

Mitchel Vs. United States

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Appellant : Mitchel

Respondent : United States

Judgement :

Mitchel v. United States - 40 U.S. 52 (1841)

U.S. Supreme Court Mitchel v. United States, 40 U.S. 15 Pet. 52 52 (1841)

Mitchel v. United States

40 U.S. (15 Pet.) 52

APPEAL FROM THE SUPERIOR COURT

OF THE MIDDLE DISTRICT OF FLORIDA

In the Supreme Court, at January term 1835, [34 U. S. 9](#) Pet. 711, the case of Colin Mitchel and others, appellants, against the United States was argued and determined, on an appeal from the Superior Court of East Florida. It was a claim to lands in East Florida, the title to which was derived from grants from the Creek and Seminole Indians, ratified by the authorities of Spain, before the cession of Florida

to the United States. The claim was confirmed by the Court, with the exception of so much of the tract surveyed between the Rivers Wakulla and St. Marks, conveyed to John Forbes &

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Company in 1811, as included the fortress of St. Marks, and the territory directly and immediately adjacent and appurtenant thereto, which was reserved to the United States.

On 30 January 1836, Collin Mitchel and others, the appellants in the Supreme Court, filed in the Superior Court of Middle Florida the decree and mandate of the Supreme Court as follows:

"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 petitioners 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 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 were 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 and 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 firstmentioned tract, between the Rivers Wakulla and St. Marks, 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 lastmentioned tract as includes the fortress 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 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

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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 to St. Marks as aforesaid, then so much land shall be comprehended in this exception as according to military usage was attached generally 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. Marks and Wakulla to the middle of the River St. Marks 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 are hereby declared to be the territory reserved as adjacent and appurtenant to the fortress of St. Marks, 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 decrees 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 said Court ought to have rendered, does 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 land described in the petition of the claimants according 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

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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 hereinbefore mentioned, and to make return thereof according to law, as to all the lands comprehended in the three first hereinmentioned tracts. And as to the tract last herein mentioned, to survey in like manner, lay off the same, so soon as the extent of land herein excepted and reserved for the use of the United States, shall be ascertained in the manner hereinbefore 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."

Subsequently, Colin Mitchel and others filed a bill in the said court, wherein they claimed the lands to the walls of the fort of St. Marks on all sides and prayed confirmation thereof to the said walls of the fort as aforesaid, to be held, as it was, under the dominion of Spain, according to the treaty of cession, and the proceedings under it in other cases. On 14 February, 1838, they filed an amended petition in the same court in which they asserted the fee in the land on which the fort of St. Marks was erected to have been and still to be in themselves, whilst they admitted the right of the government of the United States for the purposes of a fort, and they therefore prayed that the fee of the land covered by the fort, as well as

that adjoining and appurtenant, should be decreed to them, whilst the use thereof for the purposes of a fort might be reserved by a decree of that court to the government of the United States.

On 14 February, 1838, the Attorney of the United States for the District of Middle Florida filed his answer to the bill and amended petition, in which, although he denied the facts and allegations therein set forth, he alleged on the part of the United States that the matters which were to be ascertained and decided by the Court did not arise out of said petition and amended petition, and that it should not be governed or regulated

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in the investigations to be made thereby; that the power and authority of the Court to hold cognizance of the case after its former final decree therein was not in any wise founded upon the filing of said petition, but entirely and exclusively derived from and founded upon the decree of the Supreme Court of the United States at January term 1835, by and in which the court was directed to ascertain certain questions of fact, and the said petition and amended petition being therefore supererogatory, it was not necessary for the said United States of America to finally answer the same or create any issues of law or fact thereupon. The attorney of the United States therefore prayed that the said petition and amended petition might be dismissed and that the court would proceed to decide the questions referred to it by the Supreme Court according to and in pursuance of the four alternative rules prescribed in the same, without reference to the petition and amended petition.

