> nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people.[330] If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. (P. 576.)

This contention, the Court said, could not be accepted, especially in view of the rule that agreements with Indians are to be construed in favor of the Indians. The Court rejected also the further contention that the United States had repealed the reservation of water for the Indians by the admission into the Union of Montana, the state in which the reservation was situated. It would be extreme to. believe, the Court said, that Congress -

> * * * took from them the means of continuing their old habits, yet did not leave them the power to change to *new* ones. (P. 577.)

The Winters decision effects a. prohibition against the diversion of water from a stream, above and outside the reservation insofar as such diversion deprives the tribe of water necessary for the irrigation of tribal lands. In other words, these reserved rights are the property of the Indians to be protected by the Federal Government and no appropriation of water either under state or federal laws which reduces the amount of water in a stream within an Indian reservation below the amount necessary for irrigation of Indian lands is valid.

The Winters decision was thus followed in Conrad *Inv.* Co. v. *United States:* [331]

> * * * This court affirmed the decree [in the Winters case], holding that the United States, by treaties with the Indians on the reservation, had impliedly reserved the waters of Milk river for the benefit of the Indians on the reservation to the extent reasonably necessary to enable them to irrigate their lands, and that grantees and settlers on public lands outside of their reservation could not acquire, under the desert land laws of the United States or the laws of the state of Montana relating to the appropriation of the waters of the streams of that state, the right to divert the waters of Milk river to -the prejudice of the rights of the Indians residing upon that reservation. * * **The law of that case is applicable to the present case. and determines the paramount right of the Indians of the Blackfeet Indian reservation to the use of the waters of Birch creek to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other useful purposes. The government has undertaken, by agreement with the Indians on these reservations, to promote their improvement, comfort, and welfare, by aiding then to become self-supporting as a peaceable and agricultural people. The lands within these reservations are dry and arid, and require the diversion of waters from the streams to make them productive and suitable for agricultural stock-raising, and domestic purposes.

The doctrine enunciated in the Winters case as applied to reservations created by treaty was later recognized by the courts as applicable to reservations created by Executive order. In *United States v. Walker River Irrigation District* [332] the Circuit Court of Appeals had this to say:

> * * • The trial court thought *Winters v. United States* distinguishable, as being based on an agreement or treaty with the Indians. Here there was no treaty. It said that at the time the Walker River reservation was set apart, the Pahutes were at war with the whites, hence no agreement between them and the Government was possible.
>
> (a) In the Winters case, as in this, the basic question for determination was one of intent-whether the waters of the stream were intended to be reserved for the use of the Indians. or whether the lands only were reserved. We see no reason to believe that the intention to reserve need. be evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of the intent. While in the Winters case the court emphasized. the treaty, there was in fact no express reservation of water to he found in that document. The intention had to be arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved. (P. 336.)

The views expressed in the foregoing cases are supported by the course of congressional legislation relating to tribal rights in water. Congress has. repeatedly enacted special legislation authorizing the construction of irrigation projects on various designated reservations, providing always that the Indians shall be supplied with water from the project.[333]

Again, in opening reservation land. to mineral entry Congress has expressly excepted "lands containing springs, water holes, or other bodies of water needed or used by the Indians for watering livestock, irrigation, or water-power purposes." [334] By the Act of March 7, 1928,[335] Congress provided for the purchase of land with sufficient water right for the use and occupancy of the Tamoak Band of Homeless Indians. When the Yakima Reservation was receiving less water than the amount to which it was entitled under the doctrine of the Winters case, Congress appropriated a sum of money for the purchase of an additional water right for the Indians.[336] To protect the water rights of the Indians of the Taos Pueblo, Congress has authorized the President to withdraw from entry lands within the watershed and to protect said lands from any act or condition which would impair the purity or the volume of the water flowing therefrom.[337] Water from streams on the ceded portion of the Fort Hall Reservation necesary for irrigation of land under cultivation has been reserved to the Indians using same so long as the Indians "remain where they now live." [338]

Similarly, various statutes hare provided for payment of compensation to be credited to tribal funds in the event Indian water rights are sold, appropriated, or otherwise damaged.[339]

Apart from the foregoing statutes Congress has enacted various laws of general application relating to the water rights of Indian allotees.[340]

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[330] See sec. 23, ia@ and see Chapters 2, 3, and 4.

[331] 161 Fed. 829, 831-832 (C. C. A. 9, 1908). aff'g 156 Fed. 123 (C. C Mont. 1907).

[332] 104 F. 2d 334 (C. C. A. 9, 1939).

[333] Act of January 1, 1889, 25 Stat. 639 (Papago Reservatibn), Act of January 12. 1893, 27 Stat. 417 (Umatilla Reservation) ; Act of February 10, 1891. 26 Stat. 745 (Umatilla Reservation) ; Act of February 15. 1893, 27 Stat. 456 (Yuma Reservation) ; Act of January 20. 1893, 27 Stat. 420 (Yuma Reservation) ; Act of March 6. 1906, 34 Stat. 53 (Yakima Reservation) ; cf. Act of March 13, 1928, 45 Stat. 312 *("Provided further*, That all present water rights now appurtenant to the • * • irrigated Pueblo lands owned individually or as pueblos • * *, and all water for the domestic purposes of the Indians and for their stock shall be prior and paramount to any rights of the district or of any property holder thereto.") ; Act of March 1. 1899. 30 Stat. 924. 941 (Uintah Reservation).

[334] Act of December 16. 1926. 44 Stat. 922 ; cf. Act of August 26. 1922. 42 Stat. 832 (Agua Caliente Band).

[335] 45 Stat. 200, 207.

[336] Act of August 1. 1914. 38 Stat. 582. 604.

[337] Act of March 27. 1928, 45 Stat. 372.

[338] Act of June 6. 1900, 31 Stat. 672.

[339] Act of August 26. 1935. 49 Stat. 803: Act of March 3. 1927. 44 Stat 1370 (Choctaw and Chickasaw Indians) ; Act of March 22. 1906, 34 Stat. 80 (Colville Reservation) ; Act of January 12. 1893. 27 Stat. 417 (Umatilla Reservation).

[340] Act of February 8, 1887. sec. 7, 24 Stat. 388, 390–391 ; Act of May 29. 1908, 35 Stat. 444; *cf.* Act of March 2, 1889, 25 Stat. 888 (pertaining to both allotted and tribal lands).

A. TRIBAL RIGHT *versus* STATE RIGHT IN NAVIGABLE WATERS

The ownership by the United States of lands in territorial status extends to the lands underlying all bodies of water therein.[341] Where unreserved, the title to land underlying navigable waters is held to pass to a state upon admission into the Union. while title to the land underlying non-navigable waters remains in the United States.[342]

If navigable waters have not been reserved the tribe has but a right of use in common with citizens of the state.[343] It becomes pertinent therefore to examine the criteria for determining whether such waters have been reserved to a tribe. Here again questions of intent and of circumstances surrounding the creation of the reservation are of paramount importance. Thus, in holding that the lands underlying the navigable waters within the Red Lake-Indian Reservation passed to the State of Minnesota upon its admission into the Union, the Supreme Court said : [344]

> We come then to the question whether the lands under the lake were disposed of by the United States before Minnesota became a State. An affirmative disposal is not asserted, but only that the lake. and *therefore* the lands under it, was within the limits of the Red Lake Reservation when the State was admitted. The existence of the reservation is conceded, but that it operated as a disposal of lands underlying navigable waters within its limits is disputed. We are of opinion that the reservation was not intended to effect such a disposal and that there was none. If the reservation operated- as a disposal of the lands under a part of the navigable waters within its limits it equally worked a disposal of the lands under all. Besides Mud Lake, the reservation limits included Red Lake. having an area of 400 square miles. the greater part of the Lake of the Woods. having approximately the same area. and several navigable streams. The reservation came into being through a succession of treaties with the Chippewas whereby they ceded to the United States their aboriginal right of occupancy to the surrounding lands. The last treaties preceding the admission of the State were concluded September 30, 1854. 10 Stat. 1109. and February 22, 1855, 10 Stat. 1165. There was no formal setting apart of what was not ceded. nor an affirmative declaration of the rights of the Indians therein. nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. *Minnesota v. Hitchcock.* 185 U. S. 373, 389. There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future State. Without doubt the Indians were to have access to the navigable waters and to be entitled to use them in accustomed ways; but these were common rights vouchsafed to all, whether white or Indian, by the early legislation reviewed in *Railroad Co.* v. *Schurmeir*, 7 Wall. 272. 287–289, and Economy *Light & Power Co.* v. *United States, supra*, pp. 118-120. and emphasized in the Enabling Act under which Minnesota was admitted as a State. c. 60. 11 Stat. 166. which declared that the rivers and waters bounding the State 'and the navigable waters leading into the same shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States'. (Pp. 57-59.)

