

COMMENTARIES

ON

AMERICAN LAW.

BY JAMES KENT.

VOLUME I.

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construction must be admitted to be most convenient, for the expense of assessing and collecting a tax in a territory, as the North West Territory, for instance, might exceed the amount of the tax. Here is an anomalous case in our government, in which representation and taxation are not inseparable, though the principle that the power of taxation could not rightfully exist without representation, was a fundamental ground of our revolution. The court did not consider a departure from a general principle, in this case, to be very material or important, because the case was that of territories which were in a state of infancy, advancing to manhood, and looking forward to complete equality as soon as that state of manhood should be attained. It was the case also of the District of Columbia, which had voluntarily relinquished the right of representation, and adopted the whole body of congress for its legitimate government.

(4.) Congress have the exclusive right of pre-emption to all Indian lands lying within the territories of the United States. This was so decided in the case of *Johnson v. McIntosh*.^a Upon the doctrine of the court in that case, and in that of *Fletcher v. Peck*,^b the United States own the soil, as well as the jurisdiction, of the immense tracts of wild and unpatented lands, included within their territories, and of all the productive funds which these lands may hereafter create. The title is in the United States, by the treaty of peace with Great Britain, and by subsequent cessions from France and Spain; and the Indians have only a right of occupancy, and the United States possess the legal title subject to that occupancy, and with an absolute and exclusive right to extinguish the Indian title of occupancy either by conquest or purchase. The title of the European nations, and which passed to the United States, to this immense territorial empire, was founded on discovery and conquest; and, by the European customary law of nations, prior discovery gave this title to the soil, subject to the possessory

^a 8 Wheaton, 543.

^b 6 Cranch, 142, 143.

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right of the natives, and which occupancy was all the right
 that European conquerors and discoverers, and which the
 United States, as succeeding to their title, would admit to
 reside in the native Indians. The principle is, that the In-
 dians are to be considered merely as occupants, to be pro-
 tected while in peace in the possession of their lands, but to
 be deemed incapable of transferring the absolute title to any
 other than the sovereign of the country. The constitution
 gave to congress the power to dispose of, and to make all
 needful rules and regulations respecting the territory, or
 other property belonging to the United States, and to admit
 new states into the union. Since the constitution was
 formed, the value and efficacy of this power have been mag-
 nified to an incalculable extent, by the purchase of Louisi-
 ana and Florida; and under the doctrine contained in the
 case I have referred to, congress have a large and magnifi-
 cent portion of territory under their absolute control and
 disposal. This immense property has become national and
 productive stock, and congress, in the administration of this
 stock, have erected temporary governments under the pro-
 visions of the ordinance of the congress under the confede-
 ration; and they have appointed the officers to each terri-
 tory, and allowed delegates in congress to be chosen by the
 inhabitants every second year, and with a right to debate,
 but not to vote, in the house of representatives.^a

(5.) By the constitution of the United States, congress
 were, by general laws, to prescribe the manner in which the
 public acts, records, and judicial proceedings of every state,
 should be proved, and the effect thereof in every other
 state. In pursuance of this power, congress, by the act of
 May 26, 1790, provided the mode by which records and ju-
 dicial proceedings should be authenticated, and then de-
 clared, that they should have such faith and credit given to
 them in every court within the United States, as they had

^a Acts of 7th of August, 1789. January 14th, 1805. March 3d.
 1817. February 16th. 1819. April 24th. 1820.

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GENERAL EDITOR: LEONARD W. LEVY

Claremont Graduate School

**COMMENTARIES
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AMERICAN LA**

By James Kent

Volume III

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Maritime Loans, which is the most complete treatise extant on the subject. The substance of it has been ably incorporated into the work of M. Boulay Paty, on a *Course of Maritime Commercial Law*, and it has been closely and accurately translated by John E. Hall, Esq. of Baltimore.

PART VI.

OF THE LAW CONCERNING REAL PROPERTY.

LECTURE I.

OF THE FOUNDATION OF TITLE TO LAND.

IN passing from the subject of personal to that of real property, the student will immediately perceive that the latter is governed by rules of a distinct and peculiar character. The law concerning real property forms a technical and very artificial system; and though it has felt the influence of the free and commercial spirit of modern ages, it is still very much under the control of principles derived from the feudal policy. We have either never introduced into the jurisprudence of this country, or we have, in the course of improvements upon our municipal law, abolished all the essential badges of the law of feuds; but the deep traces of that policy are visible in every part of the doctrine of real estates, and the technical language, and many of the technical rules and fictions of that system, are still retained.

