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To WLW, witness to every edition, and then some. – J.E.K.
To my grandchildren. - G.S.A.
For Eli and Iris. - L.J.S.

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This book first appeared in 1981 and now enters its fourth decade of publication. The manuscript has changed considerably over the years. Yet its commitment to a pluralistic approach to property law endures, grounded in the intricacies of black letter law yet attentive to insights from history, economics, psychology, sociology, and critical approaches. As the Preface to the First Edition, which is reprinted in part on the following page, makes clear, the law student's toolkit should include a good grasp of the interdisciplinary ideas that explain the development of property law. Understanding the connections and differences among the law of real property, personal property, and intellectual property also becomes increasingly essential with each passing year. So does an appreciation for the ways in which property law interacts with and affects societal challenges such as discrimination on the basis of race, class, sex, religion, and disability, climate change, and the COVID-19 pandemic. The tenth edition highlights those relationships and developments throughout this text.

As always, our work has been greatly aided by insights from our colleagues and students. Warm thanks to everyone who has suggested new materials, flagged typos, or identified ambiguities in earlier editions, including especially Professors Josh Blackman, Jorge Contreras, Lee Fennell, Nicole Garnett, Michael Heller, Michael Herz, Aziz Huq, Bruce Johnson, Thomas Mitchell, Brenda Simon, Jonathan Watson, Mary Sarah Bilder, Douglas Whaley, and our research assistants, Blake Altman, Jess Clay, Emily Hall, Robert Okada, Sahar Segal, and Morgan Tougas, as well as our students Charles Gibson, Simon Jacobs, Justin Taleisnik, Nico Thompson-Lleras, Nick Riley, and Virginia Robinson. Thanks also to the Carl S. Lloyd Faculty Fund for research support.

James E. Krier
Gregory S. Alexander
Lior Jacob Strahilevitz

December 2021

Property is a thoroughly modern subject of thoroughly antiquated origins. Probably in no other area of law does one see more, or even as many, strains of the old in the new. As an institution for allocating resources and distributing wealth and power, property bears in fundamentally important ways on central issues in contemporary life; as a body of doctrine, it discharges these modern-day tasks with rules and concepts drawn from age-old ways of looking at social relations in an ordered society. Property law has, to be sure, undergone constant change, but — at least in Anglo-American experience — it has not been revolutionized. Its enduring mix of old and new, rife with uneasy tensions, reflects more than an institution that has evolved over centuries and across cultures; it reflects as well two often conflicting objectives — promoting stability and accommodating change — that property systems must serve. To study property is to study social history, social relations, and social reform.

It is also, of course, to study law. The primary objective of this coursebook is to help students learn the complicated structure and functions of property doctrine and something of legal method, legal reasoning, and legal analysis. We have, however, secondary objectives as well, suggested by our opening remarks. How, why, and with what implications does the property system order relations in present-day America? What sorts of incentives does it create in terms of constructive use of scarce, valuable resources? How fairly does it confer benefits and impose burdens? To what extent is today's system a valuable, or a useless, legacy of the past? What sorts of reforms are suggested, and what might they achieve?

To pursue such secondary questions as these, and especially to accomplish the primary end of learning law and legal method, we need large doses of doctrine, but also a sense of history and of methods of critiquing institutional performance. There is, then, lots of law in what follows — in cases, statutes, text, and problems. There is also a consistent effort to trace historical antecedents. Finally, there is a fairly systematic, but by no means dominating, attempt to critique — often through an economic lens. Economics, like property, is in large part about resources. The economics in the book can be managed easily, we think, even by the totally uninitiated; it can also be ignored or even scorned. So too for the history, if one likes.

