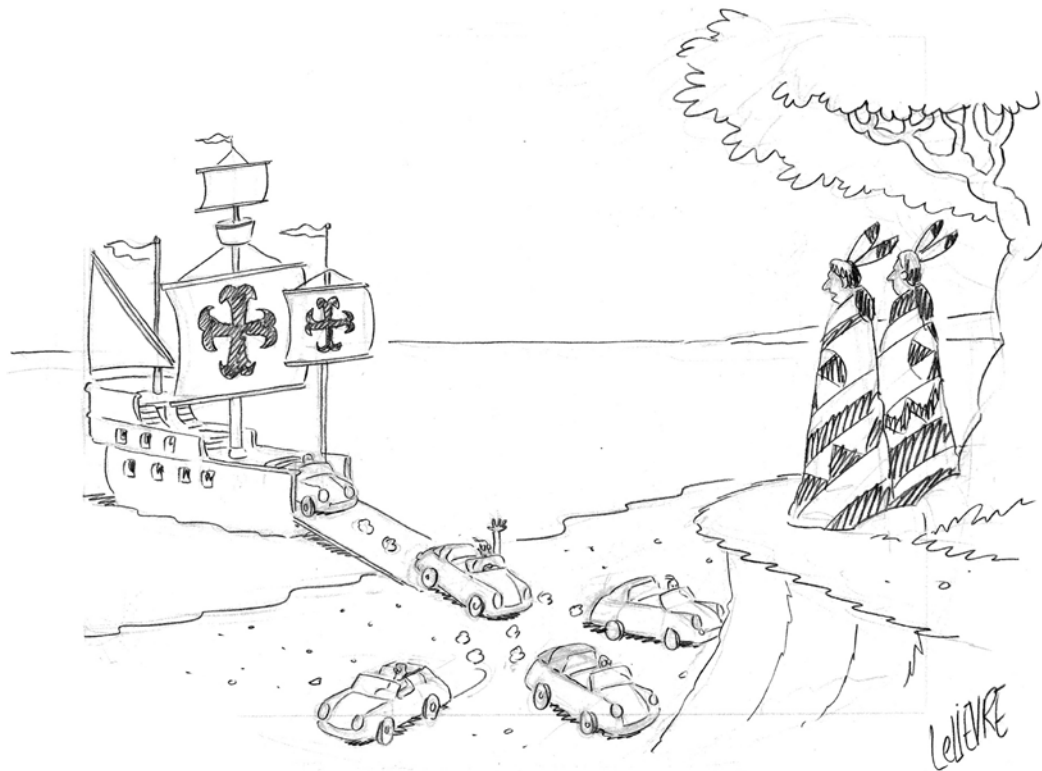


Comic Commentary

Dr. Keith E. Wilder, LL.M., Bonn*



“Lawyers.”

Who ‘Owned’ the New World?

The legal status of the Native Americans, more commonly known, and often referred to by themselves, as ‘Indians’, has been a perplexing jurisprudential issue since the discovery and first settlement of North America. This is largely due to the simple fact that North America was already ‘discovered’ and ‘settled’ by an estimated 10 million Native Americans (hence the name!). But leave it to the Europeans and, in particular, those ever creative Anglo-Saxons and their Common Law, to find a straight-faced jurisprudential argument to get around this paradox. As we will

see, much of this ‘clash of cultures’ can be traced back to the dramatic way in which basic property law concept of ‘ownership’ was lost in translation between the two civilizations.

From the outset, it necessary to dispel the commonly held belief that the Indians did not have a concept of property, and in particular, a concept of private property. All human societies have culturally defined concepts of what is owned by the community and what is owned by the individual, and even among the English settlers, regional traditions necessarily meant that they brought to the New World a rather wide spectrum of idiosyncratic property customs of their own.¹ On the other side of the fence (a

* The author is an American Lawyer and Law Lecturer at the University of Bonn and the University of Cologne.

¹ William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 1983) p. 69.

turn of phrase we will return to shortly), the over 300 tribes of what now makes up the United States each had their own individual tribal property delineations, so one must be careful with generalizations. However, a defining feature of all Indian tribes was their dependence on kinship systems, in which property was not alienable and generally held communally. In addition, they existed 'boundaries' between the various tribes, but these boundaries were normally quite fluid (imagine the national boundaries of Germany growing and shrinking based on the season) and nearly always overlapping (imagine Germany sharing large sections of land simultaneously considered to be part of Austria, Switzerland and France as well). Lastly, any 'territorial markings', while evident to a tribal member – a certain rock outcropping here, a grove of trees there, etc. – were not identifiable as 'boundaries' within the legalistic framework of the European settlers.