It is a fundamental principle in the English law, derived from the maxims of the feudal tenures, that the king was the original proprietor of all the land in the kingdom, and the true and only source of titles. In this country we have

adopted the same principle, and applied it to our republican governments; and it is a settled and fundamental doctrine with us, that all valid individual title to land within the United States, is derived from the grant of our own local governments, or from that of the United States, or from the crown, or royal chartered governments established here prior to the revolution. This was the doctrine declared in this state, in the case of *Jackson v. Ingraham*,^a and it was held to be a settled rule, that our courts could not take notice of any title to land not derived from our own state or colonial government, and duly verified by patent. Even with respect to the Indian reservation lands, of which they still retain the occupancy, the fee is supposed to reside in the state, and the validity of a patent has not hitherto been permitted to be drawn in question, under the pretext that the Indian right and title, as original lords of the soil, had not been extinguished. This was assumed to be the law of the land, by the Supreme Court of this state in *Jackson v. Hudson*,^b and the same doctrine has been repeatedly declared by the Supreme Court of the United States.^c The nature of the Indian title to lands lying within the jurisdiction of a state, though entitled to be respected by all courts until it be legitimately extinguished, is not such as to be absolutely repugnant to a claim in fee on the part of the government within whose jurisdiction the lands are situated. Such a claim may be consistently maintained, upon the principle which has been assumed, that the Indian title is reduced to mere occupancy.

The history and grounds of the claims of the European governments, and of the United States, to the lands on this continent, and to dominion over the Indian tribes, has

^a 4 *Johns. Rep.* 163. *Jackson v. Waters*, 12 *Johns. Rep.* 365. S. P.

^b 3 *Johns. Rep.* 375.

^c *Fletcher v. Peck*, 6 *Cranch's Rep.* 87. *Johnson v. McIntosh*, 8 *Wheat. Rep.* 543.

been largely discussed, and the solidity of that claim, qualified extent, explicitly asserted, by the courts of justice in this country. In *Johnson v. McIntosh*,^a it was stated as an historical fact, that on the discovery of this continent by the nations of Europe, the discovery was considered to have given to the government by whose subject or authority it was made, the sole right of acquiring soil from the natives as against all other European powers. Each nation claimed the right to regulate for itself in exclusion of all others, the relation which was to subsist between the discoverer and the Indians. That relation necessarily impaired, to a considerable degree, rights of the original inhabitants, and an ascendancy asserted in consequence of the superior genius of the Europeans, founded on civilization and Christianity, and their superiority in the means, and in the art of war. The European nations which respectively established colonies in America, assumed the ultimate dominion to be in themselves, and claimed the right to grant a title to the subject only to the Indian right of occupancy. The practice of Spain, France, Holland and England, proved very general recognition of this principle. The United States adopted the same principle, and their exclusive right to extinguish the Indian title by purchase or conquest, and to grant the soil, and exercise such a degree of sovereignty as circumstances required, has never been judicially questioned. The rights of the British government within the limits of the British colonies, passed the United States by the force and effect of the act of dependence, and the uniform assertion of those rights the crown, by the colonial governments, by the individual states, and by the Union, is, no doubt, incompatible with an absolute title in the Indians. That title has been obliged to yield to the combined influence which military,

^a 8 *Wheat. Rep.* 543.

tellectual, and moral power, gave to the claim of the European emigrants.

The whites assert the right to a qualified dominion over the Indian tribes, and to regard them as enjoying no higher title to the soil than that founded on simple occupancy, and to be incompetent to transfer their title to any other power than the government which claims the jurisdiction of their territory by right of discovery. This assumed claim or right arises from the necessity of the case. To leave the Indians in possession of the country was to leave the country a wilderness, and to govern them as a distinct people, or to mix with them, and admit them to an intercommunity of privileges, was impossible under the circumstances of their relative condition. The peculiar character and habits of the Indian nations, rendered them incapable of sustaining any other relation with the whites than that of dependence and pupillage. There was no other way of dealing with them than that of keeping them separate, subordinate, and dependent, with a guardian care thrown around them for their protection. The rule that the Indian title was subordinate to the absolute, ultimate title of the government of the European colonists, and that the Indians were to be considered as occupants, and entitled to protection in peace in that character only, and incapable of transferring their right to others, was the best one that could be adopted with safety. The weak and helpless condition in which we found the Indians, and the immeasurable superiority of their civilized neighbours, would not admit of the application of any more liberal and equal doctrine to the case of Indian lands and contracts. It was founded on the pretension of converting the discovery of the country into a conquest, and it is now too late to draw into discussion the validity of that pretension, or the restrictions which it imposes. It is established by numerous compacts, treaties, laws, and ordinances, and founded on immemorial usage. The country has been colonized and settled, and is now held by that title. It is the law of the land, and no court of justice can permit the

right to be disturbed by speculative reasonings on abstract rights.

