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# Cases, Materials and Problems in Property (Third Edition)

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# CASES, MATERIALS AND PROBLEMS IN PROPERTY

## THIRD EDITION

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# *PREFACE TO THE THIRD EDITION*

The content and structure of this text is heavily influenced by the Alternative First Year Curriculum first used at Georgetown University Law Center in the early 1990s. That program was designed to resolve several problems. First, those designing the course of study believed that the traditional first year program—heavily weighted toward common law courses—gave short shrift to the development of the administrative state since the New Deal. Second, contemporary culture, politics, social interaction and technology placed new, interdisciplinary demands on the legal profession. Whether law school graduates practiced law, ran businesses or non-profit organizations, worked in government, became judges, or worked in the myriad of other environments now employing those with legal credentials, the questions and issues they faced routinely required them to be multi-dimensional problem solvers rather than legal technicians. Finally, traditional course boundary lines had become artificial. It was time to reshuffle the deck a bit to demonstrate the ways in which legal categories overlapped and intertwined.

The result was a program that merged contracts and torts, as well as, constitutional law and criminal law, offered a new course in Government Processes that has become a standard first year offering all over the country, and placed specific interdisciplinary demands on each course. In addition, each participating student took a seminar on the History of American Legal Thought. That course, which was the spine of the curriculum, combined the study of jurisprudence and history by taking a look at the ways discourse about law and legal institutions changed over time. All the other courses played off the seminar, using the ideas of Classical Legal Thought, Realism, the Legal Process School, Critical Legal Studies, Law and Economics and other forms of discourse to structure thinking about the resolution of legal problems.

All this imposed quite specific goals on the Property in Time course, as it was called in the curriculum. First, it like all the courses, was required to contain materials that mirrored the learning in the Seminar on the History of American Legal Thought. Second, its interdisciplinary obligation was to study important aspects of American legal history. And finally, though the course was still styled as one in Property, traditional reliance on real property materials had to yield a bit in recognition of the variety of ways in which modern societies reposed value in both objects and concepts.

These three goals led to a historically based structure for both the old and new editions of this text. Various portions of property law have been highly controversial at various points in our history. Those eras of legal attentiveness, which typically were influenced by modes of legal thought then in ascendancy, provide both a historical and substantive structure for the materials. Each chapter takes up a set of legal issues important during a particular period of American history, places them in a cultural and political context, and ends with a set of contemporary disputes that echo aspects of the historic tradition. Chapter 1, for example, contains background materials on the importance of property and ideas about Republicanism in early America, explores several classic Native American land claim cases, and concludes with readings on contemporary reservation land use issues and adverse possession disputes involving Native American claims. Chapter 2 covers family property law, which was subjected to searching review during the middle decades of the nineteenth century. Changes in family law mirrored the development of

both the first major women's movement in America and the broadening democratization of life during and after the Jackson presidency. It opens with a section on common law rules about concurrent and family ownership of property, then tells a story about the gradual reform of rules restricting ownership of property by married women and ends with materials on present-day family property law. Chapter 3 covers the structure of property ownership by large organizations. It describes the late nineteenth century appearance of corporate and other forms of business organization, and ends with materials on ownership of property by present-day corporations. It follows nicely on the heels of the prior chapter, which covers all the forms of individual and small group ownership patterns typically used in our personal and family lives. Chapter 4 contains materials on the gradual opening of property ownership to African Americans after the Civil War. The history of race and property in the late nineteenth and first half of the twentieth centuries is used as the prism for scanning materials on the classic rules on present estates in land, easements, covenants, equitable servitudes and the early law of zoning. The chapter concludes with more modern materials on servitudes and common interest communities.

The post-World War II era spawned some dramatic rethinking about the meaning of property. The growth of the administrative state became the object of intense scrutiny, first by a group of scholars known as the "legal process school" and somewhat later by a bevy of movements interested in wealth redistribution. These events are the focus of Chapter 5, which reviews the ways in which property was partially redefined to include administrative benefits and the consequences for land owners of the growth in federal programs intended to benefit the poor. This chapter lays out much of the theoretical basis for property reforms that occurred after 1960. Landlord-tenant law is the focus of Chapter 6. Debates about rental housing were quite intense among Progressives at the beginning of the twentieth century, but major reforms did not occur until the 1960s and 1970s. The chapter looks at the adoption of tenement house acts early in the century, and then moves to more contemporary efforts to reform tort and eviction rules in rental settings. Chapter 7 covers land transfer. Though many of the parameters of modern residential land sales were established by reforms enacted during the Great Depression, they did not spawn massive suburban growth until the post-World War II housing boom. The massive growth of suburbs in the last forty years of the twentieth century, along with more contemporary problems of land transfer, is reviewed in this chapter.

