old maid.

JUDICIAL.

JUDGE CLAYTON'S OPINION.

THE STATE vs. CANATOO,

A CHEROKEE INDIAN,

Committed to jail upon a charge of digging gold in that part of the Cherokee Nation not as yet ceded but attached to the county of Gwinnett, for the purposes of civil and criminal jurisdiction.

The prisoner was brought up by *Habeas Corpus*, and his discharge moved for upon three grounds. 1st. Defect of commitment. 2d. There was no law making the offence criminal; and 3d. If there was, it was contrary to existing treaties, and therefore contrary to the Constitution of the United States.

There is no force in the first objection, and consequently it needs no consideration. In the 2d the Court admits there is some room to doubt. And here it will take occasion to say that as this is a very important question, involving rights of the highest character, both in relation to the State and the Indians, and as there should exist the utmost harmony between the *Legislative* and *Judiciary* branches of government, both aiming to discharge, with fidelity, the high obligations committed to their trust, and seeking to accomplish a common object, the welfare of the community, it will be strictly proper and evince a becoming respect for the Legislature, for the Court to refer the act back to that body with its views candidly expressed, on both of the last mentioned points, with a hope that such a course may prevent any future collision. And this is considered the more discreet and necessary, as this case, under its present arrangement, is not of such pressing urgency as to require a hasty decision.

Upon the 2d ground then it will be necessary to bring the act of the last Legislature into view. The substance of its caption is "to take possession of the mines within the Cherokee nation, and to punish any person or persons who may be found *trespassing* upon said mines."

The preamble of the law asserts that the mines "are of right the property of Georgia" and states that "great waste has been committed by the *trespasses* and *intrusions* of numberless citizens of this and other States, in digging, taking and carrying away large quantities of gold from said mines—*for remedy whereof*, Be it enacted &c." The 1st sec. authorises the Governor to take possession of the mines and to employ a force to protect them "from all further *trespass*."

The 2d sec. appropriates a certain sum of money to carry into effect the foregoing section, and the 3d sec. declares that "for the "better securing said mines from *trespass*, that "if any person or persons shall be guilty of "digging for gold, silver or other metal upon "said mines, or who shall take from or carry "away any gold, silver or other metal from any "of the said mines, *unless authorised by law*, "he, she, or they shall be guilty of a misde-"meanor, and upon conviction thereof, shall "be sentenced to hard labor in the Penitenti-"ary for and during the term of four years."

The 4th and 5th sec. inflicts a like punishment upon any person who "shall employ any *white man, Indian, negro or mulatto* to dig or carry away any gold, and provides that the act is not to be so construed as to confine a slave in the Penitentiary.

The 6th sec. confiscates all slaves and other *property employed in trespassing on said* mines, and the proceeds of their sale to be paid into the Treasury. The above is an analysis of as much of the law as is necessary for our present purpose. Though the caption is a general one, and applies to all persons, yet it is contended that it refers only to *trespassers*, and that as the word *trespass* is a *legal* and *technical* term, it must be received according to its legal meaning. "*Trespass* (says Blackstone,) as relates to land, signifies no more than an entry on another man's ground without a lawful authority and doing some damage, however inconsiderable, to his real property." And it matters not whether the person in possession is "landlord or tenant" whether he has an "absolute or qualified property" in the premises, either has his right of action against his *trespasser*, consequently no man can be a treaspsser upon land of which he has the use & possession or which belongs to him absolutely or for a limited time. Then applying this doctrine, it is said an Indian cannot be a trespasser upon lands of which it is acknowledged, *by treaty*, he has the full, free and undisturbed possession.

Again, it is contended that in aid of the above principle the preamble of the law is very strong if not conclusive. It states that great waste have been committed by the *trespasses* and *intrusions* of whom? Not the Indians.... but numberless citizens of this & other States." Now Indians are not citizens and never have been so considered. The preamble proceeds to declare, "for remedy whereof"-- What mischief is to be remedied? The *trespasses* and *intrusions* of numberless citizens of this and other States upon the mines." Then comes the enacting clause which states "for the better securing said mines from *trespass, all persons* guilty of digging gold shall incur the aforesaid penalty, "*unless authorised by law*" to dig. Now here is room to contend again, that it was *trespass* in its legal sense, the Legislature intended to punish, and that as it was well known no one could by any possibility, according to existing laws, be "authorised by law" to dig for gold but the Indians, they having the constant and uniform *law* of treaties as well as the intercourse law of the United States to protect them in the possession of their unceded lands, the above expression was intended as a saving in their behalf. It has been urged and some facts stated, which occurred at the passage of of the law, to explain the reason of the above *proviso*, but I presume every one knows that Courts of Justice can-

not travel out of the law for any explanations of its meaning: it would go to establish the monstrous practice of ascertaining the sense of the Legislature by oral testimony, and thereby place the laws of the land in the most dubious and fluctuating condition.

Again it is asked, if the above section was intended to embrace every person who should dig gold, where was the necessity of the 4th section which imposes the same penalty upon any person who should employ a white man. Indian, negro or mulatto to dig gold? If it is contended that these four descriptions of persons were excepted from the penalty of the third section because the white man alluded to was one who should not be a citizen of this or any other State, but who claimed the rights of an Indian as a descendant, and therefore for greater particularity common to the law, was described as a white man. That to employ him or the Indian should be a crime in the employer, for if it was criminal in them to dig gold no one can or will believe they would suffer themselves to be employed in a business that would send them to the Penitentiary. And this idea is much strengthened by the fact that there is an after provision which exempts slaves from Penitentiary confinement and subjects them to confiscation, as an additional punishment to the employer.

