

## **Johnson v. McIntosh, 21 U.S. 543 (1823)**

[In 1773, the chiefs of the Illinois Native Americans sold certain lands to William Murry and persons of European descent for \$24,000. In 1775, the chiefs of the Piankeshaw Native Americans sold certain lands to Thomas Johnson, and other persons of European descent. Thomas Johnson died, leaving his interest in these lands to his son, Joshua Johnson, and his grandson, Thomas Graham. Joshua Johnson and Thomas Graham are the plaintiffs in this case. In 1795, the Illinois and Piankeshaw tribes entered into treaties with the United States, under which they retained certain lands and ceded other lands to the federal government. In 1818, the U.S. government sold some of those lands to William M'Intosh, the defendant. The plaintiffs brought an action in ejectment against the defendants in an effort to establish their superior title. The lower courts ruled from the defendant, and the plaintiffs appeal.]

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

The plaintiffs in this cause claim the land ... 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 recognised in the Courts of the United States?

The facts, as stated in the case agreed,<sup>1</sup> 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.

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<sup>1</sup> [The “case stated” procedure meant that there was no trial that established the facts to this case. Instead, the plaintiffs’ and defendant’s lawyers agreed on the facts, submitted a joint statement of facts to the lower court judges, and asked the court to determine their legal rights based on the facts stated in their joint statement. Note that there is some doubt about the veracity of the facts in the joint statement. For example, one historian states that the property that Thomas Johnson purchased did not, in fact, overlap with the property M’Intosh purchased. The suit may have been the result of collusion between the parties to resolve the more general issue of the rights of persons whose title derives from private purchases from Native Americans, rather than a genuine suit over a particular piece of property. In general, modern U.S. law tries to prevent such cases, because they do not present a genuine “case or controversy” as required by Article III of the US Constitution. Nevertheless, collusive suits were common in early American history.]

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 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.

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

[Chief Justice Marshall then discusses the ways in which Spain, France, and the Netherlands acknowledged title based on discovery and did not recognize that Native Americans held property rights that Europeans had to respect.]

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.

[Chief Justice Marshall then discusses how charters for Virginia, Massachusetts and other colonies similarly gave their grantees full property rights over land in North America, regardless of whether the lands were occupied by Native Americans.]

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....

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....

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 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....

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....

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 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 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.

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 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 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 conquerors, 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.

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.

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 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.

...

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.

[Chief Justice Marshall discusses other evidence of title based on purchases from Native Americans.]

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.

...

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.

Questions.

- 1) How do you feel about this case? Do you think it reached a just decision? While you may think that, as a law student, you need to set aside your feelings and analyze issues solely through an objective legal lens, that is not correct. Often the best legal arguments come from harnessing your passions rather than ignoring or suppressing them. Of course, you cannot just tell judges how you feel and expect them to rule in your favor, but you can use your sense of justice or even outrage as motivation to formulate persuasive legal arguments. Consider Thurgood Marshall, the founder of the NAACP and first African-American justice of the U.S. Supreme Court. He used his zeal for justice to conceive the legal arguments and strategies that eventually overturned Jim Crow and segregation. If you think the result or reasoning in *Johnson v. M'Intosh* was wrong or unjust, formulate an argument that uses different reasoning and/or reaches a result that you think would be just. On the other hand, you should also consider the arguments that Chief Justice Marshall would make in response, even if you think the result odious. It is important to consider counter-arguments for three reasons: (a) consideration of such arguments will help you make your own arguments stronger, (b) you may not always agree with your client, so it's good to get practice in making arguments for positions you don't agree with, and (c) I will ask you to make such arguments in class, as will other professors.
- 2) Do you think Chief Justice Marshall had any moral or other qualms about his decision? Can you find evidence in the opinion that Marshall thought the denial of Native American property rights may have been unjust? Can you find evidence to the contrary?
- 3) Can you argue that this case isn't really about Native American property rights, but only about the rights of white settlers? Can you think of counter-arguments?
- 4) Private land purchases from Native Americans in Illinois and other British territories west of the Appalachian Mountains were prohibited by the British in the Proclamation of 1763. A proclamation is legislation by the king, without the assent of Parliament. In the modern U.S., we would call a proclamation an "executive order." Many American colonists resented the Proclamation of 1763, and the Declaration of Independence lists it as one of the grievances justifying the revolution. Nevertheless, after the Revolution, the new U.S. federal government passed the Indian Intercourse Act (1790), which similarly prohibited private land purchases. Can you formulate a legal argument based on the Proclamation of 1763 and/or Indian Intercourse Act to resolve *Johnson v. M'Intosh*. Do you think that argument is stronger or weaker than the one formulated by Chief Justice Marshall in the case? Can you think of a reason that Chief Justice may have chosen not to rely on arguments based on the Proclamation of 1763 and/or Indian Intercourse Act?