Jesse Dukeminier
James E. Krier

February 1, 1981

Books and Articles

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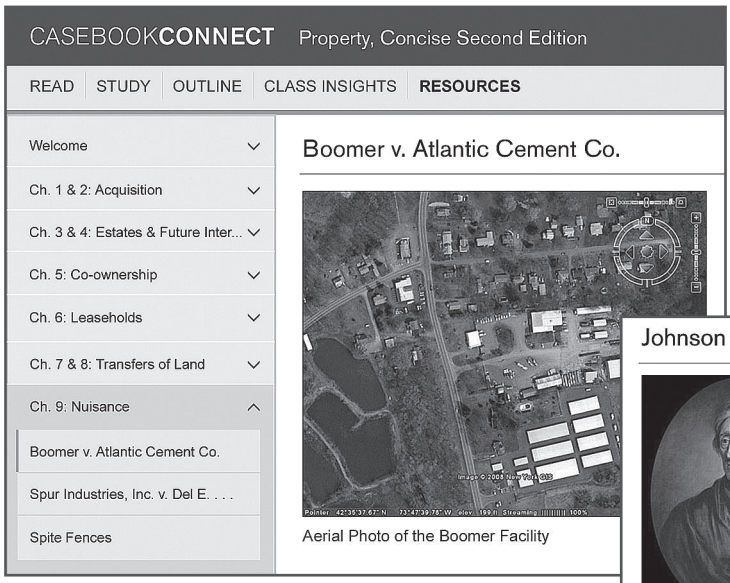

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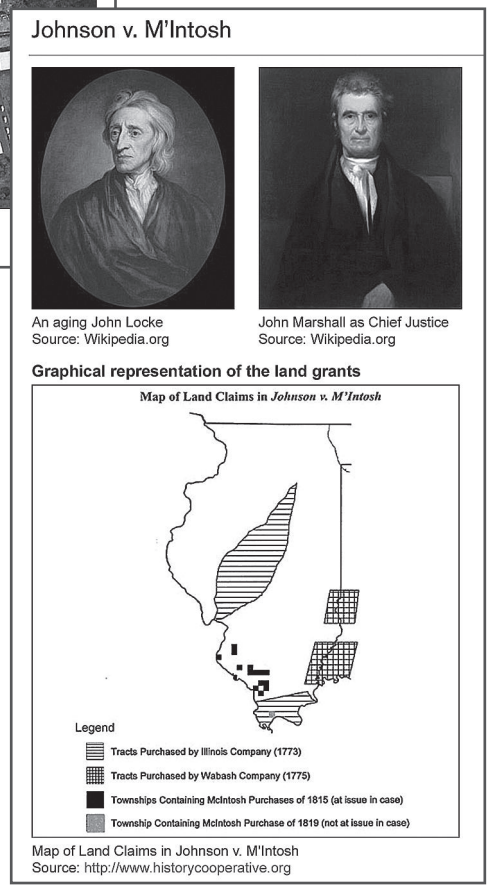

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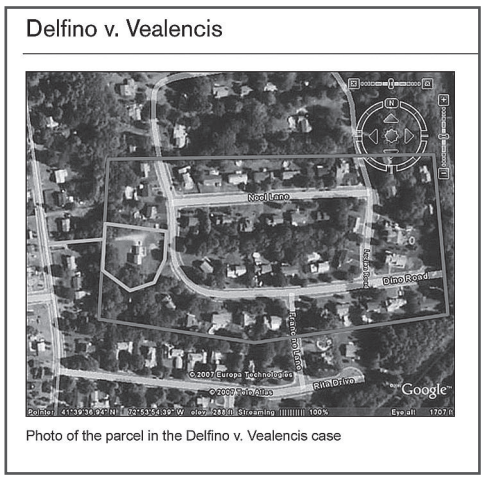

Co-ownership, Chapt6 5

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The first three chapters of this book pursue a common theme—how someone might acquire property other than by purchase—across a wide range of legal terrain. In these chapters you will learn the chief doctrinal foundations of property law. This material also introduces some key concepts, issues, and analytic methods of ongoing importance. After exploring how a person acquires property, the section concludes with an examination of what an owner can and cannot do with property and a comparison of how the law of intellectual property relates to the law governing real estate and personal property.

Qui prior est tempore potior est jure.
(Who is prior in time is stronger in right.) —

Maxim of Roman Law

First come, first served. —

Henry Brinklow,
Complaint of Roderick Mors, Ch. 17 (c. 1545)

How does property come to be, and why, and so what? Most of us most of the time take these questions for granted, which is to say that we take property for granted. But taking something for granted is not exactly the best path to understanding it. So we begin with the origins of property.

Thus in the beginning all the world was *America*. . . . —

John Locke,
Two Treatises of Government,
Book II, Ch. V ("Of Property") (c. 1690)

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

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 [later] grant from the United States. It came up on a case stated, upon which there was a judgment below for the defendant. . . .