The book ends with three chapters on more recent property law issues. These materials cover the law of waste and nuisance with the help of the law and economics school, the constitutional law of takings through the prism of jurisprudes writing about the impact of history on the justice of contemporary legal structures, and the law of property in human beings with the guidance of thinkers on individualism and community.

The structure of this book is heavily influenced by two streams of experience in my own career. I've already mentioned the first—participating in Georgetown University Law Center's experimental first year curriculum. The program (now actually a permanent feature of that school's first year life for twenty percent of each entering class) provided me with a rich understanding of the ways modes of legal thought evolved over time. It not only allowed me to organize these materials in accordance with the historical periods in which various property doctrines were the focus of attention, but also to integrate materials about modes of legal thought popular at various times into each chapter. Since moving to the New York Law School faculty in 2008 it has become clear that the lessons

learned at Georgetown are transferable, that the importance of the ways we think about legal institutions can be extracted from a particular curricular experience and generalized.

The second stream of experience is my decades of teaching and writing about the American legal history of gender and property. This work has given me a deep appreciation for the ways in which we continue to play out the dramas of our ancestors and for the importance of good stories in legal education. It has turned me into a "contextualist" —a believer that full understanding of legal materials is impossible without knowing about the context in which cases, rules and statutes develop. Reading cases as stand-alone entities loses the richness of the lived historical experiences that they exemplify. That is why this text is filled with as much information as I could gather about the historical moments in which cases were decided, the stories behind the disputes and any other information I thought helpful in gaining a full understanding of the importance of the decisions.

We no longer (if we ever did) live in a world in which there is general agreement about the nature of legal institutions, the theoretical justifications for legal actions, or the roles lawyers should play in society. This lack of uniform, systematic understandings has led to a milieu in which lots of people are vying for your intellectual attention. Participants in this vibrant debate take it for granted that non-legal disciplines have something to say about the nature and purpose of legal institutions in an administrative state. Economics, philosophy, and history have become much more important parts of legal discourse and education in the last few decades. While this volume has its economic and philosophical moments, it largely is designed as an historical adventure. I hope you enjoy the journey.

If you have comments or questions about this book, please let me know. Send mail to:

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Richard H. Chused

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Editorial Note

Many footnotes have been removed from court opinions and various excerpted materials without any notations or ellipses. Footnotes retained in court opinions and excerpted materials carry their original numbers. Author's footnotes are numbered consecutively from 1 at the beginning of each chapter.

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# Chapter 1

# PROPERTY AND THE STATE

## § 1.01 INTRODUCTION

Property often is described as a product of individual initiative and thought of as a way of defining a domain of self-control — "a shield for the individual against the intrusions of the collective." But the creation and maintenance of property — something of value that you may restrain others from using — requires the blessing and protection of state power. Property is a creature of the state. As Jennifer Nedelsky noted, it "requires collective recognition and enforcement."[1] You should immediately see the potential for conflict. If property is both a creature of the state and a shield against arbitrary exercise of power by the collective, the state itself may be asked to implement inconsistent goals. To protect one person's property may require it to impinge on another's interests in other property. The preferences of one group about one set of assets may have negative consequences for the property of others.

Zoning land for commercial use, for example, may make farming more difficult on neighboring parcels. Requiring those constructing buildings to dig their foundations in ways that prevent neighboring structures from collapsing may increase construction costs. Requiring owners of historic buildings to maintain them for public benefit may raise the cost of ownership. In each of these cases, the reverse may also be true. Zoning land for agricultural use to protect farmers may reduce the value of land an owner hoped to turn into a shopping center. Allowing those constructing buildings to dig foundations that undermine nearby structures may lead to the collapse of a neighbor's building. And allowing historic buildings to deteriorate may lead to a loss of important cultural landmarks. It is these sorts of conflicts that led Jenifer Nedelsky and others to argue that the single-minded definition of property as a shield of individual liberty is misguided, that such a notion should be replaced with a set of ideals about property as relational, about property as interconnectedness, about property as mediator (not separator) between the interests of people and the state.

