilmen] to strike their delinquents with those sweetened darts, so good naturedly and skilfully, that they would sooner die by torture, than to renew their shame by repeating the actions."[35] After having been subjected to this type of public degradation, the culprit was free to go as he was to receive no other type of punishment at the hands of the council. However, his remorse and humiliation may have been so great that it would prompt him to leave the village.

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[34]Adair, Williams, ed., op. cit., 461. [35]Ibid.

Despite Swanton's statement, contained in his Indians in the Southeastern United States, that stealing was punished with whipping, loss of ears, or death if convicted a third time, it appears that stripes came later with the advent of civilization.[36] Bartram noted that among the Creeks, conviction of theft "brought on such repeated marks and reflections of ridicule and contempt, that it generally ends in voluntary banishment."[37] Bartram was of the opinion that it was these renegadoes and vagabonds who were generally the ruffians who committed depredations and murders on the frontiers.

Whipping, however, may have been given in some situations depending, it would seem on the status of the thief as to whether he was married, old or young, and his family standing. If he were young and still unmarried, his older brother, or in any event the acknowledged elder of his house or clan might administer a public whipping, depending upon the severity of the offense. The whipping would be carried out, not to punish the person for the commission of the crime but, rather, because he had brought disgrace to the family. Thus by administering the punishment in public, family honor would to some extent be expiated.[38]

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[36]Swanton, Indians of the Southeastern United States, 731.

[37]Bartram, Van Doren, ed., op. cit., 403.

[38]Turner, op. cit., 66-67.

George Turner, in elaborating on the habits of southeastern Indians, gives credulity to the report that an older brother whipped his sister in the presence of the town chief because she had been guilty of stealing. Such was done so that he might "expiate the disgrace she brought on the family."[39]

The town chief in some situations went beyond mere ridicule and required the defendant restitution if he desired to remain in the community. Mark Catesby, in his early history of Carolina, reported that if one Indian stole corn or some other type of farm produce from his neighbor, the town elders sentenced the thief "to work or plant for him that was robbed, till he [was] recompensed for all damage he [had] suffered in his corn fields."[40]

It appears that theft was not too widespread among the Indians of the colonial period. Oglethorpe was of the opinion that theft was rare, though not unknown in the Creek Nation.[41] That this was not always true of the Cherokee Nation is to be found in Proceedings and Minutes of the Governor and Council of Georgia. As recorded on June 3, 1757, a complaint had been rendered that "some of the Cherokee

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[39] Ibid.

[40] Mark Catesby, The Natural History of Carolina, Florida, and Bahama Islands (London: Printed at the Royal Society House, 1731-1733), II, 10.

[41] Oglethorpe, loc. cit., 414.

Indians lately here in their return home had taken some Corn from two Familys settled near the Path, & likewise disturbed them in their houses . . . ."[42] Like gansterism in the early 1930's, stealing among the Cherokees was a product of the times, and its heyday was to await another fifty years until the impact of the white man's culture was fully felt. John McCullough, captured in western Pennsylvania in 1756 by a band of Delawares and Cherokees, allies in the war against the English, had occasion to relate some years later "that they are seldom guilty of larceny among themselves, although they do not consider it a crime to steal from the white people."[43]

Theft, further observed the writer, was, as a general rule, dealt with on an individual basis. To do otherwise, might bring on such temperamental repercussions as would lead to bloodshed. This observation is in agreement to Adair's statement that such "instances indeed seldom happen, for as they know each other's temper, they are very cautious or irritating, as the consequences might one day prove fatal . . . ."

In concluding his comments on theft, John McCullough, said: "If any one steals a horse, or any other property,

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[42]Allen D. Candler, ed., "Proceedings and Minutes of the Governor and Council from October 30, 1754 to March 6, 1759," The Colonial Records of the State of Georgia (Atlanta: Franklin-Turner Co., 1906-1910) VII, 182.

[43]McCullough, op. cit., 111-112.

the owner takes it wherever he can find it . . . ."[44]

But other than murder and theft, the Cherokee had little reason to know or care about those crimes so common to his white neighbors. Outside his knowledge of barter, the native of Hiawassee knew very little of the mercantile interest which necessitated the use of more complex rules.

While the Cherokees, guided by nature's rule "do to others, as you would be done by,"[45] sometimes took the position that to pay their honest debts, might result in greater damage to themselves than benefit to their creditors. Being guided by such a philosophy the debtors sometimes ran into a difference of opinion which would result in "heart burnings" but no disputes. When such a difference of opinion became "publicly known," the town council convened and the "red Archimagus, and his old beloved men" decided and solved the controversy in a very "amicable manner."[46]

While the court had no compulsive power to force the debtor to pay "yet it could impose a negative sanction; that is, it could point out that "the creditor [might] distrain his goods or chattels, and justly satisfy himself without the least interruption . . . ." Should the creditor elect to follow such a recommendation, he would be careful to take only what was his and, "in a very civil manner," send back

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[44] Ibid. [45] Adair, Williams, ed., op. cit., 460-461.
[46] Ibid., 461.

the overplus to the owner by a relative.[47]

Although many sharp differences may have come about, including controversies over debt, stealing from one another, crimes perpetrated against the town, and the violation of clan law, all were forgiven at the annual atonement of sins, except murder, "which [was] always punished with death." Adair makes this latter statement, but Haywood contradicts him by saying that "vengence and cruelty are forgotten in the sacrifice made to friendship." Haywood does say, however, that those persons who were "guilty of unpardonable offences" could not partake of the feast since all who did partake, must be forgiven, "no matter what may be the nature of the offence."[48] Haywood does not elaborate on what he means by "unpardonable offenses," and it is only after consulting Longe's treatment of Temple law, that it can be conjectured that Haywood may have reference to some crime committed against the "holy fire," in which case, the person or persons would be polluted and unclean.

This event--the annual atonement of sins--was the

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[47] Ibid.

[48] See Haywood, Rothrock, ed., op. cit., 247 and Adair, Williams, ed., op. cit., 460-461. See also Longe, SPG Papers, loc. cit. John Howard Payne was an observer at one of the Creek Green Corn Dances. He stated that "if a person under sentence for crime can steal in unobserved and appear among the worshippers when their exercises began, his crime is no more remembered." John R. Swanton, ed., "John Howard Payne's Green Corn Dance," Chronicles of Oklahoma, X (March-December, 1935), 178.

fifth of the six great festivals of the year and was held at the end of October, ten days after the ending of the Great New Moon Feast. This was the greatest of all the annual celebrations. It was a national event and was held at the national heptagon or townhouse. Seven house cleaners, seven game hunters, seven purification makers, and seven new fire makers were appointed to assist in the ceremony. This Reconciliation Festival involved, primarily, the idea of removing all uncleanness and thereby all possibility of disease. Workers were appointed to clean all houses, commencing with the national townhouse, and seven articles were cleaned as a symbol of all household belongings. All old clothes were thrown away and new ones cleaned.[49]

The new fire was lighted, which being divine, was an appeasement for all crimes and animosities.[50] In this, crimes and old grudges were wiped out as a matter of law over which the individual had no control. Many persons, in

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[49]Gilbert, Eastern Cherokees, 326. This event was formerly observed at the beginning of the first new moon at which time old food was thrown away and fresh meat and young corn roasted. The people would dance "in a very solemn manner, in a large square before the town house door . . . ." And "offer thanks to God for the corn he [had] sent them." This was the Green Corn Dance which is the festival generally, cited by writers as the expiation of sins dance, however, Gilbert, in agreement with Adair, maintain that it was changed and came much later. For further information see Adair, Williams, ed., op. cit., 104-105, Timberlake, Williams, ed., op. cit., 64, Hodge's Handbook, I, 176. Further information on the subject can be found in Jones, op. cit., 99 et seq.

[50]Longe, SPG Papers, loc. cit. See also Adair, Williams, ed., op. cit., 104.

keeping with the religious tenor of the event swore vows of eternal friendship which included young men and women who were prohibited by clan law to marry.[51]

This custom of cancelling all sins and complaints may appear quaint at first glance, but a very striking comparison can be found in many of our present day laws which govern the time element in which a person may be tried and convicted after the commission of a criminal act. While the Statutes of Limitations will vary from state to state, none of which operate against murder, it is possible to commit a lesser crime and unless arrested within a certain period, be completely relieved of the responsibility of the act. Perhaps, the classic example of that is to be found in the sensational robbery of a Boston Trust Company in the mid 1940's. The Statutes of Limitations in the State of Massachusetts for such an offense was ten years. A few days before the ten year interval elapsed, the perpetrators of the crime were apprehended. Had they managed to evade detection but a short time longer, the state would have been barred from imposing any penalty for their conduct. The theory behind such a rule, as most likely it was with the Cherokee, was to put an end to criminal prosecution, if after a reasonable time, satisfaction had not been obtained.

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[51]Gilbert, Eastern Cherokees, 328. Charles Hicks should be consulted for his remarks concerning different Cherokee celebrations. Missionary Herald, loc. cit., XIV, 215-216.

Although Mooney, Haywood, and Adair differ as to whether the crime of murder was covered by the general amnesty of the Reconciliation Dance, Adair appears to have a better case of it in that he was a contemporary to the period and the history of revenge murders many years after an alleged murder took place tends to bear him out.

But whether the murderer was absolved of his criminal act, his immediate concern, if he desired to stay alive, was to reach Echota, the national capital where he could find sanctuary. Gilbert states that there were four refuge towns in the Cherokee Nation.[52] Adair maintained that there was only one which was the national capital, and home of "Old Hop, who . . . helpless and lame, presided over the whole nation, as Archimagus, and lived in Chote, their only town of refuge."[53] The explanation may lie in the fact that at an earlier date each of the four regions had a capital, regional ruler, and head priest. Adair mentions "friend towns which [were] firmly confederated in the exercises and plays, [and] never [had] more than one Archi-magus at a time."[54]

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[52] Ibid., 324; see Mooney, Myths of the Cherokees, 207. Mooney says in the following quote: "From conversation with old Cherokee it seems probable that in cases where no satisfaction was made by the relatives of the man-slayer he continued to reside close within the limits of the town until the next recurrence of the annual Green-Corn dance, when a general amnesty was proclaimed."

[53] Adair, Williams, ed., op. cit., 85. See Bartram, Van Doren, ed., op. cit., 399.

[54] Adair, Williams, ed., op. cit., 85.

Apparently, he had reference to district towns in the days when particularism was stronger than nationalism. As the Cherokee Nation became more centralized, mercy towns in regional capitals lost their purpose. Too, the priesthood suffered a setback some time prior to the eighteenth century with Echota taking the lead in throwing off their influences.[55]

According to the tradition, the priests had so abused their privileges that they were set upon and killed. Thereafter, the matter of administering the religious needs was left to an individual "shaman" or conjuror who associated his office more with the White (civil officials) than the Red (the military class).[56] Hence, Echota became better known for its political affinity to the older more mature "Beloved Men" than to the leaders of the military. Old Hop managed to combine the offices of national priest with that of Principal Chief and popularized the idea that Echota was the national City of Refuge. By so doing, he was able to reassert its superiority over the de facto authority of Great Tellico.

Beginning then somewhere in the 1740's, attention was given to Echota rather than to the regional capitals as

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[55]There was a story that one of the priests attempted to steal the wife of the chief's brother. Haywood, Rothrock, op. cit., 249.

[56]Malone, op. cit.

the place to which criminals and unfortunates might find haven and refuge. Living up to its reputation, it gave sanctuary to all, and a murderer, having come under its jurisdiction could usually bask in its protection unmolested. In the words of Adair, "the Cheerake, though now exceeding corrupt, still observe that law so inviolately as to allow their beloved town the privilege of protecting a wilful murtherer [sic] . . . ." Adair added that it was not in the "memory of the town's oldest people that ever human blood was shed in them . . . ."[57]

Although the strict observance of the old law guaranteed perpetual immunity, actual practice might operate against the criminal's security. The lust for clan revenge might be so great that it would supersede the respect for immunity, and the aggrieved family would plan an ambush to kill the offender. Furthermore, the inhabitants of Echota, might, upon the advice of their chief, refuse to allow a hunted man to enter the town. An example of this grew out of the killing of a trader by a Cherokee who fled to Echota. He was driven "off into the river," supposedly, because they either feared having the town polluted or provoking the English by giving asylum. Adair further noted that even after the fugitive had been permitted to enter the town, the demands for his surrender, presumably those made by the English, might

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[57]Adair, Williams, op. cit., 165-167.

become so great, that the town's people would "often" force him to leave.[58] Aside from such exceptions, "the devine law of mercy extended to a captive "should he be fortunate to get loose." If he made it to the national capital or if he "could run into the house of the Archi-magus, he by ancient custom [was] saved from the fiery torture . . . ."[59] This would be true only of those captives taken outside of the Cherokee Nation since it would not apply to invaders, because they had come to shed blood."[60]

In 1768 Oconostota, the Great Warrior, and unrivaled leader of the Red military faction, made reference to Echota when he appeared in Johnson Hall, the great council room of the Iroquois Confederacy. Speaking in behalf of himself and his companions, he explained that "we come from Chatte, where the white house, the house of peace is erected."[61] Further evidence of the peace reputation of the town is to be found in the fact that Colonel William Christian when he invaded the middle town of the Cherokee Nation in 1776 spared

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[58] Ibid., 165-167.

[59] Ibid., 165; see also Mooney, Myths of the Cherokees, 207. The explanation seems to be that these men are not supposed to be associated with any kind of blood or killing and should a criminal come to them for their protection they are bound to extend it.

[60] Adair, Williams, ed., op. cit., 417.

[61] E. B. O'Callaghan, ed., Documents Relating to the Colonial History of the State of New York. Procured in Holland, England, and France by John R. Brodhead (Albany, Franklin-Turner Co., 1856-61), 42.

Echota from destruction.[62] Ten years later, 1786, in the border wars between the whites and Creeks, the friendly Cherokees made "Chota" the watchword by which the Americans might be able to distinguish them from their hostile neighbors.[63]

The idea of peace and refuge was so strong in Echota that it was reputed that should the nation be anticipating war, no one against whom they had any hostile views was permitted to go near the great white seat in the council hall, or to any holy place, or to approach any of their holy men. Should such be done, they would fall under cloak of official protection which they, the Cherokees, [were] firmly bound to keep good faith, and give sure refuge."[64]

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[62]See footnote, Adair, Williams, ed., op. cit., 166.

[63]Ramsey, op. cit., 343.

[64]See footnote, Adair, Williams, ed., op. cit., 176.

## CHAPTER X

## CHANGING TIMES: 1785 TO 1822

Relations between the Cherokees and the United States Government started in 1785 by the Treaty of Hopewell. The treaty was an attempt on the part of Congress to clear up existing arguments with regard to tracts of land that the Cherokees had sold to land companies and private individuals. While the Cherokees yielded an extensive territory to the United States, much of the land previously sold to land companies was returned to the Cherokees because of the doubtful legality of the sale.[1]

The boundaries prescribed by the treaty, were unsatisfactory to both the Cherokees and the settlers. The Cherokees, on their part, complained about the non-removal of settlers from tribal lands, and the settlers, in turn, were discontented because the United States treaty commissioners had left their home sites in Cherokee territory. In addition, the authorities of Georgia and North Carolina protested because of the alleged interference by the national

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[1]Royce, Cherokee Nation of Indians, 152. For provisions of the treaty see A Compilation of All the Treaties Between the United States and the Indian Tribes Now in Force (Washington: Government Printing Press, 1873), 31-32. See also Carter, ed., Territorial Papers, IV, p. 63.

government with what the state leaders claimed were reserved rights of the states.[2]

This bickering prompted Congress in 1788 to proclaim that unwarrantable intrusions into Cherokee land were forbidden, and all persons who had settled on Indian hunting grounds were to remove immediately.[3] Little heed was given to this mandate; most of the settlers remained on Cherokee land.

Henry Knox, Secretary of War, exasperated at this non-compliance by the settlers, communicated to the President that "the disgraceful violation of the Treaty of Hopewell with the Cherokees requires the serious consideration of Congress . . . ."[4] Agreeing with this view, President Washington urged Congress to take prompt action. Congress, however, failed to do anything, and Washington, the next year, 1790, again brought the subject to congressional attention. In this instance, the Senate was more responsive than before and adopted a resolution to the effect that the President either execute the Treaty of Hopewell or make a new agreement. Attached to the resolution was a proviso that any money paid to the Cherokees for new land would be limited to $1000 per annum. Washington, exercising his discretion, decided to negotiate a new treaty.

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[2]American State Papers, Indian Affairs (Washington: Gales and Seaton, 1827-1834), II, p. 40.

[3]Ibid., 53. [4]Ibid. [5]Ibid., 135.

Accordingly, a new treaty was made with the Cherokees on July 2, 1791, the terms of which provided that more land be ceded to the United States in return for the $1000 annuity. Before the treaty could be approved, a Cherokee delegation arrived in Philadelphia and complained to President Washington that they had been duressed into ceding more land to the United States because of the threatening attitude exemplified by its agent at the treaty conference and that $1000 was not enough.[6] Washington believed them and, accordingly, recommended to the Senate that the $1000 be increased to $1500. His request was granted and on February 17, 1792, the new treaty was proclaimed and declared to be the law of the land.[7]

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[6] Ibid., 203.