A similar result was reached in *Taylor v. United States* [345] on the theory that since the Executive order creating the Quileute Indian Reservation made no express reference to the Quileute River as the northern boundary, no reservation of its waters was intended. nor any exception to the general policy of the Government to hold such property in trust for the future states.

Where a reservation is created after admission of a state into the Union, there is some question as to whether the unappropriated navigable waters within the reservation are reserved to the tribe. An affirmative answer would seem to deprive the state of an acquired right unless it can be said that the creation of the reservation serves as a notice of the appropriation of unappropriated navigable waters within its border for the use of the Indians.

Where California by statute classified a river as nonnavigable, it has been held that by the subsequent creation of a reservation. the waters therein were reserved for the benefit of the Indians.[346]

B. EXTENT OF RESERVED WATER RIGHT

It will be remembered that the Court in the Winters case decreed only that there was an implied reservation to a tribe of an amount of water reasonably necessary for irrigation and domestic purposes. There was left open the further question of whether the water right impliedly reserved for use for irrigation includes a flow of water sufficient merely to supply the needs of the Indians at the time of the creation of the reservation, or whether it includes a flow sufficient in quantity to irrigate all the irrigable lands of the reservation.

The policy which underlies the doctrine of implied reservation of water has been given effect by holdings that when an Indian reservation is set apart. the water right impliedly *reserved* is large enough to irrigate the entire irrigable acreage of the reservation.[347] In *Conrad Inv. Co.* v. *United States*,[348] the court granted a right to a designated amount of water with leave to the Government to apply for modification of the decree at any time it might determine that its needs would be in excess of that amount. The District Court decision [349] shows clearly that the water right reserved was based on total irrigable acreage (p. 130) and increased need was anticipated only because of probable change in use of the land resulting from the Indians' progress In agriculture (p. 129). Likewise, in *Skeem* v. *United States*,[350] where water was expressly reserved by treaty for irrigation "on land actually cultivated and in use." the court held that the water right reserved was not limited in quantity to the amount of water necessary to the irrigation of such portion of the Indian lands as were at the time of the treaty actually irrigated. The court said (p. 95) :

> The purpose of the government was to induce the Indians to relinquish their nomadic habits and to till the soil. and the treaties should be construed in the light of that purpose and such meaning should be given them as will enable the Indians to cultivate eventually the whole of their lands so reserved to their use.

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[341] *Shively* v. *Bowlby*, 152 U. S. *1* (1894) : *Alaska Pacific Fisheries* v. United *States*, 248 U. S. 78 (1918). aff'g 240 Fed. 274 (C. C. A. 9. 1917).

[342] *Donnelly* v. *United States*, *228* U. S. *243 (1913).*

[343] *United States* v. *Holt State Bank, 270* U. S. 49 (1926). aff'g 294 Fed. 161 (C. C. A. 8. 1923) : The *James G. Swan*, 50 Fed. 108 (D. C. Wash. 1892) ; *Taylor* v. *United States* 44 F. 2d 53 (C. C. A. 9. 1930).

[344] *United States* v. *Holt State Bank. 270 U.* S. *49* (1926). aff'g *294* Fed. 161 (C. C. *A.* 8. 1923). It has been administratively held that even *In* the light *of United States* v. *Holt State Bank* the *reservation of* lands for the "use and occupancy" of the Chippewas had the effect of reserving to them the exclusive right of fishing In the waters or the Upper and Lower Red Lakes, *a* right which the state could neither deprive them of nor regulate. Op. Sol. I. D.. M.28107. June 30. 1936. And compare *The James G. Swan*, 50 Fed. 108 (D. C. Wash. 1892).

[345] 44 F. 2d 53 (C. C. A. 9. 1930).

[346] *Donnelly* v. *United States*, 228 *U. S. 243 (1913).*

[347] *Conrad Inv. Co.* v. *United States*, 161 Fed. 829 (C. C. A. 9. 1908). aff'g. 156 Fed. 123 (C. C. Mont. 1907) : *Skeem* v. *United States*, 273 Fed. 93 (C. C. A. 9. 1921) ; Op. Sol. I. D.. M.15849. May 12, 1925.

[348] *Ibid.*

[349] *United States* v. *Conrad Inv. Co.*, 156 Fed. 123. 130–131 (C. C. Mont. 1907). aff'd. by 161 Fed. 829 (C. C. A. 9. 1908).

[350] *OP. cit. fn. 347.*

The decision of the Circuit Court of Appeals in the case of *United States* v. *Walker River Irrigation District* [351] would seem to constrict the foregoing decisions. The court there held, in accordance with the Winters decision, that by the establishment of the Walker River Reservation in 1859 there was impliedly reserved water to the extent reasonably necessary to supply the needs of the Indians. However, in determining the *quantity* of water "to which the United States is entitled" the court held:

> The area of irrigable land included in the reservation is not necessarily the criterion for measuring the amount of water reserved, whether the standard be applied as of 1859 or as of the present; The extent to which the use of the stream might be necessary could only be demonstrated by experience. (P. 340.)

The court found from the record that about 1,900 acres were under cultivation as early as 1886; that this area had not been substantially increased up to the time of trial; and that the number of Indians on the reservation was not increasing. Adverting to the master's finding that a demand for the cultivation of more than 2,100 acres, or a water right of 26.25 cubic feet per second; had not been shown, the court concluded:

> We are constrained to accept this estimate as a fair measure of the needs of the Government as demonstrated by seventy years' experience. (P. 340.)

While lands were reserved in tribal status questions of water right were confined largely to whether particular waters had been reserved to the tribe. With the growth of the practice of allotting tribal lands to individual Indians there arose the question of whether the allottee, or a party holding under the allottee, was entitled to divert a part of the water reserved under the doctrine of the *Winters* case to the tribe. The problems to which this question gives rise are elsewhere discussed.[352]

[351] 104 F. 2d 334 (C. C. A. 9, 1939).

[352] See Chapter 11, sec. 3.

SECTION 17. TRIBAL RIGHTS IN IMPROVEMENTS

The extent of tribal possessory rights in improvements on tribal land raises two issues:, (*a*) the demarcation of rights between, the tribe and the individual member of the tribe who has made the improvements or who resides on the improved land, and (*b*) the demarcation of interests between the tribe and third parties.