The importance of state power to the definition and maintenance of property ownership is made painfully obvious by the fate of those occupying America before the Europeans invaded these shores. Native Americans living here before 1600 certainly believed they had the blessings of their elders to occupy, use and "own" this land in accordance with their settled customs and understandings. When their governing structures lost power to European colonizers and later to the United

[1] Both quotes are from Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, in LAW AND THE ORDER OF CULTURE (Robert Post, ed.) 162, 165 (1991).

States, the native legal claims to ownership fell apart. As you will learn from the court opinions that follow, the national government eventually took on the inconsistent roles of owning property and protecting the well being of Indian Nations. Dominion over land, however, usually took precedence over the welfare of native peoples.

There is a set of fundamental ironies at work here. Many of those governing America during its founding decades claimed that property ownership was a necessary pillar for creation of an independent, civic-minded citizenry. But many of those professing belief in such ideas were perfectly prepared to use government power to extinguish the interests of a putatively incompatible group claiming to own land within the new nation's boundaries. In the years just before and after 1800, a particular set of perspectives on the importance of property to the definition of self and state was prominent among the governing elites. The Republicans and the Federalists held one important idea in common. They both believed that property was an aspect of personality, of individuality, that helped define every person's cultural and political roles in society. Stanley Katz has argued that Thomas Jefferson, at least initially, believed that each person owned the products of his (and I use the masculine intentionally) labor, that a stake in ownership was central to the development of a moral, civically responsible citizenry.[2] (It is, by the way, this notion of civic responsibility in early Republicanism that is now the focus of attention in a present day movement, discussed some in the final chapters of this book, to revisit notions of public responsibility as part of a modern system of legal thought about property.) Alexander Hamilton, however, tartly observed that "as luxury prevails in society, virtue will be in a greater degree considered as only a graceful appendage of wealth, and the tendency will be to depart from the republican standard. * * * It is a common misfortune, that awaits our state constitution, as well as all others."[3] And so Hamilton, disagreeing with Jefferson's position that property encouraged civility, made the more straightforward argument that wealth, in his view something every individual craved, must be protected from the grasp of the impoverished by government structures. In sum, Jefferson contended that the minimal state would function well so long as participants in that state had an economic stake in its stability. Hamilton argued that the state's purpose was to protect private property from redistribution. But regardless of their differences, Jefferson and Hamilton, as well as many other founders, believed that the scope of individual ownership of property was a central problem for the state to consider.

The common views of Jefferson and Hamilton about the importance of land ownership as a defining element of citizenship led to widespread agreement that only property owners should be allowed to participate in running the government. Prior to 1820, property ownership was a prerequisite to male suffrage throughout the land.[4] Membership in state legislatures was similarly restricted. And both the

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[2] Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. LAW & EC. 467 (1976).

[3] Alexander Hamilton, *Address Before the New York Ratifying Convention of Poughkeepsie, New York, June 21, 1788*, in 5 PAPERS OF ALEXANDER HAMILTON 36 (Howard C. Syrett ed., 1962).

[4] Voting, of course, also was constrained on gender grounds. Women could not vote, or partake of other political rights such as serving on juries.

federal and the various state senates were appointive rather than elective bodies, with members of the landed elites usually selected for service. Until the Seventeenth Amendment was adopted in 1913, United States Senators were appointed by a method chosen by each state. Early in our history, state governors or state senators usually made the appointment. (I suspect most of you have not read the Seventeenth Amendment let alone the entire Constitution. You should read it.) While this part of our political history began to change during the Jacksonian era,[5] it was part of the general understanding of our early politicians that government was in large part created to protect the interests of those owning land.

