phrase "reserved for the sole use and occupancy" [94] or some similar phrase.[95] Other statutes of this type provide that designated lands shall be "reserved as additions to" named reservations,[96] or, that the boundaries of a designated reservation are "extended to include" specified lands.[97] Occasionally the public lands so set aside are lands which have previously been used for another purpose and the prior purpose may be mentioned in the statute.[98] In some of these statutes the designation of the Indian beneficiaries of the reservation to be established is delegated to administrative discretion. These statutes, typically, provide that given lands shall be reserved for the use and occupancy of certain named bands or tribes "and such other Indians as the Secretary of the Interior may see fit to settle thereon." [99]

(2) Another and a distinct type of statute authorizes the purchase either by voluntary- sale or by condemnation [100] of private lands for Indian use, and allocates therefor funds in the United States Treasury not otherwise appropriated,[101] or, in the alternative, tribal funds of the tribe, benefited.[102] Some of these statutes authorize the purchase of land for Indians without using the word "reservation." [103] Since the decision of the Supreme Court in *United States* v. *McGowan*,[104] it has been clear that there is no magic in the word "reservation" and that land Purchased for Indian use and occupancy is .a "reservation," at least within the meaning of the Indian liquor laws, whether or not the statute uses the term. Although the issue presented in the *McGowan* case was one of criminal jurisdiction rather than of property right, the 'views therein expressed appear to be as pertinent to the demarcation of tribal property as to the delimitation of federal jurisdiction. The Court declared, *per* Black, *J.*, "It is immaterial whether Congress designates a settlement as a 'reservation' or 'colony' " (pp. 538, 539). The Court,, quoting from its earlier opinion in *United States v. Pelican*,[105] indicated that the important issue was whether the land had "been validly set apart for the use of the Indians as such, under the superintendence of the Government" (p. 539). The determination of this question requires an ascertainment of the purpose underlying the particular legislation, to which end consideration may be given to committee hearings and reports (p. 537).

(3) In addition to the two major methods of establishing Indian reservations by statute, *public land withdrawal* and *purchase of private land*, a third method, the surrender of private lands in exchange for public lands, is followed in a number of statutes. A typical statute is that of June 14, 1934,[106] commonly known as the Arizona Navajo Boundary Act, which authorizes the Secretary of the Interior in his discretion to accept relinquishments and reconveyances to the United States of such privately owned lands as in his opinion are desirable for, and should be reserved for the use and benefit of, a particular tribe of Indians, "so that the lands retained for Indian purposes may be consolidated and held in a solid area as far as may be possible."[107] Upon conveyance to the United States of a good and sufficient title to such privately owned land, the owners thereof, or their asigns, are authorized under regulations of the Secretary of the Interior, to select lands approximately equal in value to the lands thus conveyed. Similar in effect are statutes authorizing the grant of public lands to a state id exchange for the relinquishment of state lands for Indian use.[108]

[94] Act of March 3. 1928. 45 Stat. 162 (Koosharem Band of Indians In Utah) : Act of May 23. 1928. 45 Stat. 717 (Indians of the Acoma Pueblo) : Act of February 11, 1929. 45 Stat. 1161 (Kanosh Band of Indians in Utah) ; Act of June 20, 1935, 49 Stat. 393 (Kanosh Band of Indians of Utah).

[95] Act of March 3. 1807. 2 Stat. 448 ("reserved for the use of the said [Delaware] tribe and their descendants. so long as they continue to reside thereon. and cultivate the same"). Act of April 12, 1924. 43 Stat. 92 (Zia Pueblo) : Act of March 3. 1925. 43 Stat. 1114 ("Navajo Indians residing in that Immediate vicinity") : Act of May 10. 1926. 44 Stat. 496 (Mesa Grande Reservation) : Act of June 1. 1926. 44 Stat. 679 (Morongo Indian Reservation) : Act of March 3. 1928. 45 Stat. 160 (Indians of the Walker River Reservation) : Act of February 11. 1929. 45 Stat. 1161 (San Ildefonso Pueblo) ; Act of January 17. 1936. 49 Stat. 1094 (Indians of the former Fort McDermitt Military Reservation, Nev.).

[96] Act of February 21. 1931. 46 Stat. 1201 (Temecula or Pechanga Indian Reservation)-: Act of February 12. 1932. 47 Stat. 50 (Skull Valley Indian Reservation) : Act of May 14. 1935. 49 Stat. 217 (Rocky Boy Indian Reservation) : Act of June 22, 1936. 49 Stat. 1806 (Walker River Indian Reservation), and *cf.* Act of April 22. 1937. 50 Stat. 72 ("set aside as an addition to the Barona Ranch. a tract of land purchased for the Capitan Grande Band of Mission Indians under authority contained in the Act of May 4, 1932. 47 Stat. L. 146").

[97] Act of May 28. 1937. 50 Stat. 241 (Koosharem Indian Reservation in Utah).

[98] Act of June 7. 1935. 49 Stat 332 (Veterans' Administration lands to be held by the United States in trust for the Yavapai Indians) : Act of June 20. 1935. 49 Stat 393 (National Forest lands "eliminated from the Cibola National Forest and withdrawn as an addition to the Zuni Indian Reservation").

[99] Act of April 15. 1874. 18 Stat. 28 ("use and occupation of the Gros Ventre, Piegan, Blood, Blackfoot, River Crow, and such other Indians as the President may. from time to time, see fit to locate thereon") : Act of September 7. 1916. 39 Stat. 739 ("set apart as a reservation for Rocky Boy's Band of Chippewa and such other homeless Indians in the State of Montana as the Secretary of the Interior may see fit to locate thereon") ; Act of May 31. 1924. 43 Stat. 246 ("certain bands of Paiute Indians, and such other Indians of this tribe as the Secretary of the Interior may see fit to settle thereon") ; Act of March 3. 1928. 45 Stat. 160 (Paiute and Shoshone) : Act of April 13. 1938. 52 Stat. 216 (Goshute). *Cf.* Act of April 8, 1864. sec. 2, 13 Stat. 39 ("tracts of land · · · to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state [California]") ; Act of May 5, 1864. sec. 2. 13 Stat. 63 ("set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory [Utah] as may be induced to inhabit the same").

On the interpretation of this language, see sec. 1D, *supra*, and sec. 7, *infra*.

[100] Act of June 23. 1926 44 Stat. 763: applied in United *States* v. *4,450.72 Acres of Lund, 27* F. Supp. 167 (D. C. Minn. 1939).

[101] Aet'of June 7. 1924. 43 Stat. 596 ("to purchase a tract of land, with sufficient water right attached. for the use and occupancy of the Temoak Band of homeless Indians, located at Ruby Valley. Nevada: *Provided*, That the title to said land is to be held in the United States for the benefit of said Indians") : Act of April 14, 1926, 44 Stat. 252 (Cahuilla) : Act of June 3. 1926. 44 Stat. 690 (Santa Ysabel Indian Reservation) ; Act of January 31. 1931. 46 Stat. 1046 ("purchase of a village site for the Indians now living near Elko. Nevada") : Act of April 17. 1937. 50 Stat. 69 (Santa Rosa Band of Mission Indians).

[102] Act of February 12. 1927. 44 Stat. 1089 (Jicarilla Reservation) ; Act of May 29. 1928. 45 Stat. 962 (Fort Apache Reservation) : Act of April 18, 1930, 46 Stat. 218 (Wind River Reservation) ; Act of March 4, 1931, 46 Stat. 1517 (Fort Apache Indian Reservation) ("title thereto to be taken in the name of the United States in trust for said [Fort Apache] Indians") ; Act of March 4, 1931, 46 Stat. 1522 (Cahuilla Reservation).

[103] Act of July 1. 1922. 37 Stat. 187 (Wisconsin Winnebagoes) ; Act of September 21. 1922. 42 Stat. 991 (Apache Indians of Oklahoma) ; Act of March 2. 1925. 43 Stat. 1096 ("for the use and occupancy of a small band of the Piute Indians now residing thereon : *Provided*, That the title to said lots is to be held in the United States for the benefit of said Indians") ; Act of May 10. 1926, 44 Stat. 496 ("added to and become a part of the site for the Reno Indian colony") ; Act of June 27, 1930. 46 Stat. 820 (lands occupied by "Indian colony" to be purchased. "the title to be held in the name of the United States Government. for the use of the Indians").

[104] 302 U. S. 535 (1938). rev'g 89 F. 2d 201 (C. C. A. 9, 1937). aff'g sub nom. *United States v. One Chevrolet Sedan*, 16 F. Supp. 453 (D. C. Nev. 1936).

[105] 232 U. S. 442, 449 (1914).

[106] *48* Stat. 960.

[107] Act of March 3, 1925, 43 Stat. 1115. See also : Act of May 23.1930. 46 Stat. 378. as amended by Act of February 21. 1931. 46 Stat. 1204 (Western Navajo Indian Reservation) : Act of March 1. 1933, 47 Stat. 1418 (Navajo Reservation in Utah) ; Act of May 23. 1934, *48* Stat. 795 (Fort Mojave).

[108] Act of February 11, 1903, 32 Stat. 822 (disputed lands confirmed to Torros Band of Mission Indians and new public domain lands transferred to state) ; Act of March 1. 1921, 41 Stat. 1193; Act of June 14,

Various combinations [109] as well as minor variations,[110] of the foregoing three basic methods have been used in other statutes.

