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# Johnson v. M'intosh

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## REWRITTEN OPINION

ALEXANDRA FLYNN, UNIVERSITY OF BRITISH COLUMBIA

# JOHNSON V. 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. The decision of the United States District Court is deemed to be in error.

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. 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 successors, 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 at the time of granting these letters patent, and of the discovery of the continent of North America by the Europeans, and during the whole intermediate time, the whole of the territory, in the letters patent described, 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 otherwise having a rightful possession to the subject territory, 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.

3d. That in the year 1624, this corporation was dissolved in due course of law, and all its powers, together with its rights of soil and jurisdiction under the letters patent in question, were vested in

the crown of England; where upon the colony became known by England as a royal governments, 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, for establishing the colonies of Carolina, Maryland, and Pennsylvania.

4th. 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 23rd 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.

5th. 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, which they had ceded to France, and she held 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, and 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.

6th. 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, 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.

7th. 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 in this judgment, and made part of the case.

8th. 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 individuals of each tribe or Nation holding the lands territories of such tribe in common with each other, and there being among them no separate property in the soil under their own laws; 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, but with their assent; to make the contract, and execute the deed, on behalf of the whole tribe, including its women; 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, and by the receipt by the individuals composing the tribe, of their respective shares of the price, and in no other manner.

9th. The Piankeshaw Indians, who are not a party to this action, were friendly with the United States in the Revolution, and were not a party in the Northwest Indian War, and have lived alongside the French and English before such events.

10th. That on the 5th of July, 1773, certain chiefs of the Illinois Indians, then jointly representing, 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 several men; and for a good and valuable consideration in the said deed stated, grant, bargain, sell, alien, lease, enfeoff, and confirm, to those listed on the deed, their heirs and assigns forever, 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 and bounded, to have the two tracts in land in perpetuity, so authorized by deed in advance of a notary public, and for consideration of 24,000 dollars, and so made in public.

11th. 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 many honourable men, and for good and valuable considerations, in the deed poll mentioned and enumerated, grant, bargain, sell, alien, enfeoff, release, ratify, and confirm to the

said Louis Viviat, and the other persons so represented by him, 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; with all the rights, liberties, privileges, hereditaments, and appurtenances, to the said tract belonging, 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 a notary public, duly appointed and authorized, and for consideration of 31,000 dollars, paid and delivered at the time of the execution of the deed to the Piankeshaw Indians, who freely accepted it, and divided it among all citizens of the tribe, and so made in public.

12th. And that neither William Murray, nor any other of the grantees under the deed of 1773, nor Louis Viviat, nor any other of the grantees under the deed of 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.

As the arguments are so fully stated in the opinion of the Court, it is deemed unnecessary to give anything more than the following summary. 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 recognised in the Courts of the United States?

Judgment being given for the defendant on the case stated in the District of Illinois, the plaintiffs brought this writ of error to the Supreme Court.

Chief Justice Alexandra Flynn delivered the unanimous opinion of the Court.

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.

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.

The case is to a great extent very simple: no particular laws to which this Court is bound were in place barring a sale of lands between the Piankeshaw and a party other than the United States at the time of the transaction in 1773. A colonial Virginia statute enacted in 1662 banned such purchases but this law had lapsed or been repealed, and in any case was not in force at the time of the transaction. Its reenactment in 1779, after the purchase in question, could not divest the purchaser of previously vested rights.

A denial of valid title would be inconsistent with *Fletcher v. Peck*, a decision of this noble Court.[1] We decided that where a grant is a contract executed, the obligation of which still continues; a law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, is repugnant to the constitution of this great land. It seems to me that, here, too, a contract was executed in the first order and such contract had no treaties, laws, or consistent customs denying its validity. It is likewise contrary in this present case to remove the purchaser's estate and substitute an annulment that would subsequently bar its validity. As such, a formal application of law and facts leads to a clear conclusion of ownership by Mister Johnson and his heirs.

But such a case invites reflection of the place of Indians within this sacred country on the cusp of its creation, a rare opportunity for this esteemed Court, and one which previous judgments have not engaged with full contemplation.

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 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. 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 governments, which title might be consummated by possession. It was a right with which no other Nation could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

As argued by the defendants, 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. In this interpretation of the rights of the discoverers, any grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of title and occupancy. The history of America, from its discovery to the present day, proves, we think, a recognition of this interpretation.

[1] *Fletcher v. Peck*, 10 U.S. 87 (1810).

There does not seem to have been much agreement among the European Nations, at the time, over what was necessary to acquire territorial sovereignty. Discovery grants an inchoate title to the discovering Sovereign; it means that European sovereigns could not interfere with their own Laws once a country has already laid claim to Lands. It prevents conflict between two sovereigns.

Such relations were not always peaceful amongst the European Nations. 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. 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. But 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.

