[CONSTITUTIONAL LAW.]

JOHNSON and GRAHAM'S Lessee
v.
WILLIAM M'INTOSH.

A title to lands, under grants to private individuals, made by Indian tribes or nations northwest of the river Ohio, in 1773, and 1775, cannot be recognised in the Courts of the United States.

ERROR to the District Court of Illinois. This was an action of ejectment for lands in the State and District of Illinois, claimed by the plaintiffs under a purchase and conveyance from the Piankeshaw Indians, and by the defendant, under a grant from the United States. It came up on a case stated, upon which there was a judgment below for the defendant. The case stated set out the following facts:

1st. That on the 23d of May, 1609, James I. king of England, by his letters patent of that date, under the great seal of England, did erect, form, and establish Robert, Earl of Salisbury, and others, his associates, in the letters patent named, and their successors, into a body corporate and politic, by the name and style of "The Treasurer and Company of Adventurers and Planters of the City of London, for the first Colony in Virginia," with perpetual succession, and power to make, have, and use a common seal; and did give, grant, and confirm unto this company, and their succes-

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sors, under certain reservations and limitations in the letters patent expressed, "All the lands, countries, and territories, situate, lying, and being in that part of North America called Virginia, from the point of land called Cape or Point Comfort, all along the seacoast to the northward two hundred miles; and from the said Cape or Point Comfort, all along the seacoast to the southward, two hundred miles; and all that space and circuit of land lying from the seacoast of the precinct aforesaid, up into the land throughout from the sea, west and northwest; and also all the islands lying within one hundred miles, along the coast of both seas of the precinct aforesaid; with all the soil, grounds, rights, privileges, and appurtenances to these territories belonging, and in the letters patent particularly enumerated:" and did grant to this corporation, and their successors. various powers of government, in the letters patent particularly expressed.

2d. That the place, called in these letters patent, Cape or Point Comfort, is the place now called and known by the name of Old Point Comfort, on the Chesapeake Bay and Hampton Roads; and that immediately after the granting of the letters patent, the corporation proceeded, under and by virtue of them, to take possession of parts of the territory which they describe, and to form settlements, plant a colony, and exercise the powers of government therein; which colony was called and known by the name of the colony of Virginia.

3d. That at the time of granting these letters patent, and of the discovery of the continent of

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North America by the Europeans, and during the whole intermediate time, the whole of the territory, in the letters patent described, except a small district on James River, where a settlement of Europeans had previously been made, was held, occupied, and possessed, in full sovereignty, by various independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory, and the absolute owners and proprietors of the soil; and who neither acknowledged nor owed any allegiance or obedience to any European sovereign or state whatever: and that in making settlements within this territory, and in all the other parts of North America, where settlements were made, under the authority of the English government, or by its subjects, the right of soil was previously obtained by purchase or conquest, from the particular Indian tribe or nation by which the soil was claimed and held; or the consent of such tribe or nation was secured.

4th. That in the year 1624, this corporation was dissolved by due course of law, and all its powers, together with its rights of soil and jurisdiction, under the letters patent in question, were revested in the crown of England; whereupon the colony became a royal government, with the same territorial limits and extent which had been established by the letters patent, and so continued until it became a free and independent State; except so far as its limits and extent were altered and curtailed by the treaty of February 10th, 1763, between Great Britain and France, and by the letters patent granted by the King of England,

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for establishing the colonies of Carolina, Maryland, and Pennsylvania.

5th. That some time previous to the year 1756, the French government, laying a claim to the country west of the Alleghany or Appalachian mountains, on the Ohio and Mississippi rivers, and their branches, took possession of certain parts of it, with the consent of the several tribes or nations of Indians possessing and owning them; and, with the like consent, established several military posts and settlements therein, particularly at Kaskaskias, on the river Kaskaskias, and at Vincennes, on the river Wabash, within the limits of the colony of Virginia, as described and established in and by the letters patent of May 23d, 1609: and that the government of Great Britain, after complaining of these establishments as encroachments, and remonstrating against them, at length, in the year 1756, took up arms to resist and repel them; which produced a war between those two nations, wherein the Indian tribes inhabiting and holding the countries northwest of the Ohio, and on the Mississippi above the mouth of the Ohio, were the allies of France, and the Indians known by the name of the Six Nations, or the Iroquois, and their tributaries and allies, were the allies of Great Britain; and that on the 10th of February, 1763, this war was terminated by a definitive treaty of peace between Great Britain and France, and their allies, by which it was stipulated and agreed, that the river Mississippi, from its source to the Iberville, should for ever after form the boundary between the dominions of

Great Britain and those of France, in that part of North America, and between their respective allies there.

6th. That the government of Virginia, at and before the commencement of this war, and at all times after it became a royal government, claimed and exercised jurisdiction, with the knowledge and assent of the government of Great Britain, in and over the country northwest of the river Ohio, and east of the Mississippi, as being included within the bounds and limits described and established for that colony, by the letters patent of May 23d, 1609; and that in the year 1749, a grant of six hundred thousand acres of land, within the country northwest of the Ohio, and as part of Virginia, was made by the government of Great Britain to some of its subjects, by the name and style of the Ohio Company.

7th. That at and before the commencement of the war in 1756, and during its whole continuance, and at the time of the treaty of February 10th, 1763, the Indian tribes or nations, inhabiting the country north and northwest of the Ohio, and east of the Mississippi, as far east as the river falling into the Ohio called the Great Miami, were called and known by the name of the Western Confederacy of Indians, and were the allies of France in the war, but not her subjects, never having been in any manner conquered by her, and held the country in absolute sovereignty, as independent nations, both as to the right of jurisdiction and sovereignty, and the right of soil, except a few military posts, and a small territory around each,

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which they had ceded to France, and she held under them, and among which were the aforesaid posts of Kaskaskias and Vincennes; and that these Indians, after the treaty, became the allies of Great Britain, living under her protection as they had before lived under that of France, but were free and independent, owing no allegiance to any foreign power whatever, and holding their lands in absolute property; the territories of the respective tribes being separated from each other, and distinguished by certain natural marks and boundaries to the Indians well known; and each tribe claiming and exercising separate and absolute ownership, in and over its own territory, both as to the right of sovereignty and jurisdiction, and the right of soil.

8th. That among the tribes of Indians, thus holding and inhabiting the territory north and northwest of the Ohio, east of the Mississippi, and west of the Great Miami, within the limits of Virginia, as described in the letters patent of May 23d, 1609, were certain independent tribes or nations, called the Illinois or Kaskaskias, and the Piankeshaw or Wabash Indians; the first of which consisted of three several tribes united into one, and called the Kaskaskias, the Pewarias, and the Cahoquias; that the Illinois owned, held, and inhabited, as their absolute and separate property, a large tract of country within the last mentioned limits, and situated on the Mississippi, Illinois, and Kaskaskias rivers, and on the Ohio below the mouth of the Wabash; and the Piankeshaws, another large tract of country within the same

limits, and as their absolute and separate property, on the Wabash and Ohio rivers; and that these Indians remained in the sole and absolute ownership and possession of the country in question, until the sales made by them, in the manner herein after set forth.

9th. That on the termination of the war between Great Britain and France, the Illinois Indians, by the name of the Kaskaskias tribes of Indians, as fully representing all the Illinois tribes then remaining, made a treaty of peace with Great Britain, and a treaty of peace, limits, and amity, under her mediation, with the Six Nations, or Iroquois, and their allies, then known and distinguished by the name of the Northern Confederacy of Indians; the Illinois being a part of the confederacy then known and distinguished by the name of the Southern Confederacy, and sometimes by that of the Western Confederacy.

10th. That on the 7th of October, 1763, the King of Great Britain made and published a proclamation, for the better regulation of the countries ceded to Great Britain by that treaty, which proclamation is referred to, and made part of the case.