On 30 June, 1838, the Superior Court for the Middle District of Florida decreed, on the proofs taken and after argument, that the boundaries of the territory ceded by the Indians to Spain for the purpose of erecting the fortress of St. Marks could not now be ascertained; that no evidence could now be obtained to designate the extent of the adjacent lands which were considered as annexed to said fortress by the Crown of Spain or the commandant of said post. But that there was sufficient evidence of the military usage of Spain to determine the extent of land adjacent to

forts in Florida, which were usually attached to said forts; that the extent of such reservations was determined by a radius of 1,500 Castilian varas from the salient angles of the covered way all round the works, or, there being no covered way, from the salient angles of the exterior line of the ditch. The court therefore decreed, that the lands adjacent to the fortress of St. Marks to be reserved to the use of the United States and as part of the public land of the same, should be ascertained, described, and determined as follows, *viz.*, from the eastern point of that part of the exterior line of the ditch which is in advance of, and parallel with, the northern face of the bastion and opposite the shoulder of the same, a line will be drawn at right angles with that face of the bastion, 1,500

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Castilian varas from the same point of beginning; two other lines of 1,500 varas in length will be drawn and extended to points on the margin of the two rivers, St. Marks and Wakulla, respectively; from the central one of these three points lines shall be extended connecting the terminations of these three radii, and thence, extending in the same lines, to the center of the two rivers, St. Marks and Wakulla, and all the land comprehended within these lines, and the middle of each river, from their termination to the confluence of the two rivers below the fort of St. Marks, shall be the land reserved to the use of the United States. The "vara" to be used in this survey to be the "Castilian," or "judicial vara of Spain," 5,000 of which make a league, and are equal in length to 4,635 English yards. And they further ordered, that the clerk should certify the decree of the Surveyor General of Florida, pursuant to law, with directions to survey and lay off the lands thus reserved to the United States according to the lines, boundaries, and description thereof, in the decree.

From this decree, the present appeal to the Supreme Court was prosecuted by Colin Mitchel and others.

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WAYNE, JUSTICE, delivered the opinion of the Court.

This case arises upon the mandate of this Court on the case of [Mitchel v. United States](#), reported in 9 Pet. 711. In that case, it will be seen that the lands claimed by the plaintiffs were in different tracts, and that this Court, in confirming the title of the plaintiffs, excepted from one of them the fortress of St. Marks, and "the territory directly and immediately adjacent and appurtenant thereto," which were reserved for the United States. The Court further decreed that the territory

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thus described shall be 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 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 and reserved with it, for the use of the United States. If no evidence can be obtained to designate the extent of the adjacent lands, which were considered as annexed to St. Marks, as aforesaid, then so much land shall be comprehended in this exception as, according to military usage, was attached generally 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. Marks and Wakulla, to the middle of the River St. Marks, 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 are hereby declared to be the territory reserved, "as adjacent and appurtenant to the fortress of St. Marks," 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 decreed that "the same is a part of the public lands of the United States." The Court then reversed the decree of the court below, declaring it to be reversed and annulled in all matters therein contained, with the exception aforesaid, and proceeding to render such decree as

the court below ought to have rendered, decreed the claim of the petitioners valid, to all the land claimed, except to such part as it had expected.

The clerk of this Court was directed to certify its decree to the Surveyor General of Florida, with directions to survey and lay off the lands described in the petition of the claimant, according 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

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as exhibits in the 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 was hereby declared to the territory of the United States pursuant to the exception thereinbefore mentioned, and to make return thereof, according to law, as to all the lands comprehended in the three first therein mentioned tracts, and as to the tracts last mentioned, to survey and in like manner to lay off the same as soon as the extent of the land excepted and reserved for the use of the United States should be ascertained in the manner directed. And the Court directed that the land excepted and reserved should 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, the court rendering thereupon such judgment or decree as to law shall appertain.

This mandate was filed by the plaintiffs in the Superior Court of Middle Florida. They afterwards filed a bill claiming from the court a confirmation of their title to the land excepted, up to the walls of the fort of St. Marks; asserted this claim, upon the ground of the laws, usages and military practice, in the various colonies of Spain; and then, in an amended bill, they asked the court to decree to them the fee in the land covered by the fort, as well as that adjoining and appurtenant, because they say, the land on which the fort is erected was originally obtained from the Indians for the purpose of erecting a fortification, to be occupied and used as such, for that express purpose and no other. The attorney of the United States filed exceptions

and an answer to the bills of the plaintiffs, alleging, among other things, that all the points in dispute between the United States and the plaintiffs, concerning the land they claimed had been settled by the decision and mandate in the original case, and that the only object of this Court in referring the mandate to the court below was that it might ascertain the extent and boundaries of the tract of land which included the fortress of St. Marks and the territory adjacent, to which the claim of the petitioner had been rejected, and which had been reserved for the use of the United States.

