

# Mitchel v. United States

34 U.S. (9 Peters) 711 (1835) — Supreme Court of the United States

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COLIN MITCHEL, ROBERT MITCHEL, IN HIS OWN RIGHT, AND AS ASSIGNEE OF THE ESTATE AND EFFECTS OF THE MERCANTILE HOUSE

HERETOFORE TRADING UNDER

CARNOCHAN

AND MITCHEL, AND AS TRUSTEE OF THE CRE-

DITORS OF SAID

THE FIRM OF

FIRM, AND ALSO OF RICHARD CARNOCHAN,

WILLIAM CALDER,

BENJAMIN

ROGERS,

WILLIAMSON,

JOHN P

MARSHALL, THE

BENJAMIN

HEIRS AND

LEGAL

REPRESENTATIVES OF JOHN M'NISH DECEASED, AND JAIES INNERARITY, APPELLANTS V THE UNITED STATES.

A claim to lands in east Florida, the title to which was derived from grants by the Creek and Seminole Indians, ratified by the local authorities of Spain before the cession of Florida by Spain to the United States; confirmed. It was objected to the title claimed in this case, which had been presented to the superior court of middle Florida, under the provisions of the acts of congress for the settlement of land claims in Florida, that the grantees did not acquire, under the Indian grants, a legal title to the land. Held, that the acts of congress submit these claims to the adjudication of this court as a court of equity; and those acts, as often and uniformly construed in its repeated decisions, confer the same jurisdiction over imperfect, inchoate and inceptive titles, as legal and perfect ones, and require the court to decide by the same rules on all claims submitted to it, whether legal or equitable. By the law of nations, the inhabitants, citizens, or subjects of a conquered or ceded country, territory, or province, retain all the rights of property which

have not been taken from them by the orders of the conqueror; and this is the rule by which we must test its efficacy according to the act of congress, which we must consider as of binding authority. A treaty of cession is a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property; and only such right as he owned, and could convey to the grantee. By the treaty with Spain, the United States acquired no lands in Florida to which any person had lawfully obtained such a right, by a perfect or inchoate title, that this court could consider it as property under the second article, or which had, according to the stipulations of the eighth article of the treaty, been granted by the lawful authorities of the king. which words grants or concessions were to be construed in their broadest sense, so as to comprehend all lawful acts which operated to transfer a right of property, perfect or imperfect. The effect of the clauses of the confirmation of grants made was, that they confirmed them presently on the ratification of the treaty, to those in possession of the lands; which was declared to be that legal seism and possession which follows title, is co-extensive with the right, and continues till it is ousted by an actual adverse possession, as contradistinguished from residence and occupation.

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terms of the eighth article The United States, by accepting the cession under title, and the ratification by the king, with an exception of the three annulled grants to Alagon, Panton Rostro, and Vargas, can make no other exceptions of grants made by the lawful authorities of the king. The meaning of the words lawful authorities in the eighth article, or competent authorities in the ratification, must be taken to be " by those persons who exercised the granting power by the authority of the crown." The eighth article expressly recognizes the existence of these lawful authorities in the ceded territories, designating the governor or intendant, as the case might be, as invested with such authority- which is to be deemed competent till the contrary is made to appear. By "the laws of Spain" is to be understood the will of the king expressed in his orders, or by his authority, evidenced. by the acts themselves; or by such usage and customs in the province as may be presumed to have emanated from the king, or to have been sanctioned by him, as existing authorized local laws. In addition to the established principles heretofore laid down by this court as the legal effect of an usage or custom, there is one which is peculiarly appropriate to this case. The act of congress giving jurisdiction to this court to adjudicate on these causes, contains this clause in reference to grants, &c., "which was protected and secured by the treaty, and which might have been perfected into a complete title, under and in conformity to the laws, usages and customs of the government under which the same originated." This is an express recognition of any known and established usage or custom in the Spanish provinces, in relation to the grants of land, and the title thereto, which brings them within a well established rule of law - that a custom or usage saved and preserved by a statute has the force of an express statute, and shall control all affirmative statutes in opposition, though it must yield to the authority of negative ones, which forbid an act authorized by a custom or usage thus saved and protected, and this is the rule by which its efficacy must be tested, according to the act of congress, which must be considered of binding authority In the case of *The United States v. Arredondo*, 6 Peters 691, the lands

granted had been in the possession and occupation of the Allachua Indians, and the centre of the tract was an Indian town of that name. But the land had been abandoned, and before any grant was made by the intendant, a report was made by the attorney and surveyor general on a reference to them, finding the fact of abandonment, on which it was decreed that the lands had reverted to and become annexed to the royal domain. By the common law, the king has no right of entry on lands which is not common to his subjects; the king is put to his inquest of office, or information of intrusion, in all cases where a subject is put to his action, their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to lands, he cannot acquire it without office, joined so as to annex it to his domain. The United States have acted on the same principle in the various laws which congress have passed in relation to private claims to lands in the Floridas; they have not undertaken to decide for themselves, on the validity of such claims; without the previous action of some tribunal, special or judicial. They have not authorized an entry to be made on the possession - of any person in possession, by colour of a Spanish grant or title, nor the

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[Mitchel and others v. The United States.] sale of any lands as part of the national domain, with any intention to impair private rights. The laws which give jurisdiction to the district courts of the territories to decide in the first instance, and to this on appeal, prescribe the mode by which lands which have been possessed or claimed to have been granted pursuant to the laws of Spain, shall become a part of the national domain; which, as declared in the seventh section of the act of 1824, is a " final decision against any claimant pursuant to any of the provisions of the law." One uniform rule seems to have prevailed in the British provinces in America by which Indian lands were held and sold, from their first settlement, as appears by their laws-that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Subject to this right of possession, the ultimate fee was in the crown and its grantees; which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians; though possession could not be taken without their consent. Individuals could not purchase Indian lands without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such license, or in conformity with the local laws, and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete. Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case their rights became extinct, the lands could be granted disencumbered of the right of occupancy, or enjoyed in full dominion by the purchases from the Indians. Such was the tenure of Indian lands by the laws of

Massachusetts, Connecticut, Rhode Island, New Hampshire, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina and Georgia. Grants made by the Indians at public councils, since the treaty at Fort Stanwick's, have been made directly to the purchasers or to the state in which the land lies, in trust for them, or with directions to convey to them, of which there are many instances of large tracts so sold and held, especially in New York. It was an universal rule, that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands: it prevailed under the laws of the states after the revolution, and yet continues in those where the right to the ultimate fee is owned by the states or their grantees. It has been adopted by the United States, and purchases made at treaties held by their authority have been always held good by the ratification of the treaty, without any patent to the purchasers from the United States. This rule in the colonies was founded on a settled rule of the law of England, that by his prerogative the king was the universal occupant of VOL. IX°-4 P

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on the traders resident among them to provide for their wants; while they were available to the purchasers as payment of the considerations which at their expense had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property in the power of the Indians, to suffer the latter to contract debts, and when willing to pay them by the only means in their power, a cession of their lands, withhold an assent to the purchase, which by their laws or municipal regulations was necessary to vest a title. Such a course was never adopted by Great Britain in any of her colonies, nor by Spain in Louisiana or Florida. The laws made it necessary, when the Indians sold their lands, to have the deeds presented to the governor for confirmation. The sales by the Indians transferred the kind of right which they possessed, the ratification of the sale by the governor must be regarded as a relinquishment of the title of

JANUARY TERM 1835. [Mitchel and others v. The United States.] the crown to the purchaser, and no instance is known where permission to sell has been "refused, or the rejection of an Indian sale." In the present case the Indian sale has been confirmed with more than usual solemnity and publicity; it has been done at a public council and convention of the Indians conformably to treaties, to which the king was a party, and which the United States adopted, and the grant was known to both parties to the treaty of cession. The United States were not deceived by the purchase, which they knew was subject to the claim of the petitioner, or those from whom he purchased, and they made no stipulation which should put it to a severer test than any other; and it was made to a house which in consideration of its great and continued services to the king and his predecessor, had deservedly given them high claims as well on his justice as his faith. But if there could be a doubt that the evidence in the record did not establish the fact of a royal license or assent to this purchase as a matter of specific and judicial belief, it would be presumed as a matter of law arising from the facts and circumstances of the case, which are admitted or unquestioned. As heretofore decided by this court, the law presumes the existence in the provinces of an officer authorized to make valid grants; a fortiori, to give license to purchase and to confirm; and the treaty designates the governor of West Florida as the proper officer to make grants of Indian lands by confirmation as plainly as it does the governor of East Florida to make original grants, or the intendant of West Florida to grant royal lands. A direct grant from the crown of lands in a royal haven may be presumed on an uninterrupted possession of sixty years, or a prescriptive possession of crown lands for forty years. The length of time which brings a given case within the legal presumption of a grant, charter, or license, to validate a right long enjoyed, is not definite, depending on its peculiar circumstances. After the case had been fully heard in the superior court of middle Florida, the judge of that court, in examining the evidence in the case with a view to its decision, considered that he had discovered in the date of the water mark in the paper on which one of the original Spanish documents had been written, a circumstance which brought into doubt the genuineness of the instrument. No objection of this kind had been made during the argument of the cause, and after the supposed discovery, no opportunity was permitted, by the court of Florida, to the claimants, to explain or account for the same. After the appeal had been docketed in this court, the appellants asked permission to send a commission to procure testimony,

which it was alleged would fully explain the circumstance, and offered to read ex parte depositions to the same purpose. By the Court. This is refused. because in an appellate court, no new evidence can be taken or received, without violating the best established rules of evidence. Under such circumstances, it would be dealing to the petitioner a measure of justice incompatible with every principle of equity, to visit upon his title an objection which the claimant was not bound to anticipate in the court below, which he could not meet there, and which this court were compelled to refuse him the means of removing by evidence, We will not say what course would have been taken, if his title had depended on the date of the paper alluded to: as the case is, it is only one of numerous undisputed documents tend-

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APPEAL from the superior court of middle Florida. The appellants, on the 18th day of October 1828, presented to the superior court of middle Florida, their petition under the authority of the sixth section of the act of congress passed on the 23d of May 1828, entitled an act supplementary to the several acts providing for the settlement and confirmation of the private land claims in the territory of Florida, and of the act of 1824, referred to in the said act, authorizing claimants in Missouri to institute proceedings to try the validity of their titles. The appellants claimed title to a tract of land containing one million two hundred thousand acres, in the territory of Florida, the greater part of which was situated between the rivers Appalachicola and the St Mark's, comprehending all the intervening sea coast, and the islands adjacent. The title was asserted to be held under deeds from the Creek and Seminole Indians to Panton, Leslie and Company, to John Forbes and Company, and to John Forbes. and confirmed by the authorities of Spain. These lands, the petitioners alleged, were granted by the Indian tribes, as an indemnity from the Spanish government and from those Indians, for losses sustained by them in prosecuting a trade with the Indians, under the special and exclusive license of Spain. The Indian grants were dated on the 25th May and the 22d August 1804, and the 2d August 1806, and were alleged to have been confirmed by governor Folch, the governor of the province. The facts of the case, and all the documents on which the title of the petitioners was claimed to rest, with the evidence in the case, are fully stated in the opinion of the court. The answer of the district attorney stated that the commissioners under the act "for the settlement of private land claims, and for the confirmation thereof" were instructed to report, and not to decide upon large claims, that the claim of the petitioners was reported upon by the commissioners, and

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their report laid before congress-but it was denied that the documents presented to the said commissioners and by them reported, were, by the said report, "admitted to be genuine." The title of the appellant is invalid. Congress did not confirm or adopt the report of the commissioners upon this claim, but referred all claims not annulled by the treaty of cession, nor by the decree of the king of Spain ratifying the same, nor reported by the commissioners as antedated or forged, to the decision of the judiciary. The cause was

heard in the superior court of middle Florida, on the evidence adduced by the petitioners and the United States and on public documents, all of which were sent up with the record, and was finally disposed of by a decree of the judge of that court, entered on the 2d of November 1830, dismissing the petition. The petitioners appealed to this court. The appeal was entered to January term 1831. At former terms of this court, on the motions of the counsel for the United States, the case was postponed to enable the government of the United States to procure papers from Madrid and from Havana, which were considered important and necessary in the cause. These motions were always resisted by the counsel for the appellants. At January term 1834, the case was continued, under an order of the court that it should not be argued before the 2d of February 1835. On the 9th of January, Mr Butler, attorney-general of the United States, moved the court to postpone the hearing of the case until later in the term than the day fixed for the same, alleging that the documents which had been expected from Havana had not arrived, and that the government had despatched a special messenger for them, whose return was expected before the 25th of February, during the term. The court refused to hear the motion until the case should be called, on or after the 2d of February. Afterwards, on the 9th of February, the motion was renewed on the part of the United States, by the attorney-general, and was overruled, the court not thinking it necessary to hear the counsel for the appellants against it.