Though both Jefferson and the Republicans and Hamilton and the Federalists believed in the importance of property's relation to proper governance of the state, there were some important differences. One involved their attitudes about expanding the size of the landed class. Jefferson believed in encouraging the growth of a civically responsible class of yeoman farmers by distributing land to the landless. Hamilton cared less about that as a matter of political theory, though he did see that *sale* of land might be a way of raising money for the state. This is crucial to understanding a judicial opinion like that in *Johnson v. McIntosh*, the first case in this text. Chief Justice John Marshall, a Federalist, was confronted with a dispute between two aristocratic groups, each claiming the right to property in the Northwest Territories. It was not just a case about the right of Native Americans to claim participatory rights in the new republic as owners of land, but about the state machinery to be used in resolving property disputes among the European descendants then running the nation and land speculators seeking wealth by amassing land in the western territories. When all was said and done, the Supreme Court not only confirmed the secondary status of native claims, but also affirmed the validity of federal structures for distributing lands west of the original thirteen states.

As a Federalist, Marshall also believed in the central role of the national government as the arbiter of property rights. Fearing the clamor of the masses and the unwieldy diversity of states given significant powers under the Articles of Confederation, the Federalists thought it crucial to develop a strong central government to control the major features of the new republic when the Constitution

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[5] But the impact of our early history is still felt. After the 2008 elections, politicized debates arose over use of gubernatorial appointment authority to fill four seats in the Senate after those holding them became part of the new administration. One seat was vacated when Barak Obama became President. Roland Burris was selected as his replacement by Governor Rod Blagojevich who was impeached and removed from office shortly thereafter for allegedly trying to put the vacancy up for sale. Controversy about the appointment continued after Burris took his seat in Congress when revelations of previously unknown contacts between him and Blagoyevich surfaced in the media. New York's Governor David Patterson ran into a media buzz saw while replacing Hillary Clinton, named Secretary of State by Obama, with Kirsten Gillibrand. The process dragged on for weeks and included a reported effort by Caroline Kennedy, daughter of assassinated President John F. Kennedy, to obtain the appointment. In Delaware, some negative comments surfaced after Joe Biden, the new Vice-President, was replaced in the Senate by Edward Kaufman, his chief of staff. Colorado Governor Bill Ritter's replacement of Ken Salazar, who became Interior Secretary, with Michael Bennet, Denver's school superintendent, drew little negative press, save for broad comments about the impropriety of using an appointment process rather than an election to fill a seat in the United States Senate. Proposals to amend the Constitution to require elections surfaced almost immediately after Congress convened in 2009. The hullabaloo died down after a time, and the amendment proposals quietly fell off the Congressional agenda.

was drafted in the 1780s to replace the Articles. That belief created another conflict for Marshall. What was he supposed to do with Native American communities, such as the Cherokees and others in the southeast, which had adopted many of the core political, Republican notions about property espoused by both Hamilton and Jefferson?

Jefferson, while president, established a policy for Native Americans that encouraged them to drop their nomadic habits in favor of a static agricultural life, cede to the government those lands no longer needed to support the old itinerant customs and adopt governing structures mimicking those of the newly established United States. Two commentaries Jefferson wrote explain why this happened. The first is an 1803 letter he wrote to William H. Harrison, governor of the Indiana Territory from 1801–1812 and later the ninth President of the United States. In this letter, not intended for widespread circulation, Jefferson described his "Indian policy" in fairly Machiavellian prose.[6] Though obviously not a believer in equality as now conceived, he did wish to follow through on his Republican idea that property ownership had civilizing effects:

> Our system is to live in perpetual peace with the Indians, to cultivate an affectionate attachment from them, by everything just and liberal which we can do for them within the bounds of reason, and by giving them effectual protection against wrongs from our own people. The decrease of game rendering their subsistence by hunting insufficient, we wish to draw them to agriculture, to spinning and weaving. The latter branches they take up with great readiness, because they fall to the women, who gain by quitting the labors of the field for those which are exercised within doors. When they withdraw themselves to the culture of a small piece of land, they will perceive how useless to them are their extensive forests, and will be willing to pare them off from time to time in exchange for necessaries for their farms and families. To promote this disposition to exchange lands, which they have to spare and we want, we shall push our trading uses, and be glad to see the good and influential individuals among them run in debt, because we observe that when these debts get beyond what the individuals can pay, they become willing to lop them off by a cession of lands. At our trading houses, too, we mean to sell so low as merely to repay us cost and charges, so as neither to lessen or enlarge our capital. This is what private traders cannot do, for they must gain; they will consequently retire from the competition, and we shall thus get clear of this pest without giving offence or umbrage to the Indians. In this way our settlements will gradually circumscribe and approach the Indians, and they will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi. The former is certainly the termination of their history most happy for themselves; but, in the whole course of this, it is essential to

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[6] Jefferson's assumption that native peoples would disappear as separate national groups and become part of the national polity led him in quite complex directions. While encouraging the adoption of American streams of cultural thought, he also encouraged the establishment of systems to suppress those unwilling to cooperate with his policies. This has led contemporary historians to strongly criticize the impact of his policies. *See, e.g.*, ANTHONY F.C. WALLACE, JEFFERSON AND THE INDIANS: THE TRAGIC FATE OF THE FIRST AMERICANS (1999).