11th. That from time immemorial, and always up to the present time, all the Indian tribes, or nations of North America, and especially the Illinois and Piankeshaws, and other tribes holding, possessing, and inhabiting the said countries north and northeast of the Ohio, east of the Mississippi, and west of the Great Miami, held their respective lands and territories each in common, the in-

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dividuals of each tribe or nation holding the lands and territories of such tribe in common with each other, and there being among them no separate property in the soil; and that their sole method of selling, granting, and conveying their lands, whether to governments or individuals, always has been, from time immemorial, and now is, for certain chiefs of the tribe selling, to represent the whole tribe in every part of the transaction; to make the contract, and execute the deed, on behalf of the whole tribe; to receive for it the consideration, whether in money or commodities, or both; and, finally, to divide such consideration among the individuals of the tribe: and that the authority of the chiefs, so acting for the whole tribe, is attested by the presence and assent of the individuals composing the tribe, or some of them, and by the receipt by the individuals composing the tribe, of their respective shares of the price, and in no other manner.

12th. That on the 5th of July, 1773, certain chiefs of the Illinois Indians, then jointly repre-presenting, acting for, and being duly authorized by that tribe, in the manner explained above, did, by their deed poll, duly executed and delivered, and bearing date on that day, at the post of Kaskaskias, then being a British military post, and at a public council there held by them, for and on behalf of the said Illinois nation of Indians, with William Murray, of the Illinois country, merchant, acting for himself and for Moses Franks and Jacob Franks, of London, in Great Britain, David Franks, John Inglis, Bernard Gratz, Michael

Gratz, Alexander Ross, David Sproat, and James Milligan, all of Philadelphia, in the province of Pennsylvania; Moses Franks, Andrew Hamilton, William Hamilton, and Edmund Milne, of the same place; Joseph Simons, otherwise called Joseph Simon, and Levi Andrew Levi of the town of Lancaster in Pennsylvania; Thomas Minshall of York county, in the same province; Robert Callender and William Thompson, of Cumberland county, in the same province; John Campbell of Pittsburgh, in the same province; and George Castles and James Ramsay of the Illinois country; and for a good and valuable consideration in the said deed stated, grant, bargain, sell, alien, lease, enfeoff, and confirm, to the said William Murray, Moses Franks, Jacob Franks, David Franks, John Inglis, Bernard Gratz, Michael Gratz, Alexander Ross, David Sproat, James Milligan, Andrew Hamilton, William Hamilton, Edmund Milne, Joseph Simons, otherwise called Joseph Simon, Levi Andrew Levi, Thomas Minshall, Robert Callender, William Thompson, John Campbell, George Castles, and James Ramsay, their heirs and assigns for ever, in severalty, or to George the Third, then King of Great Britain and Ireland, his heirs and successors, for the use, benefit, and behoof of the grantees, their heirs and assigns, in severalty, by whichever of those tenures they might most legally hold, all those two several tracts or parcels of land, situated, lying, and being within the limits of Virginia, on the east of the Mississippi, northwest of the Ohio, and west of the Great Miami, and thus butted

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and bounded: Beginning for one of the said tracts on the east side of the Mississippi, at the mouth of the Heron creek, called by the French the river of Mary, being about a league below the mouth of the Kaskaskias river, and running thence a northward of east course, in a direct line, back to the Hilly Plains, about eight leagues more or less; thence the same course, in a direct line to the Crab Tree Plains, about seventeen leagues more or less; thence the same course, in a direct line, to a remarkable place known by the name of the Big Buffalo Hoofs, about seventeen leagues more or less; thence the same course, in a direct line to the Salt Lick creek, about seven leagues more or less; then crossing the Salt Lick creek, about one league below the ancient Shawanese town, in an easterly, or a little to the north of east, course, in a direct line to the river Ohio, about four leagues more or less; then down the Ohio, by its several courses, until it empties into the Mississippi, about thirty-five leagues more or less; and then up the Mississippi, by its several courses, to the place of beginning, about thirty-three leagues more or less: And beginning for the other tract on the Mississippi, at a point directly opposite to the mouth of the Missouri, and running up the Mississippi, by its several courses, to the mouth of the Illinois, about six leagues more or less; and thence up the Illinois, by its several courses, to Chicagou or Garlic creek, about ninety leagues, more or less; thence nearly a northerly course, in a direct line, to a certain remarkable place, being the ground on which a

battle was fought, about forty or fifty years before that time, between the Pewaria and Renard Indians, about fifty leagues more or less; thence by the same course, in a direct line, to two remarkable hills close together, in the middle of a large prairie or plain, about fourteen leagues more or less; thence a north of east course, in a direct line, to a remarkable spring, known by the Indians by the name of "Foggy Spring," about fourteen leagues more or less; thence the same course, in a direct line to a great mountain, to the northwest of the White Buffalo Plain, about fifteen leagues more or less; and thence nearly a southwest course to the place of beginning, about forty leagues more or less: To have and to hold the said two tracts of land, with all and singular their appurtenances, to the grantees, their heirs and assigns, for ever, in severalty, or to the king, his heirs and successors, to and for the use, benefit, or behoof of the grantees, their heirs and assigns, for ever, in severalty: as will more fully appear by the said deed poll, duly executed under the hands and seals of the grantors, and duly recorded at Kaskaskias, on the 2d of September, 1773, in the office of Vicerault Lemerance, a notary public, duly appointed and authorized. This deed, with the several certificates annexed to or endorsed on it, was set out at length in the case.

13th. That the consideration in this deed expressed, was of the value of 24,000 dollars, current money of the United States, and upwards, and was paid and delivered, at the time of the execution of the deed, by William Murray, one

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of the grantees, in behalf of himself and the other grantees, to the Illinois Indians, who freely accepted it, and divided it among themselves: that the conferences in which the sale of these lands was agreed on and made, and in which it was agreed that the deed should be executed, were publicly held, for the space of a month, at the post of Kaskaskias, and were attended by many individuals of all the tribes of Illinois Indians, besides the chiefs, named as grantors in the deed; that the whole transaction was open, public, and fair, and the deed fully explained to the grantors and other Indians, by the sworn interpreters of the government, and fully understood by the grantors and other Indians, before it was executed; that the several witnesses to the deed, and the grantees named in it, were such persons, and of such quality and stations, respectively, as they are described to be in the deed, the attestation, and the other endorsements on it; that the grantees did duly authorize William Murray to act for and represent them, in the purchase of the lands, and the acceptance of the deed; and that the two tracts or parcels of land which it describes, and purports to grant, were then part of the lands held, possessed, and inhabited by the Illinois Indians, from time immemorial, in the manner already stated.

14th. That all the persons named as grantees in this deed, were, at the time of its execution, and long before, subjects of the crown of Great Britain, and residents of the several places named in the deed as their places of residence; and that

they entered into the land, under and by virtue of the deed, and became seised as the law requires.