These are the doubts thrown around this law, and the Court is called upon to remember the rule of construction to be found in the English law, which is our law, and which if it ever existed in any country, ought to exist in this boasted land of liberty, viz: "It was one of "the laws of the twelve tables of Rome, that "whenever there was a question between li- "berty and slavery, the *presumption* should be "on the side of liberty. This excellent prin- "ciple our law has adopted in the construcli- "on of penal statutes, for whenever any am- "biguity arises in a statute introducing a *new* "*penalty* or punishment, the decision shall be "on the side of lenity and mercy: or in fa- "vor of right and liberty: or, in other words, "the decision shall be according to the strict "letter in favor of the subject. And though "the Judges in such cases may frequently "raise and solve difficulties contrary to the "intention of the Legislature, yet no further "inconvenience can result, than that the law "remains as it was before the statute. And "it is more consonant to the principles of li- "berty, that the Judge should acquit whom "the Legislator intended to punish, than that he "should punish whom the Legislator intend- "ed to discharge with impunity." I do believe it was the intention of the Legislature to bring the Indians within the penalty of the law, but I candidly own I arrive at this belief more from my knowledge of the history of its passage, than from the law itself, and that to one entirely unacquainted with that history there would be much ambiguity in its true object.

Believing then as I do, and that the Legislature has perhaps not given the subject that full and deliberate investigation which belongs to Courts of justice, and which their supposed knowledge of the Constitution, laws and treaties of the land, and the constant and familiar use of legal principles in expounding the same, enables them to bestow on such questions, I will proceed to present my opinion on the ground for the future consideration of the Legislature.

In the beginning of this investigation I lay down the following principle that there never have been but two ways of acquiring Indian lands,—*by force and by purchase*. I add, history does not furnish a single instance where one foot of Indian lands has ever been taken by *force*, by the United States, especially by Georgia, and this redounds greatly to the credit of the settlers of America, for Vattel, the best writer on natural law observes, "that the cultivation of the soil was an obligation imposed by nature upon mankind, and that the human race could not well subsist, or greatly multiply, if rude tribes, which had not advanced from the hunter state, were entitled to claim and retain all the boundless forests through which they may wander. If such people will usurp more territory than they can subdue and cultivate, they have no right to complain if a nation of cultivators puts in a claim for a part." —3 Kent's Com. 312 and Vat. 1, b. sec. 81.

Vattel farther adds, "people have not then deviated from the views of nature in confining the Indians within narrow limits," but praises the moderation of the American settlers for purchasing from the Indians what they had a right to take by force. All that the first discoverers ever claimed was the right of *empire*, and the ultimate right of *dominion* over the Territory which they took the possession of in right of their sovereign, and as against all other nations this right was rigidly enforced.

This right of empire or of government has been fairly deduced into the State of Georgia, and I consider that question as at rest. The right of *domain* or soil is also in Georgia, but subject to a claim or title of the Indians which must be extinguished in some way or other before Georgia's absolute right will accrue. The question is, how is this to be extinguished? Is it to be by *force* or by *purchase*? If by force, is the Court to understand that the law of the last Legislature is intended to effect that purpose? Is it to understand that the State renounces the policy pursued by herself, her sister States and the United States, for the last three centuries, and throws herself upon the original right which Vattel admits she had at the discovery of America, and that too, where the reason for that right has almost if not entirely ceased? Will the State urge, after greatly advancing in science and civilization, and what is still better, in the knowledge of just and equal laws, that by reason of its crowded population it is unable to "subsist and multiply" without this land....that these "rude tribes have not advanced from the hunter state" and usurp more territory than is necessary for their subsistence, or are not sufficiently confined within "narrow limits?"

This court does not consider this law to be an act of force, but is founded, no doubt, in what the Legislature honestly believed to be a right acquired, somewhere between the first discovery of the country and the passage of the act, either in the force and effect of the laws of Great Britain, over that people from whom we obtained the country, or in our own laws, treaties and compacts, since its acquisition. It is then under this view we narrow down the consideration of the question.

And first, if the Indians have a title to extinguish, what is that title? I shall consider the question under a two-fold aspect. 1st. What part or portion of the land have they a right to enjoy under their *title*?

2d. What is the nature and duration of their *title*?

An idea prevails that the mines and minerals of a country are separate and distinct from the interest of the land, and that the former always belong to the sovereign. Now nothing is more erroneous, and this mistake has occasioned all the difficulty. I candidly own that I labored under it myself and granted an Injunction with a view to settle the question, but when I came to examine the subject, I found nothing to support such an idea; on the contrary I found every thing which was calculated to satisfy me I was wrong. Not desiring my own views, by any means, to be considered as authority, I shall speak whenever I can in the language of the law, as given to us by the best and most approved writers. Justice Kent, therefore, says, "it is a fundamental principle in the English law, derived from the maxims of the feudal tenures, that the King was the original proprietor of all the land in the kingdom, and the true and only source of title. (2 Black's. Com. 51, 53, 86, 105. In this country we have adopted the same principle, and applied it to our republican government: and it is a settled and fundamental doctrine with us, that all valid individual title to land within the United States, is derived from the grant of our own local governments, or from that of the United States, or from the crown, or royal chartered governments established here prior to the revolution." 3 *Kent's Com.* 370, *and the authorities there cited.*

Now what is land? "In its legal signification, (says Coke and Blackstone,) land hath an indefinite extent upwards as well as downwards. Upwards, to "the sky" is the maxim of the law, and therefore no man may erect any building, or the like, to overhang another's land; and, downwards, whatever is in a direct line, between the surface of any land and the centre of the earth belongs to the owner of the surface, as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but every thing under it or over it. And therefore, if a man grants all his lands, he grants thereby, all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows." 2 Black's. 18.

By the foregoing doctrine it will appear that the State as the "original proprietor" of all the lands, held not only all the *mines and minerals*, but every thing else that is included in the term *land*. Originally they have never been separated any more than the woods and waters have been separated from the soil, and I defy the production of any authority to prove the contrary. But whenever the Crown granted its lands, if it chose to make a reservation of the mines and minerals upon the face of the grant, it had a right to do so, and from that time they became separate and distinct, and never before. And all the mines and minerals now held by the King of Great Britain, separate from the lands, is by virtue of such reservation at the time of granting his land,—This is the case with regard to some of the lead mines of the United States, and this was attempted by an act of Georgia in 1825, but meeting the decided disapprobation of the people it was shortly repealed. I have no hesitation in saying that the State holds just as good a title to the Indian lands as it does to their mines and minerals; that it is by virtue of the former it has any right at all to the latter; they are inseparable. If they were distinct rights while the land is in the possession of the Indians they would remain so after the State acquires the land from the Indians, for there is nothing in that act that unites them, and a consequence would be, when she granted out her lands to her citizens, the mines and minerals would not pass, even though she made no reservation in the grant, and this we all know is not the case.