Of these issues, the first is an issue internal to the affairs of the tribe and therefore dealt with in accordance with tribal law and customs, [353] except as statute or treaty otherwise provides. The matter has been specially dealt with in several types of statutes and treaties. Perhaps the most common case in which the ownership of improvements must be determined arises in connection with the sale or cession of improved tribal lands. The earlier treaties generally provided that compensation for improvements was to be paid directly to the tribe,[354] thus leaving to the determination of the tribe itself the question of whether any individual Indian should receive special compensation by reason of such improvements. A few treaties and statutes provide for payment by the United States to the member of the tribe who has made the improvements,[355] and others leave uncertain, the manner in which compensation for improvements is to be made.[356] The early practice of making compensation directly to the tribe permitted adjustments between the tribe and the individual concerned, but under modern legislation restricting the use of tribal funds such adjustments became impracticable. Thus when the Act of June 18, 1934,[357] was adopted, containing a provision opening up the lands of the Papago Reservation, improved and unimproved, to appropriation by mineral prospectors, the requirement that damages should be paid "to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements," failed to do justice to the individual Indians deprived of their homes, gardens, and corrals. Accordingly, following the referendum vote of the Papago Indians favoring the application of the Act of June 18, 1934, to the Papago Reservation,[358] amendatory legislation was enacted providing that the individual Indians concerned should receive payment for improvements of which they might be deprived.[359]

For many years it was the policy of the Government to encourage the improvement of tribal lands occupied by individual members of a tribe.[360] The Federal Government, having encouraged such improvements, frequently provided, in disposing of improved tribal lands, that the individual Indian who had made, or come to enjoy, the improvements should, if possible, receive the lands improved.[361] Likewise an attempt was sometimes made to safeguard Indian improvements in marking or revising reservation boundaries,[362] and where lands were ceded provision was sometimes made for making improvements on retained or new

[353] *Rush* v. *Thompson*, 2 Ind. T. 557, 53 S. W. 333 (1899); and see Chapter 7, sec. 8, and Chapter 9, sec. 5. In the absence of proved custom to the contrary, and where laws and treaties are silent, the Interior Department has taken the position that:

> The tribe does not own the improvements placed upon tribal land by or under the direction of individual members of the tribe. (Memo. Sol. I. D., October 21, 1938 (Palm Springs).)

[354] Art. III of Treaty of September 20. 1816. 7 Stat. 150 (Chickasaw Nation): Art. V of Treaty of July 20. 1831. 7 Stat. 351 (Senecas and Shawnees): Treaty of February 8. 1831. 7 Stat. 342 (Menomonee); Art. V of Treaty of February 28, 1831. 7 Stat. 348 (Senecas); Art. V of Treaty of August 8. 1331. 7 Stat. 355 (Shawnees); Art. V of Treaty of August 30. 1831. 7 Stat. 359 (Ottaways); Art. III of Treaty of January 19. 1832, 7 Stat. 364 (Wyandots); Art. IX of Treaty of December 29. 1835, 7 Stat. 478 (Cherokees); Art. I of Treaty of November 23. 1838. 7 Stat. 574 (Creeks): Art III of Treaty of May 20. 1842. 7 Stat. 586 (Senecas); Art. VI of Treaty of October 27. 1832. 7 Stat. 403 (Kaskaskias and Peorias): Art. VIII of Treaty of January 4. 1845. 9 Stat. 821 (Creeks and Seminoles): Art. V of Treaty of June 5 and 17, 1846. 9 Stat. 853 (Pottowautomie, Chippewas. and Ottawas); Art. IV of Treaty of June 5. 1854, 10 Stat. 1093 (Miamies): Art. V of Treaty of March 17. 1842. 11 Stat. 581 (Wyandotts); Art. IV of Treaty of February 5. 1856. 11 Stat. 663 (Munsees); Act of July 21. 1852. 10 Stat. 15 (Pottawatomies): Act of July 31. 1854. 10 Stat. 315 (Kickapoos); Art. III of Treaty of March 11. 1863, 12 Stat. 1249 (Chippewas); Act of April 10. 1876, 19 Stat. 28 (Pawnee).

[355] Art. XI of Treaty of January 24. 1826, 7 Stat. 286, 288 (Creek Nation); Art. XIV of Treaty of January 15, 1838, 7 Stat. 550 (New York Indians): Art. III of Treaty of September 3. 1839, 11 Stat. 577 (Munsees): Art. VII of Treaty of November 5, 1857. 12 Stat. 991 (Tonawanda Band of Senecas); Act of May 8, 1872, 17 Stat; 85 (Kansas Tribe).

[356] Art. VI of Treaty of December 26. 1854. 10 Stat. 1132 (Nisqually); Art. VII of Treaty of January 26. 1855. 12 Stat. 933 (S'Klallams); Art. VI of Treaty of January 31, 1855. 12 Stat. 939 (Makah); Art. V of Treaty of June 19. 1858. 12 Stat. 1037 (Sisseeton and Wahpeton Bands Of Sioux); Art. V of Treaty of November 15, 1861, 12 Stat. 1191 (Pottawautomie); Art. VI of Treaty of June 28, 1862. 13 Stat. 623 (Kickapoo). And cf. Art IV of Treaty of October 18. 1848 with Menomonee Tribe. 9 Stat. 952; Act of April 26, 1906, 34 Stat. 137 (Choctaw. Chickasaw. and Seminole).

[357] 48 Stat. 984.

[358] See 38 Op. A. G. 121 (1934).

[359] Act of August 28, 1937, 50 Stat. 862.

[360] Art. IX of Treaty of May 17. 1854. 10 Stat. 1069 (Ioways); Art. IX of Treaty of August 7. 1856. 11 Stat. 699 (Seminoles and Creeks); Act of May 15. 1888. 25 Stat. 150 (Omaha Tribe).

[361] Act of March 24. 1832. 7 Stat. 366 (Creeks); Treaty Of February 18. 1833. 7 Stat. 420 (Ottawa); sec. 6 of Act of June 6. 1900, 31 Stat. 672 (Fort Hall Indian Reservation); sec. 4 of the Act of March 1, 1901, 31 Stat. 848 (Cherokees).

[362] Art. II of Treaty of February 3. 1838. 7 Stat. 566 (Oneidas).

lands to take the place of those lost,[363] or for having that portion of the tribe remaining on its original lands compensate emigrants for their improvements on such lands.[364]

The issue of possessory right in improvements that may arise between the tribe and third parties is an issue which depends not on the internal law and customs of the tribe but rather on the law governing the transaction under which the property in question has come to be recognized as tribal property. Certain statutes providing for the acquisition of land *for* the benefit of Indians specifically determine that the improvements thereon shall likewise be acquired for the benefit of the Indians.[365] Under such statutes there is no question but that the Indians have the same right in the improvements that they have in the land itself.

Where the statute is silent, a more difficult question is presented. Thus where, under the Act of February 13, 1929,[366] improved lands used for agency, school, and other purposes were reinvested in the Yankton Sioux Tribe, the question was presented whether the buildings on such land thereby became the property of the Indian tribe. The Solicitor of the Interior Department, answering this question in the affirmative declared :[367]

> The use of the term "reinvested" implies that the purpose Of Congress was to restore to the Indians the title which they held prior to the cession of 1892, that is, the Indian title of occupancy and use, the United States still retaining the title in fee. But the Indian title of use and occupancy is as sacred as the fee title of the sovereign, *United States* v. *Cook* (19 Wall. 591), and the Indians have the full beneficial ownership with all the rights incident thereto. See 34 Op. Atty. Gen. 171. Whether the ownership of the Indians extends to the buildings upon the lands is essentially a question of what was intended and where that intention is not otherwise shown. it has been held that the Government will be deemed to have assented that its conveyance be construed according to the law of the State in which the land lies. See in this connection *Oklahoma v. Texas (258* U. S. 574, 595). The act of 1929 contains nothing to indicate any intention upon the part of the Government to retain ownership of the buildings. They are neither excepted nor reserved. In the absence of such an exception or reservation, the rule is universal that the buildings are part of and pass with the land. *Isham* v. Morgan (9 Conn. 374; 23 Am. Dec. 361) : *Oesting* v. *New Bedford* (210 Mass. 396; 96 N. E. *1095)* ; *Blake McFall Co.* v. *Wilson (98* Ore. 626; 193 Pac. 902) ; *Holmes v. Neill (222* Pac. 670) : *Schiltz v. Ferguson* (231 N. W. 358). Under this rule, the grant to the Indians carried with it the buildings upon the lands.
>
> Nothing in the legislative history of the enactment is to the contrary. In reports to the Senate and House committees on Indian Affairs recommending that the bill which became the act of 1929 be not enacted, the Secretary of the Interior called specific attention to the fact that "there are forty buildings on the land used in connection with school and administrative activities." See House Re rt No. 1852 and Senate Report No. 1130 on S-2792, 70th Congress, 1st sess. The debates before the House and Senate also show that Congress was advised of the existence of the buildings upon the premises. See Congressional Record, Volume 69, Part 8, 70th Congress, 1st Session, page 8837, and Volume 70, Part 3, 70th Congress, 2nd Session, page 2489-2490.
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> * * * * *
>
> Aside from the fact that the failure of Congress, with knowledge of the existence of the buildings, to reserve them, reasonably warrants the assumption that no such reservation was intended. the statements of Congressman Leavitt and Senator McMaster strongly indicate that it was the understanding of Congress that enactment of the measure would confer upon the Indians ownership of the buildings along with the lands. such ownership, under the terms of the statute, to take effect when the property was no longer required for agency, school, and other purposes.
>
> It is understood from the information submitted by the Assistant Commissioner of Indian Affairs that the use of the reserved lands for the purposes for which they were reserved has been permanently discontinued and that the lands are no longer needed for any of such purposes. Upon that understanding, I hold, for reasons stated above, that the lands and buildings located thereon a e now tribal property belonging to the Yankton Sioux Tribe of Indians.