15th. That on the 18th of October, 1775, Tabac, and certain other Indians, all being chiefs of the Piankeshaws, and jointly representing, acting for, and duly authorized by that nation, in the manner stated above, did, by their deed poll, duly executed, and bearing date on the day last mentioned, at the post of Vincennes, otherwise called post St. Vincent, then being a British military post, and at a public council there held by them, for and on behalf of the Piankeshaw Indians, with Louis Viviat, of the Illinois country, acting for himself, and for the Right Honourable John, Earl of Dunmore, then governor of Virginia, the Honourable John Murray, son of the said Earl, Moses Franks and Jacob Franks, of London, in Great Britain, Thomas Johnson, jr. and John Davidson, both of Annapolis, in Maryland, William Russel, Matthew Ridley, Robert Christie, sen. and Robert Christie, jr., of Baltimore town, in the same province, Peter Campbell, of Piscataway, in the same province, William Geddes, of Newtown Chester, in the same province, collector of his majesty's customs, David Franks and Moses Franks, both of Philadelphia, in Pennsylvania, William Murray and Daniel Murray, of the Illinois country, Nicholas St. Martin and Joseph Page, of the same place, Francis Perthuis, late of Quebec, in Canada, but then of post St. Vincent, and for good and valuable considerations, in the deed poll mentioned and enumerated, grant, bargain, sell, alien, enfeoff, release, ratify, and

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confirm to the said Louis Viviat, and the other persons last mentioned, their heirs and assigns, equally to be divided, or to George III. then king of Great Britain and Ireland, his heirs and successors, for the use, benefit, and behoof of all the above mentioned grantees, their heirs and assigns, in severalty, by which ever of those tenures they might most legally hold, all those two several tracts of land, in the deed particularly described, situate, lying, and being northwest of the Ohio, east of the Mississippi, and west of the Great Miami, within the limits of Virginia, and on both sides of the Ouabache, otherwise called the Wabash; which two tracts of land are contained respectively within the following metes and bounds, courses and distances, that is to say: beginning for one of the said tracts at the mouth of a rivulet called Riviere du Chat, or Cat river, where it empties itself into the Ouabache or Wabash, by its several courses, to a place called Point Coupee, about twelve leagues above post St. Vincent, being forty leagues, or thereabouts, in length, on the said river Ouabache, from the place of beginning, with forty leagues in width or breadth on the east side, and thirty leagues in breadth or width on the west side of that river, to be continued along from the place of beginning to Point Coupee. And beginning for the other tract at the mouth of White river, where it empties into the Ouabache, about twelve leagues below post St. Vincent, and running thence down the Ouabache, by its several courses, until it empties into the Ohio; being from White river to the Ohio, about fifty-three leagues in length, more or less, with forty

leagues in width or breadth on the east side, and thirty in width or breadth on the west side of the Ouabache, to be continued along from the White river to the Ohio; with all the rights, liberties, privileges, hereditaments, and appurtenances, to the said tract belonging; to have and to hold to the grantees, their heirs and assigns, for ever, in severalty, or to the king, his heirs and successors, for the use, benefit, and behoof of the grantees, their heirs and assigns, as will more fully appear by the deed itself, duly executed under the hands and seals of the grantors, and duly recorded at Kaskaskias, on the 5th of December, 1775, in the office of Louis Bomer, a notary public, duly appointed and authorized. This deed, with the several certificates annexed to or endorsed on it, was set out at length.

16th. That the consideration in this deed expressed, was of the value of 31,000 dollars, current money of the United States, and upwards, and was paid and delivered at the time of the execution of the deed, by the grantee, Lewis Viviat, in behalf of himself and the other grantees, to the Piankeshaw Indians, who freely accepted it, and divided it among themselves; that the conferences in which the sale of these two tracts of land was agreed on and made, and in which it was agreed, that the deed should be executed, were publicly held for the space of a month, at the post of Vincennes, or post St. Vincent, and were attended by many individuals of the Piankeshaw nation of Indians, besides the chiefs named as grantors in the deed; that the whole

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transaction was open, public, and fair, and the deed fully explained to the grantors and other Indians, by skilful interpreters, and fully understood by them before it was executed; that it was executed in the presence of the several witnesses by whom it purports to have been attested, and was attested by them; that the grantees were all subjects of the crown of Great Britain, and were of such quality, station, and residence, respectively, as they are described in the deed to be; that the grantees did duly authorize Lewis Viviat to act for, and represent them, in the purchase of these two tracts of land, and in the acceptance of the deed; that these tracts of land were then part of the lands held, possessed, and inhabited by the Piankeshaw Indians, from time immemorial, as is stated above; and that the several grantees under this deed entered into the land which it purports to grant, and became seised as the law requires.

17th. That on the 6th of May, 1776, the colony of Virginia threw off its dependence on the crown and government of Great Britain, and declared itself an independent State and government, with the limits prescribed and established by the letters patent of May 23d, 1609, as curtailed and restricted by the letters patent establishing the colonies of Pennsylvania, Maryland, and Carolina, and by the treaty of February 10th, 1763, between Great Britain and France; which limits, so curtailed and restricted, the State of Virginia, by its constitution and form of government, declared should be and remain the limits of the State, and should bound its western and northwestern extent.

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18th. That on the 5th of October, 1778, the General Assembly of Virginia, having taken by arms the posts of Kaskaskias and Vincennes, or St. Vincent, from the British forces, by whom they were then held, and driven those forces from the country northwest of the Ohio, *east* of the Mississippi, and west of the Great Miami, did, by an act of Assembly of that date, entitled, " An act for establishing the county of Illinois, and for the more effectual protection and defence thereof," erect that country, with certain other portions of territory within the limits of the State, and northwest of the Ohio, into a county, by the name of the county of Illinois.

19th. That on the 20th of December, 1783, the State of Virginia, by an act of Assembly of that date, authorized their Delegates in the Congress of the United States, or such of them, to the number of three at least, as should be assembled in Congress, on behalf of the State, and by proper deeds or instruments in writing under their hands and seals, to convey, transfer, assign, and make over to the United States, in Congress assembled, for the benefit of the said States, all right, title, and claim, as well of soil as jurisdiction, which Virginia had to the territory or tract of country within her limits, as defined and prescribed by the letters patent of May 23d, 1609, and lying to the northwest of the Ohio; subject to certain limitations and conditions in the act prescribed and specified; and that on the 1st of March, 1784, Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, then being four of the Delegates

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of Virginia to the Congress of the United States, did, by their deed poll, under their hands and seals, in pursuance and execution of the authority to them given by this act of Assembly, convey, transfer, assign, and make over to the United States, in Congress assembled, for the benefit of the said States, all right, title, and claim, as well of soil as jurisdiction, which that State had to the territory northwest of the Ohio, with the reservations, limitations, and conditions, in the act of Assembly prescribed; which cession the United States accepted.

20th. That on the twentieth day of July, in the year of our Lord one thousand eight hundred and eighteen, the United States, by their officers duly authorized for that purpose, did sell, grant, and convey to the defendant in this action, William M'Intosh, all those several tracts or parcels of land, containing 11,560 acres, and butted, bounded, and described, as will fully appear in and by the patent for the said lands, duly executed, which was set out at length.

21st. That the lands described and granted in and by this patent, are situated within the State of Illinois, and are contained within the lines of the last, or second of the two tracts, described and purporting to be granted and conveyed to Louis Viviat and others, by the deed of October 18th, 1775; and that William M'Intosh, the defendant, entered upon these lands under, and by virtue of his patent, and became possessed thereof before the institution of this suit.

22d. That Thomas Johnson, one of the grantees,

in and under the deed of October 18th, 1775; departed this life on or about the 1st day of October, 1819, seised of all his undivided part or share of, and in the two several tracts of land, described and purporting to be granted and conveyed to him and others by that deed, having first duly made and published his last will and testament in writing, attested by three credible witnesses, which he left in full force, and by which he devised all his undivided share and part of those two tracts of land, to his son, Joshua Johnson, and his heirs, and his grandson, Thomas J. Graham, and his heirs, the lessors of the plaintiff in this action, as tenants in common.

23d. That Joshua Johnson, and Thomas J. Graham, the devisees, entered into the two tracts of land last above mentioned, under and by virtue of the will, and became thereof seised as the law requires. That Thomas Johnson, the grantee and devisor, during his whole life, and at the time of his death, was an inhabitant and citizen of the State of Maryland; that Joshua Johnson, and Thomas J. Graham, the lessors of the plaintiff, now are, and always have been, citizens of the same State; that the defendant, William M'Intosh, now is, and at and before the time of bringing this action was, a citizen of the State of Illinois; and that the matter in dispute in this action is of the value of 2000 dollars, current money of the United States, and upwards.

