WIGGINS/LAND/TITLES

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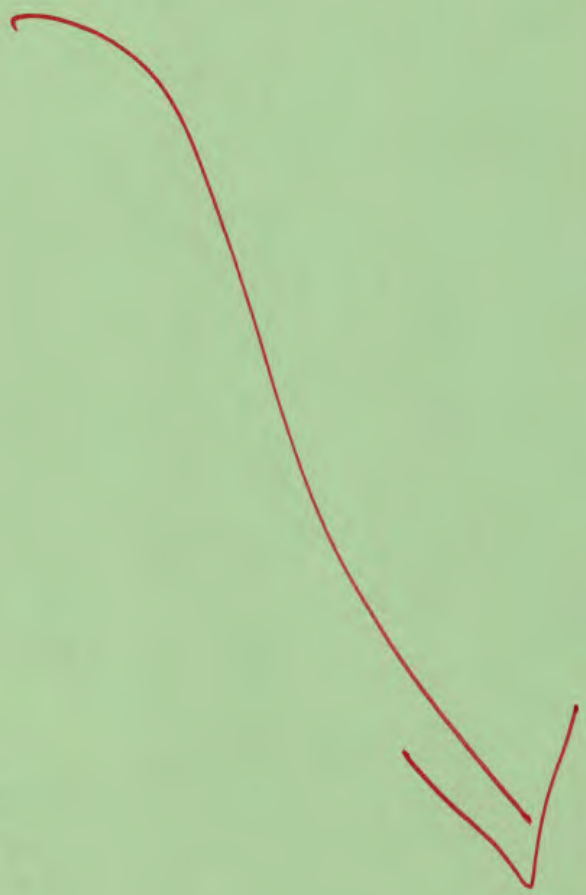
(Editors' Note: The footnotes for this article are presented together following the conclusion on page 10.)



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LAND TITLES

Claims of the Passamaquoddy and Penobscot Indians to 12 million acres of Maine lands have revived legal, moral, and philosophical disputes over the nature of all land titles. Most arguments hinge on the meaning of the "right of discovery," from which descendents of European explorers derive their title, and the precise embrace of "aboriginal rights" asserted by natives.

There are many land titles in Maine supported initially on the right of discovery; many dependent originally on sales of aboriginal rights by Indians; and many resting on both grounds.

The right of discovery was a settled principle of law in Europe by the ~~fifteenth~~ 15th century. Jeremy Bentham called it the right of the first occupant. (1)

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This eighteenth century exponent of utilitarian theories and advocate of government giving "the greatest good to the greatest number," explained the theory:

"When the right of property is granted to the first occupant, he is spared the pain of disappointment; that pain which he would feel at finding himself deprived of the thing which he had occupied before all others. It prevents contests; the combats which might take place between him and successive competitors. It gives birth to enjoyments, which, without it, would not exist for anyone: the first occupier, trembling

lest he should lose what he had found, would not dare openly to enjoy it....If every unappropriated thing did not belong to the first occupier, it would always be the prey of the strongest; the weak would be subject to continual oppression. The title of original occupation has been the primitive foundation of property. It may be employed again, with regard to newly formed islands, or lands newly discovered, reservation being made of the right of governing--the superior right of the sovereign." (2)

The Vatican publicized an already common rule among nations when it proclaimed the international rule of discovery in the fifteenth century. Charles M. Andrews, the distinguished Yale historian, points this out: "On March 3, 1493, the Bull of Alexander VI asserted that all lands discovered and to be discovered, not belonging to a Christian prince, become the property of the king under whom the discovery was made, establishing the modern right of discovery." (3)

This decree, of course, pertained to the division of the new world among the civilized great powers. It left unanswered the question of whether or not any right of discovery resided in the savage occupiers of land discovered by Europeans. It was always construed to apply only to the civilized nations, and to provide for a division of the new world that would preclude wars over national possession.

Within their colonial domains, the European discoverers claimed (and their successors continued to assert) absolute title to the lands and exclusive right of pre-emption.

James Kent wrote in the early 1800's that,

"Congress has the exclusive right of pre-emption to all Indian lands lying within the territory of the United States."

"The title is in the United States by treaty of peace with Great Britain and by subsequent cessions from France and Spain and by cessions from the individual states; and the Indians have only a right of occupancy and the United States possesses the legal title, subject to that occupancy, and with an absolute and exclusive right to extinguish the Indian title of occupancy, either by conquest or purchase."

