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Kent McNeil

*Osgoode Hall Law School of York University*, [kmcneil@osgoode.yorku.ca](mailto:kmcneil@osgoode.yorku.ca)

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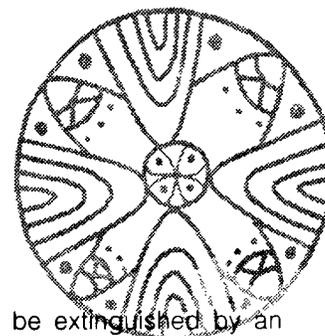
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## EXTINGUISHMENT OF NATIVE TITLE: THE HIGH COURT AND AMERICAN LAW

KENT McNEIL\*



In *Mabo v Queensland [No 2]*<sup>1</sup> the High Court opined that native title could be extinguished by an inconsistent Crown grant.<sup>2</sup> In *Wik Peoples v Queensland*<sup>3</sup>, the majority clarified this by holding that native title would only be "extinguished" to the extent that it was inconsistent with the rights of the grantee, but: left open the question of whether the inconsistent rights of the native titleholder might be suspended for the duration of the inconsistency rather than lost forever. However, while *Wik* clearly preserved the rights of native titleholders that do not conflict with the rights of grantees, the Court left no doubt that the grantees' rights prevail to the extent of any inconsistency.<sup>4</sup>

In an earlier article, I explained how the *Mabo* position on extinguishment by Crown grant violates common law principles and is racially discriminatory.<sup>5</sup> More recently, I pointed out that Canadian courts have gone much further than *Wik* in preserving Aboriginal rights against crown grants.<sup>6</sup> I am now going to examine this matter of inconsistent grant from the perspective of American law. While not relying directly on American authority, Brennan J (as he then was) did cite American cases in his discussion of the extinguishment issue in *Mabo*.<sup>7</sup> It is therefore important to look at the American case law more carefully to see whether it supports the position on extinguishment by inconsistent grant enunciated by Brennan J in *Mabo* and applied by the High Court in *Wik*.

The earliest case involving Indian land rights to reach the United States Supreme Court was *Fletcher v Peck*<sup>8</sup>, decided in 1810. The efficacy of a grant of land subject to Indian title was directly in issue, as the plaintiff alleged breach of a covenant that the State of Georgia had been "legally seized in fee of the soil ... subject only to the extinguishment of part of the Indian title", at the time the land had been granted by the State to the defendant's predecessor in title<sup>9</sup>. Chief Justice Marshall, in delivering the majority opinion that the State of Georgia had been seized, said this about Indian title:

\* Osgoode Hall Law School, Toronto, Canada. I am grateful to professors James Anaya, University of Iowa College of Law, and Hamar Foster, University of Victoria Faculty of Law, for helpful suggestions and references for this article.

1. (1992) 175 CLR 1
2. *Ibid*, per Brennan J at 64, 69, Deane and Gaudron JJ at 89, 101, 110-112. However, Deane, Gaudron and Toohey JJ were of the view that the Crown would have acted wrongfully by making an inconsistent grant, and might be liable to pay compensation, but the majority disagreed: see per Mason CJ and McHugh J at 15.
3. (1996) 141 ALR 129.
4. *Ibid*, per Toohey J at 185, 190.
5. See K McNeil, "Racial Discrimination and Unilateral Extinguishment of Native Title" (1996) 1 *AILR* 181.
6. See K McNeil, "Co-Existence of Indigenous and Non-Indigenous Land Rights: Australia and Canada Compared in Light of the *Wik* Decision" (1997) 4:5 *ILB* 4.
7. Specifically, in this context Brennan J cited Joint Tribal Council of the *Passamaquoddy Tribe v Morton*, 528 F 2d 370 (1975), at 376 n 6; *United States v Santa Fe Pacific Railroad Co*, 314 US 339 (1941), at 347, 353-4; *Tee-Hit-Ton Indians v United States*, 348 US 272 (1955), at 281-5; *Lipan Apache Tribe v United States* 180 Ct Cl 487 (1967), at 492.
8. 6 Cranch 87 (1810).
9. *Ibid*, at 88.

## COMMENTARY

It was doubted whether a state can be seized in fee of lands, subject to the Indian title, and whether a decision that they were seized in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.