(4) Distinct mention should be made of "reservation removal" statutes which authorize the sale of reservation lands and the reinvestment of the proceeds of such sale in the acquisition of new lands for the benefit of the tribe concerned.[111] Generally such statutes provide for the consent of the Indians.[112]

(5) A fifth type of statute establishing tribal property in reservation lands involves the restoration to a tribe of lands previously removed from tribal ownership.[113]

(6) A sixth source of tribal title is congressional legislation approving voluntary transfers of lands by another tribe,[114] state,[115] or individual.[116]

(7) Finally, it should be noted that tribal ownership is frequently confirmed, if not created, in allotment and cession acts, with respect to lands withheld from allotment or cession.[117]

Similar are statutes which divide up a single reservation among various component tribes or bands."[118] such division being based upon the consent of the Indians concerned.

## A. LEGISLATIVE DEFINITIONS OF TRIBAL PROPERTY RIGHTS

The foregoing statutes. except as otherwise noted, generally provide for the establishment of tribal lands. or reservations, without defining the precise character of the tribal interest therein. Certain statutes, however, seek to define precisely the extent of such tribal interest.

A number of these statutes, for instance, specify that a fee-simple title shall be vested in the Indian tribe."[119] Of particular importance in this category are the statutes authorizing the patenting. of land to the Pueblos of New Mexico and to the Mission Bands of California Indians. The former of these statutes [120] is analyzed in Chapter 20; section 6, of this volume. The latter statute [121] directed the Secretary of the Interior to appoint three commissioners (sec. 1) for the purpose of selecting

> • • • a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be-valid when approved by the President and Secretary of the Interior. (Sec. 2.)

The Secretary of the Interior was directed to issue a patent for each of the reservations,

> • • • which patents shall be of the legal effect, and declare that the United States does and will hold the land thus patented. subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use nod benefit of the band or Village to which it it issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever • • • . (Sec. 3.)

The Secretary of the Interior was further authorized to cause allotments to be made out of such reservation laud to any Indian residing upon such patented land who shall be so advanced in civilization as to be capable of owning and managing land in severalty (sec. 4). Individual patents were to "override" the group patent (sec. 5). The Attorney General was directed to

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1935. 49 Stat. 339 ("Upon conveyance to the United States by the State of Florida of a sufficient title to the lands to be acquired for the use of Seminole Indians, the Secretary of the Interior is authorized to issue a patent • • • to the State of Florida • • •").

[109] Act of June 23, 1926. 44 Stat. 763 (Chippewa); Act of February 21, 1931. sec. 1. 46 Stat. 1202 (public lands "reserved for the use and occupancy of the Papago Indians as an addition to the Papago Indian Reservation, Arizona, whenever all privately owned lands except mining claims within said addition hare been purchased and acquired as hereinafter authorized"); Act of April 13. 1938. 52 Stat. 216 (Goshute). The first named statute provides for the use of condemnation powers to complete consolidation of a given reservation. and authorizes the use of tribal funds to pay for lands acquired.

[110] Act of May 29. 1935. 49 Stat. 312 (Minnesota National Park Reserve lands transferred to Chippewa tribe upon repayment of sums originally paid tribe for such lands); Act of August 28, 1937, 50 Stat. 864 (interests in Blackfeet lands acquired for federal reclamation purposes resold to tribe). *Cf.* Act of February 26. 1925, 43 Stat. 1003 (Kiowa. Comanche. and Apache).

[111] Act of June 5, 1872, 17 Stat. 228. 229 ("set apart for and confirmed as their [Osage] reservation"); Act of April 10, 1876, 19 Stat. 28 ("purchase of a suitable reservation in the Indian territory for the Pawnee tribe of Indians"); Act of February 28, 1919, 40 Stat. 1206 ("purchase of additional lands for the Capitan Grande Band of Indians • • • to properly establish these Indians permanently on the lands purchased for them").

[112] Act of March 3. 1885. sec. 5, 23 Stat. 351. 352 (Sac and Fox and Iowa); Act of March 3. 1881, sec. 5. 21 Stat. 380, 381 ("That the Secretary of the Interior may. with the consent of the [Otoe and Missouria] Indians. expressed in open council, secure other reservation lands upon which to locate said Indians • • • and expend such sum • • • to be drawn from the fund arising from the sale of their reservation lands").

[113] Act of May 24. 1924. 43 Stat. 138 (trust patents canceled and lands restored to the status of tribal property). Accord: Act of May 24. 1924. 43 Stat. 138 (Winnebago); Act of February 13, 1929. 45 Stat. 1167 (agency lands revested in Yankton Sioux Tribe); Act of March 3. 1927. 44 Stat. 1401 (Fort Peck: payments for agency land refunded to Federal Government); see also the Indian Reorganization Act, June 18. 1934, 48 Stat. 984. which in sec. 3 provides that, "The Secretary of the Interior. if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore *opened.* or authorized to be opened, to sale. or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: • • • .*' For a more detailed discussion see section 7 of this chapter.

[114] Joint Resolution of July 25. 1848, 9 Stat. 337 (cession by Delaware Tribe to Wyandottes); Act of February 23. 1889. 25 Stat. 687 (agreement for the settlement of Lemhi Indians upon Fort Hall Reservation).

[115] Act of February 15. 1929. 45 Stat. 1186 (Alabama and Coushatta Indians of Texas).

[116] Act of August 14. 1876. 19 Stat. 139 (lands to be accepted by the Commissioner of Indian Affairs "and conveyed to the Eastern Band of Cherokee Indians in fee-simple").

[117] "• • • set apart • • • for school, church, and cemetery purposes • • • shall be held as common property of the respective tribes." Act of March 2. 1889. sec. 1. 25 Stat. 1013 (United Peorias and Miamies); Act of June 28. 1898. sec. 11. 30 Stat. 495. 497 (Indian Territory); Act of June 6. 1900, sec. 6. 31 Stat. 672. 677 (set aside for the use in common by said Indian tribes (Kiowa, Comanche, and Apache] 400,000 acres of grazing land); Joint Resolution of June 19. 1902, 32 Stat. 744 (Walker River, Uintah); Act of December 21. 1904, 33 Stat. 595 (Yakima); Act of June 4. 1920. 41 Stat. 751 (Crow): Act of May 19. 1924. 43 Stat. 132 (Lac du Flambeau Band of Chippewas); Act of February 13. 1929. 45 Stat. 1167 (Yankton Sioux).

[118] Act of April 30. 1888. 25 Stat. 94 (Sioux); Act of May 1. 1888; 25 Stat. 113 (Fort Peck, Fort Belknap, Blackfeet).

[119] Act of August 14, 1876, 19 Stat. 139 (Eastern Cherokees); Act of March 3. 1885. secs. 7 and 8, 23 Stat. 351, 332 (Sac and Fox and Iowa); Act of May 17. 1926. 44 Stat. 561 ("Title to • • • is hereby confirmed to the Sac and Fox Nation or Tribe of Indians unconditionally"); Act of June 6. 1932. 47 Stat. 169 (Secretary of the Interior authorized to "convey by deed" abandoned Indian school lands "to the L'Anse Band of Lake Superior Indians for community meetings and other like purposes • • • *Provided*, That said conveyance shall be made to three members of the band duty elected by said Indians as trustees for the band and their successors in office"); Act of February 13. 1929. 45 Stat. 1167 ("all claim, right, title, and interest in and to" agency lands revested in Yankton Sioux Tribe). *Cf.* Act of June 3. 1926. 44 Stat. 690 (declaring executive order reservation lands set apart for "permanent use and occupancy" to be "the property of said Indians. subject to such control and management of said property as the Congress of the United States may direct.")

[120] Act of December 22. 1858. 11 Stat. 374 ("a patent to issue therefor as in ordinary cases to private individuals"); extended to Zuni Pueblo by Act of March 3. 1931. 46 Stat. 1509.

[121] Act of January 12. 1891. 26 Stat. 712.

defend the rights of Indian groups "secured to them in the original grants from the Mexican Government" (sec. 6).

The provisions of this legislation have been modified in certain respects by later enactments [122] and have been incorporated by reference in a number of subsequent acts dealing with the Mission Indians of California.[123]

While the foregoing statutes may be construed to grant an estate greater than the ordinary tribal title, there. are other statutes which rigidly confine the interest of the Indians in a given tract by specifying the particular purpose for which the tract is to be used.[124] Other statutes specify that the land is established for Indian use under the supervision of the Secretary of the Interior or under rules and regulations to be prescribed by him,[125] or that the land shall not be subject to allotment.[126]

[122] The Act of March 2, 1917, 39 Stat. 969, 976, provided that the President might extend the 25-year trust period. Such power to extend- must he exercised before the expiration of the period Or it lapses. Op. Sol. I. D.. M. 27939, April 9, 1935. After expiration. the period may be extended, by Congress. Act of February 11. 1936. 49. Stat. 1106 (Pala Band of Mission Indians). Other acts extending these trust periods Include Act of February 8. 1927. 44 Stat. 1061.

[123] Act. of February 21, 1931. 46 Stat. 1201 (Temecula or Pechanga Mission) : Act of March 4. 1931. 46 Stat. 1522 (Cahuilla Mission).