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The cause then came on, and was argued by Mr White and Mr Berrien, for the appellants, and by the attorney-general and Mr Call, for the United States. For the appellants, the following points were submitted to the court. 1. That the Indian sales of 1804 and 1811, and the several acts in confirmation thereof by the governor of West Florida, vest in the grantees a full and complete title to the land in controversy. 2. That the king of Spain was bound, in good faith, to indemnify the house of Forbes & Co. for the losses sustained by them in their traffic with the Indian tribes; that the satisfaction of the claims of that house, which was effected by these sales, and the consequent release of the obligation of the king of Spain to indemnify them, constituted a sufficient consideration to the Spanish crown for any right of pre-emption or otherwise which it might have had in these lands. 3. That these sales, having been made with the knowledge, assent and previous approbation of the authorities of Louisiana and West Florida, having been subsequently ratified and confirmed by the civil and military governor of the latter province, having been notified to the captain-general of Cuba, and by him to the king, and not having been disapproved by either that these several acts and omissions amount to an acquiescence on the part of the king of Spain and his legitimate authorities, which, according to the laws and usages of that kingdom, would vest a valid title in the grantees. 4. That the decision of the captain-general of Cuba, on the petition of John Forbes, setting forth his title to these lands, and praying leave to sell the same, is a judicial decision upon the validity of that title by the highest legitimate authority of that captain-generalcy, to which West Florida was an appendage, and cannot be drawn into question in any other tribunal. 5. That the grantees, and those claiming under them, have had legal possession, in good faith, by just title, since the date of the respective grants, which constitute a title by prescription under the laws of Spain. 6. That the title thus subsisting in the grantees, by the aforesaid sales

and acts of confirmation, by the acquiescence,

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after notice, of the king of Spain and his legitimate authorities, by the judicial decision of the captain-general of Cuba, and by the right of prescription, at the date of the delivery of the Floridas to the United States, was a valid and legal title, which was recognized and confirmed by the treaty of cession. For the United States, it was contended by Mr Butler and Mr Call I. Admitting it to be true, for the sake of argument, 1. That the house of Forbes & Co. had rendered important services to the Spanish government, and had well founded claims on its bounty; 2. That the king of Spain was bound, in good faith, to indemnify the house, for the losses sustained by them in their traffic with the Indians, 3. That the government of the United States had knowledge of the existence of that house, of its claims on Spain, and of the title on which the present suit is founded, 4. That the vacant and ungranted lands in the Floridas, even if the present claim be confirmed, will yet be more than the government of the United States, at the time of the cession, expected to receive, and, 5. That other equitable circumstances exist, which entitle the claim to a favourable regard. Still it is contended, on the part of the United States, that no valid reason can be found, in either or all of these circumstances, for reversing the decree of the court below That decree must be affirmed, unless it can be shown that the claimants, at the time of the cession, had a legal right to the lands in question, acquired either, 1. By virtue of a grant or concession, made before the 24th of January 1818, by his catholic majesty, or by his lawful authorities, or, 2. By virtue of some other valid title, known to, and recognized by the laws of Florida. II. The most important of the suggestions above referred to, viz. the alleged liability of the king of Spain to indemnify Forbes & Co. for their losses, &c., is not correct in point of fact. Neither the law of nations, nor any special promise, not any existing treaty, imposed on him any such obligation.

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Besides, if such obligation existed, the duty of auditing and settling the accounts belonged alone to the intendency of the province, and the Spanish government could not be bound for the payment of any particular demand, on the mere admission of the Indians. III. The claim, in the present case, though of land within the territorial limits of the Floridas, does not profess to be founded on any original substantive grant made by the king of Spain or his officers, but on cessions made by Indian tribes, and on alleged ratifications and confirmations thereof, and acquiescence therein, by the Spanish authorities. In this respect, the present case differs from all the cases hitherto submitted to this court. IV The Indian deeds to Panton, Leslie & Co. did not, either in themselves, or with the confirmation thereof by governor Folch, convey to the grantees therein named, any legal right to the lands in question. 1. According to the laws of Spain, in force in the Floridas, the absolute title in the soil, in all the lands described in the deeds, was, at the execution thereof, exclusively vested in the crown of Spain. The Indians, by those laws, were regarded as having no title whatever, except in and to such tracts as were left in their possession by the Spanish authorities, in conformity to the laws of the Indies, and no part of the premises in question were so allotted. 2. If the title of the Spanish crown was qualified, in respect to lands in the Floridas, by any Indian right of occupancy, that right

existed only in favour of such Indian tribes, if any, as actually inhabited the lands, and as had not previously surrendered it, and the Spanish crown possessed the absolute and exclusive right to extinguish it. 3. The lands in question were, in fact, at the time of the cessions, vacant and uninhabited, and therefore no Indian right of occupancy could exist therein. 4. The original Indian right of occupancy, if any ever existed, from the shores of the gulf, as far as the flowing of the tide up the bays, rivers and inlets, in the premises in question, was extinguished by solemn compact between the government of Great Britain and the Indians, in the year 1765 and by the treaty of 1783, Spain succeeded to all the rights of soil and

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sovereignty, previously possessed by the British crown. As to the greater part of the lands described in them, the Indian deeds were therefore invalid. 5. The deeds were executed by Indians, residing, with a trivial exception, within the territorial limits of the United States. The cessions were not the act of the Seminole nation, every town and village of which was interested in the Indian right of possession. 6. The Indians could not sell to the subjects of Great Britain, land within the jurisdiction of Spain, on which was erected the fortress of St Mark's, then occupied and garrisoned by the troops of Spain, and since ceded and delivered by the Spanish government to the United States. 7. William Panton and John Leslie, of the house of Panton, Leslie & Co., were both dead, and no such firm existed in Florida as that of Panton, Leslie & Co., at the time of executing the several deeds, and at the time of their confirmation by governor Folch. 8. Panton, Leslie & Co. were foreigners. They had not taken the oath of allegiance to the crown of Spain, without which they could receive no grant of land in Florida, from the subordinate officers of the government. 9. There is no proof that the governors-general of Louisiana authorized or approved the purchases in question. 10. The original acts of confirmation of the Indian sales, by governor Folch, to the house of Panton, Leslie & Co., and to the house of John Forbes & Co., have not been produced by the petitioners, nor their absence satisfactorily accounted for. There is no evidence then, that any formal titles were given by governor Folch, to the grantees, for the land in question. 11. Governor Folch had no power to ratify and confirm the Indian cessions in question (1.) Because the power to ratify such cessions was not within the scope of his general authority, nor had he any special authority to ratify the same. (2.) Because the lands, with a small exception, were situated within the province of East Florida, and out of his jurisdiction. (3.) Because the royal order of 1798 vested in the intendants the exclusive power of granting and conceding all kinds VOL. IX.-4 Q

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of land, and at the date of the supposed grants, Juan Ventura Morales was intendant of West Florida. V If the titles executed by governor Folch could be considered as original substantive grants (which is by no means admitted), they would still be invalid, by reason of their repugnancy to the laws, ordinances, usages and regulations of the Spanish government. As to the lands in East Florida, they must certainly be invalid. VI. The facts and circumstances attending this case, and relied on by the appellants, do not amount to any such acquiescence on the part of the king of Spain and his lawful authorities, as would, according to the laws and usages of that kingdom, vest a valid title in the grantees.

And all presumption of such acquiescence is conclusively rebutted by the subsequent grants actually made by the king himself. VII. No title by prescription exists in this case. VIII. The permission granted by the captain-general of the island of Cuba, to the house of John Forbes & Co., to sell the lands in controversy to Colin Mitchell, related only to the lands described in the cession of 1804, and was not a judicial decision on the validity of the title. It created no estate either in the grantees or those claiming under them. IX. The captain-general of the island of Cuba, had no jurisdiction over the lands in Florida. The royal domain of Florida was under the exclusive control and superintendence of the intendency. X. The various circumstances and arguments relied on by the appellants, being, for the reasons above stated, each of them insufficient in itself, to sustain the present claim, they must, from the peculiar nature of this case, be equally insufficient in the aggregate. XI. The United States have a clear title to the fortress of St Mark's and its appurtenances, which, even if the claim be allowed in other respects, must be excepted by definite bounds therefrom, and should have been so excepted in the petition. On the 14th of March, the case having been argued, and the opinion of the court being about to be delivered by Mr Justice Baldwin, Mr Butler and Mr Call, for the United States, moved to postpone the final disposition of the case until next term.

