GEORGIA, GWINNETT COUNTY.

Gwinnett Superior Court, March Term, 1831.

THE STATE vs. WORCESTER AND OTHERS. } *Habeas Corpus.*

THE CASE.

The defendant and five others were in the custody of Col. Sanford, Georgia Commissioner, to whom the writ was directed, to shew the cause of their capture and detention, and who returned upon said writ, that as Commissioner aforesaid, appointed under the act of the State of Georgia, passed on the 22d of December, 1830, entitled "An Act to prevent the exercise of assumed and arbitrary power, by all persons under pretext of authority from the Cherokee Indians, and their laws, and to prevent white persons from residing in that part of the chartered limits of Georgia, occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the State within the aforesaid territory." He had arrested said persons for a violation of said act, and particularly the 7th section thereof, and had brought them to be surrendered to the civil authority to be dealt with as said law directs. Whereupon their discharge was moved for, upon the grounds herein after mentioned. Dougherty and Trippe for the State. Harris, Harden and Underwood for Defendants.

THE OPINION OF THE COURT.

Preparatory to a decision of this case, it will be necessary to bring into view, such parts of the above recited act, as are applicable to the question. The 7th section is in the following words: "That all white persons residing within the limits of the Cherokee Nation, on the first day of March next, or at any time thereafter, without a licence or permit from his Excellency the Governor, or from such agent as his Excellency the Governor, shall authorise to grant such permit or licence, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and upon conviction thereof, shall be punished by confinement in the Penitentiary at hard labor, for a term not less than four years: PROVIDED, that the provisions of this section shall not be so construed, as to extend to any *authorised agent or agents*, of the government of the *United States*, or of this State, or to any person who may rent any of those improvements which have been abandoned by Indians, who have emigrated west of the Mississippi." And it provided also, that females and children under age, were not to be effected by the section. The 8th section provides, "That all white persons, citizens of the State of Georgia, who have procured allicence in writing from his Excellency the Governor, or from such agent as his Excellency the Governor, shall authorise to grant such permit or licence, to reside within the limits of the Cherokee Nation, and who have taken the following oath, viz: "I, A. B. do solemnly swear (or, affirm as the case may be,) that I will support and defend the Constitution and laws of the State of Georgia, and uprightly demean myself as a citizen thereof so help me God, "shall be, and the same are hereby declared, exempt and free from the operation of the 7th section of this act."

The 11th section provides for the appointment of the Commissioner and guard, for the purpose of carrying the act into effect. And the 13th section declares the duty and power of the guard, or any member thereof in arresting persons charged with, or detected in a violation of the laws of the state, within said Nation, and to convey them as soon as practicable before the civil authority to be dealt with as the law directs.

In the prosecution of the defendant's application for discharge, their Counsel set up two classes of objections to the act under which they are apprehended.

1st. That it is contrary to the Constitution of the United States.

2. That it is contrary to the Constitution of the State of Georgia.

In the first, upon four grounds, viz:

1st. No State shall pass any *ex post facto* law.

2d. The citizens of each state shall be intitled to all privileges and immunities, of citizens in the several States.

3d. No state shall, without the consent of Congress, lay any duty of tonnage, *keep troops or ships of war, in time of peace*, enter into any agreement or compact with another state, or with a foreign power, *or engage in war*, unless *actually invaded*, or in such *imminent danger* as will not admit of delay.

4th. the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no *warrants* shall issue, but upon probable cause, supported by an oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

In the last, upon the following ground, viz.

"No person shall be denied the enjoyment of any civil right, *merely* on account of his religious principles," and as connected with this ground, the oath required by the statute is a *test oath*, and therefore contrary to the inherent rights of man.

The course of the argument makes it necessary to examine all these points.

1st. It is said that the act is an *ex post facto* law,—in this, that these individuals were residing on the territory at, and before the time of the passage of the act, and contrary to no existing law, and that a residence, innocent at that time, could not be made criminal by the Legislature.

This objection will be made to disappear by a very plain statement. What is an ex post facto law? It seems to be agreed on all sides, that it is a law punishing an act, which when committed, was repugnant to no law. In other words, according to the first lesson of every tyro in the legal science, law is a *rule of action* prescribed for the conduct of men, and consequently regulates all his actions after the passage of the law, and can never be said to be a rule of action to past conduct, or actions existing prior to the law. Is this the fact in relation to the statute before us? When was it passed? On the 22d of Dec. 1830. What residence of these people constitutes the crime? Is it the residence at the time, or before the passage of the act? Candor will dictate a negative answer to this question. When then does the crime of residing in the nation commence? Not until after the first day of March ensuing, the date of the act. How then can it be said, that this is prescribing a rule of action to the past, instead of the future conduct of the citizens? It cannot be.