24th. And that neither William Murray, nor any other of the grantees under the deed of July the 5th, 1773, nor Louis Viviat, nor any other of the

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grantees under the deed of October the 8th, 1775, nor any person for them, or any of them, ever obtained, or had the actual possession, under and by virtue of those deeds, or either of them, of any part of the lands in them, or either of them, described and purporting to be granted; but were prevented by the war of the American revolution, which soon after commenced, and by the disputes and troubles which preceded it, from obtaining such possession; and that since the termination of the war, and before it, they have repeatedly, and at various times, from the year 1781, till the year 1816, petitioned the Congress of the United States to acknowledge and confirm their title to those lands, under the purchases and deeds in question, but without success.

Judgment being given for the defendant on the case stated, the plaintiffs brought this writ of error.

Feb. 17*th.* 18*th*, and 19*th*.

The cause was argued by Mr. *Harper* and Mr. *Webster* for the plaintiffs, and by Mr. *Winder* and Mr. *Murray* for the defendants. But as the arguments are so fully stated in the opinion of the Court, it is deemed unnecessary to give any thing more than the following summary.

On the part of the plaintiffs, it was contended, 1. That upon the facts stated in the case, the Piankeshaw Indians were the owners of the lands in dispute, at the time of executing the deed of October 10th, 1775, and had power to sell. But as the United States had purchased the same lands of the same Indians, both parties claim from the same source. It would seem, therefore, to be unnecessary, and merely speculative, to dis-

cuss the question respecting the sort of title or ownership, which may be thought to belong to savage tribes, in the lands on which they live. Probably, however, their title by occupancy is to be respected, as much as that of an individual, obtained by the same right, in a civilized state. The circumstance, that the members of the society held in common, did not affect the strength of their title by occupancy.[a] In the memorial, or manifesto, of the British government, in 1755, a *right of soil* in the Indians is admitted. It is also admitted in the treaties of Utrecht and Aix la Chapelle. The same opinion has been expressed by this Court,[b] and by the Supreme Court of New-York.[c] In short, all, or nearly all, the lands in the United States, is holden under purchases from the Indian nations; and the only question in this case must be, whether it be competent to *individuals* to make such purchases, or whether that be the exclusive prerogative of government.

2. That the British king's proclamation of October 7th, 1763, could not affect this right of the Indians to sell; because they were not British subjects, nor in any manner bound by the authority of the British government, legislative or executive. And, because, even admitting them to be British subjects, absolutely, or *sub modo*, they were still proprietors of the soil, and could not be devested of their rights of property, or any of its

a *Grotius, de J. B. ac P.* l. 2. c. 2. s. 4. l. 2. c. 24. s. 9. *Puffen.* l. 4. c. 5. s. 1. 3.

b Fletcher v. Peck, 6 *Cranch's Rep.* 646.

c Jackson v. Wood, 7 *Johns. Rep.* 296.

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incidents, by a mere act of the executive government, such as this proclamation.

3. That the proclamation of 1763 could not restrain the purchasers under these deeds from purchasing; because the lands lay within the limits of the colony of Virginia, of which, or of some other British colony, the purchasers, all being British subjects, were inhabitants. And because the king had not, within the limits of that colonial government, or any other, any power of prerogative legislation; which is confined to countries newly conquered, and remaining in the military possession of the monarch, as supreme chief of the military forces of the nation. The present claim has long been known to the government of the United States, and is mentioned in the Collection of Land Laws, published under public authority. The compiler of those laws supposes this title void, by virtue of the proclamation of 1763. But we have the positive authority of a solemn determination of the Court of King's Bench, on this very proclamation, in the celebrated *Grenada* case, for asserting that it could have no such effect.[a] This country being a new conquest, and a military possession, the crown might exercise legislative powers, until a local legislature was established. But the establishment of a government establishes a system of laws, and excludes the power of legislating by proclamation. The proclamation could not have the force of law within the chartered limits of Virginia. A pro-

[a] Campbell v. Hall, 1 *Cowp. Rep.* 204.

clamation, that no person should purchase land in England or Canada, would be clearly void.

4. That the act of Assembly of Virginia, passed in May, 1779,[a] cannot affect the right of the plaintiffs, and others claiming under these deeds; because, on general principles, and by the constitution of Virginia, the legislature was not competent to take away private, vested rights, or appropriate private property to public use, under the circumstances of this case. And because the act is not

a This statute is as follows: "An act for declaring and asserting the rights of this Commonwealth, concerning purchasing lands from Indian natives. To remove and prevent all doubt concerning purchases of lands from the Indian natives, Be it declared by the General Assembly, that this Commonwealth hath the exclusive right of pre-emption from the Indians, of all the lands within the limits of its own chartered territory, as described by the act and constitution of government, in the year 1776. That no person or persons whatsoever, have, or ever had, a right to purchase any lands within the same, from any Indian nation, except only persons duly authorized to make such purchases on the public account, formerly for the use and benefit of the colony, and lately of the Commonwealth, and that such exclusive right or pre-emption, will and ought to be maintained by this Commonwealth, to the utmost of its power.

"And be it further declared and enacted, That every purchase of lands heretofore made, by, or on behalf of, the crown of England or Great Britain, from any Indian nation or nations, within the before mentioned limits, doth and ought to enure for ever, to and for the use and benefit of this Commonwealth, and to or for no other use or purpose whatsoever; and that all sales and deeds which have been, or shall be made by any Indian or Indians, or by any Indian nation or nations, for lands within the said limits, to or for the separate use of any person or persons whatsoever, shall be, and the same are, hereby declared utterly void and of no effect."

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contained in the revisal of 1794, and must, therefore, be considered as repealed; and the repeal reinstates all rights that might have been affected by the act, although the territory, in which the lands in question lie, was ceded to the United States before the repeal. The act of 1779 was passed after the sales were made, and it cannot affect titles previously obtained. At the time of the purchases there was no law of Virginia rendering such purchases void. If, therefore, the purchases were not affected by the proclamation of 1763, nor by the act of 1779, the question of their validity comes to the general inquiry, whether individuals, in Virginia, at the time of this purchase, could legally obtain Indian titles. In New-England, titles have certainly been obtained in this mode. But whatever may be said on the more general question, and in reference to other colonies or States, the fact being, that in Virginia there was no statute existing at the time against such purchases, mere general considerations would not apply. It may be true, that in almost all the colonies, individual purchases from the Indians were illegal; but they were rendered so by express provisions of the local law. In Virginia, also, it may be true, that such purchases have generally been prohibited; but at the time the purchases now in question were made, there was no prohibitory law in existence. The old colonial laws on the subject had all been repealed. The act of 1779 was a *private* act, so far as respects this case. It is the same as if it had enacted, that these particular deeds were void. Such acts

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bind only those who are parties to them, who submit their case to the Legislature.

On the part of the defendants, it was insisted, that the uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilized states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private individuals. They remain in a state of nature, and have never been admitted into the general society of nations.[a] All the treaties and negotiations between the civilized powers of Europe and of this continent, from the treaty of Utrecht, in 1713, to that of Ghent, in 1814, have uniformly disregarded their supposed right to the territory included within the jurisdictional limits of those powers.[b] Not only has the practice of all civilized nations been in conformity with this doctrine, but the whole theory of their titles to lands in America, rests upon the hypothesis, that the Indians had no right of soil as sovereign, independent states. Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives.[c] The sovereignty and

a Penn v. Lord Baltimore, 1 *Ves.* 445. 2 *Rutherforth's Inst.* 29. *Locke, Government*, b. 2. c. 7. s. 87—89. c. 12. s. 143. c. 9. s. 123—130. *Jefferson's Notes*, 126. *Colden's Hist. Five Nations*, 2—16. *Smith's Hist. New-York*, 35—41. *Montesquieu, Esprit des Lois*, l. 18. c. 11, 12, 13. *Smith's Wealth of Nations*, b. 5. c. 1.

b 5 *Annual Reg.* 56. 233. 7 *Niles' Reg.* 229.

c *Marten's Law of Nations*, 67. 69. *Vattel, Droit des Gens.* l. 2. c. 7. s. 83. l. 1. c. 18. s. 204, 205.

