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History and Interpretation of the Great Case of *Johnson v. M'Intosh*

ERIC KADES

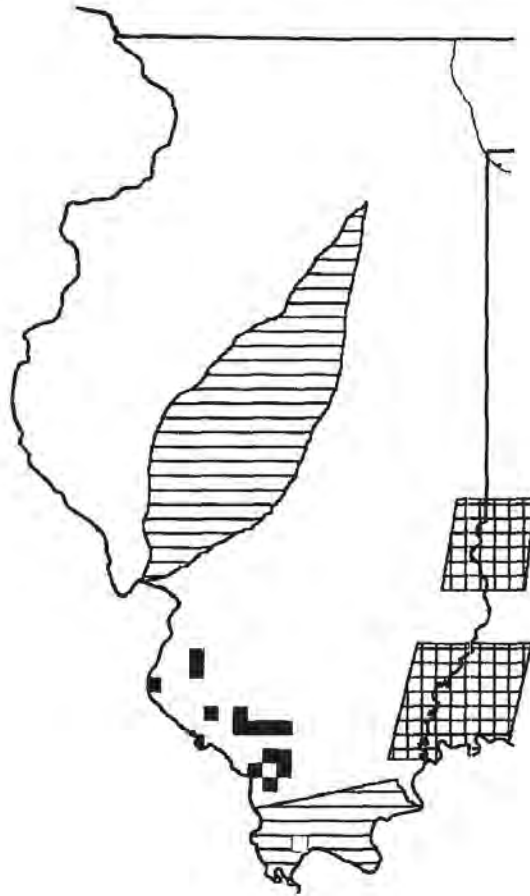
At the root of most land titles in America outside the original thirteen colonies sits a federal patent. The validity of government title, in turn, rests on "[t]he great case of *Johnson v. M'Intosh*,"¹ which held that a discovering sovereign has the exclusive right to extinguish Indians' interests in their lands, either by purchase or just war. Yet both legal and historical scholarship on this "great case" is surprisingly thin. There are no studies examining the litigants or the actual acreage under dispute (surprising for a real property dispute). There are also a number of unanswered legal questions surrounding Chief Justice Marshall's opinion in *M'Intosh*, perhaps none more glaring than the failure to pin down the legal basis for the decision. This article endeavors to fill in these gaps.

M'Intosh involved conflicting claims to large tracts of land in southern Illinois and Indiana. The plaintiffs made their claim under deeds obtained directly from the Indians by predecessors organized as the United Illinois

1. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1954), citing *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). In the opinion itself, Chief Justice Marshall adverted to the "magnitude of the interest in [this] litigation." *Ibid.*, 604. A prominent national newspaper reported in only a short paragraph the outcome of a closely watched Kentucky land title case, *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823), but devoted an entire column to *Johnson v. M'Intosh*: "from the great importance of the subject matter in controversy, [*Johnson v. M'Intosh*] seems to require rather a more detailed notice than it is usual, or even possible, in general to take of questions argued before [the Supreme Court]." *Niles' Register* (Baltimore), March 28, 1823, at 3 (vol 24, no. 1). The article goes on to laud Marshall's opinion as "one of the most luminous and satisfactory opinions we recollect ever to have listened to . . ."

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Map of Land Claims in *Johnson v. M'Intosh*



Legend



Tracts Purchased by Illinois Company (1773)



Tracts Purchased by Wabash Company (1775)



Townships Containing McIntosh Purchases of 1815 (at issue in case)



Township Containing McIntosh Purchase of 1819 (not at issue in case)

and Wabash Land Companies. The defendant countered with supposedly conflicting claims to some of the same land under a United States patent. In ruling for the defendant, Chief Justice Marshall once and for all established that the federal government would not recognize private purchases of Indian lands.

Drawing on material from a variety of sources that neither historians nor legal scholars have examined, this article uncovers a number of surprises. The (victorious) defendant's purchases may well have been illegal. The driving force behind the litigation was probably the plaintiffs' lawyer, Robert Goodloe Harper. Finally, there likely was no real conflict between the litigants' land claims.

Part 1 presents a detailed history of the events leading up to the Supreme Court's decision in *Johnson v. M'Intosh*. Part 2 offers novel solutions to a number of puzzles in Chief Justice Marshall's somewhat obtuse and cryptic opinion. Previous scholarship has passed over Marshall's refusal to decide the case based on narrow statutory grounds, despite courts' usual preference for such limited rules of decision. This article explains some of the subtleties of the system of dual, coexistent land tenure (Indian alongside European) that Marshall constructed. For instance, Marshall implicitly suggested that the plaintiffs, as purchasers from the Indians, look to Indian courts for a remedy (a disingenuous suggestion, since Marshall must have known no such courts existed and that the tribes lacked the wealth to pay damages). Although Marshall's dual tenure land regime did significantly limit their property rights, descriptions of Indian title as a "tenancy at sufferance" are patently inaccurate as a matter of law and misleading as a matter of fact. Finally, the most astonishing gap in existing legal scholarship on *Johnson v. M'Intosh* is the failure to identify the legal basis for Chief Justice Marshall's holding. As mentioned above, Marshall declined to base his holding narrowly on a colonial-era statute (or a royal proclamation) that appeared controlling. Though sometimes classified as a constitutional law case, the opinion does not cite the Constitution once. Marshall cited a few cases, but these clearly did not control the holding. This article argues that Marshall appealed to custom—the longstanding European and American practice of barring private purchases of Indian land—to provide the rule of decision in *Johnson v. M'Intosh*.

Part 3 introduces a new interpretation of the purpose of the *M'Intosh* rule: it served as a means of expropriating Indian land at minimal cost. Just as sellers can charge more when they are monopolists without competitors, so too buyers can pay less when they are monopsonists without competing bidders. The rule of *Johnson v. M'Intosh* ensured that Europeans would not transfer wealth to the tribes in the process of competing against each other to buy land. This part concludes by showing that a number of other

important nineteenth-century American legal rules similarly were designed to enable the nation to separate Indians from their land cheaply; *Johnson v. M'Intosh* was part and parcel of a complex, multifaceted machine of efficient expropriation.²

I. The History of *Johnson v. M'Intosh*

A. Land Title and Alienability in Early America

M'Intosh is about the nature of Indian land title in general and, in particular, the effect of United States law on sales by natives to private European citizens. Thus the history of the case naturally begins with English and American laws governing alienation of land.³

For the most part, colonists simply imported English real property law, wholesale, to define their rights in American lands. Two complications, however, demanded the creation of additional rules. First, competing European sovereigns had to establish rules to deal with conflicting claims among themselves to American lands. Second, the European colonizers had to decide what rights, if any, Indians had to their own lands.

The simultaneous British, French, Dutch, Spanish, and even Swedish explorations and colonizations of North America inevitably led to land disputes.

[A]s 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.⁴

It is important to note that, strictly speaking, this *discovery rule* applied only among European nations ("regulated as between themselves"). Some commentators have used the term "discovery rule" to describe the rules that the various European sovereigns established for defining Indian land rights, such as the *M'Intosh* rule that the sovereign alone could purchase land from

2. I discuss this law and economics interpretation of *Johnson v. M'Intosh* and a host of other European and American legal rules at greater length in "The Dark Side of Efficiency: *Johnson v. M'Intosh* and The Expropriation of Indian Lands," *University of Pennsylvania Law Review* 148 (2000): (1065–1190).

3. Given the colonizers' superior might, Indian rules governing land transactions had little impact on transactions between the two sides.

4. *Johnson v. M'Intosh*, 573.

the natives. Milner Ball cogently explains why this is inconsistent with Marshall's approach: "The theory [of *M'Intosh*] sets out two different relationships: one among European claimants to the New World, the other between each of the European claimants and the Indian inhabitants. As among the Europeans, the doctrine of discovery obtained. As between European and Indian nations, each relationship was to be separately regulated." The discovery doctrine did not apply, at least directly, to European-Indian relations.⁵

Confusion about this two-level doctrine (the discovery rule to regulate inter-European disputes and rules to regulate European-Indian disputes) may be due in part to the following dense passage in Chief Justice Marshall's opinion. "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." Describing the "sole right of acquiring the soil" as a necessary result of the discovery rule is misleading. Marshall meant that a discovering nation could exclude other *nations* under the first level, the inter-European discovery rule. The discovery rule does not dictate what rule each sovereign chose at the second level in defining rights vis-à-vis the Indians. Thus the quoted passage did not mean that each sovereign *had to* bar its own citizens from making private purchases of land from the Indians, the particular second-level rule that Marshall found that America and its predecessors had adopted. Indeed, contrary to the rule of *M'Intosh*, it appears that the French at times permitted their colonists to purchase lands directly from the Indians.

Marshall's very next sentence makes clear the distinction between the discovery rule as level one and whatever rules each nation decided to establish as level two: "Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves [step two]. The rights thus acquired being exclusive, no other power could interpose between them [step one, the discovery rule]."⁶

5. Milner S. Ball, "Constitution, Court, Indian Tribes," *American Bar Foundation Research Journal* 3 (1987): 24. Other scholars have made the same point. See Mark Frank Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, Green, 1926), 29; J. Youngblood Henderson, "Unraveling the Riddle of Aboriginal Title," *American Indian Law Review* 5 (1977): 75, 90; John Hurley, "Aboriginal Rights, The Constitution and the Marshall Court," *Revue Juridique Théorique* 17 (1982-83): 403, 418; Harold Berman, "The Concept of Aboriginal Rights in the Early Legal History of the United States," *Buffalo Law Review* 27 (1978): 637, 644.

6. *Johnson v. M'Intosh*, 573; Clarence W. Alvord, *The Illinois Country, 1673-1818, Centennial History of Illinois* 1 (1920; reprint, Chicago: Loyola University Press, 1965), 206 (documenting private purchases from Indians under French rule in Illinois). The United

The earliest settlers articulated a simple, selfish step-two doctrine: they declared that the Indians had no rights to their own land. Despite an initial period of weakness, when colonial Virginia was no military match for the local tribes and indeed depended on their charity to survive, Governor Harvey articulated a theoretical basis for expropriating Indian lands.

Some affirm, and it is likely to be true, that these savages have no particular propriety in any part or parcel of that country, but only a general residency there, as wild beasts in the forest; for they range and wander up and down the country without any law or government, being led only by their own lusts and sensuality. There is not *meum* and *tuum* [mine and thine] amongst them. So that if the whole land should be taken from them, there is not a man that can complain of any particular wrong done unto him.

Governor Winthrop of Massachusetts Colony invoked the Bible in support of this principle, although he generously offered to leave the Indians with enough land to maintain themselves.

The whole earth is the lords Garden & he hath given it to the sonnes of men, wth a general Condidion, Gen: 1.28. Increase & multiply, replenish the earth & subdue it. . . . And for the Natives of New England they inclose noe land neither have any settled habitation nor any tame cattle to improve the land by, & soe have noe other but a naturall right to those countries Soe as if we leave them sufficient for their use wee may lawfully take the rest, ther being more than enough for them & us . . .

In the eyes of the Puritans, hunter-gatherers were not really occupants of their lands. "God had intended his land to be cultivated and not to be left in the condition of 'that unmanned wild Country, which they [the savages] range rather than inhabit.'"⁷

Although they replaced religion with appeals to "civilization," later American leaders continued to defend their right to take land from hunters and put it to agricultural or other more intense use. In an 1802 speech honoring the Pilgrims, future President John Quincy Adams would leave

Illinois and Wabash Land Companies, *An Account of Proceedings of the Illinois and Ouabache [Wabash] Land Companies* (Philadelphia: Young, 1796), iii (Early American Imprints, 1st series, no. 30,618 [hereafter United Companies, 1796 Memorial]) (avermint that French land records in Illinois included private purchases from tribes).

7. Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990), 211 (quoting Governor Harvey); John Winthrop, *Conclusions for the Plantation in New England*, cited in Albert K. Weinberg, *Manifest Destiny: A Study of Nationalist Expansionism in American History* (Baltimore: Johns Hopkins Press, 1935), 74; Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (New York: Norton, 1976), 80, citing Samuel Purchas, *Hakluytus Posthumus or Purchas His Pilgrimes* (London, 1625), 4:1814.

the Indians only those lands they used for European-style agriculture and occupation.

The Indian right of possession itself stands, with regard to the greatest part of the country, upon a questionable foundation. Their cultivated fields, their constructed habitats, a space of ample sufficiency for their sustenance, and whatever they have annexed to themselves by personal labor, was undoubtedly *by the laws of nature* theirs. But what is the right of the huntsman[?] . . . Shall the lordly savage, not only disdain the virtues and enjoyments of civilization himself, but shall he control the civilization of a world? Shall he forbid the wilderness to blossom like the rose? Shall he forbid the oaks of the forest to fall before the ax of industry and rise again transformed into the habitations of ease and elegance?

James Monroe, as president, more than once voiced the same theme. "[T]he hunter or savage state requires a greater extent of territory to sustain it, than is compatible with the progress and just claims of civilized life, and must yield to it . . ." "[T]he earth was given to mankind to support the greatest number of which it is capable, and no tribe or people have a right to withhold from the wants of others more than is necessary for their own support and comfort." As the end of the expropriation process approached, Theodore Roosevelt made the argument with characteristic bluntness: "the settler and pioneer have at bottom had justice on their side; this great continent could not have been kept as nothing but a game preserve for squalid savages."⁸

Common settlers agreed with these sentiments and invoked egalitarian, leveling arguments to explain why the land-rich Indians should be compelled to share the wealth. Squatters on Chickasaw land successfully protested eviction that would "bring many women and children to a state of starvation merely to gratify a heathen nation Who have no better right to this land than we have ourselves; and they have by estimation nearly 100,000 acres of land to each man Of their nation . . ."⁹

A funny thing happened on the way to acquiring Indian lands. In spite of these oft-repeated justifications for simply taking it, colonists very ear-

8. John Quincy Adams, "Oration of the Anniversary Festival of the Pilgrims (1802)," quoted in Charles C. Royce, *Indian Land Cessions in the United States* (Eighteenth Annual Report of the Bureau of American Ethnology, 1896-97, part 2), 527, 536; Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834* (Lincoln: University of Nebraska Press, 1970), 227 (citing a letter from President Monroe to Andrew Jackson, Oct. 5, 1817); *A Compilation of the Messages and Papers of the Presidents, 1789-1897* (James D. Richardson ed., New York 1896), 2:16; Theodore Roosevelt, *The Winning of the West* (New York: G. Putnam and Sons, 1889), 1:90.

9. Clarence Edwin Carter, ed., *The Territorial Papers of the United States* (Washington: GPO, 1939), 6:106-13.

ly on began purchasing tracts. This soon became official policy. 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." When the Crown began to exercise 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." This was not mere rhetoric; Massachusetts towns that had occupied lands without buying them responded by retroactively making payments to the local tribes.