In cases where the discoverer discovered new lands, where such lands were vacant and not possessed by another, the discoverer claimed possession. Those relations which were to exist between the discoverer and the natives were to be regulated by themselves; once again, European powers reacted differently to the possession of the new lands by Indians.

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, conciliatory to the natives. 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. For the French, treaties were a fundamental part of the new world's relationship with the Natives, who at contact were far more powerful in number, arms and wit.

The English used various charters to claim interest in the Lands. The documents upon this subject are ample. 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. A long line of charters continued, some annulled, such as the 1609 grant issued after not very successful attempts at settlement had been made, including one 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 into the land throughout from sea to sea. Other lands went through several hands, such as the Carolinas, which 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 till the revolution, when it was forfeited by the laws of war.

The sum total of these passages of laws and title reveal that these European grants reveal a chaotic set of land and title claims without possession, or often even knowledge, of the actual lands in question. The earliest European claims to the Northern Plains may have been made by Spaniards who came north from Mexico and New Mexico, apparently without ever penetrating the region. Britain also asserted vague claims to the Northern Plains through royal charters such as the Virginia Charter of 1609, which purported to grant to the London Company all the territory within 200 miles north and south of Cape Comfort on the Atlantic Coast inland from Sea to Sea, West and Northwest, and the Hudson's Bay Company Charter of 1670, which purported to give the Company the whole of the Hudson watershed, a vast area including most of the territory, and reaching down into what we now call and name the Dakotas. However, given that the Northern Plains were entirely unknown to Europeans at the time these charters were issued, these claims can hardly be taken seriously.

Louisiana was ceded by France to Spain by a secret treaty in 1762 and transferred back to France by treaty in 1800. Significantly, neither of these treaties contained a description of the boundaries of the territory. While it is apparent from the terms of the latter treaty that the extent of the territory in 1800 was the same as it had been in 1762, the matter of the boundaries remained unclear.

The history of the wars, negotiations, and treaties, which the different Nations, claiming territory in America, have carried on, and held with each other are evidence of a long, complex chain of land holdings, which include numerous transactions with the Indians themselves, not simply European powers. 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. In other words, Indian title remained constant and unequivocal throughout these European claims, which were rarely if ever consummated with possession, a core ingredient in land title.

There is little doubt that Europeans and, later, Americans did not possess the area in question. They tried to protect their otherwise weak territorial claims by papal grants, symbolic acts of possession, such as placing crosses or plaques and royal charters that purported to assert wide geographical jurisdiction. As William Johnson, British Colonial official, wrote to the King: "The Six Nations, Western Indians [Anishnabe, etc] & c. having never been conquered, Either by the English or French, nor subject to the Laws, consider themselves as free people."[2] It is unclear how the sovereignty of the Indian Nations could be diminished if the European colonial power

[2] William Johnson to the Lords of Trade, 8 October I764.

had not yet completed its title to the territory by taking actual possession. In the present case, there was neither a war nor any treaty at the time of the purchase.

Even if one accepts the principle of discovery, as the defendants advance, under the terms of this principle itself, the agreements between the Unites States and other sovereign powers can only transfer the territory that these other powers actually possessed and controlled. If the land was occupied and controlled by Indian Nations, for the United States and Britain to have sovereignty they would have had to actually acquire territory from those Nations. These treaties would only have transferred what the transferring power actually had, that is, territorial sovereignty over the area it actually possessed and controlled, and a right as against the other European powers to acquire more territory within the limits of the discovery.

Many 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.

European charters and grants, particularly those of the British, cannot supersede, or discard, the Crown's solemn agreements to the Indians, which should meet no lawful impediment, as any other treaty so entered with other Nations, and have the force of law for our great Nation, as we decided in *Ware v. Hylton*.[3] Therefore, the Royal Proclamation, and any other documents that claim interest in American soil, must carry with them the agreements and customs made and understood by the Indians. The Royal Proclamation of 1763 prohibited sale of lands by Indians to private parties.[4] If one looks exclusively at this Royal Proclamation, it could be argued that this colonial prescription superseded all similar colonial statutes and provided a uniform and universal ban on land purchases from the Indians until the Revolutionary War in 1785.

However, the Proclamation refers to the Indians as "Nations," and the principles of the Proclamation found their genesis in the relationships between Indians and colonial powers in the decades leading up to the 1760s. The interaction of Indians and non-Indian people during this period resulted in the formulation of constitutional principles to regulate the allocation of land, resources, and jurisdiction between them. These principles were developed through practiced experience, war and negotiation and, as such, were the product of both society's precepts. There remained important agreements and gatherings between the British and other colonial powers and the Natives, which include a thirty-day conference that followed the Royal Proclamation: the Treaty of Niagara. The Royal Proclamation became a treaty at Niagara because it was presented

[3] *Ware v. Hylton*, 3 U.S. 199 (1796).