On these pleadings, and the evidence taken in it, the cause was tried.

The court expressed the opinion that the boundaries

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of the territory ceded by the Indians to Spain for the purpose of erecting the fortress of St. Marks could not now be ascertained; that no evidence could now be obtained to designate the extent of the adjacent lands which were considered as annexed to the fort by the Crown of Spain or the commandant of the post, but declared there was sufficient evidence of the military usage of Spain to determine the extent of land adjacent to forts in Florida, which were usually attached to said forts. The court proceeded to say the extent of such reservations was determined by a radius of 1,500 Castilian varas from the salient angles of the covered way all round the works, or, there being no covered way, from the salient angles of the exterior line of the ditch. A decree was made by the court conformable with this opinion, from which the plaintiffs appeal.

It is urged for the appellants, that as the sale from the Indians to Forbes & Company calls for the St. Marks River as the eastern boundary of the cession and grant, and as the title to the land was in the Indians, with only a preemptive right to the ultimate fee in the soil, in the King of Spain, with the additional right of assenting to, or rejecting sales by the Indians; that if no formal cession, or transfer of the land, upon which the fort is erected, can be found from the Indians to Spain before the sale to Forbes & Company, confirmed as it was by the authorities of

Spain without any exception of the site of the fort or land appurtenant to it, that the adjacent land up to the walls of the fort belongs to the claimants, and the site of the fort also, in the event of its abandonment as a fortification; that the right to the site would have been consummated in the claimants in virtue of the sale by the Indians if it had been disused as a fortress by Spain before Florida was ceded to the United States, and that the latter could only hold it for the same use or as Spain held it, and now having been discontinued by the United States as a fortress, that the claimants were entitled to it in fee. It was also said that the Spanish government recognized by its laws the ownership of lands to the walls of forts, and that military usage in Florida and the adjacent colonies permitted it.

The case before us does not require any discussion upon the nature and extent of the property held by the Florida Indians in these lands under Spain. That was satisfactorily done in the

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decision given by this Court in the original case. [34 U. S. 9](#) Pet. 711. It was then shown that the Indians

"held under Great Britain and Spain a right of property in these lands which could not be impaired without a violation of the laws of both and the sanctity of repeated treaties."

Id., [34 U. S. 755](#) .

"That 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 a 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. Marks."

Id., [34 U. S.](#) These extracts present the claim of the appellants under their Indian title and confirmation of it by Spain in its strongest light. The last of them is particularly applicable to the point in controversy.

It is then to be determined, whether the court below, in its judgment, has rightly apprehended and executed the mandate of this Court. The meaning of the mandate may be ascertained from the instrument itself, but the reasons which induced the court to make it are to be found in the evidence contained in the original record. The Court will now do what it did in the [Case of Sibbald](#), 12 Pet. 493. It said,

"to ascertain the true intention of the decree and mandate of this Court, the decree of the court below, and of this Court, and the petitioners' title must be taken into consideration."

In [23 U. S. 10](#) Wheat. 431, this Court said "the proceedings in the original suit are always before the Court so far as to determine any new points between the parties."

From the evidence then adduced by the claimants in the original case, it appeared that when the Floridas were retroceded to Spain by England, September 1793, Panton, an English merchant, resided at St. Augustine and traded with the Indians in East Florida. In 1784, Governor Mero, finding it necessary to cultivate trade with the Indians, gave permission to one Mather to bring two vessels from London direct to Pensacola and Mobile, laden with goods of British manufacture to supply the Indians. In July, 1784, Panton applied to Governor Zespedes for leave to remain in the province, with permission to

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import from Great Britain such articles as the Indian trade required, and to export peltries received in payment. A royal order was passed on 8 May, 1786, allowing Panton and his partners to remain in Florida on their taking the oath of allegiance, and permitting them to trade with the Indians. They were allowed to send a ship annually to Pensacola with British goods, and to take back peltries.