The majority of the court is of opinion that the nature of Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizing in fee on the part of the state.<sup>10</sup>

The *Fletcher* decision established that the fee simple to Indian title land is held by the government rather than by the Indians,<sup>11</sup> who nonetheless have a right of occupancy entitling them to what Marshall CJ later described in *Johnson v M'Intosh* as "a legal as well as just claim to retain possession of it, and use it according to their own discretion."<sup>12</sup> In *Johnson*, Marshall CJ commented directly on his decision in *Fletcher*, saying that it conformed with the principle of discovery supposedly recognized by all the colonizing European powers:

The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment.<sup>13</sup>

In other words, the holders of Indian title have a legal right to their lands that prevents the recipient of a government grant from ousting them by bringing an action of ejectment to obtain possession.<sup>14</sup> However, this does not mean that a grant of land subject to Indian title would be invalid. Marshall CJ's approach, which has been described as a "brilliant compromise",<sup>15</sup> was to uphold the rights of both the Indians and the grantees. He wrote:

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the Indians. These grants have been understood by all, to convey a title to the grantees, *subject only to the Indian right of occupancy*.<sup>16</sup> (my emphasis)

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10. *Ibid*, at 142-3.

11. The fee can be held either by a state or the federal government, depending mainly on where the land is located: see *Felix S Cohen's Handbook of Federal Indian Law*, 1982 ed. (Charlottesville: Michie Bobbs-Merrill, 1982), 489. However, even where the fee is held by a state, Indian title can be extinguished only by the United States, in accordance with federal law: *Lipan Apache Tribe v United States*, 180 Ct. Cl. 487 (1967), at 497-9; *Oneida Indian Nation v County of Oneida*, 414 US 661 (1974), at 669-70.

12. 8 Wheat. 543 (1823), at 574. Although Indian title has been described as a "right of occupancy", it nonetheless entitles the Indians to the complete beneficial interest, including timber and mineral rights, regardless of the uses they traditionally made of the land: see *United States v Shoshone Tribe*, 304 US 111 (1938) at 115-18; *Otoe and Missouri Tribe v United States*, 131 F Supp. 265 (1955), at 288-91, certiorari, denied 350 US 848 (1955); *United States v Northern Paiute Nation*, 313 F 2d 393 F 2d 786 (1968), at 796; & *United States ex rel. Chunie v Ringrose*, 788 F 2d 638 (1986), at 642.

13. 8 Wheat. 543 (1823), at 592.

14. By the sixteenth century, ejectment had become the principal action for obtaining possession of land: see A G Sedgwick and F S Wait, "The History of the Action of Ejectment in England and the United States", in *Select Essays in Anglo-American Legal History* (Cambridge: Cambridge University Press, 1909), vol. 3, 611.

15. N J Newton, "At the Whim of the Sovereign: Aboriginal Title reconsidered" (1980) 31 *Hastings Law Journal* 1215, at 1223. See Also F S Cohen, "Original Indian Title" (1947) 32 *Minnesota Law Review* 28, at 47-9.

16. 8 Wheat. 543 (1823) at 574; see also 587-8. Note that Marshall CJ's compromise is entirely consistent with common law doctrine, which allows the Crown to grant a fee simple held by it in reversion, subject to whatever interest is held

## EXTINGUISHMENT OF NATIVE TITLE

According to Marshall CJ, that right of occupancy was protected while the Indians were "in peace", but could be extinguished "either by purchase or by conquest" by the European powers or the United States after it became an independent nation.<sup>17</sup> While he recognized how "extravagant the pretension of converting the discovery of an inhabited country into conquest may appear",<sup>18</sup> he accepted the "principle" of extinguishment by conquest because,

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, and cannot be questioned.<sup>19</sup>

Marshall CJ therefore explicitly adopted a pragmatic approach that favoured the property rights of non-Indians in North America, even though that meant disregarding "[t]hat law which regulates, and ought to regulate in general, the relations between conqueror and conquered"<sup>20</sup>

The rule coming out of *Fletcher v Peck and Johnson v M'Intosh* that grants of Indian lands take effect subject to the Indian right of occupancy has never been questioned.<sup>21</sup> In *Worcester v Georgia*<sup>22</sup> Marshall CJ had occasion to apply the rule in the context of an attempt by the State of Georgia to impose its jurisdiction within the territory of the Cherokee Nation. In that case, he downplayed conquest as a means by which Indian lands were taken, and emphasized the importance of consensual treaties. He acknowledged "the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent."<sup>23</sup> Significantly, he held that royal charters, including the Georgia Charter, by which the British Crown purported to grant vast tracts of land in North America, "asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned."<sup>24</sup> As Felix Cohen has observed, Marshall CJ concluded that the Georgia Charter,

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by a third party in possession: see *Duke of Chandos's Case* (1606) 6 Co. Rep. 55a; *Earl of Rutland's Case* (1608) 8 Co. Rep. 55a, at 55b. Moreover, Crown grants of land in Nigeria that were in absolute terms on their face have been found by the Privy Council to be subject to customary land rights: *Sakariyawo Oshido v Moriamo Dakalo* [1930] AC 667 at 670; *Idewu Inasa v Sakariyawo Oshido* [1934] AC 99 at 101.