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eminent domain thus acquired, necessarily precludes the idea of any other sovereignty existing within the same limits. The subjects of the discovering nation must necessarily be bound by the declared sense of their own government, as to the extent of this sovereignty, and the domain acquired with it. Even if it should be admitted that the Indians were originally an independent people, they have ceased to be so. A nation that has passed under the dominion of another, is no longer a sovereign state.[a] The same treaties and negotiations, before referred to, show their dependent condition. Or, if it be admitted that they are now independent and foreign states, the title of the plaintiffs would still be invalid: as grantees from the *Indians*, they must take according to *their* laws of property, and as Indian subjects. The law of every dominion affects all persons and property situate within it;[b] and the Indians never had any idea of individual property in lands. It cannot be said that the lands conveyed were disjoined from their dominion; because the grantees could not take the sovereignty and eminent domain to themselves.

Such, then, being the nature of the Indian title to lands, the extent of their right of alienation must depend upon the laws of the dominion under which they live. They are subject to the sovereignty of the United States. The subjection proceeds from their residence within our territory

a *Vattel*, l. 1. c. 1. s. 11.
b *Comp. Rep.* 204.

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and jurisdiction. It is unnecessary to show, that they are not *citizens* in the ordinary sense of that term, since they are destitute of the most essential rights which belong to that character. They are of that class who are said by jurists not to be citizens, but perpetual inhabitants with diminutive rights.[a] The statutes of Virginia, and of all the other colonies, and of the United States, treat them as an inferior race of people, without the privileges of citizens, and under the perpetual protection and pupilage of the government. The act of Virginia of 1662, forbade purchases from the Indians, and it does not appear that it was ever repealed. The act of 1779 is rather to be regarded as a declaratory act, founded upon what had always been regarded as the settled law. These statutes seem to define sufficiently the nature of the Indian title to lands; a mere right of usufruct and habitation, without power of alienation. By the law of nature, they had not acquired a fixed property capable of being transferred. The measure of property acquired by occupancy is determined, according to the law of nature, by the extent of men's wants, and their capacity of using it to supply them.[b] It is a violation of the rights of others to exclude them from the use of what we do not want, and they have an occasion for. Upon this principle the North American Indians could have acquired no proprietary interest in the vast tracts

a *Vattel*, l. 1. c. 19. s. 213.

b *Grotius*, l. 2. c. 11. *Barbeyr. Puffend.* l. 4. c. 4. s. 2. 4. 2 *Bl. Comm.* 2. *Puffend.* l. 4. c. 6. s. 3. *Locke on Government*, b. 2. c. 5. s. 26. 34—40.

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of territory which they wandered over; and their right to the lands on which they hunted, could not be considered as superior to that which is acquired to the sea by fishing in it. The use in the one case, as well as the other, is not exclusive.[a] According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators. All the proprietary rights of civilized nations on this continent are founded on this principle. The right derived from discovery and conquest, can rest on no other basis; and all existing titles depend on the fundamental title of the crown by discovery. The title of the crown (as representing the nation) passed to the colonists by charters, which were absolute grants of the soil; and it was a first principle in colonial law, that all titles must be derived from the crown. It is true that, in some cases, purchases were made by the colonies from the Indians; but this was merely a measure of policy to prevent hostilities; and William Penn's purchase, which was the most remarkable transaction of this kind, was not deemed to add to the strength of his title.[b] In most of the colonies, the

a Locke, c. 5. s. 36—48. *Grotius*, l. 2. c. 11. s. 2. *Montesquieu*, tom. 2. p. 63. *Chalmers' Polit. Annals*, 5. 6 *Cranch's Rep.* 87.

b Penn v. Lord Baltimore, 1 *Ves.* 444. *Chalmers' Polit. Annals*, 644. *Sullivan's Land Tit.* c. 2. *Smith's Hist. N. Y.* 145. 184.

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doctrine was received, that all titles to land must be derived exclusively from the crown, upon the principle that the settlers carried with them, not only all the rights, but all the duties of Englishmen; and particularly the laws of property, so far as they are suitable to their new condition. In New-England alone, some lands have been held under Indian deeds. But this was an anomaly arising from peculiar local and political causes.[b]

As to the effect of the proclamation of 1763: if the Indians are to be regarded as independent sovereign states, then, by the treaty of peace, they became subject to the prerogative legislation of the crown, as a conquered people, in a territory acquired, *jure belli*, and ceded at the peace.[c] If, on the contrary, this country be regarded as a royal colony, then the crown had a direct power of legislation; or at least the power of prescribing the limits within which grants of land and settlements should be made within the colony. The same practice always prevailed under the proprietary governments, and has been followed by the government of the United States.

Mr. Chief Justice MARSHALL delivered the opinion of the Court. The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of cer- *March 10th.*

a 1 *Bl. Comm.* 107. 2 *P. Wms.* 75. 1 *Salk.* 411. 616.
b *Sulliv. Land Tit.* 45.
c *Cowp.* 204. 7 *Co. Rep.* 17 b. 2 *Meriv. Rep.* 143.

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tain Indian tribes, constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognised in the Courts of the United States?

The facts, as stated in the case agreed, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show, that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.

As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an

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ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

Discovery, the original foundation of titles to land on the American continent, as between the different European nations, by whom conquests and settlements were made here.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

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In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

The European governments asserted the exclusive right of granting the soil to individuals, subject only to the Indian right of occupancy.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

Practice of Spain, France, Holland, and England.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title.

France, also, founded her title to the vast territories she claimed in America on discovery. How-

ever conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians. Her monarch claimed all Canada and Acadie, as colonies of France, at a time when the French population was very inconsiderable, and the Indians occupied almost the whole country. He also claimed Louisiana, comprehending the immense territories watered by the Mississippi, and the rivers which empty into it, by the title of discovery. The letters patent granted to the Sieur Demonts, in 1603, constitute him Lieutenant General, and the representative of the King in Acadie, which is described as stretching from the 40th to the 46th degree of north latitude; with authority to extend the power of the French over that country, and its inhabitants, to give laws to the people, to treat with the natives, and enforce the observance of treaties, and to parcel out, and give title to lands, according to his own judgment.

The States of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe. They allege, as we are told by Smith, in his History of New-York, that Henry Hudson, who sailed, as they say, under the orders of their East India Company, discovered the country from the Delaware to the Hudson, up which he sailed to the 43d degree of north latitude; and this country they claimed under the title acquired by this voyage.

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Their first object was commercial, as appears by a grant made to a company of merchants in 1614; but in 1621, the States General made, as we are told by Mr. Smith, a grant of the country to the West India Company, by the name of New Netherlands.

The claim of the Dutch was always contested by the English; not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title. Their pretensions were finally decided by the sword.

No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to *Christian people*, and to take possession of them in the name of the king of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission, is confined to countries "then unknown to all Christian people;" and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession,

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notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.

The same principle continued to be recognised. The charter granted to Sir Humphrey Gilbert, in 1578, authorizes him to discover and take possession of such remote, heathen, and barbarous lands, as were not actually possessed by any Christian prince or people. This charter was afterwards renewed to Sir Walter Raleigh, in nearly the same terms.

By the charter of 1606, under which the first permanent English settlement on this continent was made, James I. granted to Sir Thomas Gates and others, those territories in America lying on the seacoast, between the 34th and 45th degrees of north latitude, and which either belonged to that monarch, or were not then possessed by any other Christian prince or people. The grantees were divided into two companies at their own request. The first, or southern colony, was directed to settle between the 34th and 41st degrees of north latitude; and the second, or northern colony, between the 38th and 45th degrees.