[7] U. S. Statutes at Large, VII, p. 42. By this time the capital of the Cherokees had been moved from Chota to Ustanali, near the present city of Calhoun, Georgia. Strong nationalism which had characterized the mid 1760's had given way to sectionalism, and the National Council was convened only for some specific emergency with its jurisdiction being limited to the particular business for which it had assembled. Such a council was called Ustanali (New Town) on June 26, 1792, to discuss land cessions with Governor William Blant of Tennessee. The council decisions were not regarded as representing the entire nation as the membership was not definitely fixed. This is to be seen in the titles of Cherokee chiefs as shown in the records of this meeting of the Grand Cherokee National Council: The Little Turkey, great beloved man of the whole nation; The Badger, the beloved man of the Southern division; The Hanging Man, beloved man of the Northern Division; The Boot, The Black Fox, The Cabin, Path Killer, &c, head-men of the Little Turkey's town; Keatchiskie, of Hiwassee, Richard Justice and The Glass, of the Look-out Mountain town; The Thigh, of Celicae; The Big Bear and the Kingfisher, of Estanaula; Charley of Alljoy; Nanotey, of Kawtokey; The Tereapin, of Kiukee; The Breath, and his

This concession did not heal the differences and antagonisms existing between the Cherokees and the border settlers. Even as the Treaty of 1792 was being negotiated by the Cherokee representatives in Philadelphia, a large portion of their young warriors was consummating an agreement with the Creeks to precipitate a general war with the whites, and in September, 1792, a party of over 700 Cherokee and Creek warriors attacked a settlement within four miles of Nashville.[8]

A year later, between twelve and fifteen hundred braves from the two nations invaded the settlements on the Holston River. In fact, the interval between 1791 and 1795 was filled with incursions of war parties into the white man's country.[9]

Undoubtedly, motivated by such bitterness as were manifested in these attacks, a second delegation of the Cherokee Nation arrived in Philadelphia in the summer of 1794 to point out that the boundary agreed to in 1791 had not been surveyed as provided for in the treaty. While there, they also, for good measure, reminded Secretary of War Knox, with whom they discussed their differences, that they had not

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nephew, of Nickajack; and Chickassautche, of Big Savannah, and warriors. See Journal of the Grand Cherokee National Council, Estanaula, Tuesday, June 26, 1792, American State Papers, Indian Affairs, I, 271-73.

[8] American State Papers, Indian Affairs, II, 294.

[9] Ibid., 468.

been paid for the lands ceded by them in the treaty of 1785. This oversight on the part of the United States was reflected in the new treaty 1794 which provided for an annuity increase from $1500 to $5000 per year as well as a promise to mark out the boundary line within 90 days after Senate ratification of said treaty.[10]

While the actual and final survey of the boundary line did not take place until 1797,[11] the distribution of the $5000 annuity did enable the Cherokees to come in much closer contact with the ways of the white man's civilization. Whatever their personal opinion on the subject, the Cherokees had little choice except to receive the civilization policy of the federal government. Their land circumscribed, impoverished, and greatly reduced in numbers from continued border warfare, they found after 1794 that they had to accept such items as spinning wheels, looms, farming implements, and other necessities to survive as well as to collect the individual share of the $5000 annuity. As early as 1797, in keeping with the idea of civilization, they found it expedient to appoint "some warriors expressly to assist the chiefs in preventing horse stealing . . . ."[12] Later these

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[10]U. S. Statutes at Large, VII, p. 43; see also Royce, op. cit., 172.

[11]American State Papers, Indian Affairs, II, 628.

[12]Laws of the Cherokee Nation, 3.

units were officially created as the Light Horse Guard. It was during this time that their views regarding murder were undergoing some changes. This is to be seen in a report made in 1803 by a group of Georgia commissioners who talked with an "enfluencial Cherokee" named Paris "who [was] authorized and required by the chiefs of the nation to keep a Troop of Horse always in readiness for the purpose of detecting and bringing to punishment all those of their nation who had been, or may be guilty of Murder, Robery, theift or other outrages . . . ."[13]

By 1801, as reported by Return J. Meigs, their tribal agent, they were industrious in the use of the wheel, the loom, and the plough, and were generally progressing in farming, home manufactures, and stock raising.[14] Despite such high appraisal and unquestioned advancement, the nation was shot through with hate and jealousy over the continued cession of their lands to the United States. Such engendered emotion finally culminated in the execution of Doublehead, a Cherokee chief of the Chickamauga settlements who had, allegedly, received a valuable land for his own use by a secret agreement with the United States commissioners when

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[13]From the manuscript Journal of Three Commissioners from the state of Georgia to the Cherokees, 1803, in the Cherokee Letters Collection, Georgia Department of Archives, Atlanta, Georgia. Quoted in a footnote, Malone, op. cit., 197.

[14]Wright, op. cit., 61; see also Mooney, Myths of the Cherokees, 104.

negotiating the treaties of 1805. The killing was done in compliance with the old law of treason, with the consent of the chiefs, and by a specially appointed committee commanded by Major Ridge, a prominent fullblood leader of the Hiwassee.[15] Based on the tribal law of blood revenge to which considerable attention has already been drawn, the Chickamauga retaliated against the killing in like manner and, in so doing, generated animosities that were to become significant but debilitating forces among the Cherokees for well over the next half century. The enumeration of such affairs, however, fits more in the sequence of events at a later time and place. Suffice it to say now that death of Doublehead coupled with the white man's insatiable thirst for land created such conditions that the Hiwassee and the Overhill Cherokees were rapidly brought to the realization that their only hope lay in the adoption of the white man's law and a permanent separation from the Chichamauga group. This had been advised by Return J. Meigs as early as 1801 shortly after his arrival in the Cherokee Nation. While his proposal bore little fruit at the time, it was he that first shaped their new concept of law and government. In his

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[15]See Colonel L. A. Phillip's Testimony Relating to the Death of Doublehead, August 9, 1807, BIA, Cherokee Agency, 1801-1807, No. 208. See also Wright, op. cit., 61. Meigs said the cession treaty was not made with consent of the Cherokee Nation or the Council of Elders. See Meigs' comments contained among his correspondence for the years 1806, BIA, Cherokee Agency, 1801 to 1807, Roll 208.

capacity as liaison officer between the United States and the Cherokees, most of the legal problems, both domestic and foreign, came to Meigs for adjudication. This can be seen by examining some of his correspondence. In 1802 Benjamin Blackburn wrote to Meigs requesting that a Creek Indian, indicted for murder in Jackson County, Tennessee, be denied passage through the Cherokee Nation.[16] In the same year, Meigs received a sworn statement signed by James Watson and James N. Ball that a certain Cherokee woman, named Toka Sal, had stolen a mare horse in Blount County, Tennessee, in 1800, and requested that it be returned to them.[17] In 1803, William Whilley wrote Meigs asking that Meigs use his influence to return an eleven-year old girl held by one, Dirt Merchant, a Cherokee, who had refused her surrender.

Meigs tried to be fair in his dealings with both whites and Cherokees.[18] In 1804, a Cherokee by the name of Yellow Foot was killed in Bunumb County, North Carolina. Upon Meigs' recommendation, the War Department offered a five hundred dollar reward for arrest and conviction of his

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[16]Letter of Benjamin Blackburn to Colonel R. J. Meigs, April 21, 1802, BIA, Cherokee Agency, 1801-1807, No. 208.

[17]Ibid. Letter of R. J. Meigs to Governor Rooney, January 30, 1802.

[18]Ibid., William Whilley to Colonel R. J. Meigs, July 8, 1803.

murderer.[19] On August 25, 1804, Meigs was advised by letter from Andrew Bryson of North Carolina that the murderer, a white man by the name of James Wood, had been arrested.[20] Three days after receipt of Bryson's letter, Meigs received assurance from Cotegush, a Cherokee chief, that the "young men have agreed to walk the straight line."[21] That this was more difficult to practice than it was to preach is indicated by the fact that on October first, two days later, a Cherokee shot and wounded his neighbor, another Cherokee.[22]

Although such problems continued, the Cherokees appeared to be making progress. In 1805 a new Cherokee Council House was erected.[23] Other indications that the Cherokees were thinking more along the lines of settling their own affairs is seen in the statement made by Dick Justice,

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[19] Ibid., Henry Dearborn, Secretary of War to Colonel R. J. Meigs, March 1, 1804.

[20] Ibid., Andrew Bryson to Colonel R. J. Meigs, August 25, 1804. The records do not show whether James Wood was ever convicted or not. There is a strong likelihood that he was not as Meigs complained bitterly about the failure of state courts to find a white man guilty of any crime perpetrated against an Indian.

[21] Ibid., Categush to Colonel R. J. Meigs, August 28, 1804.

[22] Ibid., Colonel R. J. Meigs to Secretary of War, August 1, 1804.

[23] Ibid. Dick Justice to Colonel R. J. Meigs, May 6, 1805. This was used both as a court house and a place of worship it being located within eleven miles of the Braine Mission. Report of the American Board of Commissioners of Foreign Missions, (September 19, 20, 1821), 55.

one of the Cherokee Elders, that a negro girl, having run off, would be returned to their Cherokee owners, a couple by the name of Broken Griffin and his wife.[24] In 1807, Black Fox, the Principal Chief of the Nation issued an order, stating that it was the wish of the Committee (the National Clan Council), for him to "decree that the people who have detained the property of Colonel Phillips & other property of every kind detained be immediately sent to their place. You will have the horses . . . [available] that there will be no delay."[25] More evidence that the Cherokees were changing their views to that of white man, especially the missionaries, is found in the following:

Cherokee Nation April 26, 1807

> Know all men by the presents that, I, Anthony Civilles, resident of the Cherokee Nation, having purchased a certain mullotte woman, Name of Hannah of Major Robert King, which said Hanna for her faithful attachment to me, I do hereby give her her perfect liberty from me and my heirs forever.
>
> Given under my hand of the day and date above written
>
> Anthony Civilles[26]

Attested:
Just K. Love
John B. Carrell

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[24]Justice to Meigs, loc. cit.

[25]Proclamation of Black Fox, August 23, 1807, BIA, Cherokee Agency, 1801-1807, No. 208.

[26]Ibid., Certificate of Emancipation, April 26, 1807.

Also indicative that the Cherokees were undergoing some kind of a change in their legal philosophy was the case a Cherokee named Rumian which arose in 1803. Briefly stated, the facts appear to be that two men, while drinking together became involved in an argument whereupon one killed the other. Rumian, being a friend of the deceased, rejected the old notion that drunkeness absolved the murderer of his crime, and, upon seeing the man who had committed the killing, shot him. The man's family then came forward, and under the blood law, demanded Rumian's life. Thereupon, Rumian appealed to the clan council, and, shortly afterwards, the "Cherokee Chiefs held a council to deliberate on the demands . . . ."[27] The record is silent as to what their decision was, but the mere fact that they gave consideration to his plea seems to indicate that the chiefs were entertaining some change of thought relative to its application of the old law. That this was so is further indicated in an incident reported by Thomas L. McKenney. According to McKenney, a Cherokee was killed accidentally in 1803. The man responsible, knowing that his own life was in danger, fled the country. The relatives of the deceased were numerous, and "they demanded the life of a brother." Word was sent to Major Ridge, a member of the National Clan Council, and "he immediately said he would kill any person who

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[27] Ibid. Colonel R. J. Meigs to Secretary of War, January, 1803.

carried out such a plan . . . ." It was this incident, according to McKenney, that prompted the National Clan Council to repeal the law of "substituting a relative in place of an escaped homicide."[28]

Being thus motivated to protect property and lives, the Overhill Cherokees petitioned President Thomas Jefferson in 1806 to give them advice concerning the establishment of their own government and a better legal system.[29] Somewhat overdue in his response to such a request, Jefferson, nevertheless, wrote a letter, dated January 9, 1808, in which he addressed the Overhills as being "My children Deputies of the Cherokee Upper Towns" and agreed with their suggestion

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[28]McKenney and Hall, op. cit., 379. See also Mooney, Myths of the Cherokees, 522-528. Major Ridge had urged the repeal of all provisions of the blood law. Major Ridge, a well educated man among the Cherokees, had been elected to the Cherokee National Clan Council in 1796. As a member of that body he had advocated the complete repeal of all provisions of the old blood law. This, however, he was unable to bring about until 1808 after the murder of Doublehead. McKenney and Hall, op. cit., 379. Ridge was the head of the committee which decreed that Doublehead was to be killed for treason, and it may have been the concern of his own safety as well as other members of the committee that brought on a full abrogation of the old law.

[29]American State Papers, Indian Affairs, II, pp. 279-283. Reference to Jefferson's help and advice can be found in Flying Cloud's Letter to the Cherokee Nation, November 24, 1831, Cherokee Papers 1815-1875, Oklahoma Historical Society. A group of Cherokee chiefs had come to Washington to see Jefferson as early as November, 1801. Being unable to see him after three days of waiting they returned without talking to him. Henry Dearborn reported that he "could not discover that they had any credentials from their Nation." Dearborn to Meigs, November 29, 1801, BIA, Cherokee Agency, 1801 to 1807, No. 204. In 1808 representatives of both the conservative and progressive elements in the Cherokee Nation visited

that they divide their country into two parts. Such an arrangement, he pointed out, would enable those who desired to live under a purely tribal government while, at the same time, the more progressive of them could adopt laws more in line with those under which the white man lived.

As a means of attaining these ends, he suggested that they select representatives from among their most competent leaders with such selections being determined by individual towns. Next, he advised them to have such persons meet in some central place, and with the assistance of their Indian Agent, Colonel Return J. Meigs, select from the laws of the white people those most fitted to their needs. He also suggested that they make a gradual allotment of their lands in severalty as soon as the people were prepared for it, and as they became agreeable to it.

For the administration of justice he advised the establishment of courts with the judges being selected by popular vote from among their wisest men. In concluding, he promised them every possible assistance of the Federal Government in the adoption and enforcement of wise laws for the improvement of their administrative system.[30]

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Washington and talked with Jefferson over the possibility that those who wanted to return to their old life, be permitted to remove to western hunting grounds, and those that wished to remain in the East, be given the opportunity to provide for a system of fixed laws and government. American State Papers, Indian Affairs, II, 279-283.

[30]Cherokee Phoenix, February 21, 1828.

Nine months later, September 11, 1808, the Cherokee National Council met at Broomstown, Georgia, and passed their first recorded law which provided for the organization of "regulating" companies of six men which consisted of one captain, one lieutenant, and four privates. The duties of these light-horsemen, as they were frequently called, were to suppress horse stealing and robbery and to protect widows and orphans. For their work as resolved by the "Chiefs and Warriors in the National Council" they were to draw a fixed salary for a year's work. Fifty dollars was to be paid to the captain, forty dollars to the Lieutenant and thirty dollars each to the privates.[31] The law also absolved them from all guilt should it become necessary for them to kill anyone while in the course of performing their duty, thus abrogating, as to them, the old law of blood revenge.[32] This law also fixed the penalty for horse stealing at "one hundred stripes on the bare back, and the punishment to be in proportion for stealing property of less value."[33] While this was only the beginning in the adoption of the white man's law, The North American Review gave warm encouragement by stating that the Cherokee Nation, "agreeably to the suggestion and advice of President Jefferson . . ., have at length,

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[31] Ibid. See also Laws of the Cherokee Nation, 3-4.

[32] Cherokee Phoenix, March 13, 1828; see also Laws of the Cherokee Nation, 4.

[33] Ibid.

with great unanimity, adopted a form of government, which, in its essential features, corresponds with our own."[34]

In 1810, because of continued violence, horse stealing, and general fear arising from the Doublehead killing, the Cherokee National Council, purporting to legislate in behalf of the entire nation, repealed the law of blood revenge as it applied to everybody by providing that it had unanimously passed an act of oblivion for all lives for which they [the clans] may have been indebted . . . ."[35] Seasoning the language with a legalistic flavor it further provided that the "aforesaid act shall become binding upon every clan or tribe . . . ."[36] With specific reference to horse stealing, the law provided:

> . . . if a man has a horse stolen, and overtakes the thief, and should his anger be so great as to cause him to kill him, let his blood remain on his own conscience, but no satisfaction shall be demanded for his life from his relatives or the clan he may belong to.[37]

In reading the above wording, it is to be seen, although stated in the negative, that it gave free sanction to

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[34]A. H. Everett, "The Case of the Cherokee Indians," North American Review, XXXIII, (1824), 136.

[35]Cherokee Phoenix, March 13, 1828. John P. Brown stated that the killing of Doublehead was the cause of the repeal of the old Cherokee law of clan revenge. See footnote, John P. Brown, "Eastern Cherokee Chiefs," Chronicles of Oklahoma, XVI, (March-December, 1938), 30.

[36]Cherokee Phoenix, March 13, 1828; see also Laws of the Cherokee Nation, 1852, p. 4.

[37]Ibid.

anyone who killed a horse thief with the only penalty being one's conscience. At the same time, it attempted to protect the killer from any repercussions from the victim's relatives. At first glance it may appear that such a law smacks only of the conditions and times under which it was passed and contains little of the legal philosophy which is associated with modern reasoning. But be that as it may, it is not too difficult or too uncommon to find that many states, to-day, grant immunity from arrest and trial when it can be clearly seen that a killing took place while a person was defending his or someone's property. For example, the penal code of some states provide that a person may lawfully and, with the intent to kill, shoot at a thief either while he is still in the act of stealing or has escaped but can still be seen by the owner of the stolen merchandise.

In cases of accidental killings, the framers of the new Cherokee code adjudged that the killer was not to be "accounted guilty in the absence of showing malice intended."[38] The reference to "malice" and "intent," in addition to its being a humanitarian improvement over the principal of a life for a life, created the necessity for setting up a whole new system of legal procedure. The qualitative concepts of the two words, being in themselves intangible, required the necessity of measurement and definition. By

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[38] Ibid.

providing also that, as a condition precedent to conviction, the two elements must exist in the mind of the accused, the Cherokee Council, unconsciously perhaps, brought on the need to have some specialized agency of the state determine such matters. In other words, before a person was adjudged guilty of murder, it had to be shown in some type of judicial hearing that he "intended" to kill and, not only had he "intended" to kill, but at the time of killing there was "malice" in his mind. While the framers of the law, i.e., the legislators of the Cherokee Nation, impliedly, reserved for themselves the responsibility to act as a court, the necessity to erect safeguards for the defendant as well as to provide procedural means to assist the state in carrying the burden of proof marked the real beginning of their legal system.

One other stipulation in the 1810 law provided that if a "brother, forgetting his natural affection, should raise his hand in anger and kill his brother, he shall be accounted guilty of murder and suffer accordingly . . . ."[39]

Here again, another example of the necessity to prove a state of mind which implicitly placed the burden of proof on the state which in turn necessitated a hearing and some form of trial procedure.

Despite the failure to adopt any formalized method of trial procedure, the need to have a complete and clearly defined legal system did not become apparent until 1820.

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[39] Ibid.