Interestingly, the idea of 'marking territory' and thereby 'establishing ownership', was not even monolithic within the colonizing European powers themselves. As Patricia Seed points out in her book, *Ceremonies of Possession in Europe's Conquest of the World, 1492 – 1640*,² the 'clash of cultures' as to what was 'ownership' played out also between the Dutch, Spanish, Portuguese, French and English themselves. For example, the Dutch view of 'colonial ownership' was that by making detailed maps of a region, for example the Hudson River Valley, they could legitimately claim that mapped territory as their own. The Spanish had a much less time consuming method, namely, hitting the beach, crossing themselves, having the leader of the expedition mutter something about the King and claiming everything from sea to shining sea (assuming there was a sea, somewhere, out there) now belonged to Spain. The Portuguese looked to the stars above, carefully measuring them, figuring out the degrees of latitude, and claiming everything between those lines. The French, in addition to a cross and some obligatory prayers and flag planting, added, by necessity, a parade in which the Indians were 'encouraged' to participate and thereby gained their 'consent' to become subjects of the French crown. A high price to pay for a polonaise!

As for England, perhaps not surprisingly, living on that tiny, little wind-swept island in blissful isolation for a millennium meant that a uniquely English view of 'ownership' would bring them into a very clear cultural clash with both the other colonizers and, in particular, the Indians they encountered in the New World. For rather depending on maps, God, or a ceremonial parade to mark the magical legal transition from 'yours' to 'mine' the English put their faith in rather more mundane and terribly practical things, namely, building houses and erecting fences.

Unlike all other colonialists in the New World, the English were unique in that their ideas of possession were guided by the necessity of establishing permanent dwellings. For example, throughout the English colonial period the own-

ership of a new claim in the Americas was always marked by the 'building of a house'. Thus, rather than lofty and abstract concepts of 'God and Country' to justify their right to possession, the English used far more basic and culturally familiar grounds – building houses, erecting fences and planting crops within those fences. With this view also came a sense of permanence lacking among the other European colonial powers, and served as a catalyst for centuries of cultural misunderstanding between the English and the indigenous population.

For example, within the English societal and legal mindset, the importance of the fence cannot be underestimated. Being a relatively densely populated, and by definition geographically limited nation (it is an island after all), by the colonial period the English had long since divvied up the motherland. To "close your eyes, and think of England" then as now is to see bucolic timelessness, a countryside of endless stone fences and hedgerows. That this cultural reality was brought with them to the New World then is hardly surprising. Critically for our purposes, it must be stressed that merely building a fence was not enough; in order to claim possession and ownership, it was also necessary to 'use' the land (plow it, plant it), if not, the law allowed anyone to claim a right to any such apparently 'unused land'. The fence as a sign of ownership was so important; it was a common English colonial policy that, even if you could not actually fence your entire land claim, you had to at least build a symbolic portion of fence to make that land 'yours' – so deeply entrenched was the fence in English property law and culture.

Therefore, when the English came to the New World, seeing no fences and nothing that they would consider to be a 'house', not surprisingly, given their cultural reference, they thought everything was 'up for grabs'. Even the Indian tribes that had rather elaborate agriculture (we must never forget that the vast majority of the vegetables we eat today are actually New World plants), because these gardens were not fenced in, were viewed by the English as growing 'wild'. Thus, given that, in English eyes, the Indians lacked anything that could be described as boundaries, had nothing they at least would recognize as permanent dwellings, and built no fences or hedges, let alone worked the land within such an enclosed area; the English impression was that the Indians roamed the New World almost like ghosts – using the plentiful natural resources, but not actually 'owning' the land on which they lived. Therefore, due to the simple fact that the indigenous populations' concepts of 'ownership' in no way mirrored the 'ownership' concepts held by their English conquerors, the fate of the Indians was sealed; and North America was open to be settled and 'owned' by the English with a (relatively) free conscience.

² Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the World, 1492 – 1640* (Cambridge: Cambridge University Press, 1995).