I have looked in vain for any historical fact, in relation to the discovery and settlement of America, for any reservation of the mines and minerals to the sovereign, separate and apart from the territory itself; indeed there could be no reason for such a distinction, for as before observed, the *whole empire and domain* belonged to the discoverer. No Charter, Proclamation, law or public document, contains any mention of such reservation. I therefore conclude that whatever right the Indians hold to their land, they hold the same right to every thing which falls within its legal definition, and this brings us to consider, secondly, the nature and duration of their title.

In considering this head, I shall present three views of the subject.

1st. In what manner their title was respected by Great Britain, the discovering nation, and from whom Georgia obtained the country.

2d. In what manner Georgia has respected it since its acquisition.

And 3d. How it has been respected by the Courts of Justice.

1st. We have already shewn that the discovering nation had a right to take *by force a part* of the country, such as would strictly answer the exigency making such *force* necessary, but that nothing would justify the taking the *whole* of the country and leaving its inhabitants to perish. That though they might be confined in "narrower limits," yet there were *some limits* to which they would have a right under the laws of nature, free from the right of *force*. Whether they are now within those limits, it is not my intention to enquire, though it is well worthy of humane consideration, especially as they are receding from the "hunter life," which originally justified the seizure of their lands, and approaching the agricultural condition, which brings them within the "curse" of their creator, and entitles them, in common with the rest of mankind, to a portion of the earth, for their support. But Great Britain never took one foot of their land by *force*. She chose the rather to adopt a more enlarged and liberal policy, and waving the right as admitted by Vattel, resulting, as he said, from a "celebrated question to which the discovery of the new world had principally given rise," and was therefore a new doctrine in the law of nations, she reposed herself upon the law as it stood previous to this new principle, and took the country subject to the right of conquest. This right as every one knows confers upon the conqueror only the *empire* and the *unappropriated domain*, but private property is sacred.—It is true the Indians did not hold their lands in private right, that they enjoyed them in common; but Great Britain, greatly to the praise of her justice and humanity, chose to respect them in that light, and consequently we find in a statement of the Province of Georgia, in 1740, sent home to the trade office in London, that not an "Englishman was settled within this district when the first Colony of Georgia arrived. The country was then all covered with woods. Mr. Oglethorpe, [illegible] with the Indians, and possessing a

them the limits mentioned in the treaty." Except the charters which granted all Georgia to Oglethorpe and his company, this is the first instrument or compact between the whites and the Georgia Indians, and what does it imply? Does it not incontestibly shew some kind of right in the Indians. If Savannah and the surrounding country was bought, is it not proof that the seller had title, and if he had title to that which was sold did he not retain a title to that which he did not sell? If before Oglethorpe landed, while Georgia "was then all covered with woods," and in the exclusive possession of the Indians, they had mines which they then used or might have used that did not fall within the cession made to Oglethorpe, does any one believe that he could by virtue of this treaty, there being no other instrument in the way, have restrained the Indians from the use of those mines? I think no one can answer in the affirmative. Then from that day to this, where is the treaty that is upon any other footing? If the Indians had the right, then where have they lost it? Oglethorpe, within his ceded territory, and with his company under his King's charter, was as much the government of Georgia, as Georgia now is under its present constitution, and if he could not divest the Indians of their right to dig gold in their lands, not ceded to him, how can Georgia do it now with no higher right, indeed with precisely a similar right? We have only to carry Georgia's present government back to that time and leave out all the treaties we have had with the Indians since, and we have precisely the question above stated. Deriving our right from Great Britain, we do not pretend to claim any better title than she had, unless indeed it is the genius of Republics to be more grasping than Monarchies, a principle I trust, that will never be admitted. The above reasoning then shows a time when the Indians had a right to the gold found on their land; if they have lost that right, it is certainly incumbent upon the party who says he has acquired it, to shew the deed by which it has passed. I confess I have looked for it in vain.

The next distinct and public evidence of respect for the Indian title on the part of Great Britain is to be found in the King's proclamation of 1763—It is as follows: "Whereas it is just and reasonable and essential to our interest, that the several nations or tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as, *not having been ceded*, or *purchased* by us, are reserved to them, or any of them, as their hunting grounds; we do therefore declare it to be our royal will and pleasure, that no Governor of any of our colonies do presume for the present, and until our further pleasure be known, to *grant warrant of survey* or *pass patents* for any lands beyond the heads or sources of any of the rivers which fall into the Atlantic Ocean, or upon any lands whatever, which not having been ceded to, or purchased by us, as aforesaid, are reserved to the said Indians or any of them."

The next clause of this proclamation further defined the reserved lands to the Indians, and forbid all persons from either purchasing or settling within the same, and further required all persons who had inadvertently "seated themselves upon lands which had not been ceded or purchased, forthwith to remove them-

selves from such settlements." And then it concludes in the following just and emphatic language; "to the end that the Indians may be convinced of *our justice* and determined resolution to remove all reasonable cause of discontent, we do, with the advice of our privy council, strictly enjoin and require, that no private person do presume to make any purchase from the said Indians, but that if at any time, any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only FOR US, in our name, at some *public meeting* or assembly of the said Indians, to be held for that purpose by the Governor of our Colony, within which they shall lie."

Here then we do most clearly perceive that Great Britain forever relinquished the idea, whether founded in right or not, of taking Indian lands *by force*, and that she as clearly substituted in its place the right, and no other, of PRE-EMPTION. In this proclamation the *pre-emption* right, most obviously originated, was the only one claimed by Great Britain while the country remained her's, and was continued, as we shall hereafter see, by Georgia, down to a very late period.