17. *Ibid.*, esp. 586-92

18. *Ibid.*, at 591. From the perspective of English law, at least, extinguishment by conquest after the Crown acquired sovereignty would involve an unlawful and hence invalid attempt to seize Indian lands by act of state: see K McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), at 245-9.

19. 8 Wheat, 543 (1823) at 591.

20. *Ibid.* See R Bartlett, "Native Title: From Pragmatism to Equality before the Law" (1995) 20 *Melbourne University LR* 282, at 283-5, and "Is Equality Too Hard for Australia?" (1997) 3:2 *UNSWLJ Forum* 3 at 3. However, I disagree with the view Bartlett expressed in the latter article that, "in order to legitimise the early settlement of the United States, native title was recognized but made subject to extinguishment by inconsistent grant irrespective of legislative authority." Marshall CJ's pragmatic solution was not to accept extinguishment *by inconsistent grant*, but to legalize the taking of Indian lands *by conquest* after European sovereignty had been asserted by so-called discovery.

21. See Cohen, *supra* n 15, for a valuable survey of the relevant case law. Cohen, who also authored *Handbook of Federal Indian Law* (Washington: US Government Printing Office, 1942), the most comprehensive and influential American work on Indian law, concluded at 47: "The cases on original Indian title show the development across twelve decades of a body of law that has never rejected its first principles." As Cohen incontestably demonstrated, prominent among those principles is the rule that Indians cannot be deprived of their lands by government grant unless that is very clearly intended and authorized by Congress.

22. 6 Pet. 515 (1832).

23. *Ibid.*, at 561

24. *Ibid.*, at 546.

did not terminate or alter the Cherokee Nation's original title, which survived the Crown grant and later became the basis of Cherokee treaties with the Federal Government. The case thus stands squarely for the proposition adumbrated in *Johnson v McIntosh*, that a grant by the sovereign of land in Indian occupancy does not abrogate original Indian title.<sup>25</sup>

That proposition was reaffirmed in *Mitchel v United States*, the last Marshall Court decision respecting Indian title, where Baldwin J for a unanimous Court wrote, in reference to the British colonial period, that "friendly Indians were protected in the possession of the lands they occupied", but

[s]ubject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians, though *possession could not be taken without their consent*.<sup>26</sup> (my emphasis)

A string of Supreme Court decisions has continued to protect Indian title from government grants, whether issued before or after the independence of the United States, by either making the grant subject to that title<sup>27</sup> or interpreting the grant to exclude the Indian lands.<sup>28</sup> While some of those cases involved Indian title that had been recognized by treaty with the United States, the Supreme Court has not made the protection of Indian title from grant dependent on such recognition.<sup>29</sup> The rule that grants of Indian lands are subject to the Indian right of occupancy is applicable to both recognized and unrecognized Indian title.

Application of the rule can be seen in *United States v Santa Fe Pacific Railroad*,<sup>30</sup> a case cited repeatedly by Brennan J in his judgment in *Mabo*. The main questions in *Santa Fe* were whether the Walapai Indians in Arizona had Indian title to lands within a tract granted to the respondent's predecessor in title by an 1866 Act of Congress, and if so whether their title survived the grant and remained unextinguished. The Ninth Circuit Court of Appeals concluded that Indian title had not been recognized by the United States in the territory ceded to the United States by Mexico in 1848, and so the Walapai could have no right against the grantees.<sup>31</sup> Delivering the unanimous decision of the Supreme Court, Douglas J rejected that conclusion and affirmed that "[t]he fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive."<sup>32</sup> He then turned to the issue of extinguishment:

The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. *Buttz v Northern Pacific Railroad*, [*supra* n 29, at] 66. As stated by Chief Justice Marshall in

25. Cohen, *supra* n 15, at 50 (footnote omitted).

26. 9 Pet. 711 (1835), at 745-6. See also *United States v Fernandez*, 10 Pat. 303 (1836), at 305.

27. Eg see *Chouteau v Molony*, 16 How. 203 (1853), at 239; *Beecher v Wetherby*, 95 US 517 (1877), at 525-6. In *United States v Shoshone Tribe of Indians*, 304 US 111 (1938), at 116, the Court stated succinctly: "Grants of land subject to the Indian title by the United States, which had only the naked fee, would transfer no beneficial interest." See also *James v Watt*, 716 F 2d 71 (1983), at 74; *United States v Dann*, 706 F 2d 919 (1983), at 928-9, 932, reversed on other grounds, 470 US 39 (1984).