[124] Act of February 20. 1895. 28 Stat. 677 (Southern Ute) ("That for the sole and exclusive use end occupancy of such of said Indians as may not elect or be deemed qualified to take allotments of lend in severalty, as provided in the preceding section, there shall he, and is hereby. set apart end reserved all that portion of their present reservation lying . . ● , subject, however. to the right of the Government to erect and maintain agency buildings thereon and to grant rights of way through the same for railroads, irrigation ditches. highways, and other necessary purposes: end the Government shall maintain an agency et some suitable place on said lends so reserved"). *Cf.* Act of June 30, 1864 sec. 2. 13. Stat. 323 (Navajoe end Apache). Joint Resolution of January 30. 1897. 29 Stat. 698 (Fort Bidwell; lands to be used by the Secretary of the Interior "for the purposes of an Indian training school"); Act of May 14; 1898, sec. 10. 30 Stat. 409. 413; Act of May 27. 1910, 36 Stat. 440 (Pine Ridge); Act of May 30. 1910, 36 Stat. 448 (Rosebud) (Secretary of the Interior authorized to reserve "such lands as be may deem necessary for agency, school end religious purposes, to remain reserved as long as needed and as long es agency. school, or religious institutions are maintained thereon for the benefit of said Indians"); Act of May 31, 1924, 43 Stat. 246 ("reserved for and as a school site" for the Ute Indians); Act of June 23, 1926, 44 Stat. 763; Act of June 24. 1926. 44 Stat. 768 (for the use of the Yakima Indians and confederated tribes as a burial ground); Act of June 28. 1926, 44 Slat. 775 ("agency reserve of the Papago Indian Reservation"): Act of March 3, 1927, 44 Stat 1389 (addition to United States Indian school farm); Act of May 21, 1928, 45 Stat. 684 (public lends "permanently reserved for said village site -for, said [Chippewa] Indians"); Act of March 28, 1932, 47 Stat.. 74 (for cemetery -purposes).

[125] Act of March 3, 1891, sec. 15. 26 Stat. 1095 (Metlakatla Indians); Act of June 23. 1926, 44 Stat. 763 (Chippewa Indians of Minnesota).

[126] Act of March 3. 1891, sec. 15, 26 Stat. 1095 (Metlakatla Indians); Act of February 13, 1929, 45 Stat. 1167 (Yankton Sioux).

## SECTION 7. EXECUTIVE ORDER RESERVATIONS

Although the practice of establishing Indian reservations by Executive order goes back at least to May 18, 1855,[127] the practice rested on an uncertain legislative foundation prior to the General Allotment Act.[128] In fact, so uncertain was the legislative foundation for the exercising of the power by the Executive that the Attorney General in upholding its legality in an opinion rendered in 1882, did so chiefly on the basis that the practice had been followed for many *years* and Congress had never objected.[129]

Questions as to the validity of already established Executive order reservations were settled [130] by the language of the General Allotment Act which referred to "any reservation created for their use, either by treaty stipulation or by virtue of an Act of Congress or Executive order setting apart the same for their use . . *" (sec. 1). The view that Executive order reservations have exactly the same validity and status as any other type of reservation is expressed in a carefully documented opinion of Attorney General Stone, rendered with respect to the validity of attempts by Secretary of the Interior Fall to dispose of minerals within Executive order Indian reservations under the laws governing minerals within the public domain. In holding the proposed practice to be illegal, the Attorney General declared :

> That the President had authority at the date of the orders to withdraw public lands and set them apart for the benefit of the Indians. or for other public purposes, is now settled beyond. the possibility of controversy. *United States* v. *Midwest* Oil Co., 236 U. S. 459; *Mason* v. United *States*, 260 U. S. 545. And aside from this, the General Indian Allotment Act of February 8, 1887 (24 Stat. 388, Sec. 1). clearly recognizes and by necessary implication confirms Indian reservations "heretofore" or "hereafter" established by executive orders.
>
> Whether the President might legally abolish, in whole or in part, Indian reservations once created by him, has been seriously questioned (12 L. D. 205; 13 L. D. 628) and not without strong reason; for the Indian rights attach when the lands are thus set aside; and moreover, the lands then at once become subject to allotment under the General Allotment Act. Nevertheless, the President has in fact, and in a number of instances. changed the boundaries of executive order Indian reservations by excluding lands therefrom, and the question of his authority to do so has not apparently come before the courts.
>
> When, by an executive order, public lands are set aside, either as a new Indian reservation or au addition to an old one without further language indicating that the action is a mere temporary expedient, such lands are thereafter properly known and designated as an "Indian reservation;" and so long, at least, as the order continues in force, the Indians have the right of occupancy and use and the United States has the title in fee. *Spalding* v. *Chandler*, 160 U. S. 394; *In re Wilson*, 140 U. S. 575.
>
> But a right of "occupancy" or "occupancy and use" in the Indians with the fee title in the sovereign (the Crown, the original States, the United States) is the same condition of title which has prevailed in this country from the beginning, except in a few instances like those of the Cherokees and Choctaws. who received patents for their new tribal lands on removing to the West. And the Indian right of occupancy is as sacred as the fee title of the sovereign.
>
> The courts have applied this legal theory indiscriminately to lands subject to the original Indian occupancy, to reservations resulting from the cession by Indians of part of their original lands and the retention of the remainder, to reservations established in the West in exchange for lands in the East, and to reservations created by treaty, Act of Congress, or executive order, out Of "public lands." The rights of the Indians were always those of occupancy end use and the fee was in the United States. *Johnson* v. *McIntosh*, 8 Wheat. 543; *Mitchell* v. *United States*, 9 Pet. 711, 745; *United States* v. *Cook*, 19 Wall. 591; *Leavenworth, etc. R. R. Co.* v. *United States*, 92 U. S. 733. 742; *Seneca Nation* v *Christy*. 162 U. S. 283, 288–9; *Beecher* v. *Wetherby*, 95 U. S. 517, 525; *Minnesota* v. *Hitchcock*, *185* U. S. *373*. 388 et seq.; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Jones* v. *Meehan*, 175 U. S. 1;

[127] 34 Op. A. G. 181. 186-189 (1924).

[128] Act of February 8. 1887. 24 Stat. 388.

[129] Indian Reservations, 17 Op. A. G. 258 (1882); in 1887 the Attorney General ruled that an act of Congress would be necessary in order to establish a reservation in Alaska for Indians emigrating from Canada since the President's "power to declare permanent reservation for Indians to the exclusion Of others on the public domain does not extend to Indians not born or resident in the United States." 18 Op. A. G. 557. 559 (1887).

[130] See 29 OP. A. G. 239, 241 (1911); end see In *re Wilson*, 140 U. S. 575, 577 (1891).

*Spalding* v. *Chandler*, 160 U. S. 394; *M'Fadden* v. *Mountain View Min. & Mill. Co.*, 97 Fed. 670, 673; *Gibson* v. *Anderson*, 131 Fed. 39.

In *Spalding* v. *Chandler*, *supra*, which involved an executive order Indian reservation, the Supreme Court said (pp. 402, 403):

> "It has been settled by repeated adjudications of this court that the fee of the land in this Country in the orginal occupation of the Indian tribes was from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw At until such right of occupation had been surrendered to the government. When Indian reservations were created. either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated."

In *M'Fadden* v. *Mountain View* Min. *& Mill.* Co., supra, the Circuit Court of Appeals for the Ninth Circuit said (p. 673):

> "On the 9th day of April, 1872, an executive order was issued by President Grant, by which was set apart as a reservation for certain specified Indians, and for such other Indians as the department of the interior 'should see fit to locate thereon. a certain scope of country 'bounded on the east and south by the Columbia river. on the west by the Okanagon river, and on the north by the, British possessions, thereafter known as the 'Colville Indian Reservation.' There can be no doubt of the power of the president to- reserve those lands of the United States for the use of the Indians. The effect of that executive order was the same as would have been a treaty with the Indians for the same purpose. and was to exclude all intrusion upon the territory thus reserved by any and every person, other than the Indians for whose benefit the reservation was made, for mining as well as other purposes."

The latter decision was reversed by the Supreme Court and on an entirety different ground (180 U. S. 533). The views expressed in the *M'Fadden* case were reaffirmed by the same court in *Gibson v. Anderson. supra.* involving a reservation created by executive order for the Spokane Indians..

The General Indian Allotment Act of February 8. 1887 (24 Stat.. 388, Sec. 1). is based upon the same legal theory as. the decisions of the courts: for it is expressly made applicable to "any reservation created for their use, either by treaty stipulation or by virtue of an Act of Congress or *executive -order setting apart the same for their use;*" * * *.[131]

A few years after the foregoing opinion was rendered, the question raised by Attorney General Stone as lo the propriety of modifying Executive order reservations by new Executive orders received its legislative answer in section 4 of the Act of March 3. 1927,[132] which declared:

> That hereafter changes in the boundaries of reservations created by Executive order. proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: *Provided*, That this shall not apply to temporary withdrawals by the Secretary of the Interior.

Some years earlier. a general prohibition against the creation of new Executive order reservations or new additions to existing reservations had been enacted, in these terms:

> That hereafter no public lands of the United States shall be withdrawn bv Executive Order. proclamation. or otherwise, for or as an Indian reservation except by act of Congress.[133]

The foregoing Statute. which terminates the practice of establishing Indian reservations by Executive order, remains in force to this day, except with respect to the Territory of Alaska, where it has been substantially repealed by section 2 of the Act of May 1. 1936.[134] It may be argued that the procedure of establishing reservations by Executive order is revived. *pro tanto*, by section 3 of the Act of June 18. 1934,[135] which authorizes the Secretary of the Interior to add to existing reservations by restoring to Indian ownership "the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation. or by any of the public-land laws of the United States." Under this provision, it has been administratively held that the restoration of land must be for the benefit of the entire tribe that would, according to the terms of the cession, be entitled to receipts from the sale thereof, rather than to a fraction of the tribe to which the land formerly belonged.[136]

Executive orders setting apart public lands for Indian reservations or Indian use are by no means uniform. Perhaps the most common type of order is that which presumes to set apart a designated area for the use.[137] or use and occupancy,[138] or as a reservation [139] for a particular tribe or tribes of Indians. Frequently the order uses the term "permanent use and occupancy."[140] Other orders of this type provide that designated

[131] 34 Op. A. G. 181. 186-189 (1924).

[132] 44 stat. 1347.