Prior to that time, the Principal Chief, assisted by a secretary, performed the functions of chief executive and head of state. In addition to a personal secretary, the National Committee, helped him carry out his work. This committee was really a continuation of the National Clan Council of the mid-eighteenth century which had been brought up to date by having it deliberate on matters that pertained more to the nation than to individual clans. The National Council functioned as the legislative department but its members were implemented by having the National Committee sit in on all matters that it took up for consideration. To expedite and guide it in its work, the General Council utilized the services of a chairman, respectfully described as the Speaker of the Council whose signature was required on all bills passed. It also had a secretary, whose prime task, apparently, was to aid the Speaker in whatever capacity that he could as well as to attest, publish, and make known the laws of the council. When called on to act in a judicial capacity, both houses convened collectively into a general court performing the functions of a jury as well as a court with the Speaker, it is assumed, directing the proceedings as a presiding judge.[40]

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[40] In May of 1817 the Cherokee Council, complaining that fifty-four towns and villages had convened without unanimous consent of the Council, created a Standing Committee of thirteen persons who were to hold office for two-year terms and be eligible for re-election. This committee was given jurisdiction over foreign affairs which included annuity payments, however, the council retained appellate power over any decision or decree that the committee might make. See Laws of the Cherokee Nation, 4-5.

Despite the many substantive and procedural renovations, the National Council continued to give deference to old laws and customs. Evidence of this is to be seen in Article Four of the Government Act of 1817 which guaranteed the right of property gained through the "mother's side."[41] Another indication that "petticoat government" was not completely gone is to be found in the fact that in 1818 a delegation of Cherokee women addressed the Council and vigorously opposed western removal stating that the very idea was "dreadful."[42]

Such, then, in part, was the system of government which had been recommended to them by President Jefferson and which, in the absence of evidence to the contrary, served them well during the formative years. The Cherokee Nation was, however, hard put to hold intact the outer limits of its national domain. In 1817, the United States, insisted that the Cherokee Nation cede to it approximately one-third of its land to compensate for a like amount that the United States had given to the Chickamauga (Western) Cherokees in the Territory of Arkansas.[43] After haggling over the number of Cherokees who had left and those who had remained east of the Mississippi, the chiefs, "wearied and discouraged,"

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[41] Laws of the Cherokee Nation, 5.

[42] Malone, op. cit., 82.

[43] Mooney, Myths of the Cherokees, 106; see also Royce, Cherokee Nation of Indians, 222-228.

consented to give up approximately six thousand square miles, or more than one-fourth of all the land then claimed by the Nation. The session treaty, concluded at Washington on February 27, 1819, recited that the greater part of the Cherokee Nation, having expressed an earnest desire to remain in the East, and being anxious to begin the necessary measures for the civilization and preservation of their nation, consented to cede to the United States a tract of country "at least as extensive" as that to which the United States was entitled under its removal treaty with the western Cherokees.[44]

Having now reached the point that their tribal lands, being so reduced in size, could easily lend themselves to district division, the Cherokees in the fall of 1820, adopted a regular republican form of government, closely akin to that of the United States. Under this new system the nation was separated into eight districts, each of which was entitled to send four representatives to the Cherokee National Legislature which had been moved from Echota on the Tennessee River to New Town or New Echota at the junction of the Conasaugh and Coosawatce Rivers, a few miles above the present city of Calhoun, Georgia.[45]

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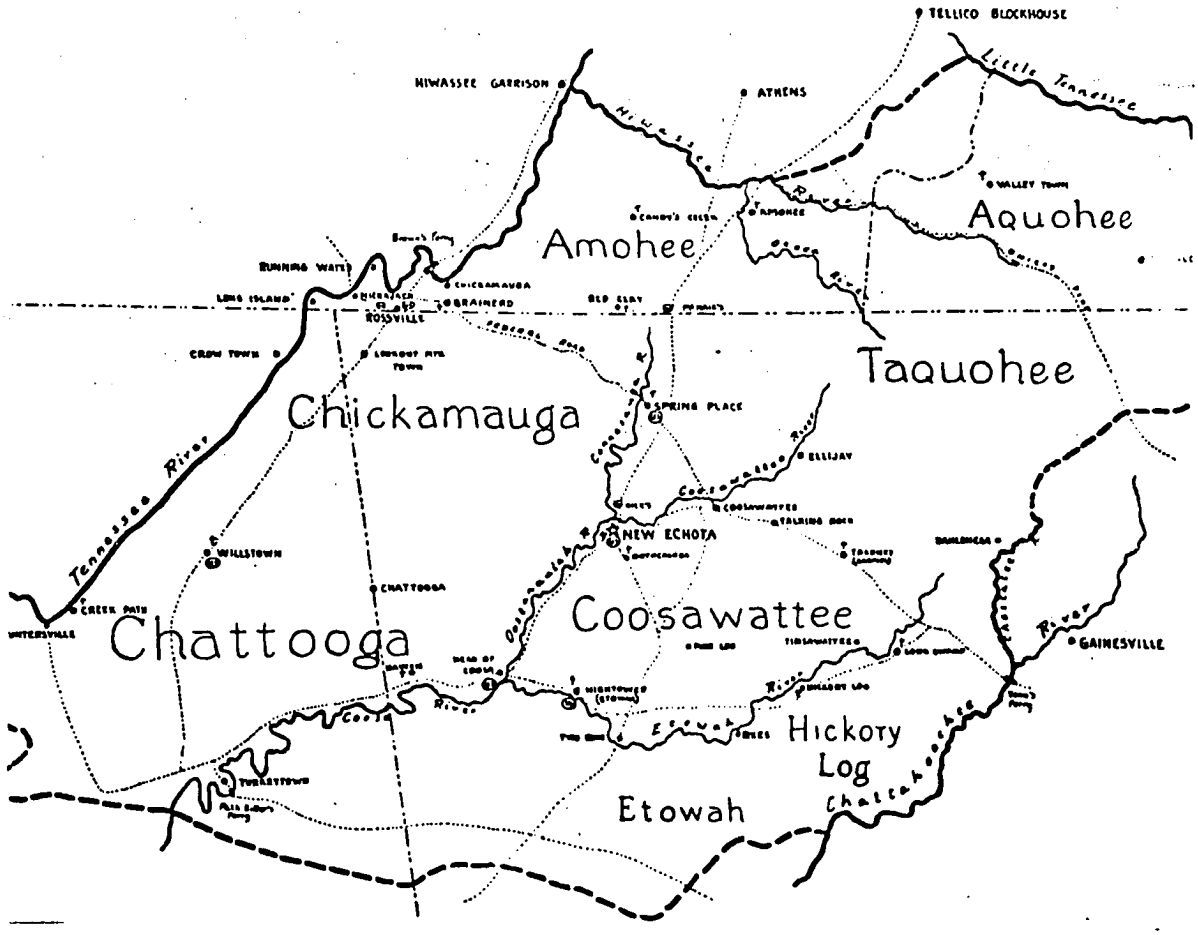
[44]Mooney, Myths of the Cherokees, 106. The chief argument of the Cherokees against removal was that they would revert to hunting, wandering, and would return to a savage way of life. Missionary Herald, loc. cit., XV, 273.

[45]Ibid., 107. See also the Report of the American Board of Commissioners for Foreign Missions, (September 19, 20, 1821) 47-58.




**EIGHT JUDICIAL DISTRICTS IN THE CHEROKEE NATION IN 1825**

**SCALE: One inch equals approximately eighteen miles**

**Taken from the Cherokees of the Old South by Henry T. Malone**

The new government brought little structural change in the national legislature as the upper house continued to be designated respectively as the National Committee and the lower house the National Council. One notable difference did occur with respect to members of the Lower House. They were elected for fixed terms by the voters of each district, whereas before, they were elected, apparently, for indefinite periods and held office on good behavior. A change also occurred with respect to the number of members in the lower house. Unlike the National Committee which still based its membership on two delegates from each of the seven clans, the lower house now had a fixed membership of thirty-two representatives, four from each district,[46] whereas before its size would vary, depending upon the desire of each town as to whether it did, or did not, elect to send a deputy to the National Council. The lower house also added an extra speaker giving it two speakers rather than one as before. As Principal Speaker he was given the title as President of the Council and was entitled to draw three dollars per day while the lower house was in session. The Second Speaker drew one dollar and fifty cents for his legislative position.

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[46] Laws of the Cherokee Nation, 14-15. For a brief discussion of the government established at this time, see George B. Foster, Literature of the Cherokees (Ithaca, New York: Phoenix Publishing House, 1889), 36-38. It was also significant that the Cherokee National Council provided for compulsory education for school children. Missionary Herald, loc. cit., XVII, 73.

Each of the representatives were entitled to draw two dollars for each day they were in session. All clerks were paid a like sum but if anyone could double as an interpreter, and, apparently, this included representatives, he was entitled to an extra stipend of fifty cents per day. The Principal Chief drew one hundred and fifty dollars per annum.[47]

Each of the eight districts was brought more in line with the state governments. District leaders selected and designated a district council house so that local legislators might meet in the spring and fall and pass such ordinances that would take care of local needs. Let it be said, however, and perhaps to the credit of the Cherokee national government that, in organizing on a federal basis, it never permitted any notion of dual sovereignty to plague its relations to the districts. When it was a question of power, the Cherokee national council pre-empted for itself the paramount right to legislate on those matters regarded as beneficial to national welfare.

In keeping with such a view, the new government passed laws for the collection of taxes and debts, for repairs on roads, for licenses to white persons engaged in farming or other business in the nation, for the support of schools, for the regulation of the liquor traffic and the conduct of Negro slaves, for punishing horse stealing and

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[47] Cherokee Phoenix, March 27, 1828.

theft, and compelling all marriages between white men and Indian women to be according to regular legal or church form. It also re-enacted the 1808 law which prohibited blood revenge. The National Council also made it treason, punishable by death, for any individual to sell land to the whites without the consent of the national council.[48] Other laws adopted by the new government prohibited white men from holding office or voting and provided for the collection of a poll tax. Each head of a family and each single man under sixty was subject to pay the tax.[49]

Another noteworthy change, and more to the specific point of legal reform, was the creation of a full-scale judicial system. Each district was provided with a district court with the presiding judge, elected by the voters of his district, and serving office during good behavior. He was to hold court in the district council house and "to administer justice in all causes and complaints that may be brought forward for trial.[50] Each of the district courts were to have two five-day sessions each year. The districts of Chickamaugee, Coosewatee, Hickory Log, and Aquohee were to start their sessions on the "First Mondays in May and September." The other four districts, Chatooga, Amohee, Tahquohee, and Aquohee were to commence their court hearings

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[48]American State Papers, Indian Affairs, II, 279-283; see also Drake, Aboriginal Races, 437-438.

[49]Ibid. [50]Laws of the Cherokee Nation, 11-12.

on second Mondays of the same two months.[51] The district courts had original jurisdiction over all criminal cases except murder and theft to the amount of one hundred dollars in value. With regard to civil litigation, all suits involving the sum of twenty-five dollars or less were tried in district courts.[52]

Evidence has been unrevealing as to the first Cherokee juries, the number of jurors, and the procedure used to select prospective persons to serve in jury duty, but it is assumed that the juries were small, perhaps, not more than four or five individuals and that they were appointed or requested to serve by the judge. In minor infractions, violations of local legislation, comparable to our own city ordinances, juries were, most likely, dispensed with altogether and decided entirely by the court.

Four circuit judgeships were created under the 1820 law with each judge holding two sessions per year in two districts.[53] Such judges were appointed by the National Committee, and their courts had original jurisdiction to try all murder cases and theft, involving an amount exceeding

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[51]Malone, op. cit., 79. Malone reports in a footnote that the date is not shown in the Laws of the Cherokee Nation but that Starr in his Early History of the Cherokees cites the date of the first official court sessions as starting November 2, 1820.

[52]Laws of the Cherokee Nation, 90.

[53]Laws of the Cherokee Nation, 11-12; see also Cherokee Phoenix, March 27, 1828.

one hundred dollars in value. In civil cases, they had original jurisdiction in all controversies in which the amount of damage alleged by the plaintiff exceeded the sum of twenty-five dollars. In amounts under that sum they had appellate jurisdiction over the district courts.[54] Apparently, the circuit courts had no concurrent jurisdiction with the district courts other than those instances in which a circuit court had taken original jurisdiction, and in its proceedings it was discovered that the amount of the controversy was less than had been alleged. Here, in this particular, the circuit court would not relinquish control of the case but act out the maxim of modern law that once a court takes jurisdiction, it, having the power to do so in the first instance, will not thereafter relinquish its control over the matter and thus perform an empty function. When sitting as an appellate court on an appeal from the district court involving an amount twenty-five dollars or less, it would appear that the proceeding would have been a trial de nova, i.e., a complete new trial with witnesses and evidence appearing before the court as in the first instance. Such an assumption is grounded on the idea that judiciary act of 1820, made no mention of any records and it is a likely assumption that few records if any were kept of the district court level. That would appear to be particularly true

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[54] Laws of the Cherokee Nation, 90.

where the amount in controversy was twenty-five dollars or less. Research has not, thus far, turned up any written proceedings of these early district trials, and it is not known that clerks were hired to help the judge with his paper work or if the court employed the services of a court reporter to take down what transpired in the trial. Here again, the conjecture is nothing like that occurred since there was a general lack of knowledge as to how to expedite and overcome the technological difficulties, implicit in such an undertaking, as well as a specific knowledge of the legal technique necessary to carry it out. Assuming that such was the case, the circuit court, acting in an appellate capacity, would have been precluded from having any means by which it could find the error of the lower court and thus reverse and remand, that is, reverse the decision and send it back for a new trial. Neither could the circuit court reverse and render, that is, reverse the district court's decision and render its own decision based on the merits of the case. Neither was there available any great legal body of substantive or procedural law to which the reviewing court could turn in order to decide the issue on points of law. In this respect, it would appear that a very valid analogy can be made between the first Cherokee district courts and our own obsolete but still persisting justices of the peace courts. This is by no means to say that the Cherokees, in erecting their first judiciary, did not achieve a very

noteworthy accomplishment. Quite the reverse is true, but it does point up the fact that the Cherokee judges, in the formative stage of their legal development, like the Puritan magistrate of colonial Massachusetts, found it necessary to formulate procedural rules and to decide points of law on the basis of what seemed most rational and correct at the time.

An example of that can be found in those matters related to equity pleadings wherein the complainant was seeking relief other than money damages. While the Cherokee justice, undoubtedly, was well educated by the standards of his day, he might not be familiar with the law that was practiced in the chancery courts of the various states. However, it is a fairly safe guess that should a chancery case arise either at the district or circuit court level, the court, although unaware of the formal styling and classification of equity law, would, in its discretion, render a decision in keeping with the idea that relief and justice were to be administered regardless of the manner and form in which it had been sought. An example of such, and perhaps, still more to the point, would be the case where the complainant sought relief by asking the court to enjoin or mandamus a person or persons to either abstain or to perform some act. Upon hearing the plea, the court, rather than the jury, would either deny or grant the request. With reference to the jury, evidence, as in the case of the district courts, appears to be

very meager on this point from 1820 to 1824, but it is again, to be assumed that the circuit judge made use of his clerk by having him summon several of the leading and local dignitaries for jury duty, the number depending upon the severity of the case or the amount of damages.

Judges during that time, as described by William P. Thompson, were "uneducated" but were men of "good sound sense." The first reported murder case to take place under the Judiciary Act of 1820 was tried by Circuit Judge James Brown in the "Skinboyou District." Judge Brown, as characterized by Thompson, was a person of "robust character, physically and mentally without any legal training whatever."[55] In 1822 Judge Brown paid a visit to the Braine Mission and was described by an observer who talked with him that "he possessed no small degree of unaffected dignity."[56]

In his first murder trial, Judge Brown called for an arraignment of the person. Upon being asked if he pleaded "guilty" or "not guilty," the prisoner stated that he had killed the man, but had done so to save his own life. Thereupon, and "without further procedure," Judge Brown "took the law and read it." At the conclusion of his reading, he announced to the arresting officer who was present to take

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[55]William P. Thompson, "An Address Delivered Before the First Annual Meeting of the Oklahoma State Bar Association in 1910," Chronicles of Oklahoma II (March-December, 1924) 63.

[56]Missionary Herald, loc. cit., XVIII, 139.

charge of the prisoner and "hang him in three days." Richard Fields, one of the few Cherokees who had some experience as a lawyer, "jumped up and pointed out" that the prisoner had not even been tried. Appealing to the Principal Chief on the basis of such an error, Fields was able to set aside Judge Brown's first murder sentence.[57]

As part of the general legal and law enforcement program of 1820, eight companies of "light horse," appointed by the National Committee, were organized to aid and accompany the circuit judges on their circuits.[58] It was their duty and responsibility to execute and carry out whatever punishment and holdings the circuit courts decreed. They were also deputized by the National Committee to enforce any and all laws passed by the National Council. A marshal and a ranger were elected by the district council at one of the two council meetings held each year. The duties of the marshal consisted of collecting all taxes and debts owed to the district as well as to execute the judgment of the district

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[57] Thompson, "An Address Delivered Before the First Annual Meeting of the Oklahoma State Bar Association 1910," loc. cit., 67. Abraham Steiner and Frederick C. De Schweintz travelled into the Cherokee Nation in 1796. While in the Chickamuga area they met a half-blood by the name of Dick Field who, according to their report, was well educated. This may be one and the same person who defended the accused at Judge Brown's first murder case. "Report of the Journey of the Brethren Abraham Steiner and Frederick C. De Schweintz to the Cherokee Settlements and Cumberland Settlements," Early Travels, Williams, ed., op. cit., 473.

[58] Cherokee Phoenix, March 13, 1828.

courts. The duties of the ranger, it appeared, was to receive, post, and advertise the finding of all stray horses and to arrange for their sale or return to their proper owner.[59]

Having now completed a full fledged court system at both the trial and appellate level, the National Council soon found it incumbent that their penal code be extended and clarified. Acting on the well known principal of law that criminal statutes are strictly construed so as not to impose sentence on a defendant for an act, which, in its written form, might be ambiguous and subject to more than one construction, the national legislature, in 1821 re-stated various criminal provisions and added new ones.

