

**JUDGE CLAYTON'S OPINION.**

**THE STATE vs CANAWOO,**

A CHEROKEE INDIAN.

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

(CONCLUDED.)

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 Cherokee 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 he 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 believed 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, through very many difficulties which she had with the general government, but yielded the right to that government to purchase off by treaty, 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 fair 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 Pensacola between Georgia and 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; and 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 ablest 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 rights of jurisdiction and soil, justly recognizes a title in the Indians, the right to extinguish which, is only pre-emptive 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 controlling power of the United 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