[133] Act of June 30, 1919. sec. 27. 41 Stat. 3. 34: *Cf.* Chapter 20. fn. 90.

[134] 49 Stat. 1250. See Chapter 21. see. 8.

[135] 48 Stat. 984. 25 U. S. C. 463.

[136] Op. Sol. I. D.. M.29616. February 19. 1938 (Chippewa); Op. Sol. I. D.. M.29791. August 1. 1938 (Red Lake Chippewa). Where there is a preexisting lien against land restored to tribal ownership. it has been administratively decided that such lien remains unaffected by the restoration and may be enforced by judicial process.

[137] Executive order, March 12. 1873 (Moapa River); Executive order, November 4. 1873 (Leech Lake): Executive order. November 4. 1873 (Quinaielt): Executive order. February 25. 1874 (Skokomish); Executive order. May 26. 1874 (Leech Lake): Executive order May 26. 1874 Winnebagoshish); Executive order, November 11. 1907 (Jicarilla Apache); Executive order, June 2. 1911 (Hualapai); Executive order. May 29. 1912 (Hualapai): Executive order, March 11. 1912 (Smith River): Executive order. April 24, 1912 (Chuckekansies Band); Executive order. February 10. 1913 (Navajo): Executive order. May 6. 1913 (Navajo); cf. Executive order. February 12. 1875 (Lembi) ("for the exclusive use"); see Executive order. December 19. 1906 (Jemez Pueblo) ("for the use and benefit of"), amended by Executive order. September 1. 1911 (Jemez Pueblo): Executive order. March 23. 1914 (Gosbute); Executive order, November 10. 1914 (Cold Springs); Executive order, October 4. 1915 (Jemez Pueblo); Executive order. June 18. 1917 (Winnemucca); Executive order. February 8. 1918 (Winnemucca).

[138] Executive order. November 22. 1873 (Lummi): Executive order, March 16. 1877 (Zuni Pueblo). amended by Executive order. May 1. 1883 (Zuni Pueblo); Executive order. June 8. 1880 (Suppai); Executive order, November 23. 1880 (Suppai); Executive order. January 18. 1881 (Spokane): Executive order. March 31. 1882 (Suppai): Executive order, December 16. 1882 (Moqui); Executive order, January 4, 1883 (Hualapai); Executive order. November 26. 1884 (Northern Cheyenne); Executive order. February 11, 1887 (Jicarilla Apache): Executive order. March 14. 1887 (Mission): Executive order. June 13. 1902 (San Felipe Pueblo); Executive order. September 4. 1902 (Nambe Pueblo); Executive order, July 29 1905 (Santa Clara Pueblo); *cf.* Executive order. May 6. 1913 (Colony or Nevada) ("for the Nevada or Colony Tribe"); Executive order. September 27. 1917 (Cocopah).

[139] Executive order. November 8. 1873 (Coeur D'Alene): Executive order. July 3. 1875 (Moapa River); Executive order. May 10. 1877 (Carlin Farms); Executive order. April 16. 1877 (Duck Valley): Executive order. February 7. 1879 (Southern Ute); Executive order. March 18. 1879 (White Earth): Executive order. June 27. 1879 (Drifting Goose); Executive order. September 21. 1880 (Jicarilla Apache); Executive order. December 20. 1881 (Vermillion Lake); Executive order. January 5. 1882 (Uncompahgre): Executive order September 11. 1893 (Hoh): Executive order. May 6. 1889 (Mission): Executive order. April 12. 1893 (Osette); Executive order. June 28. 1911 (Seminole); Executive order. March 23. 1914 (Kalispel); Executive order. January 14. 1916 (Papago).

[140] Executive order. December 27. 1875 (Mission): Executive order. May 15 1876 (Mission); Executive order. April 19. 1879 (Columbia or Moses); Executive order. March 6. 1880 (Columbia or Moses); Executive order. March 2. 1881 (Mission); Executive order, June 19. 1883 (Mis-

lands shall be "set apart as additions to" named reservations,[141] or, that the boundaries of a designated reservation are "extended to include" [142] specified lands. Occasionally an order merely recites the boundary of the reservation it presumes to establish.[143] Another type of order restores theretofore reserved lands to the public domain and withdraws in lieu thereof certain designated land to be set apart for an Indian reservation,[144] or as an addition to an established reservation.[145] Various combinations of the foregoing types may be found in other orders.[146]

In some of the orders the designation of additional Indian beneficiaries of the reservation to be established is delegated to administrative discretion. These orders, typically, provide that given lands shall be set apart for the use and occupancy of certain named bands or tribes and "such Indians as the Secretary of the Interior may see fit to locate thereon." [147] Under another type of order the land is withdrawn and set apart for an indefinite period, the duration of which is conditioned upon the happening of a named event. For example, the Executive order of November 14, 1901, provides that designated land 'be "withdrawn from sale and settlement until such time as the [Navajo] Indians residing thereon shall have been settled permanently under the provisions of the homestead laws or the general allotment act * * *".[148] Yet another type of order, merely provides that designated land be set apart 'for Indian purposes.[149] In some cases a particular 'purpose is designated.[150]

sion) ; Executive order, June 30, 1883 (Deer Creek) ; Executive order, August 15, 1883 (Iowa) ; Executive order, August 15. 1883 (Kickapoo) ; Executive order, January 29, 1887 (Mission) ; Executive order, February 19, 1889 (Quillehute) ; Executive order, March 19, 1900 (Northern Cheyenne) ; Executive order, August 2. 1915 (Paiute).

[141] Executive order, October 26, 1872 (Makah) ; Executive order, October 29, 1873 (Winnebagoshish) ; Executive order; November 22, 1873 (Colorado River) ; Executive order, April 9, 1874 (Muckleshoot) ; Executive order, November 16, 1874 (Colorado River) ; Executive order, January 11, 1875 (Standing Rock) ; Executive order, January 11, 1875 (Cheyenne River) ; Executive order, January 11, 1875 (Crow Creek) ; Executive order, January 11, 1875 (Lower Brule) ; Executive order, January 11, 1873 (Rosebud) ; Executive order. March 16. 1875 (Standing Rock) ; Executive order, April 13, 1875 (Blackfeet) ; Executive order, October 20, 1875 (Crow) ; Executive order, April 13, 1875 (Fort Belknap) ; Executive order, April 13, 1875 (Fort Peck) ; Executive order. May 15, 1875 (Malheur) ; Executive order, May 20, 1875 (Crow Creek) ; Executive order, May 20, 1875 (Rosebud) ; Executive order, November 22, 1875 (Confederated Ute) ; Executive order, May 15, 1876 (Colorado River) ; Executive order, August 31. 1876 (Pima and Maricopa) ; Executive order, November 28, 1876 (Standing Rock) ; Executive order, October 29, 1878 (Navajo) ; Executive order, January 10, 1879 (Pima and Maricopa) ; Executive order, January 6, 1880 (Navajo) : Executive order. January 24, 1882 (Great Sioux) ; Executive order, January 24, 1882 (Pine Ridge) ; Executive order, May 5. 1882 (Pima and Maricopa) ; Executive order. November 15, 1883 (Pima and Maricopa) ; Executive order, May 4. 1886 (Duck Valley) : Executive order. November 21. 1892 (Red Lake) ; Executive order, July 31. 1903 (Moapa River) ; Executive order, March 10. 1905 (Navajo) ; Executive order, November 9, 1907 (Navajo) ; Executive order, July 1. 1910 (Duck Valley) ; Executive order. October 20, 1910 (Salt River) ; Executive order. December 1, 1910 (Fort Mojave) : Executive order, July 31. 1911 (Pima and Maricopa) ; Executive order, October 28. 1912 (Moapa River): Executive order. November 26. 1912 (Moapa River) ; Executive order, June 2, *1913* (Gila River) ; Executive order. April 13. 1914 (Los Coyotes) : Executive order November 12, 1915 (Ute) ; Executive order, April 29.1916 (Camp or Fort Independence) ; cf. Executive order, September 4. 1902 (Nambe Pueblo) (*"Provided further,* That if at any time the lands covered by any valid claims shall be relinquished to the United States. or the claim lapse, or the entry be canceled . . ., such lands shall be added to . . * the reservation hereby set apart . * . "). Accord: Executive order. June 13. 1902 (San Felipe Pueblo): Executive order. July 29. 1905 (Santa Clara Pueblo).

[142] Executive order; October 16, 1891 (Hoopa) ; *cf.* Executive order, July 26. 1876 (Round Valley) ("as an extension thereof") ; Executive order, August 17, 1876 (Confederated Ute) ("set aside as a part of"). Accord: Executive order, August 8, 1917 (Fort Bidwell).

[143] Executive order, September 9. 1873 (Swinomish Reservation-Perrys Island) ; Executive order. December 23. 1873 (Tulalip or Snohomish).