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of 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, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show, that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.

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

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

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.

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. However conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians. . . .

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

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

In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission, is confined

to countries "then unknown to all Christian people"; and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.

The same principle continued to be recognised. [Omitted here is a discussion of various charters from the English crown, granting lands in America.]

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

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

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

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.

Virginia, particularly, within whose chartered limits the land in controversy lay, passed an act, in the year 1779, declaring her

> exclusive right of pre-emption from the Indians, of all the lands within the limits of her own chartered territory, and that no person or persons whatsoever, have, or ever had, a right to purchase any lands within the same, from any Indian nation, except only persons duly authorized to make such purchase; formerly for the use and benefit of the colony, and lately for the Commonwealth.

The act then proceeds to annul all deeds made by Indians to individuals, for the private use of the purchasers.

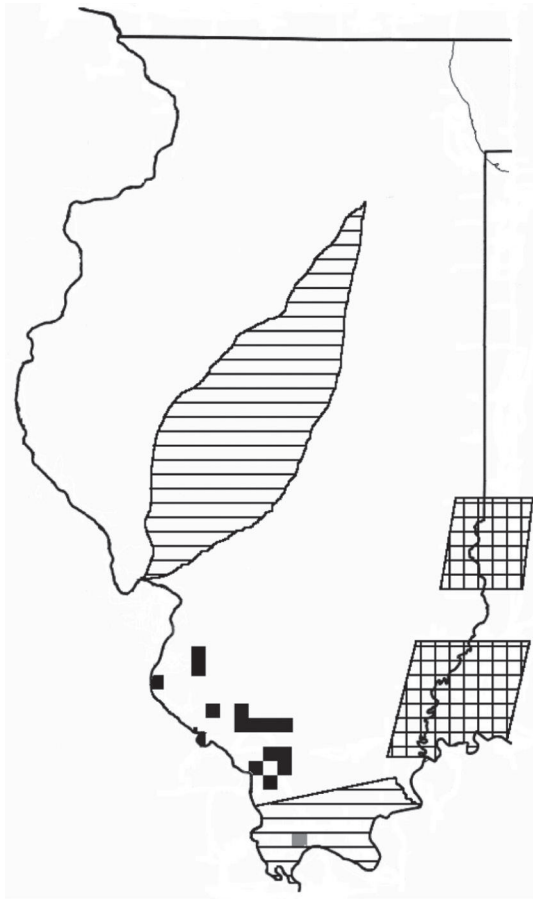
Without ascribing to this act the power of annulling vested rights, or admitting it to countervail the testimony furnished by the marginal note opposite to the title of the law, forbidding purchases from the Indians, in the revisals of the Virginia statutes, stating that law to be repealed, it may safely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

In pursuance of the same idea, Virginia proceeded, at the same session, to open her land office, for the sale of that country which now constitutes Kentucky, a country, every acre of which was then claimed and possessed by Indians, who maintained their title with as much persevering courage as was ever manifested by any people.

The States, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country northwest of the river Ohio. . . . 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. . . .

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

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



Map of land claims in Johnson v. M'Intosh. The areas in horizontal lines are the tracts purchased by the Illinois Company (1773). The areas in the hashed lines are the tracts purchased by the Wabash Company (1775). (See note 5 on page 17 for more on the Illinois and Wabash companies' purchases.) The areas in black are the townships containing McIntosh purchases of 1815, at issue in the case.

(Courtesy of Professor Eric Kades.)

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 a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title 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. . . .

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. . . .

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.

A logical place to begin. Our concern here is not the complexities of title to land once occupied exclusively by Native Americans.[1] We are interested, instead,

1. Students wishing to pursue these and other issues regarding the legal situation of Native Americans might well begin their inquiries with Felix Cohen's Handbook of Federal Indian Law (rev. ed. 2012). Cohen (1907-1953), a man of great heart and energy, made important contributions to a number of fields, including legal philosophy. He was the son of another leading philosopher, Morris Cohen (1880-1947), whose views on "Property and Sovereignty" will be considered shortly.

in getting a study of property under way, and Johnson v. M'Intosh provides an apt point of departure for several reasons.