The passage does note the one instance in which outright expropriation was permissible: "just" war, that is, defensive wars. "While the English generally recognized the validity of aboriginal ownership and felt the necessity to pay for the Indians' lands, no such necessity existed for lands acquired by conquest in a just war. Two wars, the Pequot War (1637) and King Philip's War (1675–1677) resulted in large transfers of realty by conquest." Conquest in New England, however, remained very much the exception, and the bottom line is that "contrary to the common belief that the Indians were ruthlessly deprived of their land, almost every part of [Massachusetts] that came to be inhabited by the whites was purchased from the Indians, except the areas that were either acquired by conquest or, like Salem and Boston, never claimed by Indians, because of depopulation by epidemics."¹⁰

The pattern of European land acquisition in New England, purchases punctuated by rare conquests, repeated itself across the rest of the continent. The United States paid over \$800 million for Indian lands. According to Congress, the United States exercised the right of conquest only once and then half-heartedly.¹¹

10. Joel N. Eno, *The Puritans and Indian Lands* (New York: 1906), 1, cited by Yasuhide Kawashima, *Puritan Justice and the Indians: White Man's Law in Massachusetts* (Middletown: Wesleyan University Press, 1986), 47–48, 50, 51; William H. Whitmore, ed., *The Colonial Laws of Mass. Reprinted from the Edition of 1660, with the Supplements to 1672* (Boston: City Council of Boston, 1889), 160–61; James Warren Springer, "American Indians and the Law of Real Property in Colonial New England," *American Journal of Legal History* 30 (1986): 49.

11. Felix S. Cohen, "Original Indian Title," *Minnesota Law Review* 32 (1947): 28, 37 n.20, 46. Citing the Report of the Commission of Indian Affairs for 1872, Cohen maintains that "[e]xcept only in the case of the Indians in Minnesota, after the outbreak of 1862, the United States government has never extinguished an Indian title as by right of conquest; and in this latter case the Government provided the Indians another reservation, besides giving them the proceeds of the sales of the lands vacated by them in Minnesota."

Although Europeans recognized some Indian interest in land, they never "granted" the tribes all the sticks in the common-law bundle of property rights; in particular, colonists consistently narrowed or entirely denied the Indians' power to sell land. Two facets of European doctrine are particularly relevant for *Johnson v. M'Intosh*: the ability of European governments to sell lands before they had purchased them from the Indians and the exclusive right of the British and American governments to purchase when a tribe was ready to sell.

British sovereigns and American officials asserted the right to sell Indian land to their citizens before any dealings with the occupying tribe. Purchasers took "subject only to the Indian right of occupancy,"¹² but otherwise had a full fee interest. Combined with the exclusive right to purchase Indian lands (or conquer the tribe), discussed in the following section, this created a novel and peculiar "bifurcated title." Ultimate title resided with the European sovereign or its grantee; the Indian occupants retained "Indian title" until they sold (or were otherwise relieved of their lands).

Colonizers always jealously maintained the superiority of their title. The London Company warned its agents to make "no admission, either direct or by inference, that the Indians possessed a superior claim on the land. When such an implication was made . . . the company reacted with bitter resentment."¹³ British and American law never questioned the basic premise that, whatever rights Indian title encompassed, such rights were ultimately subordinate to the separate title derived from the Crown, colony, state, or the United States.

For example, if Indian title was equal to European title, adverse possession would have posed a serious problem to bifurcated title. A tribe could argue that if the sovereign did not extinguish their Indian title within the limitations period for trespass, and they continued to occupy the land, they had adverse possession against any grantee of the British or American governments. The next logical step in the argument would be that the Indians could also adversely possess against the sovereign itself.

The colonists never recognized Indian title as creating such a power. In *Klock v. Hudson*, both (American) claimants rooted their title in a grant from the colony of New York in 1731. 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 onward, 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. In re-

12. *Johnson v. M'Intosh*, 574.

13. W. Stitt Robinson, *Mother Earth: Land Grants in Virginia, 1607-1699* (Richmond: Virginia 350th Anniversary Corp., 1957), 3.

jecting this adverse possession claim, the court pointedly noted, as discussed above, that this same theory implied that the Indians could adversely possess against New York itself.

[I]t must be apparent, that if the possession of the *Indians* was sufficient to destroy the operation of the deeds in 1761, it would be equally effectual to destroy the grant from government in 1731. Such a suggestion, however, is inadmissible. The policy, or the abstract right of granting lands in the possession of the native *Indians*, without their previous consent, as original lords of the soil, is a political question with which we have at present nothing to do.¹⁴

Another dilemma might arise with bifurcated title if the Indians sold to Y while the Crown or the United States sold to X. This was the basic fact pattern of *M'Intosh*. Given the superiority that colonizers assigned to their title, it comes as no surprise that X has title as against Y. The colonies, the British government, the states, and the United States achieved this result by the same rule: they barred anyone but themselves from purchasing lands from the Indians. Although most of the property rules discussed thus far involve European-Indian relations, this stricture was a regulation made by colonists, directed only at colonists.¹⁵

The universal and repeated enactment of laws barring purchases of land by private citizens from the Indians attests to the importance Britain, its colonies, and later the United States attached to this rule. In colonial New England, "[i]t is a reasonable generalization to say that land purchases from Indians were a governmental monopoly . . ." Massachusetts apparently adopted the first such official law in 1634 and reenacted similar measures repeatedly. As late as 1760, Massachusetts publicized the law and empowered local officials to enforce it at colonial expense. Almost every colony adopted such measures as soon as it began purchasing significant amounts of Indian land.¹⁶

As the British government increasingly took control over Indian affairs

14. 3 Johnson's Reports 375, 384–85 (N.Y. 1808).

15. As discussed above, the French apparently did not adopt such a rule and recognized private purchases of Indian lands.

16. Springer, "Indians and the Law of Real Property," 35–39 (collecting cites). Rhode Island appears to be an exception to the otherwise universal colonial rule against private purchases from the natives. Based on the radical politics of the colony's founder, Roger Williams, and his relatively friendly posture toward the Indians, "in early Rhode Island the acquisition of the Indian title was thought to be paramount, and merely perfunctory approval of the purchase was made by the legislature." Shaw Livermore, *Early American Land Companies: Their Influence on Corporate Development* (1939; reprint, New York: Octagon Books, 1968), 21 (footnote omitted). For additional history on the inalienability of aboriginal land title in the British Colonies, see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Oxford University Press, 1989), 221–41.

in the mid-1700s, it reiterated the long line of colonial precedents; for instance, in 1753, the British government instructed the governor of New York "to forbid purchases of land by private individuals." The process of centralizing Indian policy culminated in the Proclamation of 1763. Inter alia, the Proclamation dictated 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 [in public, by colonial officials]." This royal proclamation superseded all similar colonial statutes and provided a uniform and universal ban on land purchases from the Indians until the Revolutionary War.

The Continental Congress, despite the unclear division of state and federal powers under the Articles of Confederation, soon enacted measures echoing the prohibition in the Proclamation of 1763. The subsequent Constitution of 1789 unequivocally 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 \$1000.¹⁷

Even though the United States generally respected French and Spanish property law in lands it purchased (or conquered) from those nations, such was the strength of the Anglo-American rule against private purchases from the Indians that this deference apparently did not extend to cases where these other sovereigns permitted such transactions. In several cases, United States commissioners adjudicating French claims in present-day Indiana "refused a tract for the time being because it was obtained by a private person from the Indian tribes in the neighborhood." Many of the laws barring private land dealings with the Indians forbade not only outright purchases, but leases and even timber sales.

Chief Justice Marshall conceded that rare exceptions existed to the laws refusing to recognize grants from Indians. "In New-England alone, some lands have been held under Indian deeds. But this was an anomaly arising from peculiar local and political causes." The sovereign could always give

17. Robert N. Clinton, "The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs," *Boston University Law Review* 69 (1989): 329, 349. For the complete text of the Proclamation of 1763, see Wilcomb E. Washburn, *The American Indian and the United States: A Documentary History* (New York: Random House, 1973), 3:2135, or Clinton, "Proclamation of 1763," 328 (Appendix); *Journals of the Continental Congress*, 24:264, 319–20; 25:602; 1 Stat. 138 (1790); 1 Stat. 330 (1793); 1 Stat. 472 (1796); 1 Stat. 746 (1799). Congress worded these later statutes quite broadly, criminalizing the act of negotiating ("treating") with the Indians for land "directly or indirectly."

its blessings to unapproved land purchases after the fact, and according to a recent book this practice was common in colonial Massachusetts.¹⁸

Later on, however, the United States rarely granted such ex post facto approval of land purchases from the Indians. The government did recognize the acquisition of Grosse Ile, near Detroit, by the Macomb brothers. The last such dispensation apparently occurred in 1807. Much more common, even before 1807, was the treatment received by war hero George Rogers Clark. Congress refused to recognize a 1779 grant the Piankashaw tribe made to Clark, in the wake of his remarkable conquest of Illinois during the Revolutionary War. Even the extraordinarily sympathetic attempt by the Chippewa, Ottawa, Wyandot, and Pottawatamie Indians in an 1807 treaty to reserve three square miles for one Dr. William Brown, who had ministered to them for ten years, failed to move Congress. The committee processing the petition first voiced its irritation with such requests, stating that it was "almost unnecessary for the committee to state to the house, that many applications have been made to Congress for the confirmation of titles to land purchased by individuals from the Indian tribes . . ." "Had the committee been sympathetic, it could have ruled for Dr. Brown on the ground that rather than selling land directly to him, the tribes instead had negotiated a grant to Brown under the aegis of a treaty with the United States. Applying substance over form, and voicing fear of a slippery slope of private purchases disguised as reservations in treaties, the committee recommended rejection of the petition.

In the present case no direct sale or transfer is pretended; but the committee can discover, neither in the manner, nor the object, any thing to materially distinguish it from former applications; or that would induce a relaxation of a general rule. Therefore, *Resolved*, that the prayer of the petitioners ought not to be granted.

Congress' refusal to recognize grants to a philanthropic doctor and a war hero of Clark's stature shows the importance attached to the long-standing rule against private acquisitions of land from the tribes.¹⁹

18. *American State Papers: Documents, Legislative and Executive of the Congress of the United States, Public Lands* (Washington: Gales and Seaton, 1834), 1:9; Nathaniel Shurtleff, ed., *Records of the Governor and Company of the Massachusetts Bay in New England* (Boston: W. White, 1853), 4:282 (statute of 1665 barring leases); Livermore, *Early American Land Companies*, 198–203 (administrators refuse to recognize 999-year lease given by Seneca tribe to the New York-Genesee Land Company); Springer, "Indians and the Law of Real Property," 36 (barring timber sales); *The Seneca Lands*, Opinions of the United States Attorney General (1819), 1:465 (same); *Johnson v. M'Intosh*, 570, citing James Sullivan, *The History of Land Titles in Massachusetts* (1801; reprint, Buffalo: W. S. Hein, 1972), 45; Kawashima, *Puritan Justice*, 54 (sovereign approving purchase from Indians after the fact).

19. John R. Command, "The Story of Grosse Ile," *Michigan Historical Magazine* 3 (1919):

There are two reasons that I have traced the history of this longstanding rule in such detail. First, its long and unbroken pedigree makes the holding of *M'Intosh* (reaffirming the rule disallowing private purchases from the Indians) seem predictable and, moreover, lays the foundation for the novel argument that *custom* forms the central ground for Chief Justice Marshall's opinion. Second, the rule makes perfect sense as a tool for efficient expropriation of Indian lands. Hence its universal enactment and strict enforcement support the thesis of least-cost expropriation presented below in Part 3.

In the context of the facts of *M'Intosh*, the omnipresence of the rule poses a puzzle: why did the predecessors in interest to the plaintiffs in *M'Intosh*, experienced and worldly businessmen as demonstrated below, spend a considerable sum to buy a seemingly worthless title directly from the Indian tribes in southern Illinois and Indiana?

The plaintiffs' predecessors were not alone in speculating that British or American governments might recognize some Indian deeds. George Washington, undoubtedly a sophisticated observer of politics and an astute land speculator, confided to a close friend his view of the Proclamation of 1763's ban on purchases from the tribes:

I can never look upon that proclamation in any other light (but this I say between ourselves) than as a temporary expedient to quiet the minds of the Indians . . . Any person, therefore, who neglects the present opportunity of hunting out good lands, and in some measure marking and distinguishing them, for his own, in order to keep others from settling them, will never regain it.

Washington felt, correctly, that all Indian lands would soon fall into colonists' hands, and if purchase from the Indians no longer established title to good lands, then he planned to pursue other means to the same end. George Croghan, a prominent trader, land speculator, and British Indian agent, continued to buy land directly from the tribes even after colonial officials nullified earlier purchases he had made.

Croghan and many other "gentlemen of fortune" felt emboldened to make such private purchases from the Indians in part because of the Cam-

130. One George Ash, in 1807, was the recipient of "the last Indian grant to receive any favorable treatment from Congress." Ash, originally abducted by the Indians, had become very friendly with his captors and the tribes eventually released him. Congress gyrated on the petition for five years, eventually approving a 640-acre Indian grant. Payson Jackson Treat, *The National Land System, 1785-1820* (New York: E. B. Treat, 1910), 296-97; *American State Papers, Public Lands*, 2:11 (Application to Confirm an Indian Grant, Communicated to the House of Representatives, January 20, 1810).

den-Yorke Opinion, a peculiar legal opinion letter originally written by British Attorney General Charles Pratt (who later became Lord Camden) and Solicitor General Charles Yorke. This document affirmed the right of individuals to buy land from rajahs in British *India*. A slightly altered version, not limited to India (it is not clear if the original authors, or others, made the alterations), found its way to America no later than 1773.

Croghan was not alone in basing decisions to invest significant sums, in large part, on the seemingly shaky foundation of the Camden-Yorke Opinion. The Illinois and Wabash land companies, whose purchases in 1773 and 1775 lie at the root of *M'Intosh*, were also motivated by the opinion. Patrick Henry "was convinced from every authority [including the Camden-Yorke Opinion] that the law knew, that a purchase from the natives was as full and ample a title as could be obtained."²⁰

Improvident belief that courts would agree with the Camden-Yorke Opinion and void all legislative and executive bars on private purchases of Indian lands may in part explain how land speculators in the 1770s hoped to succeed. But this hardly seems a sufficient basis for such experienced businessmen to take this risk. As the later actions of many of the speculators indicate, they may have planned from the first to obtain legislative action after the fact to except them from the laws that would void their titles. The incredible size of their claims, often in the millions of acres, provided a ready source of consideration with which to bribe legislators. Finally, anticipation of political change may have motivated the marked increase in private purchases from the Indians in the 1770s.

20. Letter from Washington to Crawford, in *The Writings of George Washington* (Washington, D.C.: GPO, 1931), 2:220; Albert T. Volwiler, *George Croghan and the Western Movement, 1741-1782* (Cleveland: Arthur H. Clark, 1926), 257, 296-97; Jack M. Sosin, "The Yorke-Camden Opinion and American Land Speculators," *Pennsylvania Magazine of History and Biography* 85 (1961): 38, 42-43; Clarence Alvord, *The Mississippi Valley in British Politics: A Study of the Trade, Land Speculation, and Experiments in Imperialism Culminating in the America Revolution* (Cleveland: Arthur H. Clark, 1917), 2:201. There appear to have been at least two similar documents supporting private purchases of Indian lands. Samuel Wharton, the Philadelphia Indian trader and western land speculator, "wrote that he had secured a very full and satisfactory opinion from Sarjeant Glynn, 'the best Lawyer, Lord Camden assures me, in England,' upon the title of the Indian grant of 1768." George Elmer Lewis, *The Indiana Company, 1763-98* (Glendale, Cal.: Arthur H. Clark, 1941), 159. The United Illinois and Wabash Companies cited Glynn's opinion in their last memorial to Congress. United Companies, *Memorial of 1816*, 46-47 (Early American Imprints, 2d series, no. 39,145). The United Companies also reproduced an opinion by Henry Dagge, Esq., on the validity of private purchases of Indian lands. *Ibid.*, 45-46. Benjamin Franklin and Patrick Henry wrote short endorsements of both opinions. *Ibid.* 47. According to the United Companies, both opinions and the endorsements were authored in 1775.