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The Attorney-General stated, that the messenger who had been despatched to Havana, had on the day preceding returned to the city of Washington, and had brought with him documents of great importance to the just decision of the case, and that information had been received by the department of state, that other documents, showing the action of the government of Spain in relation to titles to lands in Florida, were preparing in Havana by the consul of the United States there, who had been specially commissioned for the purpose, which would be received before the next session of the court. These documents were represented by the agent at Havana, to be very important in the cause. The motion was opposed by Mr White, Mr Ogden, Mr Berrien and Mr Webster, of counsel for the appellants; and supported by Mr Call and Mr Butler. The motion was held under advisement until the 17th of March, when Mr Chief Justice MARSHALL said The court has taken into its serious and anxious consideration, the motion made on the part of the government to continue the cause of Mitchel v. The United States to the next term. Though the hope of deciding causes to the mutual satisfaction of parties would be chimerical, that of convincing them that the case has been fully and fairly considered, that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised on the case, may be sometimes indulged. Even this is not always attainable. In the excitement produced by ardent controversy, gentlemen view the same object through such different media, that minds not unfrequently receive therefrom precisely opposite impressions. The court however must see with its own eyes, and exercise its own judgment guided, by its own reason. The motion is founded on the expectation, that by the next term admissible evidence may be obtained, which will shed much light on this cause, and change essentially its present character. This motion is opposed on the ground that the delays have already been excessive, that a farther continuance for twelve months would affect one of the parties most inju-

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riously; and that no rational foundation is laid, for the opinion, that new and important additions will or can be made to the information the record at present contains. The cause was docketed on the 2d of February 1831. OR the 26th of the same month a motion was made on the part of the United States, to bring on the cause for argument at that term. This motion was opposed and was overruled. The reasons of the court are not recollected, but the motion was in opposition to a positive rule, and must for that cause alone have been rejected. In March 1832, the parties were willing to bring on the cause, but the court thought it too late in the term to take it up, and it was continued. In 1833 and in 1834 the cause was continued, on the motion of the attorney for the United States, supported by the same arguments which are now urged. This cause was commenced in the district court of the United States for the territory of Florida, in October 1828. The degree of intelligence which has been employed in preparing the record for a final decision, gives the most absolute assurance that from the commencement of the controversy, it must have been perceived that the case depended essentially on the sanction given by the authorities of Spain to the grants made by the Indians. It was perceived, and great efforts were made in the district court by both parties for the establishment of this fact. A vast mass of evidence has been collected on it, and is to be found in the record. An inspection of that evidence goes far to establish the opinion, that it cannot be materially varied. The government has unquestionably made great exertions, we believe all that could be made, to obtain any additional documents which the case may furnish. No difficulty has been opposed by the Spanish government to the inquiries of the American agents. On the contrary, every facility has been given to them. We cannot doubt that the most important documents would be the most immediately forwarded. Those which have arrived have been inspected. They are not believed to vary the case many of them are undoubtedly important, but they were already in the record, and have been considered. The transfer of all sales of crown lands from the

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political to the treasury department, from the governor to the intendant, and the ordinance by which this change was effected, were already in possession of the court, and had been maturely considered. The documents referred to were chiefly in the record. We are not satisfied, from the communications of the agent of the United States, that the additional papers to which he alludes, and which he hopes to obtain, can materially affect the merits of the case. With this strong impression on our minds, we should not be justified in granting a still further continuance. The opinion of the court will be delivered. Mr Justice BALDWYN delivered the opinion of the Court. The land in controversy is claimed by the United States, in virtue of the treaty of cession by Spain, by which the territory and sovereignty of the two Floridas were acquired, in consideration of 5,000,000 dollars, paid in extinguishment of certain claims of the citizens of the United States on the government of Spain. Colin Mitchel claims, by deeds from various tribes of Indians belonging to the great Creek confederacy, to Panton, Leslie & Co., to John Forbes & Co., and to John Forbes, confirmed by the local authorities of Spain, whose right has become vested in him by sundry mesne conveyances, to which it is unnecessary to refer as the regular deraignment of whatever title was vested in the original grantees to the present claimants is not questioned. (Record 362.) The lands are in four separate tracts, extending

from the mouth of the river St Mark's, outside of the islands along the sea coast, to the west end of St Vincent's island, west of the mouth of the river Appalachicola, thence to that river about five miles from its mouth, up the same for many miles, thence by a back line to a point on the western bank of the St Mark's above the old fort of that name, and down the said river to the sea. It is unnecessary to refer to the boundaries of the separate tracts, or the particular designation of the lines and points of the whole body of lands, as they are not a subject of controversy in this case, the quantity, as estimated by the claimant, is one million two hundred and fifty thousand acres (Record 5), and by the Spanish officers, one million three hundred and ninety-one thousand arpents. (Record 224.) The history of the claim is this.

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The commercial house of Panton, Leslie & Co. had long been established at St Augustine, in east Florida, it had extensive connexions and great credit in England, and its operations were very great. After Spain had taken possession of the Floridas, in virtue of the treaty of peace in 1783, the king, by a royal order, gave them license to carry on and continue their commercial operations in those provinces and Louisiana. (Record 164-167, 236-281, 157-160.) As they were an English house, an oath of allegiance was required, which was taken by Mr Panton, (Record 127, 128) and by Mr Leslie, for himself and the other members of the firm who were not in the province (Record 275, 281, 282) in 1786, with which the Spanish government was satisfied, as a compliance with the royal orders of the same year. (Record 160-164). This house conducted its affairs to the entire satisfaction of the successive governors-general of Louisiana (Record 120-129) and the local authorities of the Floridas, rendered Important services to the crown, met with many and great losses, amounting, by the estimate of the marquis of Casa Calvo, then governor-general of Louisiana, in 1800, to 400,000 dollars. (Record 125, 136, 147, 148.) Five of his predecessors had recommended the awarding some indemnity to the house, they had made repeated claims upon the crown, the justice of which had been acknowledged by all the local authorities during all the changes of administration (Record 121, 122, 132, 133, 134), in their numerous despatches to the ministry, which had been submitted to the king. (Record 130, 374.) They concurred in representing to the king the great importance and services of the house as a political instrument of the government, that they had a right to indemnity from the king, that the situation of the house was such, that they must sink under their losses if it was not afforded, and that it must be sustained and preserved as indispensable to retain any control over the Indians, and secure the possession of the provinces entrusted to their care. (Record 130, 139, 143-152, 151, 252-257, 302, 580.) In consequence of the repeated solicitations of the house to the king for compensation, a royal order was directed to the captain-general of Cuba on the subject of the indemnities proper to be given them, in reply to which, among other propositions made by the governor-general of Louisiana, was a grant

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of twenty leagues square of royal lands west of the Mississippi, or a loan of 400,000 dollars without security (Record 144, 145.) This shows the sense of that high officer of the value of the services of the house, the extent of their losses in their exertions in favour of

the government, with the measure of remuneration which he considered to be due of right in 1800. (Record 144, 147 ) Among the losses sustained by the house, was a large amount due by the Seminole Indians prior to 1800, and for robberies of their stores in 1792 and 1800, by members of that tribe, headed by the celebrated adventurer Bowles, exceeding in all 60,000 dollars (Record 22-28), of which they were unable to procure any payment from the Indians, but who had expressed a willingness to make compensation by a grant of their lands. Early in 1799 the house made an application to the governor-general of Louisiana for leave to purchase from the Indians as much land as would satisfy the above claims, which was favourably received by both him and his successor. (Record 54, 56.) Negotiation with the Indians was followed by a deed of cession from them, in 1804, of the large tract containing one million two hundred thousand arpents. (Record 554.) This deed was confirmed at a general council of the nation and its chiefs held at Pensacola in 1806, in the presence of Folch, governor of West Florida (Record 568, 584, 590, 614), in all the form and solemnity which Indians could give it. This governor had previously given leave to make the purchase on a petition presented to him by the house in January 1804, setting forth the circumstances of the case, which was granted on only one condition, that they should not dispose of the lands without notice to and knowledge of the government, and in December 1806, gave his full confirmation to the grant of the Indians made to Panton, Leslie & Co. (Record 58, 84.) Another application was made to the same governor in 1807, for his permission to make an additional purchase from the same Indians, which was granted in December 1810, on condition that the house should cede the whole or part of the lands to the king, if he should want them, at the price at which they acquired them, and not dispose of them without notice to the government. (Record 273, 274, 275.) In the following

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year the Indians granted the other tracts between the rivers Wakulla and St Mark's, including the fort, which was also confirmed by the governor (Record 606), at a great public council of the Indians at Pensacola, this tract contained by estimation ninety-seven thousand arpents. At the same time another tract on the sea coast, including some islands at and west of the mouth of the Appalachicola, was in like manner granted by the Indians and confirmed by the governor to John Forbes & Co., the successors of Panton, Leslie & Co. (Record 106) containing sixty-five thousand arpents. At the same time and place there was granted and confirmed to John Forbes an island in the Appalachicola, containing six thousand eight hundred arpents, for which no consideration was paid, the grant being a gratuity by the Indians to Forbes, in consideration of his services and friendship rendered and shown to them for years before. (Record 217-224.) It is not deemed necessary to recite more specially the various original deeds from the Indians, or those made in councils after the lines had been marked which designated the boundaries of the respective grants, nor the grants of the governor of West Florida, confirming them by titles in form delivered to the parties, they are in form and substance alike (Record 28-106, 430, 447), and no question has arisen on their terms. Those of the Indians recite the considerations which led to the grants, convey the lands with a warranty of their title by ascertained boundaries (Record 39, 40, 49, 91, 95, 86, 93, 69, 82-84, 29-36, 59, 63, 95-108, 562), those of the governor ratify and confirm the grants in full and direct

dominion (Record 37, 49, 91, 95, 111) and in full property, put the grantees in possession, and promise to defend and maintain it, (Record 106, 137, 145) all of which he declares is done by using the powers vested in him. (Record 75-91,30-37,99, 233,234.) They are drawn up in great form, contain a perfect recognition of the Indian grants, and give to them all the validity which he could impart to them. (Record 106, 131, 175, 191, 193.) They are made in the name of the king, executed and attested in all due formality, and their authenticity proved as public documents, and by the testimony of witnesses to the official signatures. (Record 562, 579, 615, 620, 623, 646, 611, 612, 613-626). The claims of the house upon the Indians

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for debts due since 1789 and depredations committed, were notorious to the government and inhabitants of Pensacola, (Record 273, 274, 536, 590) as were the purchases, and their confirmation by the Indians, at which two thousand are computed to have attended in 1811 (Record 592, 601), is proved as a fact by witnesses present in the different councils, so is the fact of the ratification by the governor. (Record 579, 614, 615, 620, 623, 646.) The original deeds, and the demarcation of lines and boundaries were made (Record 42, 43, 100, &c.) in the presence of the commandant at St Mark's, (Record 73, 97, 104, 108), exercising the offices of lieutenant governor and subdelegate of the intendency, or were approved by him every act done in relation to the cessions and their ratification, from the first application to the governor-general in 1799 to their consummation in 1811, was public and notorious to both Indians and whites. (Record 590.) Governor Folch reported all his proceedings to the captain-general of Cuba, by whom they were approved, who declared that the king would confirm them, and, as some of the witnesses say, declared that he had confirmed them. (Record 228, 229, 232, 568, 572, 584, 594.) From the time of the first, cession in 1804, the Indians acknowledged the validity of the grants, were satisfied with them, called the land the white land, or the land of the whites, (Record 606) asked permission from the house to hunt upon them, and with the exception of some occasional depredations, respected their possessions and property (Record 619-621, 623.) Their title too was equally respected by the local government, and all the officers of the king (Record 234, 574, 624, 625) nor from him to the lowest does there appear to have been expressed any dissatisfaction at any of the acts of governor Folch, or the least doubt of the perfect validity of the title, though the claim of the house to the whole land conveyed was perfectly known and evidenced by a partial actual possession, taken at an early period and continued till the cession of the provinces. (Record 620, 624, 625.) There is no evidence in the record, that either the Indians, the governor, or intendant ever made a cession, grant, order of survey, or gave permission to settle within the boundaries of any of the grants. It is also a circumstance of no small consideration, that notwithstanding the long and inveterate controversy VOL. ix.-4 it

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lands even in small tracts, there was none in relation to these. Yet the intendant had full notice of them, spoke of them, but made no objection (Record 571) or preferred any complaint to the captain-general or the king, although the quantity of land thus granted to

this house was nearly double to the whole amount of the grants of royal lands made by the government of West Florida. (Record 421, 469.) It was also proved, that in the opinion of those who know the land, as well as the officers of government, it was not worth, at the time, the amount of the just claims of the house on the Indians, that the grants were taken as the only means of their indemnification, and that the purchase was much less advantageous to them than to the king, who thereby became absolved from a claim not only too just to deny, but too large to satisfy with convenience. (Record 570-574, 579, 556, 573, 625.) It is also proved, that the Indians who made the cessions occupied the lands for hunting grounds, were deemed the owners of them as Indian lands, and had three settlements upon them previously, (Record 559, 565, 576, 585) and that the country was claimed by the Seminoles. (Record 12, 52, 607.) The lines were marked by persons appointed by the governor in presence of the Indians, who consented to them, (Record 621-623, 632) and the governor gave formal possession to the house (Record 625) according to the plats of the several grants exhibited to him, which the witnesses declare to have corresponded with the lines marked upon the ground, and those recited in the deeds and petitions. (Record 623.) In opposition to this mass of documentary and parol testimony, in support of the allegations of the petitioners, that the grants were in fact made and confirmed, in the manner, and for the reasons and considerations set forth, no direct evidence appears in the record. Some of the witnesses were examined as to the supposed influence of the house with governor Folch, but the imputation was negatived, and the proceedings throughout declared to have been in good faith. (Record 554-583.) So far then as the merits of the case depend on the genuineness of the deeds and documents, the facts of the grants and confirmations by the Indians and governor, the marking the lines and possession of the land, the good faith of the whole