This is the view of the subject which was taken by the Supreme Court of the United States; and the several local governments, both before and since our revolution, have always acted upon the principles there laid down. It was shown, in *Goodell v. Jackson*,^a that the government New-York had always claimed the exclusive right to extinguish Indian titles to lands within their jurisdiction, and had held all individual purchases from the Indians, whether made from them individually, or collectively as tribes, made without the previous authority of the government, to be null and void. The legislature of Virginia, in 1777, asserted the same exclusive right of pre-emption, and the colonial and state authorities throughout the Union, always negotiated with the Indians within their respective territories as dependent tribes, governed, nevertheless, by their own chiefs and usages, and competent to act in a national character, but placed under the protection of the white and owing a qualified subjection, so far as was required for the public safety. The Indian tribes within the territorial jurisdiction of the government of the United States, are treated in the same manner, and the numerous treaty ordinances, and acts of Congress, from the era of our independence down to the present time, establish the fact. But while the ultimate right of our American government to all the lands within their jurisdictional limits, and the exclusive right of extinguishing the Indian title by possession, is not to be shaken; it is equally true, that the Indian possession is not to be taken from them, or disturbed

^a 20 John. Rep. 693 This case was argued and decided in March 1823, at Albany, and concurrently, in point of time, with that of *Johnson v. McIntosh*, at Washington; and the entire coincidence in the doctrine of the two cases, is very apparent, and evidence of the general sense of the nation.

without their free consent, by fair purchase, except it be by force of arms in the event of a just and necessary war.

If the settled doctrine on the subject of Indian rights and titles was now open for discussion, the reasonableness of it might be strongly vindicated on broad principles of policy and justice, drawn from the right of discovery ; from the sounder claim of agricultural settlers over tribes of hunters ; and from the loose and frail, if not absurd title of wandering savages to an immense continent, evidently designed by Providence to be subdued and civilized, and to become the residence of civilized nations.

When the country, now within the dominion of the United States, was first discovered by the Europeans, it was found to be, in a great degree, a wilderness, sparsely inhabited by tribes of Indians, whose occupation was war, and whose subsistence was drawn chiefly from the forest. Their possession was good and perfect to the extent requisite for subsistence and reasonable accommodation, but beyond that degree their title to the country was imperfect. Title by occupancy, is limited to occupancy in point of fact. Erratic tribes of savage hunters and fishermen, who have no fixed abode, or sense of property, and are engaged constantly in the chase or in war, have no sound or exclusive title either to an indefinite extent of country, or to seas and lakes, merely because they are accustomed, in search of prey, to roam over the one, or to coast the shores of the other. Vattel had just notions of the value of these aboriginal rights of savages, and of the true principles of natural law in relation to them. He observed, that the cultivation of the soil was an obligation imposed by nature upon mankind, and that the human race could not well subsist, or greatly multiply, if rude tribes, which had not advanced from the hunter state, were entitled to claim and retain all the boundless forests through which they might wander. If such people will usurp more territory than they can subdue and cultivate, they have no right to complain, if a nation

of cultivators puts in a claim for a part. The conquest of the half civilized empires of Mexico was a palpable usurpation, and an act of atrocious crime, the establishment of the French and English in North America was entirely lawful; and the c have not deviated from the precepts of the law of *its confining* the natives within narrower limits.^b

The settlement of the country, now composed of the United States, has been attended with as little and aggression, on the part of the whites, in a point of view, as were compatible with the fact of a race of civilized men into the territory of and with the power and the determination to rec occupy it. Vattel extols the moderation of Willia and of the first settlers of New-England, who are stood to have fairly purchased of the natives, from time, the land they wanted to colonize. But w the Indians resulted, almost inevitably, from the of the whites, and especially when the spirit of t tutions of Penn was wanting. The origin of th is not imputable to any unkindness or injustice part of the colonial governments, though there times, acts of fraud and violence committed by in among the colonists, prompted by cupidity, and as consciousness of superior skill and power, as well as ing from a very blunt sense of the rights of savag colony of Massachusetts, in 1633, prohibited the of lands from the natives, without license from vernment; and the colony of Plymouth, in 1643, a similar law. Very strong and authentic evi the distinguished moderation and entire equity of the distinguished moderation and entire equity of England governments towards the Indians, is to

a. *Proctides Gens.*, b. 1. sec. 41.