In 1787 or 1788, they were allowed to erect a storehouse on the River St. Marks to collect their peltries, and the vessel from Pensacola was permitted to go there to load them. In 1789, Panton was entrusted with the exclusive trade, and in 1791

received a special royal license. The year after, an attack was made by the Indians, under Bowles, on Panton's store on the River St. Marks, and much property taken away. The same kind of outrage was repeated in 1800, with heavy loss to Panton and his associates. The Indians also owed them a large sum for goods. Forbes succeeded Panton in the trade which the latter began with the Indians, and was the assignee of his claim upon the Indians. In January 1801, he informs the Marquis Casa Calvo that he had been negotiating with the Indians to cede lands in payment of the debt, and in satisfaction for the outrages committed by them on the store at St. Marks. The governor countenanced the negotiation. In 1804, Inverarity, an agent of Forbes, informed Governor Folch that the Indians had agreed to sell the land, and asks his consent to complete the purchase. The consent was given. On 25 May, a deed was made, and in August, in a full Indian council held at St. Marks, the governor being present, the sale was ratified. This was Forbes' first purchase. It embraced the land between the Appalachicola and Wakulla, extending several miles up the rivers. The boundaries of this first purchase were run and fixed by the Indians in 1806. All the surveys being completed within that year, Governor Folch confirmed the grant and gave the grantees possession. In January, 1811, a new negotiation was made with the Indians, and they agreed to sell additional strips of land on the western, northern, and eastern sides of the first purchase, but the cession was of "all the right the Indians had retained in the land until that time." The eastern addition embraced

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the land from the Wakulla to the St. Marks, and down the latter to the sea, thus including the point between the two rivers. This second cession was also confirmed by governor Folch in June 1811. Thus matters stood, the cession being known as Forbes' land, and the fort of St. Marks continuing to be garrisoned by Spain until it was surrendered to the United States under the treaty. The history of the grants to the claimants having been traced, it is here necessary to give that of the fortress of St. Marks as it is to be collected from the evidence in the original case.

In the record, a dispatch from the Marquis of Casa Calvo shows that during the possession of Florida by the English, the fort of St. Marks had been a military post, though it had been abandoned and suffered to go to decay. Shortly after its retrocession to Spain, the latter extended the jurisdiction of West Florida, so as to include the site of the fort. In May, 1785, Count Galvas issued an order to repair the old fort at St. Marks, and a detachment of troops was ordered to it from Pensacola. This detachment was cut off or driven away by the Indians. But in the spring of 1787, a royal order was issued directing the permanent establishment of the fort. "It is notorious and public," says Governor Folch, the principal witness of the claimants and the person who gave them possession of their whole purchase, "that at the establishment of the fort of St. Marks at Appalachia in the year 1787, all the solemnity and requisites were observed to obtain from the Indians, in sale, the lands necessary to that object."

Benigno de Calderon, who was then an officer of the Spanish government, twice refers to the fact that not merely a military post itself, "but the quantity of land needed to preserve it," and what he calls "the circle of jurisdiction of a fortified place," was severed from the Indian land and vested in the government of Spain.

Immediately after the sale of which Governor Folch speaks, the fort was constructed by Spain at a heavy expense. So were the public stores. The evidence of the claimants shows at least \$200,000 was expended upon these works. Calderon says there was a regular Spanish garrison there from 1787 to 1818. Caro says they exercised

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both civil and military jurisdiction. When Florida was ceded to the United States, St. Marks was given up as a military fortress of the King of Spain. Such is the history of the fortress of St. Marks, taken from the testimony and the witnesses of the claimants in the original case. Is it surprising, then, that the court, in its mandate, should have excepted the fort and land directly adjacent to it from its confirmation of the claimant's title to the lands bought by them from the Indians?