B. The Land Companies and Their Purchases

The specific background of *Johnson v. M'Intosh* begins with land purchases from tribes in southern Illinois and Indiana by two closely related entities: the Illinois Land Company and the Wabash Land Company. The two later merged into the United Illinois and Wabash Land Companies.

The Illinois Company arose out of the Indian trading and troop provisioning activities of a group of prominent Philadelphia merchants led by David Franks and the Gratz brothers, Bernard and Michael. These merchants had very limited business success in the later 1760s and early 1770s. When their partner and agent in Illinois, William Murray, caught wind of the Camden-Yorke Opinion in 1773, he elatedly wrote the Gratzes of his plans for turning their activities towards land speculation. "So courage, my boys. I hope we shall yet be satisfied for past vexations attending our concern in Illinois."²¹

Murray reached Kaskaskia, a town with a British fort on the Mississippi in southern Illinois, in June 1773. He promptly "showed the [Camden-Yorke Opinion] to Captain Lord, commander at Kaskaskia. Lord, however, was not overawed by the weighty names and informed Murray that he 'should not suffer him to settle any of the lands as it was expressly contrary to his Majestys Orders.'" Despite this admonition, Murray promptly began negotiations with the Illinois tribes. He conducted his negotiations at the fort and claims to have been scrupulously honest. "[T]o avoid any insidious suggestion of malignant persons, I prevented the Indians from getting a drop of spirituous liquor during the whole of the negotiation."

He negotiated slowly, over more than a month, in order to make sure that all tribes with claims agreed to terms. This was important since land rights among the tribes were unclear. Boundaries separating the Illinois

21. Anna Edith Marks, "William Murray, Trader and Land Speculator in the Illinois Country," *Transactions of the Illinois State Historical Society* 26 (1919): 190. Marks's article contains the most reliable account of William Murray and the thin record of his activities in Illinois. A more recent biography of Murray is not reliable. See Martin Ridge, Book Review, *Illinois History Journal* 82 (1989): 275 (reviewing Myles N. Murray and Robert V. Zoda, *William Murray, Esq.: Land Agent in the Illinois Territory Before the Revolutionary War* (Brooklyn: T. Gaus, 1987) ("Dubious premises, unsubstantiated assertions, and a lack of hard facts plague the authors" in their "shabby and misguided effort to make a Revolutionary hero of a failed intriguer . . ."). For similar appraisals, see John D. W. Guice, Book Reviews, *Journal of Mississippi History* 51 (1989): 265; Dwight F. Henderson, Book Reviews, *Journal of the Early Republic* 9 (1989): 558. The Illinois Company involved in the *Johnson v. M'Intosh* case must be distinguished from an earlier (1766) abortive venture of the same name. See Alvord, *The Mississippi Valley in British Politics*, 1:94–101, 316–24; Richard White, *The Middle Ground: Empires, Indians and Republics in the Great Lakes Region, 1650–1815* (New York: Cambridge University Press, 1991), 308 n.77.

and other Great Lakes tribes were not well-defined and seemed to shift continuously.²²

Murray dealt with the remnants of the once great Illinois tribes. Their population had dropped from around 12,000 in 1680 to 1,720 in 1756, to 500 in 1800, as they fell victim to European diseases and Indian enemies on all sides. Unable to prevent neighboring tribes from encroaching on their extensive land, the Kaskaskia, Peoria, and Cahokia tribes on July 5, 1773, deeded to Murray and the other twenty-one members of the Illinois Company two large tracts of land in southern and central Illinois.²³

In return for the two tracts, the Illinois Company paid the tribes with a wide variety of goods, including inter alia 250 strouds (sheets of coarse woolen cloth), 250 blankets, 500 pounds of gunpowder, 400 pounds of lead, 2000 gun flints, 10,000 pounds of flour, 2 horses, and 12 horned cattle. The company originally valued these goods at over \$37,000, but in the stipulated facts of *M'Intosh* its successors placed the value at only \$24,000.²⁴

The otherwise unremarkable deed contains a feature apparently overlooked by earlier scholars: an alternative conveyance to the King, in use (trust) for the grantees. After naming the members of the Illinois Company as grantees directly, the deed in the alternative grants the two tracts "unto his most sacred majesty, George the Third, . . . for the use, benefit, and behoof of all the said several abovenamed grantees."²⁵ Although never raised by congressional committees rejecting the company's claim, or by Chief Justice Marshall in the *M'Intosh* opinion that foreclosed the claim once and for all, this is strong evidence that even at the time of the purchase the grantees had profound doubts about their ability to buy legal title directly from the Indians. Utilizing a lawyerly "belts and suspenders"

22. Clarence W. Alvord, *The Illinois Country, 1673-1818*, vol. 1 of *The Centennial History of Illinois* (1920; reprint, Chicago: Loyola University Press, 1965), 301, citing letter of Lord to Haldimand, July 3, 1773 (British Museum); United Companies, *1796 Memorial*, i-ii (Murray's abstract of transaction); White, *The Middle Ground*, 17, 19.

23. Emily J. Blasingham, "The Illinois Indians, 1634-1800: A Study in Depopulation" (Ph.D. diss., University of Illinois, 1956), summarized in *Ethnohistory* 3 (1956): 193-224, 361-412; William C. Sturtevant and Bruce G. Trigger, eds., *Handbook of North American Indians* (Washington, D.C.: Smithsonian Institution, 1978), 15:594-97, 674, 678-79. Less than one hundred years earlier, the Illinois Confederation consisted of as many as twelve distinct tribes, but the severe population decline led to a series of mergers and extinctions that left only these three. The map above (68) shows the location of the Illinois Company's purchases. Murray promptly recorded the deed at the Kaskaskia records office. United Companies, *1796 Memorial*, i-ii, 11-12.

24. United Companies, *1796 Memorial*, 5 (quoting deed), 49; *Johnson v. M'Intosh*, 553.

25. United Companies, *1796 Memorial*, 6. This alternative grant is reiterated in the habendum clause of the deed: "to HAVE and to HOLD [to the grantees individually] or unto his said Majesty . . . to and for the use, benefit, and behoof of the said grantees . . ." *Ibid.* 9.

approach, Murray, the presumptive scrivener, tried to paint himself and his associates as beneficiaries of land formally held in the name of the King.

Murray's caution proved well-advised, for the Illinois Company purchase "evoked a sharp response in London . . . [British officials aimed to] prevent the speculators from establishing any settlement in consequence of 'those pretended Titles' and to authorize the local commander in the Illinois country to declare the 'King's disallowance of such unwarrantable proceedings.'" They instructed the commander at Kaskaskia "to delete from the public notary's register any of the proceedings relating to purchases already made and to declare publicly that they were invalid."²⁶

About eighteen months after the purchase, in January 1774, the British commander at Kaskaskia made just such a public pronouncement, telling the Illinois Indians that they could still consider themselves holders of the land. According to Murray, the commander told him that the tribal leaders rejected this seemingly magnanimous offer.

After some deliberation, the Chiefs replied, "That they thought; what the great Captain said was not right; that they had sold the lands to me [Murray] and my friends not for a short time, but, as long as the Sun rose and set;—That I had paid them what they had agreed for, and to their satisfaction, and more than they had asked for; and that they wished how soon I and my friends should come and settle upon the lands; that they would help to protect us against our enemies, and hoped we would do the same for them &c."²⁷

Murray and his Philadelphia partners perhaps took some heart from this faithfulness on the part of their vendors, but they continued to worry about obtaining official recognition for the Illinois Company's deed. Unable to find political support in their own state for their purchase, the Pennsylvanians of the Illinois Company turned to Lord Dunmore, Governor of Virginia. Absent direct royal administration, Virginia claimed, and was recognized to have, jurisdiction over Illinois by virtue of its colonial charter. Murray visited Dunmore in April 1774. An aspiring land speculator himself, the governor apparently agreed to throw his weight behind the Illinois Company's claim in return for the chance to participate in subsequent transactions. Murray was already talking of a second scheme by May.

To satisfy the desires of the governor, Murray created the Wabash Land Company, of which Lord Dunmore and several men from Maryland, Philadelphia, and London became members . . . His reward promised, Lord Dunmore wrote to Lord Dartmouth [British Secretary of State] a most cordial recommenda-

26. Jack M. Sosin, *Whitehall and the Wilderness: The Middle West in British Colonial Policy* (Lincoln: University of Nebraska Press, 1961), 233; Marks, "William Murray," 203 n.92 (order dated March 9, 1774).

27. United Companies, *1796 Memorial*, ii–iii (Murray's abstract of transaction).

tion of the Illinois Land Company . . . In a later letter Dunmore denied that he had any connection with the Illinois Land Company, but he kept discreetly silent about the Wabash Land Company.²⁸

Instead of negotiating a second purchase himself, Murray recruited a prominent local Frenchman, Louis Viviat, as a partner and agent.²⁹ One historian has suggested that Murray employed a Frenchman for this second purchase in order to invoke the tradition of private purchases by that nation's citizens and to ensure their political support for the Company's title. Murray may have believed that a decision against Viviat's Indian deed would be seen as a threat to all French titles in the west, an impression the British wanted to avoid.

Viviat treated with Piankashaw tribal leaders at Vincennes (Post St. Vincent) and Vermillion in present-day Indiana. The Piankashaw were one of six tribes classified as Miami Indians. Like the Illinois tribes, the Miami as a group suffered precipitous population declines after contact with Europeans; their numbers fell from 7,500 in 1682 to just over 2,000 in 1736. Although they were closely related to the Illinois tribes in culture and perhaps heritage, the two groups had long-standing animosity for each other.

Viviat reached terms and executed a deed, on behalf of the twenty members of the Wabash Company, with the Piankashaw representatives on October 18, 1775. Like the Illinois Company deed, it conveyed two large tracts, both along the Wabash River. The first (northern) tract straddled the Wabash between the Cat River and Point Coupee; the second (southern) tract ran from the Ohio up to the White River. The Piankashaws specifically reserved the land between the two tracts, and in a further term implying their sovereignty the tribes granted the Wabash Company a navigation easement on those portions of the Wabash River and its tributaries situated outside the purchased lands. The Wabash Company paid the Piankashaws with trade goods similar to those given by the Illinois Company, but with a slightly higher value: the Company originally claimed the

28. Marks, "William Murray," 202; Alvord, *Illinois Country*, 302–3 and n.35.

29. Viviat was "a prominent Frenchman of Kaskaskia." Clarence Edwin Carter, *Great Britain and the Illinois Country, 1763–1774* (1910; reprint, Port Washington, N.Y.: Kennikat Press, 1970), 69. He was apparently a far-ranging trader; business took him as far east as Pittsburgh. Clarence Walworth Alvord and Clarence Edwin Carter, eds., *Trade and Politics, 1767–1769*, vol. 26 of the Collections of the Illinois State Historical Society, British Series 3 (Springfield, Ill.: Trustees of the Illinois State Historical Society, 1921), 142. He served as a judge under the British regime in Illinois and remained loyal to the British during the Revolution. See Alvord and Carter, *Trade and Politics*, 462–67, and Alvord, *Illinois Country*, 320. This led to a break with Murray, who was a revolutionary and "devoted both time and money to the cause of the revolting colonies . . ." See Alvord, *Illinois Country*, 321–22.

items were worth \$42,477.73, but its successors stipulated to the figure of \$31,000 in the litigation of *M'Intosh*.³⁰

Unlike Murray, Viviat apparently failed to include all the tribes with colorable claims to the lands purchased. In particular the Weas may have had claims in the southern tract. In addition, there is evidence that the Piankashaw negotiators did not have the support of their own tribe in making the grant. These facts are at odds with the case stated in *M'Intosh*, which represented both purchases as being made from united, consenting tribes with exclusive Indian title.

Like the Illinois Company deed, Viviat included an alternative grant to the King, in use (trust) for the grantee members of the Company. This again shows that the members of the Company had sincere doubts about the validity of direct private purchases from the Indians.³¹

C. Losing the First Round

In order to cure any defect in their title, the Illinois and Wabash companies did what so many other land speculators did in the early republic: they lobbied the legislature. Lobbying was no prettier then than today. For legislators, land claims formed "the most complicated and embarrassing Subject . . . Infinite pains are taken by a certain sett of men vulgarly called Landd robbers [jobbers], or Land-Sharks to have it in their power to engross the best lands . . ."³²

In the early years of the American Revolution, the companies took two important steps to obtain legislative confirmation of their titles. First, they attracted influential, well-connected investors to bolster their lobbying efforts, and second, they merged into the United Illinois and Wabash Land Company (the "United Companies") to pool their resources and coordinate their efforts.

James Wilson, later one of the primary architects of the Constitution and a Supreme Court Justice, was, by 1779, the central figure in the United Com-

30. Marks, "William Murray," 204; Sturtevant and Trigger, *Handbook of North American Indians*, 15:596–97, 681, 688. Population figures for the Piankashaw tribe alone are apparently unavailable; United Companies, *1796 Memorial*, 17, 21–22, 49; *Johnson v. M'Intosh*, 557. The map above (68) shows the location of the Wabash Company's purchases. Wabash Company investors included Virginia Governor Lord Dunmore and Maryland Governor Thomas Johnson—predecessor in interest to the *Johnson v. M'Intosh* plaintiffs, Joshua Johnson (his grandson) and Thomas Graham (son-in-law).

31. United Companies, *1796 Memorial*, 19 (granting clause), 23 (habendum clause), 23–24 (mentioning only Piankashaw chiefs as signatories to deed); White, *The Middle Ground*, 372.

32. Paul Wallace Gates, *History of Public Land Law Development* (Washington D.C.: GPO, 1968), 64, quoting statement of Rep. David Howell, Rhode Island.

pany's efforts. Robert Morris, financier of the American Revolution, was another prominent investor, as was Dr. Thomas Walker, "a dominant figure among Virginia's land speculators in the later 1700s." The Companies also tried to lure American military leaders to their cause, including General Arthur St. Clair and Brigadier General Anthony Wayne, though there is no evidence that either became a shareholder in the United Companies.³³

The members of the Illinois Company and the Wabash Company merged on March 13, 1779. Wilson became chairman on August 20, 1779. He, along with Murray, drafted the Articles of Union and the Constitution, which the members adopted on April 29, 1780. The preamble to the Articles stated that "the lands should be in common between [the two companies' members]." Apparently the shareholders believed that the Wabash Company lands were slightly more valuable, since two of the eighty-four authorized shares were "conceded to the Ouabache [Wabash] Company upon uniting their interest with the Illinois Company."³⁴

Murray had begun lobbying even before the companies united. While the British government had clearly rejected the claims, the happenstance of the American Revolution opened up a new possibility for vindicating the titles: the (newly sovereign) state of Virginia, whose colonial charter encompassed Illinois along with the rest of the Old Northwest (basically those lands north of the Ohio River and East of the Mississippi). Thus Murray presented a memorial to the Virginia legislature in December 1778 outlining the Companies' land claims. There was precedent for relief from this quarter: Richard Henderson, organizer of the Transylvania Company, twice received grants of other lands when the Virginia General Assembly rejected his purchases from the Indians.