h. Time: b 1. sec. 209.

b. *Ibid.* O. 1, sec. 207.
c. Hutchinson's *History of Massachusetts*, vol. i. 5. 23.
d. *American Annals*, vol. i. 184.

in the letter of Governor Winslow, of the Plymouth colony, of the 1st May, 1676; in which he states, that before King Philip's war, the English did not possess one foot of land in that colony, but what was fairly obtained, by honest purchase from the Indian proprietors; and that by law none could purchase, or receive by gift, any lands of the Indians, without the knowledge and allowance of the general court.^a

But the causes of wars with the Indians were inherent in the nature of the case. They arose from the fact of the presence and location of white people; and the Indians had the sagacity to perceive, what the subsequent history of this country has abundantly verified, that the destruction of their race must be the consequence of the settlements of the English colonists, and their extension over the country.^b In all the wars of the whites with the Indians, the means and the power of the parties were extremely unequal, and the Indians were sure to come out of the contest with great loss of numbers and territory, if not with almost total extermination. Their usages in war were ferocious and cruel; but there was still much in the Indian character, in their earlier and better state, to excite admiration, and in their sufferings, at all times, to excite sympathy. If wars with them were never unjustly provoked by the colonial governments or people, they were, no doubt, stimulated, on the part of the Indians, by a deep sense of injury, by a view of impending danger, by the

^a *Hazard's Collection of State Papers*, vol. ii. 531—534. *Holmes' American Annals*, vol. i. 435. See also an account of the various purchases from the Indians, in that part of Massachusetts which is now the state of Maine, between the years 1643 and 1675, in *Sullivan's History of the District of Maine*, p. 143—149.

^b The war of the Pequots, in 1637, and the confederacy of Indian nations formed in 1675, by Metacom, the sachem of the Wampanoags, commonly called King Philip, would seem to have been engendered by these patriotic views on the part of the Indians.

suggestions of patriotism, and by a fierce and lofty spirit of national independence. Their history appears under manifest disadvantage to them, and with scarcely a cheering page to the honour of their race. We have been called too frequently to delineate the darkest traits in the character, and have told their story according to our prejudices and partial views. Being ignorant of letters, they have had no annalists of their own; no native poets historians to transmit to posterity the specimens of their genius, to portray their feelings, to record their grievances, to vindicate their character, or to perpetuate the memory of their daring achievements.

The government of the colony of New-York has a claim equally fair with that of any part of America, to a politically uniform just, temperate, and pacific, towards the Indians within the limits of its jurisdiction. The Indian titles have always been respected and distinguished with the consent of the natives, and by fair means.^a The fierce and formidable confederacy of the Six Nations, of which the Mohawks were the head, placed themselves and their lands under the protection of our government from the earliest periods of the colony administration. The friendship the parties was cemented by treaties, alliances, and kinship offices. It continued unshaken from the first settlement the Dutch on the shores of the Hudson and the Mohawks down to the period of the American war; and the fidelity of that friendship is shown by the most honourable and

^a On the first settlement of the English at New-York, in 1665, it was ordained, that no purchase of lands from the Indians should be valid without the governor's license, executed in his presence, and this salutary check to fraud and injustice was continued. (*Smith's History of New-York*, p. 39, edit. 1792.) This has been the invariable American position down to this day; and the prohibition of individual purchases of Indian lands without the consent of the government, has been made even a constitutional provision in some of the states; as, for instance, in New-York, Virginia, and North Carolina.

the most undoubted attestations. And when we consider the long and distressing wars in which the Six nations were involved on our account with the Canadian French, and the artful means which were used from time to time to detach them from our alliance, it must be granted, that the faith of treaties has no where, and at no time, been better observed, or maintained with a more intrepid spirit, than by those generous barbarians.^a