In 1609, after some expensive and not very successful attempts at settlement had been made, a new and more enlarged charter was given by the crown to the first colony, in which the king granted to the "Treasurer and Company of Adventurers of the city of London for the first colony in Virginia," in absolute property, the lands extending along the seacoast four hundred miles, and

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into the land throughout from sea to sea. This charter, which is a part of the special verdict in this cause, was annulled, so far as respected the rights of the company, by the judgment of the Court of King's Bench on a writ of *quo warranto;* but the whole effect allowed to this judgment was, to revest in the crown the powers of government, and the title to the lands within its limits.

At the solicitation of those who held under the grant to the second or northern colony, a new and more enlarged charter was granted to the Duke of Lenox and others, in 1620, who were denominated the Plymouth Company, conveying to them in absolute property all the lands between the 40th and 48th degrees of north latitude.

Under this patent, New-England has been in a great measure settled. The company conveyed to Henry Rosewell and others, in 1627, that territory which is now Massachusetts; and in 1628, a charter of incorporation, comprehending the powers of government, was granted to the purchasers.

Great part of New-England was granted by this company, which, at length, divided their remaining lands among themselves; and, in 1635, surrendered their charter to the crown. A patent was granted to Gorges for Maine, which was allotted to him in the division of property.

All the grants made by the Plymouth Company, so far as we can learn, have been respected. In pursuance of the same principle, the king, in 1664, granted to the Duke of York the country of New-England as far south as the Delaware

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bay. His royal highness transferred New-Jersey to Lord Berkeley and Sir George Carteret.

In 1663, the crown granted to Lord Clarendon and others, the country lying between the 36th degree of north latitude and the river St. Mathes; and, in 1666, the proprietors obtained from the crown a new charter, granting to them that province in the king's dominions in North America which lies from 36 degrees 30 minutes north latitude to the 29th degree, and from the Atlantic ocean to the South sea.

Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government, the king claimed and exercised the right of granting lands, and of dismembering the government at his will. The grants made out of the two original colonies, after the resumption of their charters by the crown, are examples of this. The governments of New-England, New-York, New-Jersey, Pennsylvania, Maryland, and a part of Carolina, were thus created. In all of them, the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants. In some instances, the soil was conveyed by the crown unaccompanied by the powers of government, as in the case of the northern neck of Virginia. It has never

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been objected to this, or to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only, would never contain words expressly granting the land, the soil, and the waters. Some of them purport to convey the soil alone; and in those cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed; and, in some instances, even after the powers of government were revested in the crown, the title of the proprietors to the soil was respected.

Charles II. was extremely anxious to acquire the property of Maine, but the grantees sold it to Massachusetts, and he did not venture to contest the right of that colony to the soil. The Carolinas were originally proprietary governments. In 1721 a revolution was effected by the people, who shook off their obedience to the proprietors, and declared their dependence immediately on the crown. The king, however, purchased the title of those who were disposed to sell. One of them, Lord Carteret, surrendered his interest in the government, but retained his title to the soil. That

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title was respected till the revolution, when it was forfeited by the laws of war.

Further proofs of the extent to which this principle has been recognised, will be found in the history of the wars, negotiations, and treaties, which the different nations, claiming territory in America, have carried on, and held with each other.

Recognition of the same principle in the wars, negotiations, and treaties, between the different European powers.

The contests between the cabinets of Versailles and Madrid, respecting the territory on the northern coast of the gulf of Mexico, were fierce and bloody; and continued, until the establishment of a Bourbon on the throne of Spain, produced such amicable dispositions in the two crowns, as to suspend or terminate them.

Between France and Great Britain, whose discoveries as well as settlements were nearly contemporaneous, contests for the country, actually covered by the Indians, began as soon as their settlements approached each other, and were continued until finally settled in the year 1763, by the treaty of Paris.

Each nation had granted and partially settled the country, denominated by the French, Acadie, and by the English, Nova Scotia. By the 12th article of the treaty of Utrecht, made in 1703, his most Christian Majesty ceded to the Queen of Great Britain, "all Nova Scotia or Acadie, with its ancient boundaries." A great part of the ceded territory was in the possession of the Indians, and the extent of the cession could not be adjusted by the commissioners to whom it was to be referred.

The treaty of Aix la Chapelle, which was made

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on the principle of the *status ante bellum*, did not remove this subject of controversy. Commissioners for its adjustment were appointed, whose very able and elaborate, though unsuccessful arguments, in favour of the title of their respective sovereigns, show how entirely each relied on the title given by discovery to lands remaining in the possession of Indians.

After the termination of this fruitless discussion, the subject was transferred to Europe, and taken up by the cabinets of Versailles and London. This controversy embraced not only the boundaries of New-England, Nova Scotia, and that part of Canada which adjoined those colonies, but embraced our whole western country also. France contended not only that the St. Lawrence was to be considered as the centre of Canada, but that the Ohio was within that colony. She founded this claim on discovery, and on having used that river for the transportation of troops, in a war with some southern Indians.

This river was comprehended in the chartered limits of Virginia; but, though the right of England to a reasonable extent of country, in virtue of her discovery of the seacoast, and of the settlements she made on it, was not to be questioned; her claim of all the lands to the Pacific ocean, because she had discovered the country washed by the Atlantic, might, without derogating from the principle recognised by all, be deemed extravagant. It interfered, too, with the claims of France, founded on the same principle. She therefore sought to strengthen her original title to

the lands in controversy, by insisting that it had been acknowledged by France in the 15th article of the treaty of Utrecht. The dispute respecting the construction of that article, has no tendency to impair the principle, that discovery gave a title to lands still remaining in the possession of the Indians. Whichever title prevailed, it was still a title to lands occupied by the Indians, whose right of occupancy neither controverted, and neither had then extinguished.

These conflicting claims produced a long and bloody war, which was terminated by the conquest of the whole country east of the Mississippi. In the treaty of 1763, France ceded and guarantied to Great Britain, all Nova Scotia, or Acadie, and Canada, with their dependencies; and it was agreed, that the boundaries between the territories of the two nations, in America, should be irrevocably fixed by a line drawn from the source of the Mississippi, through the middle of that river and the lakes Maurepas and Ponchartrain, to the sea. This treaty expressly cedes, and has always been understood to cede, the whole country, on the English side of the dividing line, between the two nations, although a great and valuable part of it was occupied by the Indians. Great Britain, on her part, surrendered to France all her pretensions to the country west of the Mississippi. It has never been supposed that she surrendered nothing, although she was not in actual possession of a foot of land. She surrendered all right to acquire the country; and any after attempt to purchase it from the Indians, would have been con-

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sidered and treated as an invasion of the territories of France.

By the 20th article of the same treaty, Spain ceded Florida, with its dependencies, and all the country she claimed east or southeast of the Mississippi, to Great Britain. Great part of this territory also was in possession of the Indians.

By a secret treaty, which was executed about the same time, France ceded Louisiana to Spain; and Spain has since retroceded the same country to France. At the time both of its cession and retrocession, it was occupied, chiefly, by the Indians.

Adoption of the same principle by the United States.

Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?

By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the "propriety and territorial rights of the United States," whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these States. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It

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has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.

Virginia, particularly, within whose chartered limits the land in controversy lay, passed an act, in the year 1779, declaring her "exclusive right of pre-emption from the Indians, of all the lands within the limits of her own chartered territory, and that no person or persons whatsoever, have, or ever had, a right to purchase any lands within the same, from any Indian nation, except only persons duly authorized to make such purchase; formerly for the use and benefit of the colony, and lately for the Commonwealth." The act then proceeds to annul all deeds made by Indians to individuals, for the private use of the purchasers.