Having no ready-made jails in any of the districts and being, perhaps, somewhat behind in their theory of rehabilitation as were the reforming citizens of New York and Pennsylvania, as well as lack of funds, a natural dislike for them, and it being a matter of expediency, the Cherokee legislators provided confiscation, fines, corporeal punishment, ear cropping, and death as penalties for criminal

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[59] Ibid. All such named officers as well as judges and public officials were required to take the following oath: "You do solemnly swear, by the Holy Evangelists of Almighty God, that you as _____ of _____ District, will strictly support and observe the laws of the Cherokee Nation, and to execute the decisions of the courts, and to make collections without favor or affection, to any person or persons whatever, to the best of your knowledge and abilities: so help you God." Laws of the Cherokee Nation, 1852, pp. 68-77.

violations rather than incarceration. A quick enumeration of some of the criminal provisions will bear this out. For example, intercepting and opening sealed mail was punishable by a fine of one hundred dollars and one hundred stripes on the bare back.[60] The punishment for selling liquor was the loss of the liquor but the penalty for its sale by a non-citizen or its purchase by an Indian from a non-citizen was both loss of the liquor and a fine of one hundred dollars, one-half of which went into the national treasury and the other half to the informer.[61] The penalty for rape ran the gamut in terms or penalties. For the first offense the offender was "punished with fifty lashes upon the bare back, and the left ear cropped off close to the head; for the second offense, one hundred lashes and the other ear cut off; for the third offense, death."[62] In citing rape as an example of crime and punishment, is not clear whether the severity of the punishment marked a departure from the earlier liberality afforded both women and men, or that "ear-cropping" was a grim reminder that a woman's consent had always been a prerequisite. But whatever its indication, such a punishment was a relic of the eighteenth century and stood out in sharp relief to the other punitive measures. Women, however, who brought forward a charge of rape had to be sure

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[60] Laws of the Cherokee Nation, 27-28.

[61] Ibid., 40. [62] Ibid., 104.

of her ground since her testimony was subject to being rebutted. Should "sufficient proof" be "adduced to refute" her testimony, either the District or Circuit Judge was to sentence her to the punishment of having twenty-five lashes administered on her "bareback" such being inflicted by the marshal.[63]

Infanticide was punishable with fifty lashes and any person, shown to have been accessory, was given the same penalty.[64] In enumerating this offense, it will be recalled, that the infanticide had been widespread in the past and the very fact that the legislature, deemed it necessary to provide a penalty for it, indicates that the custom still had some followers at this late date.

In keeping with the times, gaming at cards,[65] dice, roulette, or thimbles was prohibited. The penalty for wilful murder was death by shooting.[66] Upon due conviction, the condemned criminal was allowed a respite of five days before sentence was carried out during which time he was

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[63] Cherokee Phoenix, May 14, 1828.

[64] Laws of the Cherokee Nation, 79.

[65] In 1804 James Davis, Chief of the town of Tusquste, made a request of Meigs that he send him "four pair [pack] of cards." James Davis to Colonel R. J. Meigs, July 29, 1804, BIA, Cherokee Agency, 1801-1807, No. 208. That gambling had got out of hand is most likely the explanation on gaming devices.

[66] Laws of the Cherokee Nation, 104.

kept under guard by the light horse or the sheriff at a later time.[67]

With regard to accidental killing and killing in self-defense, the new code made no substantive change in the 1810 law but exonerated the person in the absence of any showing that he had preconceived the crime or that it was not in self-defense. From the language used in the statute, it would indicate that when the issue was clear cut and no evidence of malice, the state, in its discretion, could abstain from holding any hearing at all. Such a practice would fit in with custom prevailing today, it being summed up in the expression that the "state has no case" and hence no need to undergo the expense of an examining trial. Bearing indirectly on the point is a report contained in the Missionary Herald for the year 1823. According to the Herald:

> A Captain of the Light Horse, came with four of his men, having in custody a man who had been of stealing and killing hogs belonging to the mission. The officer said that Mr. Hicks [Charles Hicks, Assistant Principal Chief] directed him to bring the suspected person here, and if there appeared to be sufficient evidence to justify a trial to bring the case before the judge.[68]

An assault with the intent to kill, rape, or rob was punishable by fine of not over fifty dollars and a whipping of not over fifty lashes.[69] Note that the punishment included both a fine and a lashing. In calling attention to

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[67] Ibid. [68] Missionary Herald, loc. cit., XVII, 171.

[69] Laws of the Cherokee Nation, 104.

this, it is to be seen that fines were not stated as alternatives to corporeal punishment, something which might be left to the discretion of the court, but were attached to and made irrevokably a part of the sentence. This fixation of punishment follows throughout their criminal provisions and would seem to indicate that the Cherokee lawmakers were encountering some difficulty in adjusting their views so as to permit the judges and jury to be influenced by the admission of any evidence which would tend to "extenuate" or "migate" the crime. The old notion that a killing was a killing regardless of the reason, seemed to find faint procrastination in the idea that a crime could not be segmented into different levels or different degrees. If a criminal act was committed, and if it was shown and proved that the accused had committed the act, then he should suffer the same fate as anyone else, regardless of any external conditions or circumstances surrounding his conduct.

The Cherokees were not static in their endeavors to improve their judiciary. On October 27, 1821 it was resolved by the National Committee that it was unlawful for anyone to move to Arkansas Territory. To hinder the person even more, it was made a crime for him to sell his improvements. If such did happen, the guilty person, was to forfeit one hundred and fifty dollars to the National Council with the said sum being collectable by the Marshal of the District.[70] The

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[70] Cherokee Phoenix, April 3, 1828.

same day the National Committee passed the resolution that it was to become the duty of circuit and district judges to collect stolen horses and turn them over to the United States. Apparently, anticipating the difficulty of enforcing this law, the National Committee specifically stated that if anyone killed a marshal or a member of the light horse, he was to be killed on the spot.[71]

Further attempts were made in 1821 by the National Committee and Council to enact legal reforms. In November, the law was passed that should a "white man marry a Cherokee" he would not upon her death be entitled to any of her property. Should he leave her without "just provocation," he was to pay her support in whatever amount the National Committee and Council deemed necessary. Neither was a white man entitled to have more than one wife.[72] In this respect it is interesting to note that the National Committee "recommended that all others" restrict themselves to just one wife.

More concern was given to their court system as the National Council on November 8, 1822 enacted into law a provision that all "courts were to keep records of proceedings of all causes, evidence and decisions, and clerks of the courts be paid two dollars per day."[73]

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[71] Ibid. [72] Ibid., May 27, 1828.

[73] Ibid., April 10, 1828.

## CHAPTER XI

## THE HIGH COURT OF THE CHEROKEES AND THE NATIONAL COUNCIL

The final step in the completion of the Cherokee judiciary occurred in 1822 when the Committee and Council authorized the creation of a National Supreme Court. It consisted of four circuit judges, and it sat in the nation's capital; a jury was required to bring in the court's verdict.[1] In all cases involving treason, sedition, national security, treaty violation, sale of national lands, or the violation of any of the several laws which had been passed to protect the national welfare, it was to have original jurisdiction. To implement the work of the high court and execute its decisions, the office of national or federal marshal was created.[2] Such a person or his deputy was to be on hand at all sessions of the court, and the court was empowered to deputize such other officers as were called for.

The nation's high court held its first session in New Town, the name now given to Ustanali on October 9, 1823. In compliance with the law which required the keeping of

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[1] Cherokee Phoenix, April 10, 1828.

[2] Ibid., May 14, 1828; see also Laws of the Cherokee Nation, 51-52.

records,[3] it was duly recorded that "their Honors John Martin, James Daniels, Richard Walker, Circuit Judges" were present. It was also noted that James Brown, the fourth Circuit Judge was absent. Five men, George Saunders, Thomas Saunders, Daniel Griffin, Hair Trimmer, and Small Wood, were chosen as jurors with George Saunders serving as foreman. The first case was that of James Griffin, plaintiff, in a suit for damages, or in the alternative, title and possession of the farm belonging to the defendant, Nancy West.[4] The court and jury ruled against him decreeing that "the defendant shall hold the contended farm."[5] It is hard to surmise on what grounds the plaintiff, James Griffin, brought his suit for damages. It may have been that the defendant had abandoned some improvements to which she was reclaiming to the detriment of the plaintiff. Individual ownership of land being impossible, attention was given to land improvements and the right of possession as reflected by many of the early Cherokee land laws. For example, the Cherokee Council had adopted the provision that all improvements on

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[3] Ibid., April 10, 1828.

[4] Malone, op. cit., 83. Malone has stated his information came from the Manuscript "Record Book on the Supreme Court of the Cherokee Nation 1823-1835" which is now in the personal possession of Mrs. Penelope J. Allen, of Chattanooga, Tennessee. Dr. Malone states further that Robert Ross, a grandson of John Ross gave the manuscript to Mrs. Allen and the record book listed the names of the contesting parties and the verdict with a short statement as to the case.

[5] Ibid.

the land of "our people by the mother's side shall be inviolate during the time of occupancy."[6] It was also the law that no person could make improvements within one fourth of a mile's distance to anyone's possession without first getting the consent of his neighbor under the penalty of forfeiting all labor and money. Neither could a person leave improvements for longer than one year, else it would constitute legal abandonment.[7]

But whatever the specific circumstances surrounding the first case, the Supreme Court in its first term, October 9-25, heard twenty-one cases. The controversies included thirteen pleas of debt, three pleas for damages, two complaints of fraud, one ejectment, one plea of settlement, and two criminal cases of hog-stealing and grand larceny.[8] With reference to the criminal proceedings, it is assumed that the defendant was given most of the procedural rights which were subsequently included in the Cherokee Constitution of 1827. Such rights may have included the privilege to be heard, to confront accusing witness face to face, knowledge and notice of the charge brought against him, and the compulsory right to have witnesses brought into court in his behalf. He was also, most likely, protected from an unreasonable search of his person, house, papers, and possessions

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[6]Cherokee Phoenix, March 13, 1828. [7]Ibid.

[8]Malone, op. cit., 83.

as well as afforded the chance to make bond.[9]

Two months after the court's first session, legislation was passed providing for the erection of a two-story frame structure[10] in New Echota to be used exclusively by the court which, in the thirteen years of its operation, it decided 246 cases which included more than fifty different kinds of appeals ranging from such diverse cases as recovery of a ferry, bigamy, gambling, and harboring slaves, to the illegal hiring of United States citizens. By far, however, the chief cause of complaint was that of debt, it coming up for litigation no less than seventy-six times.[11]

A quick look at some of the verdicts reveals that in 1823 the court ruled "on a plea of debt" wherein Bushey Head was required to pay to Samuel Carr sixty-five dollars. The next year, Richard and John Rattiff, whether owing for a slave or were illegally "harboring a neagroe," were ordered to pay the slave's owner, Lewis Ross, $92.50. Chief Path Killer had been dilatory in paying his partnership indebtedness; and hence, he was sued for his interest in a Coosa River ferry.[12]

While the high court continued its work, the Cherokee

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[9]Cherokee Phoenix, February 21, 1828.

[10]Thomas Lee Ballinger, "The Development of Law and Legal Institutions Among the Cherokees," (Unpublished Ph.D. dissertation, Dept. of History, University of Oklahoma, 1938), 32.

[11]Malone, op. cit., 83. [12]Ibid.

National Council did not remain idle. Living up to the praise that its "incipient jurisprudence appears to secure the respect of the people,"[13] it prohibited stores and other businesses from remaining open on Sunday.[14] The Missionary Herald reported that in the neighborhood of Dwight, a half-blood Cherokee trader refused, "contrary to custom, to trade on that day."[15] On the first Sunday in October, 1824, the National Council convened. Daniel S. Buttrick, an American Board Missionary was elected to address the Council on that date, and all members attended with great solemnity. The Sabbath was observed during the setting, and "all traffic or business on that day strictly forbidden."[16]

Modeling its law "after the states of Georgia, Mississippi, and Alabama,"[17] the Cherokee Council, on November 11, 1824, enacted its first law concerning miscegenation in that it was made a crime for an Indian or a white woman to marry a Negro man. If convicted on such a charge the slave was to receive thirty-nine lashes on his bare back with the woman receiving twenty-five. A law was also enacted that no slave could possess any property in horses, cattle, or hogs. If a slave did have such property he was required to dispose

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[13] Missionary Herald, loc. cit., XVIII, 235.

[14] Ibid., XX, 46. [15] Ibid. [16] Ibid., XXI, 282.

[17] "An Address Delivered Before the First Annual Meeting of the Oklahoma State Bar Association in 1910," loc. cit., 65.

of it within twelve months from the date of November 11, 1824.[18]

The council in 1824 gave due regard to arson by making it unlawful and punishable by a fine of five dollars for the setting of fires in the timber before the first of March. The council also gave its concern to stray stock by providing that it was legal to build fences five feet high and should any mule, ass, ox or cow break through such a fence, the owner of the animal would be "responsible in damages" to which the court would take "cognizance of every such case."[19]

With regard to dead cows, the council provided that a person, upon skinning every dead cow that he found, was entitled to collect fifty cents or twenty-five cents from the rightful owner depending on whether the animal was a cow or calf. If the owner refused, he could keep the skin. Should the person skin the dead animal, however, and conceal the hide, he was to pay the owner twice that amount.[20]

The council also gave its attention to law enforcement by reducing the Light Horse from six to four in each district. Whether this represented a decline in crime or a desire for higher pay is not known, but the four who remained did have their salaries increased with the captains receiving

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[18] Cherokee Phoenix, April 24, 1828. [19] Ibid. [20] Ibid.

sixty-five dollars per annum, fifty-five for Lieutenants, and forty-five for all privates.[21] An increase in pay meant more work as these policemen were to serve as juries in all circuit court cases with the judge of their district acting as a jury foreman.[22]

However, they were not the only persons who found themselves drawn closer to court functions. Witnesses were compelled by subpoena to appear in court. A failure to do so without a reasonable excuse was punishable by a fine of ten dollars. At the same time provision was made for them to be paid for their services to the amount of fifty cents per day. A perjury law was also enacted at this time which subjected a witness to a possible punishment of thirty-nine "stripes" on the back.[23]

In civil ligation, jury payment was included among the other court costs and made part of the judgment against the loser. In criminal cases, less than capital, the defendant, if convicted was required to pay the jury, the officials who guarded him from time of arrest until trial, and the expense incurred by the arresting office if it had been necessary for him to go outside the district to make the

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[21] Laws of the Cherokee Nation, 1852, p. 78.

[22] Ibid.

[23] Cherokee Phoenix, April 17, 1828; Samuel Worcester said that there were almost no crimes of perjury. See Herbert R. Bass, Cherokee Messenger (New York: W. Morrow Company, 1940), 99.

arrest.[24] Should it be found that the defendant had no ready cash to pay his court costs and fine, he was required to surrender up any property that he might possess which, apparently, included any and all household goods regardless of whether he was married or not. The principle of exempting the necessities of everyday living, plus tools of trade or profession apparently, like our tax laws of today, did not operate in the Cherokee Nation. It is to be noted, however, that in civil cases, the house, farm, improvements, household and kitchen furniture, along with one cow, one calf, one sow and pigs, and one gun were safe from any attachment for debt or damages awarded to an individual.[25] Anything above that, however, was subject to be sold to the highest bidder at a judgment sale. This is to be seen in a legal notice announced by Marshal Joseph Lynch that he was to conduct a sale on the 1st day of December next, at the late residence of James Pettit near Conasauga" at which time there was to be said "between sixty and hundred bushels of corn in the Crib . . . twenty-five stacks of Fodder . . ." and on the next day "seventeen head of cattle . . . all levied on as the property of James Pettit to satisfy a judgment against said Pettit in favor of Elizabeth Pettit."[26] The

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[24]Laws of the Cherokee Nation, 1852, p. 39.

[25]Cherokee Phoenix, May 14, 1828.

[26]Ibid., November 12, December 3, 1829.

sale was subject of course to the right that the defendant could redeem before the announced date should he be able to find the money and pay off the judgment. In the event the defendant was utterly destitute and the judgment ran in favor of the state, his individual share of any annuity was confiscated. If the indebtedness was in the nature of a fine, and the defendant had no annuity benefits, it is not certain what would be the outcome. Presumably, however, he was not retained under guard but was at liberty to go about where he wanted to go except, of course, he was prohibited from leaving the district or Nation until he paid his fine. On the matter of paying his fine, it was most likely that he was subject to being employed, under guard if necessary, on any district or national work project until his fine, plus interest, was paid.

In capital cases where the defendant was convicted and executed, it is assumed that the Nation had first claim on his property, such claims being in the nature of court costs or burial expense should no one come forward to claim the body.

Rounding out the year for 1824, the Cherokee National Council in respect to reforming its criminal code, on November 10, made it a crime for any man, Indian or white, to have more than one wife.[27] It is assumed that it had application

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[27] Ibid., May 21, 1828.

only to those persons who would marry after that date. Otherwise, it would have found many husbands with more than one wife, each hard put to select the one he wanted to keep. This may have been an attempt to break up the practice of white men, having wives in the neighboring states, from coming into the Nation and marrying Cherokee women for the sole purpose of obtaining "all privileges of citizenship."[28]

The following year, 1825, the National Council continued to give attention to criminal matters by absolving children under twelve years of age, lunatics, and idiots from penal liability.[29] It also made some attempt to reduce the number of lawsuits by providing that in all contested claims, if the claimant or claimants had not demanded payment two years after the "claim or claims" were alleged to have existed, they would, as a matter of law, be declared null and void.

More laws were enacted to put an end to litigation. On October 14, 1825, the National Council provided that no court was to give "cognizance of any case transpiring previous to the organization of courts of law which may have been acted upon by the Chiefs in Council under the existing custom and usage of the nation . . . ."[30] On the same day,

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[28]Missionary Herald, loc. cit., XIV, 171.

[29]Laws of the Cherokee Nation, 78.