The approach taken in the foregoing opinion suggests that in upon any specific tribal claim of possessory right in improvements on tribal land. first resort must be had to the governing statute or treaty. Silence or ambiguity may be resolved (a) by reference to legislative history. or (b) by reference to the state or the common law rule. In general. it may be said that Congress has frequently subordinated the traditional common law rule that improvements run with the land to the equitabie principle that one who has built improvements, in good faith, on another's land should not be entirely deprived of the fruit of his labor. Attempts to do justice to the claims of those who have improved tribal lands include provisions allowing non-Indians who have improved tribal lands to sell their improvements at their appraised value.[367a] or allowing Indians of another tribe to purchase the lands on which their improvements stand.[368] As a matter of history, the improvements on land conveyed to Indians were frequently more important inducements of reciprocal cessions than the land itself.[369]

[363] Art. VII of Treaty of November 6, 1838, 7 Stat. 569 (Miamies) ; Art. I of Treaty of January 22, 1855. 10 Stat. 1143 (Oregon Bands) ; and cf. Art. III of Treaty of February 27. 1855. 10 Stat. 1172 (Cherokees) ; Art. II of Treaty of June 9. 1863. 14 Stat. 647 (Nez Perce) : Treaty of May 6, 1828. 7 Stat. 311 (Cherokees).

[364] Art. 6 of Treaty of May 20, 1842. with Seneca Nation. 7 Stat. 586.

[365] Act of July 1. 1892. 27 Stat. 61 (Mission Indians). The Act of March 2. 1889. 25 Stat. 1013 (United Peorias and Miamies) provides that certain lands, together with all improvements thereon. shall be held as tribal property. *Cf. Donohoo* v. *Howard. 4* Ind. T. 433 (1902) (Cherokee legislation relating to "intruder improvements").

[366] 45 Stat. 1167.

[367] Op. Sol. I. D.. M.27671. March 1. 1934.

[367a] Act of March 2. 1907. 34 Stat. 1220 (intermarried whites on Cherokee lands).

[368] Art. 13 of Treaty of May 6. 1854, with Delaware Tribe. 10 Stat. 1048 (for benefit of Christian Indians). *Cf.* Memo *Sol* I. D.. October 20, 1937, and cases cited (log house on Fort Belknap tribal land).

[369] *Cf.* Art. I of Treaty of January 22, 1855. 10 Stat. 1143.

SECTION 18. TRIBAL CONVEYANCES

A. RESTRAINTS ON ALIENATION

It is frequently assumed that the inability of an Indian tribe to alienate tribal land is a consequence of the peculiar tenure by which such lands are held.[370] This tenure is commonly designated as "occupancy," "mere occupancy," "possession," or "Indian title." and these phrases are sometimes deemed a sufficient explanation for the conclusion that Indian lands are inalienable. Careful examination of the cases and of the historical practice of the United States shows that this view is inaccurate. This Inaccuracy appears most clearly in five situations:

(1) If the inalienability of tribal land is caused simply by the peculiarity that tribal land is not held in fee simple, then an Indian tribe which does hold land in fee simple should be able

[370] See *United States* v. *Cook*, 19 Wall. 591, 592-593 (1873) ; *Howard* v. *Moot*, 64 N. Y. 262. 271 (1876) ; Kerr, Real Property (1895). sec. 221.

to alienate it. But the decisions are uniform that a tribe holding land in fee simple is subject to exactly the same restraints, upon alienation as any other tribe.[371]

(2) If "Indian title" is something less than, a fee simple,[372] then an Indian conveyance of tribal land to private parties should convey something less than a fee simple. But the cases uniformly hold that a conveyee of tribal property under a valid conveyance acquires a complete title.[373]

(3) If title by aboriginal occupancy is simply equivalent to a tenancy at will, the land cannot be sold to the sovereign. Yet the practice of the United States[374] and of the British Crown, before 1776, of purchasing land from Indians, and the validity of conveyances thus effectuated, has never been questioned. As Marshall, *C. J.*, observed, when sovereigns claimed "the exclusive right to purchase" they "did not found that right, on a denial of the right of the possessor to sell."[375]

> 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.[376]
>
> * * * the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent.[377]

(4) If "Indian title" is something substantially less than a fee simple, then in cases of involuntary alienation damages should be based upon something less than the value of the land itself. Yet the courts hold that in such cases the value of the land is the measure of damages.[378]

(5) If "Indian title" is something less than a fee simple subject to restraints on alienation, then when the sovereign grants a right of preemption to a third party, there should be a fee left in the sovereign. But the cases hold that this is not the case and that all interest in the land outside of the right of preemption rests with the Indian tribe."

These defects in the theory of "Indian title" do not show that all tribes hold property in fee simple or that any tribe can alienate any property at will, but they should serve to direct our consideration of, well-established restraints on alienation[380] towards the field of' commercial legislation rather than the morass of medieval doctrine that surrounds the feudal fiction of "title in the sovereign."[381]

B. HISTORICAL VIEW OF RESTRAINTS

The historical fact is that the alienation of Indian lands, far from being a legal impossibility because of Peculiarities of Indian title, was probably the chief objective attained by the Indian land law of Britain, Spain, France, the Colonies, and the United States, for some four centuries. None of these sovereigns forbade such alienation but each sought to regulate, It and, generally, to profit from it. Thus, the Supreme Court declared in the case of *Mitchel v. United States:*[382]

> The Indian right to the lands as property, was not merely of Possession; that of alienation was concomitant: both were equally secured, protected, and guaranteed by Great Britain and Spain, subject only to ratification and confirmation by the license, charter or deed from the governor representing the king. Such purchases enabled the Indians to Pay their debts, compensate for their depredations on the traders resident among them, to provide for their wants; while they were available to the purchasers as Payment of the considerations which at their expense had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property in the power of the Indians. to suffer the latter to contract debts, and when willing

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[371] *United States* v. *Candelaria,* 271 U. S. 432 (1926) ; Christian Indians, 9 Op. A. G. 24 (1857) ; *Goodell* v. *Jackson, 20* Johns. 693 (1823).