First, how better to start a course in the American law of property than with the foundations of landownership in the United States? Land, you will learn, plays an important part in property law, and not just because so much of that law aims to resolve—better yet, avoid—conflicts over real property (as land is called). Landownership also commonly determines the ownership and control of a host of other natural resources, such as wild animals, water and minerals, peace and quiet, clean air, and open space. Moreover, many of the general legal principles pertaining to real property also apply to personal property and intellectual property (that is, property other than land). So landownership is important, and, as Johnson v. M'Intosh suggests, most landowners in the United States trace their ownership—their title—back to grants (or patents, as they are called in the case of conveyances of public land out of the government) from the United States. The United States, in turn, traces its title, by grant and otherwise, all the way back to the "discovery" of America by white men.[2]

Discovery . . . or conquest? Discovery and conquest, both of which are mentioned in Chief Justice Marshall's[3] opinion in the *Johnson* case, are terms of art referring to methods of acquiring territory in international law. Acquisition by *discovery* entails "the sighting or 'finding' of hitherto unknown or uncharted territory; it is frequently accompanied by a landing and the symbolic taking of possession," acts that give rise to an inchoate title that must (on one view) subsequently be perfected, within a reasonable time, by settling in and making an effective occupation. 4 Encyclopedia of Public International Law 839-840 (1992). *Conquest* is the taking of possession of enemy territory through force, followed by formal annexation of the defeated territory by the conqueror. See Parry & Grant Encyclopaedic Dictionary of International Law 96 (2000).

Neither of these two modes of territorial acquisition has much immediate relevance today. As to discovery, there are virtually no unknown territories on earth (what about a new volcanic island emerging in the high seas?), and territories beyond the earth are governed by special treaties and agreements placing the moon and other celestial bodies outside the reach of national appropriation. As to conquest, it has come to be proscribed by contemporary international law as a method of territorial acquisition. 4 Encyclopedia of Public International Law, supra.

In earlier times, though, discovery and conquest were of great importance, as Johnson v. M'Intosh suggests. In that case the two doctrines worked in concert.

2. Mention of tracing introduces the idea of a *chain of title*. The links in the chain are the transactions (conveyances) by which a parcel of land moves from owner to owner over time. The significance and operation of chain of title are examined in Chapters 8 and 9 of this book.

3. John Marshall (1755-1835), the fourth Chief Justice of the United States (from 1801 to 1835), is one of the great figures in the constitutional history of the United States. Marshall had little formal education (and only six weeks of formal legal training!) but had a remarkable mind and character. He was prominent as a diplomat, as a legislator, and as Secretary of State before being nominated as Chief Justice by President John Adams. A strong defender of the Constitution and the architect of judicial review, "Marshall raised the office [of Chief Justice] and the Supreme Court to stature and power previously lacking." Under his leadership, the practice of individual opinions by individual justices largely ceased, dissents were discouraged, and the "Court came to speak with one voice. Usually the voice was Marshall's." The quotations are from Robert Faulkner's essay on Marshall in 4 Encyclopedia of the American Constitution 1672-1676 (2000).

Discovery, Marshall wrote, "gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[4] See page 7. The first "discoverer" had a preemptive right to deal with the Indians, as against subsequent "discoverers." But why did discovery play any role at all? In principle, only a *res nullius* or *terra nullius* (a thing or territory belonging to no one), a "hitherto unknown territory," can be discovered. See 4 Encyclopedia of Public International Law, supra. North America in the fifteenth century was not unknown to its indigenous occupants. Why didn't it *belong* to them?

The answer is discomfiting. During the so-called classical era of discovery (1450-1600), Europeans commonly thought that prior possession by aboriginal populations did not matter. "In previous centuries European international lawyers were sometimes reluctant to admit that non-European societies could constitute states for the purposes of international law, and territory inhabited by non-European peoples was sometimes regarded as *terra nullius*." Peter Malanczuk, Akehurst's Modern Introduction to International Law 148 (7th ed. 1997). Marshall was alluding to this attitude when he said of North America that "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."[5] See page 4.