[30]Cherokee Phoenix, May 7, 1828.

perhaps in response to criticism made of certain procedural practices, the Council passed into law a provision that "each judge [would] be incompetent to sit, act, or decide, upon any cause" which had been appealed from his respective district.[31] It was also on October 14, 1825, that the National Council repealed the law which provided that district judges and members of the Light Horse serve as juries in circuit court cases. Replacing them would be "five disinterested men" selected by the marshal, sheriff, or constable. Such jurors would be entitled to seventy-five cents per day by presenting to the national treasurer, a certificate duly signed by either a circuit or district judge and attested by the clerk of such court.[32] October 14, 1824, must have been a busy day for the Cherokee National Council as another very significant bit of legislation was passed--namely, that all land belonged to and was the property of the Cherokee Nation with the improvements belonging to the persons who made them.[33] This last mentioned law undoubtedly represented an attempt to prevent individual Cherokees from selling their land to whites.

On November 9, 1825, the National Council took up the matter of wills and gave legal standing to a nuncupative will if witnessed by two or more persons during the last

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[31] Ibid. See also Foster, op. cit., 36-37.

[32] Cherokee Phoenix, May 7, 1828. [33] Ibid.

sickness of the testator and provided that it could be admitted for probate ten days after death.[34] In matters relating to descent and distribution, the Council enacted more probate legislation by providing that in the absence of a last will and testament, the wife, in the event there were no living children, was entitled to receive, after all debts were paid, one-fourth of all real property either belonging to her husband before marriage or that acquired during marriage with the balance going to his nearest relative or relatives. If there were children, the wife and children shared equally.[35]

With respect to written wills, provision had been made as early as September 11, 1808, when the Cherokee Council in legalizing the Light Horse, stipulated that they were to give protection to children as heirs of their father's property and to his widow in her share. In the case of wills, the language was explicit in that it stated:

> . . . . In case a father shall leave or will any property to a child at the time of his decease, which he may have had by another wife, then his present wife shall be entitled to receive any property as may be left by him or them, when substantiated by two or more disinterested witnesses.[36]

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[34] Laws of the Cherokee Nation, 52-53. A nuncupative will is an oral will declared or dictated by the testator in his last sickness before a sufficient number of witnesses and afterwards reduced to writing.

[35] Ibid.; see also Cherokee Phoenix, May 14, 1828.

[36] Laws of the Cherokee Nation, 3.

Six months later with the district and circuit courts not yet established, the Cherokee Clan Council convened and gave judicial interpretation to the above stipulations. It seemed that a prominent Cherokee, James Vann, had been killed and had left a will, giving all of his holdings, which were considerable, to his oldest minor son, excluding five other children and his second wife except for the household furniture.

After an examination of all the facts, including a judicial construction of the law just cited, the sixteen-man tribunal came to the conclusion that the will was invalid, apparently, because under the recently passed law, the husband was required to provide his wife with a child's part which Vann had not done, and that "all children" of the same father "ought to receive some share in the property." Accordingly, the Cherokee jurists directed the executor to allow the oldest son to have the greatest share and that the wife be given a life estate in the house as "long as she pleases."[37]

Such then was the law of wills and inheritance as proclaimed by statute and decided by judicial construction which, with little modification, remained the same throughout their national history. One exception did occur in 1828 when it was provided that a will was valid if signed by only

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[37]The will of James Vann, dated May 7, 1808 is quoted in Malone, op. cit., 151.

one attesting witness.[38]

The Cherokees, however, were experimenting and learning as they went. In 1827 their government underwent further organization when elected delegates from all eight districts convened at New Town and drafted a constitution.[39] The first six articles spelled out the boundaries of the Cherokee Nation and stipulated that the Cherokee government had "Sovereignty and Jurisdiction" over such territory.[40] It incorporated laws those earlier laws to the effect that all Indian citizens were guaranteed the right of occupancy to their lands, together with their improvements, subject only to the reservation that they could forfeit such rights by leaving the Cherokee Nation.[41]

The judicial powers of the new government were set forth in Article Five with provision being made for the creation of a new Supreme Court together with "such Circuit and Inferior Courts as the General Council may from time to time

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[38] Cherokee Phoenix, March 13, 1828. [39] Ibid.

[40] With regard to its national boundary lines, the Missionary Herald had reported in 1818 that they were "perfectly defined;" but as there was no line between Georgia and Tennessee, "Chichamaugah may fall in Tennessee." The Herald also reported that a traveller, talked of passing through the nation" just as a traveller from France to Germany might talk of passing through Switzerland." One other interesting observation made by the Herald was that it was no problem for a stranger to pass through as there were no reports that the "Natives" (Cherokees) had killed anyone as they were not apt to "intermeddle with travellers . . . unless intoxicated." Missionary Herald, loc. cit., XIV, 132.

[41] Cherokee Phoenix, February 21, 1828.

ordain and establish." The Supreme Court was to consist of three members elected by the joint vote of the General Council for four-year terms. Sessions were to meet concurrently with the legislature when it convened each October. Justices of the peace were to be appointed by the General Council as the need arose.[42] Expressly providing for procedural due process, Section Fourteen stated:

> In all criminal prosecutions, the accused shall have the right of being heard, of demanding the nature and cause of the accusation against him, of meeting the witness face to face . . . a speedy public trial by an impartial jury of the vicinage, nor shall he be compelled to give evidence against himself.[43]

Familiar language was found in Section Fifteen which further enlarged procedural due process:

> The people shall be secure in their persons . . . and possessions from unreasonable seizures and searches, and no warrant to search . . . shall be issued without describing them as nearly as may be . . . . All prisoners shall be bailable by sufficient securities, unless for capital offenses . . . .[44]

Substantive due process was made the object of some concern as the constitution stipulated that laws could not be passed which would impair any legal existing contract. Religious liberty was guaranteed except where its practices would "be inconsistent with the peace or safety of this nation."[45] Such a limitation was no more than what is today implied in any declared freedom. That is, personal freedoms

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[42] Ibid. [43] Ibid.

[44] Ibid., March 6, 1828. [45] Ibid.

cannot be exercised in such fashion that they will encroach on the rights of others. However, the framers of the Cherokee Constitution felt that if any person denied the "being of God or a future state of rewards and punishment" he should be precluded from holding office.[46]

Along with the new constitution, a weekly newspaper, the Cherokee Phoenix came into existence and on February 21, 1828 published its first issue. The paper gave space to legal notices, printed in full the recently accepted constitution, and editorialized on such topics as murder, stealing, and drunkness.

Giving some indication that worthless notes were not unknown in the new republic, the following notice appeared in its first five issues:

> All persons are forewarned against trading for a Note of hand, drawn by John Martin, in favor of John M'Carver, and Monce Gore of East Tennessee, for three hundred and fifty Dollars; payable on the first day of March next, dated January 14, 1828.
>
> As consideration for which said note was given, has proved to be unsound, I am determined not to pay unless compelled by law.
>
> New Echota, February 21, 1828.[47]

The Phoenix also provided an insight into the kinds of evidence which were admitted in criminal trials. In that respect it seems that a certain Cherokee, Sway Back by name, while in a state of intoxication has become embroiled in argument with one Murphy and struck him with a "large oak

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[46] Ibid. [47] Ibid.

stick" which resulted in death.[48] Tried three weeks later in the Crawfish Court House, Sway Back was found guilty "by the testimony of his own wife preponderating the truth of the crime."[49] Apparently, the Honorable Judge James Brown who sentenced the unfortunate man to death had never heard of the rule which precludes a wife from testifying against her husband in a criminal case, or if he had heard of it, was unimpressed with the theory that it was designed to promote tranquility in the household. Sway Back, apparently, however was a good criminal and was satisfied that he was getting what he deserved as he made "no objection to any of his jurors" after sentence was pronounced.[50]

In calling attention to this case, a number of observations seem to be in order. First, with reference to the rules of evidence and trial procedure, it would appear that the defendant had a right to object to any juror by showing cause. Second, he may have had the right to "poll" the jury by asking each individual juror if that was his decision after the verdict was announced. Third, for that reason, the five man jury would have had to be unanimous in its verdict of guilt, that being in line with the tradition

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[48]Drinking seems to have been on the increase at this time as it had been reported by a visitor to the Braine Mission in 1822 that he had seen only one intoxicated Cherokee and had heard no oaths at all during his stay of three months. Missionary Herald, loc. cit., XVIII, 139.

[49]Cherokee Phoenix, February 21, 1828. [50]Ibid.

that unanimity was required in the old seven man council court as well as familiarity with the idea of a white man's "hung" jury. Fourth, under the due process clause of the new constitution he was not compelled to testify.[51] Fifth, he had the right to confront his accusers, namely, his wife. Sixth, the trial was public and speedy; in his case, three weeks after the alleged murder. Seventh, he may or may not have had a lawyer. The conjecture is that he did not--not a lawyer in the sense that a person, experienced and trained, pleaded his case and represented him before the court. He may have, and it seems logical that he did have someone, to "speak" for him either as a character witness or as a personal friend.[52] Eighth, the judge did not consider drinking as mitigating the crime as it had been under tribal law, or if he did, he did not instruct the jury on the subject of extenuating circumstances as is required under most modern rules of trial procedure. The best explanation as to why it wasn't done was the fact that there were no places available

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[51] Ibid.

[52] For an extended eye witness account of a Cherokee murder trial held in 1841 consult John Howard Payne, Indian Justice, edited by Grant Foreman, (Oklahoma City: Harlow Publishing Company, 1934), passium. Stand Watie, later famous as a brigade commander in the Confederate army, spoke in the defense of the defendant and stated to the jury that he was no lawyer, but that he was appearing as a friend of the accused. Stand Watie had some knowledge of law as he was the clerk of the Cherokee Supreme Court in 1829. Mabel Washbourne Anderson, "General Stand Watie," Chronicles of Oklahoma, X (March-December, 1932) 542.

for confinement for any protracted period of time. Hence, it was the policy of the court to either execute the man, administer physical punishment, or let him go. As a citizen of the Cherokee Nation in later years reported, it was a custom that confinement was never longer than ten years in murder cases. If the crime required more "severe punishment the victim was hanged."[53] It would also appear that the defendant had been indicted as such a requirement was provided for under the constitution. It would also appear that the indictment would have "run in the name of the Cherokee Nation" and would have stated that the defendant, did and there, on a certain date, commit murder with malice aforethought "against the peace and dignity of the Cherokee Nation."[54] The concluding words "against the peace and dignity" of the nation were constitutional mandates and, an absence of such would have rendered the charge defective to which the court would have been obligated to take judicial notice.

Sway Back, however, made no appeal to the Supreme Court, or if he did, it was summarily denied as he was shortly hanged.[55] By comparing Sway Back's trial to that of

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[53]V. A. Travis, "Life in the Cherokee Nation a Decade After the Civil War," Chronicles of Oklahoma, IV, (March-December, 1926), 19. See footnote, Payne, Foreman, ed., op. cit., 3.

[54]Cherokee Phoenix, February 28, 1828.

[55]Ibid., April 24, 1828.

another murder case, Archilla Smith v. The Cherokee Nation which was held in 1841, several procedural requirements may be noted. While the Smith case was conducted after removal and under the Cherokee Constitution of 1839, it would seem that a valid analogy can be made between the two. In brief, the facts of the Smith case involve the murder of one John MacIntosh by Archilla Smith . . . . Smith was arrested by a group of some twenty men and guarded at different homes until he was brought to trial on December 15, 1840. Held at Tahlequah, capital of the Cherokee Nation, in a court-house made of logs with little court room furniture, Smith was convicted after undergoing two trials and nine days of trial hearings.[56]

The first day of the trial was devoted to selecting a jury. Twenty-four names were submitted, and Judge Tomey Price, an associate judge of the Cherokee Supreme Court and the presiding trial judge in the case, instructed the accused that he "might reject twelve without assigning any reasons."[57] If, however, he objected to any more than twelve his objections would have to be stated and ruled on

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[56]Payne, Foreman, ed., op. cit., 3-7, 87.

[57]The Constitution of 1839 provided in Article V, Section I, that in all criminal prosecutions, the accused shall have a speedy and public trial by an impartial jury of the vicinage. Constitution and Laws of the Cherokee Nation (Tahlequah, Indian Territory: National Advocate, 1881), 23. The right to have a jury was a constitutional requirement, but the number of jurors was regulated by Cherokee National Council. Payne, Foreman, ed., op. cit., 10.

by the court.

On the second day of the trial, the jury having been selected and the defendant announcing ready, the arrest warrant, "taking the place of the more elaborate 'indictment' in our courts," was read to the accused. The wording of the document is as follows:

> Cherokee Nation
> Salisaw District
>
> To any lawful officer,
> Greeting:
>
> Robert Brown, High Sheriff of Salisaw District,
> You are hereby commanded to take the body of Archilla Smith, if he be found within your bounds, and him safely keep; and bring him before the Circuit Judge, or any one of the Judges of the Supreme Court, then and there to answer the charge of murder alleged against him, for taking the life of John MacIntosh late in the fall of 1839, or early in the winter:
> Fail not under penalty of law in such cases provided.
> Given under my hand November 11th, 1840
>
> Prosecuting Attorney — David Carter
> Issac Bushyhead — District Judge[58]

The above having been read to him, the defendant pled not guilty. Judge Price instructed the jury as to what was expected of them and advised the court reporter to write down the evidence in English and with "great care." The

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[58] Ibid. Payne seems to be mistaken that an arrest warrant could serve as an indictment. Both the Constitution of 1827 and that of 1839 are clear in saying that all criminal prosecutions must be by information or indictment and that all indictments shall conclude--'against the peace and dignity of the Cherokee Nation.' Constitution and Laws of the Cherokee Nation, (1881), Article V, Section 9 and 11, p. 23.

first witness was called and the oath was administered by having him raise his right hand, kiss the Holy Bible, and swear to tell the truth. Should he do otherwise the court warned him that he would receive the double punishment of hell fire and severe chastisement under the law. Having so sworn, the witness gave his testimony as requested by the prosecuting attorney; at the end of which, he was cross-examined by Stand Watie, friend and agent of the accused. The trial continued in that fashion being marked by the "best of humor" exhibited by defendant, judge, jury, and spectators alike. As John Howard Payne described it, "the accused smoked much of the time; and his judge, and most of his jury, every now and then would get up and go across the log-court to him with 'Arley, lend me your pipe . . . .'"[59]

On the third day of the trial, after the prosecutor had called a witness for the state, one of the jurors, while admitting that it might be improper, stated to the court that it was his opinion that such a witness was mentally incompetent. The judge ruled on the question and permitted the witness to testify. Stand Watie objected, not on the grounds of incompetency, but on the question of relevancy. The court overruled his objection, apparently, guided by the same rule as modern judges that it is better to hear some irrelevant

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[59]Payne, Foreman, ed., op. cit., 18.

facts than not enough since a man's life is at stake.[60]

Having put on all of their testimony, both sides rested with Stand Watie declining to address the jury with oral argument. The prosecutor, however, was of no such frame of mind and gave a long discourse on the guilt of the defendant, terminating his argument with the words: "Archilla Smith has incurred a debt under your law, which can only be satisfied with his blood. I shall say no more." At this point, Stand Watie, undoubtedly, moved by the prosecutor's words, retracted his earlier decision on the matter and spoke to the jury. Professing to be only a friend of the defendant and not a lawyer--not a man who "made his trade at public speaking"--he made reference to the good character of the defendant and concluded his rebuttal by stating that it was his opinion "that MacIntosh quarreled with some new comer, who stabbed him in the dark, and escaped."[61]

Even though he had been unable to hinge his remarks on any point of law, his words must have made a poignant appeal to the jury and court as Payne related that at the end of Stand Watie's speech there was entire silence for awhile and no one moved, until the counsel for the nation got up and suggested that any other friend or the accused himself might like to address the court and jury at this time. Responding to this invitation made by the prosecutor, the

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[60] Ibid., 26-27. [61] Ibid., 40-41.

January 3rd 1876

Office supreme Ct. Room
Cooweescoowee Dist
To whom it may concern Greeting
Josiah Young a citizen of the
Cherokee Nation is hereby licensed
to practice as an attorney at law in the
Courts of and judges of the
Cherokee Nation from this date
he having complied with all
the requirements of the law
in regard to Attys

George W Cooper
Associate Justice
Supreme Court

Copy
I hereby certify the above license
to be a true copy of original.
Jno Ballard Clerk
Cooweescoowee Dist

License to practice law in the Cherokee Nation 1876
Manuscripts Division, University of Oklahoma

defendant got up and stated that he knew nothing of the crime. After that, the judge instructed the jury as to their responsibilities by reading to them the applicable portions of the penal code. Upon being retired for deliberation, two jurors advised the judge that they could never "be able to make up a verdict and prayed to be discharged . . . ." Their request granted, the judge adjourned the case.[62]

In the meantime, the presiding judge had become ill and a new judge, the Chief Justice of the Cherokee Supreme Court, Jesse Bushyhead, was instructed by the Principal Chief to preside over the second trial. In the proceedings that followed, Stand Watie, again acting as agent and friend of the accused,[63] pleaded double-jeopardy and exoneration of the defendant on the basis that, if he had committed the killing, he was entitled to do so under the old law of blood for blood. The judge rejected both arguments and on the second, the question of justification under the law of retaliation, he charged the jury that, while such laws did prevail at one time, that the present criminal statute contained

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[62] Ibid., 47.

[63] In order to practice law and to appear before the courts in the Cherokee, a person was required to obtain a license from the National Treasurer, or from one of the judges of the Supreme or Circuit Courts. For such license, the attorney had to pay five dollars annually. If he desired to practice before the Supreme Court he was required to pay ten dollars annually. Constitution and Laws of the Cherokee Nation, (1881), 265-266.

no "reference whatever to the ancient rules of the clan-kin." The judge further admonished the jury that even though they were of the same clan as the defendant, their oaths "binds you to forget your clan-kin."[64] Despite such instructions, the jury encountered difficulty in applying the law. Several times they sought additional help from the judge by having him explain to them the difference between accidental killing, killing in self-defense, and wilful murder. The jurors were also concerned over the meaning of circumstantial evidence as distinguished from point blank evidence.[65] At length, however, the jury returned a verdict of guilty against the defendant and, despite Stand Watie's alleged attempt to bribe the guard, Archilla Smith was executed on January 1, 1841.