[372] *Cf. United States* v. *Pains Lumber Co.. 206* U. *S. 467, 473* (1907). aff'g 154 Fed. 263 (C. C. E. D. Wis. 1904) :

> The restraint upon alienation must not be exaggerated. It does not of Itself debase the right below a fee simple. [Said of allotted. land]

Apparently the theory that Indian title is something less than a fee was invented to justify the holding that when the sovereign granted an individual land owned by Indians and the Indians afterwards abandoned the land the grantee was entitled to the land in fee simple. See, for example, *United States* v. *Fernandez,* 10 Pet. 303 (1836). But this result, which seems eminently sensible, can be justified on the Wound that the grantee received a contingent future interest which ripened into a fee simple on the happening of the contingency contemplated. Even under the classical theory of land tenures, a grant of a possibility of reverter by the sovereign is not inconsistent with the retention Of a fee simple in the Indian tribe. It must be remembered that a fee simple, according to classical theory, may be either "absolute" or "qualified," or "conditional," and the possibility of death without issue was a standard condition for the termination of an estate. In fact, the general right of escheat was vested in the sovereign, so it was only natural that if a tribal owner became extinct the land would pass to the sovereign and there was nothing to prevent the sovereign from speculating on that contingency and making grants limited to take effect upon its happening.

[373] United *States* v. Brooks. 51 U. S. 442 (1850) ; *Godfrey* v. *Beardsley,* 10 Fed. Cas. No. 5497 (C. C. Ind. 1841). And note sec. 23 of the Act of June 4. 1924, 43 Stat. 376, which declares:

> That the authority of the Eastern Band of Cherokee Indians of North Carolina to execute conveyances of lands owned by said band. or any interest therein, is recognized and any such conveyance heretofore made, whether to the United States or to others. shall not be questioned in any case where the title conveyed or the instrument of conveyance has been or shall be accepted or approved by the Secretary of the Interior. (P. 381.)

[374] See Chapter 3 ; and cf. *Omaha Tribe of Indians* v. *United States,* 53 C. Cls. 549 (1918), holding that where the United States undertook by treaty to compensate the tribe for ceded land it was estopped from thereafter denying the title of the Omaha Tribe :

> . . . the defendants can not now be heard to say that the Indians did not own the land when the treaty was made and had no right to make a cession of it. (P. 560.)

But *cf.* Shore v. *Shell Petroleum* Corp., 60 F. 2d 1 (C. C. A. 10. 1932), cert. den. 287 U. S. 656.

[375] Worcester v. Georgia, 6 Pet. 515. 543 (1832).

[376] Ibid., 546.

[377] *Ib'd.*, 559.

[378] "For all practical purposes, they [the tribe] owned the land," *United States v. Shoshone Tribe, infra,* at p. 116. Grants of land subject to the Indian title by the United States, which had only the naked fee, would transfer no beneficial interest. *Leavenworth, L. & G. R. Co.* v. *United States, 92* U. S. 733, 742–743 (1875) ; *Beecher* v. *Wetherby, 95* U. S. 517. 525 (1877). The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee. *See Holden* v. *Joy, 17* Wall. 211, 244 (1872) ; *Western Union Tel.* Co. v. *Pennsylvania R. Co.,* 195 U. S. 540, 557 (1904) ; *United States* v. *Shoshone Tribe, 304* U. S. 111, 117 (1938). aff'g *Shoshone Tribe* v. United *States,* 85 C. Cls. 331 (1937.) See secs. 11–15 of this chapter and cases cited. See also Op. Sol. I. D.. M.28589, August 24. 1936 (damages for flooding tribal land).

[379] *Blacksmith* v. *Fellows, 7 N.* Y. 401 (1852) :

> The lands were then in the independent occupan of a nation of Indians, and were owned by them, and all that Massachusetts acquired by the cession to her, was the exclusive right of buying from the Indians. when they should be disposed to sell. (P. 411.)

Cf. United States v. *Oregon Central Military Road Co.,* 103 Fed. 549 (C. C. Ore. 1900). holding that a floating grant to road company did not extend to Indian reservation, and declaring:

> The intention to bestow the fee subject to the burden of the Indian occupation must necessarily refer to the temporary character of that occupation. Here the treaty provides for allotment of the reserved lands. and guaranties to the allottees the Perpetual possession and use of the tracts so granted, reserving to the United States the right of sale for the benefit of the Indians whenever their prosperity will be advanced thereby. This leaves nothing to be taken cum onere, and where there is nothing there is no fee. (P. 558.)

This case was reversed on other grounds in 192 U. S. 355 (1904). sub nom: *United States v. Calif. and Ore. Ld. Co. Cf. also 3* op. *A.* G. 458 (1839) (holding that land may be held by tribe according to "same manner as Indian reservations, have been heretofore held." and yet be subject to trust for named Indians "and their heirs forever").

[380] For recognition of these, restraints see 3 Kent's Comm. 377; 3 Washburn, Real Property (6th ed. -1902) sec. 2009: Rice, Modern Law of Real Property (1897) see. 32; 1 Dembitz, Land Titles (1895) sec. 65.

[381] The character of the "Indian title" theory as a fiction of feudalism was recognized a hundred years ago by Kent, *op. cit.* p. 378.

[382] 9 Pet. 711. 758-759 (1835).

> to pay them by the only means In their power, a cession of their lands, withhold an assent to the purchase, which, by their laws or municipal regulations, was necessary to vest a title. (Pp. 758–759.)

Again, in the case of *United States* v. *Pico*,[383] the Supreme Court declared, in upholding the validity of a grant made by an Indian pueblo :

> The transfer of land to the Picos was made in conformity with the existing regulations established for the protection of the Indians, under the supervision and with the approval of the local authorities, and appears to have been satisfactory to all parties. (P. 540.)

Again, in the case of *Chouteau* v. *Molony*,[384] where it was held that an instrument executed by the Fox Tribe amounted to a permit to mine rather than a conveyance in fee, the Supreme Court declared :

> It is a fact in the case, that the Indian title to the country had not been extinguished by Spain, and that Spain had not the right of occupancy. The Indians had the right to continue it as long as they pleased, or to sell out parts Of it-the sale being made conformably to the laws of Spain, and being afterwards confirmed by the king or his representative, the Governor of Louisiana. Without such conformity and confirmation no one could, lawfully, take possession of lands under an Indian sale. *We* know it was frequently done, but always with the expectation that the sale would be confirmed, and that until it was, the purchaser would have the benefit of the forbearance of the government. We are now speaking of Indian lands. such as these were, and not of those portions of land which were assigned to the Christian Indians for villages and residences. where the Indian occupancy had been abandoned by them, or where it had been yielded to the king by treaty. Such sales did not need ratification by the governor. If they were passed before the proper Spanish officer, and put upon record. (Pp. 236–237.)

Similarly did the various colonies. at least since 1633. make provision for the confirmation of Indian conveyances by proper governmental authorities.[385]

Indian grants in Massachusetts Colony, for example, required the approval of the General Court.[386] In New York, under the Constitution of 1777. Indian tribal conveyances required the assent of the legislature, or, after the Act of March 7. 1809, of the State Surveyor-General.[387]

The legislation of the United States on the sale of Indian lands has followed the course thus fixed by European and colonial sovereignties, and under this legislation the existence of a transferable estate in land has not been denied but the method of transfer has been rigidly circumscribed. This regulation of land sales by Indians to non-Indians has been an essential part of the general power of supervision over "Indian intercourse," claimed by each of the European sovereigns exercising dominion in North America. This power the United States likewise claimed. in its Constitution, and to this claim many Indian tribes were induced to give explicit assent.[388] The most substantial subject of such intercourse was land. since this was the most valuable possession of the Indian tribes. The United States asserted the power, as did other sovereign nations, of regulating the sale of land by Indians. As an essential part of such regulation the United States claimed the right, either for itself or for the state in which the land was situated, of purchasing land from the Indian tribes and of excluding other would-be purchasers from the market, and various treaties assented to this claim.[389] This policy was parallel to a policy which excluded from the Indian country unlicensed private traders In commodities other than land.