In all the treaties made with the Indians, on the part of Great Britain, that government evinced a studious care to make it appear to the world that all its purchases were fair and just. In the last treaty made in 1773, with the Cherokee and Creek Indians, there is a remarkable instance of this anxiety. After stating in the preamble, that the Indians in a full, free and voluntarily manner desire to cede the lands therein mentioned, for the purpose of paying their debts to the traders, and that it will be a great favor rendered them to purchase the same, the Indians say, "we do hereby solemnly declare that we do fully and clearly understand every part of this treaty and cession, it having been fully explained and interpreted to us, and that the same is made at our own requests and for our own benefit and advantage." This treaty was for all that fine country above Little river, up to the Cherokee Corner.

This closes the first view proposed, which was to shew the manner Great Britain respected the Indian title, and creditable as it may and does appear to that Kingly government, it is not more so than that of the Republics of America after the Indians fell to our charge. I proceed to show how Georgia has respected their title since her acquisition of the territory.

She commenced precisely as Great Britain left off, which was to *purchase* by *treaty*, a scope of country extending from the upper line of the cession last named to the Currehee mountain. This treaty was made in 1783, and by the authorities of Georgia alone with the Indians. Two years after another Treaty was made by Georgia Commissioners with the Creeks, in which is found this clause, "if any citizen of this State or other person shall attempt to settle or run any of the lands reserved to the Indians for their hunting grounds, such person or persons may be detained until the Governor shall demand him or them," and then the was to be punished in the presence of the Indians. In 1787 the Federal Constitution was formed, the 10th Sec. of the 1st Art. of which declared that "*no State shall enter into any Treaty*," and by the 2d. Sec. of the 2d. Art. it is also declared, that the "*President, with the advice and consent of the Senate, (two thirds concurring,) shall make all Treaties.*" Under this constitution, Georgia had no idea that she had no longer the right to treat with the Indians for their lands; she always asserted and maintained her right to the jurisdiction and ultimate soil of the country, though very many difficulties which she had with the general government, but yielded the right to the government to purchase off by treats, for her use, the Indian title to said lands, always conceding that the Indians had a title of which they could not be divested but by a purchase, and that Georgia had the pre-emption right to

the same. The first public document where this right of purchase is considered a pre-emption right, is in the Convention of Beaufort between Georgia & South-Carolina, in which both parties designate it by that name, to wit: "Georgia cedes to South-Carolina, (the lands between Tugaloo and Kiowee) all the right, title and claim, which she hath to the government, sovereignty and jurisdiction, in and over the same, and also the right of *pre-emption* of the soil from the native Indians."

In numerous acts of the State, whenever Indians or Indian lands occur, a title of some sort is always acknowledged in the Indians, and that the same must be extinguished by purchase, and that by the U. States, since the adoption of the Federal Constitution. It is wonderful to observe the mass of evidence spread through the public records to this effect. For instance, in the act of '93, appropriating lands for the payment of the State troops, it is required that our "Senators and Representatives apply without loss of time for a treaty to be held with such tribes who may claim the right of soil to such lands." In an act amendatory of this act, commonly called the "Yazoo act," where, if all sense of justice to Indian rights could have been forgotten, it would be the very place to find it; yet even here their title was respected, and the Yazoo purchasers were bound to extinguish it through the agency of the General Government by fair purchase; & what is remarkable, in four places of that act, the right of Georgia is expressly called a *pre-emption right*.—But this may be considered as not the best authority, and I am so disposed to consider it. I only mention it to shew that men of all descriptions have been disposed to respect the title of the Indians, and that surely less ought not to be expected from an honest community. There is however, an authority that I am sure every body will regard, and it is the memorable act which repealed the Yazoo act, commonly called the rescinding act. This act was drawn up by the late Governor, James Jackson, one among the oldest statesmen and patriots that Georgia ever had. The preamble, which is an able view of Georgia's rights over the Indian territory, and which boldly claims the *right of jurisdiction* and soil, justly recognizes a title in the Indians, the right to extinguish which is only *pre-emption* on the part of the State. Then in the first enacting clause, it declares that the Yazoo act and the grants issued under it are null and void, "and the territory therein mentioned is also hereby declared to be the sole property of the State, *subject only to the right of treaty of the United States to enable the State to purchase under its pre-emption right, the Indian title to the same.*"

The fifth section of this act declares the right to extinguish the Indian title, or to apply to the General Government for that purpose, is vested in the people and government of this State, and concludes in these explicit terms, "*to whom the right of pre-emption to the same belongs, subject only to the controling power of the U. States, to authorize any treaty or treaties for, and to superintend the same.*" This act passed in '96. The next public document in which we find the subject mentioned, is in the Constitution of, the State, adopted in the year '98. The 23d section of the 1st art. describes the boundaries of the State, asserts the right of soil and jurisdiction, and concludes by declaring that "no sale of territory of this State, or any part thereof shall take place to individuals or private companies, unless a county or counties shall have been first laid off including such territory, and the *Indian rights* shall have been *extinguished* thereto." Words can not be plainer and the obligations they impose can not be higher: for this Court, as well as all officers, are sworn to support it. But this is not all; keeping up and acting entirely in conformity with previous acknowledgments as contained in treaties, acts and the Constitution, the highest evidence of right, we find in a compact with the General Government, called the articles of cession, made in 1802, Georgia stipulating "that the United States shall at their own expense, extinguish for the use of Georgia, as early as the same can be peaceably obtained on reasonable terms, the Indian title" to the lands left within the State and not sold to the General Government. What title? Surely the title we have been all along tracing down from the earliest settlement of the country, and which we have just seen was called a pre-emption right on the part of the State. I know Georgia has a right to complain that this title has not been extinguished: that it could have been done long ago upon reasonable and peaceable terms. But her complaint is against the General Government.—The Indians are no party to this contract. They have not bound themselves by this instrument.—They cannot be answerable for the bad faith of one of the contracting parties. Will it be contended that if the Indians will not sell their lands to the General Government, we will take them by force? Would such a doctrine be countenanced among ourselves? If one citizen were to oblige himself to purchase a tract of land of another citizen, for the benefit of a third, will it be said that this third person may seize the land if its owner do not choose to part with it? If this is answered in the affirmative, and it is insisted upon seriously that a court of justice ought to enforce such an usurped right, then I confess I have nothing more to say. But suppose the General Government never had undertaken to extinguish this right. What then would have been our situation with the Indians? They must live some where. I presume no one is yet prepared to say their throats should be cut to make way for christianized man. Recollect, we would have had no territory beyond the Mississippi to which we could transport them. Recollect too, they are incapable of being incorporated with white men. Will any one maintain, in the face of the strong current of evidence flowing through so many inviolable public documents, which I have just adduced in favor of *their* rights, and which so accurately marks our *own*, that it would be just and right, before Heaven, to take their property away without consideration, or to pen them up in such limits as to perish? I cannot believe it. So much for the articles of cession. The next confession of Georgia (and confessions are considered in courts the very best evidence,) is to be found in an able report made in 1819, to the Legislature, in the shape of a petition to the President of the United States, complaining of the treaty of Fort Jackson, and also Calhoun's treaty which had annulled the only treaty that was likely to effect a removal of the Indians, viz., the treaty of 1817, made by Jackson and Meriwether. In this memorial is the following distinct acknowledgment—"The State of Georgia claims a right to the jurisdiction and soil of the territory within her limits. She admits however, that the *right is inchoate*, remaining to be perfected by the United States in the *extinction* of the *Indian title*; the United States, *pro hac vice*, acting as our agents."