2d. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several States. It is urged, that the law is not a general one, that it applies to a particular part of the state, and these individuals being citizens of other states, and coming into that territory contrary to no law at the time of their emigration, are now made to perform duties that are not required by the other citizens of Georgia residing in the settled parts of the State. This is not a true construction of the act. Laws are not made to act upon mere territory, but upon people who may occupy that territory, whether one, or one thousand miles square, and if all persons, without discrimination, are to be equally effected by the law so soon as they enter the forbidden land, it is a general law, because it is the whole people sought to be restrained, and not the land. The expression of the law is, not citizens of other states, but *all white persons*, whether citizens of Georgia or elsewhere, who may reside within the limits of the Cherokee Nation on, and after the first of March shall, &c. Now here is no distinction between citizens of this and other States. The moment a citizen of South Carolina comes into Georgia, he is a citizen of Georgia, for all the purposes of enjoying the privileges and immunities resulting from the powers granted by the states to the Federal government, in that sense, he is a citizen of the Union, and consequently a citizen of each state. In reference to the reserved and ungranted powers of the states, he is not a citizen entitled to all the immunities and privileges of the citizens of the state into which he comes, such as voting at state elections, participating in public lands, &c. until he has complied with certain conditions as to residence, imposed by the laws of the state. But without this distinction, these persons cannot complain of the law, for it applies to our own citizens as well as all others, and surely it will not be contended that citizens of other states shall have *greater* privileges than our own! We will not let our own reside there without obeying the law.

3d. No state shall *keep troops or ships of war* in time of peace. It is contended, that the officers and guard for the protection of the gold mines, and to enforce the laws of the state within the Indian territory, are such troops as come within the meaning of the clause just quoted. It is said they bear arms, are raised for a year, have barracks, are paid and furnished like regular troops, &c. Now this may all be true, and yet they are clearly not troops in the acceptation of the constitution. The character of a military service is better known by its *objects*, than by its *name* or *organization*. They may be called guards, troops, nay if you please, army—they may even wear a uniform and bear arms, but if they are not raised for the purposes against which the constitution intended to guard, they neither violate its letter nor spirit. The Federal Convention, with their well known wisdom, caution and forecast, seem to have thrown around every power in the constitution a due and proper restriction, or some forcible expression by which their meaning might be ascertained. In the clause under consideration, the word WAR is the leading and controlling idea, is mentioned twice, and stands intimately connected with the phrase relied upon. To wit, no state shall "*keep troops or ships of war* in time of peace, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." Now who does not perceive the object of this clause? What is *war*, and against whom is it *waged*? Is it ever carried on by a regular government, not in a state of revolution against its own citizens? Are we at war, or do we contemplate war in protecting our gold mines, and in enforcing the laws of the state within a particular district? A proper attention to the concluding paragraph of the clause, will plainly shew that the Keeping of troops *in time of peace*, has reference to defence against foreign invasion, for troops may be raised and kept, and the states may engage in *war* if "*actually invaded*" or in "such imminent danger as will not admit of delay." Here the *object* and the *enemy* are clearly designated, against which their shall be no preparation for war, *in time of peace*, on the part of the states. This power of defence having been conferred upon the Union, the separate states should not interfere with it for very many reasons, but particularly, for fear they might embroil the Federal Government in unnecessary wars. (*See the Federalist on this subject.*) It cannot be believed for a moment, that the convention intended by this clause to take away from the states, the right to execute *by force*, their municipal regulations. The moral powers of a government would be perfectly useless, if they could not employ their physical energies to carry them into effect, and these must be exerted exactly in proportion to the degree of resistance to the public authority. Slight resistance will require the application of only slight force, or just enough to overcome it, and this will be found in all the varied degrees of opposition to the laws, from the refusal to pay a simple debt, up to the most angry state of insurrection, and the corresponding application of force, from the arm of a Constable to the whole artillery of the government. Hence, all those guards for the protection of Jails, Penitentiaries, Cities, and many other objects not now necessary to be mentioned. Hence the patrol of the southern states. These may with the same propriety be called troops of war, or rather for the purposes of war, as the guard designated to protect the gold mines. This is public property and can at the discretion of the state, be guarded and protected, as well as any other property. What is the difference between a treasure in the Cherokee Nation, and one in the state-house? A Captain and guard for the last thirty years have been kept to secure the public monies in the treasury, and no one has ever suspected for a moment, that they were such troops, in *time of peace*, as were forbidden by the federal constitution.