C. FEDERAL LEGISLATION

Section 4 of the first Indian Intercourse Act[390] covered the sale of lands, together with other types of trade, and declared :

> That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not. unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

This provision was amplified in the Second Indian Intercourse Act, approved March 1, 1793,[391] section 8 of which provided :

> That no purchase or grant of lands. or of any title or claim thereto, from any Indians or nation or tribe of Indians. within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States. in negotiating such treaty or convention. punishable by fine not exceeding one thousand dollars. and imprisonment not exceeding twelve months. directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided. nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty. held with Indians under the authority of the United States. in the presence. and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to the lands within such state, which shall be extinguished by the treaty.

This provision was reenacted from time to time with various minor modifications.[392] It should be noted that this provision was

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[383] 5 Wall. 536 (1866). *Accord : Pueblo de San Juan* v. United *States*. 47 F. 2d 446 (C. C. A. 10, 1931). cert. den. 284 U. S. 626.

[384] 16 How. 203 (1853). See comment in Blanchard and Weeks. Law of Mines. Minerals, and Mining Water Rights (1877) pp. 93-94.

[385] See 3 Rent Comm. 391 et seq. for an analysis of the colonial legislation.

[386] *Lynn* v. *Nahant*, 113 Mass. 433 (1873) (citing colonial authorities: Indian deed dated September 4, 1686). And see *Danzell* v. *Webquish*, 108 Mans. 133 (1871).

[387] See *Goodell* v. *Jackson. 20* Johns. *693. 722. 733 (1823).*

[388] Art. IV of Treaty of December 30. 1849, 9 Stat. 984 (Utahs) : Art VII of Treaty of June 22. 1852. 10 Stat. 974 (Chickasaws) ; Art. *VII* of Treaty of February 22. 1855. 10 Stat. 1165 (Mississippi Bands of Chippewas) : Art. VIII Of Treaty of February 27. 1855. 10 Stat. 1172 (Winnebagoes) ; Art. XV of Treaty of August 7. 1856. 11 Stat. 699 (Seminoles) : Art. XIII of Treaty of April 19. 1858, 11 Stat. 743 (Yankton Tribe of Sioux) ; Art. X of the Treaty of June 11, 1855. 12 Stat. 957 (Nez Perces) : *Art.* IX of Treaty of March 12. 1858. 12 Stat. 997 (Poncas) : Art. IV of Treaty of June 19. 1858. 12 Stat. 1031 (Mendawakanton and Wahpakoota Bands of Sioux) : *Art. IV* of Treaty of June 19. 1858. 12 Stat 1037 (Sisseeton and Wahpaton Bands of Sioux) : Art. I of Treaty of April 15. 1859. 12 Stat. 1101 (Winnebagoes) ; Art. I of Treaty of July 16 1859. 12 Stat. 1105 (Swan Creek and Black River Chippewas and Munsees or Christians) ; Art. II of Treaty of February 18. 1861. 12 Stat. 1163 (Arapaboes and Cheyenne Indians) : Art. VIII of Treaty of June 9. 1863. 14 Stat. 647 (Nez Perces) ; Art. IV of Treaty of March 6, 1865 14 Stat. 667 (Omahas) ; Art. XI of Treaty of July 19. 1866. 14 Stat. 799 (Cherokees): Art. II of Treaty of October 1. 1859 15 Stat. 467 (Sacs and Foxes of Mississippi). And see Chapter 3. sec. 3C(1).

[389] See, for example. Art. III of the Treaty of January 9. 1789. with the Wiandot. Delaware, Ottawa. Chippewa. Pattawattima. and Sac Nations. 7 Stat. 28. 29; *Art.* V of the Treaty of August 3. 1795. with the Wyandots. Delawares. Chipewas. and other tribes. 7 Stat. 49. 52; Art. VI of the Treaty of September 24. 1857. with the Pawnee Tribe. 11 Stat 729 : Art. V of the Treaty of March 12. 1858. with the Ponca Tribe. 12 Stat. 997. And see Chapter 3. sec. 3B(2). That similar provisions were Included in colonial legislation Is manifest in the reference of Marshall. C. J.. in State *of New Jersey* v. *Wilson*, 7 Cranch 164 (1812). to the New Jersey Act of August 12. 1758. restraining the Delaware Indians from alienating lands reserved to them by agreement.

[390] Act of July 22. 1790. 1 Stat. 137. See sec. 10. this Chapter. and see Chapter 16

[391] 1 Stat. 329.

[392] Act of March 1. 1793. sec. 8. 1 Stat. 329. 330: Act of May 19. 1796, sec. 12. 1 Stat. 469. 472: Act of March 3. 1799. sec. 12. 1 Stat. 743. 746 ; Act of March 30. 1802, sec. 12, 2 Stat. 139. 143 ; Act of June

not intended to prevent the alienation. of Indian lands and in fact many Indian treaties thereafter concluded provided for the alienation of Indian lands to parties other than the United States,[393] notably to religious bodies,[394] railroads,[395] or other Indian tribes.[396] In some instances a particular grant is validated.[397] In other cases authority is given to some administrative officer generally the Secretary of the Interior, to sell at public sale,[398] and, in a few cases the tribe itself is given authority to sell land to a named grantee[399] or to any purchaser.[400] A number of treaties provide for tribal grants of land by the tribe to individual members.[401] In effect this statutory requirement that all tribal grants be made by treaty simply applied to the American constitutional scene the principle that had been developed under British rule that the consent of the Crown was necessary to validate a tribal conveyance.[402] This principle is not dependent upon the character of the Indian title and applied as much to land held in fee simple by an incorporated tribe as to land held under any lesser tenure.[403]

So firmly has this principle been established that the Supreme Court suggested, in the *Candelaria* case, that quite apart from any particular statute, the United States sustained a relation of guardianship towards an Indian pueblo such that even land held in fee simple could not be granted or lost by court action unless the United States was represented by an attorney.[404] It is difficult to understand how the appearance of a United States attorney would validate a conveyance of tribal land which is invalid by' statute,[405] and the scope of this doctrine remains uncertain.

General limitations on the conveyance by an Indian tribe of interests in real-property have been supplemented, from time to time, by special statutes prohibiting such conveyances with respect to particular tribes.[406]

On the other hand, general limitations upon the manner of disposing of tribal property have been qualified by numerous special acts of Congress., Since 1871, transfers of tribal land have generally been made pursuant to statutes relating to particular reservations or areas and authorizing sales by the Secretary of the Interior. Some of these statutes require tribal consent to such sale.[407] Other statutes. validate conveyances by one tribe. to another tribe,[408] or by a tribe to, non-Indians,[409] or

30, 1834, sec. 12, 4 Stat. 729. 730; R. S. § 2116 ; 25 U. S. C. 177. Of the scope of this statute, an opinion of the Attorney General declares

> I cannot think that it applies merely to those Indian tribes who hold their land by the original Indian title.. The words are broad enough to include a trile holdingg lands by patent from the United States, and the purpose of the statute manifestly requires it to receive that construction. (Christian Indians, 9 Op. A. G. 24, 27 (1857).)

Accord: United States v. Candelaria and *Goodell* v. *Jackson,* discussed above. Contra: *Clark* v. *Williams,* 36 Mass. 499, 501 (1837) (holding that similar colonial statute applies to aboriginal occupancy but not to land held by Individual Indian in fee simple, and such tenure is presumed where land is in settled community).

[393] Various treaty provisions by which the New York Indians conveyed lands are analyzed in 1 L. D. Memo. 35 (1929) ; 5 L. D. Memo. 236 (May 13. 1935). Other treaty provisions empower prospectors to take minerals from an Indian reservation, *e. g.,* Art IV of Treaty of October 12. 1863, with the Shoshone-Goship Bands, 13 Stat. 681, 682. An example of a tribal land grant disapproved by treaty will be found in Art. VI of the Treaty of March 29. 1836. with the Pottawatamies, 7 Stat. 498. A contract for the transfer of land is modified in a supplemental article concluded April 27. 1868, 16 Stat. 727. to the Treaty of July 19, 1866, 14 Stat. 799. with the Cherokee Nation.