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transaction, the absence of fraud, the authority of the Indian chiefs, as representatives of their respective tribes, we entirely concur in opinion with the court below. That the grants were made bona fide, for a valuable consideration, of the adequacy of which the Indians were competent judges, if they had any right in the lands which they could convey, that the ratification of the governor was fairly and fully made, and for good and sufficient reasons, of which he was the judge, if he had competent authority to give effect and validity to Indian cessions of the land in controversy. The view which the learned judge took of these questions, after a thorough, searching examination of the documents and evidence, is so entirely satisfactory, that we have only to express our assent to the conclusions at which he arrived. (Record 662-669.) There is, however, one subject which was considered by him, into which we do not feel at liberty to inquire, which is the water-mark in the paper on which the governor's permission of the 7th of January 1804, was written, noticed and commented on at large by the judge. (Record 706.) This objection was not made in the court below, at the hearing, or in the argument, so that no opportunity was afforded to the petitioner to produce any evidence on the subject, or to his counsel to answer the objection. This court also refused to grant him a commission to take testimony to explain and account for the water-mark, or permit him to read the ex parte evidence offered to explain it, because in an appellate court no new evidence could be taken or received without violating the best established rules of evidence and law.

Under such circumstances, it would be dealing to the petitioner a measure of justice incompatible with every principle of equity, to visit upon his title an objection which he was not bound to anticipate in the court below, which he could not meet there, and which this court were compelled to refuse him the means of removing by evidence. 'We will not say what course would have been taken if his title had depended on the date of the paper alluded to, as the case is, it is only one of numerous undisputed documents tending to establish the grant, the validity of which is but little, if it could be in any degree affected by the date of the permission. It is objected by the counsel of the United States, that the

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original acts of confirmation of the Indian sales by governor Folch are not produced, and that the copies in evidence are not legal proof of such acts. This objection seems to us not to be well founded in fact or law. The original Indian deeds were procured by the agent of the United States from the public archives in Havana (Record 529, &c.) and are now before us. The deeds of confirmation were made according to the rules of the civil law adopted by Spain, and in force in Florida and Cuba, the original is a record, and preserved in the office, which cannot be taken out, a testimonio or copy is delivered to the party, which is deemed to be and is certified as an original paper, having all the effect of one in all countries governed by the civil law. Such is proved to be the law of those colonies, as a fact, by Mr White (Record 628), such is the form of the certificates in this case, varying in phraseology somewhat, but agreeing in substance and effect (Record 19, 38, 45, 50, 58, 91, 106, 111), in perfect accordance with the civil law adopted in Louisiana, and recognized by this court in the case of Owings v. Hull, decided at the present term. We therefore consider those now produced as original deeds of confirmation by the governor, duly certified and proved. It is objected, that the deeds of 1804 and 1806, to Panton, Leslie & Co. were inoperative to pass the lands, they having died previously. It is in proof as a fact that Forbes & Co. were the successors in business and interest to Panton & Co. This change of the name and partners of the house after the death of Mr Panton was known to the officers of the local government and the king, who by a royal order in 1805, (Record 262) and another in 1807, (Record 270) directed that it should have no effect on their privileges. To the king it mattered not whether the lands were conveyed to the house as a firm, or to the partners nominatim, they, it seems, preferred considering the lands as a part of the general effects of the partnership, and received the deeds accordingly, as it concerned only them, and as there has been produced no law of Spain invalidating such a grant, the objection cannot be sustained. Another objection, on account of an oath of allegiance not

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having been taken by the grantees, is removed by the evidence already referred to, and need be no further considered. It is objected that the grant of 1811 is invalid, because it comprehends the fort of St Mark's, then actually occupied by the troops of the king. It is in full proof that the site of St Marks and the adjacent country was within the territory claimed by the Seminole Indians (Record 12, 131, 603-607, 618.) It is not certain, from the evidence, whether it was purchased from the Indians, or merely occupied by their

permission there seems to be no written evidence of the purchase, but no witness asserts that possession was taken adversely to the Indian claim, and it is clearly proved to have been amicably done. (Record 232, 306, 581.) Whether the Indians had a right to grant this particular spot then or not, cannot affect the validity of the deeds to the residue of the lands conveyed in 1811. The grant is good, so far as it interfered with no prior right of the crown, according to the principles settled by this court in numerous cases arising on grants by North Carolina and Georgia, extending partly over the Indian boundary, which have uniformly been held good, as to whatever land was within the line established between the state and the Indian territory. *Wear v Danforth*, 9 Wheat. 673, *Patterson v Jenckes*, 2 Peters's Rep. 216, and *Winn v Patterson*, decided by the supreme court of the United States, January 1835, ante 663. As to the land covered by the fort and appurtenances, to some distance around it, it becomes unnecessary to inquire into the effect of the deeds, as the counsel of the petitioners have in open court disclaimed any pretensions to it. Another objection is of a more general nature, that the grantees did not acquire a legal title to the lands in question. But it must be remembered, that the acts of congress submit these claims to our adjudication as a court of equity, and, as often and uniformly construed in its repeated decisions, confer the same jurisdiction over imperfect, inchoate and inceptive titles as legal and perfect ones, and require us to decide by the same rules on all claims submitted to us, whether legal or equitable. Whether, therefore, the title in the present case partakes of the one character or the other, it remains only for us to inquire whether that of the petitioner is such in our opinion that

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he has, either by the law of nations, the stipulations of any treaty, the laws, usages, and customs of Spain, or the province in which the land is situated, the acts of congress or proceedings under them, or a treaty, acquired a right which would have been valid if the territory had remained under the dominion and in possession of Spain. In doing so, we shall not take a detailed review of the leading cases on Spanish grants already decided by this court, in relation to those lands which formed a part of the royal domain, in contradistinction to those which may be considered as Indian lands claimed by Indians, by their title, whatever it may be. Those comprehended within the claim of the petitioners being of the latter description, as they contend and thereupon rest their title, it will suffice to state some general results of former adjudications which are applicable to this case, are definitively settled, so far as the power of this court can do it, and must be taken to be the rules of its judgment. They are these That by the law of nations, the inhabitants, citizens, or subjects of a conquered or ceded country, territory, or province, retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws until they shall be changed. That a treaty of cession was a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned and could convey to the grantee. That by the treaty with Spain the United States acquired no lands in Florida to which any person had lawfully obtained such a right by a perfect or inchoate title, that this court could consider it as properly under the second article, or which had, according to the stipulations of the eighth, been granted by the lawful authorities of the king; which words grants or concesswms were to be construed

in their broadest sense, so as to comprehend all lawful acts which operated to transfer a right of property, perfect or imperfect. 6 Peters 710, 7 Peters 86, 88, 8 Peters 445, 449, 450, 486. That the effect of the clauses of confirmation of grants made was that they confirm them presently on the ratification of the treaty, to those in possession of the lands, which was declared

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to be, that legal seisin and possession which follows a title, is coextensive with the right, and continues till it is ousted by an actual adverse possession, as contradistinguished from residence and occupation. 6 Peters 743, 8 Cranch 229, 230, 4 Wheat. 213, 233, 4 Peters 480, 504, 506, 5 Peters 354, 355. That the United States by accepting the cession under the terms of the eighth article, and the ratification by the king, with an exception of the three annulled grants to Allegon, Punon Rostro, and Bargas, can make no other exceptions of grants, made by the lawful authorities of the king. 8 Peters 463, 464. That the meaning of the words lawful authorities in the eighth article, or competent authorities in the ratification, must be taken to be "by those persons who exercised the granting power by the authority of the crown." That the eighth article expressly recognizes the existence of these lawful authorities in the ceded territories, designating the governor or intendant; as the case might be, as invested with such authority, which is to be deemed competent till the contrary is made to appear. 8 Peters 449 to 453. That "by the laws of Spain" is to be understood the will of the king expressed in his orders, or by his authority, evidenced by the acts themselves, or by such usages and customs in the province as may be presumed to have emanated from the king, or to have been sanctioned by him, as existing authorized local laws. 6 Peters 714 to 716. In addition to the established principles heretofore laid down by this court as to the legal effect of an usage or custom, there is one which is peculiarly appropriate to this case. The act of congress giving jurisdiction to this court to adjudicate on these causes, contains this clause in reference to grants, &c., "which was protected and secured by the treaty, and which might have been perfected into a complete title, under and in conformity to the laws, usages and customs of the government under which the same originated." 6 Peters 708, 709, 3 Story's Laws 1959, 1960. This is an express recognition of any known and established usage or custom in the Spanish provinces, in relation to the grants of land and the title thereto, which brings them within a well established rule of law. That a custom or usage saved

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and preserved by a statute has the force of an express statute, and shall control all affirmative statutes in opposition, though it must yield to the authority of negative ones, which forbid an act authorized by a custom or usage thus saved and protected, 4 Co. Inst. 86, 298, and this is the rule by which we must test its efficacy according to the act of congress, which we must consider as of binding authority. In taking possession of Florida pursuant to the treaty, and in establishing a government in and over it, congress have acted on the same principles as those which were adopted by this court in the former cases. In the act of 1821, for carrying the treaty into execution, congress authorizes the vesting the whole power of government in such person as the president may direct for the maintaining the inhabitants in the free enjoyment of their property. Pamphlet Laws 47.