The King's royal order to establish a fort at St. Marks, the occupancy of the fortress for more than twenty years before any grant was made to Forbes, twentyfive years before the grant was made which includes it, and forty years occupation of it with the use of the land adjacent seemed to the Court to be inconsistent with the idea that it was intended to be included in the sale by the Indians, or by the confirmation of that sale by Governor Folch. It must be remembered also that when Governor Folch gave possession of the land to the grantees, the fort was retained, and the land, to the extent at least of what is termed the circle of military jurisdiction, had been cleared, and that the grantees, though living by permission for protection of themselves and their trade, within that circle, never exercised, by cultivation or otherwise, any acts of ownership over any part of it. Besides, the Court was advised when the decision in the original case was made that by the laws of the Indies, reservations of lands were made appurtenant to forts, though the extent of such reservations was not known. It was then, however, a subject of inquiry, and would no doubt have been fully investigated if the counsel for the claimant had not admitted in his argument that the Indian title for the sale of the fort of St. Marks had been extinguished by a negotiation made by the Governor of West Florida.

In the opinion of the Court, given by MR. JUSTICE BALDWIN, is found the following paragraph:

"It is objected that the grant of 1811 is invalid because it comprehends the fort of St. Marks, 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. 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

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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. Whether the Indians had a right to grant this particular spot then or no, 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. [Danforth v. Wear,](#) 9 Wheat. 673; [Patterson v. Jenks,](#) 2 Pet. 216; and [Winn v. Patterson,](#) 9 Pet. 663. As to the land covered by the fort and appurtenances, to some distance around it, it became unnecessary to inquire into the effect of the deeds, as the counsel of the petitioners have in open court disclaimed any pretensions to it."

It is not, however, upon this disclaimer of the claimants' counsel that the Court relies to sustain the judgment of the court below upon the mandate. It is cited only to show that the subject matter of the present controversy was considered by the Court. That the Court, not knowing at that time what should be the reservation appurtenant to the fort of St. Marks, directed it to be ascertained, and excepted it absolutely from the grant of the claimants, declaring it to be a part of the public lands of the United States. The object of the Court was to put these claimants, in respect to the lands which they claimed, in the condition they would have been if Florida had not been ceded to the United States. It was the intention of the Court, in the language of the treaty, to put them in possession of the lands to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty. Can it be supposed for a moment, when the King, by his royal order, directed the intendant general of Cuba to inquire into the subject of the indemnity which should be made to the house of Panton, Leslie & Company, for services to the Crown and for Indian depredations, that he would have sanctioned, or that the intendant general would have ventured to propose a cession of land, including public stores and a fortress,

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which had been built at a great expense, at an important point on the coast, which was essential to control and keep the Indians in subjection, and allimportant to resist external attack. Does anyone believe, when Governor Folch sanctioned the

purchases, confirmed and gave possession of the lands to Forbes & Company, that he would have done either if he had thought he was giving to them a title to the fort of St. Marks, and its circle of military jurisdiction, against the king, or that the captain-general of Cuba, to whom Governor Folch reported his proceedings in this matter, would have approved and declared that the king would confirm them, if he had supposed that he was permitting the Indians to sell a fortress, then garrisoned by the troops of Spain, and which had been so for more than twenty years? Is it not certain, nothing of the kind was intended when it is remembered, that Governor Folch, who superintended the sale of the land, marked out its boundaries, and gave possession, of it to the original grantees, says

"It is notorious and public that at the establishment of the fort of St. Marks, at Appalachia, in the year 1787, all the solemnities and requisites were observed to obtain from the Indians in sale the lands necessary to that object."

We will not enter into the question how far the appropriation of the land for a fortress by order of the government extinguished the Indian title. It might be done successfully, upon the positions taken by this Court in respect to the rights of European monarchs to Indian lands in North America, in [*Johnson v. McIntosh*](#), 8 Wheat. 543. We are inclined to put this case upon facts disclosed by the claimants' evidence in the former cause, and the inferences and arguments which may be drawn from them, because the Court did not do so in its decision in consequence of the admission of counsel "that the land covered by the fort and appurtenances, to some distance around it," were not contended for.

