Outline – Class 06

I. The fork in the road:

1. The high road—occupation as the root of property. The relationship between high-level abstractions and what actually happens in cases is not tight. We'll try to get a bit more sense of it when we do *Johnson* and *Percheman* today.

2. The low road—practical implications. *Commonwealath v. Agway, Inc.*, the case that I omitted from the materials, is as an example of S. F. C. Milsom's remark that the common law proceeds through the unceasing abuse of its fundamental ideas. Prior to the adoption of the Water Quality Improvement Act of 1970, *as amended*, 33 U.S.C. §§ 1251–1376, and in the face of a local statute that had a totally inadequate remedy, the PA Attonrey General tried to sue a company that polluted a river for trespass on the ground that Agway had killed fish that belonged to the sovereign, the state, while they were in their wild state. It didn't work in *Agway*, but sometimes this sort of abuse does work.

3. The middle road—where we spend most of our time in law school.

II. THE OCCUPATION AND LABOR THEORIES OF PROPERTY

1. The occupation theory.
   a. What is the occupation theory of property?
   b. To what extent is it a justification of property?
      i. Preservation of the species.
      ii. In order to protect the peace.
      iii. By protecting acquisitiveness we are protecting human will.
      iv. On the ground of efficiency.

2. The labor theory.
   a. Once more the normative and the descriptive.
   b. How does it differ from the occupation theory?
   c. Can anyone think of a situation today where we give someone property rights in something that did not already exist as a reward for labor?

3. The occupation theory. This remark applies less to the labor theory, but both posit an original assembly of individuals taking things from the common stock. Whether those who propounded the theory thought that they were describing something that actually happened turns out to be a hard question. We have a tendency to associate our own views about the age of the world and of the human species with 19th-century geology and evolutionary biology, but the idea of evolution considerably antedates Darwin, and I don't think that we can simply assume that Blackstone, for example, believed that the world was created in 4004 BC, which is the date that he would have found in notes in the King James Bible. Be that as it may be, to the extent that the occupation theory purports to be a description of something that actually happened, it is almost certainly wrong.

4. There's an element in the labor theory that is not normally found in the occupation theory in addition to the labor element itself: Like the occupation theory, the labor theory begins with the individual. It also begins with the notion that the individual, to start off with, has property in him/herself. I'm not quite sure that I know what that means, but I think it may be key to the next step. I extend the property in

myself to an object by mixing my labor with it. Initially positing property in one's self probably excludes the possibility, which exists in the occupation theory, of saying that there is no property until there is an organized community that recognizes it.

I. JOHNSON V. M'INTOSH (1823)

1. This was a case decided in the US Supreme Court in 1823 on a writ of error to the US District Court for the District of Illinois. Illinois became a state in 1818. Jurisdiction in the Federal District Court was probably founded on diversity of citizenship. (General federal question jurisdiction was not given to the U.S. District Courts until 1875.) The plaintiffs claimed title to a large amount land in southern Illinois and southern Indiana. The defendant had acquired title by patent from the United States in 1819. If the grant from the Indian chiefs was good, then the plaintiffs would prevail both because their grant was prior in time, and because, so they argued, whatever claim the United States had was dependent on the same grant by the Indians. This argument was apparently based on the fact that the 1775 deed granted the land in the alternative to the plaintiffs' predecessors in title *or* to George III to the use of plaintiffs' predecessors in title. (This is the argument that Marshall counters by referring to the treaties that the U.S. negotiated with the Piankeshaws in the early 1800's.) The plaintiffs' position was a radical one, and sustaining it would have upset a great many titles, a fact which certainly influenced the Court to come out in favor of the defendants.

2. Why does John Marshall not follow the occupation theory in *Johnson v. M'Intosh*? After all, the Indians got there before the white settlers, and, thus, under the occupation theory would seem to have a stronger claim. What is Marshall's answer to this argument? Let us rearrange his arguments (which are somewhat non-linear).

   a. P. S52: "But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . . " The Indians' occupation was not occupation within the meaning of the theory.

   b. P. S50: "They [the Indians] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it." The occupation theory leads to the protection of possession. That's not what's involved here.

   c. P. S52: "As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed." The Indians are not occupants.

   d. P. S52: "That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable." And, more importantly, by conquest. This argument can be combined with (a) in order to avoid conflict with the normative argument about protecting the peace.

e. P. S51: "Conquest gives a title which the Courts of the conqueror cannot deny." Whatever may be the Indians' moral claim to occupancy of the land, we are the Court of a sovereign whose title to the land depends upon a conquest by the king of England.