In common law countries outside of the United States, indigenous populations have sometimes fared better than they did in Johnson v. M'Intosh. In 2007, Belize's Supreme Court considered the land claims of that country's Mayan population in villages that Mayans occupied before the arrival of the Spanish and British. The court held that these villages, which generations of Mayan inhabitants continued to occupy through a combination of individual and communal claims, remained the property of these indigenous villagers. See Aurelio Cal et al. v. Attorney General ¶ 92, Claims No. 171 & 172 (Belize 2007). The court held that the Mayan villages at issue never had been conquered, adding that the transfer of sovereignty over Belize as a whole had not extinguished the property rights of the native inhabitants. Id. at ¶¶ 80, 127.

For more on the historical context of Johnson v. M'Intosh, see Blake Watson, Buying America from the Indians: *Johnson v. McIntosh* and the History of Native Land Rights (2012); Robert J. Miller, Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny (2006). We shall return to the subject shortly, after considering some additional reasons to begin a study of property with Johnson v. M'Intosh.

4. Note that the modern indictment of acquisition by conquest is not "regarded as being retroactive to titles made by conquest in an earlier period." Robert Y. Jennings, The Acquisition of Territory in International Law 56 (1963).

5. The sarcasm and irony seen here and elsewhere in Marshall's opinion suggest his embarrassment with what he had to write, and there is independent evidence that he was sympathetic to the plight of Native Americans. In an 1828 letter to Justice Joseph Story, for example, Marshall mentioned some reasons to be forgiving of the "conduct of our forefathers in expelling the original occupants of the soil," but went on to state his view that "every oppression now exercised on a helpless people depending on our magnanimity and justice for the preservation of their existence impresses a deep stain on the American character." Quoted in The Political and Economic Doctrines of John Marshall 124-125 (John E. Oster ed., 1914).

John Marshall
Chief Justice of the United States, 1801-1835
by Chester Harding (1828)
Collection of the Boston Athenaeum

Occupancy theory and the principle of first in time. The doctrine of discovery at work in *Johnson* may be of little importance today, but exactly the opposite is true of the doctrine's foundation—the principle of first in time.

"The notion that being there first somehow justifies ownership rights is a venerable and persistent one." Lawrence C. Becker, Property Rights: Philosophical Foundations 24 (1977). The theory of first occupancy, or first possession, dates back to Roman law and played a considerable part in the writings of Hugo Grotius and Samuel Pufendorf in the seventeenth century (you will soon bump into these figures again; see pages 20-22, 26). As Grotius saw it, the riches of the earth were initially held in common (nothing belonged to any one individual). But because avarice eventually led to scarcity, the institution of private property became necessary to preserve peace. Private ownership was imagined to have developed according to agreements, explicit ones or those implied by occupation; it was to be "supposed" that whatever each person had taken possession of should be that person's property. Eventually, systems of government were introduced (how?), and the original rules of acquisition were modified. Still, though, the government had to recognize the pre-established property rights of its citizens.

> [T]he institution of private property really protected men's natural equality of rights. "Now property ownership was introduced for the purpose of preserving equality to this end, in fact, that each should enjoy his own." But what is this "own" to which each man has an equal right? . . . In fact, the "own" which the laws of property protect is whatever an individual has managed to get hold of, and equality of right, applied to property, means only that every man has an equal right to grab. The institution of property was an agreement among men legalizing what each had already grabbed, without any right to do so, and granting, for the future, a formal right of ownership to the first grabber. As a result of this agreement, which, by a remarkable oversight, puts no limit on the amount of property any one person may occupy, everything would soon pass into private ownership, and the equal right to grab would cease to have any practical value. [Richard Schlatter, Private Property: The History of an Idea 130-131 (1951).][6]

Occupancy fares rather well as a positive (descriptive or explanatory) theory of the origins of property. Sir William Blackstone put it to that use in his famous Commentaries on the Laws of England, completed a few years before the American Revolution (see page 26). As Becker observed above, the idea that being prior in time matters is not only "venerable" but "persistent." You will see it running throughout the materials in this book, particularly in the next section on Acquisition by Capture. For an overview of its active role in contemporary property law, see Lawrence Berger, An Analysis of the Doctrine that "First in Time Is First in Right," 64 Neb. L. Rev. 349 (1985).