The governor thus appointed, by his proclamation in the same year, announces to the inhabitants that he has been invested with all the powers, and charged with all the duties heretofore held and exercised by the captain-general and of the intendant of the island of Cuba over the Floridas; and the governor thereof; recites the foregoing act of congress, declares that they shall be maintained and protected in the free enjoyment of their property, &c., and that all laws and municipal regulations which were in existence at the cessation of the late government remain in full force. Pamphlet of 1822, 113. The tenth section of the act of 1822 contains the same pledge for the protection of property, and the thirteenth continued in force the existing laws, till altered by the local legislature then organized. Pamphlet 15. The formal act of the surrender of the Floridas by Spain to the United States was made by the commandants of both of the provinces, by the authority of the captain-general of Cuba under a royal order. Pamphlet 110. These are most solemn acts of both governments, which, as the proceedings under the treaty of cession, are made a rule for our guide in deciding on the validity of the title to lands in the provinces, they have all been ratified and approved by the king and congress, affording the highest possible evidence of the true meaning of both the high contracting parties to the treaty. They point directly to the kind of government

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which existed before the cession as being vested in the captain-general and intendant of Cuba, and the governors of the provinces, as the supreme legislative, executive, and judicial power, subordinate to the king only And as it became afterwards in the hands of the governor alone by act of congress subordinate only thereto, while under both, the government was administered in conformity to the local laws and municipal regulations. It cannot therefore be doubted that among the other powers of the former government, that of granting lands was invested in some of its officers, nor that such officers were the governor, the intendant, or captain-general, as the case might be, thus exhibiting a union of opinion between the king of Spain as well as the legislative and judicial departments of this government, as to the meaning of the treaty, which cannot be Without its influence on its true construction and bearing on the rights of parties now before this court sitting in an appellate court of equity, directed to decide "in conformity to the principles of justire" and the laws and ordinances of the government under which the claim of the petitioner originated, they must be our guide. Colin Mitchel claims the land in controversy as a purchaser

from Panton, Leslie & Co., John Forbes & Co., and John Forbes, who were purchasers from the Seminole or Tallapoosa Indians, bona fide, for a valuable consideration paid by one party, and received by the other by force or contract, accompanied with the legal seisin and possession of the whole, and actual pedispossession of a part, under a claim of right and title to the whole by grant. The equity of the parties from whom Mitchel purchased commenced in 1789, 1790, 1792, when the depredations were first committed and the debts contracted which formed the consideration of the Indian deeds, the debts increasing till 1800, and the depredations then renewed. A claim early made on the Indians for compensation and on the government of Spain for indemnity, continued till an agreement for the cession of lands by the former was made in 1800, and carried into effect in 1804 and 1806, when it was carried into grant, ratified and confirmed by the

Indians, the governor of West Florida, and captain-general of Cuba, without an interfering claim till the cession to the United States in 1820, 1821. On the other hand, the United States claim the land VOL. IX.--4 s

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by purchase from the king of Spain, made bona fide, for a valuable consideration fully paid, but with full and direct notice of the equity of Forbes & Co., and the purchase in the name of Panton, Leslie & Co., of which Forbes was partner, which notice was as early as 1804 (Record 283, 286, 290, 291, 568). The earliest equity claimed by the United States was in January 1818, when the cession was first proposed, the first agreement to convey by Spain was in 1819, the date of the treaty; and the final grant was made in 1820, the date of the ratification, and possession first taken in 1821, pursuant to the conveyance of the treaty. Thus viewing the contending parties, we proceed as a court of equity to inquire, whether at the time the cession by the treaty took effect in favour of the United States there was a right of property in Colin Mitchel to the lands included in his grants, or whether they had been previously granted by the lawful authorities of the king. That they were granted in fact is incontestable, and they were private property, if there was a grant competent by law to vest a title. It is contended by the United States that the acts of governor Folch, in the permissions to purchase from the Indians, and the ratifying and confirming their deeds, are void, as the lands were not in West Florida, over which province alone lie had any jurisdiction. There seems no doubt that under the British government the river Appalachicola remained the boundary between East and West Florida, as it was so established by the proclamation of the king in 1763 (1 Laws U. S. 444), but it does not appear that Spain had adopted it in administering the government of those provinces by any royal order, or that such was a common opinion of the inhabitants (Record 602 to 604) on the contrary, it appears that so early as 1785, Don Galvez, then governor-general of Louisiana, considered the district of St Mark's de Appalachy as a dependency of his government, and in 1786 placed it under care of the government of West Florida, and ordered the establishment of a post there by a detachment from the garrison of Pensacola, which acts were approved by a royal order in March 1787 (Record 306, 197). These orders were acquiesced in by the governor of East Florida, who appears to have exercised no jurisdiction within that

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territory, or to the west of it, after 1786 (Record 260). There is abundant evidence in the record that that post, the circumjacent territory, with what lies between it and the Appalachicola, was a dependency on and subject to both the civil and military jurisdiction of the governor of West Florida, and was so considered by all the officers of the government, the captain general and the king, as appears from many documents (Record 163, 165, 167, 168, 189, 190, 201, 202, 203, 209, 227, 228, 234, 236, 266, 267, 297, -298, 304). The fact of the exercise of jurisdiction over that territory by the governor of West Florida is also established by the concurring testimony of many witnesses, (Record 582, 600, 601, 602, 604) as is also the fact of its surrender by him to the United States as a part of the territory under his command. (Record 602, Laws of 1832, pamphlet 112.) But evidence of the fact still more conclusive, and its most solemn recognition by both

governments, is to be found in the formal act of surrendering the sovereignty and possession of the province by Spain to the United States. The governor of West Florida "placed the commissioner of the United States in possession of the country, territories and dependencies of West Florida, including the fortress of St Mark's, with the adjacent islands, dependent on said province." (White 198, Pamphlet Laws 112.) So it was accepted and is yet held by the United States, and so we must consider it as understood by congress in the various laws passed since the cession, and the proceedings therein authorized under the treaty in reference to East and West Florida. The boundary between them must be taken to be that which existed under Spain from 1785 till 1821, as incontestably proved, and most solemnly admitted by the United States, up to which the powers of the governor of West Florida, whatever they might be, could be exercised in their plenitude, both as a government de facto and a government de jure. It becomes needless to inquire whether, after these solemn acts, it is competent for the United States to now contest the existence of such boundary, it suffices for this case, that it is abundantly established by all the evidence, which is uncontradicted, and that the lands in controversy are situated within West Florida, according to the boundaries recognised by both

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governments. This objection cannot therefore be allowed to prevail. It is next contended, that the power to grant lands in West Florida was not vested in the governor, but was confided exclusively to the intendant, this is clearly proved to be the settled law of that province as to royal lands, which were the property of the crown, and is admitted by the counsel of the petitioner. But the reverse is, we think, equally apparent as to Indian lands, until their right had been abandoned, and the land become annexed to the royal domain by a process in the nature of an office at common law (White 25, 40, 42, 79, 43, 47, 215.) The relations between the Indians and the government of Spain, were considered as matters of the deepest political concern, in nowise connected with its fiscal operations, the commerce with the Indians was, as a political instrument, entrusted exclusively to the governors, as clearly appears by their correspondence with each other, the captain-general of Cuba, and the ministry in the mother country, and-regulated by royal orders (Record 113-153) with which the intendancy had nothing to do. (Record 151, 571, 579, 586, 587, 590, White 32.) It was a part of the governor's oath, as prescribed by the laws of the Indies, "that you shall take care of the welfare, increase and protection of the Indians." (Record 237.) He was their protector, whose duty it was to examine whether claims upon them were well founded, and if so, contribute by all possible means to their being paid, (Record 587) but not to lend his sanction, or allow the smallest injury to be done to them. (Record 571, 232.) The fact of the supervision of Indian sales of their land by the governors of provinces and commandants of posts, in acts of confirmation and putting the purchasers in possession, is very clearly established by the report of the land commissioners of the United States in Louisiana. (Record 325-333.) It was exercised by Don Galvez, governor general of Louisiana, as early at least as 1777, in confirming an Indian sale of the great Houma tract on the Mississippi (1 Laws U. S. 551, 552, 554), and there is no evidence that this power was ever entrusted to or conferred on any other officer, nor that it was ever exercised by any other. It was an authority expressly delegated to them by the laws, (White 232-234) and so reported by the commissioners

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cord 329), proved also as a fact by the former secretary of the province (Record 572) and Governor Folch (Record 231234). It cannot, indeed, be well questioned that the governors and commandants of posts were the appropriate officers for these purposes, in the absence of any evidence of confirmations by intendants, with positive evidence of their approbation by the captain-general of Cuba, in making (Record 12) formal acts of confirmation without objection by the ipsteridant-general of Cuba, or by local intendants. When to these considerations is added another, arising from the circumstance of there being no instance of the rejection or disaffirmance of a deed confirming an Indian sale by any of the superior authorities in the provinces, or by the king, as is clearly established (Record 336, 627, 628) and admitted in the argument, we cannot feel authorized to declare that governor Folch usurped any powers vested in the intendant, in any of his acts relating to these lands. The confirmation of similar grants made by acts of congress, or by boards of commissioners acting under their authority, are also powerful evidence of the lawful exercise of the authority of these officers, and being proceedings under the treaty and laws, they are made a rule by which among others we may adjudicate on the claims of the present parties, in doing which we cannot sustain this objection without overlooking such a concurrence of evidence of various descriptions, as leaves no reasonable cause of a doubt of the authority of governor Folch, especially when we connect with his first permission to make the purchase of 1804, the condition attached to it, that the lands should not be disposed of without the giving notice to and knowledge of the government, and to that of 1811, that it should be conveyed to the king, if required, at the price at which it was purchased, and the mode in which that condition was performed and released. Pursuant to these conditions, John Forbes applied to the captain-general of Cuba, in 1817, for permission to sell the land to the petitioner, which being referred to the assessor-general for his advice, he reported that the lands had been transmitted actually and lawfully in full property to Mr Forbes, with a conditional title, or "titulo oneroso," for which acquisition competent permission was given by governor Folch, who

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delivered titles of confirmation subsequently, whereupon a formal permission was given by the captain-general to make the sale, which was a direct approbation of all the proceedings authorized by that governor, as well as that he was the officer designated for such purpose. (Record 12, 52, 53.) Such a confirmation by an officer subordinate only to the king, performed so long after the acts done by the governor of a province who was under the control of the captain-general, must be referred to his legitimate authority competent for the purpose. It was done also on the deliberate advice of an officer responsible to the crown, which makes the presumption very strong, if not irresistible, that every thing preceding it had been lawfully and rightfully done. (White 25, 40, 43, 47, 49.) This proceeding is in the nature of an inquest of office, in analogy to the writ of ad quod damnum, which by the common law precedes the grant of any charter, license, or patent of the king, of any thing which may be injurious to his or the rights of others, on which an inquesL is taken, on whose report the king acts, on the advice of the proper

officer or tribunal, makes the grant or withholds it, as advised. (3 Bla. Coin. 259, 17 Vin. Ab. 171, 176, 7 Day's Coin. Dig. 80.) The report of the assessor-general seems to have been acted on as an inquisition at common law, finding that there was no obstacle to the making-use of the powers entrusted to the captain-general. We should feel it to be an assumption of much responsibility to declare that on the evidence in this record, and the law arising upon it, that either of the officers referred to usurped powers not vested in them, or exercised them against or without the authority of the king. The counsel of the United States pressed in argument the decision of this court in the case of Arredondo, as an affirmance of the right of the intendant of the province, or of Cuba, to grant Indian lands. In that case the lands granted had been in the possession and occupation of the Allachua Indians, and the centre of the tract was an Indian town of that name. But the land had been abandoned, and before any grant was made by the intendant a report was made by the attorney and surveyor-general on a reference to them, finding the fact of abandonment, on which it was decreed that the land had reverted to and become annexed to the royal domain.