4th. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This clause is said to be violated by seizing these persons without a warrant, without oath, and without the usual regular process for arresting offenders against the laws of the land. This is an amendment of the Constitution, and one of the offsprings of that jealous fear entertained by the states, of the powers of the federal government, and it was designed to protect the citizens from a species of *star chamber* oppression, which in England, had proved fatal to many a true friend of liberty. Blackstone says, "a practice had obtained in the Secretary's office ever since the restoration, grounded on some clauses in the acts, for regulating the press, of issuing *general* warrants to take up (without naming any person in particular) the authors, printers, and publishers of such obscene or seditious libels, as were particularly specified in the warrant. When those acts expired in 1694, the same practice was inadvertently continued in every reign, and under every administration, except the four last years of Queen Anne, down to the year 1763; when such a warrant being issued to apprehend authors, printers and publishers of a certain seditious libel, its validity was disputed; and the warrant was adjudged by the whole Court of Kings bench to be void, in the case of *Mancy vs. Leach*. After which, the issuing of such *general* warrants was declared illegal by a vote of the house of commons." To prevent the issuing of these *general* warrants, so obnoxious to the liberty of the Press, the great safe guard of the liberties of the people was the sole object of the clause in question. They have now ceased in England, but it was thought advisable to guard against the recurrence of them in a government which had so much to expect from the freedom of the press. It has not disturbed, either in England or this state, the usual common law manner of arrest, which in general may be made four ways, 1. By warrant. 2. By an officer without warrant. 3. By a private person also, without a warrant. 4. By hue and cry. To these modes of arrest, being nothing but the creatures of the law, it will not be denied that the Legislature may superadd any other method they may think proper. If they can authorise a Sheriff, Constable, or even a private person to arrest, what is to hinder them from conferring the same power upon a guard. They require the guard to bring them before the civil authority, and the act of the Legislature is their warrant for that purpose. A Constable does no more by virtue of a Magistrate's warrant. He often has his fire arms to effect his purpose, and where is the difference in principle between one armed man, with the power to summon as many to his aid as he pleases, in arresting an offender, and twenty armed men clothed with authority to do the same thing. Besides, the state is not without example on this subject, when the Cherokee Nation was under the control of the General Government, they had a much more rigorous law against white men, than the one which the state has passed since she has taken the management of the Nation, and which is so grievously complained of. The intercourse law subjected a white man to severe fine and imprisonment, if he even put his foot into the nation, and that but for a moment. And often has poor men, ignorant of the law, been dragged from the frontiers to Savannah, and there fined and imprisoned, for no other offence than the one above mentioned. How often have white men on the line separating the nation from the white settlements, had their houses demolished, their fields laid waste, and themselves imprisoned for no other offence than residing in this self same nation, that Georgia is now legally attempting to regulate. If the general government could do it, in the name of every thing that is consistent, what hinders Georgia from exercising precisely the same power, now that it is acknowledged by the President himself, we have a right to do it. When the Federal troops, by virtue of the intercourse act, arrested white men in the nation, and carried them before the civil authority to be dealt with as that law directed, who ever dreamed that it violated the clause of the constitution, now said to be assailed? That clause does not declare that no offender shall be arrested without warrant supported by oath, &c. but that if that method of arrest shall be pursued, no warrant shall issue, but upon probable cause, supported by oath, particularly describing the place to be searched, and the person to be seized. The object is too plain to be misconceived.

We have now gone through the objections arising under the Federal Constitution, we will next consider those which spring from the state Constitution.

1. "No person shall be denied the enjoyment of any civil right, merely on account of his religious principles."