Virginia, however, refused to recognize the Companies' Indian deeds. Indeed, the activities of the Illinois and Wabash companies led the state's

33. Wilson was an inveterate land speculator, investing in at least two other large schemes: the (in)famous Yazoo lands and the Indiana Company. C. Peter Magrath, *Yazoo—Law and Politics in the New Republic: The Case of Fletcher v. Peck* (Providence: Brown University Press, 1966), 5; Aaron M. Sakolski, *The Great American Land Bubble* (New York: Harper and Bros., 1932), 135; Lewis, *The Indiana Company*, 253. Morris bought a share of The United Company on October 2, 1779. Minutes of the United Illinois and Wabash Land Companies 46 (manuscript in collection of the Historical Society of Pennsylvania, Philadelphia) [hereafter Minutes of the United Companies]. Thomas Perkins Abernethy, *Western Lands and the American Revolution* (New York: D. Appleton, 1937), 60, discusses some of Dr. Walker's speculation. The members of the United Companies proposed granting Generals St. Clair, Thompson, and Parsons tracts of up to 24,000 acres and discussed extending the same terms to Brigadier General Wayne. Apparently contemplating the formation of a broader base of support for their claims, the shareholders also considered smaller grants to soldiers of lower rank. Minutes of the United Companies, 50, 53–58, 61.

34. Minutes of the United Companies, 19, 62–67; United Companies, *1796 Memorial*, ix, 7–13; United Illinois and Wabash Land Companies, *1803 Memorial to Congress* (Early American Imprints, 2d series, no. 5193, 9–14).

legislature, in May 1779, to restate the ancient rule against direct purchases from the Indians. And the reason given could not have come as a surprise. "It was stated that no person had ever had the right to purchase lands within the limits of Virginia from the natives, except those persons authorized to make such purchases for the use and benefit of the colony and later the state."³⁵

The fluid political situation, however, soon gave the United Companies yet another body to lobby: the new national legislature. In response to pressure from states without extensive claims to western lands under their colonial charters, Virginia and other states ceded their western territory to the nation in 1783. Initially, in 1781, Virginia tried to condition the cession of this land on the Continental Congress' refusing to recognize the claims of the land companies. Although the final deed of cession contained no such explicit term, there was a tacit understanding that the national legislature would reject the claims.³⁶

Between 1781 and 1796 Wilson drafted no less than five memorials to the national legislature pleading the United Companies' case. Complete copies survive of only the extraordinary efforts made in 1796–97, when the Companies publicly printed a fifty-five-page pamphlet and submitted a thirty-page memorial to Congress. Wilson, along with Morris and sometimes others, received expenses and stipends for trips to present these memorials to Congress and, presumably, to lobby legislators. The Companies apparently also engaged in propaganda as part of their lobbying efforts. Murray purchased two hundred copies of Samuel Wharton's *Plain Facts*, a diatribe invoking universal natural rights—Indians' rights to sell their land and settlers' rights to buy it—to justify private purchases from the tribes.³⁷

To buttress these efforts, the Companies continually scavenged for evi-

35. William P. Palmer, ed., *Calendar of Virginia State Papers and Other Manuscripts, 1652–1781* (1875), 1:314 (Dec. 26, 1778); Livermore, *Early American Land Companies*, 95–96; Alvord, *Illinois Country*, 341, citing William Waller Hening, ed., *The Statutes at Large of Virginia* (1809), 10:97; Lewis, *The Indian Company*, 220. Virginia's 1779 statute barring private land purchases from the Indians replaced a similar provision that appears to have lapsed prior to the United Companies purchases; the legal implications of this lapsed statute in the *Johnson v. M'Intosh* case are discussed below.

36. Thomas Donaldson, *The Public Domain* (Washington: GPO, 1884; reprint, New York: Johnson Reprint Corp., 1970), 67–70; Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution, 1774–1778* (Madison: University of Wisconsin Press, 1940), 225–26; Letter from Thomas Jefferson to Rayneval (March 20, 1801), in Paul L. Ford, ed., *Writings of Thomas Jefferson* (New York: G. P. Putnam, 1892–1899), 8:19–21.

37. Minutes of the United Companies, 82–84 (1781, 1782), 98 (1787), 101 (1790), 105 (1796), 107–108 (April 12, 1799) (empowering Wilson and Morris "to prosecute the business of this Company" with Congress). The company granted Wilson an extra share for drafting the first memorial; no payment is recorded for the later ones.

dence supporting their claims. In 1787, they obtained an affidavit from one Bernard Tardiveau averring that during his travels in Illinois he had seen the Companies' deeds and that "the Inhabitants of that Country speak of the said Purchase as being made in the most publick manner." When a delegation of Indians from Illinois visited Philadelphia in early 1793, the Companies appointed one of their shareholders, Pollack, to ask about conditions in the region and any knowledge the Indians had of the Companies' deeds. A smallpox epidemic among the visitors, along with strenuous objections of government officials to contacts by such a private citizen with Indian guests of the United States, made this job almost impossible. Pollack did manage to speak with a chief named Petit Castor (Little Beaver) who, after touching his father's signature on a copy of the deed, said "he had often heard his father speak of it as a fair sale and that value had been received for the lands . . ."

The Companies kept close tabs on American land acquisitions that might overlap their claims. In 1793, they inquired about a treaty made with the tribes occupying the banks of the Wabash River, but Secretary of War Henry Knox noted that, since the Senate was still considering the Treaty, he could not disclose its contents. The Companies took pains to inform Knox that they had no intentions of violating federal law by settling lands not yet ceded by the tribes.³⁸

The members' changing choices for financing their operations indicates increasing pessimism over the Companies' prospects. In 1778 and 1779 they repeatedly assessed themselves in order to raise funds, displaying confidence by declining to sell any interest in their claims to new investors. Thereafter, however, the members instead raised funds by selling shares, thus diluting their ownership. The Companies Articles created eighty-four shares, with thirty retained by the Companies. Robert Morris was one of the first purchasers, in 1789, and others bought all but three of the thirty company-owned shares over the next year. When the Companies needed to raise \$500 in late 1792, five members offered only \$100 for an additional share, and that only if the Companies could not find an outside purchaser. Somebody, however, found a mark: John Nicholson, Esq., a noted Pennsylvania land speculator, willing to part with \$500 for the share.³⁹

38. Minutes of the United Company, 104 (Jan. 23, 1787), 116–19 (Feb. 6, 1793), 157–59 (April 2, 1793, citing the first Trade and Intercourse Act, codifying ban on private purchases of Indian land).

39. The Companies assessed each shareholder \$50 on Nov. 3, 1778; \$100 on Nov. 7, 1778; \$30 on March 24, 1779; and £5 (Pennsylvania currency) on September 24, 1781; *ibid.*, 5, 6, 20, 98; *ibid.*, 28, 61 (number of shares authorized and issued); *ibid.*, 112–13 (Dec. 1792) (sale of share to Nicholson). Interestingly, in a later (1793) transaction between two insiders, Michael Gratz paid David Franks \$500 Spanish Milled Dollars for a share. Gratz and

The members, even before beginning to lobby in earnest, contemplated dilution of their interest in another way: granting a large portion of their lands to the federal government in return for recognition of the Companies' title to the remainder. The members first discussed a gift to the United States in conjunction with a supposed patriotic desire to reward members of the armed forces by making "a Cession to Congress at a moderate value, in trust for the United States of a Tract of Land sufficient to enable them to pay the stipulated bounties to Officers and Soldiers . . ." ⁴⁰

The Companies were always very careful about the legal formalities of such a grant. They consistently proposed to cede *all* their lands to the government, which would then grant a portion back to the Companies. Why did they propose this two-step transaction, when it would have been simpler for the company to grant the government the proposed share of its lands in one step? The shareholders probably felt more secure with title rooted in a patent directly from the federal government.

The Companies vacillated on the fraction of lands they proposed to retain. They first discussed keeping a fifth of their acreage, expressed willingness later to reduce that fraction to an eighth, but in their final major lobbying effort, in 1796, told Congress that they would compromise their claim if permitted to take title to a quarter of the land encompassed in their four tracts, leaving the details to later negotiation. ⁴¹

In trying to sell Congress on such a compromise, the United Companies repeatedly emphasized that, by relying on their deeds, the nation could avoid paying the Illinois and Piankashaw Indians a second time for the same lands. "[A] transfer of [the company's title] to the United States may be rendered effectual, to preclude the necessity of a *second purchase*, and to *bar* all future claims of the Indians to the lands in question . . ." Just in case Congressmen missed the point, the Companies later made the point again, more stridently:

Franks were business partners in other ventures, and it is possible that this was a sham transaction to try to prop up the publicly perceived value of shares.

Land claims based on Indian deeds sold at deep discounts; as early as 1779, "[s]hares in the Indiana Company [discussed above, note 33] were advertised for sale and brought when sold at about twenty per cent of their estimated face value . . ." Volwiler, *George Croghan*, 314. Sales at 20 percent of face value correspond precisely to the ratio that United Companies insiders were willing to pay for the share Nicholson bought at full price.

40. Minutes of the United Companies, 15.

41. The members first discussed this approach at a meeting in late 1781 and proposed "cleansing" their title via a United States patent in all subsequent memorials. *Ibid.*, 98. For subsequent offers, see United Illinois and Wabash Land Companies, *Memorial of 1797*, 5 (Early American Imprints, 1st series, no. 32, 977); Minutes of the United Companies, 98 (fall 1781) (one fifth, consisting of part of the first, or southern, Illinois Company tract); *ibid.*, 110 (Dec. 17, 1791) (one eighth, no location specified).

We are persuaded that the government of the United States, would not reject a valid *title*, to the great injury of many of their good citizens; and, at a greater price, recur to the Indians for a new purchase, sinking in their pockets (viz. the Indians) the large sums that have been paid and expended by the first *bona fide* purchasers, who remain true and faithful citizens of the United States.

Successive national legislatures never found a compromise attractive. From the very first memorial in 1781, they rejected the Companies' claims based on the ancient, omnipresent rules against private purchases of land from the Indians: "the said purchase had been made, without the *license* of the *then* government, or other public authority, contrary to the common and known usage, in such cases established." The Companies did win over one legislative committee in 1788, which reasoned that the nation could step into the Companies' shoes: "however improper it may be in general to countenance private purchases from Indians . . . the United States will be ultimately benefitted by an exemption from the expense of purchasing the same Lands . . ."

This is as close as the United Illinois and Wabash Companies would ever get to success. In 1792 a Senate committee felt that the benefits of strictly enforcing the rule against private purchases of Indian lands outweighed the benefits of waiving the rule in this particular case. Thus it rejected the Companies' petition on the predictable grounds that "deeds obtained by private persons from the Indians, without any antecedent authority or subsequent confirmation from the government, could not vest in the grantees . . . a title to the lands . . ."⁴²

In their concerted lobbying effort of 1796–97, the Companies marshaled every possible argument in favor of recognizing Indian deeds. They cited a few exceptional cases in which colonies had recognized private purchases from Indians and quoted at length from the Camden-Yorke Opinion. They emphasized the independence of the tribes from whom they purchased and the fact that these Indians had never sold any rights in land to a colony or the royal government. Summing up, they stated a rule flatly at odds with the weight of authority: "Mere *sovereignty*, without *purchase* from the native Indians was never considered, as conveying a title, or any Right of *Soil*." Congress was unmoved and adopted the Senate committee's 1792 report rejecting the claims. The Companies had an insurmountable hurdle:

42. Statement of December 1791, included in United Companies, *1796 Memorial*, 29; *ibid.*, 50–51; United Companies, *1797 Memorial*, part 1, 5, 6; *ibid.*, Appendix II ("Additional Statements by the Agents of the Illinois and Wabash Land Companies"), 7 [emphasis in original]; *ibid.*, Appendix I, 3; Carter, *Territorial Papers of the United States*, 1:115–16 (Report of Committee [on] The United Land Companies of the Illinois and Wabash, June 27, 1788).

the long and virtually uninterrupted line of laws barring private purchases from the Indians.⁴³

Even as they lobbied Congress, the United Companies intimated that they might pursue a judicial remedy. Their 1797 memorial quoted at length from *Van Horne's Lessee v. Dorrance* on the constitutional limits on legislative power.⁴⁴ The Companies emphasized that, in offering to compromise with Congress, they in no way admitted that a legislature could decide the validity of title—a quintessentially judicial issue.

D. *Interregnum*

The Companies' strenuous lobbying in 1796–97 may have been motivated by pecuniary pressures on some of its leading members due to a severe financial panic beginning in 1796. Wilson, hounded by creditors even as he traveled to sit on federal circuit courts, died a pauper in 1798. Robert Morris came out of debtors' prison in 1801 as "lean, low-spirited and as poor as a commission of bankruptcy can make a man whose effects will, it is said, not pay a shilling on the pound" and died penniless in 1806.⁴⁵

The next step certainly evidenced desperation. Only months after Congress rejected the Companies' claims, unspecified "Inhabitants" of Knox County, Indiana Territory (which included parts of present-day Illinois), presented a copy of the Wabash Company deed to the secretary of the Indiana Territory and asked that the government either confirm the grant or at least refrain from making any other grants in the specified regions. These "Inhabitants" were most likely claimants under the Wabash deed or their heirs and successors, perhaps spurred on by their strapped partners in the east.

The territorial secretary, Winthrop Sargent, reminded these petitioners of the long-standing rule against private grants and scolded them for asserting a claim "so wildly set up." Some of the petitioners, Sargent implied, had made claims to the same lands on more tenable grounds, and he rhetorically asked, "why my Friends have we been making these requests, if the Claim you propose to me is just?" He refused even to raise the issue in

43. United Companies, *1796 Memorial*, 28, 47; Report of the Committee To whom was referred, on the 13th ultimo, The Memorial of the Illinois and Wabash Land Company, Feb. 3, 1797 (Early American Imprints, 1st series, no. 33,032).

44. 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012 (no. 16,857) (Circuit Ct. Pa., 1795); United Companies, *1797 Memorial*, Appendix III, 6–7. The Memorial quoted the case without a citation.

45. Charles Page Smith, *James Wilson, Founding Father* (Chapel Hill: University of North Carolina Press, 1956), 382–94; Ellis P. Oberholtzer, *Robert Morris: Patriot and Financier* (New York: B. Franklin, 1903), 55.