In addition to what has been said, however, in respect to St. Marks and the appurtenant land not being within the grant from the Indians to the claimants, we remark that the subject may be satisfactorily disposed of by a reference to the second article of the treaty with Spain.

"His Catholic Majesty cedes to the United States in full property and sovereignty all the territories

which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida; the adjacent islands dependent on said provinces; all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings which are not private property."

In the construction of this article, it will be admitted that the last member of the sentence cannot refer to any of the enumerated cessions, notorious as public property, or that it must be confined to the terms, "other buildings in connection with it." The treaty, then, secures to the United States the fort of St. Marks and so much land appurtenant to it as, according to military usage, was attached generally to forts in Florida or the adjacent colonies. Was there any such usage, and has it been established by sufficient testimony to sustain the judgment of the court below? We think there was, and that the proofs are sufficient.

At the instance of the claimants, the testimony of the director of engineers was taken by order of the Governor General Tacon. His evidence on the record before us is that, "a radius of 1,500 Castilian varas is measured from the salient angles of the covered way all around the fortification." That such was the rule is confirmed by a document introduced by the claimants, as evidence in this case. In 1801, a petition was presented to Governor White, for a grant of land at Macariz. He referred it to the chief engineer. The engineer reported it to be within 1,500 yards of the castle,

"that it cannot be cultivated in corn, nor can ditches, or thorn fences be allowed; that plants of a low growth, and vegetables may be permitted to be cultivated, and it may be allowed for the security of the produce to erect simple post and rail fences, which may be sufficient to prevent animals from breaking in."

Under these restrictions it was granted, so that it could only be used in such a way as could not interfere with the defensive and offensive power of the castle. Several witnesses were examined on this point; all of them concur in saying a fortress cannot be defended unless it has the command of the ground around it, to a considerable extent. Colonel Murat gives as the usage of the European armies that from the salient angles of the covered way, a radius of 3,400 yards is marked,

in which it is not permitted to erect any permanent buildings, or embankments, or stone fences, or

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ditches. We know it also to be the usage of all civilized nations, to assert such rights over the ground adjacent to fortifications, in a time of war. It is reasonable, then, to conclude that European monarchs, in the construction of permanent fortifications in the new world upon Indian lands, before it had been granted by the sovereign, or permitted to be alienated by the Indian, intended to appropriate so much of the land adjacent to a fortification as was necessary to defend it. That it was so intended, in the instance of St. Marks is strongly corroborated by the testimony of Col. Butler, who says the woods had been cleared away by the authorities at St. Marks to the distance of a mile and a half from the walls. Another witness says no buildings were erected outside of the fort before 1827, and then by permission of the United States. It is hard to resist the conclusion that such a clearing, before the sale by the Indians, without the cultivation or occupancy of any part of it by the grantees, from the time of the Indian sale, to the surrender of the fort to the United States, does not indicate an intention upon the part of the authorities of Spain to reserve some land adjacent to the fort for military purposes, and the acquiescence of the purchasers, that though within the boundaries of the grant, the fort and land attached to it by military usage was not intended to be conveyed.

Nor can we admit, as it was argued by the counsel of the appellants, that the instances cited in the record of grants of land up to the walls of fortifications by the Spanish authorities in Florida and Louisiana disprove the existence of a military usage to reserve land adjacent to forts in them. Those instances are exceptions out of the military laws of Spain, as contained in the royal ordinances, which declare that "a radius of 1,500 varas is measured from the salient angles of the covered way." We do not think it necessary to remark further upon the opinion given by the chief engineer, in respect to the manner in which such titles were acquired to land adjacent to fortifications, or the extent of the military jurisdiction over them, than to observe the fact of certain reservation being declared by him,

as a fact; we require something more than his conclusion or inference, that there was no reservation according to the military usage and ordinances of Spain, in the instance of St. Marks.

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Our opinion is that the court below has fully apprehended and executed the judgment of this Court, and its judgment is accordingly

affirmed.

This case came on to be heard on the transcript of the record from the Superior Court of the Middle District of Florida, and was argued by counsel, on consideration whereof it is ordered and decreed by this Court that the decree of the said superior court in this cause be and the same is hereby affirmed.

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