I am at a loss to know how this clause is intended to apply, for certainly no distinct application of it has been made to the case. No one will contend, I presume that the act strikes at any religious opinions, that there is any one word of it can be so tortured, as to indicate any hostility to religion, or the separate tenets of any denomination. I do not suppose that such is the idea intended to be conveyed by the present use of the clause. I collect from the argument used, that the oath required to be taken is such as to produce *scruples of conscience*, which the religious sense of the individuals at the bar will not allow them to disregard. I am sorry for it, but they know what *they can do*, they can leave the country, especially too as it does not belong to them, and as they have been living there by the gracious favor of the state to whom it rightfully belongs. There can be no *scruples* against such a course as this, unless indeed they should be of that character which makes a man unhappy at the performance of duty. But it is my opinion we should be very cautious how we let religion interfere with the civil rule of the country. It is not less encroaching to day than it has been in any past period of the world, and though I may be alone in this matter, yet whenever religion leaves its proper sphere and gets to reaching out its feelers after civil power, it ought to be driven back with the same alarm and despatch that is employed to chain a furious beast that has broken from its confinement. There is scarcely a law against which similar objections might not be raised. We have a statue that makes it criminal to hunt or fish on the Sabbath, and this purely because it is the Lords day. Now to those whose Sabbath is different, and those whose religious opinions claim the right to disregard all Sabbaths, it might be urged by them, with the same propriety contended for at bar, that they have great scruples of conscience in obeying such a law. But the same answer remains for all such, if you can not, *for conscience sake*, live in a society which has passed such laws as it conceives most conducive to its well being, go where you can find more repose for that troubled spirit, and do not expect or ask so unreasonable a boon as for a whole community to give up their conscience to appease yours.

But another idea is suggested and relied upon, connected with the foregoing, that the oath required is a *test oath*, and though not actually trampling upon the Constitution, it so treads upon its heels as to give it great inquietude. It is said to be contrary to the inherent rights of man, and English law is quoted to prove its illegality. It is urged that no man ought to be required to swear to support the "laws of a state and uprightly to demean himself as a citizen thereof." whatevermay be required as to his support of the Constitution, and that this oath is not general, and taken by all the citizens of the state, and that therefore it is a *test oath*, and odious in the extreme. Oaths have been required in all ages, and have been considered as coming more strongly in aid of the civil authority in effecting the great ends of government, than perhaps any one agent employed for that purpose. The oath of *fealty*, *homage* and *allegiance* are familiar to every man of reading. Oaths of office are almost innumerable. Oaths of witnesses and affiants are forever recurring. Now if a new oath required falls within any of these classes, how can it be objected to? For instance if it is an oath of allegiance, or in the nature of it, who can refuse to take it, without incurring the suspicion that he is secretly inimical to the government It is not a *partial* oath, it is a *general* one, and intended for every man who places himself in a certain situation justly subjecting him to the suspicion of infidelity to his country. What is the plain state of the case? Let us be honest in the answer to this question. (The Cherokee Indians, within the acknowledged limits of Georgia, have set up a government of their own, declared themselves free and independent, and for fear the thrice boasted declaration of it would not be enough, they have determined to give us other more convincing proofs, and consequently our citizens residing out of the nation have been dragged before their Courts, held in the woods, upon the most summary notice, without preparation, nay, without a knowledge of their language, and after a mock trial, they have been stripped and suspended, and then scourged in the most inhuman manner. Georgia has determined that this state of things shall not exist, that the Indians shall come under our laws, and that our citizens shall not be subjected to their savage code. This has produced a most unusual excitement every where, and the most obstinate and undutiful conduct in the Indians. In this course they are pertinaciously encouraged *in* and *out* of the nation. | Now, surely Georgia has a right to say to such white men as wish to reside in the nation, you must choose sides; if for the Indians, leave the nation. If for us, take the oath and you are welcome to remain. Georgia may well say, this is our jurisdiction, and when the Indians leave it, it is our land; it is ours now, only subject to the occupancy of the Indians. At least, you have no rights there. But as you have homes and connexions in that country, we are willing you should remain. All we ask of you is not to aid and countenance the Indians in their rebellious conduct towards the public authority of the State. This you can do, by taking an oath which we require of all persons who do not hold under our permission. Like the power which the general government was wont to exercise, when it controlled that territory, we have the same right to order you away, cut down your corn, and burn down your houses; but this we do not wish—we are disposed to be more lenient towards you—leave the nation or give us proof of your fidelity! What is there unreasonable in this? Again, may not this be analogized to an oath of office? What is the language of such an oath? The government requires good behaviour of the officer, that he will support the laws and demean himself as an honest, upright officer—take the oath and take the office; but if you leave the oath, leave the office. What says the oath before us? Take the oath and live in the nation; but if you reject the oath, leave the nation. It is said in argument, that all oaths are for the benefit of the person required to take them, and that this is a proper test of their legality. Without admitting the correctness of this position in the general, it may be safely granted in the case before us, and we think that a snug, profitable residence upon land that does not belong to the person who occupies it, is a very fair equivalent for the simple oath of allegiance. But there are some oaths, and one in particular, which every man in the state has to take, and which promises him but a very remote, if any benefit at all, and which in many cases might justly alarm his conscience. I mean the tax oath. Now this oath shows that the state has the power to impose oaths on every citizen in the state, whether he holds office or not, and the only reason why the oath of allegiance is not required from every man, is on account of its inconvenience. It is believed that the attachment of the people to their government, is strong enough to bind them to their duty; and that the trouble and expense of administering that oath, is not justified by any present suspicions of their infidelity; but this does not preclude the right to impose that oath, whenever in the discretion of the Legislature, an occasion either in whole or part, calls for the exercise of the right. Hence, when private individuals rise to public trusts, they meet the oath of allegiance, demanding security for the faithful discharge of duty, and the defence of the laws. Also they may require it under any other emergency, where a well grounded apprehension may dictate the necessity for its aid.