Whether Sway Back enjoyed all of the constitutional guarantees as did Archilla Smith, it does appear that most criminal procedures as first propounded by the judiciary act of 1820, and brought forward in the Constitution of 1827, remained pretty much the same throughout the legal history of the Cherokee Nation. Speaking of the matter in 1910, William P. Thompson stated to the Oklahoma State Bar Association that the first Cherokee legal authority commanded:

> 'Let there be light and there was light,' and this fair land gave birth to a new system of jurisprudence in 1808

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[64]Payne, Foreman, ed., op. cit., 72-74.

[65]Ibid.

and lived its life and ceased to be in 1898, covering a period of ninety years.[66]

In the early development of Cherokee law, not all persons received the same fast justice as did Archilla Smith and Sway Back. According to the Cherokee Phoenix, a man by the name of William Fallen was murdered by a certain Bear's Paw on February 21, 1828, in the "neighborhood of Sumach."[67] One month later, the editor vehemently pointed out that "Bear's Paw, who committed murder not long since at Sumach [was] allowed to run unmolested."[68] Whether or not Bear's Paw was ever brought to trial, the Cherokee Phoenix never reported. In April, however, the paper voiced another strong protest against a policeman who also had the name of Bear's Paw but in the words of Elias Boudinot, the editor of the Cherokee Phoenix, this was "another one [Bear's Paw]" who, having arrested a man by the name of Gunnowsoske subsequently killed him. From the facts given in the Phoenix, it seems that Gunnowsoske had been previously arrested for stealing, and had been convicted of the offense by the District Court in Coosewattee. Bear's Paw, apparently, knowing this as well as knowing also that the penalty for the second conviction would be one hundred lashes, took it on himself to forget about the arrest should poor Coosewattee promise that he wouldn't do it again. Coosewattee, however, was unable

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[66]Thompson, loc. cit., 67.

[67]Ibid., March 6, 1828. [68]Ibid., April 3, 1828.

to make such a promise, apparently realizing his own addiction to such a vice whereupon "Bear's Paw struck him dead with an axe." The editor, in concluding his recital of the affair, found the occasion to urge the law enforcement officers to be more concerned about their responsibilities otherwise "these frequent thefts and murders will go to confirm the world in the opinion that we are still savages."[69]

Despite this admonition, the Cherokee Phoenix found it necessary within a few weeks to announce two more murders in the Nation. The editor woefully observed that "we do not remember ever to have noticed so many instances of murder within so short a time."[70]

Murder, however, was not the only crime being committed as the Nation's only newspaper reported on May 21, 1828, that the High Tower Circuit Court had convicted three persons of stealing horses and had sentenced them to "fifty lashes" each.[71] The root of all such evil, according to the paper, were the "pernicious effects of intempence" and "such" frequent cases speak a language, not to be understood, to the dealers of ardent spirits.[72] To show the correlation between crime and drink, the Phoenix in a somewhat humorous vein, gave headline to the report that a thief had broken

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[69] Ibid. [70] Ibid., August 27, 1828.

[71] Ibid. [72] Ibid., February 21, 28, 1828.

into the store belonging to Mr. Elizah Hicks and after helping himself to "pocket knives, shoes, boots, sugar, and whiskey . . ." became so "intoxicated before leaving the store as to forget his shoes."[73]

The Cherokee National Committee and Council shared this belief with the Phoenix and had, at a much earlier date, passed into law the provisions that no whiskey was to be brought within three miles of the Grand Council or any court house. Neither were "ardent spirits" to be tolerated at ball games, all night dances, or any public gathering."[74]

While the nation's law makers probably spent most of their time trying to find ways and means to improve the general health and morals of the country, it may have been, that they, not too infrequently, had reason to be concerned about the happiness and the domestic tranquility of individual citizens. That this was a possibility is to be found in an announcement printed by the Cherokee Phoenix for one William McConnell who quite succinctly "forewarned all persons against crediting" his wife, Deliam to his account as "she has absconded without my concent." McConnell goes on to say that he was "therefore determined to pay none of her contracts."[75]

Concerning family discord, it is assumed that the

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[73]Ibid., June 25, 1828. [74]Ibid.

[75]Ibid., November 19, 1828.

Cherokee Committee and Council delegated no jurisdictional authority to any of its courts to grant a divorce but required the complainant to submit his or her petition directly to it. This would have been in line with the procedural practice followed in the various states as Domestic and District Courts with full power to grant divorces remained some distance in the future. That complainants were encountering some problem in knowing where to take their matrimonial difficulties is indicated by the fact that one distraught Cherokee wife submitted her plea for relief to the Indian Agency. Being, most likely, advised by a self-styled lawyer, she attempted to follow some of the legal language by stating in her petition "this Coms to inform you that Mr. Bager [her husband] & his wife [herself] has parted . . . . As grounds for divorce she alleged that she is "a Frade that he will take some means to Destrase [Distress] her." She concluded her prayer by saying that "their is nothing to bad for him to say or do & she can prove it by White & Rade [Red]."[76] The subject of divorce and polygamy, however, in contrast to frequent references made to them in the mid-eighteenth century seemed, during this period, to have been piously disregarded with the Supreme Court of the nation having only one recorded case of bigamy. That polygamy and divorce

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[76] "Nancy Badger's complaint of her husband," September 14, 1805, Bureau of Indian Affairs, Cherokee Agency Files (1801 to 1823), quoted in Malone, op. cit., 131.

didn't completely die out, however, is seen in the statement made by Josiah Gregg, who visited the Cherokees in 1839 after their removal to the Indian Territory. It was his belief that polygamy, while decreasing in practice was still "occasionally practiced" by those who could afford to "as sometimes [they] still take any number of wives, and divorce them at pleasure."[77]

But it is open to conjecture as to whether the National Committee and Council, rather than the courts, litigated the issue of divorce. It does appear, however, that the National Committee had difficulty in relinquishing its traditional role as an appellate court. This is to be seen in the prayer submitted to it by Nancy Reggs for redress from the "unlawful proceeding" brought against her "by the Court at Chichamauga." It is not known what the "unlawful proceedings" were, but the National Committee, in dismissing her complaint, decided that "they had no right to interfere with the courts." That the Committee did not always practice what it preached can also be seen in its approval of a proposal that it "appropriate for the benefit of Joshua Buffington and Alfred A. Hudson fifteen dollars for the illegal fee collected from them by the direction of the Supreme Court

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[77]Josiah Gregg, "Commerce of the Prairies," Early Western Travels 1748-1846, edited by Reuben Gold Thwaites, (Cleveland: Arthur H. Clarke Publishing Company, 1896-1901) XX, 310.

in 1827."[78]

By way of summary, it can be said that within two decades, the Cherokee Nation developed a complete legal system which included original and appellate levels, a supreme court, trial by jury, a body of civil law, a penal code, and some specialization in trial procedure. In addition, the laws passed by the National Council encompassed almost every aspect of their society and were quite ample in their breath to meet the needs of the people. Provisions were made for a system of taxation and for moratoriums from taxes and debts when conditions required it, for a complete census of population and property, for the construction and management of turnpike roads, for ferries and bridges, and, lastly, for schools. Coming at the end of this twenty year period was adoption of the 1827 Constitution, which has been seen, was comparable in many respects to that of the United States and one which brought high praise from the New York Daily Advertiser in that it would "form an era in the history of constitutions, and if their plans succeed will furnish philanthropists new ground for congratulation . . . ."[79] Such optimism was short-lived, however, as conditions were developing elsewhere which were to bring plight and distress to the Cherokees for the next forty years.

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[78]Cherokee Phoenix, November 19, 1828. [79]Ibid.

## CHAPTER XII

## THE LEGAL STATUS OF THE CHEROKEE NATION

So as to have a better appreciation of how the Cherokee Nation operated within its own jurisdictional sphere and at the same time within the bigger orbit of Great Britain, and still later the United States, some explanation is called for. To simplify an analysis of the relationship, reference is made to the manner and theory by which England, like her rivals, obtained holdings in the New World. In that regard, the great powers of Europe, in their eagerness to appropriate as much land in America as was possible, and, at the same time, avoid war in the scramble, worked out the principal that discovery placed title in the discoverer which might be consummated by possession. In perfecting such a claim, the Indian title to the soil was nowhere allowed to intervene, it being assumed that the nation making the discovery had the sole right to acquire the land from the natives. At the same time, 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 or rather so much as was necessary for their use . . . but their rights to complete sovereignty . . . were necessarily diminished

. . . ."[1]

That England recognized a vested possessory right in the Indians is reflected in a letter written by Lord Hillsborough, dated May 25, 1770. In the letter Hillsborough explained that it had been the policy of England to purchase land from the Indians by treaty and to establish boundaries lines between "His Majesty's territories" and the hunting grounds of the Indians. Further, Hillsborough wrote, that "as the faith of the crown was pledged in the most solemn manner" no settlement was possible beyond such lines.[2]

Acting on such a principal, Spain and France joined England in taking legal title to the land in North America. At the close of the French and Indian War, France and Spain, by separate treaties, ceded to England all the land east of the Mississippi River basing their right to do so on the theory that they acquired title to the soil by discovery and occupation. As the recipient of grants, England did not question the legitimacy of the grants, but irrespective of whether she did, or did not, she could receive no greater title than that held by her grantors. There being no necessity to litigate the issue, England accepted the former

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[1]Johnson's and Graham's Lessee v. McIntosh, 8 Wheaton (U.S.), 543 (1824).

[2]Lord Hillsborough's Letter to Benjamin Franklin, May 25, 1770, Cherokee Documents, No. 14, Northeastern State College, Tahlequah, Oklahoma. Hereafter cited as Cherokee Documents.

holding of France and Spain without question. In the second treaty of Paris which concluded the Revolutionary War, England ceded to the United States all her claim and interest in the lands between the Appalachian mountains and the Mississippi River, including of course those lands formerly claimed by France. Here again, there was no necessity to adjudicate the title. Nevertheless, the United States could not, merely by substituting herself in England's place, improve upon the title to any possession that she had received. She stood in the shoes of England and took whatever title England had.

One new element, foreign but yet related to the argument, entered the picture at this time. It was not too apparent at first and caused trouble only at a later date, but it hardly need be said that once it emerged, it made up for any time lost in the beginning. This of course is with reference to whether or not the United States, in accepting the lands formerly held by Great Britain, gained title to them as individual states or that the thirteen states received them collectively.[3] Without attempting to supply an answer to the exhaustive question to which legal scholars and historians are still at odds, suffice it to say that the

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[3]One writer has stated that "being left to the tender mercies of the Americans, the Cherokee became pawns in one of the strangest jurisdictional disputes in the annals of American history." Randolph C. Downes, "Cherokee-American Relations in the Upper Tennessee Valley, 1776-1791," The East Tennessee Historical Society's Publications, No. 8 (1936), 39.

national government under the Articles of Confederation, purporting to act in behalf of all the states, entered into treaty negotiations with the various Indian nations. These negotiations, for the most part, pertained to the sale of Indian lands. The states, in the meanwhile, claiming legal title to such land in themselves by virtue of the fact that the land had been granted to them in their original charters, maintained that they and not the national government had authority to negotiate on this matter.

In an attempt to clarify the situation, the Confederation Congress in September, 1783, citing as its authority the ninth article listed in the Articles of Confederation, issued an official proclamation which among other things, specifically prohibited all persons from "purchasing or receiving any gift or cession" of Indian lands without the express authority of the United States.[4] The ultimate solution to controversy was in the nature of a compromise, namely, that the individual states acquired title to land granted to them by their charters, thus taking title through any claim England may have had. The central government, on

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[4]The proclamation was issued by Congress September 22, 1783 and stated: "Whereas the 9th of the Articles of Confederation, it is among other things declared, that" the United States in Congress assembled have the sole and exclusive right and power of regulating the trade, and managing all affairs with the Indians not members of any of the States, provided that the legislative right of any State, within its own limits, be not infringed or violated. See U.S., Laws Respecting the Public Land 1783 (Washington, Gales and Seaton, 1828) IV, 275.

the other hand, was to act as their agent in acquiring such land from the Indians.[5] This arrangement, of course, did not settle the issue as to whether England and France could, by discovery and possession, take sovereignty over the soil in the first instance, nor was it intended to since the question was not even considered as was pointed out by the Supreme Court a few years later.[6]

The first of many federal provisions designed to exert jurisdiction over the Indians as opposed to that of the states is to be found in the Ordinance of 1787. In examing Article Three of the Ordinance, the following language is significant:

> . . . The utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without their consent: and invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.[7]

Two years later on August 20, 1789, Congress passed another act which provided for the appointment of Federal commissioners to represent the Government in its agency relationship to the various Indian tribes and to negotiate

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[5]See Felix S. Choen, Handbook of Federal Indian Law (Washington: Government Printing Office, 1942), 48-51.

[6]Johnson's and Graham's Lessee v. McIntosh, 8 Wheaton (U.S.), 543 (1824).

[7]Act of August 7, 1789, U.S., Statutes at Large, I, 50.

Indian treaties whenever the need arose.[8] The first act passed by Congress which specifically defined the substantive rights of Indians was entitled, "An Act to regulate trade and intercourse with the Indian tribes." Passed on July 22, 1790, Section four of the Act declared:

> . . . That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.[9]

Sections five and six dealt with crimes and trespasses committed by whites against Indians within "any town, settlement or territory belonging to any nation or tribe of Indians . . . ." Such offenders were to be subject to the same punishment to which they would be subject as "if committed in any place or district of country under the sole and exclusive jurisdiction of the United States. . . ." These provisions were reenacted with slight modification in Trade and Intercourse Act of 1793, 1796, and 1799, and were embodied in the first permanent Trade and Intercourse Act of 1802.[10] The general rule of law which emerged from these statutes provided that if any non-resident, Indian, white, or otherwise, committed a crime in any Indian nation or tribe, that person or persons would be tried in a Federal

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[8]U.S., Statutes at Large, I, 54. [9]Ibid., 137.

[10]Ibid., 329, 469, 743. The Act of 1802 is found in U.S., Statutes at Large, II, 139.

District Court and punished by the laws of the United States. This rule was subject to the exception that it could not supercede or affect any treaty which was in force between the United States and any Indian nation. Neither did the rule "extend to any offence committed by one Indian against another, within any Indian boundary."[11] This rule of law was confirmed in the Act of March 3, 1817,[12] and reenacted in the Trade and Intercourse Act of June 30, 1834.[13]

Meanwhile, the problem of Indian lands continued. The Federal Government, accepting the proposition that Indian tribes and nations held a right of occupancy, attempted to find some legal rationalization which would give recognition to the principal and at the same time be consistent with the position that the United States had total sovereignty over all the land as opposed to that of the states. With regard to the latter, Thomas Jefferson wrote to the Secretary of War Henry Knox on August 10, 1791, and stated:

> . . . That the Indians have a right to the occupation of their lands independent of the states within whose chartered lines they happen to be; that neither under the present constitution, nor the ancient confederation, had any state, or person, a right to treat with the Indian tribes without the consent of the Central Government; that consent has never been given away in any treaty . . . .[14]

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[11] Ibid. [12] U.S., Statutes at Large, III, 383.

[13] U.S. Statutes at Large, IV, 729.

[14] Letter of Thomas Jefferson to General Henry Knox, August 10, 1791, Cherokee Documents, No. 14.

The establishment of jurisdiction over Indian tribes and nations was a mandatory requirement on the part of the central government so as to enable it to extinguish Indian titles in lands that were not necessary for their actual use. This idea that the Indians could have usufruct or right of occupancy only to those lands which they actually needed and could put to necessary use became the guiding philosophy behind the policy that the government sponsored and worked out at this time. This problem of aboriginal possession was nothing new as Emerich de Vattel, in accordance with the precept of natural law, stated in 1733:

> That no nation can . . . exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate . . . . We do not, therefore, deviate from the views of nature in confining the Indians within narrower limits. However, we cannot help praising the moderation of the English puritans who first settled in New England; who, notwithstanding their being furnished with a charter from their sovereign, purchased of the Indians the land to which they intended to take possession.[15]

Undoubtedly, such a clear expression of the classical view influenced John Quincy Adams when he touched on the matter in an oration given at the anniversary of the Sons of the Pilgrims, December 22, 1802. On the particular point, he said:

> Their cultivated fields, their constructed habitations, a space of ample sufficiency for their subsistence, and whatever they had annexed to themselves by personal labor, was undoubtedly by the laws of nature theirs. But what is the right of a huntsman to the forest of a

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[15]Emerich de Vattel, Law of Nations, translated by Josephy Chitty, 1839, n. 51, quoted in Cohen, op. cit., 291.

> thousand miles over which he was accidentally ranged in quest of prey? Shall the liberal bounties of Providence to the race of man be monopolized by one of ten thousand for whom they were created?[16]

Adams concluded his speech by saying that "heaven has not thus placed at irrenconcilable strife its moral laws with its physical creation."[17]

As a corollary to this theory arose the question as to what legal significance should be given to the status of the independent Indian tribes. It being impossible to possess land on an individual basis since the land was owned by the community, it followed as a matter of necessity that the only policy that the Government could adopt was that in which the Indian tribes were recognized as "quasi and distinct political communities, or nations, or half sovereign states, and treat them as such." While this method of regarding each tribe as a distinct nation was in fact a "legal fiction," it has been defended on the ground that circumstances and the pressing conditions surrounding the matter necessitated the young republic to adopt such a theory. "It was not part of wisdom then," as one writer explained, "to hamper the struggles for national life with theoretic lines or legal technicalities which stood in the way of practical

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[16] The Annual Report of the Commissioner of Indian Affairs for 1867, 143.

[17] Ibid.

progress."[18]

There has been some argument made that neither Great Britain nor the United States could enter into any kind of an agreement with the Indians for which the Indians would be bound. Part of the contention was based on the idea that the Indians were children of nature, and, in law, like infants, minors, lunatics and were incapable of being held accountable for their acts. Another argument placed emphasis on the fact that the essential ingredients of a contract were missing, namely, the meeting of the minds. That is to say that the American aborigine, familiar only with the law of the forest, could not and did not understand the legal significance of what he was doing when he negotiated a contract for the sale of land. Still another view stressed the notion that the chiefs, whatever power they held over their tribal lands, held it in trust only and that they could not lawfully alienate or sell the "soil of the nation" over which they ruled.