[144] Executive order, November 9. 1855 (Siletz) : Executive order. February 21. 1856 (Red Cliff) : Executive order. January 20. 1857 (Muckleshoot) ; Executive order, January 20. 1857 (Nisqually) : Executive order. January 20. 1857 (Puyallup) ; Executive order, June 30. 1857 (Grande Ronde) ; Executive order. October 3. 1861 (Uintah Valley) ; Executive order, January 15. 1864 (Bosque Redondo) ; Executive order. July 8. 1864 (Chehalis) ; Executive order. October 21, 1864 (Port Madison) : Executive order. March 20. 1867 (Santee) : Executive order, August 10. 1869 (Cheyenne and Arapaho) : Executive order. April 12, 1870 (Fort Berthold) ; Executive order. March 14. 1871 (Malheur) ; Executive order. April 9, 1872 (Colville) ; Executive order. July 2. 1872 (Colville) ; Executive order. September 12. 1872 (Malheur) ; Executive order, January 2. 1873 (Makah) : Executive order, May 29. 1873 (Fort Stanton or Mescalero Apache) ; Executive order. September 6. 1873 (Puyallup) ; Executive order. October 3. 1873 (Tule River) ; Executive order. October 21, 1873 (Makah) ; Executive order. February 2. 1874 (Fort Stanton or Mescalero Apache) ; Executive order. February 12, 1874 (Moapa River) ; Executive order. March 19. 1874 (Walker River) ; Executive order. March 23. 1874 (Pyramid Lake or Truckee) : Executive order. October 20. 1875 (Fort Stanton or Mescalero Apache) ; Executive order. December 21. 1875 (Hot Springs) ; Executive order. June 14. 1879 (Pima and Maricopa) : Executive order, July 13. 1880 (Fort Berthold) ; Executive order. May 19. 1882 (Fort Stanton or Mescalero Apache) : Executive order. January 9, 1884 (Puma) ; Executive order, June 3, 1884 (Turtle Mountain) ; Executive order, October 1. 1886 (Chehalis) ; Executive order, December 4, 1888 (Umatilla) ; Executive order, July 12. 1895 (Cheyenne and Arapaho) ; Executive order, February 17. 1912 (Navajo) ; Executive order, December 5, 1912 (Papago) ; Executive order. February 1, 1917 (Papago).

[145] Executive order, February 2. 1911 (Fort Mohave) ; Executive order, May 15. 1905 (Navajo).

[146] *E. g.,* Executive order, December 14, 1872 (Chiricahua and White Mountain) ("It is hereby ordered that the following tract, of country be . . . set apart . . . for certain Apache Indians . . . to be known as the 'Chiricahua Indian Reservation' . * . It is also hereby ordered that the reservation heretofore set apart for certain Apache Indians * . . known as the 'Camp Grant Indian Reservation,' be . . . restored to the public domain. It is also ordered that the following tract of country be . . . added to the White Mountain Indian Reservation . . . "). -

[147] Executive order, April 9, 1874 (Hot Springs) ; Executive order, July 1, 1874 (Papago) ; Executive order. December 12, 1882 (Gila Bend) ; Executive order, December 21, 1882 (Turtle Mountain) ; Executive order, July 6, 1883 (Yuma) ; Executive order, August 15. 1883 (Iowa) ; Executive order, January 9, 1884 (Yuma) ; Executive order, September 15, 1903 (Camp McDowell) ; Executive order, December 1, 1910 (Fort Mojave) ; Executive order, February 2. 1911 (Fort Mojave) ; Executive order, March 22, 1911 (Salt River) ; Executive order. September 28. 1911 (Salt River) ; Executive order, May 8. 1911 (Pima and Maricopa) ; Executive order, May 28, 1912 (Papago) ; Executive order. January 14. 1913 (Paiute and Shoshone) ; Executive order. March 4. 1915 (Fond Du Lac) ; Executive order, August 2, 1915 (Paiute) ; Executive order. April 21. 1916 (Shebit or Shivwits) ; Executive order. January 15. 1917 (Navajo) ; Executive order. March 21, 1917 (Laguna Pueblo) ; Executive order, July 17, 1917 (Kaibab) : Executive order:February 15. 1918 (Skull Valley) ; Executive order, March 23. 1918 (Western Shoshone).

[148] Similar in effect is the Executive order of May 7. 1917 (Navajo) which provides that designated land be "set aside temporarily until allotments in severalty can be made to the Navajo Indians living thereon, or until some other provision can be made for their welfare." Accord : Executive order., January 19. 1918 (Navajo). See also Executive order, May 9, 1912 (Paiute) ("until their suitableness for allotment purposes . . . may be fully investigated") ; Executive order. December 13. 1910 (Coeur d'Alene) ("as an addition to the Indian school and agency site . . . until such time as it shall be no longer needed and used for his purpose").

[149] Executive order. September 22. 1866 (Shoalwater) : Executive order, June 23. 1876 (Hoopa) ; Executive order. August 25. 1877 (Mission) ; Executive order. September 29. 1877 (Mission) ; Executive order. March 9. 1881 (Mission), ; Executive order. June 27. 1882 (Mission) ; Executive order, November 19. 1892 (Navajo) : Executive order. May 24. 1911 (Navajo). *Cf.* Executive order. August 14. 1914 (Chuckekanzie) ("for Indian use") : Presidential proclamation, August 31. 1915 (Cleveland National Forest—Mission Indians).

[150] Executive order. July 12. 1884 (Chillocco School Reservation) ("for the settlement of such friendly Indians . . . as have been or who may hereafter be educated at the Chillocco Indian Industrial School") : Executive order. October 3. 1884 (Pueblo Industrial School Reservation) ; Executive order. July 9. 1895 (Cheyenne and Arapaho) ; Executive order. December 22. 1898 (Hualapai) ("for Indian school purposes"). Accord : Executive order, May 14. 1900 (Hualapai) ; Executive order. November 26. 1902 (Greenville Indian School) ; Executive order, February 5. 1906 (Uintah) ("be . . . temporarily set apart to the Protestant

It will be noted that the foregoing types of order are all similar in certain respects. In each it is decreed that certain designated land be set apart in a designated manner for a named purpose. In contradistinction to these is the type of Executive order which, though it effects the same purpose, namely, the setting apart of designated land for a particular purpose, may more accurately be termed Executive approval than Executive order. The typical situation wherein this Executive approval is found arises where agents of the War or Interior Departments of their own discretion set aside designated lands and notify the Executive department of such action. In confirmance thereof the Executive may indicate his approval either by affixing his signature to the official notification or by issuing an order confirming same.[151] Needless to say this type of Executive order is of equal validity with the orders hereinbefore mentioned.[152]

Comparatively few questions have arisen as to the interpretation of Executive orders establishing Indian reservations. One such question was raised before the Court of Claims in the case of *Crow Nation* v. United *States*.[153] According to that court, the phrase in controversy reserving an area for the Crow tribe "and such other Indians as the President may, from time to time, locate thereon",[154] gave to the Crow tribe

> . . . only the right to reside upon the reservation so set apart by Executive order, and did not confer upon them any definite title or particular interest in the land. It was in the nature of a tenancy by sufferance or residential title. . . . The Executive order reserves to the President the right to put other Indians on the reservation and this could not be done if a statutory title, as tenants in common, was given to these five tribes alone. (Pp. 278, 279.)

Where an Executive order establishes an Indian reservation in an area previously reserved for reservoir purposes, it has been held that the later Executive order supersedes the earlier order.[155]

It has been held that a reservation in the nature of an Executive order reservation may be established without a format Executive order if a course of administrative action is shown which had for its purpose the inducing of an Indian tribe to settle in a given area and if the area has thereafter been referred to and dealt with as an Indian reservation by the Executive branch of the Government.[156]

Likewise it has been held that an Executive reservation may be created by administrative action prior to the formal issuance of an Executive order, the effect of such order being simply to give "formal sanction to what had been done before."[157]

Occasionally a treaty leaves a good deal of discretion to administrative authorities in establishing a reservation, and the courts must took to administrative correspondence, maps, and other records to determine the date, extent, and character of the reservation. Here we are on the borderline between treaty and Executive order reservations.[158] In fact, the connection between treaty and Executive order is characteristic of many, if not most, of the early Executive orders and provides a legal basis of unquestioned validity for such Executive orders.[159]

Episcopal Church for missionary and cemetery purposes for the benefit of the Ute Indians so long as used therefor."): Executive order, July 6, 1912 (Rosebud). *Cf.* Executive order, June 16, 1911 (Papago) ("for school, agency, and other necessary uses"); Executive order, January 17, 1912 (Skull Valley Band); Executive order, May 29, 1912 (Deep Creek Band); Executive order, July 22, 1915 (Paiute) ("for use . . . as a cemetery and camping ground"); Executive order, March 15, 1918 (Walker River) ("as a grazing reservation").

[151] Executive order, May 14, 1855 (Isabella); Executive order, August 9, 1885 (Ottawa and Chippewa); Executive order, September 25, 1855 (Outonagon); Executive order, May 22, 1856 (Mendocino); Executive order, December 21, 1858 (Fond Du Lac); Executive order, April 16, 1864 (Little Traverse); Executive order, February 27, 1866 (Niobrara or Santee Sioux); Executive order, July 20, 1866 (Niobrara or Santee Sioux); Executive order, June 14, 1867 (Fort Hall); Executive order, June 14, 1867 (Coeur D'Alene); Executive order, November 16, 1867 (Niobrara or Santee Sioux); Executive order, January 16, 1868 (Cheyenne and Arapaho Halfbreed); Executive order, July 30, 1869 (Fort Hall); Executive order: January 31, 1870 (Mission); Executive order, March 30, 1870 (Round Valley); Executive order, November 9, 1871 (Fort Apache); Executive order, November 9, 1871 (White Mountain); Executive order, January 9, 1873 (Tule River); Executive order, July 5, 1873 (Blackfeet); Executive order, July 5, 1873 (Fort Belknap); Executive order, July 5, 1873 (Fort Peck); Executive order, March 19, 1874 (Walker River); Executive order, September 19, 1880 (Fort Mojave); Executive order, November 16, 1885 (Klamath River).

[152] *Cf. United States* v. *Walker River Irr. Dist.*, 104 F. 2d 334 (C. C. A. 9, 1939).

[153] 81 C. Cls. 238 (1935).

[154] *Cf.* fn. 36, *supra*.

[155] Op. Sol. I. D., M.28589, August 24, 1936.

[156] Old Winnebago and Crow Creek Reservation, 18 Op. A. G. 141 (1885).