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Considering this to be a judicial act in the nature of an inquest of office, and the decree of the intendant as making the fact a *res adjudicata*, we did not feel at liberty to look behind it for the evidence on which it was founded, the consequence of which was, that by the judgment of a competent tribunal, the land was part of the royal domain, subject to the disposition of the intendant. There is no pretence of a similar proceeding having been had in relation to these lands, nor could there well be in opposition to the evidence in the record, especially the report of the assessor-general in 1817, that they were the lands of the Seminoles at the time of the cession by them and the confirmation by governor Folch. By the common law the king has no right of entry on lands which is not common to his subjects, the king is put to his inquest of office, or information of intrusion, in all cases where a subject is put to his action, their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to lands, he cannot acquire it without office, found so as to annex it to his domain. (2 Co. Inst. 46, Saville 8, 9, pl. 20, Hob. 347, Hardress 460, 7 Day's Com. Dig. 77, Gilbert's Ex. 109, 3 Bla. Com. 257, Fitz. N. B. 90 b., 4 Co. 58b., 16 Vin. 552, 3 Co. 10, 11, 9 Co. 95, 96, 98, Hardress 51, 52, Plow 236, 486, 1 Co. 42, 5 Co. 52 b, Plow. 229, 230.) Such, too, seems to be the law of Spain in the Floridas and Cuba, as appeared in the case of Arredondo, and as it must have been understood by the Spanish authorities, when they acknowledged the Indian right to lands in the harbour of Pensacola to be an existing one in 1816. Nor is there any evidence in the record that their right ceased to be respected, or that lands which had been in their possession became annexed to the royal domain, till some official proceeding, founded on the law of Spain, in the nature of an office by the common law, had taken place under the proper authority. (White 25, 40, 37) The United States have acted on the same principle in the various laws which congress have passed in relation to private claims to lands in the Floridas, they have not undertaken to decide for themselves on the validity of such claims without the previous action of some tribunal, special or judicial. They have not authorized an entry to be made on the possession of

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[Mitchel and others v. The United States.] any person in possession, by colour of a Spanish grant or title, nor the sale of any lands as part of the national domain, with any Intention to impair private rights. The laws which give jurisdiction to the district courts of the territories to decide in the first instance, and to this on appeal, prescribe the mode by which lands which have been possessed or claimed to have been granted pursuant to the laws of Spain, shall become a part of the national domain, which, as declared in the seventh section of the act of 1824, is a "final decision against any claimant pursuant to any of the provisions of the law" Another objection is made to the title of the petitioner, on the allegation that by the treaty of Picolata between Great Britain and the Creeks in 1765, the Indians had ceded all the lands in controversy between the sea and flow of the tide, in virtue of which they became the property of the crown and passed to Spain by the treaty of 1783. The fifth article of the treaty of Picolata, made to prevent encroachments on the lands or hunting grounds of the Creeks, stipulates that the boundary of the province of East Florida "shall be all the sea coast as far as the tide flows, in the manner settled with the great Tomachiches by the English," with all the country particularly described therein, which they grant and confirm to the king. As this refers to a treaty or compact made with this chief, its meaning must be sought in it, and unless something can be found there which will make the expression more definite than the general terms "all the sea coast as far as the tide flows," it will require great latitude of construction, as to an Indian cession, to extend it from the St Mary's around the peninsula of Florida to the mouth of the Appalachicola. The tract of country ceded lies on the sea coast, east of a point formed by a line run from the source of the St John's, which is its southern boundary, the western boundary is a line run from the junction of the Ocklawaha with the St John's northwardly to the St Mary's, nearly parallel to the sea coast, at an average distance of about thirty miles west. It would be stretching the meaning of this treaty very far, to embrace within it an extent of sea coast and contiguous land within the flow of the tide to its whole extent, when the extent of the lands ceded west of a line from the mouth of the Ocklawaha to

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the sea was so small. Before we could do it, it must appear to have been so previously settled between the English and Tomachiches, as is referred to in the treaty of Picolata. From the account given in M'Call's history of Georgia, the treaty with Tomachiches was held in 1733, and the cession of the sea coast was only between the Altamaha and Savannah, extending west to the extremity of the tide water. (1 M'Call's Hist. 37 ) As this is the act referred to, it must be taken in connexion with the subsequent treaty to make it certain by the reference, (6 Peters 739) which entirely removes the objection, and shows the cessions of the sea coast to be confined to that part which is between the St Mary's and St John's rivers. The report of the surveyor-general in 1817, is very full on the subject of the boundaries between the British government and the Indians in East and West Florida. (Record 184194.) He says, "with regard to East Florida, I have never been able to discover that there has ever been any treaty or agreement with the natives of that province concerning the limits of their possession, nor in that of the Spanish authority." As the surveyor-general had referred to the treaty of Picolata in his report, it is clear that it was construed by the Spanish government as it now is by this court. We now come to

consider the nature and extent of the Indian title to these lands. As Florida was for twenty years under the dominion of Great Britain, the laws of that country were in force as the rule by which lands were held and sold, it will be necessary to examine what they were as applicable to the British provinces before the acquisition of the Floridas by the treaty of peace in 1763. One uniform rule seems to have prevailed from their first settlement, as appears by their laws, that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the VOL. IX.-4 T

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crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent. Individuals could not purchase Indian lands without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws, but such purchases were valid with such license, or in conformity with the local laws, and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete. Indian possession or occupation was considered with reference to their habits and modes of life, their hunting grounds were as much in their actual possession as the cleared fields of the whites, and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case their right became extinct, the lands could be granted disincumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians. Such was the tenure of Indian lands by the laws of Massachusetts (Indian Laws 9, 10, 15, 16, 17, 18, 19, 21), in Connecticut (40, 41, 42), Rhode Island (52, 55), New Hampshire (60), New York (62, 64, 71, 85, 102), New Jersey (133), Pennsylvania (138), Maryland (141, 143, 144, 145), Virginia (147, 148, 150, 153, 154), North Carolina (163, 4, 58), South Carolina (178, 179), Georgia (186 187), by congress, (Appendix 16), by their respective laws, and the decisions of courts in their construction. (See cases collected in 2 Johnson's Dig. 15, tit. Indians, and Wharton's Dig. tit. Land, &c. 488.) Such, too, was the view taken by this court of Indian rights in the case of Johnson v. M'Intosh (8 Wheat. 571, 604), which has received universal assent. The merits of this case do not make it necessary to inquire whether the Indians within the United States had any other rights of soil or jurisdiction, it is enough to consider it as a settled principle, that their right of occupancy is considered as sacred as the fee simple of the whites. (5 Peters 48.) The principles which had been established in the colonies were adopted by the king in the proclamation of October 1763, and applied to the provinces acquired by the treaty of peace and

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the crown lands in the royal provinces, now composing the United States, as the law which should govern the enjoyment and transmission of Indian and vacant lands. After

providing for the government of the acquired provinces, (1 Laws U. S. 443-444) it authorises the governors of Quebec, East and West Florida, to make grants of such lands as the king had power to dispose of, upon such terms as have been usual in other colonies, and such other conditions as the crown might deem necessary and expedient, without any other restriction. It also authorised warrants to be issued by the governors for military and naval services rendered in the then late war. It reserved to the Indians the possession of their lands and hunting grounds, and prohibited the granting any warrant of survey, or patent for any lands west of the heads of the Atlantic waters, or which, not having been ceded or purchased by the crown, were reserved to the Indians, and prohibited all purchases from them without its special license. The warrants issued pursuant to this proclamation for lands then within the Indian boundary, before the treaty of Fort Stanwick's in 1768, have been held to pass the title to the lands surveyed on them, in opposition to a Pennsylvania patent afterwards issued. (Sims v. Irvine, 3 Dallas 427-456.) And all titles held under the charter or license of the crown to purchase from the Indians have been held good, and such power has never been denied, the right of the crown to grant being complete, this proclamation had the effect of a law in relation to such purchases, so it has been considered by this court. (8 Wheat. 595-604.) Settlements made by permission of the commanding officers of posts on lands not ceded by the Indians, have been held to give a pre-emption to lands in a proprietary government, and warrants and patents for such lands have been uniformly held good, when knowingly made by the proprietary or his officers as lands not purchased from the Indians. (See Wharton's Dig. tit. Lands 488.) This proclamation also directed that purchases from Indians should be made at a public council or assembly, in the presence of the governor or commander-in-chief of the colony, and be purchased for the king and in his name. (1 Laws 447.) The Indian deeds made at the treaty of Fort Stanwick's were to the king in trust for the grantees. (Colony Titles 82-98.)

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Grants made by the Indians at public councils have since been made directly to the purchasers or to the state in which the land lies, in trust for them, or with directions to convey to them, of which there are many instances of large tracts so sold and held, especially in New York. (Indian Treaties 1338.) It was an universal rule that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands, it prevailed under the laws of the states after the revolution, and yet continues in those where the right to the ultimate fee is owned by the states or their grantees. It has been adopted by the United States, and purchases made at treaties held by their authority have been always held good by the ratification of the treaty, without any patent to the purchasers from the United States. This rule in the colonies was founded on a settled rule of the law of England, that by his prerogative the king was the universal occupant of all vacant land in his dominions, and had the right to grant it at his pleasure, or by his authorised officers. (Hob. 322, Co. Litt. 1, 41, b, 4 Bac. Abr., Prerog. 153, 7 Day's Com. Dig. 76.) The authority of the proclamation is in the right of the king to legislate over a conquered country, which, as lord Mansfield says, was never denied in Westminster Hall, or questioned in parliament. If a king comes to a country by conquest, he may alter its

laws, but if he comes to it by title and descent, it must be with consent of parliament. He is entrusted with making the treaty of peace, he may yield up the conquest or retain it on what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the king might change part or the whole of the law or political form of government of a conquered dominion. He comes in place of the king of Spain, the former sovereign. (Cowper 204, 213), in a case arising under this proclamation.) The proclamation of October 1763, then, must be taken to be the law of the Floridas till their cession by Great Britain to Spain in 1783, superseding during that period the laws of Spain which had been before in force in those provinces, so far as they were repugnant, and according to the established principles of the

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laws of nations, the laws of a conquered or ceded country remain in force till altered by the new sovereign. The inhabitants thereof also retain all rights not taken from them by him in right of conquest, cession, or by new laws. It is clear then that the Indians of Florida had a right to the enjoyment of the lands and hunting grounds reserved and secured to them by this proclamation, and by such tenure and on such conditions as to alienation as it prescribed, or such as the king might afterwards direct or authorise. The Indians had also a right to the full enjoyment of such rights of property as the king might choose to impart to them by any regulation, by treaty or promise made to them by his authority. By the treaty of Mobile in 1765 the boundary of the lands or hunting grounds reserved and claimed by the Chickasaw and Choctaw Indians was settled, a cession was made to the king, reserving to themselves full right and property in all the lands northward of such boundary. (Record 309.) The treaty of Pensacola in the same year established the boundary with the upper and lower Creeks, who made a cession of lands, which they granted and confirmed to the king, (Record 310, 311) and a similar treaty was made with the Creeks at Picolata, in east Florida, in the same year. (Record 312.) By thus holding treaties with these Indians, accepting of cessions from them with reservations, and establishing boundaries with them, the king waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property which they could cede or reserve, and that the boundaries of his territorial and proprietary rights should be such, and such only as were stipulated by these treaties. This brings into practical operation another principle of law settled and declared in the case of *Campbell v. Hall*, that the proclamation of 1763, which was the law of the provinces ceded by the treaty of 1763, was binding on the king himself, and that a right or exemption once granted by one proclamation could not be annulled by a subsequent. (Cowp. 213.) It cannot be necessary to inquire whether rights secured by a treaty approved by the king are less than sacred under his voluntary proclamation.

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By the treaty of Augusta in 1773, a cession was made to the king of certain lands for a specified consideration, which was to be paid to persons to whom the Cherokees and Creeks were indebted, and to defray the expenses of the treaty. This cession was made under an asserted claim of a right of property by the Creeks to the ceded lands, and a boundary was established between their remaining lands and those of the king in Georgia.