Despite its persistence, however, the normative case for first possession—its force as a justification—is commonly thought to be rather weak. See Morris

6. For implicit disagreement with Schlatter's account, see Adam Mossoff, What Is Property? Putting the Pieces Back Together, 45 Ariz. L. Rev. 371, 379-386 (2003), arguing that the words "one's own" in the arguments of Grotius and Pufendorf refer not just to what one can get hold of, but to the idea that one has a right to life and liberty, and that actions based on this right are necessary and sufficient to create a right of property. John Locke's labor theory, to which we will turn momentarily, begins with the same theoretical starting point.

Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 15-16 (1927). But Cohen was not single-minded; he did find "a kernel of value" in the principle. Richard Epstein provides a more spirited defense in Richard A. Epstein, Possession as the Root of Title, 13 Ga. L. Rev. 1221 (1979). Can you anticipate the arguments in these articles, constructing for yourself a list of the pros and cons of first in time?

Labor theory and John Locke. The famous philosopher John Locke (1632-1704) drew first occupancy into his labor theory of property, but in a way that was thought to give it greater moral weight. The problem is this: So what if someone possesses something first; why should anyone else be obliged to respect the claim of the first possessor? Locke reasoned that the obligation "was imposed by the law of nature, and bound all men fast long before mere human conventions had been thought of." Schlatter, supra, at 154. Here is the core of Locke's argument:

> Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided, and left it in, he has mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others. [John Locke, Two Treatises of Government, Book II, Ch. V (1690).]

Locke's labor theory appears in several versions, most of them deficient in one respect or another. Like what? See Carol M. Rose, Property and Persuasion 11 (1994) (why does one own one's labor? In any event, how broad is the right that one establishes by mixing one's labor with something else?). Still, though, labor theory has its appeal, and the law of property continues to feel its influence (just as with its forerunner, occupancy theory). See, e.g., Mala Chatterjee, Lockean Copyright versus Lockean Property, 12 J. Legal Anal. 136 (2020); Eric R. Claeys, Labor, Exclusion, and Flourishing in Property Law, 95 N.C. L. Rev. 413 (2017). We mention a few examples here as an aside and ask you to watch for others as your studies progress.

Consider, then, the law of *accession*, which comes into play when one person adds to the property of another: by labor alone, *A* chopping *B*'s trees and making flower boxes from them; by labor and the addition of new material, *C* using her own oils and *D*'s canvas to produce a valuable painting. As between *A* and *B*, or *C* and *D*, which party is entitled to the final product? Is the other party entitled to damages equal to the value of his or her contribution? These issues look to be simple ones, but they are not. What factors do you suppose the courts would consider in resolving them? See Ray A. Brown, The Law of Personal Property 49-62 (Walter V. Raushenbush ed., 3d ed. 1975). For an interesting theoretical analysis of the law of accession, see Thomas W. Merrill, Accession and Original Ownership, 1 J. Legal Analysis 459 (2009). A particular virtue of Merrill's treatment is that it shows a number of connections between accession and several other topics considered in the first three chapters of this book.

Another illustration of labor theory at work is found in Haslem v. Lockwood, 37 Conn. 500 (1871), where the plaintiff had raked into heaps manure that had accumulated in a public street, intending to carry it away the next day. Before he could do so, the defendant found the heaps of manure and hauled them off in his cart. In an action in trover for the value of the manure, the court held for the plaintiff. The manure belonged originally to the owners of the animals that dropped it, but had been abandoned. As abandoned property, it belonged to the first occupant, the plaintiff, who "had changed its original condition and greatly enhanced its value by his labor. . . ." 37 Conn. at 506. The defendant argued that the plaintiff had lost his rights when he left the heaps unattended overnight. The court asked, "if a party finds property comparatively worthless . . . and greatly increases its value by his labor and expense, does he lose his right if he leaves it a reasonable time to procure the means to take it away, when such means are necessary for its removal?" 37 Conn. at 507. Answer: No.

John Locke and Johnson v. M'Intosh. Return now to the *Johnson* case where we left it at the end of Note 2 above. Locke appears to have shared the common European view that the Native Americans had no substantial claim to the New World they had so long occupied.

> [He] reasoned that the Indians' occupancy of their aboriginal lands did not involve an adequate amount of "labor" to perfect a "property" interest in the soil. His argument helped frame and direct later liberal debates in colonial America on the natural rights of European agriculturists to dispossess tribal societies of their land base. [Robert A. Williams, Jr., The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought, 57 S. Cal. L. Rev. 1, 3 n.4 (1983).]

