

From the Southern Recorder.

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 misdemeanor, and upon conviction thereof, shall be sentenced to hard labor in the Penitentiary 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 trespasser upon land of which he has the use and 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 had 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 has been committed by the *trespasses* and *intrusions* of whom? Not the Indians—but "numberless citizens of this and 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 the