Under all the foregoing views of the subject, I am of the opinion that the law is perfectly constitutional, and that its provisions must be carried into effect. But there is one provision in it which two of the individuals in custody seem, for reasons best known to themselves, to have overlooked, and which will discharge them from their present arrest, if I have been correctly informed as to the facts. Both of them are Missionaries, and one of them a Post Master. In the first character they are there with the consent of the general government, and as its agents are in the nation for the purpose of civilizing and christianizing the Indians, and as evidence of their being government agents, they have the disbursement of large sums of public money for the aforesaid objects It is not for me to say what kind of temper that must be, or what the character of that spirit is, which declines the benefit of a law because that law cannot be set aside altogether. Whether it proceeds from religious scruples, or a more wayward passion, I shall not pretend to say; but this much I will assert, that I respect too much my own oath, and the character of the state, to inflict penalties unauthorised by law, merely to indulge individuals in the fanciful idea that they are suffering a species of martyrdom. They must be discharged upon the following

grounds—The act has this *proviso*, "that the provisions of this section shall not be so construed as to extend to any *authorised agent or agents* of the *government* of the *United States*."

1. I am proud of the present occasion to testify my hearty respect for the Federal Constitution, and I am willing to declare that the truly consistent advocate of state rights, ought always to have an equal zeal for the support of the Federal Constitution, because they are both governments of his own choice. That instrument declares that "Congress shall have power to establish post offices and post roads," therefore the appointment of this individual is clearly within the right of the General government, and he would have been discharged without the provision above referred to. It would be inconsistent to contend for a contrary doctrine, for Georgia urges that the Cherokee nation is as much a part of the state as any other, and, if it would be lawful to appoint a post master for Lawrenceville, it would be equally so to appoint one for any part of the Nation. We certainly have the right to draw this conclusion from the fact, that it is not considered a *foreign* nation by the general government, unless, indeed, there is *some treaty* that obliges them to furnish post masters for that unfortunate race.

2. The missionary character has not so high a claim for his discharge, he properly falls within the provision of the act. The law prescribes no limits to the agencies to be protected, it is indifinite and extends the exemption to *any authorised agent* of the general government. It is not for the Court to prefix boundaries to the will of the Legislature, it has thought proper not to do so, and of course it would be highly improper for me to do it. All that remains for me is to enquire not into the kind of agency, but is he an agent? and is he an "authorised agent" of the general government? If he is, he comes within the saving of the statute. I wish it, however, distinctly understood, that this individual owes his discharge to the courtesy which the state has manifested to the general government by excluding its agents from the operation of the law.—The general government has no more right to send missionaries into the Nation and quarter them there, than they have to fix them upon any other part of the state. It is said that the agents intended by the law, were the Indian agents sent to the Nation to carry into effect the intercourse law. This does not appear, and the expression is too broad to act upon such a suggestion. Besides, Indian agents have now no more constitutional privileges in the Nation, since Georgia has taken it into her own hands, than missionary or any o her agents, and this has been frequently stated by the President, and lately confirmed by a special communication to the Senate of the United Stated.

Let the two missionaries (one of them being a post master) be discharged, and let the other four persons be bound over to answer to the misdemeanor charged against them, they having exhibited no excuse.

A. S. CLAYTON.