"The title of European nations, which passed to the United States, to this immense territorial empire was founded on discovery and conquest; and the European customary laws of nations prior to discovery gave this title to the soil subject to the possessory rights of natives, and which occupancy was all the right that European conquerors and discoverers, and which the United States, as succeeding to their title, would admit to reside in the native Indians." (4)

James Kent was chancellor of the New York Court of Chancery in 1814, and the reports on his cases from 1799 to 1823 made him the virtual creator of equity jurisdiction in the United States. (5)

Another aspect of the law at the time of American discoveries also figured importantly in the whole question of American land titles:

"It is a fundamental principle of English law derived from the maxims of feudal times, that the king was the orginal proprietor, or lord paramount of all the land in the kingdom and

the true and only source of title. In this country we have adopted the same principles and applied them to our republican government." ~~(6)~~ wrote Kent, (6)

Title to lands in this country, according to Kent, must derive from existing governments or royal predecessors or colonial chartered governments. He wrote:

"....it is a settled and fundamental doctrine with us that all valid individual titles to land within the United States derive from the grant of our own local governments or from that of the United States or from the crown or royal chartered governments established prior to the Revolution. This is the doctrine declared in New York in the case of Jackson vs. Ingraham. And it was held to be a settled rule that the courts could not take notice of any title of land not derived from our own state or colonial governments and duly verified by patent. Even with respect to the Indian reservation lands of which they still retain the occupancy, the validity of a patent had not hitherto been permitted to be drawn into question in a suit between citizens of the state under the pretext that the Indian title as original lords of the soil had not been extinguished." (7)

Kent also set forth the right of the states to take Indian land, as he found it established in Fletcher vs. Peck. He wrote:

"It was also declared, in Fletcher vs. Peck, to be the opinion of the Supreme Court of the United States, that the

nature of the Indian title to lands lying within the territorial limits of a state, though entitled to be respected by all courts until it be legitimately extinguished, was not such as to be absolutely repugnant to a seisen en fee on the part of the government within whose jurisdiction the lands are situated." (8)

The theory that the right of conquest or discovery gave Europeans titles to land superior to native title has been much disputed on moral and theoretical grounds. Kent dismissed these reproaches, in the following paragraphs:

"The rule that the Indian title was subordinate to the absolute, the ultimate title of the governments of the European colonists, and that the Indians were to be considered as occupants, and entitled to protection in peace in that character only, and incapable of transferring their rights to others was the best one that could be adopted with safety. It is established by numerous compacts, treaties, laws, and ordinances, and founded on immemorial usage. The country has been colonized and settled and is now held by that title. It is the law of the land and no court of justice can permit the right to be disturbed by speculative reasonings on abstract rights." (9)

Decisive as these statements of the law seem to be, they do not mean, and Kent did not mean, that the Indians had no rights whatever as "occupants." The English colonists, as Kent has pointed out, "were not satisfied or did not deem it expedient to settle the country without the consent of the aborigines." They made purchases from the Indians under sanction

of the civil authority. (10)

What the Indian rights really were remained a long subject of dispute. D'Arcy McNickle, of the Center for the History of the American Indian at the Newberry Library, last year pointed out the conflict between the humanist-assimilationists and those who regarded the Indians as mere savages without rights. He said the Spaniard, Vitoria, had spelled out what those rights were: "They were entitled to the land they occupied, which could not be taken from them except in a 'just' war or for compensation. This idea was echoed later in the Royal Proclamation of 1763 when the British government declared that the lands occupied by the Indians were not to be taken except in proper negotiation, with the British Crown participating to ensure that the Indians received fair treatment. Otherwise, Indians were not to be molested in the lands they were occupying. ....Henry Knox argued that the Indians were 'possessors of the soil' they occupied. Some people suggested that the question of land title could be settled most effectively by exterminating the Indians. A debate was in process at the time as to whether Indians should not be exterminated and get the thing over with, but Knox argued that this solution would not only be dishonorable but it would be expensive. Thomas Jefferson was in the same tradition. He said, 'let our settlements and theirs meet and blend together.'" (11)

The Virginia Company, while it never "acknowledged the validity of Indian titles to the soil, always instructed the governors, whom it sent over, to buy lands of the Indians and

to enter into friendly relations with them." (12)

John Adams, in his early years of law practise in Massachusetts, wrote: "No man has a right to a foot of land who has not a good purchase from the natives, by a license from his lawful prince." (13)

Roger Williams inveighed against the Massachusetts Charter for claiming rights of discovery, rejecting all prior rights of the crown to the soil; but he went to England in 1644 to get a patent confirming his colony's right to the soil which he had already purchased from the Narragansett Indians. (14)

In times without number, the New England colonists, while denying Indian rights to the land, bought land from them (or such rights as they had). People from Dorchester, Newton, and Watertown, in 1635, seized upon Connecticut lands which the Plymouth colony had already bought from the Indians, and which the Dutch had purchased from the Pequots. They called the land "the Lord's Waste," and therefore open to all, under the conviction then prevailing among many of the Puritans that they had "a common right to (all new land) with the rest of the sons of Noah." The colony at New Haven had no crown patent of any kind and erected their civil government "upon the uncertain foundation of a title obtained from Indian purchases." (15)

A group of former New Haven residents bought land from the Indians at Menuncatuck, a few years after they arrived from England in 1639.

