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 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 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 liberty and slavery, the *presumption* should be on the side of liberty. This excellent principle our law has adopted in the construction of penal statutes, for whenever any ambiguity arises in a statute introducing a *new penalty* or punishment, the decision shall be on the side of lenity and mercy; or in favor of right and liberty; or, in the 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 liberty, that the Judge should acquit whom the Legislator intended to punish, than that he should punish whom the Legislator intended 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 3d 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 further 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 feudel 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 *agreed* with the Indians, and PURCHASED of 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, with 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 on 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 of 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 themselves from such settlements." And then he 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 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 voluntary 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 country above Little river, up to the Cherokee Corner.

[*Remainder next week.*]