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BOOK REVIEW

*William D. Wallace**

Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands*, Oxford University Press, 2005.

Introduction

Today the United States is a self-described nation of laws and not men; a beacon of freedom, opportunity, and equality before the law. However, there was a time, during the infancy of the institutions of our republic, when a sentiment of entitlement, a belief in manifest destiny, and conflicting loyalties to state and nation tore at the motives of men.

There were no templates for the founders to follow in the development of our polity. No republic had ever endured through history and the slow and curious development of our judicial system left a vacuum into which speculation and greed became driving forces for the former founders of our nation. Speculation on land ownership in the new republic must have seemed much less foolish and far safer than the steps already taken to create that republic. In the void left by an uncertain legal system, land companies were formed to seek out and speculate on real estate, fuel for the constantly straining forces of settlement and expansion. In this context the question of Indian land title buzzed as little more than an annoyance to a Congress that considered the matter closed.

A mere thirty-five years after the passage of the United States Constitution, Chief Justice John Marshall settled the question with an opinion that created more an “alienation of laws” than a “nation of laws.” In doing so, *Johnson v. M’Intosh* yielded a doctrine that defeated millions of Native Americans of their sovereign right to land; land they had occupied, drawn their sustenance from, and ruled for untold centuries. *Conquest by Law* is a fresh look into the story of the Discovery Doctrine, told for the first time with the benefit of information contained in the private papers of the litigants.

The Find

In 1992, while researching material for his doctoral dissertation in history Lindsay Robertson, traveled to Philadelphia, to the archives of the Historical

* Editor-in-Chief, 2004-2005, *American Indian Law Review*.

Society of Pennsylvania. The Society boasts a collection including the first draft of the United States Constitution and an original printer's proof of the Declaration of Independence.¹ There Robertson found a reference to the Illinois & Wabash papers in a card catalog held by the Society. While he had encountered references to the papers during his research, the actual papers had not yet surfaced. In fact, the question of what documents were even contained in the papers was equally unknown.

Lindsay Robertson approached the librarian of the Historical Society of Pennsylvania and learned that the papers had been placed with the Society sometime in the late 1970s, but the donor had later reclaimed them through his son. As such, the Illinois & Wabash papers were gone for good and the reference in the card file was outdated, yet to be purged. Undaunted and against all odds, Robertson tracked down the donor's son and asked the fateful question: Whatever happened to the papers?

The papers had become the property of the donor's son and were, in fact, still safely stored in a trunk at his home. Robertson was extended an invitation to visit and review the documents and there, in the old trunk, he found the complete corporate records of the United Illinois & Wabash Land Companies, compiled and stored by the company's last corporate secretary, John Hill Brinton. The records contained letters from corporate officers to each other, to investors, and to counsel discussing the process and posture of the single most important case in the company's history, *Johnson v. M'Intosh*. Also found was one of the most significant pieces of evidence in the case, the Illinois & Wabash copy of the Camden-Yorke Opinion, ostensibly voiding the King's Proclamation of 1763 and making the Illinois & Wabash land purchases proper and legal.

The find was impressive in its own historical right, but the contents of the letters were even more telling than one might have initially expected. They told a story of desperate financial dealings, deliberate legal manipulation, a lawsuit between conspiring adverse parties and, counsel complicit in the conspiracy. Robertson found these records told the dark story of *Johnson v. M'Intosh*.

The Significance of the Find

No reading of *Johnson v. M'Intosh* can be complete without reference to the motives behind the case and the intentions of its key players. *Conquest by*

1. Historical Society of Pennsylvania, *Research and Collections*, at <http://www.hsp.org/default.aspx?id=2> (last viewed on May 19, 2005).

Law is the first accounting of this landmark case with the input of counsel. That is not to say the input of brilliant legal minds...certainly deep probes into *Johnson*, dissections of the Discovery Doctrine, and research into the meat and the fat contained in Chief Justice Marshall's opining, is well-trod ground. No, the uniqueness of *Conquest by Law* is that it is informed by the attorneys who actually argued the case before the United States Supreme Court.