This finishes the view in which the Indian title has been respected by the State of Georgia, and brings us to the consideration of the last thing proposed, how it has been settled by the Courts of justice, and this branches again into two views.

1st. As settled by the Supreme Court of the U. States and the separate States of the Union—and 2d, as decided by our own Courts.

And 1st. As to the Supreme Court Justice Kent, the ablest American commentator that has appeared, in collecting the decisions of that Court & consolidating the doctrine on this subject observes, that "the nature of the Indian title to lands lying within the jurisdiction of a State, though *entitled to be respected by all Courts* until it is *legitimately extinguished*, is not such as to be absolutely repugnant to seisen in fee on the part of the Government within whose jurisdiction the lands are situated."—6 Cran. Rep. 87. Judge Johnson in the same case, went farther than the rest of the Court—he enquires, "If the interest in Georgia was nothing more than a *pre-emptive* right, how could that be called a *fee simple*, which was nothing more than a power to acquire a fee simple by purchase, when the proprietors should be pleased to sell? And if it ever was any thing more than [illegible] it certainly was reduced to that [illegible] the State of Georgia ceded to the U. States both the *power of pre-emption* and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States."

[illegible] Kent [illegible] in the case of *Johnson vs. McIntosh* [illegible] 543,) it was stated [illegible] that [illegible] discovery of this con[illegible]

tinent by the nations of Europe, the discovery was considered to have given to the government by whose subjects or authority it was made, the *sole right of acquiring the soil* from the natives, (the right of *pre-emption*) as against all other European powers. Each nation claimed the right to regulate for itself, in exclusion of all others, the relation which was to subsist between the discoverer and the Indians." After stating that all the European nations, who had made discoveries in America, assumed the ultimate dominion and claimed the right to grant the soil, "subject to the Indian right of occupancy," he adds, "The U. States adopted the same principle, and their exclusive right to extinguish the Indian title *by purchase* or conquest, and to grant the soil and exercise such a degree of sovereignty as circumstances required, has never been judicially questioned." He then affirms what I have already stated, that the States within which any of the Indian nations fell, claimed and exercised the right to govern them, and that they "could transfer their title" to no one but the power claiming the jurisdiction of their territory. "The peculiar habits and character (says our author) of the Indian nations, rendered them incapable of sustaining any other relation with the whites than that of dependence and pupilage. There was no other way of dealing with them than that of keeping them separate, subordinate and dependent, with a guardian care thrown around them for their protection." After mentioning that the rule established to keep the Indians subordinate, to govern and protect them, to prevent them from selling their lands to others, was the best that could be adopted with safety, he states, "this was founded on the pretension of converting the discovery of the country into a conquest, and it is now too late to draw into discussion the validity of that pretension, or the restrictions which it imposes. It is established by numerous compacts, treaties, laws and ordinances, and founded on immemorial usage. The country is colonized and settled, and is now held by that title. It is the law of the land, and no court of justice can permit the right to be disturbed by speculative reasonings on abstract rights." This, he continues, is the doctrine of the Supreme Court, & the United States "have never insisted upon any other claim to the Indian lands than the right of *pre-emption* upon fair terms." It is the view taken by New-York in the case of *Goodell and Jackson*, (20 John. Rep. 693,) where that State claimed the right of *pre-emption* to the Indian lands within her limits and held all other purchases void. The Legislature of Virginia in 1799 asserted the same exclusive right of *pre-emption*, and the colonial and State authorities throughout the Union, always negotiated with the Indians within their respective territories. And then, in summing up the whole doctrine, he observes, "that while the ultimate right of our American governments to all the lands within their jurisdictional limits, and the exclusive right of extinguishing the Indian title by possession, is not to be shaken; it is equally true, that the *Indian possession* is not to be taken from them, or DISTURBED without their *free consent*, by *fair purchase*, except it be by force of arms in the event of a just and necessary war."