[394] Art. II of Treaty of January 31, 1855, with the Wyandotts, 10 Stat, 1159.

[395] Art. II of Treaty of July 19, 1866. 14 Stat. 799, with Cherokee Nation, construed in *Bell* v. *Atlantic & P. R. Co., 63* Fed. 417 (C. C. A. 8,1894). Art V of Treaty of June 28. 1862, with the Kickapoos, 13 Stat, 623: Art V of Treaty of March 21, 1866, with the Seminoles, 14 Stat, 755; Art V of Treaty of June 14. 1866. with the Creeks, 14 Stat 785; Art. I of Treaty of July 4, 1866. with the Delawares, 14 Stat. 793; Treaty of June 22, 1855, with Choctaw-Chickasaws, 11 Stat. 611 (conferring power on President to prescribe manner of fixing compensation, construed in 17 Op. A. G. 265 (1882)) ; Treaty of April 28, 1866, with Choctaws and Chickasaws. 14 Stat. 769. And of. "agreements" ratified by Act of July 10, 1882, 22 Stat. 157 (Crow) *and Act* of September 1, 1888, 25 Stat. 452.

[396] See sec. 8. this chapter.

[397] Treaty of June 30. 1802. with the Senecas, 7 Stat. 72 ; Art. XIV of Treaty of January 15, 1838, with New York Indians, 7 Stat 550.

[398] Art. II of Treaty of January 31. 1855, with Wyandotts, 10 Stat. 1159: Art. IX of Treaty of June 24, 1862, with the Ottawas, 12 Stat. 1237.

[399] Art. X of Treaty of January 15, 1838, with the New York Indians 7 Stat. 550.

[400] Art. XVIII of Treaty of July 19, 1866, with the Cherokees, 14 Stat 799; Art. I of Act of February 13. 1891, 26 Stat. 749 (Sac and Fox Nation).

[401] Sec. 5 of Act of July 1. 1902. 32 Stat. 636 (confirming agreement submitted by Kansas Indians).

[402] See *Jackson* v. *Porter.* 13 Fed. Cas. No. 7143 (C. C. N. D. N. Y. 1825), p. 241.

[403] See fn. 370 *supra. A* similar provision in the Constitution of New York of 1777 (Art. 37) ("that no purchases or contracts for the sale of lands. made with, or of the said Indians, shall he binding on them, or deemed valid. unless made under the authority, and with the consent of the legislature") was construed in *Goodell* v. *Jackson (20* Johns. 693, 1823). The Court. holding that such limitations applied to an Indian holding land under a patent, declared :

> This is the provision ; and the constitution states one im portant fact as the basis, and the sole governing motive for the w hole of it, and that is, that *frauds* were too often practised towards the *Indians* in contracts made for their lands. It was this, and this only, that endangered our peace and amity with them. There was no suggestion of fraud or imposition committed by them upon the whites. That. indeed. would have been an idle suggestion. and about as reasonable as the complaint of the wolf in the fable, that the lamb. standing far below him, was disturbing him in the enjoyment of the running stream. * * * Thus. in the resolution of congress of *January,* 1776, regulating trade with the *Indians,* it was declared, that no person should be pepermitted to trade with them without license. and that the traders should take no unjust advantage of *their* distress *and intemperance.* In a speech, on behalf of congress, to the six nations, in April 1776, it was said to them, that congress were determined to cultivate peace and friendship with them, and prevent the white people from *wronging them in any manner, or taking their lands.* That congress wisbed to afford protection to all their brothers the *Indians,* who lived with them on this great island, and that the white people should not he suffered. by *force* or *fraud, to deprive them of any of their lands.* And in November, 1779, when congress were discussing the conditions of peace to be allowed to the six nations, they- resolved. that one condition should be. that no land should be sold or ceded by any *of the said Indians,* either *as* individuals, *or* as a nation, unless by consent of congress. (PP. 722-723.)
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> * * *
>
> It was immaterial whether the Indians held their lands by immemorial possession. or by gift or grant from the whites. provided they had an acknowledged title. In either case, the lands were of equal value to them. and required the same protection. and exposed them to the like frauds. (Pp. 729.)
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> * * * * *
>
> My conclusion upon the whole case is, 1. That the patent of *John Sagoharase* and his heirs. was a patent to him and his Indian heirs, whatever their civil condition and character might be, whether aliens or natives.
>
> * * * * *
>
> 4. That by the constitution and statute law of this state no white person can purchase any right or title to land from any one or more *Indians,* either individually or collectively, without the authority and consent of the legislature, and none such existed, when the land in question was purchased by *Peter Smith,* in 1797. (P. 734.)

[404] 271 U. S. 432 (1926). See Chapter 20, sec. 7.

[405] "* * * the Department of Justice has no greater authority than has the Interior Department to legalize such use or to divest the Indians of their land, no authority to do so, and no authority to bring the action having been conferred by Congress, and there being no theory in law upon which compensation may he awarded by the court." *United States* v. *Portneuf-Marsh Valley In-. Co.,* 213 Fed. 601, 605 (C. C. A. 9, 1914), aff'g 205 Fed. 416 (D. C. Idaho 1913).

[406] Act of February 28, 1809, 2 Stat. 527 (Alibama and Wyandott).

[407] Sec. 4 of Act of May 8, *1872.* 17 Stat. 85 (Kansas) ; Act of June 10, 1872, 17 Stat. 388 (Ottawas) ; Act of June 10. 1872. 17 Stat. 391 (Omahas) ; Act of March 3, 1873, 17 Stat. 631 (Miamis) ; Act of August 27. 1894. 28 Stat. 507 (recital shows tribal consent to exchange of lands for missionary use) ; Act of May 28, 1928, 45 Stat. 774 (Fort Peck Indian Reservation).

[408] Joint Resolution of July 25. 1848, 9 Stat. 337 (Wyandotts and Delawares) ; Act of June 8, 1858, 11 Stat. 312 (grant by Delaware Indians to Christian Indians) ; Act of June 22. 1874. 18 Stat. 146. 170 (Omaha and Winnebago) ; Act of March 3. 1875. 18 Stat. 420. 451 (Senecas and Kaskaskias) ; Act of March 3, 1883, 22 Stat. 603 (Cherokees. Pawnees,

by a tribe to its members,[410] which amounts, of course. to allotment. Other statutes authorizing sales by the Secretary of the Interior are silent on the issue of tribal consent. Statutes of this character are generally limited to surplus lands left after the completion of allotment.[411] Between 1912 and 1932 a number of statutes were enacted authorizing the Secretary Of the Interior to sell or otherwise dispose of specific areas Of tribal land to municipalities, religious bodies, and public utilities. without reference to the wishes of the tribe.[412] Questions raised by these statutes are dealt with separately, insofar as they present a question of the extent of federal power over Indian lands.[413]

Statutes authorizing the sale of tribal lands were superseded,[414] with respect to Indian tribes subject to the Act of June 18, 1934,[415] by section 4 of that act, which provides:

> Except as herein provided, no sale. devise. gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved : *Provided, however.* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in. which the lands or shares are located or from which the shares were derived or to a successor corporation; and in ail instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State. or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located. to any member of such tribe or of such corporation or any heirs of such member: *Provided further*, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

The prohibitions of that section have been supplemented by prohibitions against alienation contained in tribal constitutions adopted pursuant to section 16 of the act and tribal charters adopted pursuant to section 17.