^a *Colden's History of the Five Nations of Canada, dependent on the Province of New York*, vol. i. 34. *et passim*. The confederacy of the Five Nations, (and which was known as the confederacy of the Six Nations after the Tuscaroras were admitted into the Union,) was distinguished, from the time of the first discovery of the Hudson down to the war of 1756, for its power and martial spirit. At the close of the seventeenth century, that confederacy was computed to contain 10,000 fighting men; but their decrease was so rapid, that in 1747 they were supposed not to exceed 1500. (*Burke's Account of the European Settlements in America*, vol. ii. 193. *Douglass' Summary of the British Settlements in North America*, vol. i. 185, 186.) The Five Nations, during the time of their ascendancy and glory, extended their dominion on every side, and levied tribute on distant tribes. Charlevoix (*Travels in Canada*, vol. i. 152, 167—171.) speaks in strong terms of the power and fierceness of the Iroquois, who, as early as 1720, had almost extirpated the Algonquins, the Hurons, and other tribes of Canadian savages. Governor Colden was well acquainted with their history, and in his character of surveyor general of the province, he had access to the best means for information. He wrote the first part of his history as early as 1727, and he says, that the Five Nations carried their arms to the Carolinas, and to the banks of the Mississippi, and entirely destroyed many Indian nations. In 1684, Lord Howard, the Governor of Virginia, was under the necessity of meeting the Five Nations in council at Albany, in order to check by negotiation their incursions to the south. (*Colden's History*, vol. i. 36—45.) Their military spirit and daring enterprise were continued to a later period. An intelligent old Mohawk Indian communicated the fact to General Schuyler, that in his early life he was one of a party of Mohawks who left their castles on an expedition against the Chickasaws in Carolina, and he said that the expedition was disastrous, and the Chick-

The government of the United States, since the of our independence, has also pursued a steady, pacific, just, and paternal policy towards the within their wide spread territories. The United have never insisted upon any other claim to the lands, than the right of pre-emption, upon fair terms the plan of permanent annuities, which the United and which the state of New-York, among others adopted, as one main ingredient in the consideration of the national government to protect the from wars with each other, from their own propensity to intemperance, from the frauds and injustices of civilization, and to impart to them some of the essential blessings of civilization, have been steadily and judiciously pursued. This affords consolation on our national character. This affords consolation under a view of the melancholy contrast between the original character of the Indians, when

as was met and destroyed them by an attack in ambush: that of them, of which he was one, escaped. His companion fled to Gustin, and he returned home to the Mohawk, and supplied him his long journey with food by his bow and arrow. He cautioned all Indian settlements, and did not see the face of a human from the time that he fled from the battle in Carolina until he the Mohawk castles. This anecdote I received in the year 1800 General Schuyler, who appeared to place implicit confidence in every subject connected with our colonial history, and I find that than that very intelligently and accomplished man; and since has been thus incidentally introduced. I cannot refrain from that he stands conspicuous in that proud roll of statesmen and of patriots and heroes, who adorned the annals of New-York in trying periods of its history, between the years 1735 and 1790. be truly said, that no part of the history of this country excels the history of the period I have alluded to, in interesting events, or more worthy of the pen of some native scholar and man of genius.

Europeans first visited them, and their present condition. We then found them, a numerous, enterprising, and proud spirited race ; and we now find them, a feeble and degraded remnant, rapidly hastening to annihilation. The neighbourhood of the whites seems, hitherto, to have had an immoral influence upon Indian manners and habits, and to have destroyed all that was noble and elevated in the Indian character. They have generally, and with some very limited exceptions, been unable to share in the enjoyments, or to exist in the presence of civilization ; and judging from their past history, the Indians of this continent appear to be destined, at no very distant period of time, to disappear with those vast forests which once covered the country, and the existence of which seems essential to their own.^a

^a An able and well instructed writer in the *North American Review*, No. lv. art. 5., has satisfactorily shown that the intentions of the government of the United States, in their treatment of the Indians, and in all their intercourse with them, have been uniformly just and benevolent. But the system of treaty making, and assembling conventions of Indians, pursued to a considerable extent on the part of the United States, and accompanied with presents and annuities, is supposed by another writer, also able and well instructed, the *American Quarterly Review*, No. vi. art. 5.) to have been attended with much abuse in practice, and with very injurious effects upon the moral and civil condition of the Indian tribes. The subject of the treatment of the Indians is one which appears to be, in every view, replete with difficulty and danger. It seems to be almost impossible to stay or arrest their rapid progress to ruin. The condition of the Indian tribes is deplorably wretched. They consider their country lost to them, by encroachment and oppression, and they are irreclaimably jealous of their white neighbours. The restless and enterprising population on their borders, and which, in a considerable degree, partakes of the fierce and lawless manners of the hunter state, are exempt, no doubt, from much sympathy with Indian sufferings, and they are penetrated with perfect contempt for Indian rights. If it were not for the frontier garrisons and troops of the United States, officered by correct and discreet men, there would probably be a state of constant hostility between the Indians, and the

white borderers and hunters. They covet the Indian hunting and they must have them ; and the Indians will finally be expelled by circumstances, annoyed as they are from without, and constantly and rapidly diminishing population, and with increasing poverty and misery, to recede from all the habitable parts of the Mississippi valley, and its tributary streams, until they become extinguished, or lost to the eye of the civilized world.