> cultivate their love. As to their fear, we presume that our strength and their weakness is now so visible that they must see we have only to shut our hand to crush them, and that all our liberalities to them proceed from motives of pure humanity only.[7]

The second excerpt is from an address Jefferson delivered in 1808 to several "Indian chiefs." Here Jefferson more politely and publicly described the aims of his policy.

> Scanty and unwholesome food produce diseases and death among young children, and hence you have raised few and your numbers have decreased. Frequent wars, too, and the abuse of spirituous liquors, have assisted in lessening your numbers. The whites, on the other hand, are in the habit of cultivating the earth, of raising stocks of cattle, hogs, and other domestic animals, in much greater numbers than they could kill of deer and buffalo. Having always a plenty of food and clothing they raise abundance of children, they double their numbers every twenty years, the new swarms are continually advancing upon the country like flocks of pigeons, and so they will continue to do. Now, my children, if we wanted to diminish our numbers, we would give up the culture of the earth, pursue the deer and buffalo, and be always at war; this would soon reduce us to be as few as you are, and if you wish to increase your numbers you must give up the deer and buffalo, live in peace, and cultivate the earth. You see then, my children, that it depends on yourselves alone to become a numerous and great people. Let me entreat you, therefore, on the lands now given you to begin to give every man a farm; let him enclose it, cultivate it, build a warm house on it, and when he dies, let it belong to his wife and children after him. Nothing is so easy as to learn to cultivate the earth; all your women understand it, and to make it easier, we are always ready to teach you how to make ploughs, hoes, and necessary utensils. If the men will take the labor of the earth from the women they will learn to spin and weave and to clothe their families. In this way you will also raise many children, you will double your numbers every twenty years, and soon fill the land your friends have given you, and your children will never be tempted to sell the spot on which they have been born, raised, have labored and called their own. When once you have property, you will want laws and magistrates to protect your property and persons, and to punish those among you who commit crimes. You will find that our laws are good for the purpose; you will wish to live under them, you will unite yourselves with us, join in our Great Councils and form one people with us, and we shall all be Americans; you will mix with us by marriage, your blood will run in our veins, and will spread with us over this great island. Instead, then, my children, of the gloomy prospect you have drawn of your total disappearance from the face of the earth, which is true, if you continue to hunt the deer and buffalo and go to war, you

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[7] Letter to Governor William H. Harrison (Feb. 27, 1803), *in* THOMAS JEFFERSON, WRITINGS 1118 (Library of America, 1984).

see what a brilliant aspect offered to our future history, if you give up war and hunting.[8]

It is fascinating how Jefferson paternalistically extended his views about expanding the number of white land owners to the Native American "children" then dependent upon American policy for survival. The combination of Jefferson's respect for yeoman farmers and land ownership, the connections between morality and cultivation of property, and the relationship between governance and property ownership is palpable in these excerpts. And, in light of Jefferson's ownership of slaves[9] and our troubled history of race relations, his assumption that property ownership would lead to intermarriage is remarkable. As a result of Jefferson's policy, a number of southeastern tribes developed agricultural habits, established governing structures emulating those of the United States, and settled down for what they hoped was the long term. What you are about to do is investigate what happened to these tribes. While it is easy to predict the fate of the small minority of native communities that fought for their land, you also will read about disputes not involving warring peoples. *Johnson v. McIntosh* sets the legal stage and the *Cherokee Cases* conclude the early part of this continuing saga.