Washington, claiming that it would undermine legitimate claims, and accused the petitioners of appearing to be "*not Men, but Children*."⁴⁶

In 1802 and 1803, the Companies submitted memorials to Congress that contained little if any new material; Congress again summarily refused to recognize the claims. They then took a stab at administrative relief in the territories, petitioning the commissioners adjudicating the morass of land claims at Vincennes in 1804. Clear directions from Washington, however, barred recognition of the Companies' deeds for the same old reason: the United States would never validate "treaties made between the Indians and private persons." In 1805, the secretary of the treasury summed up the consensus view of the Companies' claims: "[they] have not the shadow of a title to support their claim . . . I speak with perfect confidence on this point, because I have read all the Memorials of the Companies and never heard of a more frivolous claim." Two years later the secretary made clear that the United States would have "no hesitation" removing claimants under the Companies' deeds.⁴⁷

The Companies were dormant until 1810. In that year they submitted a fresh memorial to Congress, apparently authored by a new shareholder, the prominent Supreme Court litigator and land speculator Robert Goodloe Harper.⁴⁸ While formally maintaining a right to the entirety of the lands described in two deeds, the Companies were "ready to admit, that the measures adapted by the Government for the defence and settlement of the neighboring country have greatly enhanced the value of this property" and hence were willing to yield a portion of their lands. On the other hand, the Companies argued that they had rendered a valuable service to the United States: the nation, the memorial declared, had paid an unusually low price to the Indians for lands recently purchased that overlapped with the Com-

46. Carter, *Territorial Papers of the United States*, 2:490-92 (Oct. 28, 1797).

47. United Companies, *Memorial of 1802* (Early American Imprints, 2d series, no. 3191); United Companies, *1803 Memorial*; United Companies, *Memorial of 1810*, reprinted in *American State Papers, Public Lands*, 2:110; Carter, *Territorial Papers of the United States*, 7:205-8, 311-12, 329, 445; Logan Esarey, ed., *Messages and Letters of William Henry Harrison* (Indianapolis: Indiana Historical Commission, 1922), 1:102.

48. Harper argued (often with co-counsel) at least eighty-six cases between 1806 and 1825. Search of LEXIS, Genfed Library, US file (March 12, 1997). In addition to *Johnson v. M'Intosh*, he argued such leading cases as *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) (requiring complete diversity between litigants in order to invoke federal courts' diversity jurisdiction) [Harper's first Supreme Court case, successfully argued] and *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (holding that the Contract Clause barred Georgia from rescinding grants made as part of the Yazoo scheme). Harper served as the Yazoo Company's Philadelphia agent in 1791. Charles William Sommerville, *Robert Goodloe Harper* (Washington: Neale, 1899), 7. Apparently he purchased some shares himself. He also invested in the North American Land Company and authored at least part of a pamphlet supporting its claims.

panies' tracts. Balancing the benefits that each side provided the other, the memorial proposed one of the Companies' most generous compromises: that the United States grant the Companies title to the portion of the second (southern) grant in the Wabash Company deed east of the Wabash River. This would have left the Companies with roughly an eighth of the lands they originally purchased.⁴⁹

Congress rejected the memorial of 1810 on the same grounds used by the British to reject the companies' claims before the Revolution: it contradicted the then-governing Proclamation of 1763 and the universal rule, introduced "at a pretty early day . . . regulating the intercourse with Indian tribes, which requires the concomitant assent or subsequent sanction of the Government to a conveyance of lands by Indians, in order to render it valid." The Committee on Public Lands did admit that "a few solitary instances may be found, in the early settlement of the country, of Indian deeds of land being recognised as valid," but refused to make any more such exceptions. Questioning whether the earlier purchases allowed the U.S. to buy the same Indian land more cheaply, the committee found that, even admitting this, "to recognize such unauthorized proceedings of individuals with the Indians . . . would encroach upon the great system of policy so wisely introduced to regulate intercourse with the Indian tribes."⁵⁰

The last recorded corporate act in the Companies' minutes is the gift of a share in 1812. The Companies resubmitted the 1810 memorial, with only trivial additions in 1816, but Congress never even bothered to respond. The Companies' next stop would be federal court. Litigation requires an adversary, however, and until the United States extinguished Indian title and sold land within the tracts purchased by the Companies, there was no way to test title in a lawsuit.

The Companies did not have to wait long. By the early 1800s the United States had extinguished most Indian claims in Ohio and began purchasing numerous tracts in Indiana and Illinois that intersected with the Companies' claims. It took a negotiator willing to cut a few corners to buy Indian lands. General St. Clair "had been ordered to purchase cessions from the Indians, but on his first visit he was unable to discover any nation with a clear title to the southern lands of Illinois." William Henry Harrison, who negotiated all the major treaties discussed in this section, had no such compunction, "showing a readiness to enter into negotiations with any faction

49. United Companies, *1810 Memorial*, 111, 116. The Companies offered, as an alternative, to take debt certificates equal in value to the land, to be paid off from land sale proceeds.

50. *American State Papers, Public Lands*, 2:253 (Report of Committee on Public Lands, Jan. 10, 1811). Congress cited the long list of the colonial statutes against private land purchases discussed in the first part of this article.

or isolated band of Indians who would consent to a relinquishment of land titles . . . ”⁵¹

Before Harrison negotiated any major land cessions, President Jefferson made two important points to him regarding negotiations with the Illinois tribes. First, in an interesting addendum to the discovery rule, Jefferson asserted that the United States took title to the lands of any tribes that became extinct. Applying this law to the facts at hand, he noted that “[t]he Cahokias [an Illinois tribe] having been extirpated by the Sacs, we have a right to their lands in preference to any Indian tribe, in virtue of our permanent sovereignty over it.” Similarly, Jefferson claimed for the nation a “strip along the southern bank of the Illinois River . . . because it was the property of the Peoria Indians who had become extinct.” He also advised Harrison that the Kaskaskias, another Illinois tribe, were reduced to “a few families, exposed to numerous enemies, and unable to defend themselves, and would cede lands in exchange for protection.”

Harrison appears to have heeded this advice when, in August 1803, he obtained all the lands in the Illinois Company’s deed and more in a huge 8.9 million acre cession from the Illinois tribes. The cession specifically notes the tribes were “reduced to a very small number . . . unable to occupy the extensive tract of country which of right belongs to them . . . ” And although he did obtain signatures from the supposedly extinct Cahokias, he did not bother looking for representatives of the Peorias. The meager surviving bands ceded their lands in large part for the protection of the United States, as anticipated by Jefferson and promised in article two of the treaty.

Neighboring Indians disputed the title of such a “decimated and impotent tribe” to so vast a territory, and there was “considerable doubt as to their rightful claim to the land they had ceded.” A recent account labeled the 1803 treaty with the Illinois tribes as “[t]he most notorious” of Harrison’s dealings with tribes having only tenuous claims to lands ceded. Harrison dealt with “the remnants of the Kaskaskias under Ducoigne, a band that numbered, according to the United States, only 30 men, women, and children in 1796 but that ceded [all of] southern Illinois [and much of central Illinois] to the United States . . . ”⁵²

51. Alvord, *Illinois Country*, 416.

52. “Hints on the Subject of Indian Boundaries, Suggested for Consideration” (Dec. 29, 1802), in Albert E. Bergh, ed., *The Writings of Thomas Jefferson* (Washington, D.C.: Thomas Jefferson Memorial Association, 1907), 17:375; Dwight L. Smith, “Indian Land Cessions in the Old Northwest, 1795–1809” (Ph.D. diss., Indiana University, 1949), 257; 7 Stat. 78, 200 (1803); Treat, *The National Land System*, 404 (giving acreage of tract). For maps of this and the other cessions cited, see Royce, *Indian Land Cessions*, pls. 124–26; Smith, “Indian Land Sessions,” 245, citing letter from William Henry Harrison to Secretary of War

When Harrison began buying lands in the area of the Wabash Company's claims, the United States, otherwise disdainful of Indian deeds, decided to take a page from the United Companies' book. Secretary of War Henry Dearborn counseled Harrison to convince the Piankashaw and Kickapoo tribes to cede their lands, without payment, based on the earlier sale to the Wabash Company. Apparently, however, this plan was foiled by other tribes' vehement objection that the Piankashaw had lacked the right to sell the lands in the first place.⁵³

In part because the United States had to deal with so many tribes, acquisition of the lands described in the Wabash Company's deed occurred through a series of cessions. Accepting the weakness of the Piankashaw's claim to all the lands sold to the Wabash Company, the federal government bought 2.8 million acres that included the first (northern) parcel in the Company's deed, in the fall of 1809, from a group of five other tribes and never paid the Piankashaws a cent. The Piankashaws were among the tribes ceding lands included in the second (southern) parcel they granted to the Wabash Company, but they were not alone.⁵⁴

The United States began surveying these purchases, a necessary prerequisite to sales, almost immediately after finalizing the treaties and opened land offices at Vincennes, Indiana, and Kaskaskia, Illinois, in 1804. The War of 1812 and the uprising led by Tecumseh and his brother, the Prophet (Tenskwatawa), however, delayed the process of bringing any land in Illinois to market. Before these conflagrations, however, the United States did sell a significant amount of land in the Vincennes district, overlapping both of the Wabash Company's parcels.⁵⁵

This presents a puzzle. Why did the plaintiffs in *M'Intosh* not bring their

Dearborn, March 3, 1805 (manuscript in the Esarey Collection) (claiming fear of Potawatomis was main reasons Kaskaskians agreed to treaty of cession); Reginald Horsman, *Expansion and American Indian Policy, 1783-1812* (East Lansing: Michigan State University Press, 1967), 146; Treat, *The National Land System*, 169; White, *The Middle Ground*, 474 n.6.

53. Carter, *Territorial Papers of the United States*, 7:46-47, 53-54.; Moses Dawson, *A Historical Narrative of the Civil and Military Services of Major-General William H. Harrison* (Cincinnati: Dawson/Advertiser, 1824), 25-26.

54. 7 Stat. 81 (Delaware; 1804); 7 Stat. 83 (Piankashaws; 1804); 7 Stat. 91, 100 (Miami; 1805); 7 Stat. 113 (Miami including Eel Rivers, Delawares, and Potawatomis; 1809); 7 Stat. 116 (Weas; 1809); 7 Stat. 117 (Kickapoos; 1809).

55. Joseph W. Ernst, "With Compass and Chain: The Federal Land Surveyors in the Old Northwest, 1785-1816" (Ph.D. diss., Columbia University, 1958), 251 (map); Malcolm J. Rohrbough, *The Land Office Business: The Settlement and Administration of American Public Lands, 1789-1837* (New York: Oxford University Press, 1968), 28; Congressional Information Service, *Index to Presidential Executive Orders and Proclamations* (1986) (CIS no. 1806-52-13), 1:65 (announcing commencement of land sales at Vincennes on October 10, 1806).

suit as soon as sales were made in the Vincennes district, instead of waiting until 1820 to file, alleging conflicts with later sales out of the Kaskaskia office? One possibility is that they did not want to litigate in a territorial court. Hence they waited until Indiana and Illinois achieved statehood (in 1816 and 1818 respectively). The next section offers a different explanation: the litigation was driven by the coincidence of the death of a claimant (Thomas Johnson) and the identity of his executor (Robert Goodloe Harper).

E. The Litigation of Johnson v. M'Intosh

In their first years of service, officials at the Kaskaskia, Illinois, land office devoted themselves almost exclusively to sorting out the tangle of preexisting French, British, and early American claims over southern Illinois lands. New business picked up when surveyors finished their work in the district and Congress passed a "preemption" act giving occupiers and improvers (squatters) the right to purchase their claims at the statutory minimum price of two dollars an acre. Like most preemption acts, Congress limited individual claims to a single quarter section (160 acres). Preemptors purchased about 110,000 acres from 1814 to 1815. The president (Madison) finally proclaimed open market land sales, by auction, on May 16, 1816, and business boomed.⁵⁶

This chronology raises questions about the purchases by the defendant in *M'Intosh*, William McIntosh.⁵⁷ He obtained the lands at issue in the case

56. 2 Stat. 446, 447 (1807) (declaring need for more time to clear up claims in Kaskaskia district); 2 Stat. 607 (1810) (confirming claims approved by Kaskaskia commissioners made through 1809); 2 Stat. 677 (1812) (reexamining existing claims and permitting new claims in Kaskaskia district); Solon J. Buck, *Illinois in 1818* (Urbana: University of Illinois Press, 1967), 53; 2 Stat. 797 (1813). Congress twice extended the time period for preemptive claims in the Kaskaskia district. 3 Stat. 307 (1816); 3 Stat. 218 (1815); 2 Stat. 797 (1813).

57. William McIntosh apparently emigrated to America from Scotland after his father joined Bonnie Prince Charles's failed uprising and thus forfeited the family estate. Milo M. Quaife, ed., *John Askin Papers* (Detroit: Detroit Library Commission, 1928), 1:293-94 n.15. He served in the King's army during the Revolutionary War, rising to the rank of major. Carter, *Territorial Papers of the United States*, 7:669 (Letter from Governor Harrison to the Secretary of the Treasury Gallatin, Vincennes, Aug. 29, 1809); Letter to the Western World, Extra, Frankfort, Thursday, March 3, 1808, *ibid.*, 8:94. After the war, McIntosh appeared as an attorney in Vincennes and resided there until at least 1816; at some date thereafter he moved to Grand Rapid, near Palmyra, Illinois. *John Askin Papers*, 1:328 n.75. He served as treasurer of the Indiana Territory circa 1804 and, like many other frontier officials, "jumped in at the very beginning of [his] residence in the new territories to acquire [land] claims . . ." Gates, *The Public Lands*, 92; Carter, *Territorial Papers of the United States*, 7:194 (Letter from Michael Jones, Register of Land Office at Kaskaskia, to the Secretary of the Treasury, from Kaskaskia, May 18, 1804).

(fifty-three tracts amounting to nearly 12,000 acres) on April 24, 1815, before the first public sales.⁵⁸ The law limited preemption claims to 160 acres, and it is extremely doubtful that McIntosh had claims dating from British or French rule to over 11,000 acres scattered all over southern Illinois. How, then, did McIntosh manage to get patents from the federal government to all this land, at the statutory minimum price, before the government auctioned it to the public? There are two possibilities, both consistent with what little is known of William McIntosh.

First, McIntosh may have engaged in a massive fraud, claiming preemptive or colonial rights to acreage one hundred times the per person limit. This undoubtedly would have required the assistance, or at least the acquiescence, of a local land office employee. McIntosh helped the register of the Kaskaskia land office, Michael Jones, obtain his job and “politely offered to become [one of Jones’s] sureties.” There is no direct evidence that Jones assisted McIntosh in any malfeasance, but land office registers could, and did, assist in myriad land frauds on the frontier. Given the size of McIntosh’s claims, however, it seems probable that officials in Washington would have noticed any irregularity, and so outright fraud seems unlikely.

It is more likely, and consonant with a large body of evidence, that McIntosh obtained these lands from preemptioners and colonial claimants in return for legal services rendered to help establish their claims. He served as the voice of French claimants in southern Indiana and Illinois as early as 1803, and William Henry Harrison, governor of the territories, identified McIntosh as one of the “the principal councillors of the Kaskaskias Spec-

William McIntosh spelled and signed his last name with a “c” instead of an apostrophe, yet the Supreme Court used an apostrophe.