Such Indian purchases went forward in the colonies. It is

interesting to note that they continued in spite of Massachusetts Bay laws in 1641 providing that "no person whatsoever shall henceforth buy land of any Indian, without license first had and obtained of the General Court." (16)

In 1701, Massachusetts vacated title to lands acquired from the Indians without the government's consent since 1633, except lands bought by towns. The Act of 1701-2 was an interesting predecessor to the Trade and Intercourse Act of the United States Congress adopted in 1790. (17)

Early Americans anguished a lot over the ownership of land, the international rights by discovery and the nature of Indian titles. James Sullivan, in his HISTORY OF THE DISTRICT OF MAINE, 1795, just about boxed the compass. He wrote on European Grants of Land: "The question, whether the sovereigns of Europe had a right to grant lands in America, can never be answered in the affirmative, with any pretensions to justice and reason." (18)

He thought acquisition of territory could only come from conquest, pre-occupancy, or from purchase. There was no purchase and no conquest before James I granted the lands, he argued.

Sullivan, however, thought there were also objections to the right of the Natives to sell lands in America. He was of the belief that neither the Europeans nor the Savages had a right to sell lands, but conceded that "the titles are fairly and regularly derived and held." (19)

He rested his claims to title on man's right to existence. He contended a man in a crowded country had a right to seek subsistence in a country less crowded: "If in the country to which he shall migrate, there is no soil but what is the property of the nation existing there, or some individual member of it, he must come in by purchase; but if he can find a spot not thus appropriated, he has clearly a right to seize upon it as his own.....the earth belongs to the sons of men indiscriminately..." (20)

Sullivan's theories are like Bentham's theory of the "first occupant." They partake of the utilitarian, practical notion that it is the use of the soil that justifies its retention as property, and so he concludes:

"As the Savages had no ideas of a permanent use and improvement of the soil, or ever had a personal, or individual right in it, or ever by annexing their labour to it, rendered it better, or more apt for the life of man, I am led to conclude that they had no more property in the soil on which they hunted, than they had in the waters in which they fished." (21)

Sullivan protested the idea that the whole continent must be left to a people who would use it for the chase and the hunt instead of cultivating it, and be able to sustain only one person where civilized peoples could maintain 500.

Henry Rowe Schoolcraft, a great deal later, in 1851, in his HISTORICAL AND STATISTICAL INFORMATION RESPECTING THE HISTORY, CONDITION AND PROSPECTS OF THE INDIAN TRIBES OF THE UNITED STATES, ventured the same philosophy. Of the possessory right of the Indians,

he wrote: "The Americans who succeeded to their (the Indians') guardianship treat them as quasi-nationalities, devoid of sovereignty, but having an absolute possessory right to the soil, and to its usufruct; power to cede this right to make peace, and to regulate the boundaries of their land...". (22)

Like Sullivan he could not bear the thought of a great empty continent (under native land title). It was never desirable, he said, "or in accordance with the attributes of the Divine mind as exhibited by the process of art, industry, science, education or christianity to keep such an immense and valuable tract of territory in a state of wilderness for no other purpose than that wild animals may multiply, and the most predatory and destructive war be continued." (23)

American notions of Indian title to land seemed to move slowly in the direction of this pragmatic philosophy. Just what the aboriginal title amounted to was not always clear. Chief Justice John Marshall, in Johnson vs. McIntosh, in 1823, decided that title to 50 million acres between the Wabash and Illinois River, lay with the holder of a grant that originated with Great Britain's possession by right of discovery, as against a title resting on purchase from the Indians. Marshall's biographer said the opinion "brushed aside Indian titles almost as brusquely as did Georgia," in its claims on Cherokee lands. "All the Indians had had, said the Court, was a right of occupancy, apparently acquired by the mere accident of having been born on the lands and having used them for generations." (24)

In their brief in Passamaquoddy vs. Morton, the Maine Indians argue that Marshall intended to apply the right of discovery only as a rule between nations, but never intended to say that the Indian title meant nothing. Nevertheless, Johnson vs. McIntosh in 1823 clearly disabled the holders of Indian titles from a valid sale of land (without government approval). If it did not make clear what "occupancy" amounted to, it made clear what it did not amount to, i.e. the right to give a valid title by sale.