(Record 3183-317.) By a subsequent treaty at Augusta in 1783, and at Shoulderbone in 1786, the obligation of the Indians to pay their debts is mutually recognized. (Record 317 ) By the treaty of Fort Schuyler in 1788, the obligation of the Indians to make compensation for injuries committed by them, is also admitted, as is also the case in treaties with the United States. (1 Laws 371, 407, 409, 410.) It may then be considered as a principle established by the king that the Indians were competent judges of the consideration on which they granted their lands; that they might be granted for the payment of debts, and that this principle has been fully recognized by the United States. It can hardly be contended that while such cessions by the Creeks were valid in Georgia on one side of a then imaginary line, they would be void on the other side in Florida, as to lands held under the same law and by the same tenure. Whether the grants were made to the king directly, and the debts or injuries which formed their consideration be paid by him to the persons to whom they were due, or -compensation made through him, or directly to the parties by a grant to them, must be a matter purely in the discretion of the king, or the officer whom he had authorised to accept or confirm the cessions by his license. Such were the relations between the Indians and Great Britain as established by the proclamation of 1763, and confirmed by subsequent treaties between them 'from 1765 to 1779, (Record 186, 188) during the period of her dominion over the Flondas. This liberality and kindness to them, with respect for their rights of property in their lands or hunting grounds, would seem to have arisen more from a sense of justice than motives of mere policy, when we consider the position of Great Britain between the treaty of 1763 and the commencement of the revolution. The undisputed sovereign of the whole territory from the Gulf of Mexico to that JANUARY TERM 1835. [Mitchel and others v. The United States.]

of St Lawrence, she had little to fear from the rival or hostile policy of Spain, the only neighbour to her colonies, and who had been humbled during the preceding war, and weakened to such a degree that she was no longer formidable in Louisiana. It was far different with Spain. On taking possession of the Floridas, after the independence of the United States had been established, with such a formidable, and rival, if not hostile neighbour along the whole line of a narrow and weak province, the friendship of the Indians was a most important consideration. It would have been lost by adopting towards them a less liberal, just, or kind policy than had been pursued by Great Britain, or acting according to the laws of the Indies in force in Mexico and Peru. It was soon found necessary not only to respect their rights, as they had been enjoyed for twenty years before, but to place them on the permanent foundation of treaties and direct guarantees by the king. The most solemn assurances of both were given. (Record 232.) A treaty was accordingly held in Pensacola in 1784 with the Tallapoosas or Seminoles, the object of which was declared to be to make the subjects of the king enjoy the fruits of peace, by which the Indians acknowledge themselves his subjects, promising to obey the laws in those points which were compatible with their character and circumstances, conforming themselves to the usages and municipal customs which are established (Record 320), observing their contracts with the traders in good faith (Record 323), and promising to observe "those orders exacted by reason, equity and justice, the principal basis of this congress." By the thirteenth article, the officers of the crown promised in the royal name, the security and guarantee of the lands which the Indians hold, according to the right of

property with which they possessed them, on the sole condition that they are comprehended within the limits of the king as the sovereign. (Record 324, 404, 405, 364.) In 1793 another treaty was held at the Walnut Hills with the same Indians (among others), it was declared to be a treaty of friendship and warranty between them and the king, who was declared their immediate protector and mediator between them and the American states, in order to regulate their boundaries with them, and preserve the Indians in the possession of their lands. They were referred to the governor of West Florida, "as

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representing the Icing in it," by the fifth article, with a stipulation in the fifteenth, that the points negotiated would be determined on by the commissaries of the king, with the approbation of the governor of that province, with the same force as if expressed in the treaty By the nineteenth article, the Spanish and Indian nations approved and ratified all which was contained it, and mutually promised and swore a mutual guarantee, the Indians declaring themselves under the protection of the king, he assuring them of his protection in all cases where they wanted it. (Record 240-245.) This treaty also ratified all former treaties made from 1784. (Record 241.) They were also approved by the king (Record 117, 118), and thereafter considered by the highest officers of the government in Florida, Louisiana and Cuba, as solemn guarantees to the Indians of all the rights they held under Great Britain. (Record 139, 140, 168, 174, 181-189, 228, 229, 232-247, 257, 258, 295, 570, 583.) This right was occupancy and perpetual possession, either by cultivation, or as hunting grounds, which-was held sacred by th6 crown, the colonies, the states and the United States; whilethe unauthorized settlement of the whites, on royal or proprietary lands, gave them not even the right of pre-emption, unless by special laws, or custom and usage, sanctioned by proprietary officers. (See Wharton's Dig. ut supra.) But Spain did not consider the Indian right to be that of mere occupancy and perpetual possession, but a right of property in the lands they held under the guarantee of treaties, which were so highly respected, that in the establishment of a military post by a royal order, the site thereof was either purchased from the Indians or occupied with their permission, as that of St Mark's. The evidence of governor Folch, given in 1827, -on the nature of the Indian title, is very strong and full (Record 231-235), and the high respect paid to it by all the local authorities so late as 1816, is strikingly illustrated in a report of the surveyor-general of West Florida. It seems that in that year an application was made for permission to buy lands on the other side of the Bay of Pensacola, to which the reply of the governor and sub-intendant was, if the lands are situated on the side from Yellow Water hitherward, "I am persuaded they belong to the Indians, even our own careemnig

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ground which is zn front of thzs town" (Record 172) which, according to another report from the surveyor-general, belonged by the treaties with England, to the Indians (Record 175), and who refers to the limited space of province left to the government, and the necessity of recurring to negotiations with the Indians to obtain some of the lands, which are the best in the vicinity of Pensacola. (Record 176.) When their right is thus regarded as to their lands in the immediate vicinity of the seat of government of the province at so late a period, it cannot be doubted, that it was considered by the officers of the king as at

least equally valid in a far distant part, remote from any habitation of the whites, save those connected with the house of Panton or Forbes. Although it may be conceded as a principle of national law, that when Spain took possession of these provinces, the king could establish whatever form of government or system of laws he pleased, consider by the law of power, though not of right, the Indians as his subjects or as mere savages, with whom there should be no relations but those of peace and trade, and who held no rights otherwise than at the pleasure of the government, or according to the laws in force in other provinces; yet, it was his orders to his officers to continue and confirm those relations which had previously existed, to consider, treat and protect the Indians as his subjects, and to give them new and most solemn pledges of his protection in all their rights, as individuals, and as nations or tribes, competent parties to treaties of mutual guarantee, for his, as well as their protection in those provinces, which had not before been done in any of his dominions. This was not done for slight reasons, but for such as would seem in the opinion of all, the great officers of the provinces to have led to these treaties, and strong stipulations, as indispensable to secure their possession. But their obligation on the king did not depend on the motives which led to their adoption, they bound his faith, and when approved by him became the law of the provinces, by the authority of royal orders, which were supreme, and bound both king and Indians as contracting parties, in this respect as nations on a footing of equality of right and power. The consequence was, that when once received into his protection as individuals, they

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became entitled by the law of nations and of the provinces, on the same footing as the other inhabitants thereof, to the benefits of the law and government, which, in every dominion, equally affect and protect all persons and all property within its limits, as the rule of decision, for all questions which arise there, (Cowper 208) as in this case it must be as to the right of property in the Indians. The situation of the Florida Indians was well known to the United States, as is most clearly indicated in the fifth article of the treaty with Spain in 1795 CCso that Spain will not suffer her Indians to attack the citizens, of the United States, nor the Indians inhabiting their territory." As thus considered by the United States and Spain, they were called "her Indians," while those in the United States were considered as the mere inhabitants of their territory, as the practical result of the respective treaties which were recognized as subsisting ones between the then contracting parties and the Indians, of the stipulations of which and their effect, the United States could not have been otherwise than well informed at that time, as to the right of property in Indian lands in the Floridas. When they acquired these provinces by the treaty of cession, it was not stipulated that any treaty with the Indians should be annulled, or its obligation be held less sacred than it was under Spain, nor is there the least reference to any intended change in the relations of the Indians towards the United States. They came in the place of the former sovereign by compact, on stipulated terms, which bound them to respect all the existing rights of the inhabitants, of whatever description, whom the king had recognized as being under his protection. They could assume no right of conquest which may at any time have been vested in Great Britain or Spain, for they had been solemnly renounced, and new relations established between

them by solemn treaties, nor did they take possession on any such assumption of right, on the contrary, it was done under the guarantee of congress to the inhabitants, without distinction, of their rights of property, and with the continued assurance of protection. They might, as the new sovereign, adopt any system of government or laws for the territory consistent with the treaty and the constitution, but instead of doing so, all former laws and municipal regulations which were in existence at the cession, were con-

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tinued in force. It was not necessary for the United States, in the treaty of cession, to enter into any new stipulation to protect and maintain the Indians as inhabitants of Florida, in the free enjoyment of their property, or as nations, contracting parties to the treaties of Pensacola and Walnut Hills with Spain in 1784 and 1793, for by the sixth article of the Louisiana treaty between France and the United States, they had promised "to execute such articles and treaties as may have been agreed on between Spain and the nations or tribes of Indians, until by mutual consent, other suitable articles shall have been agreed upon." (ILaws 137.) These were the treaties which guaranteed to the Seminole Indians their lands according to the right of property with which they possessed them, and which were adopted by the United States, who thus became the protectors of all the rights they had previously enjoyed, or could of right enjoy under Great Britain or Spain, as individuals or nations, by any treaty to which the United States thus became parties in 1803. When they acquired and took possession of the Floridas, these treaties remained in force over all the ceded territory by the orders of the king, as the law which regulated the relations between him and all the Indians, who were parties to them, and were binding on the United States, by the obligation they had assumed by the Louisiana treaty, as a supreme law of the land which was inviolable by the power of congress. They were also binding as the fundamental law of Indian rights, acknowledged by royal orders and municipal regulations of the province, as the laws and ordinances of Spain in the ceded provinces, which were declared to continue in force by the proclamation of the governor in taking possession of the provinces, and by the acts of congress, which assured all the inhabitants of protection in their property. It would be an unwarranted construction of these treaties, laws, ordinances and municipal regulations, were we to decide that the Indians were not to be maintained in the enjoyment of all the rights which they could have enjoyed under either, had the provinces remained under the dominion of Spain. It would be rather a perversion of their spirit, meaning and terms, contrary to the injunction of the law under which we act, which makes the stipulations of any treaty, the laws and ordinances of Spain,

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and these acts of congress, so far as either apply to this case, the standard rules for our decision. On these considerations, we are clearly of opinion that the Indians who claimed the lands in question had, under the government of Great Britain and Spain, a right of property in them which could not be impaired without a violation of the laws of both, and the sanctity of repeated treaties, that these rights continued till the time of the cession, are guaranteed by the treaty and acts of congress in relation to the Floridas, in perfect conformity with its stipulations and faith, unless the Indians had previously made a

binding transfer to the parties under whom the petitioner claims them. The remaining question is, whether he has become invested with the right of the Indians, either in virtue of their deeds, or by the grant of the lawful authorities of the king, pursuant to the laws, usages and customs of the Spanish government of the province. The proclamation of 1763 was undoubtedly the law of the province till 1783, it gave direct authority to the governors of Florida to grant crown lands subject only to such conditions and restrictions as they or the king might prescribe. These lands were of two descriptions such as had been ceded to the king by the Indians, in which he had full property and dominion, and passed in full property to the grantee, and those reserved and secured to the Indians, in which their right was perpetual possession, and his the ultimate reversion in fee, which passed by the grant subject to the possessory right. The proclamation also authorized the union of these rights by a purchase from the Indians, and taking possession with the leave and license of the crown in favour of an individual, or by the governor at an Indian council, for and in the name of the king. This proclamation was also the law of all the North American colonies in relation to crown lands. The grants of the governors were universally considered as made by the king

through his authorized representatives, and when his authority to grant those lands of the crown, the right to which was perfect by the union of the rights of possession with the reversion, it is scarcely possible that their authority would be more limited as to those in which the king had only a remote ultimate fee. As a matter of policy, it was for the benefit of the king and colony to substitute the possession, settlement and culti-