58. District Court Records of *Johnson v. M'Intosh*, National Archives and Records Administration, Record Group 267 (Supreme Court Case Files), Microfilm M214 (1792–1831), Roll 56, Frame 410 (hereafter District Court Records of *Johnson v. M'Intosh*) (copy of McIntosh’s patents). The district court records of McIntosh’s purchases match exactly patents issued to him as recorded in a database of all United States patents issued for land in Illinois. gopher://gopher.uic.edu:70/11/library/libdb/landsale/ (State of Illinois, Archives, Public Domain Land Tract Sales Archive). The Supreme Court dates the purchases three years later, in 1818, when the federal government issued patents. *Johnson v. M'Intosh*, 560. Such delays between purchase and issuance of patent were common. Rohrbough, *The Land Office Business*, 175. The Supreme Court’s acreage count, 11,560 acres, based on the parties’ stipulated facts, appears to be off a bit; the land records indicate that McIntosh purchased 11,982.81 acres (forty-four quarter sections, one half section, six sections, a fractional section [521.21 acres] and a fractional half section [260.6 acres]). According to the State of Illinois Public Domain Land Tract Sales Archive database cited above, McIntosh paid the statutory minimum two dollars per acre for each and every parcel.

ulators . . . " It is strange, however, that McIntosh chose to file all these claims, accumulated over ten years or more, on a single day.⁵⁹

By some accounts, McIntosh was not faithful to his clients, or to the law, in providing legal guidance in return for a portion of land claims. "By magnifying the difficulty of obtaining confirmations and other vile deceptions, upon those illiterate and credulous people, he succeeded frequently in obtaining 200 out of 400 acres, for barely presenting the claim." Governor (later President) Harrison accused McIntosh of controlling an "illiterate Ignorant Irishman . . . possessed of a large property" and cited documents purporting "to shew McIntosh guilty of perjury . . . [McIntosh] will swear any falsehood whatever to gain any of his purposes . . . the greatest stigma I shall incur is that of having my name Coupled with [McIntosh and other] such Scoundrels . . ." It is likely that McIntosh suborned perjury. "McIntosh had written in the English language, two depositions, to be sworn to by a Frenchman, who could neither write, read, nor speak one word of English . . ." When this Frenchman appeared before the land commissioners, he "declared with horror in his countenance, that he had never sworn to the facts there stated, and that if they really contained those facts, they had been inserted by McIntosh, without his knowledge or consent."

These sources, however, must be read with a grain of salt. Although Harrison and McIntosh began as partners in purchasing lands at the rapids of the Wabash River in 1800, they had a falling out in 1804. McIntosh opposed Harrison's desire to advance the Indiana Territory closer to statehood, since the administrative costs involved would require levying higher property taxes—anathema to a land speculator like McIntosh. The two publicly traded barbs. McIntosh apparently went too far by accusing Harrison of cheating the Indians, and Harrison obtained a \$4000 libel judgment.⁶⁰

59. Carter, *Territorial Papers of the United States*, 7:194 (Letter from Michael Jones, Register of Land Office at Kaskaskia, to the Secretary of the Treasury, from Kaskaskia, May 18, 1804); *ibid.*, 125 (Petition to Congress by Inhabitants of Knox, St. Clair, and Randolph Counties, Oct. 22, 1803); *ibid.*, 503 (Memorial on behalf of French claimants of Vincennes—William McIntosh to the President, Dec. 15, 1807); *ibid.*, 536–38 (William McIntosh to the President, March 30, 1808); *ibid.*, 612 (Memorial to Congress by Inhabitants of Knox County) (Israel Rouland signed "by Will: McIntosh his agent"); *ibid.*, 669 (Letter from Governor Harrison to the Secretary of the Treasury, Gallatin, Vincennes, Aug. 29, 1809).

60. Letter to the Western World, in Carter, *Territorial Papers of the United States*, 8:94–99; *ibid.*, 93–94 (Deposition of Newton E. Westfall, Jan. 23, 1811); *ibid.*, 81 (Deposition of Judge Vanderburgh, Jan 14, 1811); Dawson, *A Historical Narrative*, 78; Francis S. Philbrick, ed., *The Laws of Indiana Territory 1801–1809*, vol. 21 of the Collections of the Illinois State Historical Library, Law Series vol. 2, xxvi. An anonymous ally of Harrison described how McIntosh avoided a duel and mocked him for "his unutterable aversion to the smell of gunpowder. He surely is the veriest coward that ever bit the dust."

The historical record of the plaintiffs in *M'Intosh* is less colorful. Thomas Johnson, an original investor in the Wabash Company, was the first governor of the state of Maryland and served briefly on the United States Supreme Court from 1791 to 1792. He died on or about Nov. 1, 1819. The plaintiffs, his son Joshua and grandson Thomas Graham, were the primary beneficiaries of his will. Perhaps more importantly for the commencement of the *M'Intosh* litigation, the will made Robert Goodloe Harper executor of the estate. Harper apparently determined that Johnson's estate owned shares and decided to go to court in a final stab at a happy ending to the long and sad story of the United Illinois and Wabash Land Companies.⁶¹

Looking for a federal patent holder to sue, as a test of the validity of their claim under the Wabash Company's Indian deed, Johnson and Graham, probably led by Harper, targeted McIntosh. As one of the largest landholders in the Illinois and Indiana territories, McIntosh was a natural adversary, but he does not appear to have been a real one. Mapping the United Companies' claims alongside McIntosh's purchases as enumerated in the district court records shows that the litigants' land claims do not overlap. Hence there was no real "case or controversy" between the parties and the federal courts lacked jurisdiction. Even so, the record makes clear that the defendant McIntosh made no effort to dispute the plaintiffs' questionable assertion that the parties' claims conflicted. In addition, the courts did nothing to establish the existence of a true dispute between the litigants. It is impossible to determine whether the parties and the courts were negligently ignorant, willfully ignorant, or knowing participants in yet another early Supreme Court case that was arranged by parties who knew or should have known that no true conflict existed.⁶² Everyone, it seems, wanted a Supreme Court decision deciding once and for all whether private purchases from the Indians were valid.

Given the location of his properties, it is at first puzzling that the plaintiffs contended that McIntosh's patents conflicted with the Wabash Company's southern tract. The Supreme Court opinion specifically limited the controversy to claims "by the plaintiffs, under a purchase and conveyance from the *Piankashaw* Indians"—grantors to the Wabash Company only. As the map shows, none of McIntosh's tracts come within fifty miles of the

61. Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court 1789–1969*, 1:149–58; Letter from Roger Taney to Robert Goodloe Harper, Dec. 4, 1822, in Harper Papers, Legal Correspondence, 1797–1824, Maryland Historical Society Collection (Manuscript 1884, accession number 55,644).

62. See map above, 68; Magrath, *Yazoo* (showing that *Fletcher v. Peck*, 10 U.S. [6 Cranch] 87 [1810], resolving Yazoo land case, was feigned); Charles Warren, *The Supreme Court in United States History* (Boston: Little, Brown, 1926), 1:147 (arguing that *Hylton v. United States*, 3 U.S. [3 Dall.] 171 [1796] was feigned).

Wabash Company's claims. It would have been more plausible to argue that McIntosh had claims that conflicted with the Illinois Company's southern tract.⁶³

Real property law at the time, however, may have required the plaintiffs to assert claims under the Wabash Company deed, since they took their interest from a grantee in that deed (Thomas Johnson). While the United Companies' articles stated that, on unification, they held their lands "in common," there is no record that they executed deeds conveying mutual coownership interests. Without such a formality, it is doubtful that courts in the 1820s would have recognized any real property interest of successors in interest under the Wabash Company deed to the lands described in the Illinois Company deed. Hence the plaintiffs claimed, and the defendant and courts agreed, to what the map shows is clearly not possible: that McIntosh's property overlapped the southern Wabash Company tract.

There is other evidence to support the contention that the parties either feigned their dispute or that the defendant and the courts declined to take even the simplest steps to verify the existence of a true controversy. If the plaintiffs simply wanted to get into court based on any of the four tracts in either of the two deeds, they could have done so easily. M'Intosh bought a piece of land clearly within the southern tract of the Illinois Company in 1819.⁶⁴ Probably the plaintiffs did not mention this tract because they felt that they had no standing to sue on the Illinois Company deed. Instead they grounded their complaint on other tracts owned by McIntosh that were closer to Wabash Company claims—though not close in absolute terms, as the map shows.

McIntosh stipulated to every fact alleged in the complaint, jurisdictional and otherwise. Perhaps he participated in framing the complaint, which became the stipulated facts of the case. Neither the district court nor the Supreme Court ever questioned any of these facts. Again, all parties seemed determined to obtain a legal ruling whether or not the facts showed that the litigants had conflicting land claims.

The plaintiffs' case commenced in the United States District Court for Illinois in December 1820, in Vandalia, Illinois, Judge Nathaniel Pope presiding. The complaint, following the traditional formalities and fictions of ejectment, claimed that the plaintiffs had a lessee, Simeon Peaceable, who was ousted by a claimant, Thomas Troublesome, invoking rights conferred

63. District Court Records of *Johnson v. M'Intosh*, Frame 414 (summarizing stipulated facts); *Johnson v. M'Intosh*, 543 (emphasis added).

64. McIntosh purchased Township 14 South, Range 1 East, on September 24, 1819 (shown on map above, 68), over a year before the plaintiffs filed their case. State of Illinois Public Domain Land Tract Sales Archive database (data record no. 166,128).

by the defendant McIntosh. Such “rigorous adherence to the antiquated technicalities of English law” was common in frontier federal courts, and thus they

retained the ancient pleadings of ejectment cases, with lengthy fictitious exchanges between mythical legal contestants . . . John Doe, Richard Roe, John Den, Richard Fen, and many other characters with ingenious alliterative names continued to sue one another throughout this period . . . sometimes the attorneys exercised their ingenuity and litigated cases in the names of Richard Peaceable and Henry Troublesome, Samuel Seekright and Solomon Spendall, Elder Grant and Void Claim, suggesting a bias toward the plaintiff.⁶⁵

The court swore in a jury of twelve men, but immediately, on agreement of both parties, “for certain causes” removed one juror (Thomas Ray), at which point the court discharged the rest of the jury and gave the parties leave “to make a stated and agreed case of facts for the consideration of the Court . . .” Dismissing a juror was apparently the standard procedural mechanism in this era to dispense with a jury trial and instead let the judge decide the case on a paper record. Without providing any substantive opinion, the court rendered judgment for the defendant. In yet another piece of evidence that both sides wanted a definitive judgment on the validity of Indian deeds, McIntosh waived his right to force the plaintiffs to post an appeal bond.⁶⁶

II. The Supreme Court's Opinion

A. Arguments and Holding

The plaintiff filed a writ of error in the Supreme Court on February 5, 1822, “by consent”—one more indication that McIntosh wanted the case heard

65. District Court Records of *Johnson v. M'Intosh*, Frame 422; Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky, 1789–1816* (Princeton: Princeton University Press, 1978), 77, 84, 177 n.24. For biographical information on Pope, see 30 Fed. Cas. 1391 (Bibliographic Notes of the Federal Judges); Paul M. Angle, “Nathaniel Pope, 1784–1850,” in *Illinois State Hist. Soc'y, Transactions for Year 1936*. The Great Chicago Fire consumed most of Pope's, and the Illinois District Court's, early records. Charles Davey (or Dewey—the handwritten transcript is unclear) represented the plaintiff; research failed to uncover any biographical information on him. Henry Starr represented the defendant McIntosh. Starr practiced out of Kaskaskia and had a partner, Blackwell, who worked in Belleville, Illinois. Advertisement, *Illinois Intelligencer* (April 14, 1819), vol. 3, no. 33, 4.

66. District Court Records in *Johnson v. M'Intosh*, Frame 347. “[J]uries were often discharged without making a finding. The technique usually employed for dismissing a jury was to withdraw a juror, ‘whereupon the jury was discharged.’” Tachau, *Federal Courts in the Early Republic*, 88.

at the highest level despite his victory in district court. Unsurprisingly, Robert Goodloe Harper served as counsel for the plaintiffs, along with Daniel Webster. Webster's fame as a Supreme Court litigator in the early republic is well known; unfortunately there is no direct reference to the *M'Intosh* case in his extensive surviving papers.⁶⁷ Harper, as discussed above, was also a preeminent Supreme Court lawyer of his era. Although there is little discussion of the case in his surviving papers, Harper did make inquiries as far afield as London in trying to build a case.⁶⁸ General William H. Winder, another prominent Supreme Court litigator, along with Henry M. Murray, who apparently joined the Supreme Court bar specifically for this case and never appeared in the Court again,⁶⁹ presented the case for the defendant McIntosh. Argument took four days, and only nine days later the Court affirmed the district court's judgment for the defendant.⁷⁰

The bulk of Webster's and Harper's reported argument for the plaintiffs focuses on narrow statutory issues. They claimed (i) that banning the purchase of lands from a foreign sovereign was a *legislative* act beyond the power of the Crown acting without consent of Parliament, and thus that the Proclamation of 1763, a purely administrative act, was void; and (ii) that

67. National Archives and Records Administration, microcopy series 216 (Supreme Court Docket Sheets), frame 408. The Supreme Court received the district court records almost a year before the plaintiff finally filed the writ of error. *Ibid.* An index of all of Webster's letters and an even more detailed index of microfilms containing his complete works contain not a single cite to *Johnson v. M'Intosh*. See Alfred S. Konefsky and Andrew J. King, eds., *The Papers of Daniel Webster: Legal Papers, 1798-1824* (Hanover, N.H.: Published for Dartmouth College by the University Press of New England, 1982), 1:383-475; *Microfilms of Daniel Webster's Papers* (Charles Wiltse, ed. 1974). In a letter written about a month before he argued the case, Webster in passing mentioned working on a case with Harper and requested a pamphlet on the *Mohegan* case, a famous and interminable Connecticut land dispute. Webster Microfilms, Reel 4, Frame 3384 (Letter from Webster to Daggett, January 7, 1823).

68. In early 1822, Harper wrote to Thomas Aspinwall in London: "Will you be so good, my dear Sir, as to inform me at your earliest convenience, of the result and expense of the inquiries which you were so good as to make for the Illinois and Wabash companies, at my instance." He apparently received no reply; in an addendum to a copy of this letter, he renewed the request. Letter from Harper to Aspinwall, Jan. 13, 1822, with addendum dated April 25, 1822. Harper Papers, Legal Correspondence, 1797-1824, Maryland Historical Society Collection (Manuscript 1884, accession number 57,784).

69. Murray joined the Supreme Court bar on Feb. 27, 1822, a month before the plaintiffs filed their writ of error; no residence is given. National Archives and Records Administration, Record Group 267 (Supreme Court Case Files), Microfilm M217 (Attorney Signatures), Roll 1. A computer search did not reveal another Murray arguing in the Supreme Court before the Civil War. Search of LEXIS, Genfed Library, US file (March 12, 1997).

70. The case was argued February 15 and February 17-19, 1823; judgment was entered on Friday, February 28, 1823. National Archives and Records Administration, microcopy series 216 (Supreme Court Docket Sheets), frame 408.

a colonial Virginia statute enacted in 1662, banning such purchases, had lapsed (or been repealed), and that its reenactment in 1779, after the United Companies' purchases, could not divest the companies of previously vested rights.