[4] The Proclamation dictates that "no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians . . . if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our name."

by the colonialists for affirmation and was accepted by certain Indians. When presenting the Proclamation, both parties made representations and promises through treaty secured by belts of wampum, establishing the principles of non-interference and mutual respect.

Many Indians, including the tribes connected with the Piankeshaw, did not attend the Niagara meetings or exchange treaties by wampum or otherwise with the British, and, thus, did not accept the Royal Proclamation. Thus, the Royal Proclamation must be read with this transaction, both in understanding its meaning. The Royal Proclamation did not apply to the Piankeshaw or any Indians with governing power in respect of their lands who did not enter in treaty with the British, as they did not adopt the document as binding on their territory.

In addition, it is clear that the United States, while infant in its independence, has chosen a different route, in statute, case law, and custom that the British in respect of its relations with the Indians. It was not clearly established that the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty or that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it.

I have already referenced the lack of binding legislation in Virginia at the time of the earliest transaction. No other laws were in place that prohibited purchases directly from Indians. Indeed, Article III of the Northwest Ordinance very clearly states the preferred relationship with the Indians:

> Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them

So, too, the Constitution of 1789 gave the national Congress exclusive power to conduct Indian affairs. Beginning in 1790, under a series of "Trade and Intercourse" acts, Congress continued to ban private land purchases from the Indians; later versions explicitly made private purchases a misdemeanor, punishable by jail terms of up to a year and fines of up to $1000. However, this supreme law was not in place at the time that Johnson purchased the Land, and, thus, the constitution can not reasonably be used as the basis for our decision.

Several customs suggest that prohibiting sales by Indians were far from a universal position and that the Proclamation appears not to be the final word on sales by Indians. First, colonists very early on began purchasing tracts directly from Indians. This soon became official policy. For example, the Massachusetts Bay Company instructed its colonists in 1629 that, "[i]f any of the Savages pretend Right of Inheritance to all or any Part of the land in our Patent . . . purchase their claim in order to avoid the least Scruple of Intrusion."[5] When the Crown began to exercise

[5] Letter from Governor of the New England Company, to Governor Endicott (1629).

more direct oversight of the colonies in the 1660s, it reiterated this principle. "No colony hath any right to dispose of any lands conquered from the natives, unless both the cause of the conquest be just and the land lye within the bound which the king by his charter hath given it . . . the country is [the natives] till they give it or sell it, though it not be improved." Massachusetts towns that had occupied lands without buying responded by retroactively making payments to the local tribes.

Legal decisions affirm such purchases. In *Jackson ex dem. Klock v. Hudson*, both American claimants rooted their title in a grant from the colony of New York in 1731.[6] The defendant, however, established that Mohawk Indians occupied the disputed tract at the time of a deed in the plaintiff's chain of title, from 1761, and hence, "under the doctrine of the common law rendering void the sale of lands, while they are in adverse possession," the plaintiff's chain of title had a gap. The title of the Mohawk Indians was extinguished as their title had never been claimed and the Indians had become extinct; but the purchase from Indians was not in contest.

Second, a peculiar legal opinion letter originally written by British Attorney General Charles Pratt (who later became Lord Camden) and Solicitor General Charles Yorke affirmed the right of individuals to buy land from rajahs in British India. The letter stated in part:

> As to the latter part of the prayer of the petition relative to the holding or retaining Fortresses or Districts already acquired or to be acquired by Treaty, Grant, or Conquest, We beg leave to point out some distinctions upon it. In respect to such Places as have been or shall be acquired by treaty or Grant from the Mogul or any of the Indian Princes or Governments Your Majestys Letters Patent are not necessary, the property of the soil vesting in the Company by Indian Grants subject only to your Majestys right of Sovereignity over the Settlements as English Subjects who carry with them your Majestys Laws wherever they form Colonies and receive your Majestys protection by virtue of your Royal Charters. In respect to such places as have lately been acquired or shall hereafter be acquired by Conquest the property as well as the Dominion vests in your Majesty by virtue of your known Prerogative & consequently the Company can only derive a right to them through your Majestys Grants.

The opinion, written in 1757, was intended to guide the Privy Council in responding to a petition for guidance filed by the East India Company. A version of the opinion was in circulation in North America by 1773, without language making clear its concern with subcontinental India. Evidence was tendered at trial that the 1773 purchase was motivated by the opinion and the common law generally permitted purchases of foreign lands; that a purchase from the natives was considered as full and ample a title as could be obtained. This is further evidence that either the law and custom were unsettled or that individuals could purchase land from Indians, as the king's subjects carry with them the common law wherever they may form settlements.

[6] 3 Johns. Rptr. 375 (1808).