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vation of the whites for the mere occupancy of the Indians in the pursuit of game, and it cannot be imagined, without clear proof, that the autograph of the king, or his order in council, should be indispensable for a license or permission to purchase, when a patent was valid without either. There is no evidence in the record or in the history of the colonies that such a distinction existed in law or usage, but is in direct collision with all the colonial laws relating to purchases from the Indians, as well as the course pursued at treaties, when deeds were made to purchasers with the consent of the governor, or to the king, state, or United States, for their use, or in trust to convey to them. There is no evidence or reason to induce the belief that Spain acted in any other manner in the confirmation of Indian deeds, the usage of her local governors and commandants of posts in such confirmation, is in precise conformity to that of the other colonial officers under Great Britain, and was also in conformity to the existing laws of Spain. (Record 329.) From the confirmation of the Houma grant in 1777 by the governor-general of Louisiana to that of the captain-general of Cuba of this, in 1811, during forty years, no instance appears of a direct confirmation by the king, or of his ever having required any other act than the approbation of the local governor to give perfect validity to the purchase. Independently of these considerations there is another, founded on the treaty at the Walnut Hills, with the Creek and Tallapoosa Indians, held by the then governor of West Florida, under the authority of the governor-general of Louisiana. The governor of that province is in the fifth article declared to be "as representing the king in it." Such a stipulation in a treaty of friendship and warranty would bind the king in good faith not to disavow his acts declared to be done in the royal name and authority. It would be an imputation on his faith to his

acknowledged subjects, plighted by repeated guarantees, to suppose that he intended by the treaty of cession to exclude from confirmation, those lands which his white subjects had purchased from the Indians under the sanction of treaties, with the approbation and formal confirmation of his highest officers, and to confirm only those grants of the royal domain, which had been made at the mere will of his governors, for such consideration only as they might prescribe. If there could be any

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foundation for such an imputation in any case, the history, terms and consideration for the present grants would at once repel it, and when we consider, that the United States accepted of the cession with a knowledge that they had been made, as well as the circumstances under which they were made, connected with the quantity of land embraced within them, without excepting them from confirmation, we can have little doubt that it was the meaning and intention of both contracting parties to the treaty, to place them on the same footing as the grants of lands belonging to the royal domain. There is nothing in the treaty which authorizes a distinction between such grants, which operate by their own force as a transfer of the full property in royal lands, held by the crown under cessions from the Indians, or deeds of confirmation, which give validity to grants conveying the Indian right, in confirming the transfer by the license of the king in the person of his representative. The governor was equally the lawful authority of the king for the one purpose as the other. though he had, by his royal order, transferred the power to grant royal lands, from the governor to the intendant, he had not affected the authority of the former, to confirm grants made by the Indians in such form as to validate the title conveyed. Whether this act of the governor operated by way of confirmation or grant is immaterial, it gave such effect to the purchase, that the lands became the property of the purchaser, so that they could not revert to the crown by the abandonment of the Indians, or any judicial process known to the law of England or Spain, which in substance and effect were the same. When we look, too, to the very remote contingent interest which the king could have to these lands, consistently with his guarantee to the Indians, there can be no reason perceived why deeds or grants, operating to confirm in full property to the purchasers from the Indians, lands thus guaranteed to them, should not be held in a court of equity as valid as original grants of the royal domain. The Indian right to the lands as property, was not merely of possession, that of alienation was concomitant, both were equally secured, protected, and guaranteed by Great Britain and Spain, subject only to ratification and confirmation by the license, charter, or deed from the governor representing the

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king. Such purchases enabled the Indians to pay their debts, compensate for their depredations on the traders resident among them, to provide for their wants; while they were available to the purchasers as payment of the considerations which at their expense had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property in the power of the Indians, to suffer the latter to contract debts, and when willing to pay them by the only means in their power, a cession of their lands, withhold an

assent to the purchase, which by their laws or municipal regulations was necessary to vest a title. Such a course was never adopted by Great Britain in any of her colonies, nor by Spain in Louisiana or Florida of this fact there is abundant proof in the record, by public documents, and the testimony of the highest officers of the local government, the laws, usages and customs of which were well known to the United States before the treaty. The report of the commissioners on Opelousas claims was submitted to the secretary of the treasury in 1815, acted on and approved by congress in 1816, in which report the commissioners state "that the right of the Indians to sell their land was always recognised by the Spanish government. (Record 328.) The laws made it necessary when the Indians sold their lands to have the deeds presented to the governor for confirmation. (Record 329.) The sales by the Indians transferred the kind of right which they possessed, the ratification of the sale by the governor must be regarded as a relinquishment of the title of the crown to the purchaser (Record 333), and no instance is known where permission to sell has been "refused (Record 330), or the rejection of an Indian sale" (Record 336). In the present case the Indian sale has been confirmed with more than usual solemnity and publicity, it has been done at a public council and convention of the Indians conformably to treaties, to which the king was a party, and which the United States adopted, and the grant was known to both parties to the treaty of cession. The United States were not deceived by the purchase, which they knew was subject to the claim of the petitioner, or those from whom he purchased, and made no stipulation which should put it to a severer test than

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any other, and it was made to a house which, in consideration of its great and continued services to the king and his predecessor, had deservedly given them high claims as well on his justice as his faith. But if there could be a doubt that the evidence in the record did not establish the fact of a royal license or assent to this purchase as a matter of specific and judicial belief, it would be presumed as a matter of law arising from the facts and circumstances of the case, which are admitted or unquestioned. As heretofore decided by this court, the law presumes the existence in the provinces of an officer authorized to make valid grants (6 Peters 728, 8 Peters 459), a fortiori, to give license to purchase and to confirm, and the treaty designates the governor of West Florida as the proper officer to make grants of Indian lands by confirmation as plainly as it does the governor of East Florida to make original grants (8 Peters 452), or the intendant of West Florida to grant royal lands. A direct grant from the crown of lands in a royal haven may be presumed on an uninterrupted possession of sixty years (2 Anst. 614, 1 Dow. Par. Ca. 322, 323), or a prescriptive possession of crown lands for forty years (3 Dow Par. Ca. 112). An encroachment on a royal forest by a continued possession of twenty years will be presumed to have been by the license of the crown or by a grant, if no act of parliament prohibits it. (11 East 57, 284, 488, 495.) On the same principle, after a long possession of Indian lands the law would presume that it was founded on an Indian deed duly confirmed, or any title consistent with the facts and circumstances in evidence. (1 Paine 469, 470.) Any thing which would make the ancient appropriation good (Cowper 110), if it could have had a lawful foundation, for whatever may commence by grant is good by prescription. (1 Roll. Ab. 512, 4 Mod. 55, 1 Saund. 345.) The length of time which brings a given case

within the legal presumption of a grant, charter, or license, to validate a right long enjoyed, is not definite, depending on its peculiar circumstances, in this case we think it might be presumed in less time than when the party rested his claim on prescriptive possession alone. There is every evidence, short of the sign manual or order of the king, approving and confirming this grant, and if that were wanting to secure

JANUARY TERM 1835. [Mitchel and others v. The United States.] I a right of property to lands which have been held as these have been, the law would presume that it once existed, but was lost in the lapse of time and change of governments. The more especially as by the laws of Spain prescription for the period of ten years has the same effect as twenty by the principles of the common law For these reasons we think the title of the petitioner is valid by all the rules prescribed by the acts of congress, which give us jurisdiction of the case.

This cause came on to be heard on the transcript of the record from the superior court for the middle district of Florida, and was argued by counsel on full consideration whereof, this court is unanimously of opinion, that the title of the petitioner to so much of the lands in controversy as is embraced within the lines and boundaries of the tract granted by the deeds, grants and acts of confirmation to Panton, Leslie & Co. in 1804 and 1806, also to the island in the river Appalachicola, ceded, granted and confirmed to John Forbes in 1811, also to the lands and islands at and west of the mouth of said river, which were ceded, granted and confirmed to John Forbes & Co. in 1811, is valid by the law of nations, the treaty between the United States and Spain, by which the territory of the Floridas was ceded to the former; the laws and ordinances of Spain, under whose government the title originated, the proceedings under said treaty, and the acts of congress relating thereto and do finally order, decree, determine and adjudge accordingly. And this court doth in like manner order, adjudge, determine and decree, that the title of the petitioner to so much of the tract of land which lies east of the first mentioned tract, between the rivers Wakulla and St Mark's, which was conveyed to John Forbes & Co. in 1811, as shall not be included in the exception hereinafter made, is valid by the laws, treaty, and proceedings as aforesaid, with the exception of so much of the last mentioned tract as includes the fortress of St Marks and the territory directly and immediately adjacent and appurtenant thereto, which are hereby reserved for the use of the United States. And it is further ordered and decreed, that the territory thus described shall be VOL. ix.-4 v

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that which was ceded by the Indian proprietors to the crown of Spain for the purpose of erecting the said fort, provided the boundaries of the said cession can be ascertained. If the boundaries of the said cession cannot now be ascertained, then the adjacent lands which were considered and held by the - Spanish government or the commandant of the post as annexed to the fortress for military purposes, shall be still considered as annexed to it, and reserved with it for the use of the United States. If no evidence can now be obtained to designate the extent of the adjacent lands, which were considered as annexed o to St Mark's as aforesaid, then so much land shall be comprehended in this exception as, according to the military usage, was generally attached to forts in Florida or the adjacent colonies. If no such military usage can be proved, then it is ordered and decreed that a

line shall be extended from the point of junction between the rivers St Mark's and Wakulla to the middle of the river St Mark's, below the junction, thence extending up the middle of each river three miles in a direct line, without computing the courses thereof, and that the territory comprehended within a direct line, to be run so as to connect the points of termination on each river, at the end of the said three miles up each river, and the two lines to be run as aforesaid, shall be, and the same is hereby declared to be, the territory reserved as adjacent and appurtenant to the fortress of St Mark's, and as such reserved for the use of the United States. To which the claim of the petitioner is rejected, and as to which this court decree that the same is a part of the public lands of the United States. The decree of the court below is, therefore, reversed and annulled in all matters and things therein contained, with the exception aforesaid, and this court, proceeding to render such decree as the said court ought to have rendered, do order, adjudge and decree, that the claim of the petitioner is valid and ought to be confirmed, and is and remains confirmed by the treaty, laws and proceedings aforesaid, to all the lands embraced therein, except such part as is- herein above excepted. And this court does further order, adjudge and decree, that the clerk of this court certify the same to the surveyor-general of Florida, pursuant to law, with directions to survey and lay off the lands described in the petition of the claimant, according

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to the lines, boundaries and description thereof in the several deeds of cession, grant and confirmation by the Indians or governor of West Florida filed as exhibits in this cause, or referred to in the record thereof, excepting nevertheless such part of the tract granted in 1811, lying east of the tract granted in 1804 and 1806 as is hereby declared to be the territory of the United States, pursuant to the exception herein before mentioned, and to make return thereof according to law as to all the lands comprehended in the three first herein mentioned tracts. And as to the tract last herein mentioned, to survey and in like manner to lay off the same, so soon as the extent of the land herein excepted and reserved for the use of the United States shall be ascertained in the manner herein before directed. And this court doth further order, adjudge and direct, that the extent and boundaries of the land thus excepted and reserved shall be ascertained and determined by the superior court of the middle district of Florida in such manner and by such process as is prescribed by the acts of congress relating to the claims of lands in Florida, and to render thereupon such judgment or decree as to law shall appertain.