See generally Robert A. Williams, Jr., The American Indian in Western Legal Thought (1990).

Notwithstanding the foregoing, there is considerable evidence that American lawyers and government officials actually did, for a time, regard the Indians as owners of their lands. See Stuart Banner, How the Indians Lost Their Land: Law and Power on the Frontier (2005). In a detailed and convincing account, Professor Banner shows that acknowledgment of Indian ownership was common in the early 1790s. But by the time of the decision in *Johnson* some 30 years later, conventional wisdom was to the opposite effect: The Indians were not owners but merely had a right of occupancy. "A major change in American legal thought had taken place during the intervening three decades. . . . Like many transformations in legal thought, this one was so complete that contemporaries often failed to notice that it had occurred. They came to believe instead that they were simply following the rule laid down by their English colonial predecessors, and that the Indians had *never* been accorded full ownership of their land. And that view, expressed most prominently by the Supreme Court in *Johnson v. M'Intosh*, has persisted right up until today." Id. at 150. Rights to land flowed from the legitimate sovereign government, and only from that source.

Some recent scholarship by legal historians helps explain these developments. See Gregory Ablavsky, The Rise of Federal Title, 106 Cal. L. Rev. 631 (2018). Ablavsky notes that in 1763, the English crown prohibited both individuals

and the colonies from purchasing western lands from the Indians, though speculators continued to make such purchases despite the legal prohibitions. During the decades that followed, two groups of speculators purchased millions of acres of land in the West: The Transylvania Company bought from the Cherokees, and the Illinois and Wabash companies purchased from the Illinois and Piankeshaw Indians. Id. at 647. Thomas Johnson, whose son and grandson brought suit in *Johnson*, was a major investor in the Illinois and Wabash companies, and also served as a justice on the Supreme Court of the United States from 1792 to 1793.

The Transylvania, Illinois, and Wabash companies made their purchases shortly before the onset of the Revolutionary War. While company executives knew the purchases were invalid under English law, they guessed that a new government might soon be in charge, one that could prove more sympathetic to their claims to title. After the war was won, these companies lobbied the states to recognize their claims, to no avail. (Virginia's government officials wanted to be in charge of allocating the Commonwealth's western landholdings themselves.) So the would-be landowners took their fight to Congress, where they waged a long but unsuccessful campaign to win recognition of their landholdings. Id. at 656. With Congress's final, definitive rejection in 1811, the companies (and M'Intosh, who claimed title to smaller but still substantial swaths of land, as the map on page 8 shows) turned to their last resort: the federal courts, culminating with the decision in *Johnson*. As Ablavsky writes, the decision "was unsurprising, given that the companies' claim had already been adjudicated, and rejected, by three separate sovereigns." Id.

Johnson hardly settled everything. State records describing who controlled what were a mess. States eventually ceded most of their public lands to the federal government, which was forced to settle numerous disputes among conflicting claimants. For example, western land had been promised to revolutionary war veterans, and while many veterans sold their landholdings willingly, others had been swindled. Id. at 663. In Kentucky, meanwhile, grants had been issued by the government to more than 24 million acres of land, "twice as much land as the state contained[!]" Id. at 649. Meanwhile, a recurring problem arose when states granted white men rights to land still occupied by Indians, and the federal government later promised those same lands to Indian tribes by treaty. Congress and Thomas Jefferson (then Secretary of State) were for the most part hostile to the claims of those tracing their title to state grants in these circumstances. See Lindsay G. Robertson, Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Land 106-109 (2005). All these disputes over title gave rise to an avalanche of litigation. Real property disputes comprised a sizable percentage of the Supreme Court's docket between 1815 and 1835, becoming the largest category of non-constitutional cases. Ablavsky, supra, at 650 & n.94.

Notice finally that in the penultimate paragraph of the *Johnson* opinion (page 10) the Court recognized an Indian title of occupancy, which only the government could purchase. Given that the European settlers had such superior might, why did they not instead simply conquer the Indians altogether, and grant them nothing? A persuasive answer is suggested in Eric Kades, The Dark Side of Efficiency: *Johnson v. M'Intosh* and the Expropriation of American Indian Lands,