Third, the sovereign could, and did, approve previous land purchases after the fact, a common practice in colonial Massachusetts.[7] Congress also passed a preemption act giving occupiers and improvers the right to purchase their claims at the statutory minimum price of two dollars an acre. Congress may have limited individual claims to a particular section; but other times did not. Moreover, in Illinois, land office devoted themselves almost exclusively to sorting out the tangle of preexisting French, British, and early American claims over southern Illinois lands. Indeed, in 1818, Piankeshaw Chief Chekommia signed a treaty selling rights to their land to the United States.

These arguments affirm that law and custom in regard to individual purchases of native land is far from clear and decided, contrary to the eloquent arguments of the defendant. This, in combination with the absence of any statutes to the contrary, leads to the clear conclusion that the transfer to Johnson and his heirs was valid. The question, next, is what, then, is the nature of this title?

The concept of Indian title that emerges from this case is a right over land that is separate and distinct from the laws of the United States, that can include communal title, matriarchal lineage, and so on, depending on how they create and understand the law. Indian laws and customs that provide for the creation and enjoyment of land rights that are determined by the Tribe. But the practices of each Tribe and the Laws of the Indians are not for this Court to decide; as it would not decide in the Nations of France or elsewhere. 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.

This interpretation of Indian title appears so too in other parts of the Law of the United States. For example, the commerce clause of the U.S. Constitution, which came into force in 1789, and after the date of the transfer to Judge Johnson, also considers Indian tribes as other sovereigns.[8] The *Northwest Ordinance of 1787* spoke of honouring the lands of Indians.[9] The *Territorial Papers of the United States* include a declaration by President Jefferson that Indians retained "full, undivided and independent sovereignty as long as they choose to keep it, and that this might be forever."[10] President Jefferson so extended this rule in circumstances where a tribe becomes extinct. Treaty practices affirm tribal sovereignty. For example, in the negotiation of many treaties with Indian tribes, U.S. officials negotiated slowly, over more than a month, in order to make sure that all tribes with claims agreed to terms.

In the present case, the Piankeshaw endorsed that the sale to the purchaser was valid under their law after the transaction, when they were approached by the British to sell the land anew. About eighteen months after the purchase, in January 1774, the British commander at Kaskaskia told

[7] *The Seneca Lands,* Opinions of the United States Attorney General (1819).
[8] Constitution of the United States, Article 1, Section 8, Clause 3 sets out that Congress shall have the Power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
[9] Northwest Ordinance (July 13, 1787).
[10] Letter from Thomas Jefferson, Second Question (Feb. 26, 1793).

the Piankeshaw that they could still consider themselves holders of the land.[11] In the United Companies 1796 Memorial, the commander told him that the tribal leaders rejected this seemingly magnanimous offer.[12] After some deliberation, the Chiefs replied, "That they thought; what the great Captain said was not right; that they had sold the lands." Accordingly, and with the only information we have to decide, assess, and know, it appears the sale of the subject land between Mister Johnson was valid under the laws of the Piankeshaw.

The deed in question was drafted in such a manner so as to transform the Indian title to valid fee simple title under the laws of the colonial power, as evidenced by the transfer to the plaintiffs or, in the alternative, to the King. Such language was deliberate, to transform the land from Indian land to valid land in the United States. This means that the laws or usages of such parcels were no longer part of their territory, nor held under them, by a title dependent on their laws. The Indians may also, under their laws and ours, sell their lands to this great Nation, as they have and did, and in such case, as in the present, such grants would become fee simple title under the laws of this great Nation.

In respect of the validity of the title passed from the Piankeshaw, the Courts of the United States cannot interpose for the protection. However, the person who purchases lands from the Indians in the manner so done in this case, no longer holds their title under their protection of the Indians and subject to their laws.

Indian law may also create interests in land within their own territories, while retaining other forms of title, such as their communal title, or title to persons that could not so possess according to the laws of the United States, to the whole of their territories. If the laws of an Indian Nation can permit the creation of interests in favour of citizens of the Nation, as must be the case, there appears to be no valid reason why they cannot also permit the creation of interests in favour of non-citizens. If it were a lesser title, and not a transformation as in the present case, the non-member's interest would be held under the Nation's title and subject to their laws, the Nation would retain control over the land. The land would still be part of their territory and so could be resumed by them through the exercise of their continuing authority to change and apply their own laws.

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 defendants do not exhibit a title which can be sustained in the Courts of the United States; and that there was error in the judgment which was rendered against them in the District Court of Illinois. It is so decided that the plaintiffs have title to the lands in question.

Judgment of District Court of Illinois is in error, with costs.

[11] Letter from Lord [Include name/title], to [Include title] Haldimand (July 3, 1773) (on file with British Museum).
[12] United Companies, *1796 Memorial.*