So much for the decisions of the Federal and other State courts, after adding, that at the last term of the Supreme Court, when it virtually decided the jurisdiction in favor of Georgia, it incidentally remarked, that the right of property in the Indians, as to the possession of their lands, would be protected by that court. I come now to the decisions of our own courts. I presume the celebrated *Reserve* question is well recollected by most persons. There were certain reserves made in favor of a number of the Indians in the treaty made by Meriwether and Jackson in 1817, and also in the one by Calhoun in 1819. The Legislature received these treaties, but determined to reject the Reserves. To that end they ordered a survey of the cession without any respect to the Reserves, and subjected them to a lottery with the other lands. The fortunate drawers of these Reserves commenced their actions against the Indians residing thereon, and the question presented was, which title should prevail, the treaty title or the Georgia grant? The question is so plain, that I apprehend there is not one mind in one thousand, at this day, that would entertain a doubt.—The decision was, of course, in favor of the treaty, and it was universally approved (out of the immediate interest of the question) by the good people of Georgia, and indeed every where else. The view taken of that case was this, and it continues to be the deliberate opinion of this Court. That the treaty making power is parted with by the States and resides in the General Government according to the limitations and powers granted to that Government in the Federal Constitution, but that all treaties, as well as all laws, must be made, in the language of that instrument, "in pursuance thereof." That the treaty making power can no more exceed the powers of the General Government than the law making power; indeed, it would be absurd in the extreme, to contend that the President and Senate can bind the States "in all cases whatever," and thereby remove all limits from the Federal Government, when Congress, composed of the representatives of the people, cannot do it! Then according to this view, it became necessary to ascertain whether the treaties above mentioned were made "in pursuance of the Constitution." In order to do this, another view became important, and it was this—By the articles of cession already mentioned, made in 1802, the State of Georgia, in addition to the constitutional right of the General Government to make treaties, had actually agreed with that government that it should purchase the lands—making it, in the language of the memorial before referred to, "our agent *pro hac vice*." So far, and no farther as the purchase of the Indian title was concerned, powers could not be more ample. In the first place the government possessed the right to treat under the Constitution, and buy the lands, but with Georgia's own money, as it was in the habit of doing for Georgia (and the other States) whenever they wished to acquire Indian lands within their respective limits. In the second place, it had Georgia's special consent, by positive contract, to treat and pay for the lands out of its money; now when the treaty was made and accepted, the whole treaty, *as to the purchase of the lands*, being the extent of the government's agency, must be taken, or none. To say that it would take a part of the contract, such as suited Georgia, and reject the balance, was so repugnant to every principle of justice, that it could not be tolerated for one moment. Then, as Georgia had received the treaty, if the General Government had transcended its powers, the court could not possibly view the matter in any other light than as a waiver of all objections, and that Georgia had made the treaty her own, as though she had the right originally to have entered into it.

Now let us apply these principles to the case before us, and in doing so, two ideas present themselves. First, if these Reserves, which were really nothing more than small portions of the Indian nation set apart for particular tribes, possessing precisely the same nature and condition of the balance of their country, as was proved by an after extinguishment of their title, was decided to be the property of the Indians, who will contend that the State had a right to prevent them from using that property in any manner they please? Who will say, if they had found mines upon their Reserves, that the State could have prohibited them from using them? Who will say it would have been just to have done so and leave the citizens all around these *Reserves* to do what they pleased with their own lands? Well, if in these Reserves the *land* and *minerals* are not separated so as to make the latter the property of the State, how do they differ from the rest of the nation? The Indians hold the balance of their lands precisely by a similar title, as has already been shown, and will be more fully exhibited presently. Suppose one of those Reserves had remained to this day in the hands of one of the reservees, unextinguished, does any one believe that the law of the last Legislature would operate upon his land? In the name of every thing that is just and sacred how can it do so upon lands exactly in the same situation differing in nothing but the number of the tenants and the extent of the reserve, for they are as effectually reserved to their nation for their own use, by these same identical treaties, as they did the small reserves for the use of individual Indians?

I avail myself of this occasion to state, that these reserves afford a happy illustration of the difference

between the State's right of jurisdiction & the Indian's right of property. If after the Court had awarded to the Indian the private property secured to him by the treaty, in his reserve, he had have applied for the right of jurisdiction also, he would have been answered, no—you fall under the government of the State precisely like all other persons within its limits, be the nature of their titles to lands what it may, or be them citizens or foreigners, black, red or white. And so with regard to the rest of the nation, because, as before stated, they are precisely in the same situation of these Reserves, being only a larger scope of country and a greater number of tenants.

The other idea is this. If the treaties just mentioned were accepted by the State under the articles of cession of 1802, and secured to these Reserves, by the decision of the Court, the right to *their* reserves, there are other treaties made since 1802, that *guaranty in like manner*, to the nation, all their lands not ceded to Georgia, and which Georgia has also accepted. I know it is now contended, that notwithstanding the States have yielded to the General Government the right to make treaties, and declared that no State shall make treaties, that such power was never meant to apply to the purchase of Indian lands within the limits of States. This might be safely granted, though a different construction has certainly prevailed throughout the Union both by the States and the General Government, and though Georgia has repeatedly declared otherwise, as I have shown in three distinct acts, yet, as stated before, Georgia has vested the General Government by special contract, and made her the State's agent to purchase these very lands; consequently whatever treaty is made by that government and received by Georgia, must be binding. In various treaties made prior to the articles of cession, the following stipulation is to be found—" The United States solemnly guaranty to the Cherokee nation, all their lands not hereby ceded." This guarantee is found in the treaty of Holston, in the year 92, and the treaties prior to that time. In the treaty of '98 is found this article—" the treaties *subsisting* between the present contracting parties, are acknowledged to be of full and operating force, together with the construction and usage under their respective articles, and so to continue." And again, in the same treaty, 6th article—" In consideration of the relinquishment and cession hereby made, the United States (will pay so much money and goods) and will continue the *guarantee* of the remainder of the country forever, as made and continued in former treaties." And in the last article of this treaty, it is declared that said treaty " shall be considered as additional to, and forming a part of previous treaties, and shall be carried into effect, on both sides, WITH ALL GOOD FAITH." These are the pledges prior to the articles of cession, and perhaps, by some, it may be said, are not binding upon Georgia. Now let us see what pledges are made after the year 1802, the time when Georgia made the General Government an agent to "extinguish the Indian title." In the treaty of 1805, made at Tellico, the very first article declares "all former treaties, which provide for the maintenance of peace and preventing crimes, are on this occasion, recognized and continued in force." Can any thing conduce more to peace than the undisturbed and quiet possession of one's home? Can any thing sooner contribute to an opposite consequence than the violation of one's possessions? But again, in the 5th article of Jackson's & Meriwether's treaty, in 1817, which divided the nation and sent a part across the Mississippi, it is agreed, " that the treaties heretofore between the Cherokee nation and the United States, are to continue in full force with both parts of the nation, and both parts thereof entitled to all the immunities and privileges which the old nation enjoyed under the aforesaid treaties." This treaty procured for Georgia all that valuable country in which the counties of Walton, Gwinnett, Hall and Habersham are situated, and of course formed the consideration for the above stipulation, securing to the Indians the provisions of other treaties, one of which provisions was, that the Indians should be *guaranticed* in the balance of their lands not ceded.