Chief Justice Marshall, in a brief detour toward the end of the Court's unanimous opinion, rejected both contentions out of hand. Bluntly disagreeing with the plaintiffs' first point, he declared that the Crown retained exclusive power to deal with "vacant lands," including Indian lands, as it pleased. Much more peculiar was Marshall's response to the supposedly lapsed, and tardily reenacted, Virginia statute banning private purchases. The only evidence that the statute of 1662 had been repealed, it seems, was a "marginal note opposite to the title of the law, forbidding purchases from the Indians, in the revisals of the Virginia statutes, stating that law [the 1662 statute] to be repealed." Marshall did not argue that a marginal note beside a title was insufficient evidence that the legislature had repealed the statute; indeed, he explicitly refused to recognize that the 1779 law could "countervail the testimony furnished by the marginal note"; instead he found that the 1779 law could "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."⁷¹

We will return to what Marshall meant by "broad principles . . . always . . . maintained." But there is a more immediate question: why did Marshall not limit his opinion to these two points? If either the Proclamation of 1763 or the Virginia colonial statute of 1662 was good law at the time of the United Companies' purchases, then the Companies' purchases were clearly illegal. A contemporary New York case rejected an Indian deed precisely on such narrow grounds.⁷² The main difference between this approach and the broader rule Marshall enunciated is that a more limited ruling would leave loopholes for future litigation. For instance, what if a colony had a lapsed statute and some speculators made purchases before the Proclamation of 1763? Marshall apparently thought the stakes were important enough to warrant a universal rule barring private purchases from the Indians.

Scholars have justly complained about the "tumbling logic" of Marshall's opinion and its "conflicting and confusing potpourri of arguments." Yet

71. *Johnson v. M'Intosh*, 585, 595–96. Marshall distinguished the plaintiffs' primary supporting case, *Campbell v. Hall*, 1 Cowp. Rep. 204 (1774), as involving royal imposition of a tax. Parliament, not the Crown, had the exclusive power to tax.

72. *Goodell v. Jackson*, 20 Johnson's Reports 693 (N.Y. 1823) (refusing to recognize Indian grant based on exhaustive analysis of New York Constitution of 1777, article 37, and a long line of colonial and state statutes forbidding land transactions with the Indians).

there is an underlying structure to the opinion, and we can distill the arguments from Marshall's "conflicting and confusing potpourri" and assess each in turn. We have already seen, for example, that the Proclamation of 1763 and colonial statutes were too narrow to support a more general holding. We can ignore most other arguments in Marshall's opinion as mere dicta unnecessary to decide the case.⁷³

In order to find the true holding, we must start with the question Marshall proposed to answer. Here, at least, in its very first paragraph, the opinion is crystal clear: "the question is, whether [the United Companies'] title can be recognised in the Courts of the United States?" The key clause is the last one, "in the Courts of the United States." Marshall repeated this phrase in the second paragraph of the opinion and again in the last paragraph. It at first seems superfluous; what courts, other than the courts of the United States, could possibly be relevant to the dispute?

The answer is Indian courts. Marshall laid out the two tiers governing rights in American lands: the discovery rule that regulated inter-European claims and "[t]hose relations which were to exist between the discoverer and the natives." The Indians' rights to their lands, defined in the second tier, "were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired." The discovery rule itself, Marshall noted, prevented the Indians from selling to other sovereigns. Under colonial practice, however, the Indians were not stripped of all rights; they retained what Marshall labeled the "Indian title of occupancy," which could be extinguished only "by purchase or by conquest."

The plaintiffs, then, via their predecessor (a member of the Wabash Company and then the United Companies), purchased this Indian title of occupancy. Since they purchased Indian title, Marshall directed them to an Indian forum for a remedy.

[The plaintiffs hold] under [the Indians], by a title dependent on their laws. The grant derives its efficacy from their will; and if they [the Illinois and Piankashaw tribes] choose to resume it, and make a different disposition of their land, the Courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.

73. Henderson, "Unraveling the Riddle of Aboriginal Title," 87; David E. Wilkins, "Johnson v. M'Intosh Revisited: Through the Eyes of *Mitchel v. United States*," *American Indian Law Review* 19 (1994): 166-67. Marshall's opinion cites few precedents, and all are tangential to the main doctrines established by *Johnson v. M'Intosh*. Research into lower federal court, colonial, and state court decisions uncovered only one antecedent opinion anticipating Marshall's approach: *Marshall v. Clark*, 4 Call 268 (Virginia 1792), a land dispute between Marshall's father and George Rogers Clark.

Included in the Indians' title of occupancy was the power to sell lands to the discovering sovereign that a tribe had previously conveyed to someone else. Thus, as Ball puts it, "[t]he plaintiffs' claim to the land was defeated principally because the Indians themselves had extinguished plaintiffs' interest" by the later sale to the United States.⁷⁴

Marshall, then, created the rather strange two-tiered land tenure system described in the first part of this article: Indian title of occupancy applied before American purchase or conquest, the common law of the several states applied after. The courts of the United States have no jurisdiction over claims based on Indian title of occupancy. The dual land tenure system explains why the plaintiffs lost the case: they purchased the Indian title of occupancy, which the Indians could and did extinguish, under the law of the United States, by reselling to the United States.

B. Marshall's Version of Indian Title

What is less clear in *M'Intosh* is the precise contours of the Indian title of occupancy. The most important question for the Indians, given that they could sell full title only to the United States, was whether they could refuse to sell. Marshall's black letter rule, that the United States could divest the Indians of title only via purchase or conquest, was consistent with earlier doctrine. The word conquest was subsequently limited to "defensive wars" or those fought for some other "just cause." In addition to purchase and just conquest, later cases held that the Indians could lose their title of occupancy by abandonment.⁷⁵ Outside of these elaborations, the Supreme Court has never altered the rules established in *M'Intosh*.

74. *Johnson v. M'Intosh*, 571–72, 573, 574, 587, 593, 604–5; Ball, "Constitution, Court, Indian Tribes," 25; Henderson, "Unraveling the Riddle of Aboriginal Title," 93–96. Marshall knew full well, of course, that there was no Indian court to hear the plaintiffs' grievance. In the very next sentence, he observed, "[i]f they annul the grant, we know of no tribunal which can revise and set aside the proceeding." *Johnson v. M'Intosh*, 593.

75. Carter, *Territorial Papers of the United States*, 4:35 (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"); Smith, *Indian Land Cessions in the Old Northwest*, 213–14, citing Speech of Jefferson to Tribes, April 22, 1808 (counseling Indians that in negotiating to sell land, "you have been free to do as you please, your lands are your own . . . to keep or sell as you please . . ."); *Worcester*, 31 U.S. 545. Abandonment explains *Marsh v. Brooks*, 55 U.S. (14 How.) 513 (1852), where the court ruled that the holder under a federal patent could adversely possess against the Indians, despite the failure of the government to extinguish Indian title. Without appealing to abandonment as the basis for extinguishing title, this case would be inconsistent with *Johnson v. M'Intosh*, empowering a private citizen to do by occupation what she could not do by purchase. The court formally declared that abandonment can extinguish Indian title in *Williams v. City of Chicago*, 242 U.S. 434, 437 (1917). Arguably, Marshall alluded to abandonment in *Johnson v. M'Intosh*.

Formally, then, describing Indian title as amounting to "only a tenancy at sufferance" is misleading, since under *M'Intosh* the Indians could remain on their land, and refuse to sell, as long as they remained peaceful. Marshall specifically deemed them "rightful occupants," the antithesis of tenants at sufferance, whom the law distinguishes from trespassers only by the legality of their original *entry*. The opinion, doctrinally at least, casts Indians as term of year tenants, with full rights to renew, rather than as tenants at sufferance subject to immediate eviction. As a matter of realpolitik, however, the sufferance label may be accurate, and later cases did erode Indian rights.⁷⁶

As peculiar as Indian title seems in and of itself, even stranger is its coexistence with European title in Marshall's dual land tenure construct. Real property was still the centerpiece of the common law in 1823, and few common law doctrines were as deeply established as the idea that all titles were rooted in a unique sovereign, be it the Crown, a state, or the federal government. Marshall himself apparently found it most odd that, under this system of dual land tenure, European sovereigns could convey titles before they had extinguished Indian title, for he devoted almost half of his opinion to laying out the historical record that "our whole country had been granted by the crown while in the occupation of the Indians." Why did Marshall devote so much time to summarizing long historical practice? Why did he emphasize that grants of European title before extinguishment of Indian title were "understood by all," "exercised uniformly," and extended "universal recognition" as legitimate?⁷⁷

After describing Indian migrations caused by settlers thinning the game population, he noted that the "soil, to which the crown originally claimed title, *being no longer occupied by its ancient inhabitants*, was parceled out according to the will of the sovereign power." *Johnson v. M'Intosh*, 590–91 (emphasis added).

76. Philip P. Frickey, "Marshaling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law," *Harvard Law Review* 107 (1993): 381, 386. In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1954), the Court held tribes had no Fifth Amendment constitutional right to compensation for a taking of their title of occupancy. Payment is made at the pleasure of the United States government. This case seems to contradict *Johnson v. M'Intosh*, since it permits extinguishment of Indian title without purchase, just conquest, or abandonment. At bottom, however, it merely shows that *Johnson v. M'Intosh* was not decided on constitutional grounds. It also makes sense within Marshall's scheme of dual land tenure systems: there are no remedies "in the Courts of the United States" for rights based on Indian tenure, whether held by the plaintiffs in *Johnson v. M'Intosh* or the Indians in *Tee-Hit-Ton*.

77. *Johnson v. M'Intosh*, 574–89. One scholar has argued that this extended discussion was no more than tracing the chain of the United States' title, complaining that the "Court spent an extravagant amount of time in establishing the principle that the ultimate title to land within the United States was held by the federal government as the successor-in-interest

C. Legal Basis for the *M'Intosh* Rule: Custom

The answer is tied to the basis for the holding in *M'Intosh*: *custom*. Phrases like “understood by all,” “exercised uniformly,” and “universal recognition” appeal to long-established practice, not to any specific constitutional, statutory, or common law rule. “Common practices, sanctioned by general usage, that cover . . . similar situations are what . . . (in accordance with long usage) [is meant] by custom.”⁷⁸

Basing customary law on a general, long-term *statutory* usage is admittedly unusual; it ordinarily arises via long *private* practice, independent of formal rule creation by a public entity. A recent commentator cogently captures this anomaly, noting that Marshall “ground[ed] his decision in actual practice (i.e., custom) and positive law (i.e., the long line of colonial statutes).” While most customary legal rules may have arisen from entirely unofficial acts, drawing on old statutes for customary law is (perhaps surprisingly) quite consistent with the rationale behind English customary law. “The theory of the English law was that, if there had been a usage from time immemorial . . . it might fairly be presumed that it arose under an act of Parliament or other public act of governing power, the best evidence of which had perished.” The Supreme Court articulated the same view only nine years after *M'Intosh*:

[C]ustom . . . is always presumed to have been adopted with the consent of those who may be affected by it. In England, and in the states of this union which have no written constitution, it is the supreme law; always deemed to have its origin in an act of a state legislature . . . The court not only may, but are [sic] bound to notice and respect general customs and usage as the law of the land, equally with the written law, and, when clearly proved, they will control the general law; this necessarily follows from its presumed origin,—*an act of parliament or a legislative act.*

This theory, that custom evidences ancient and lost legislative will, dovetails well with Marshall’s blithe response to the possibility that the relevant Virginia colonial statute barring private purchases had lapsed. He considered the later reenactment of a similar provision “as an unequivocal

to the discovery by England.” Henderson, “Unraveling the Riddle of Aboriginal Title,” 90. Marshall focused, however, on the fact that various grants were made *while the Indians occupied the lands*, rather than on the legitimacy of each transfer. He adverted to grants made “notwithstanding the occupancy of the Indians,” or “while in the occupation of the Indians,” no less than nine times in the course of discussing the history of the dual land tenure regime in America.

78. Richard A. Epstein, “The Path to *The T.J. Hooper*: The Theory and History of Custom in the Law of Tort,” *Journal of Legal Studies* 21 (1992): 3, 6.

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." Marshall seemed to say that the longstanding customary *legislative* practice of barring private purchases of Indian title was so strong that it overrode the "mere technicality" of a lapsed or repealed statute.

This is a strong form of customary law, which is usually subordinate to explicit statutory formalities. Marshall displayed a similarly strong deference to custom in response to the plaintiffs' argument that the enactment of the numerous statutes barring private purchases (discussed at length above) showed that the background (common law) rule, absent such statutes, was that such purchases were valid. He enlisted the very existence of these statutes to make the case for a customary rule of law: "the fact that such acts have been generally passed, is strong evidence of the general opinion, that such purchases are opposed by the soundest principles of wisdom and national policy." Universal, uniform, long-standing legislation added up to a customary rule greater than its statutory parts.⁷⁹

That said, Marshall did not even hint that Congress was powerless to reverse his opinion by statute and permit private citizens to buy land directly from the Indians; there is no evidence that *M'Intosh* created a *constitutional* rule. Reading *M'Intosh* as decided on customary grounds is consistent with the general ability of parties to *contract around* customary laws. "[C]ustom is best understood as setting out the 'right' default provisions, not as creating a body of mandatory rules."⁸⁰

Marshall was not troubled that different rules might apply elsewhere in the British empire, also consistent with a customary law reading of *M'Intosh*. In Britain, custom was usually local (applying only to a manor, village, parish, or similarly small group). On precisely such parochial grounds, Marshall dismissed the relevance of the Camden-Yorke Opinion (approving of private purchases of land *in India*) relied on so heavily by the original members of the United Companies. Without explaining *why* America should have a different rule, Marshall merely noted that the Opinion referred to "princes or governments," terms "usually applied to the East Indians, but not to those of North America. We speak of their sachems, their warriors, their chiefmen, their nations or tribes, not of their 'princes or governments.'" Marshall admitted that the Camden-Yorke Opinion stood

79. Charles F. Hobson, ed., *Papers of John Marshall* 9:279-84; *Graham v. Walker*, 61 A. 98, 99 (Conn. 1905); *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 714-15 (1832). *Johnson v. M'Intosh*, 585, 604.

80. Richard A. Epstein, "International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News," *Virginia Law Review* 78 (1992): 85, 87 n.6.

for the proposition that "the king's subjects carry with them the common law wherever they may form settlements." Although the common law generally permitted purchases of foreign lands, Marshall's opinion implies that customary practice in America created an exception to this rule. He argued that the system of dual land tenure had been "adapted to the actual condition of the two people" and was "indispensable to that system under which the country has been settled." Such an essential practice, Marshall said, "cannot be rejected by Courts of justice." Not only was the custom of barring private purchases from the Indians immune to legislative lapse, it was wholly beyond the power of common law courts to alter.⁸¹

Admittedly, early American courts rarely recognized custom as a basis for law; until a modern resurgence, "'custom' had almost no authority in American law."⁸² In *M'Intosh*, Marshall never invokes the word custom, yet the passages from the opinion cited above show that it is a recurrent theme underlying the holding of the case. Given the long and uninterrupted line of statutes in every colony, it was probably unthinkable to Marshall, the other Justices, and most Americans, that private citizens could purchase land directly from the Indians. We have seen abundant evidence that the customary norm behind the *M'Intosh* rule ran deep.