- 5) The land at issue in this case was purchased by the U.S. government from Native Americans in 1803. Is that fact mentioned in Chief Justice Marshall's opinion? If not, why do you think he doesn't mention it?
- 6) Chief Justice Marshall's opinion essentially holds that title based on purchase by the U.S. government from Native Americans is superior to title whose root is purchase by private parties from Native Americans, even if the private party purchase was earlier. Can you argue that that rule benefits Native Americans? Can you argue that recognizing title based on private purchases from Native Americans would have been better for Native Americans?
- 7) William Cronin, a distinguished historian, has analyzed Native American views of property and property rights. He concluded that Native American tribes had relatively fixed territories that they controlled. Within the territories, sachems (chiefs) controlled and distributed land. That sachem might, for example, allocate land to individuals and families for farming purposes. In general, Native American individuals and families possessed land only for a few years and then moved on to other land. They did not generally build houses or other permanent structures. The process of farming depleted nutrients from the soil, so farmers could be more productive if they moved around. Land was sufficiently abundant that such movement was possible. Tribal members could hunt or gather on land that the Sachem had not allocated to individuals or families for farming purposes. Does this historical understanding of Native American property rights support or contradict the reasoning and/or outcome of *Johnson v. M'Intosh*?
- 8) Given Native American views about property rights in land mentioned above, what do you think Native Americans thought they were doing when they sold land to whites, whether it was to private individuals or governments? Does your view affect your opinion of the correct outcome in *Johnson v. M'Intosh*? Given their different views of property rights in land, how should land have been allocated between whites and Native Americans? Should Native Americans have been barred from selling their land? Should whites have been barred from any settlement in North America? Should whites have been allowed only the sort of temporary occupancy that Native American chiefs customarily allocated to Native American individuals and families?
- 9) Under modern international law, when sovereignty over a territory is transferred from one sovereign to another, whether by conquest or some other process, the new sovereign is legally required to respect private property rights of the inhabitants, but may take title to public lands held by the prior sovereign. If that rule applied in 18th and 19th century America, how would *Johnson v. M'Intosh* be resolved? Does Chief Justice Marshall address a similar argument? If so, how does Marshall respond to it?
- 10) Stuart Banner argues that, for roughly the first two hundred years of European settlement in what is now the eastern United States and Canada, nearly all land was, in fact, acquired by purchase from Native Americans. Sometimes the purchasers were private individuals, and sometimes the purchases were governments (i.e., the British government or colonial governments before 1776 or the U.S. government or state governments after 1776). Only starting in the late eighteenth-century century did some people begin to assert legal title

without purchase from Native Americans. How could you use that fact to argue for a result different from that in *Johnson v. M'Intosh*? Does Chief Justice Marshall address a similar argument? If so, how does he respond to it?

- 11) The opinion refers to title founded on “discovery” and on “conquest.” What is the difference? Does it matter?
- 12) The plaintiffs first purchased the land from the Illinois tribes. By the time of the purchase, the tribes numbers had fallen roughly ninety percent as a result of exposure to European diseases and warfare with other Native Americans. At the time they sold their land, the Illinois tribes were probably about to lose them to neighboring tribes. The plaintiffs also purchased land from the Piankeshaw, whose numbers and strength had also been depleted by disease and war. Do these facts change your view of the case?