

INDG / CRIM 429: Indigenous Peoples and International Law

The Marshall Cases: *Johnson v M'Intosh* (1823)

Background:

- *Royal Proclamation* (1763) asserts British claim to North America and notes that land can be acquired from Indians only by the Crown
- In 1775, a group of land speculators (including Thomas Johnson) buy a huge chunk of land in the colony of Virginia (in what is now Illinois) from the Piankeshaw Indians
- In 1776 the United States comes into existence after a revolutionary war with Britain
- In 1779 the Colony of Virginia passes a law that is reminiscent of the Royal Proclamation regarding land acquisition
- In 1783 Virginia cedes its territory to the United States and the land that Johnson et al had purchased becomes part of the state of Illinois
- Johnson and his co-investors keep on trying to get the US to affirm its ownership, but are ignored
- By 1818 Johnson, Sr is dead, has bequeathed his portion to his son, and the US sells a big chunk of land, which included land purchased by Johnson et al, to William M'Intosh
- Johnson and his co-investors sue M'Intosh, saying the land was theirs and the US had no right to sell.

Johnson argues:

- The Piankeshaw Indians had title to the land
- They are not British citizens and hence are not bound by the *Royal Proclamation* and hence could sell to whomever they wanted
- Although Johnson et al were British citizens, there were colonies in existence so it was no longer the King's jurisdiction
- The 1779 Virginia law was passed after they had already purchased the land

M'Intosh argues:

- His title came from the US government, who are the only legal entity who could legitimately pass on title
- The Law of Nations denies the right of Indians to hold sovereign title; living in "state of nature"
- "Discovery" is the source of sovereign title, and there can be only one sovereign in any given place at any given time
- Even if the Piankeshaw Indians were once sovereign, that was no longer the case: they are "perpetual inhabitants" with "diminished rights" "living under the protection of another"

The Court decides:

- The question becomes "Is it within the power of the Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country?"
- The "doctrine of discovery" does not in and of itself bestow sovereignty; it is a mutual agreement among nations designed to ease tensions and avoid war with other European nations
- The Indians had title as "occupants" of the country, but their right to sovereignty is a "diminished" right, i.e., they can't "own" land, but can only use/occupy it. A diminished title that was nonetheless a claim on the land
- Discovery gave the discoverer the right to negotiate, and to extinguish because to leave the land to the Indians was to leave it a wilderness
- Bottom line is that Johnson is out of luck; the land belongs to M'Intosh