The history of American policy toward its native peoples can be roughly divided into three large stages. During the first period, which lasted until the Adoption of the Dawes Act in 1887, most native communities were removed from their homelands. Many died in battles or from diseases brought for the first time to these shores by European settlers. Those who survived were forced into reservations, most located west of the Mississippi River. The *Johnson* and *Cherokee* cases deal with this epoch's disputes over land and tribal claims of sovereignty. During the Dawes Act, or General Allotment Act,[10] period, the federal government embarked on an ill-fated attempt to gradually shift federal ownership of reservation lands into the private ownership system typical in most of the United States. Members of tribes were given an allotment of land that had to remain in the hands of an Indian owner for twenty five years. After that waiting period, the land could be sold to anyone. Lands not subject to allotment were declared to be surplus property open to general sale by the government. During the Dawes Act era, the amount of land under tribal jurisdiction decreased by about two-thirds. The results were disastrous. Many tribal members became landless. Reservations lost their geographic coherence and became checker-boarded with lands owned by outsiders. Tribal governance became more difficult. The depression greatly exacerbated the problems and the allotment system was repealed by the Indian Reorganization Act of 1934.[11] This act reestablished the reservation system, restricted the further disposal of allotted Indian lands to outsiders and barred the further sale of surplus

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[8] Advice to Indian Chiefs, to Captain Hendrick, the Delawares, Mohicans, and Munries (Washington, December 21, 1808), in LETTERS AND ADDRESSES OF THOMAS JEFFERSON 189–90 (Unit Book Ed. 1905).

[9] Jefferson's relationships with his slaves were enormously complex. After his wife died, he carried on a long term relationship and raised a family with his slave Sally Hemings, the half sister of his deceased spouse. The story is told in spellbinding detail in ANNETTE GORDON-REED, THE HEMINGSES OF MONTICELLO: AN AMERICAN FAMILY (2008).

[10] Ch. 119, 24 Stat. 388 (1887).

[11] Ch. 576, 48 Stat. 984 (1934); 25 U.S.C. §§ 461–479.

lands. Though the scope of authority left in the hands of tribal governments has ebbed and flowed over the years, the Reorganization Act system has remained largely intact to this day.

## § 1.02 EARLY NATIVE AMERICAN LAND CLAIM CASES

### [1] *Johnson v. McIntosh*

#### [a] Background of the Case

In 1609, King James I of England granted to "The Treasurer and Company of Adventurers and Planters of the City of London, for the First Colony of Virginia" all the lands in the area known as Virginia. This grant included all the area to the west and northwest of a 200-mile segment of the Atlantic Ocean coast. Prior to 1609, this land was held, in full ownership and sovereignty, by various native tribes. In 1624, this corporation of "Adventurers" was dissolved, leaving the Colony of Virginia under the control of the English crown. Segments of this crown colony were later given over to the control of other colonial groups under new charters. During the years before 1756, the French government also laid claim to portions of Virginia west of the Allegheny and Appalachian Mountains, and took possession of certain parts of it. The international dispute led to the French and Indian War. During the war, the Iroquois, or Six Nations, allied themselves with Great Britain. The Illinois (or Kaskaskias) and the Wabash (or Piankeshaw) tribes, residing in the territory northwest of the Virginia coast and west of the mountains, allied themselves with France. At the conclusion of the French and Indian War in 1763, the northwest tribes signed treaties of peace with Great Britain and the Six Nations. France's claims to the land east of the Mississippi River and northwest of the mountains were extinguished.

On July 5, 1773, certain Chiefs of the Illinois tribes delivered a deed to a group of British colonial subjects, led by William Murray, for two large tracts of land, one along the Kaskaskia and Ohio Rivers, and the other along the Mississippi River. The British colonists paid $24,000 to the tribe for the land. On October 18, 1775, certain Chiefs of the Wabash deeded another two tracts of land to another group headed by Lewis Viviat. This land, transferred for $31,000, ran along the Wabash, Cat, White, and Ohio Rivers. On May 6, 1776, the Colony of Virginia declared itself independent of Great Britain. On October 5, 1778, the armies of the Virginia colony took possession of the lands northwest of Virginia from Britain. The Virginia Assembly authorized the transfer of these Northwest Territories to the United States on December 20, 1783. This was part of the general cession to the central government of claims to western lands made by a number of the original thirteen states. The formal transfer of Virginia's northwestern land claims to the United States, then organized under the Articles of Confederation, occurred on March 1, 1784, with Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe acting on behalf of Virginia as the state's representatives to Congress.