Now if Georgia has accepted this treaty, received the land thereby conveyed and distributed the same to her citizens, can she in good faith violate the *guarantee* solemnly made in that treaty to the Indians? Is not this precisely a similar case to the one decided in favor of the Reserves? Besides a violation of the faith of treaties, the most solemn of all contracts, and so regarded by all civilized nations, it would be a palpable violation of that part of the 10th section of the 1st article of the Federal Constitution which positively forbids the States from passing any " law impairing the obligation of contracts." This is a contract made by Georgia herself, because made by the U. States under her power of attorney, " acting as her agent " ratified by her, and its benefits fully enjoyed on her part!

I have on a former occasion said, and I am yet of the same opinion, that the United States have no right to treat with the Indians on any subject, but such as relates to peace or war, and to commerce, these being the only general relations in which they stand to that government, and as falling within the powers granted in the Constitution. Any thing else the State of Georgia might reasonably object to, but where lands have been ceded as the terms of peace, or ending a war, or preventing future disturbances, or settling claims, the treaties are such as fall strictly within the power of the United States, and as Georgia herself has frequently admitted. Such were all the treaties prior to the articles of cession. And thus believing, how can this Court, under the solemn oath it has taken, evade this explicit injunction contained in the Federal Constitution, to wit—" this Constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made, under the authority of the United States, shall be the Supreme law of the land; and the JUDGES in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding." I confess, under the immense obligation imposed upon my conscience by this unequivocal direction, I am not prepared to nullify these treaties. We owe it to our own character, at home and abroad; we owe it to justice, we owe it to humanity; but above all, we owe it to our love and veneration for the Federal Constitution, when executed according to its acknowledged powers, to respect these treaties, to the extent of securing to the Indians the possession of those lands not parted with, by fair purchase, and under their free consent.

Before I leave this branch of the subject, I will suggest a fact which goes to illustrate, under another aspect, the foregoing reasoning. The last Legislature passed an act to survey the Cherokee nation and distribute it by lottery in the manner heretofore pursued, with this exception, that the improvements of Indians falling within any of the lots, should be reserved to them, and that the fortunate drawers of such lots should not be entitled to a grant for the same, or in any manner remove, or attempt to remove the Indians from their said improvements, unless the General Assembly shall enact to the contrary, or said Indians or their descendants shall voluntarily abandon such improvements. Now a question naturally arises, what kind of a title have these reserves, under said act? In sinking a well upon their premises or in ploughing their fields, if they should turn up a piece of gold and appropriate it to their own use, would they be obnoxious to the law, which makes it criminal to dig gold in the Cherokee nation? If they would not, where is the difference between that case, and their present condition as the nation? They would hold their reserves under no better title than they now hold the nation. The act only reduces their title from a tenancy in *common* to one in *severalty*, and the quantity from a large to a small amount, and surely whatever right they would have in the last case, is precisely the same which belongs to the first, for the operation of the act does not in the smallest degree change the nature of their title. It is still a title by occupancy, without limit as to its duration unless the State chooses to end it by force.

I come now to consider the only argument that has been advanced to sustain the State, in the course she has taken. It is this—the Indians hold their lands by the mere title of occupancy—the fee simple is in the State and therefore having the reversionary interest she can restrain the Indians from injuring the freehold, or in other words

from committing waste. If this be true, she can also prevent them from cutting timber beyond what is necessary for absolute use, and from doing many things, which in legal language is called waste; working mines comes within that definition, & is of no higher injury to the freehold than any other species of waste. But the truth is, the Indian title of occupancy assimilates itself to no principle of the English law which gives the right to stay waste as it is called. It is analagous to no estate, upon condition, which involves the relation of landlord and tenant, remainder man or reversioner, and these are the only three characters who can restrain the tenant from committing waste. It must be a particular estate to which there is a definite limit, certain as to the time of expiration, which will entitle the owner of the freehold to restrain the commission of waste.—We all know what the renting of land means; it does not fall under this head. It is not every reversionary interest in lands that will give the right to restrain the tenant from committing waste. It is a well known fact that the State, as the source of all title, has a reversionary interest in every foot of land she grants out to her citizens; for if they die without heirs and intestate, their lands revert to the State by virtue of the *escheat* law. Now under this remote expectant interest, no one will contend the Legislature could restrain the good people of the State from digging gold on their lands. The State does not hold in remainder, for remainder "is defined to be an estate *limited*, to take effect and be enjoyed after another estate is *determined*. There must be a *particular estate* created, certain and determinate, as for years, for life, or in tail, and *remainder* being a relative term, implies that *a part* has been previously disposed of, for where the *whole* is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it may be, will be an estate in possession."—2 Blac. 165. Every one must perceive that this relation does not exist between Georgia and the Indians. "An *estate in reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him.—2 Blac. 175. Sir Edward Coke describes a reversion to be the returning of land to the *grantor* or his heirs, after the grant is over. Now it is equally clear that this estate does not apply to the case of the Indians; for instead of Georgia's being the grantor and limiting a particular estate, to the Indians, which is to have a specific duration, the very reverse is true. The Indians are the original grantors, and reserve to themselves in the grant, to wit, the treaties, an interest which is unlimited as to time, and not to end without their consent. These are all the estates which can by any possibility be made to bear upon the question, and it may with great confidence be asserted, that none other can be found. Their occupant title is unlimited as to duration, and to them is, to all intents and purposes, the same as a fee-simple; they do not care what it is called, if you do not take it away by force, and will suffer them to retain the use and possession of it till they choose to part with it upon their free and voluntary consent. But we frequently attach wrong ideas to particular terms, and if it is understood by the term occupancy, that it is such a title as will justify Georgia in removing the Indians whenever she pleases, nothing can be more erroneous; for according to the legal signification of occupancy, as understood in the English law, they will have a right to retain their land until they voluntarily abandon or sell it. Mr. Blackstone in describing the title *to lands* by occupancy, says it "is the taking possession of those things, which before belonged to nobody. This as we have seen is the true ground and foundation of all property, or of holding those things in severalty, which by the law of nature, unqualified by that of society, were common to all mankind. But when once it was agreed that every thing capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating any thing to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it."—2 Blac. 258. There is now no title by occupancy in England, and never was but one instance, and that is now virtually destroyed by statute. The case of the Indians in America comes the nearest to it of any we know of, hence it is so called, and applying it to the definition above laid down, it is a much more stubborn title than is usually conceived. We have seen also, that the first discoverer, G. Britain, chose so to consider it, and imposed no other condition or restriction upon it than the right of *pre-emption* on her part. This has been followed up by Georgia, by the other States, and by the U. States; so that as far as human action and decision can confirm and settle a question, this is at rest.