The papers of the United Illinois & Wabash Land Companies contain privileged, even illegal, correspondence between parties to the case. Additionally, they refer to ex parte communications between the district court judge, attorneys for the plaintiff, attorneys for the defendant, and officers of the company.² The papers discovered by Robertson provide a thorough understanding of the intentions of the key characters in *Johnson v. M'Intosh*. In doing so, they more than inform a deeper understanding of the case, they serve to undermine the ultimate result. The papers reveal a litigation strategy so clear and so narrowly defined that there can be only one conclusion, that the Discovery Doctrine was actually dicta to solve a different legal question and salve a different political concern and was never intended to become the timeless foundation of property law in the United States, to say nothing of the other countries that lend it credence.

The Story

Lindsay Robertson tells a story in *Conquest by Law* that weaves through more than four decades. He reveals the climate in which the victors of the Revolutionary War felt both the inclination and the right to expand westward. The savvy businessmen of the time knew that ownership of the western lands desired for settlement would make them very wealthy. The promise of riches drove many to speculate on land, purchased from Indians west of the Allegheny Mountains. However, in 1763 King George had decreed that land west of the Allegheny Mountains could not be purchased from the Indians without a patent issued directly from the Crown. After the revolution, speculators were betting that the King's proclamation would be called into question and schemes emerged to justify purchases of the forbidden land directly from Indians. Purchases of vast areas of land in the Illinois and Wabash tracts eventually became the subject of *Johnson v. M'Intosh*.

2. Illinois Territorial District Court Judge Nathaniel Pope, Plaintiff Johnson's counsel, Robert Goodloe Harper and Daniel Webster, Defendant M'Intosh's counsel William Henry Winder and Henry Maynadier, and Illinois & Wabash Corporate Secretary Edward Ingersoll.

Initially, the mostly Federalist investors considered their speculation to be sound. During the years between 1787 and 1802, the Illinois & Wabash Land Companies pursued the Continental Congress and the United States Congress for recognition of their title and even sought a government offer to purchase the land from the Illinois & Wabash. However, in 1802 the Federalists lost control of Congress and until 1810 the Illinois & Wabash speculation bore no fruit. Without political support, the Illinois & Wabash had no safe harbor, no sympathetic ear, and no clear path out of a desperate financial situation. However, the success of Baltimore attorney Robert Goodloe Harper in *Fletcher v. Peck* in 1810 portended a new strategy for the investors of the Illinois & Wabash Land Companies. They would set out on a path to resolve their title concerns in the United States Supreme Court. The U.S. Supreme Court was still Federalist in its leanings and the challenge lay only in the path, not in the outcome or so they thought.

Conquest by Law comes into its own, leaving other historical accounts behind, when the conflict moves from Congress to the courts. The tale follows Robert Goodloe Harper's innovative and manipulative use of the restricted territorial court system, the old fashioned cause of action called Plea in Ejectment, the novel and limiting litigation technique called an Agreed Statement of Facts, the dubious use of a "pro forma" opinion, the cavalier waiver of an appeal bond, and the absence of an appellate court. Robertson leads the reader through an early 1800s corporate scandal that could be likened to the Enron of its day. The method, the process, and the audacity involved in Mr. Harper's legal strategy become clear for the first time in *Conquest by Law* and add the flavor of a novel rather than a treatise.

The Result

The fix was in, the question narrowly defined, and the outcome predetermined and so...what result? Had Chief Justice Marshall resolved only the legal question before him, Johnson would have won; Marshall would never have reached the point of creating the Discovery Doctrine. *Conquest by Law* demonstrates that the Illinois & Wabash's investors conspired to manufacture a fixed court case in order to save a speculative investment. We learn that the parties truly had no controversy and that *Johnson v. M'Intosh* was, in effect, a fraud upon the court. What then should we make of the result? Lindsay Robertson reveals not just the rationale behind Chief Justice Marshall's opinion, but also the fact that the Discovery Doctrine was truly obiter dicta and focused on other concerns.

The toughest pill to swallow in the outcome of *Johnson v. M'Intosh* is the reality that the Discovery Doctrine went further than even Marshall intended.

Lindsay Robertson leads the reader through the ramifications of the decision and its use to justify the removal of Indians to lands in the west. Along the way we learn about Chief Justice Marshall's realization that his doctrine was far too broad and we learn of his partial repudiation of *Johnson*. However, the subsequent Court immediately resurrected the Discovery Doctrine. The result remains today, the defeat of native title, the defeasing of a sovereign right, and the conquest of an indigenous people by the slow and civil convention of law.