28. See *Leavenworth v United States*, 92 US 733 (1875).

29. See *Clark v Smith*, 13 Pet. 195 (1839), at 201; *Buttz v Northern Pacific Railroad*, 119 US 55 (1886); *Cramer v United States* 261 US 219 (1923); and discussion in Cohen, *supra* n 15, at 29-31, 52-3. However, Indians do not have a constitutional right to compensation for congressionally authorized taking of their lands unless their title has been recognized: see *Tee-Hit-Ton Indians v United States*, 348 US 272 (1955).

30. 314 US 339 (1941).

31. *Ibid*, at 345.

32. *Ibid*, at 347, quoting *Cramer v United States*, 261 US 219 (1923), at 229.

## EXTINGUISHMENT OF NATIVE TITLE

*Johnson v M'Intosh*, [*supra* n 12 at] 586, 'the exclusive right of the United States to extinguish' Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justice is not open to inquiry in the courts. *Beecher v Wetherby*, [*supra* n 27 at] 525.<sup>33</sup>

However, Douglas J held that the grant of land to the respondents' predecessor, although made by the 1866 Act of Congress, would still be subject to any title the Walapais might have unless that title had been extinguished before the grant took effect.<sup>34</sup> So while Congress has the power to extinguish Indian title, a grant, even though made by Congressional Act, will not have that effect unless that is clearly intended by Congress.<sup>35</sup>

In spite of his dictum that Indian title can be extinguished "by the exercise of complete dominion adverse to the right of occupancy", Douglas J also said that "extinguishment cannot be lightly implied."<sup>36</sup> After surveying a series of congressional Acts, including statutes opening the region to settlement, which the respondent argued had extinguished the Walapais' title, Douglas J concluded that none of them were clearly intended to have that effect.<sup>37</sup> For Felix Cohen, this was the most significant aspect of the decision, as the Indian right of occupancy was "held to have survived a course of congressional legislation and administrative action that had proceeded on the assumption that the area in question was unencumbered public land."<sup>38</sup>

Clearly, then, the High Court's position on extinguishment by inconsistent grant articulated in *Mabo* and *Wik* is in direct conflict with American law on Indian title. However, as the United States usually purchased Indian lands by treaty before granting them, in the present century the American rule that grants are subject to unextinguished Indian title has not created large scale uncertainty for non-Indian land titles.<sup>39</sup> The situation in Australia is obviously very different. There can be no doubt that the High Court's position on extinguishment has been influenced by the fact that virtually all private, non-native land titles in Australia would be vulnerable if grants did not extinguish or suspend native title to the extent that the two were inconsistent. So maybe it is time to acknowledge that the High Court's position on extinguishment is a policy-driven way of avoiding that result, rather than pretend that it is supported by legal doctrine. Such an

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33. 314 US 339 (1941), at 347.

34. *Ibid.*

35. Note that, while the 1866 Act provided that the United States would extinguish by voluntary cession the Indian title to lands granted under it (see *ibid.*, at 344), Douglas J did not explicitly rely on that provision in holding that the grant would be subject to unextinguished Indian title. Instead, from the cases cited *ibid.* at 345, 347, he appears to have relied on the common law rule to that effect originating in Marshall CJ's judgments.

36. *Ibid.*, at 347, 354.

37. However, Douglas J went on to decide that the creation of a reservation in 1883 "at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment": *ibid.*, at 357-8. See also *United States v Dann*, 706 F 2d 919 (1983), reversed on other grounds, 470 US 39 (1984).

38. Cohen, *supra* n 15, at 55-6; see also 31-3, for interesting information on the background and impact of the case. Compare *State of Vermont v Elliott*, 616 AL 2d 210 (1992), *certiorari* denied 113 S Ct 1258 (1993), where the cumulative effect of grants, historical events, and legislative acts, culminating in the admission of Vermont as the fourteenth state by an Act of Congress in 1791, was held to extinguish the Indian title of the Western Abenaki Tribe. For critical discussion of the *Elliott* decision, see J P Lowndes, "When History Outweighs Law: Extinguishment of Abenaki Aboriginal Title" (1994) 42 *Buffalo Law Review* 75; J W Singer, "Well Settled?: The Increasing Weight of History in American Indian Land Claims" (1994) 28 *Georgia Law Review* 481.

39. See Cohen, *supra* n 15.

C O M M E N T A R Y

acknowledgement could involve an admission that the taking of native lands by inconsistent grant was both morally and legally wrong, without necessarily conceding that legal remedies for those wrongs are available today. Such an admission might open the door to negotiations that would hopefully result in mutually-satisfactory resolution of Indigenous claims. Lasting solutions are not going to be found in the adversarial forum of the courts, nor should they be imposed on the Indigenous peoples of Australia by legislatures in which those peoples have no effective representation. Admission of past wrongs, and a genuine willingness to address the consequences of those wrongs in the context of present-day needs and aspirations, could go a long way toward promoting understanding and achieving reconciliation. ●