Chancellor Kent described the basis for Marshall's opinion in words that support our customary reading: "[The *M'Intosh* rule] 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."⁸³

We find further support for custom as the basis of Marshall's holding by using the process of elimination: all other possibilities are either explicitly contradicted by, or implicitly dissonant with, Marshall's opinion. The discussion above highlighted Marshall's rejection of both statutory and common law bases for the rule of *M'Intosh*. He flatly rejected both natural and international law, defending the rule against private purchases from Indians "however this restriction may be opposed to natural right, and to the usages of civilized nations . . ." From the previous discussion of the discovery rule, itself clearly an element of international law, it was already clear that a different set of rules regulated relations between Europeans and Indians. He declared that domestic law (of unspecified source) must decide property cases.

81. *Johnson v. M'Intosh*, 591-92, 600.

82. Carol Rose, "The Comedy of the Commons: Custom, Commerce, and Inherently Public Property," *University of Chicago Law Review* 53 (1986): 711, 717 (footnote omitted).

83. James Kent, *Commentaries on American Law*, Part VI, Lecture LI (emphasis added).

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.⁸⁴

In extensive, apologetic dicta, Marshall offered "excuse, if not justification" for refusing to extend intra-European civility to the Indians in the form of equal treatment under natural or international law. While natural or international law usually required a conqueror to integrate the defeated population into its own and extend them equal property rights, Marshall claimed that an agricultural and industrial society simply could not incorporate hunters like the Indians. He refused to justify this less favorable treatment on the theory that "agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits," deeming irrelevant such "speculative opinions . . . respecting the original justice of the [Europeans'] claim."⁸⁵

The reporter classified the case as "Constitutional Law" without elaboration. Although it is possible to imagine the *M'Intosh* plaintiffs invoking, for instance, the Due Process Clause or the Takings Clause, they do not mention either, nor does the Court. There is not a single reference to the United States Constitution. Joseph Cotton maintained that the opinion "establishes the constitutional power of the United States to dispose of all vacant lands, not within any state, free of any Indian titles or rights of ownership." Yet he provides no explanation for labeling this a *constitutional* power, and Marshall never discusses, for instance, the enumerated powers of Congress or the president. Finally, as discussed above, Marshall never suggested that Congress was powerless to reverse his decision and permit private citizens to purchase land directly from the Indians. It is thus difficult to argue that *M'Intosh* is a constitutional case, at least as the term is commonly used.⁸⁶

84. *Johnson v. M'Intosh*, 572–73, 591–92. Marshall seemed to define international law as in large part a subspecies of natural law. He said he was rejecting "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."

85. *Ibid.*, 588–89.

86. *Ibid.*, 543 (case header). The reporter, Wheaton, may have used the constitutional label to refer to international law cases. In the same volume, he classified a case involving

III. Efficient Expropriation

From an economic perspective, it is unsurprising that colonizing Europeans had adopted a rule barring private purchases of Indian lands. A free market inevitably would have led to bidding wars for desirable Indian lands. While some colonists might have favored an unfettered market for Indian land, Europeans as a group would have been the losers since Indians would have extracted higher prices for their acreage. Under the plausible assumption that Europeans gave little if any weight to Indian welfare, it was collectively efficient for Europeans to make their governments the only legal entities empowered to buy Indian land. Single buyers (monopsonists) can drive prices down just as single sellers (monopolists) can drive prices up.

The *M'Intosh* rule was an attractive way to create a monopsony because it was administratively cheap. It required no soldiers, diplomats, complex administrative proceedings, or expensive record keeping. Any private party foolish enough to buy land directly from the Indians had a deed worthless in the eyes of American law. Note, too, that the plaintiffs in *M'Intosh*, holders under an Indian deed, bore the cost of commencing suit. After the Supreme Court handed down its decision, potential buyers of Indian lands got the message. There is no record of subsequent attempts by private parties to purchase land directly from a tribe.

The monopsony affirmed by *M'Intosh* clearly had a deleterious effect on the Indians. Like consumers in a nation without antitrust laws, they suffered economic harm at the hands of those better able to act collusively. In light of this long-term harm to all Indians, it is ironic that the Illinois and Piankashaw tribes were the only real winners to come out of the case. The plaintiffs saw their Indian deeds declared worthless. The defendant McIntosh simply retained title to acreage he purchased from the United States. The tribes, however, sold the land twice and retained the proceeds from both sales. Marshall declined to order the tribes to make restitution to the plaintiffs, despite the fact that they sold the same land to the United States that they had sold to the plaintiffs' predecessors fifty-odd years earlier. This may be yet another indication of the importance that the Court

property rights of foreign nationals as constitutional. *Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven*, 21 U.S. (8 Wheat.) 464 (1823). Joseph P. Cotton, ed., *The Constitutional Decisions of John Marshall* (1905; reprint, New York: Da Capo Press, 1969), 2:1. Cotton appears unreliable, asserting that the plaintiffs "had long been in undisputed possession and enjoyment of the land . . ." This assertion in the record was clearly a fiction required by the common law action of ejectment. Frickey argues that *Johnson v. M'Intosh* was a "quasi-constitutional" decision, meaning that although it did not bar legislation to the contrary, it established a clear statement rule requiring Congress to be explicit about any further erosion of Indian rights. Frickey, "Marshaling Past and Present," 385.

attached to the rule against private purchases of Indian lands. Marshall's implicit suggestion that the plaintiffs ask the Indians for restitution was disingenuous. The decision maintained America's monopsony by denying any remedy to grantees under Indian deeds.

The monopsony created by *M'Intosh* and the long line of equivalent statutes and executive orders preceding the case (and providing the basis for the decision itself) were but one cog in a great machine of efficient conquest. In addition to stifling other bids, European and American negotiators systematically used bargaining tricks and the threat of force to further reduce the price paid for Indian lands. Such threats were credible because of steep declines in tribal populations, drastically reducing the number of warriors the Indians could muster. The precipitous depopulation occurred not from battles and massacres, but rather because European frontier settlers (i) thinned the forests and the game within the forests on which Indians depended for food and other necessities, and (ii) spread lethal diseases, such as smallpox, for which Indians had no inherited resistance. American leaders were well aware of these low-cost means of reducing tribal populations. They passed many well-known measures, such as the Preemption Acts and the later Homestead Acts, to lure settlers to the frontier where they would inevitably thin the forests and game and spread infectious diseases among border tribes. The monopsony rule of *M'Intosh*, then, is but one facet (albeit an important piece) of the Europeans' efficient expropriation of Indian lands.

We can make further generalizations from the rule of *M'Intosh*. An important element of efficient expropriation was presenting a united front to the Indians in negotiations and military operations as well as in economic relations. The importance of this broader united front suggests a novel interpretation of the *Cherokee Nation* and *Worcester* cases that, together with *M'Intosh*, comprise the "Marshall trilogy" on Indian law. Focusing on sympathetic dicta, many scholars have suggested that these cases embodied a sympathetic and fair-minded approach to dealing with the Indians that later opinions overlooked. Frickey argues that, while Marshall's *M'Intosh* opinion may have legitimized unsavory colonialism in past events, taken together with *Cherokee Nation* and *Worcester*, it shows an attempt to soften colonialism with constitutional-style rules that limited the ability of the other branches to exploit the Indians. He reads the Marshall trilogy as an implicit message to the other branches of government and the nation that they "should help those poor Indians." Newmyer concurs, arguing that *Worcester* offered Chief Justice Marshall and the Court "a chance to soften the harshness of *McIntosh* and perhaps even put the Court and its law on the side of morality." Based on private letters and other sources, Newmyer concludes that Marshall "was personally gratified to soften the im-

pact of *McIntosh*, and to harmonize the law of the land with his personal feelings about Native Americans."⁸⁷

Whatever Marshall pontificated about in his, as usual, extensive dicta, the holdings of the two cases clearly served the purpose of maintaining a united front in Indian relations. *Cherokee Nation* held that the Supreme Court did not have original jurisdiction over a lawsuit filed by Indians since they were not the type of foreign "State" contemplated in the Supreme Court's grant of original jurisdiction in the Constitution. By deeming Indian tribes "domestic dependent nations," Marshall ensured that neither foreign powers nor any of the several states would meddle in Indian affairs. And *Worcester* held, under the clear language of the Constitution (reversing the Articles of Confederation), that the state of Georgia had no power to deal directly with the tribes in its borders. By preserving a unitary entity to deal with the Indians, Marshall's opinion helped the United States continue to present a united political, military, and economic front, facilitating low-cost acquisition of Indian lands.⁸⁸

IV. Conclusion

This thesis, that the implicit but overarching purpose of the *M'Intosh* rule against private purchases of Indian land was *cheap* acquisition of Indian lands, is consistent with the historical discussion in Part 1. The unwavering opposition of administrators and legislators to private purchases from the very beginning of European colonization, even in the face of intense

87. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); Frickey, "Marshaling Past and Present," 424; R. Kent Newmyer, "Chief Justice John Marshall's Last Campaign: Georgia, Jackson, and the Cherokee Cases," *Journal of Supreme Court History* 23 (1999): 86, 92.

88. U.S. Constitution, Article III, sec. 2; *Cherokee Nation v. Georgia*, 30 U.S. 17 ("it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases"). While President Jackson's infamous refusal to enforce Marshall's decision is apocryphal, it is nevertheless true that his "administration worked in various ways to subvert the decision. . . ." Newmyer, "Marshall's Last Campaign," 90. This at first blush appears to undermine the unifying, nationalist holding of *Worcester v. Georgia*. In fact Jackson's refusal to protect the Indians against the depredations of the Georgia state government may only indicate that the nation and its popular president approved of the state's policy and in effect relied on Georgia, as an agent, to further national policy. Marshall's decision gave the federal government the *power* to prevent state actions inconsistent with the national interest; Jackson merely chose not to exercise this power against Georgia.

lobbying and bribery by the United Companies and similar holders of Indian deeds, demonstrates that popularly elected officials felt the *M'Intosh* rule was quite valuable. It had little effect on the distribution of wealth among Europeans; its value must have come from its negative effect on Indian welfare. The willingness of the courts to reaffirm the rule against private purchases in a case where jurisdiction was questionable at best indicates the importance officials continued to attach to the rule. The plaintiffs, as shareholders of companies that assembled significant capital to attempt such private purchases, demonstrated that the danger of bidding for Indian lands was not theoretical.

This thesis is also consistent with the strategy of Chief Justice Marshall's opinion. He declined to decide the case on narrow statutory grounds, choosing instead to rely on *universal* American custom to lay down a rule that would declare, once and for all, the illegitimacy of private purchases of Indian lands. Even the limited property rights Marshall recognized in the tribes served the ends of efficient expropriation: by requiring purchasers and squatters to delay settlement until the United States purchased Indian land, the *M'Intosh* rule helped minimize conflict that was a relatively expensive means (in dollars and lives) of obtaining land.

The efficient expropriation hypothesis helps reconcile the discordant history of European treatment of American Indians. There can be no doubt that European colonizers expropriated North America with full knowledge of the effect on Indians. Yet battles and massacres were extraordinarily rare, and some leading modern scholars argue that America treated the tribes, at least relatively speaking, with humanity.⁸⁹ The history behind *M'Intosh*, and Marshall's opinion, provides support for the intermediate thesis that European policymakers harbored neither enmity nor charity for the Indians. The colonizers simply wanted to obtain tribal lands cheaply. The rule of "the great case of *Johnson v. M'Intosh*," by stifling bidding for Indian land by entities like the United Illinois and Wabash Land Companies, played an important role in the process of efficient expropriation.

89. Don Russell, "How Many Indians Were Killed?," *American West* 42 (July 1973): 63; Cohen, "Original Indian Title," 34 ("[w]e are probably the one great nation in the world that has consistently sought to deal with an aboriginal population on fair and equitable terms. We have not always succeeded in this effort but our deviations have not been typical"); Prucha, *American Indian Policy in the Formative Years*, 248 (citing statutes and treaties evidencing attempt by nation to treat Indians fairly).

APPENDIX

This appendix explains the derivation of the map, reproduced above (68), showing the United Illinois and Wabash Companies' claims alongside William McIntosh's purchases. There is no doubt about McIntosh's lands; the difficulty lies in delineating the United Companies' tracts. It is impossible to reconstruct these parcels precisely from the metes and bounds descriptions contained in the Companies' deeds and reproduced in the Supreme Court's opinion. While some of the landmarks survive (e.g., rivers), others are lost in the mists of history (e.g., "Crab Tree Plains," "a remarkable place known by the name of the Big Buffalo Hoofs," or a "certain remarkable place, being the ground on which a battle was fought, about forty or fifty years before that time, between the Pewaria and Renard Indians"). In addition, the size of the unit of measure used in the deeds, the league, was not well defined.⁹⁰

The map follows the United Companies' claims as drawn by Clarence Alvord, the leading historian of Illinois during the early 1900s. Alvord does not explain how he derived his map.⁹¹ That said, it is consistent with those portions of the metes and bounds description (the rivers and a few other landmarks, like Point Coupee on the Wabash River) that can still be identified. Further, it is consistent with the proportions given in the Indian deed descriptions: the Wabash Company tracts extend about a third farther eastward into Indiana than they do westward into Illinois.

Maps from the era of the purchases purporting to show the tracts are clearly erroneous. A map drawn in 1791 represents each company's purchase as one tract instead of two, and the proportions of the Wabash tract are distorted (six times larger on the Illinois side of the Wabash River than on the Indiana side; the deed states that the tract is one-third wider on the Indiana side). Another contemporary map made similar errors.⁹² Interestingly, the errors in these maps, showing the Wabash Company tracts extending much further into Illinois than they did, may have fooled

90. Definitions of a league ranged from a little over two miles to three miles. "General Harmar used 22 leagues as about 50 miles." Francis S. Philbrick, ed., *Law of the Indiana Territory, 1801-1809* (Collections of the Illinois State Historical Library 21, Law Series 2, 1930), lxx n.3. "The league was a rather indefinite measurement, usually considered to be about three miles in length." Carter, *Territorial Papers of the United States*, 7:53 (Secretary of War Dearborn to William Henry Harrison, June 17, 1802).

91. Alvord, *The Mississippi Valley in British Politics*, vol. 2, frontispiece. Alvord briefly discussed the difficulties determining the northern Illinois Company tract, confessing that "[t]he boundaries of the tract on the Illinois River are impossible to trace." *Ibid.*, 203 n.375. The Companies themselves admitted that the description of this tract had serious flaws. Minutes of the United Companies, 14, 18.

92. *The United States of America Laid down From the best Authorities Agreeable to the Peace of 1783* (I. Norman, Boston, 1791) (Osgood Carleton, mapmaker) (Library of Congress, Map Section, G3700 1791 .C3 VAULT); *A Map of the Northern and Middle States* (Amos Doolittle, New Haven, 1789) (Library of Congress, Map Section, G3300 1789 .D6 VAULT). This map shows the Illinois side of the Wabash Company tracts as three times their Indiana side.

the parties to *M'Intosh*, and the courts, into believing that there was a real controversy in the case. Of course, the briefest examination of the metes and bounds description of the tracts reveals this error, making it clear that neither the defendant nor the courts made any serious effort to verify the plaintiffs' claims of a live dispute. Given these conspicuous errors, the impossibility of reproducing the grants directly from the metes and bounds descriptions in the deeds, and Alvord's reputation for careful scholarship, his work seems like the most reliable map of the United Companies' tracts.