In response to such arguments, the concept of wardship emerged. In using the word "ward" attention should be drawn to the fact that the relationship of guardian and ward, as regarded at common law, implied custody of the ward's person, the responsibility to educate him, the care

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[18]Charles C. Royce, Indian Land Cessions in the United States, Bureau of American Ethnology (Washington: U. S. Government Printing Office, 1855), Part 2, p. 535.

of his property without profit to the guardian, and a report to the courts that such requirements had been complied with.[19] It is clear then that this definition of wardship did not describe the relationship between the United States and the Indian tribes. The idea of "wardship" being applied to relationship between the United States and Indian nations appears to have been first used by Chief Justice John Marshall in the case of the Cherokee Nation v. Georgia. Chief Justice Marshall, however, did not apply the term "ward" to individual Indians; he applied the word to Indian tribes. He did not say that the Indian tribes were wards of the Government but only that the relationship of Indian tribes to the United States was in the nature of a wardship. In this, Marshall explained by the following bill of particulars:

> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations as well as ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory . . . .[20]

Thus in its original and precise signification the term "ward" was applied (a) to tribes rather than to individuals, (b) as a suggestive analogy rather than as an exact description, and (c) to distinguish an Indian tribe from a

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[19]Cohen, op. cit., 169 ff.

[20]Cherokee Nation v. Georgia, 5 Peters 1, 17, 18, (1831).

foreign state. As one writer has stated, the United States was both guardian and court, and as there was no higher authority to which application could have been made, its decisions had to be final, otherwise no transfer of land and title would have been possible, "however advantageous it might have been to the wards."[21]

It is not the object here, however, to labor the point as to what could or could not have been done but rather to touch on some of the events which ultimately led to the final adjudication of the matter. In that respect the Supreme Court in 1823, in the case of Johnson v. McIntosh handed down its decision which conclusively settled the nature of Indian land titles with regard to the federal government.

In giving its opinion, the court traced the long history of Indian land acquisition from the position taken on the subject by European powers to that of the United States under the Constitution. In concurring with the European powers on the matter of discovery, the court succinctly noted that "discovery gave exclusive title to those who made it."[22]

In extending its remarks, the court further observed:

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[21] Royce, Indian Land Cessions in the United States, 536.

[22] Johnson and Graham's Lessee v. McIntosh, 8 Wheaton (U.S.), 543 (1834).

> While the different nations of Europe respected the right of the natives as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy. The history of America, from the discovery to the present day, proves, we think, the universal recognition of these principles.[23]

After digressing to explain that the sovereign powers of Europe, in acceding to this theory of discovery, had subsequently granted and divested of themselves most of land in America to individuals, corporations, or to an association of persons, the court returned to give additional elaboration on the matter as to whether the United States had recognized such principles. In touching directly on the point, the court stated:

> Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?
>
> By the treaty which concluded the war of our Revolution, Great Britain relinquished all claim, not only to the government, but to the "propriety and territorial rights of the United States," whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these states. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted, that either the United States, or the several states, had a clear title to all the lands within the boundary lines described in the treaty, subject only to

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[23] Ibid., 572-574.

> the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it.[24]

In concluding the subject as to who held paramount title to the Indian lands, the high court, somewhat vigorously asserted that it lay with the United States as can be seen in the following language:

> The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise. The power now possessed by the Government of the United States to grant lands resided, while we were colonies, in the crown of its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands can not exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognized the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.[25]

Having put the issue of Indian land titles to rest, the court next turned to the question as to what right, if any, the Indians had left in the soil. Pointing out that the law which regulated, in general, the relations between the conqueror and the conquered was incapable of application in

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[24] *Ibid.*, 544-545. [25] *Ibid.*, 548.

America, a "new and different rule" by the conquerors had to be found. This "new rule," as ultimately refined by the powers of Europe, envisaged the Indian inhabitants as occupants of the soil who might remain there as long as they were peaceful. In accepting this principal as a rule of law, the Supreme Court stated that "it has never contended that the Indian title amounted to nothing. Their right of possession has never been questioned."[26]

The limitations upon Indian rights as emphasized by Chief Justice Marshall in the McIntosh case were supplemented a few years later when the court again had the occasion to examine the matter. In the case of Worcester v. Georgia, Chief Justice Marshall noted that it was difficult to comprehend . . . that the inhabitants of either quarter of the globe could have rightful . . . claims . . . over the inhabitants of the other . . . or over the lands they occupied.[27] Marshall added, however, that war and conquest gave rights which were conceded by the world and "can never be controverted by those on whom they descend."

Following the McIntosh and Worcester cases, opinions oscillated between placing stress on the content of the Indian possessory right and stress on the limitations of that right. In concluding the relationship of Indian nations to the United States, it need be noted that the importance of

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[26] Ibid., 587-589. [27] 6 Peters 543 (1832).

the historic case of Johnson v. McIntosh lay not in anything new, but rather that it gave legal cognizance to that which had long been policy and custom.

Turning from Indian tribes in general to the Cherokees specifically, it has been seen that they first entered into treaty relations with the United States while the latter was operating under the Articles of Confederation. The United States recognized the sovereignty and the territorial boundaries of the Cherokees but required of them that they make no treaty with any individual or foreign power. In 1789 when the Articles were superceded by the Constitution, the United States again negotiated a treaty with the Cherokee Nation the provisions being much the same as before with the United States being granted the "sole and exclusive right of regulating their trade."[28]

In the meantime, Georgia retained title to all her western lands. Beginning in 1795, she entered into the sale of such lands which resulted into the well known Yazoo land frauds. Because of the utter confusion which followed in the wake of such speculative fervor, in 1802 she elected to cede all of her lands to the United States which lay between her present western boundary and the Mississippi River. As part of the cession compact, the United States agreed to remove all Cherokees within the state as soon as it could be

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[28]Act of August 7, 1789, U.S., Statutes at Large, I, 50.

done peaceably and with their consent. Upon becoming aware of the provisions, the Cherokees realized their plight and, as it will be shown later, doubled their efforts to catch up with the white man's civilization. Progress in extinguishing Indian titles was slow, however, and Georgia became impatient. As a result, the controversy between the two became intense. With the issue attracting the attention of the nation, leading men of the day debated the matter. Henry Clay, while serving as one of the peace commissioners to end the War of 1812 read into the minutes of the meeting at Ghent, held in December, 1814, a statement pertaining to the sovereignty of the Cherokees. In his words, the Cherokees claimed the rights of sovereign people as the country which they inhabited was an "inheritance bequeathed to them by their ancestors."[29] In extending his remarks, Clay stated that "their title to the soil and jurisdiction is that of immemorial occupancy and independence."[30] In a speech delivered January 16, 1817, Thomas Jefferson stated that the Cherokees, having surrendered the "usufruct of their lands" to the United States, were denied the same right as it respected other nations . . . and Congress, in regulating

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[29] Cherokee Documents, No. 14.

[30] Ibid. There is reference made to Clay's position on the Cherokee question in "The Speech of Mr. Everett of Massachusetts For Removing the Indians From the East to the West Side," House of Representatives, May 19, 1830, (Washington: Gales and Seaton, 1830), 4.

their trade, provided for punishment should anyone violate such trade regulations . . . ."[31] In 1824, Henry Clay again defended the right of the Cherokees to retain their lands by saying that "they have their rights upon the lands where they inhabit or hunt, and are secured in them by boundaries defined in amicable treaties between the United States and themselves . . . ."[32] On May 31, of the same year, Jefferson voiced his interpretation of the compact of 1802 by pointing that the United States had promised to extinguish title to Indian lands within Georgia's chartered limits as soon as it could be done "peaceably" and upon removal terms . . . [but] the general government was not bound to put Georgia in possession of those lands, unless the Indians should be willing to sell them at a fair price."[33]

Encouraged, however, by the decision given in Johnson v. McIntosh, Georgia decided to take matters in her own hands. In 1824 she asserted partial jurisdiction over the Cherokees and at the same time declared that the Federal Government could not bind a state by any treaty made with an Indian Nation.[34] This proposition was false as it was and

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[31] Cherokee Documents, No. 14, p. 1. See also U.S., Congress, House, Preservation and Civilization of the Indians, 19th Cong., 1st Sess., 1826, p. 1.

[32] Cherokee Documents, No. 14. [33] Ibid.

[34] Charles Warren, The Supreme Court in the United States History (Boston: Little, Brown, and Company, 1922), II, pp. 190-205; see also Acts of General Assembly of Georgia, 1827, pp. 236-250.

is a general rule of law that treaty provisions take precedence over all the law in the land, even that of the Constitution. The difference here, however, as maintained by Georgia was to be found in the qualification given to the terms sovereignty and treaty as they were applied to any Indian nation.

Digressing briefly on the meaning of the two words, it is to be noted that both are superlative terms; that is their meanings and definitions cannot be shaded or changed. The word treaty refers to an agreement between sovereign powers. If it were between something other than sovereign states, the agreement would be called something else such as a compact or contract. On the other hand, the term sovereign or sovereignty implicitly, as well as explicitly, gives the connotation of an independent nation with such nation being in no way limited in its ability to act.[35] Attention is called to the meaning of these two terms, not to engage in a game of dialectics, but rather to point up

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[35]As defined by the United States Supreme Court in Charlton v. Kelly, 57 L.Ed. 1274, (1904) a treaty is an agreement, league, or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns or the supreme power of each state. As further construed by the Federal Supreme Court a treaty is not only a law but also a contract between nations and must, if possible, be so construed as to give full force and effect to all its parts. In the well known case of Chisholm v. Georgia 2 Dallas, 455, 1 L.Ed. 440, (1890), the Federal Supreme Court defined sovereignty as the supreme absolute power by which any independent state is governed.

the problem which confronted the jurists in trying to give a legal answer to some of the questions which were inherent in the use of such terminology and at the same time be consistent with expressions of public policy.

It can be said, however, that the high justices of the day were equal to the task. From a score of decisions handed down, there emerged the rule of law, applicable only to Indian nations in America that they had sovereignty only in the sense that they had power or jurisdiction to govern and to administer their own immediate and domestic problems.[36] While negotiating on matters entirely within such an area they could make a treaty only with the United States but such treaty had the same force and dignity as if made with a foreign power. Attorney General William Wirt, in an opinion given to President John Q. Adams in 1828 pertaining to the Treaty of Indian Springs, was confronted with the necessity to answer the contention that Indian treaties were not effective because they were not treaties with an independent nation. In discussing this contention the Attorney General said, in part:

> If they are independent to the purpose of treating, they have all the independence that it necessary to the argument . . . the point, then, once conceded, that the

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[36]This was regarded as being true by reason of the fact that Indians were guardians of the Federal Congress. See Super v. Work, 3 F. 2d 90 (1926). Congress has power to abrogate, supersede, or modify a treaty with Indians, or any provisions of such a treaty. Lone Wolf v. Hitchcock, 23 S. Ct. 216, 187 U.S. 553, 47 L.Ed. 299, (1903).

> Indians are independent to the purpose of treating, their independence is, to that purpose, as absolute as that of any other nation.[37]

Returning now to the matter between the state of Georgia and the Cherokee Nation, it is to be seen that Georgia continued to push for a removal of the Cherokees. By a legislative resolution passed December 27, 1827, Georgia decided to take definite steps to bring the Cherokees under complete control of the state.[38]

A few months later, gold was discovered in the Cherokee Nation near the present town of Dahlmega, Georgia. That, plus the election of Andrew Jackson to the Presidency, prompted the legislature of Georgia in December, 1829 to extend complete jurisdiction over the Cherokee Nation. At the same time, the legislature declared "that all laws, usages, and customs, made and established and enforced in the said territory, by the said Cherokee Indians, be, and the same hereby, on and after the first day of June, 1830, declared null and void . . . ."[39]

Principal Chief John Ross, described by Governor Lumpkin of Georgia as a man who should have been "banished to New England, Hayti, or anywhere else,"[40] sought redress

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[37]U.S., Attorney General's Opinion 1789 to 1939, II, 110 (1828).

[38]Wilson Lumpkin, The Removal of the Cherokee Indians from Georgia (New York: Dodd, Mead, 1907) I, 44-45.

[39]See footnote 21, Ballenger, "The Development of Law and Legal Institutions Among the Cherokees," 11-12.

[40]Lumpkin, op. cit., 192.

from the Georgia laws by instituting the now famous case of the Cherokee Nation v. The State of Georgia.[41] In dismissing the case in January, 1831, the Supreme Court by a majority opinion, ruled that the Cherokee Nation did not constitute a "foreign" state within the meaning Constitution so as to bring them within description of the parties who might sue and be sued in the Federal Court.[42] While the court held that it had no original jurisdiction to litigate the matter as to whether Georgia could or could not extend its power over the Cherokee Nation, its explanation as to why it had no such power was conclusive in defining the legal status of the Cherokee Nation with respect to its relationship to the United States.

In the words of the court, the Cherokee Nation was a "domestic dependent Nation" having as its guardian the United States and could not, separate and distinct from the United States maintain its own suit. In other words, the Cherokee Nation was a ward of the United States and the United States, and the Cherokee Nation would have to maintain the suit in the name of its guardian.[43] Such was and is a

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[42] 5 Peters 1, (1831).

[43] The United Government as the guardian and trustee has the right and duty to maintain a suit for the purpose of preserving intact an Indian reservation with the management of internal affairs within the hands of the Indians. This was so held in United States v. Charles, 23 F. Supp. 346 (1938). While the United States had no ownership in Indian lands in any of the thirteen original states, the native Indians who held and occupied such lands, whether in common

general rule of law, but the only catch in this particular instance was that the guardian and not the ward could decide if and when a lawsuit was called for, and, further, the guardian was not the Congress of the United States, but the chief executive and his Solicitor General. The executive at this time was Andrew Jackson. Chief Justice John Marshall, undoubtedly aware of the political as well as the legal ramifications, vigorously dissented from the majority by saying that the "acts of our Government plainly recognize the Cherokee Nation as a State, and the courts are bound by these acts."[44]

Having won the first round in its controversy with the Cherokees, Georgia enacted a law in late 1830 to the effect that all white persons living within the area claimed by the Cherokees were required, after March 11, 1831, to obtain a license and swear an oath of allegiance to the state. Upon the refusal to comply with the law, two missionaries, Samuel A. Worcester and Elizur Butler were arrested, tried, convicted, and sentenced to four years at

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or in severalty, by agreement between themselves, were wards of the Federal Government; and it could maintain suits for the protection of their property and rights. See United States v. Boylan, 256 F. 468, 42 S. Ct. 113, 257 U.S. 614, 66 L.Ed. 397 (1921). As stated in the case of United States v. Charles, the Federal Government may sue to prevent a state from over-riding the tribal customs and usages respecting descent of realty and substituting therefore the state law with respect thereto.

[44]5 Peters 1, 16 (1831).

hard labor.[45] Worcester appealed his case, Worcester v. The State of Georgia, directly to the Supreme Court which accepted jurisdiction because of the alleged constitutional violation and issued a writ of error to the Superior Court of Georgia serving the said writ on the Governor and the Attorney General of the State. Worcester had pleaded his own defense and had maintained that the State of Georgia was without power to extend its laws over the Cherokee Nation. On November 31, 1831, Wilson Lumpkin, Governor of Georgia wrote to President Jackson, explaining to him that it was necessary for Georgia to extend state law over the Cherokee Nation because the discovery of gold in their lands had produced a lawless situation that the Cherokees were incapable of handling. As envisaged by Lumpkin it was a case in which "a few thousand persons dispersed over a territory of five million of acres of land, abounding in rich gold mines; the people indisposed and incompetent to aid in the administration of the law . . . ." The solution to this problem as well as the honorable thing to do as Lumpkin saw it was place in the Cherokee Nation "a virtuous freehold population" made up of the citizens of Georgia who, backed by the Georgia legislature, would be able to protect the rights of the Indians and their "property of every kind."[46]

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[45]Cohen, op. cit., 55.

[46]Lumpkin, op. cit., 193-194.

In rejecting Georgia's argument of benevolent paternalism, the Supreme Court held on March 3, 1832, that the Georgia statute was unconstitutional because the Federal Government had exclusive control over the Cherokee Nation, and that no state had power to pass any laws affecting them on their territory. Marshall, speaking for the court, declared:

> The Cherokee nation, then, is a district community, occupying its own territory, with the boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and the acts of Congress.[47]

At this point it may be well to stop and briefly enumerate some of the legal principles which the Supreme Court had enunciated up to this time with respect to status of the Cherokee Nation. In the order of their occurrence, the first clear cut pronouncement was that the Cherokees had a possessory right in their tribal lands. This right was such that it could not arbitrarily be taken away except under such conditions that would comply with the requirement of a contract of sale. Such a sale could only take place between the duly delegated Cherokee Chiefs and the authorized agents of the Federal Government. States and individual whites were excluded from buying land from either individual Cherokees or deputies of the Cherokee Nation. Second,

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[47] 5 Peters 560 (1832).

the Cherokee Nation was permitted to make treaties only with the United States; that such treaties were superior to any enactment made by a state legislature, but inferior to that of a Federal statute. Third, the Cherokee Nation was sovereign only in the administration and supervision of its own domestic and internal affairs. Fourth, the relationship between the United States and the Cherokee Nation was in the nature of ward and guardian which by judicial construction meant (1) that only the United States could maintain a lawsuit in behalf of the Cherokee Nation and (2) that the United States had exclusive control over the Cherokee people.[48]

With regard to the above there was some difference of opinion as to how far the United States should go in permitting its Cherokee wards to govern themselves. The occasion to debate the issue was brought on by the fact that continued agitation for removal finally developed a cleavage within the ranks of the Cherokees themselves.[49] One faction favored staying in Georgia come what may, whereas the other regarded further resistance as hopeless. Rival delegations went to Washington and councils were held in the nation to debate the problem. The climax was reached on December 29,

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[48]As announced by the Supreme Court in United States v. The Creek Nation, 82 L.Ed. 599, (1938), Congress was free to exert its guardianship in any manner which it deemed appropriate, and might adjust its action to new and changing conditions as long as no fundamental right was violated.

[49]Wright, op. cit., 64.