[157] *Northern Pacific Ry. Co.* v. *Wismer*, 246 U. S. 283 (1918), aff'g 230 Fed. 591 (C. C. A. 9, 1916).

[158] *Spalding* v. *Chandler*, 160 U. S. 394 (1896).

[159] In the present instance, the orders of May 29, 1873, February 2, 1874, and October 20, 1875, not *only* confirmed Indian rights of use and occupancy (34 Op. Atty. Gen. 181, 187), but were issued in pursuance of obligations toward the Apache Indians undertaken by the United States in the Treaty of July 1, 1852, 10 Stat. 979, in which the Government agreed "at its earliest convenience" to "designate, settle, and adjust their territorial boundaries." Memo. Sol. I. D., June 28, 1940 (Mescalero Apache).

## SECTION 8. TRIBAL LAND PURCHASE

That a tribe may acquire land in its own name is a consequence of its general contractual capacity, discussed in Chapter 14 of this volume. In the exercise of this capacity various tribes have, from time to time, purchased lands (using the term "purchase" in its technical sense to include acquisition through gift and devise as well as bargain and sale), and the validity of such purchases has been recognized legislatively [160] and judicially.[161]

A notable instance of land acquisition is found in the history of the Eastern Band of Cherokee Indians of North Carolina. The individual members of the band had the foresight to provide that land purchased with individual funds should be held under a single title, first by a private trustee, then by the incorporated band, and finally (by cession from the band)[162] by the United States in trust for the band. Always resisting allotment, the band has maintained its lands intact, in sharp contrast to the fate of its fellow tribesmen in Oklahoma.[163]

From time to time, the Secretary of the Interior has been authorized to purchase lands for Indian tribes. Such legislation, where specific, has been dealt with under the heading "Statutory Reservations." Where the legislation creates a general authority, the process of establishing reservations by purchase resembles the process whereby the tribe itself undertakes to acquire lands.

The acquisition of land by the Secretary of the Interior for

[160] Pueblo Lands Act of June 7, 1924, 43 Stat. 636; Act of March 3, 1875, 18 Stat. 420, 447 (Eastern Cherokees); Act of August 4, 1892, 27 Stat. 348 (Eastern Cherokees); Act of March 3, 1925, 43 Stat. 1141, 1148, 1149 (Choctaw).

[161] *Garcia* v. *United States*, 43 F. 2d 873 (C. C. A. 10, 1930); *Pueblo De Taos* v. *Archuleta*, 64 F. 2d 807 (C. C. A. 10, 1933); *United States* v. *7,105.3 Acres of Land*, 97 F. 2d 417 (C. C. A. 4, 1938).

[162] See Act of June 4, 1924, 43 Stat. 376.

[163] See *United States* v. *7,105.3 Acres*, 97 F. 2d 417.

an Indian tribe, through purchase, gift, exchange or assignment of through relinquishment of land by individual Indians, is authorized by section 5 of the Act of June 18, 1934.[164] It has been held that the purpose of "providing land for Indians" is Served by an exchange transaction whereby an individual Indian transfers allotted land to the tribe in exchange for an assignment Of occupancy rights in the same or in another tract, since the tribe through this transaction acquires a definite interest in the land over and above the transferror's retained occupancy right.[165] Where a tribe exchanges land with a non-Indian, under this section, the value of the land acquired must be equal to, or greater than, the value of the land ceded, since the purpose of section 5 is to increase the tribal estate rather than to open the way to its alienation.[166]

Relinquishments of individual timber arid mineral rights to the tribe have been made in consideration of other similar relinquishments by other members of the tribe.[167] The result of such a transaction is that each member of the tribe has an undivided interest in the entire mineral and timber wealth of the reservation, instead of a particular interest in the possible timber and mineral wealth of his own allotment.

It has been held that a tribe may purchase allotted lands in heirship status where such lands are offered for sale by the Secretary of the Interior.[168] The mechanics of such a transaction are elsewhere discussed.[169]

The acquisition of land by one tribe from another was at one time a common method of acquiring tribal property. The distinction between such a transfer and a transaction whereby one tribe is dissolved and its members incorporated in another tribe, is carefully analyzed by the Supreme Court in the case of *Cherokee* Nation v. *Journeycake.*[170]

For some time it was doubted whether land conveyed to an Indian tribe by private parties was within the protection of the Federal Government. These doubts were largely dissipated by the case of *United States v. 7,405.3 Acres of Land,*[171] in which it was held that lands of the Eastern Cherokees of North Carolina were not subject to a claim of adverse possession. In an opinion which illuminates the subject, the court declared, per Parker, *J. :*

> As we were at pains to point out in the *Wright Case,* it makes no difference that title to the land in controversy was originally obtained by grant from the state of North Carolina, or that the Indians are citizens of that state and subject to its laws. The determinative fact is that the federal government has assumed towards them the same sort of guardianship that it exercises over other tribes of- Indians, from which it results that their property becomes an instrumentality of that government for the accomplishment of a proper governmental purpose add may not be taken from them by contract, adverse possession, or otherwise, without its consent. *United States v. Candelaria,* 271 U. S. 432, 440, 46 S. Ct. 561, 562, 70 L. Ed. 1023; *United States v. Minnesota, 270* U. S. 181, 196, 46 S. Ct. 298, 301, *70* L. *Ed.* 539; *United States* v. *Sandoval,* 231 U. S. 28, 34 S. Ct. 1, 58 L. Ed. 107; *Heckman* v. *United States, 224* U. S. 413, 438, 32 S. Ct. 424, 56 L. Ed. 820. Indeed, a statute of the United States expressly forbids the acquisition of lands of any Indian tribe by purchase. grant, lease or other conveyance, except by treaty or. convention and subjects to penalty anyone not being employed under the authority of the United States who attempts to negotiate such treaty.. R. S. § 2116, 25 U. S. C. A. § 177. This statute protects Indians, such as. these as well as the nomadic tribes. *United States v. Candelaria, supra.* And the protection is not affected by reason of the fact that the 'band has been incorporated under a state charter and attempts to take action thereunder. United *States v. Boyd, supra, 4* Cir., 83 F. 547, 553. Certainly if the land was not alienable by the Indians, title could not be obtained as against them by adverse possession. *Schrimpscher v. Stockton,* 183 U.. S. 290, 295, 22 S. Ct. 107.46 L. Ed. 203; *Garcia v. United States,* 10 Cir., 43 F. 2d 873. (Pp. 422–423.)
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> * * * * *
>
> If adverse possession will not give title under state statutes of limitation against restricted allotments of individual Indians, a fortiori such possession cannot give title to lands held in trust for the common benefit of the tribe over which the United States exercises guardianship. It is beyond the power of the state, either through statutes of limitation or adverse possession, to affect the interest of the United States; and the United States manifestly has an interest in preserving the property of these wards of the government for their use and benefit. As said in the *Heckman Case. supra (32 S.* Ct. page 432), "If these Indians may be divested of their lands. they will be thrown back upon the Nation a pauperized, discontented * * * people." The lands held for them are thus an instrumentality in the discharge of the duty which the government has assumed toward them. Title to it can no more be acquired by adverse possession under state statute. than to land held for other governmental purposes. (P. 423.)

A further step in assimilating the status of lands purchased for Indians to the status of treaty. Executive order, and statutory reservations was taken in the Act of February 14. 1923,[172] which extended the provisions of the General Allotment Act [173] as amended, which in terms covered only reservations created "either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use," to "all lands heretofore purchased or which may hereafter be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians."

[164] 48 stat. *984. 25* U. S. *c. 465.*
[165] Memo. Sol. I. D.. April 4. 1935.
[166] Memo. Sol. I. D.. February 3. 1937.
[167] Memo. Sol. I. D., October 7, 1937 (Jicarilla Apache).
[168] Memo. Sol. I. D., August 14, 1937.
[169] See Chapter 11. sec. 6C. On the disposition of reimbursable debts chargeable to the estate. see Memo. Sol. I. D.. January 2. 1940.
[170] 155 U. S. 196 (1894). aff'g. *Journeycake* v. *Cherokee Nation, 28* C. Cls. 281 (1893). Accord : *Cherokee* Nation v. *Blackfeather,* 155 U. S. 218 (1894).
[171] 97 F. 2d 417 (C. C. A. 4, 1938).
[172] 42 Stat. 1246.
[173] Act of February 8. 1887, 24 Stat. 388.

## SECTION 9. TRIBAL TITLE DERIVE D FROM OTHER SOVEREIGNTIES

The analysis of tribal rights in land is complicated by the fact that all of the territory of the United States (with the possible exception of Oregon territory) was at one time subject to some other sovereignty, and it has been the consistent policy of the United States to respect rights in real property recognized under such prior sovereignty. This policy, based upon international law,[174] has been affirmed in our various treaties with Spain, France, Great Britain, Mexico, and Russia. It would take us far beyond the limits of this volume to analyze in any detail the principles of Spanish. French, British, Mexican, and Russian law governing aboriginal titles. It is necessary. however, to refer to the statutes and judicial decisions of this country which interpret the applicable principles of foreign law and mark out the authority which the courts of this Nation will accord to such principles.

In some measure the Spanish and Mexican law relating to the Pueblos of New Mexico and the Russian law relating to the

[174] See *Barker* v. *Harvey,* 181 U. S. 481 (1901) (discussing Treaty of Guadalupe Hidalgo).

natives of Alaska are dealt with in separate chapters [175] and need not be discussed at this point. The relevance of Spanish and Mexican law is not, however, limited to the problems of the Pueblos of New Mexico. The cession of Florida and the land claims of nomadic Indians in the later Mexican cessions often involve difficult questions of Spanish law.