Without ascribing to this act the power of annulling vested rights, or admitting it to countervail the testimony furnished by the marginal note opposite to the title of the law, forbidding purchases from the Indians, in the revisals of the Virginia statutes, stating that law to be repealed, it may safely be considered as an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained, that the exclusive right to purchase from the Indians resided in the government.

In pursuance of the same idea, Virginia proceeded, at the same session, to open her land

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office, for the sale of that country which now constitutes Kentucky, a country, every acre of which was then claimed and possessed by Indians, who maintained their title with as much persevering courage as was ever manifested by any people.

The States, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country northwest of the river Ohio. This grant contained reservations and stipulations, which could only be made by the owners of the soil; and concluded with a stipulation, that "all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation," &c. "according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."

The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.

After these States became independent, a controversy subsisted between them and Spain respecting boundary. By the treaty of 1795, this controversy was adjusted, and Spain ceded to the United States the territory in question. This territory, though claimed by both nations, was chiefly in the actual occupation of Indians.

The magnificent purchase of Louisiana, was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are in fact independent. Yet, any attempt of others to intrude into that country, would be considered as an aggression which would justify war.

Our late acquisitions from Spain are of the same character; and the negotiations which preceded those acquisitions, recognise and elucidate the principle which has been received as the foundation of all European title in America.

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

The exclusive right of the British government to the lands occupied by the Indians, has passed to that of the United States.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never

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been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

Foundation and limitation of the right of conquest.

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title

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to a vast portion of the lands we now hold, originates in them. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

When the conquest is complete, and the conquered inhabitants can be blended with the con-

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querors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

Application of the principle of the right of conquest to the case of the Indian savages.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled

into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

Nature of the Indian title, as subordinate to the absolute ultimate title of the government.

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be

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adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

This question is not entirely new in this Court. The case of *Fletcher* v. *Peck*, grew out of a sale made by the State of Georgia of a large tract of country within the limits of that State, the grant of which was afterwards resumed. The action was brought by a sub-purchaser, on the contract of sale, and one of the covenants in the deed was, that the State of Georgia was, at the time of sale, seised in fee of the premises. The real question presented by the issue was, whether the seisin in fee was in the State of Georgia, or in the United States. After stating, that this controversy between the several States and the United States, had been compromised, the Court thought it necessary to notice the Indian title, which, although entitled to the respect of all Courts until it should be legitimately extinguished, was declared not to be such as to be absolutely repugnant to a seisin in fee on the part of the State.

This opinion conforms precisely to the principle which has been supposed to be recognised by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment.

Another view has been taken of this question,

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which deserves to be considered. The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.

As such a grant could not separate the Indian from his nation, nor give a title which our Courts could distinguish from the title of his tribe, as it might still be conquered from, or ceded by his tribe, we can perceive no legal principle which will authorize a Court to say, that different consequences are attached to this purchase, because it was made by a stranger. By the treaties con-

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cluded between the United States and the Indian nations, whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States, without any reservation of their title. These nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens. Their cession of the country, without a reservation of this land, affords a fair presumption, that they considered it as of no validity. They ceded to the United States this very property, after having used it in common with other lands, as their own, from the date of their deeds to the time of cession; and the attempt now made, is to set up their title against that of the United States.

Effect of the proclamation of 1763.

The proclamation issued by the King of Great Britain, in 1763, has been considered, and, we think, with reason, as constituting an additional objection to the title of the plaintiffs.

By that proclamation, the crown reserved under its own dominion and protection, for the use of the Indians, "all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest," and strictly forbade all British subjects from making any purchases or settlements whatever, or taking possession of the reserved lands.

It has been contended, that, in this proclamation, the king transcended his constitutional powers; and the case of *Campbell* v. *Hall*, (reported by *Cowper*,) is relied on to support this position.

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It is supposed to be a principle of universal law, that, if an uninhabited country be discovered by a number of individuals, who acknowledge no connexion with, and owe no allegiance to, any government whatever, the country becomes the property of the discoverers, so far at least as they can use it. They acquire a title in common. The title of the whole land is in the whole society. It is to be divided and parcelled out according to the will of the society, expressed by the whole body, or by that organ which is authorized by the whole to express it.

If the discovery be made, and possession of the country be taken, under the authority of an existing government, which is acknowledged by the emigrants, it is supposed to be equally well settled, that the discovery is made for the whole nation, that the country becomes a part of the nation, and that the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains, by that organ in which all vacant territory is vested by law.

According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown, that this principle was as fully recognised in America as in the island of Great Britain. All the lands we hold were originally granted by the crown; and the establishment of a regal government has never been considered as

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impairing its right to grant lands within the chartered limits of such colony. In addition to the proof of this principle, furnished by the immense grants, already mentioned, of lands lying within the chartered limits of Virginia, the continuing right of the crown to grant lands lying within that colony was always admitted. A title might be obtained, either by making an entry with the surveyor of a county, in pursuance of law, or by an order of the governor in council, who was the deputy of the king, or by an immediate grant from the crown. In Virginia, therefore, as well as elsewhere in the British dominions, the complete title of the crown to vacant lands was acknowledged.

So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.

According to the theory of the British constitution, the royal prerogative is very extensive, so far as respects the political relations between Great Britain and foreign nations. The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required, that means should be adopted for

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the preservation of peace; and that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the whites; and the power to do this was never, we believe, denied by the colonies to the crown.

In the case of *Campbell* against *Hall*, that part of the proclamation was determined to be illegal, which imposed a tax on a conquered province, after a government had been bestowed upon it. The correctness of this decision cannot be questioned, but its application to the case at bar cannot be admitted. Since the expulsion of the Stuart family, the power of imposing taxes, by proclamation, has never been claimed as a branch of regal prerogative; but the powers of granting, or refusing to grant, vacant lands, and of restraining encroachments on the Indians, have always been asserted and admitted.

The authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our Courts.

In the argument of this cause, the counsel for the plaintiffs have relied very much on the opinions expressed by men holding offices of trust, and on various proceedings in America, to sustain titles to land derived from the Indians.

The collection of claims to lands lying in the western country, made in the 1st volume of the Laws of the United States, has been referred to; but we find nothing in that collection to support the argument. Most of the titles were derived

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from persons professing to act under the authority of the government existing at the time; and the two grants under which the plaintiffs claim, are supposed, by the person under whose inspection the collection was made, to be void, because forbidden by the royal proclamation of 1763. It is not unworthy of remark, that the usual mode adopted by the Indians for granting lands to individuals, has been to reserve them in a treaty, or to grant them under the sanction of the commissioners with whom the treaty was negotiated. The practice, in such case, to grant to the crown, for the use of the individual, is some evidence of a general understanding, that the validity even of such a grant depended on its receiving the royal sanction.

Case of the Mohegans.

The controversy between the colony of Connecticut and the Mohegan Indians, depended on the nature and extent of a grant made by those Indians to the colony; on the nature and extent of the reservations made by the Indians, in their several deeds and treaties, which were alleged to be recognised by the legitimate authority; and on the violation by the colony of rights thus reserved and secured. We do not perceive, in that case, any assertion of the principle, that individuals might obtain a complete and valid title from the Indians.

Memorial of 1755.

It has been stated, that in the memorial transmitted from the Cabinet of London to that of Versailles, during the controversy between the two nations, respecting boundary, which took place in 1755, the Indian right to the soil is recog-

nised. But this recognition was made with reference to their character as Indians, and for the purpose of showing that they were fixed to a particular territory. It was made for the purpose of sustaining the claim of his Britannic majesty to dominion over them.

Opinions of the Attorney General, &c.