1835 when the removal faction signed a treaty at New Echota with commissioners of the United States which provided that all Cherokee lands in the East were ceded to the United States and that the Eastern Cherokees were to have a joint interest in lands ceded to the Western Cherokees in Indian Territory and that all Cherokees were to remove west two years after ratification of the treaty.[50] Chief John Ross led a delegation to Washington and submitted a protest signed by thousands of Cherokees. Despite this, the United States Senate ratified the treaty May 23, 1836.[51]

Two years later, Ross and his faction, faced with the hazards of being driven west by the army, resolved through the agency of their General Council, it convening at Camp Aquohee, Georgia, that the Cherokee "constitution, laws, and usages" would remain in force and effect and to continue so in perpetuity. At the same time and in the same resolution, they repudiated the treaty of New Echota by describing it as the "pretended treaty."[52] Adopted at the same time was a verbal resolution which decreed that all signers of the "pretended treaty" be put to death. The authority for imposing the death penalty was to be found in the law of treason which the General Council had passed on

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[50]Cohen, op. cit., 55. [51]Wright, op. cit., 65.

[52]Ibid., see also Cohen, op. cit., 55. The best account of this treaty is perhaps given by Grant Foreman, Indian Removal (Norman: University of Oklahoma Press, 1932), 264-265.

October 29, 1829, when both factions were represented.[53]

Soon thereafter, the Eastern Cherokees moved west, established settlements, and organized a national convention comprised of themselves and the Old Settlers (Western Cherokees). Old animosities broke out between the two factions and three days after adjournment, three prominent signers of the New Echota treaty "were assassinated at almost the same hour in different parts of the country."[54] Feeling ran high and civil war threatened.

It was at this juncture that the War Department made public the Aquohee Resolution and in the words of J. R. Poinsett, Secretary of War, advocated the Federal Government's intervention. Poinsett maintained that of the United States was "not disposed to interfere with the enactment or the execution of laws which do not violate natural rights . . ." but that it had a sovereign right to interpose its will to

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[53]Ralph Henry Gabriel, Elias Boudinot, Cherokee and His America (Norman: University of Oklahoma Press, 1941), 139; in a statement made and signed December 25, 1890, Allen Ross, son of John Ross, stated that the Committee appointed certain persons to draw from a box which contained twelve cards that were marked X. Those who drew such marked cards were the executioners. Grant Foreman, "The Murder of Elias Boudinot written by Allen Ross," Chronicles of Oklahoma XII (March-December, 1935) 23. For Gabriel's treatment of Boudinot's murder, see Gabriel, op. cit., 176-178.

[54]Wright, op. cit., 66. For an extended treatment of these killings as brought out in the trial of Stand Watie, held in Arkansas, 1843, see Grant Foreman, "Trial of Stand Watie," Chronicles of Oklahoma, XII (March-December, 1935), 305-339. For additional information on meeting Camp Aquohee, see Gabriel, op. cit., 142; also Cohen, op. cit., 55.

"preserve the peace of the country, and to protect the innocent against the vindictive passions of their persecutors . . . ."[55] The Secretary of War further alleged that the Cherokee legislators exceeded their power in condemning to death those "chiefs, who in the exercise of their authority vested in them, signed a treaty with the United States . . . ."[56]

Undoubtedly, the Secretary of War was correct in his view that the United States could intervene in the internal affairs of the Cherokees to prevent bloodshed and protect lives, but it would seem that such an action on the part of the Federal Government could be taken only after it was clear that the officials of the Cherokee Nation were no longer capable of maintaining law and order. Otherwise the stipulations in the treaty of New Echota assuring the Cherokees domestic sovereignty would have had little meaning.[57]

Here again, it is not intended to theorize as to what could or could not have taken place, but rather to draw emphasis to the fact that the United States did not place the Cherokee Nation under military rule. Neither did it make arrests nor remove any Cherokee official from office.

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[55] Annual Report of the Commissioner of Indian Affairs, 1839, p. 425.

[56] Ibid.

[57] This treaty was signed December 29, 1835 and the full text is to be found in U.S., Statutes at Large, VII 478-488 (Supplement).

While a government commission was appointed to investigate conditions in the Cherokee Nation, it acted only in an advisory capacity. While this policy of passive intervention may have lacked something to be desired by the more militant, it found a strong supporter in Congressman John Bell of Tennessee who stated in 1840 that it had always been the policy of the United States to allow the Cherokees to settle their factional differences in their own way. For fifty years, he pointed out, "they have been permitted to be their own legislators--to enjoy their own laws and customs, with the sole condition that they be not inconsistent with the Constitution and the laws of the United States."[58]

But whatever the difference of private opinion on the matter, the fact remained that the United States, during this turbulent period, made no aggressive move to impeach the domestic sovereignty of the Cherokee Nation. This principal was given judicial approval as late as 1894 in the case of Edwin D. Chadick, Complainant, v. Walter A. Duncan et al, Defendants when the Supreme Court of the District of Columbia held that the Cherokee Nation had absolute control of its own internal affairs. Briefly the facts of the case were as follows: The Federal Government had bought from the Cherokee Nation certain lands in the Cherokee Outlet.

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[58]"John Bell's Suppressed Report," National Intelligenar, (1840), N. 28 as cited by Ballinger, "The Development of Law and Legal Institutions Among the Cherokees," 16.

Payments for these lands were delayed. Therefore, the Government allowed the Cherokee Nation to issue bonds and sell them for cash. The Government endorsed the bonds and guaranteed their payment. The Cherokee Nation, then offered them for sale to Edwin D. Chadick, For some reason, the Cherokee Nation sold the bonds to R. T. Wilson and Company of New York. Chadick brought suit against the Cherokee Nation to force it to deliver to him the bonds as had been agreed. A temporary injunction was granted against the Cherokees restraining them from disposing of the bonds, pending an appeal to the Supreme Court of the District of Columbia. The appellate court, however, dissolved the restraining order and refused to grant any further injunction on the grounds that the Cherokee Nation was not under the jurisdiction of the court except in so far as it had submitted voluntarily to plead against such jurisdiction. The court further ruled that the Cherokee Nation had control over its own internal affairs and like a state or territory could not be sued without its consent.

In 1854 President Franklin Pierce, acting on the opinion and advice of Attorney General Caleb Cushing, proclaimed by executive decree that the Fugitive Slave Law applied to Indian Territories as well as states and that the Federal Government was obligated to assist in the recovery

of slaves who had escaped into such areas.[59] By implication the President was giving, at least in this particular the same standing to the Indian Nations as to states.

Thus far the discussion has been concerned with the Cherokee Nation and its relationship to the Federal Government but the question now arises as to what was the status of an individual who was an inhabitant and lived within the nation. In terms of criminal as well as civil jurisdiction it became the policy of the Federal Government to respect tribal law as it pertained to Indian citizens of their own nations. As noted, this was expressed in the Act of March 3, 1817 which contained the following provision:

> Provided, That nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian Nation, or to extend to any offence committed by one Indian against another, within any Indian boundary.[60]

The first judicial expression of the above was made by John Marshall in the Worcester case in which he stated that it was the "settled law of nations, that a weaker power does not surrender its independence--its right of self government--by associating with a stranger and taking its

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[59] Indian Agency Records, Opinion of Attorney General, February 18, 1854, Oklahoma Historical Society. The clause of the fugitive slave law applicable here stated: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

[60] U.S., Statutes at Large, III, 383.

protection."[61] Marshall's analysis became the basis for Indian self-government despite the fact that Georgia refused to release Worcester who was compelled to languish for sometime after the Supreme Court ruling in a Georgia prison.[62] In giving heed to Marshall's pronouncement of Indian self-government, both Federal and State courts permitted tribal courts, where not limited by Federal law, to apply the law of their own nation as it had been expressed or exercised through customs and handed down by word of mouth or through written constitutions. This was the basis for the decision rendered by Alabama Supreme Court in 1845 in the case of Wall v. Williamson in which the court upheld tribal law as it was related to divorce.[63] Further affirmation of these principles is found in the case of Talton v. Mayes.[64] Cherokee law authorized indictment by a grand jury composed of only five members. The defendant, after indictment by such number sued out a writ of habeas Corpus to a federal court alleging that a grand jury of five was not a grand jury as contemplated in the Fifth Amendment of the Federal Constitution rejecting the defendant's contention, the Supreme Court ruled that the Fifth Amendment applied only to the acts of the United States; that the sovereign powers of the Cherokee Nation, although recognized by the Federal Government,

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[61] 6 Peters 560 (1832). [62] Cohen, op. cit., 123.

[63] 8 Ala. 48, 51 (1845). [64] 163 U.S. 376 (1896).

were not created by the Federal Government; and that the judicial authority of the Cherokee Nation was, therefore, not subject to the limitations imposed by the Federal Bill of Rights.

In the case of Famous Smith v. The United States,[65] Smith, a Cherokee had killed another Cherokee with the alleged act taking place in the Cherokee Nation. He was tried and sentenced to be executed by a Federal Court. He appealed the decision on the grounds that a United States court lacked proper jurisdiction to hear the case. The Supreme Court upheld the defendant's argument by saying:

> Jurisdiction may be created in any particular case by the legislation of the United States but until this is done the federal courts have no more right to interfere when the Indian courts have jurisdiction than they have the right to interfere with the High Court of Chancery of England.[66]

The same principle was applied much earlier in the case of Jacob West. West, a white man, was accused of murdering a Cherokee and was arrested. Tried by one of the circuit courts in the Cherokee Nation, he was found guilty and sentenced to death. Appealing his case to the Federal District Court in Little Rock, Arkansas, the court refused jurisdiction ruling that West, by marrying an Indian and by living in the Cherokee Nation, had become a member of the tribe.[67]

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[65] 151 U.S. 50 (1894). [66] Ibid., 58.

[67] The case was decided in 1843 and reported in the Annual Report of the Commissioner of Indian Affairs, 1844, p. 461.

That this rule was not always followed, however, is indicated in a report made to the Commission of Indian Affairs in 1872. According to the report, a Cherokee, Ezekiel Proctor, killed Polly Chesterson, a Cherokee woman, and then assulted her husband who was a white man. Proctor was duly arrested by the officials of the Cherokee Nation was brought to trial before a Cherokee court. In the process of the trying him, a United States marshal and his posse "swept down on the Cherokee Court" and stated that Proctor was to be tried in Fort Smith, apparently because he had assaulted a white man. The court refused to surrender their prisoner, and a fight started in which three Cherokees were killed and six wounded. However, they gave a good account of themselves in that they killed eight members of the posse and wounded three before they were ultimately subdued and taken to Fort Smith. Included among the prisoners were several Cherokee bystanders who were "unarmed and had no part in the foray."[68]

Despite the several rules of law enunciated by both state and federal courts, confusion and ugly animosities

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[68]V. A. Travis, "Life in the Cherokee Nation a Decade After Civil War," Chronicles of Oklahoma, IV (March-December, 1926), 19. Jurisdictional conflict was one of the major difficulties between the Cherokee Nation and the United States. In 1824 one of the chiefs submitted a letter to an official of Tennessee in which he was asking that a white man be punished who had entered the nation and had "grossly abused" another white man from Tennessee. The Weekly Register, edited by H. Nites, (Baltimore: Franklin Press, 1824), IV, 97.

characterized the legal relations of the Cherokee Nation and her guardian over matters of jurisdiction. After the Cherokees had removed to Oklahoma, Congress extended the laws of the state of Arkansas to the Indian Territory in which case, crimes not defined by statute but had existed as common law, were propounded by the territorial judges when the need arose.[69] Such judges justified this on the grounds that congress had jurisdiction to try all crimes committed which were not specifically exempt by treaty provisions with the Five Civilized Tribes regardless of who and where the act was committed.[70] It is to be said, however, that this was an exception rather than the rule as the Federal Supreme Court in Ex parte Kan-gi-shun-ca, citing a long line of cases, restated the principle that jurisdiction over crimes committed by one Indian against another, or within an Indian Nation, was to be determined by controlling statutory and treaty provisions, and in the absence of such authorization, a crime committed by an Indian against another Indian in their own Nation was a matter for regulation by tribal custom and was not within the jurisdiction of either federal or state courts.[71] By the Act of March 3, 1885, the Federal

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[69]Oklahoma, Ex parte Nawabbe, 61 P. 2d 1139 (1911).

[70]Indian Territory, Glover v. United States, 91 S.W. 41, 6 Ind. T. 262 (1906).

[71]Ex parte Kan-gi-shun-ca, 3 Supreme Court, 396, 302 U.S. 666, 82 L.Ed. 514 (1883). For an extreme application of the doctrine of tribal sovereignty see Ex parte Grow Dog,

Government limited the criminal jurisdiction of tribal courts by providing that the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny were to be tried in Federal courts regardless of whether the acts were committed by a white man or an Indian.[72] A few years later robbery, incest, and assault with a dangerous weapon was added to the list.[73]

With reference to civil jurisdiction, stated broadly, the rule seems to have been that treaties contained no expressed provisions on the subject and, therefore, by implication, tribal law governed the members of the Cherokee and other Indian nations, to the exclusion of state law.

Before concluding this discussion on the status of the Cherokee Nation a few other items need be noted. On July 12, 1839, the Western and Eastern Cherokees signed the formal "Act of Union"[74] which declared them to be one political body, and on September 6, 1839,[75] they drafted a new

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109 U.S. 556 (1883). Language expressly concerning tribal sovereignty is found on page 571. See also Cherokee Nation v. Kansas Railway Co., 135 U.S. 641, in which the Supreme Court stated that since local self-government of the Cherokees "existed prior to the Constitution, they are not operated upon by the Fifth Amendment . . . ." p. 382-384.

[72] U.S., Statutes at Large, XXIII, 362, 385; see also United States Code, XVIII, 548.

[73] Act of March 4, 1909, sec. 328, U.S., Statutes at Large, XXXV, 1088, 1151.

[74] Compiled Laws of the Cherokee Nation, (1881), 5-9

[75] Ibid., 10-27.

constitution. Ratified on June 26, 1840, the new document, with slight changes, was the same as that of 1827.[76] In 1856, a new district was added which increased the old number of eight to nine.

On October 7, 1861, Stand Watie, forcing Chief John Ross to abandon his position of neutrality in the Civil War, met with Indian Commissioner Albert Pike and declared for the Confederacy. In the course of the war, the Cherokee Nation divided into the Northern and Southern factions each with its own government.[77] Meeting in Washington with United States representatives on July 19, 1866, the Northern Cherokees signed the Treaty of 1866 which provided for a continuation of the Cherokee Nation.[78] On May 17, 1893, officials of the Cherokee Nation executed a deed to the United States Cherokee Commission relinquishing their right and claim to what remained of their western Outlet land.[79] In the same year the Dawes Commission was appointed by Congress to deal with the Five Civilized Tribes in order to

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[76]Wright, op. cit., 67. [77]Ibid., 70-71.

[78]U.S., Statutes at Large, XIV, 799. While the Cherokees were compelled to give up much territory, under the terms of the treaty, they were promised peace, general amnesty, and continued self-government. In return, they agreed to abolish slavery, grant civil and property rights to freed men, and to acknowledge that the Federal Government had paramount control over their affairs. See also Royce, Cherokee Nation, 337.

[79]Wright, op. cit., 73.

secure agreements for allotment of lands in severalty.[80] After rejecting the Dawes proposal on two previous occasions, the Cherokee Nation, by a vote of the people, held August 7, 1902, agreed to dismantle their government and to accept land in severalty. By March, 1907, the tribal rolls were completed with each allotment amounting to 110 acres. By 1917 all allotment deeds were signed by officials of the Cherokee Nation, and William C. Rogers, Principal Chief, resigned his office.[81]

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[80]By the Act of March 3, 1871, it was provided that there would be no further treaties made with any Indian tribe or nation in the United States. U.S., Statutes at Large, L, 566. From the standpoint of a legal history of the Cherokees as well as other Indian nations, see Cohen, op. cit., 46-67.

[81]Wright, op. cit., 73.

# THE CHEROKEE NATION,

## INDIAN TERRITORY.

To All To Whom These Presents Shall Come, Greeting:

WHEREAS, By the Act of Congress approved July 1, 1902 (32 Stat., 716), ratified by the Cherokee Nation August 7, 1902, it is provided that there shall be allotted by the Commission to the Five Civilized Tribes, to each citizen of the Cherokee Tribe, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, and,

WHEREAS, It was provided by said Act of Congress that each citizen shall designate or have designated and selected for him, at the time of his selection of allotment, out of his allotment, as a homestead, land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, for which he shall receive a separate certificate, and,

WHEREAS, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of

Rachel D. Henry

a citizen of said tribe, as an allotment, exclusive of land equal in value to forty acres of the average allottable lands of the Cherokee Nation, selected as a homestead as aforesaid,

NOW, THEREFORE, I, the undersigned, Principal Chief of the Cherokee Nation, by virtue of the power and authority vested in me by aforesaid Act of the Congress of the United States, have granted and conveyed, and by these presents do grant and convey unto the said

Rachel D. Henry

all right, title and interest of the Cherokee Nation, and of all other citizens of said Nation, in and to the following described land, viz: The North West Quarter of the North West Quarter of the South East Quarter of Section Thirty (30), and the North East Quarter of the South West Quarter of the South East Quarter and the East Half of the North West Quarter of the South East Quarter of Section Nineteen (19), and the West Half of the North West Quarter of the South West Quarter and the West Half of the South West Quarter of the South West Quarter of Section Twenty (20), Township Twenty-two (22) North and Range Seventeen (17) East, and the North East Quarter of the North East Quarter of the South East Quarter and the North West Quarter of the North West Quarter of the South East Quarter of Section Twenty-nine (29), Township Thirteen (13) North and Range Twenty-six (26) East

of the Indian Base and Meridian in Indian Territory, containing

One Hundred (100)

acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to all the provisions of said Act of Congress.

IN WITNESS WHEREOF, I, the Principal Chief of the Cherokee Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this fifth day of December, A. D. 1906.

Principal Chief of the Cherokee Nation.

Department of the Interior,

Approved [illegible] 1906.

James Rudolph Garfield
Secretary.
By Oliver A. Ridgely

**An Allotment Deed of a Cherokee Citizen, 1906. Cherokee Nation Papers, Manuscripts Division, University of Oklahoma.**

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