3. The courts can recognize the occupation theory only to the extent that that recognition does not involve conflict with the acts of the sovereign on whom the power of the courts is based.

4. What role does the Non-Intercourse Proclamation of 1763 play in this decision?

5. Any indications that Marshall is troubled morally by his coming to this result?

a. P. S49: "[T]his immense continent . . . offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence."

b. P. S52: "Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them."

c. P. S52: "The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword . . . ."

d. P. S52: "However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned."

6. Whether *Worcester v. Georgia*, the note case, indicates that Marshall continued to be troubled and/or that he changed his views by 1832, I leave you to decide. Indian title remains a hugely complex problem. We have a whole course on it. We clearly can't cover it in this course. I leave the notes on it simply for you to pursue it if you are interested.

II. United States v. Percheman

1. What does the case hold? (Note: Florida was not admitted as a state until 1845.)

2. If occupancy by the Indians is not a title that will be recognized by the courts in *Johnson*, why is occupancy by the Spanish ground for a title that will be recognized in *Percheman*?

a. What role does the type of settlement play?

b. What role does the "law of nations" (what today we call 'international law') play?

c. What role does the treaty between the U.S. and Spain of 22 February 1819 play? Article 8 in English: "*shall be ratified and confirmed* to the persons in possession of the lands." Article 8 in Spanish: "*quedarán ratificadas y reconocidas* á las personas que esten en posesion de ellas."

d. What role do the statutes play? The jurisdictional provisions of the Act of 1830 with its cross-reference to the Act of 1828.

i. Act of 1830: P. S64: "an act to provide for the final settlement of land claims in Florida." J. M.'s description: "The first section confirms all the claims and titles to land filed before the register and receiver of the land office under one league square, which have been decided and recommended for confirmation. The second section confirms all the conflicting Spanish claims, recommended for confirmation as valid titles. The fourth enacts 'that all remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled upon the same conditions [as in the act of 1828],'" which authorized the transfer to the district court of certain land claims.

ii. Can you see an argument that the court had no jurisdiction under this Act even if the claim was not one "decided and finally settled under the foregoing provisions of this act"? (Note: the statutory confirmations were all for one square league or less, but one square league is a considerably larger amount than the 2000 acres which Percheman claimed.) The 1828 act transfers to the court all claims "which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and above the amount confirmed by this act, and which have not been reported as antedated or forged." [P. S64]

iii. What's the relevance of the following remarks about the commissioners: (α) p. S63 "It is impossible to suppose that congress intended to forfeit real titles not exhibited to their commissioners within so short a period." (β) p. S63–64 "The commissioners do not appear to have proceeded with open doors, deriving aid from the argument of counsel, as is the usage of a judicial tribunal, deciding finally on the rights of parties"

3. We may, thus, arrive at the conclusion that while title by occupancy will not be recognized where the sovereign has given no indication that that title should be supported, where there is indication by the sovereign, even if that indication is ambiguous, the philosophical theory will operate to support the title.

4. As one of the first U.S. Supreme Court decisions involving treaties *Percheman* has had a permanent effect on American jurisprudence. For example, the suggestion in the case that where there is ambiguity in the language of a treaty, the official version in another language may be cited to resolve the ambiguity, particularly when the provision was introduced by the party which used the other language, is well recognized. *Percheman* has recently become controversial as the U.S. Supreme Court has recently revived a doctrine that at least in some circumstances treaties are not "self-executing" but require further

> legislation, in addition to the "advice and consent" that the Senate gives to them, in order to become judicially enforceable.

What might be the 'bottom-line'? While title by occupancy will not be recognized where the sovereign has given no indication that that title should be supported (*Johnson*), where there is indication by the sovereign, even if that indication is ambiguous, the philosophical theory will operate to support the title (*Percheman*). All analysis of jurisdiction and the statutes in *Percheman* is designed to show that Marshall, C.J., was forcing the interpretation because the theory was telling him that he should come out in favor of Percheman.