It will be recollected, that at the August Term, 1830, of Clark court, I delivered a charge to the Grand Jury, in which I mentioned that it was my fixed determination to enforce the laws of Georgia in the Cherokee nation. I told them of the illiberal interference of other States in this question—that they had reproached us with cruelty, fraud and injustice to the Indians, and said even in Congress, that it was our intention to oppress by legislation, to persecute by legal prosecutions, and finally destroy the Indians to obtain their lands. I concluded that charge by saying, "let us falsify the prophecies that have been made as to the treatment which the Indians are to receive at our hands, by exercising towards that unfortunate people, the utmost kindness, justice and humanity. Their rights must be respected. To the Indians I will say, they have nothing to dread, as far as they are concerned, either from the character of our laws or their mode of administration—for if *we* can live under them, *they* surely can, and no distinction shall be made in their execution." In the name of every thing that is holy in religion, that is lovely in charity, that is sacred in justice and dear to freedom, let not this be an idle, faithless pledge. "Justice (says Vattel) is the basis of all society, the sure bond of all intercourse. All nations are then strictly obliged to cultivate justice with respect to each other, to observe it scrupulously, and carefully to abstain from every thing that would violate it. Every one ought to render to others what belongs to them, to respect their rights, and to leave them in the peaceable enjoyment of them." The elegant historian, Dr. Ramsey, has said, "universal justice is universal interest. The most enlarged happiness of one people by no means consists in the degradation or destruction of another; it would be more glorious to civilize one tribe of savages than to expel or exterminate a score. Instead of invading their rights, promote their happiness and give them no reason to curse the folly of *their* fathers who suffered *yours* to set down upon a soil which the common parent of us both had previously assigned to them." In this strong sentiment of justice, all good men must concur, and, I am persuaded, it is one which Georgia, slandered as she has been, will not feel herself authorized to disobey. But to consign a weak and defenceless race to the scourge of slavery by day, and the gloom of a dungeon by night, far from their country and their friends, for no other crime than that of taking gold from their own land and the land of their fathers, is not only a departure from this heaven directed principle, but will incur the condemnation of all civilized nations, if it do not provoke the curse of a much higher tribunal.

We are requested by Judge Clayton to publish the following as a part of his opinion delivered in the case of Canatoo, the Cherokee Indian.

It was my intention to have given the Court's opinion upon an incidental question resulting from the main point in the above case, but it escaped my recollection: it is this; it is contended that if the Indians are permitted to dig gold, they can employ any one else to do it, under the maxim that, "he who does a thing by another, does it by himself;" and that therefore they can employ white-men and negroes to any number, to operate in the mines. And it is urged that whatever use a man has of property, he has the right to employ all means in his power to make that use as productive as possible. Now there is nothing more erroneous than this principle. In the first place the above maxim does not apply to criminal acts; it is strictly applicable to civil transactions.—Crime admits of no agencies; whenever an act is made criminal he who commits it will be answerable on his own account and cannot plead that he

does it at the instance of another. But if the maxim did apply to criminal cases, surely no one will deny the right of the Legislature to alter it and make such exceptions to the maxim as they pleased. Admit for the sake of argument, that the Legislature could not control the Indians in employing laborers to work their farms and mines, what is to hinder them from preventing their own citizens and indeed all white persons from going into the nation, upon any terms whatever, as the United States did when they had the charge of the Indians and their lands? And if they can exclude them altogether, what hinders them from permitting it upon such terms and conditions, as they might think proper, as they have lately done in the act passed last session, prescribing an oath and requiring them to obtain a license? What is to prevent an additional condition, that no white man shall go into the nation, unless he takes an oath that he will not be concerned in digging gold, or under a severe penalty it he attempts to do it.

To recur again to the reasoning, that a man who has property may employ all the means in his power to make that property as productive as possible, I would observe, the slightest reflection will convince any one of the unsoundness of this doctrine. There are to be found various instances in our statute books, where this position is falsified. Witness the numerous acts that prevent persons from using their gaming tables, that prohibit the retailing of spirituous liquors without paying a tax for the permission, and if a tax to one amount can be imposed, so may another, and it may be so increased as to prohibit the use of the property altogether. But there is a case exactly in point in the act passed at the session of 1829, entitled "act to prohibit the employment of slaves and free persons of colour, in the setting of types in printing offices of this State!" That act inflicts a penalty of ten dollars a day for every day, or a part of a day, such slave or free person may be employed. Now what is to hinder the Legislature from taking the above caption, striking out the words "setting of types' &c. and substitute "digging of gold in the Cherokee nation," and instead of prescribing the penalty of 10 dollars a day, confiscate the slaves, & punish the free persons in such manner as they may think proper? Nothing. If owners of Presses cannot use or employ their *own* slaves in working in their offices, a property as much theirs as the use of the land is that of the Indians, surely no objection can be urged against the State's preventing *white* people from employing slaves or free persons in digging gold in the nation, or of hiring them to the Indians for that purpose. If a law can prevent the hiring of a slave to himself, or to another slave, it can to an Indian. On this subject the court feels no difficulty, for while the United States regulated the intercourse with Indians, which right has now passed to the State of Georgia, it restrained the admission of white persons into the nation, under much severer penalties than ever Georgia has resorted to. Whatever rights were exercised by that government, and indeed all the rights which belong to Indian relations, are now exclusively under the control of Georgia, no otherwise bound than by her own contracts and the lawful treaties of the land.