Congress, in May of 1830, in conformity with the wishes of the Jackson Administration, passed a bill to remove the Cherokee Indians to Oklahoma. This was deplored as a violation of the public faith of the Union and of its treaties with the Indians, by John Quincy Adams, and by many others. There was further enabling legislation passed on July 14, 1832. This, Chancellor Kent said, "became the systematic and settled policy of the Administration of Andrew Jackson. The protection which was directed to be afforded to the Indians under the Act of March 30, 1802, and which was stipulated by treaties to be granted to them has been withdrawn...." (25)

The policy of settling the Indians beyond the Mississippi thereafter proceeded, year by year. By 1848, James K. Polk, in his fourth annual message to Congress, on December 5, reported: "Within the last four years eight important treaties have been negotiated with different Indian tribes, and at a cost of $1,842,000; Indian lands to the amount of more than 18,500,000 acres have been

ceded to the United States, and provision has been made for settling in the country West of the Mississippi the tribes which occupied this large extent of the public domain. The title to all the Indian lands within the several States of our Union, with the exception of a few small reservations, is now extinguished, and a vast region opened for settlement and cultivation." (26)

These removals did not go unopposed at the time and they have been abundantly criticized since. When the Cherokee had attempted to arrest this policy by an appeal to the United States Supreme Court, on the basis of the ground that they were a foreign nation, and had a treaty with the United States, the Supreme Court in March, 1831, decided against them. The Cherokee had argued that the State could not take away their lands since all the land originally belonged to the Indians and could be acquired only by treaty. (27)

A dissenting opinion by Associate Justices, Story and Thompson, in that case made the argument presented by the Passamaquoddy and Penobscot Indians to the First District Court. They held that the Federal government was the protector of the Indians, and the Federal courts, as the arm of that government, must have jurisdiction. But they did not persuade John Marshall.

While the Federal government proceeded to move great numbers of tribes west, in conformity with Andrew Jackson's theory that they could not subsist in close proximity with European descendants

without impairment of the Indian culture, it paid little attention to the Indians of the Northeast.

"As the Revolution progressed, Indian affairs were handled centrally more and more, and after the Peace of 1783, it was increasingly recognized that the Confederation must assume greater control over Indians' matters west of the Appalachian ranges. It was natural, therefore, that the new federal government, in 1789 was given most of the responsibility for supervising Indian relations, although the original states retained responsibility for Indian tribes, wholly within their boundaries." (28)

The Maine Indians no doubt are fortunate that their plight was left to the State of Maine from 1832 to 1848, or they probably would have joined the Cherokee and the other tribes in reservations across the Mississippi.

For more than 200 years, Indian and Europeans have dwelt together on the North American continent without reconciling their views on land titles. Passamaquoddy vs. Morton is only the most recent of a long train of litigation between peoples of utterly differing notions about the land.

Robert H. Gardiner, in the Maine Historical Society Collections, commented on the Indian view:

"The Indian notions of landed property are different from ours--his ownership is not in its nature exclusive--he wants land only for hunting and fishing, and he can sell this right to others and yet retain the same possession himself, which he had before, he did not hesitate, therefore, for the merest

trible, to grant large tracts to anyone with all the formalities of English law, supposing he only gave the right of hunting and fishing on his grounds in common with himself, and he could, therefore, grant again each succeeding day the same land to others. The evils arising from these deeds became so great that an act was passed in 1701 by the General Court of Massachusetts, to prevent and make void clandestine and illegal purchases from the Indians, though it did not make void purchases made previous to this period to the Eastward of Piscataqua." (29)

Into an almost empty continent peopled by primitive tribes with these notions of real property came the Europeans with settled views of landed property titles, including the principle that the sovereign holds all land in fee simple, that among European princes the right of discovery prevails, that titles so derived reside in the crown, and its successors, that aborigines have only a right of occupancy that they cannot convey, that the occupying nation has the right of pre-emption (the exclusive right to buy from the natives), that it has the power to modify or extinguish native title to land at will.

Titles to land held by the descendants of Europeans on the Eastern seaboard derive from these conceptions of real property rights, and if they are substantially altered or overturned in the litigation now in process, there will be few land titles between the Appalachians and the Atlantic not open to like assault of 120,000 other tribal Indians who, in the language of the Passamaquoddy brief "also have been ignored by the federal government."

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footnotes follow