The opinion of the Attorney and Solicitor General, Pratt and Yorke, have been adduced to prove, that, in the opinion of those great law officers, the Indian grant could convey a title to the soil without a patent emanating from the crown. The opinion of those persons would certainly be of great authority on such a question, and we were not a little surprised, when it was read, at the doctrine it seemed to advance. An opinion so contrary to the whole practice of the crown, and to the uniform opinions given on all other occasions by its great law officers, ought to be very explicit, and accompanied by the circumstances under which it was given, and to which it was applied, before we can be assured that it is properly understood. In a pamphlet, written for the purpose of asserting the Indian title, styled "*Plain Facts*," the same opinion is quoted, and is said to relate to purchases made in the East Indies. It is, of course, entirely inapplicable to purchases made in America. Chalmers, in whose collection this opinion is found, does not say to whom it applies; but there is reason to believe, that the author of *Plain Facts* is, in this respect, correct. The opinion commences thus: "In respect to such places as have been, or shall be acquired, by treaty or grant, from any of the Indian princes or go-

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vernments, your majesty's letters patent are not necessary." The words "princes or governments," are usually applied to the East Indians, but not to those of North America. We speak of their sachems, their warriors, their chiefmen, their nations or tribes, not of their "princes or governments." The question on which the opinion was given, too, and to which it relates, was, whether the king's subjects carry with them the common law wherever they may form settlements. The opinion is given with a view to this point, and its object must be kept in mind while construing its expressions.

Titles in New-England under Indian grants.

Much reliance is also placed on the fact, that many tracts are now held in the United States under the Indian title, the validity of which is not questioned.

Before the importance attached to this fact is conceded, the circumstances under which such grants were obtained, and such titles are supported, ought to be considered. These lands lie chiefly in the eastern States. It is known that the Plymouth Company made many extensive grants, which, from their ignorance of the country, interfered with each other. It is also known that Mason, to whom New-Hampshire, and Gorges, to whom Maine was granted, found great difficulty in managing such unwieldy property. The country was settled by emigrants, some from Europe, but chiefly from Massachusetts, who took possession of lands they found unoccupied, and secured themselves in that possession by the best means in their power. The disturbances in

England, and the civil war and revolution which followed those disturbances, prevented any interference on the part of the mother country, and the proprietors were unable to maintain their title. In the mean time, Massachusetts claimed the country, and governed it. As her claim was adversary to that of the proprietors, she encouraged the settlement of persons made under her authority, and encouraged, likewise, their securing themselves in possession, by purchasing the acquiescence and forbearance of the Indians.

After the restoration of Charles II., Gorges and Mason, when they attempted to establish their title, found themselves opposed by men, who held under Massachusetts, and under the Indians. The title of the proprietors was resisted; and though, in some cases, compromises were made and in some, the opinion of a Court was given ultimately in their favour, the juries found uniformly against them. They became wearied with the struggle, and sold their property. The titles held under the Indians, were sanctioned by length of possession; but there is no case, so far as we are informed, of a judicial decision in their favour.

Charter of Rhode-Island.

Much reliance has also been placed on a recital contained in the charter of Rhode-Island, and on a letter addressed to the governors of the neighbouring colonies, by the king's command, in which some expressions are inserted, indicating the royal approbation of titles acquired from the Indians.

The charter to Rhode-Island recites, "that the said John Clark, and others, had transplanted

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themselves into the midst of the Indian nations, and were seised and possessed, by purchase and consent of the said natives, to their full content, of such lands," &c. And the letter recites, that "Thomas Chifflinch, and others, having, in the right of Major Asperton, a just propriety in the Narraghanset country, in New-England, by grants from the native princes of that country, and being desirous to improve it into an English colony," &c. "are yet daily disturbed."

The impression this language might make, if viewed apart from the circumstances under which it was employed, will be effaced, when considered in connexion with those circumstances.

In the year 1635, the Plymouth Company surrendered their charter to the crown. About the same time, the religious dissentions of Massachusetts expelled from that colony several societies of individuals, one of which settled in Rhode-Island, on lands purchased from the Indians. They were not within the chartered limits of Massachusetts, and the English government was too much occupied at home to bestow its attention on this subject. There existed no authority to arrest their settlement of the country. If they obtained the Indian title, there were none to assert the title of the crown. Under these circumstances, the settlement became considerable. Individuals acquired separate property in lands which they cultivated and improved; a government was established among themselves; and no power existed in America which could rightfully interfere with it.

On the restoration of Charles II., this small so-

ciety hastened to acknowledge his authority, and to solicit his confirmation of their title to the soil, and to jurisdiction over the country. Their solicitations were successful, and a charter was granted to them, containing the recital which has been mentioned.

It is obvious, that this transaction can amount to no acknowledgment, that the Indian grant could convey a title paramount to that of the crown, or could, in itself, constitute a complete title. On the contrary, the charter of the crown was considered as indispensable to its completion.

It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right. The object of the crown was to settle the seacoast of America; and when a portion of it was settled, without violating the rights of others, by persons professing their loyalty, and soliciting the royal sanction of an act, the consequences of which were ascertained to be beneficial, it would have been as unwise as ungracious to expel them from their habitations, because they had obtained the Indian title otherwise than through the agency of government. The very grant of a charter is an assertion of the title of the crown, and its words convey the same idea. The country granted, is said to be " our island called Rhode-Island;" and the charter contains an actual grant of the soil, as well as of the powers of government.

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The letter was written a few months before the charter was issued, apparently at the request of the agents of the intended colony, for the sole purpose of preventing the trespasses of neighbours, who were disposed to claim some authority over them. The king, being willing himself to ratify and confirm their title, was, of course, inclined to quiet them in their possession.

This charter, and this letter, certainly sanction a previous unauthorized purchase from Indians, under the circumstances attending that particular purchase, but are far from supporting the general proposition, that a title acquired from the Indians would be valid against a title acquired from the crown, or without the confirmation of the crown.

The acts of the several colonial assemblies, prohibiting purchases from the Indians, have also been relied on, as proving, that, independent of such prohibitions, Indian deeds would be valid. But, we think this fact, at most, equivocal. While the existence of such purchases would justify their prohibition, even by colonies which considered Indian deeds as previously invalid, the fact that such acts have been generally passed, is strong evidence of the general opinion, that such purchases are opposed by the soundest principles of wisdom and national policy.

After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the Court is decidedly of opinion, that the plaintiffs do not exhibit a title which can

be sustained in the Courts of the United States; and that there is no error in the judgment which was rendered against them in the District Court of Illinois.

Judgment affirmed, with costs.

ARCHIBALD GRACIE and others, *Plaintiffs in Error,*

v.

JOHN PALMER and others, *Defendants in Error.*

By a charter-party, the sum of 30,000 dollars was agreed to be paid for the use or hire of the ship, on a voyage from Philadelphia to Madeira, and thence to Bombay, and at the option of the charterer to Calcutta, and back to Philadelphia, (with an addition of 2000 dollars, if she should proceed to Calcutta,) the whole payable on the return of the ship to Philadelphia, and before the discharge of her cargo there, in approved notes, not exceeding an average time of 90 days from the time at which she should be ready to discharge her cargo. The charterer proceeded in the ship to Calcutta, and, with the consent of the master, (who was appointed by the ship-owners,) entered into an agreement with P. & Co. merchants there, that if they would make him an advance of money, he would deliver to them a bill of lading stipulating for the delivery of the goods purchased therewith to their agents in Philadelphia, free of freight, who should be authorized to sell the same, and apply the proceeds to the repayment of the said advance, unless the charterer's bills, drawn on G. & S. of Philadelphia, should be accepted, in which event the agents of P. & Co. should deliver the goods to the charterer. The goods were shipped accordingly, and a bill of lading signed by the master, with the clause, "freight for the said goods having been settled here." The bills of exchange drawn by the charterer were refused acceptance, and the agents of P. & Co. demanded the goods, which the owners of the ship refused to deliver without the payment of freight: *Held*, that the owners of the ship had a lien on these goods for the freight.