The California Private Land Claims Act of March 3, 1851,[176] provided a means for determining land titles established under Mexican law, including rights of permanent occupancy vested in Indian tribes. It has been held that claims not presented to the commission established under this act have been waived. even though such claims emanate from Indian tribes not practically in a position to present them at the time when the commission was functioning.[177]

The effect of Spanish and' British law upon Indian rights within the Florida cession was analyzed by the Supreme Court in the case of *Mitchel* v. *United States*,[178] from which the following excerpts are taken:

> We now come to consider the nature and extent of the Indian title to these lands.
>
> As Florida was for 20 years under the dominion of Great Britain, the laws of that country *were* in force as the rule by which lands were held and sold ; it will be necessary to examine what they were as applicable to the British provinces before the acquisition of the Floridas by the treaty of peace in 1763. One uniform rule seems to have prevailed from their first settlement, as appears by their laws; that friendly Indians were protected in the possession of the lands they occupied. and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots.
>
> Subject 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.
>
> Individuals could *not* purchase Indian lands without permission or license from the crown. colonial governors. or according to the rules prescribed by colonial laws; but such purchases were valid with such license, Or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee. which passed from the crown by the license, the title of the purchaser became complete.
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> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting. grounds were as much in their actual possession as the cleared fields of the whites: and their rights to Its [ex]clusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them. made a cession to the government, or an authorized sale to individuals. In either case their right became extinct. the lands could he granted disencumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians. Such was the tenure of Indian lands by the laws of Massachusetts Indian Laws. 9. 10. 15. 16. 17. 18, 19, 21: in Connecticut. 40. 41. 42; Rhode Island. 52. 55; New Hampshire. 60: New York. 62. 64. 71. 85. 102: New Jersey. 133; Pennsylvania. 138: Maryland. 141. 143. 144, 145; Virginia, 147. 148, 150. 153, 154 : North Carolina. 163. 4, 58; South Carolina. 178. 179: Georgia. 186. 187: by Congress. Appendix. 16; by their respective laws, and the decisions of courts in their construction. See cases collected in 2 Johnson's Dig. 15, tit. Indians: and Wharton's Dig. tit. Land, &c. 488. Such, too, was the view taken by this court of Indian rights in the case of *Johnson v. M'Intosh*, 8 Wheat. 571, 604. which has received universal assent
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> The merits of this case do not make it necessary to inquire whether the Indians within the United States had any other rights of soil or jurisdiction; it is enough to consider It as a settled principle, that their right of occupancy is considered as sacred as the fee-simple of the whites. 5 Pet. 48. The principles which had been established in the colonies were adopted by the king in the proclamation of October, 1763. and applied to the provinces acquired by the treaty of peace and the crown-lands in the royal provinces, now composing the United States, as the law which should govern the enjoyment and transmission of Indian and vacant lands. After providing for the government of the acquired provinces, 1 Laws U. S. 443, 444. it authorizes the governors of Quebec, East and West Florida, to make grants of such lands as the king had power to dispose of. upon such terms as have been usual in other colonies. and such other conditions as the crown might deem necessary and expedient, without any other restriction. It also authorized warrants to be issued by the governors for military and naval services rendered in the then late war. It reserved to the Indians the possession of their lands and hunting-grounds; and prohibited the granting- any warrant of Survey, or patent for any lands west of the heads. of the Atlantic waters. or which; not having been ceded or purchased by the crown, were reserved to the Indians ; and prohibited all purchases from them without its special license. The warrants issued pursuant to this proclamation for lands then within the Indian boundary, before the treaty of Fort Stanwick's in 1768, have been held to pass the title to the lands surveyed on them, in opposition to a Pennsylvania patent afterwards issued. *Sims* v. *Irvine*. 3 Dallas, 427–456. And all titles held under the charter of license of the crown to purchase from the Indians have been held good, and such power has never been denied; the right of the crown to grant being complete, this proclamation had the effect of a law in relation to such purchases; so it has been considered by this court. 8 Wheat. 595–604. (Pp. 745–747.)[179]

A classic historical account of the extent to which Indian rights were recognized under British and colonial rule is given by Chief Justice Marshall in his epic opinion in *Worcester* v. *Georgia*.[180] After analyzing the claims of the European nations on the subject of aboriginal right,[181] the Chief Justice offered these comments on the colonial charters issued by the European powers and the recognition of Indian rights implicit in the language of these charters :

> The power of making war is conferred by these charters on the colonies. but defensive war alone seems to have been contemplated. In the first charter to the first and second colonies, they are empowered, "for their several defences, to encounter. expulse, repel. and resist all persons who shall. without' license," attempt to inhibit "within the said precincts and limits of the said several colonies, or that shall enterprise or attempt at any time hereafter the least detriment or annoyance of the said several colonies or plantations."

After analyzing various colonial charters. the court concluded:

> These motives for planting the new colony are incompatible with the lofty ideas of granting the soil. and all its inhabitants from sea to sea. They demonstrate the truth that these grants asserted a title against Europeans only. and were considered as blank paper so far as the rights of the natives were concerned. The power of war is given only for defence, not for conquest.
>
> The charters contain passages showing one of their objects to be the civilization of the Indians, and their conversion to Christianity-objects to be accomplished by conciliatory conduct and good example; not by esterumination.
>
> The actual state of things, and the practice of European nations. on so much of the American continent as lies

[175] Chapter 20 (Pueblos of New Mexico) ; Chapter 21 (Alaskan Natives)

[176] 9 Stat. 631.

[177] *Barker* v. *Harvey*, 181 U. S. 481 (1901) : *United States* v. *Title Ins. Co.*, 265 U. S. 472 (1924). aff'g 288 Fed. 821 (C. C. A. 9, 1923).

[178] 9 Pet. (11 Curtis) 711 (1835).

[179] Apparently the Supreme Court was of the opinion that the principles applicable to Indian possessions in Florida under Spanish rule were not identical with those applicable in the Territory Of New Mexico. The court declared that. to Spain, "the friendship of the Indians was a most Important consideration. It would have been lost by adopting towards them a less liberal, just. or kind policy than had been pursued by Great Britain, or acting according to the laws of the Indies in force in Mexico and Peru." (P. 751.)

[180] 6 Pet. (10 Curtis) 515 (1832).

[181] See sec. 4 of this chapter.

between the Mississippi and the Atlantic, explain their claims and the charters they granted. Their pretensions unavoidably interfered with each other; though the discovery of one was admitted by all to exclude the claim of any other, the extent of that discovery was the subject of unceasing contest. Bloody conflicts arose between them, which gave importance and security to the neighboring nations. Fierce and warlike in their character, they might be formidable enemies, or effective friends. Instead of rousing their resentments; by asserting claims to their lands, or to dominion over their persons, their alliance was sought by. flattering professions, and purchased by rich presents. The English, the French, and the Spaniards were equally' competitors for their friendship and their aid. Not well acquainted with the exact meaning of words, nor supposing it to be material whether they were called the subjects, or the children of their father in Europe: lavish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched, and their right to self-government acknowledged, they were willing to profess dependence on 'the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country; and this was probably the sense in which the term was understood by them.

Certain it is that our history furnishes no example, from the, first settlement of our country, of any attempt, on the part of the crown, to interfere with the internal affairs of the Indians, further than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell. at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.

The general views of Great Britain, with regard to the Indians, were detailed by Mr. Stuart, superintendent of Indian affairs, in a speech delivered at Mobile, in presence of several persons of distinction. soon after the peace of 1763. Towards the conclusion, he says: "Lastly. I inform you that it is the king's order to all his governors and subjects, to treat Indians with justice and humanity, and to forbear all encroachments on the territories allotted to them: accordingly, all individuals are prohibited from purchasing any of your lands; but, as you know that, as your white brethren cannot feed you when you visit them unless you give them ground to plant, it is expected that you will cede lands to the king for that purpose. But whenever YOU shall be pleased to surrender any of your territories to his Majesty, it must be done, for the future, at a public meeting of your nation, when the governors of the provinces, or the superintendent shall be present. and obtain the consent of all your people. The boundaries of your hunting grounds will be accurately fixed, and no settlement permitted to be made upon them. As you may be assured that all treaties with your people will be faithfully kept. so it is expected that you, also, will be careful strictly to observe them."

The proclamation issued by the king of Great Britain, in 1763, soon after the ratification of the articles of peace. forbids the governors of any of the colonies to grant warrants of survey, or pass patents upon any lands whatever. which, not having been ceded to or purchased by us, (the king), as aforesaid, are reserved to the said Indians, or any of them.

The proclamation proceeds: "and we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve, under our sovereignty, protection. and dominion. for the use of the said Indians. all the lands and territories lying to the westward of the sources of the rivers which fall into the sea, from the west and northwest as aforesaid: and we do hereby strictly forbid. on Pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.

"And we do further strictly enjoin and require all persons whatever. who have, either wilfully or inadvertently, seated themselves upon any lands within the countries above described, or upon any other lands which, not having been ceded to or purchased by us, are still reserved to the said Indians, as aforesaid, forthwith to remove themselves from such settlements."

A proclamation, issued by Governor Gage, in 1772, contains the following passage: "Whereas many persons, contrary to the positive orders of the king, upon this subject, have undertaken to make settlements beyond the boundaries fixed by the treaties made with the Indian nations. which boundaries ought to serve as a barrier between the whites and the said nations: particularly on the Ouabache." The proclamation orders such persons to quit those countries without delay.

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted; she considered them as nations capable of maintaining the relations of peace and war; of governing. themselves, under her protection; and she made treaties with them. the obligation of which she acknowledged. (Pp. 545–549.)