Despite the formal transfer of the Northwestern Territories to the central government, it took some time before many settlers migrated west. The Northwest Ordinance, under which the Northwest Territories were organized, was adopted in

1787, but it took quite a bit of time before land was surveyed, native land claims extinguished, hostile tribes removed, and land bureaucracies organized to handle the flow of title documents to the new settlers.[12] On July 20, 1818, the United States issued a patent to William McIntosh for a parcel of over 11,000 acres, which was, the parties to the case claimed, within the area conveyed by the Wabash to the Lewis Viviat group in 1775. Thomas Johnson, one of the grantees in the Viviat group, died on October 1, 1819. He was a member of the Continental Congress, the first Governor of Maryland after it became a state, and an Associate Justice on the Supreme Court during the 1790s. His will's *residuary clause*[13] bestowed most of his real estate on his son Joshua Johnson and his grandson Thomas Graham, the lessors in *McIntosh*. Joshua Johnson and Thomas Graham, and their lessee, were citizens of Maryland. William McIntosh was a citizen of Illinois, established as a state in 1818. The Murray and Viviat groups petitioned to Congress many times to confirm their title claims, but without success. The case itself was brought to assess the validity of their various title claims. The plaintiffs, Johnson and Graham's lessee and others, brought an *ejectment*[14] action in the Illinois District Court. The case came before the courts on a statement of facts agreed to by the parties. In modern parlance, the case was decided at the trial level on the equivalent of a *motion for a summary judgment*.[15] Judgment below was for the defendants, and the plaintiffs appealed.

The existence of an agreed upon statement of facts has long suggested that *Johnson v. McIntosh* was a test case, perhaps even based on a less than truthful tale. In a ground breaking study, Eric Kades reconstructed the flow of property documents in the case. McIntosh, he opined, probably obtained much of his land through fraud, bribery or trickery. The land claims were perfected several years before the federal patent was issued at a time when the area was not open for general settlement. Kades also unearthed evidence that the land at issue in the dispute was never actually within the areas claimed by the Murray and Viviat groups. The case, he concluded, was a feigned contest designed to recoup the losses of the last remnants of a largely dispirited and sometimes impoverished group of land investors, nee speculators, who had purchased land from various tribes.[16]

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[12] While it seems obvious, don't forget that communication was very difficult at the end of the eighteenth century. The mails, if they worked at all, were extremely slow. Moving documents back and forth between the new territories and the land bureaucrats in Washington, D.C. took months. Final distribution of land patents, the name given deeds issued by the United States, usually took years after the initial land claims were made.

[13] The *residuary clause* is usually the final granting clause of a will and disposes of all property not dealt with by other provisions in the will.

[14] An *ejectment* action tries the right of the parties to claim possession to the land. While deciding the right to possess *may* also resolve issues as to who owns the land, that is not always so. Think, for example, about a tenant. A tenant has the right to possess a place, and to eject others who claim a right to that possession. But a tenant does not own the rented land. Though neither party was actually living on the land during the *McIntosh* litigation, both claimed the right to do so. It was the right, more than the reality, that was being tested.

[15] *See* F.R.C.P. 56. A *motion for summary judgment* may be granted if there are no material facts in dispute in the claim. The motion therefore makes it possible to decide a case without a trial.

[16] Eric Kades, *History and Interpretation of the Great Case of* Johnson v. McIntosh, 19 L. & HIST. REV. 67 (2001); Eric Kades, *The Dark Side of Efficiency:* Johnson v. McIntosh *and the Expropriation of*

## [b] The United States Supreme Court Opinion

### JOHNSON & GRAHAM'S LESSEE v. WILLIAM MCINTOSH

United States Supreme Court
21 U.S. (8 Wheat.) 543 (1823)

March 10th, 1823. MARSHALL, CH..J., 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 certain Indian tribes, constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognized 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 simply 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 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 ascendancy. 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. 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

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*American Indian Lands*, 148 U. PA. L. REV. 1065 (2000).

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.

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. 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.

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, 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 recognized. 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 sea-coast, 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 sea-

coast four hundred miles, and 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.

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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 been objected to this, nor 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 title was respected until the revolution, when it was forfeited by the laws of war.

Further proofs of the extent to which this principle has been recognized, 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. 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.

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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 guaranteed 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 considered 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 south-east 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. Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized 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