The question of how far Spain and Mexico recognized rights of possession in nomadic tribes is a question upon which conflicting views have been expressed. In *Hoyt v. United States and Utah Indians*,[182] the Court of Claims took the position that Spain and Mexico had never recognized any right of exclusive possession in any of the nomadic tribes, and that only areas affirmatively designated as Indian reservations could be considered Indian country within the meaning of the Indian Intercourse Act of 1834. The actual decision in the case, however, was simply that a plaintiff was not precluded from maintaining a suit for depredations committed by Ute Indians by the mere fact that he was on territory which later became recognized as an Indian reservation. On the other hand, the Supreme Court, in the case of *Chouteau v. Molony* [183] held that under the Spanish law applicable to what is now the State of Iowa when that territory was under Spanish dominion, the Fox tribe of Indians had rights of ownership in the land they occupied which were of such dignity that a purported grant of such land by the Spanish Governor would be

> * * * an unaccountable and capricious exercise of official power, contrary to the uniform usage of his predecessors in respect to the sales of Indian lands. and that it could give no property to the grantee. It is not meant, by what has just been said, that the Spanish governors could not relinquish the interest or title of the Crown in Indian lands and for more than a mile square: but when that was done, the grants were made subject to the rights of Indian occupancy. They did not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish governor to authorize any one to interfere with it. (P. 239.)

Apparently the Foxes were as nomadic in their habits as most of the other Plains tribes, so that the correct historical view would seem to be that if Spanish law ever denied title by aboriginal occupancy to certain Indian tribes it was because these tribes did not in fact maintain exclusive occupancy of any territory at all but merely wandered over lands which were traversed by other tribes as well. In this situation even our own law recognizes that no possessory rights are created.[184] There would seem, therefore, to be no valid reason to suppose that the Spanish law was more rigorous than the law of Great Britain or the United States with respect to the recognition of Indian possessory rights derived from aboriginal occupancy.[185]

[182] 38 C. Cls. 455 (1903).

[183] 16 How. 203 (1853).

[184] *Assiniboine Indian Tribe* v. *United States*, 77 *C. Cl. 347* (1933). app. dism. 292 U. S. 606.

[185] For a classical statement of Spanish legal theory on the subject of Indian title. see Victoria, De Indis et De Jure Belli Relectiones (trans. by John Pawley Bate. 1917). originally published in 1557. And see: Hall. Laws of Mexico (1885). secs. 36, 38. 40. 45. 49, 85. 195; 2 White's Recopilacion (1839), 34, 51-52, 54-55, 59, 95–98. See also Chapter 3, sec. 4A, *supra*.

## SECTION 10. PROTECTION OF TRIBAL POSSESSION

Tribal possessory right may be defined as a power to command the aid of the law against trespassers, coupled with a privilege to use reasonable force in excluding such trespassers. An assertion of possessory right. whether contained in statute, treaty, Executive order, or judicial decision, is meaningless if both these elements are lacking, and imperfect if one is lacking.

The right to protection of tribal possession through an action of ejectment or other similar possessory action was affirmed at an early period. Thus, the Supreme Court in the case of Marsh v. *Brooks* [186] declared :

> * * * This Indian title consisted of the usufruct and right of occupancy and enjoyment; * * * That an action of ejectment could be maintained on an Indian right to occupancy and use. is not open to question. This is the result of the decision in Johnson v. *McIntosh*, 8 Wheat. 574, and was the question directly decided. in the case of Cornet v. *Winton*, 2 Yerger's Ten. Rep. 143, on the effect of reserves to individual Indians of a mile square' each, secured to heads of families by the Cherokee treaties of 1817 [1] and 1819.[2] * * * (Pp. 232-233.)
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> [1] 7 Stats. at Large. 156.
> [2] Ibid, 195

This measure of Common law protection was amplified from time to time by treaty and statute provisions designed to prevent or punish various types of trespass upon Indian land. These provisions were generally limited either to a particular tribe or reservation or to a particular type of trespass, *e. g.*, trespass for purposes of trading. driving livestock, stealing horses. and settlement. At no time has there been comprehensive legislation on the general problem of the protection of tribal property against trespass.[186a] The Law on the subject is therefore a historical patchwork which can hardly be understood without reference to historical considerations.

### A LEGISLATION ON TRESPASS

The early legislation. whether emanating from the United States,[186b] from the colonies,[186c] or from the European powers,[187] purported not to create new possessory rights. but to recognize existing rights Inherent In the Indian nations. This recognition took the form of (a) disclaiming the right or intention to interfere with the action of the Indian tribes, in their own territories, in excluding or removing Intruders. or (6) establishing forms of civil or criminal proceedings In non-Indian courts against such intruders. Thus, we find in many of the early treaties, provisions recognizing the right of the Indian tribes to proceed against trespassers in accordance with their own laws and customs.[188] which, of course, antedated the discovery of America by Europeans and applied, originally. only to intruders from other Indian tribes.

The historic source of tribal possessory right is a matter of more than antiquarian interest, since even today the limitations upon the right depend in part upon its source. Perhaps the clearest authoritative analysis of the basis and origin of tribal possessory right is that given in the case of *Buster v. Wright.*[189]

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have Its origin In act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of Its original sovereignty. It was a natural right of that people. indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it. Neither the authority nor the power of the United States to license its citizens to trade in the Creek Nation. with or without the consent of that tribe. is in issue In this case. because the complainants have no such licenses. The plenary power and lawful authority of the government of the United States by license. by treaty. or by act of Congress to take from the Creek Nation every vestige of its original or acquired governmental authority and power may be admitted. and for the purposes of this decision are here conceded. The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek tribe itself. (P. 950.)

The proposition that a tribe needs no grant of authority from the Federal Government in order to exercise its inherent power of excluding trespassers has been repeatedly affirmed by the Attorney General.[190] It is against the background of this recognition of tribal power that the course of federal legislation must be viewed. Thus viewed, legislative prohibitions against trespass on Indian land are seen as implementing the assumed international obligations of the United States.[191]

The early Indian Intercourse Acts. culminating in the Act of June 30. 1834,[192] dealt with five distinct types of trespassers: (I) trespassers seeking to trade with Indians: (2) trespassers

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[186] 8 How. 223 (1850). A suit in trespass, brought by the individual occupant of tribal land against a non-Indian. was successfully maintained In *Fellows* v. *Blacksmith*, 19 Row. 366 (1856).

In a case where a conveyee under a congressional grant brought a successful suit in ejectment in a state court against the local Indian superintendent. the Attorney General held that the writ Of execution founded on that judgment did not give the conveyee legal possession of the land and that the plaintiff was an intruder who could be removed by federal authorities under R. S. § 2118, and said :

> * * * the tribe hold the reservation. not under the treaty. but under their original title. which is confirmed by the Government in agreeing to the reservation. (See *Gaines* v. Nicholson, 9 How. 365.)
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> Thus It would seem that the title imparted by the acts of 1848 and 1853 was at that period. and has ever since continued to be, subject to the Indian right of occupancy in said tribe. the enJoyment of which right. moreover. is assured thereto by the Government by solemn treaty stipulations. * * * (P. 573.)

Nez Perce Reservation—Claim of W. G Langford. 14 Op. A. G. 568 (1875). decision reaffirmed In 17 Op. A. G. 306 (1882). and 20 Op. A. G. 42 (1891), the latter case holding that Langford held "nothing but a naked title" (p. 47. *per* Taft. Sol. G.). which could not be invoted to prevent allotment. "What is the Indian right Of OCCUPancY? It Is the right to enjoy the land forever with the right of alienatiOn limited to one alienee. the United States. or to such persons as the United States. in its capacity of guardiau over the Indians. may permit." (P. 48.)

[186a] The nearest approach to such general legislation was &islation authorizing Indian Service officials. with the aid of the military. "to remove from the Indian country all persons found therein contrary to law." See Act of June 30. 1834. sec. 10. 4 Stat 729. 730. R S. § 2147, 25 U. S. C. 220. repealed by Act of May 21. 1934. 48 Stat. 787. And see United *States ex rel. Gordon* v. *Crook.* 179 Fed. 391. 398 399 (D. C. Neb. 1875).

[186b] Reference to legislation of the United States on this subject under the Articles of Confederation is found in 18 Op. A. G. 235, 236-237 (1885).

[186c] Preston v. *Browder*, 1 Wheat 115. 121 (1816).

[187] See *United States* v *Ritchie*. 17 How 525 (1854) (dealing with the Act of March 3. 1851, 9 Stat 631).

[188] Treaty of January 21. 1785 with the Wiandot. Delaware. Chippewa. and Ottawa Nations. Art. V. 7 Stat 16. 17 *Accord. Art.* VII of Treaty of January 31. 1786. with the Shawanoe Nation. 7 Stat. 26. and see Chapter 3. sec. 3D (1).

[189] 135 Fed 947 (C C A 8 1905). app dism 2 0 3 U. S 599 (1906).

[190] * * * So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive : and there exists no authority to enter upon their lands for any purpose whatever, without their Consent. * * * 1 Op. A. G. 465, 466 (1821).

See to the same effect. 17 Op A G 134 (1881) ; 18 Op A G. 34 (1884.)

[191] See for example. Art 7 of Treaty of August 7. 1790. with Creek Nation. 7 Stat. 35. 37: Art 2 of Treaty Of October 3. 1818. with Delawares. 7 Stat. 188.

[192] Act of July 22. 1790. 1 Stat 137 ; Act of March 1. 1793. 1 Stat. 329 ; Act Of May 19. 1796. 1 Stat. 469 ; Act of March 3. 1799. 1 Stat. 743 : Act of March 30. 1802. 2 Stat. 139 ; Act of June 30. 1834. 4 Stat. 729.