On the other hand, the proviso in section 4 allowing exchanges of land of equal value, and section 5 of the act allowing acquisition of lands by exchange. make it possible for tribes subject to the act to execute valid conveyances of tribal land by deed, approved by the Secretary of the Interior. provided the consideration is land of equal or greater value.[416]

D. INVOLUNTARY ALIENATION

Generally speaking, restraints on alienation of Indian land apply to involuntary alienation as well as to voluntary alienation. Thus, treaty guarantees of tribal possession are held to protect tribal land against sale by state authorities for nonpayment of taxes and therefore, inferentially. to protect such lands against taxation.[417] Restraints on alienation of tribal lands which prevent a tribe from making a valid conveyance of its property equally prevent individual members of the tribe from conveying such property.[418] Restraints on alienation of tribal lands likewise operate to prevent partition of such lands by state court at the suit of a tribal member.[419]

E. IN-VALID CONVEYANCES

Despite all statutes, Indian tribes have, from time to time, executed grants of tribal land. Although such grants are clearly invalid to convey a legal or equitable estate, it would be rash to say that all such grants are meaningless acts that cannot affect any rights. There are at least two federal cases which suggest that rights may accrue under tribal law, though not under federal or state law.

In *Johnson v. McIntosh*,[420] Marshal, *C. J.*, intimated that an Indian tribe might make a grant under its own laws even though such a grant would not be enforceable in the courts of the United States :

> If an individual might extinguish the Indian title, for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their [the Indians'] power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock. and hold it in severalty, still it is a part of their territory, and is held under them. by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it. and make a different disposition of the land, the courts of the United States cannot interpose for the protection of the title. (P. 593.)

A similar view is taken in the case of *Jackson v. Porter*,[421] where it was held that a grant made by an Indian tribe might be revoked by the tribe and that the grantee would have no redress in the courts of the United States.

> A purchaser, from the natives. at all events, could acquire only the Indian title. and must hold under them and according to their laws. The grant must derive its efficacy from their will, and if they choose to resume it and make a different disposition of it, courts cannot protect the right before granted. The purchaser incorporates himself with the Indians. and the purchase is to be considered in the same light as if the grant had been made to an Indian; and might be resumed by the tribe, and granted over again at their pleasure.

Poncas, Nez Perces, Otoes and Missourias and Osages) : on the distinction between a sale by one tribe to another. and an amalgamation of tribes, *note Delaware Indians v. Cherokee Nation, 38 C. Cls. 234* (1903); aff'd 193 U. S. 127 (1904).

[410] Act of March 3, 1871. 16 Stat. 588 (conveyance to railway company by Oneida tribe. Wisconsin).

[411] Act of April 20, 1878. 20 Stat. 513 (Brothertown Indians and Menomonees). And see Chapter 11.

[411] Act of February 26. 1896. 29 Stat. 17 (Chippewa) : Act of February 19. 1912. 37 Stat. 67 (Choctaw and Chickasaw) ; Act of August 24. 1912. 37 Stat. 497 (Five Civilized Tribes) : Act of February 14. 1913. 37 Stat. 675 (Standing Rock Reservation) : Joint Resolution of December 8. 1913. 38 Stat. 767 (Choctaw-Chickasaw) : Joint Resolution of January 11. 1917. 39 Stat. 866 (Choctaw-Chickasaw) : Act of January 25. 1917 39 Stat. 870 (Choctaw-Chickasaw) : Act of February 27. 1917. 39 Stat 944: Act of April 12. 1924. 43 Stat. 93: Act of May 26. 1930. 46 Stat 385 (Chickasaw-Choctaw) : on the sale of coal deposits in the segregated mineral lands of the Choctaw and Chickasaw tribes. see Memo. Sol. I. D. December 11. 1918; Op. Sol. I. D.. M.7316. April 5. 1922; Op. Sol. I. D.. M.7316. May 23. 1924; Op. Sol. I. D M.24735. November 19. 1928.

[412] Act of July 1. 1912. 37 Stat. 186 (Umatilla Reservation) ; Act of July 10. 1912. 37 Stat. 192 (Flathead Reservation) ; Act of September 8. 1916. 39 Stat. 846 (Chippewa) : Art of January 7. 1919. 40 Stat. 1053 (Flathead Reservation) ; Act of February 28. 1919. 40 Stat. 1206 (Capitan Grande Reservation) : Act of April 15. 1920. 41 Stat. 553 (Nez Perce) : Act of February 21. 1921. 41 Stat. 1105 (Choctaw and Chickasaw) : Act of March 3. 1921. 41 Stat 1355 (Fort Belknap) ; Act of May 4. 1932, 47 Stat. 146 (Capitan Grande Reservation). And see Chapter 5. sec. 9C.

[413] See Chapter 5.

[414] Memo. Sol. I. D.. August 22. 1936 (Pyramid Lake). Sec. 4 does not, however, prevent foreclosure of a lien on land existing when land is restored to tribal ownership under sec. 3. Op. Sol. I. D., M.29791 August 1. 1938.

[415] 48 Stat. 984. 25 U. S. C. 451 *et seq.*

[416] Memo. Sol. I. D.. February 3. 1937. The problem of what officials of a tribe may execute a deed is dealt with in *Pueblo of Santa Rosa v. Fall.* 273 U. S. 315 (1927). rev'g. 12 F 2d 332 (App. D. C. 1926) : 55 I. D. 14 (1934) ; Memo. Sol. I. D.. March 11. 1935

[417] See Chapter 13. sec. 2.

[418] *United States v. Boylan*, 265 Fed 165 (C. C. A. 2. 1920). affg. 256 Fed. 468 (D. C. N. D. N. Y. 1919). app. dism. 257 U. S. 614 (1921) : *Franklin v. Lynch. 233* U. S 269 (1914) (holding adopted white member of tribe subject to restraint on alienation). And see authorities cited in Chapter 9. sec. 2.

[419] *United States v. Charles, 23* F. Supp. 346 (D. C. W. D. N. Y. 1938).

[420] 8 Wheat. 543 (1823).

[421] 13 Fed. Cas. No. 7143 (C. C. N. D. N. Y. 1825). And see 1 Dembitz. Land Titles (1895), p. 494.

If this be the view which we are to take of the Indian right of occupancy, the claim of John Stedman considered in the most favourable manner, could never have been any thing more than a mere right of possession, subject to be reclaimed, and extinguished at the will of the Indians, and which has been done, as will be seen hereafter. But it may very well be questioned, whether this claim is entitled even to so favourable a consideration. (P. 240.)

* * * * *

It has already been shown; that admitting a purchaser from the Indians 'acquires their right of occupancy, the 'Indians may whenever they choose, resume- it, and make a different disposition of the land, which in the present case has been done by the 3d article of a treaty between his Britannic majesty and the Seneca Nation of Indians, dated the 3d of April, 1764. * * * There can therefore be no doubt, but that the Indian right to the land in question was ceded to the king by the treaty of 1764; and all Stedman's right of occupancy must then have ceased, and been extinguished; and 'he stood upon his mere naked possession, without title, and without the right of possession. (P. 242.)

In 1882 the Attorney General in an opinion on the claim of William G. Langford, declared: [422]

The occupancy of the land by the American Board of Commissioners for Foreign Missions 'from 1836 to 1847 was by the consent and allotment of the tribe; the occupancy by the United States since 1862 has been by a similar consent, manifested by the treaties of 1855 (12 Stat., 957), and 1863 (14 Stat., 467). Chief Justice Marshall, in *Johnson* v. *McIntosh* (8 Wheaton, 543); speaking of a deed poll executed by the Illinois Indians, said (p. 593) : (Quoting the passage above set forth.)

It is not suggested in the present case that any grant was made by the Nez Perces to the board, and it is fair to assume that the inducement for the allotment was the appreciation by the tribe of the benefits which the agents of the board had come there to confer on them. If the presence of the board became distasteful to them, I know of no law to prevent the annulment of the allotment and the resumption of the land. (P. 307.)

The possibility suggested in these cases, that a tribe may give effect under its own laws and customs to grants that would be held invalid in state or federal courts, assumes that this is a subject not within the scope of the federal statutes and one on which the local law of the tribe is therefore conclusive. Authority for this view, is available. but not conclusive. [423]

Speaking. of a colonial statute similar to 25 U. S. C. 177, [424] Chief Justice Shaw of Massachusetts, holding the statute inapplicable where the land was within a settled community, declared: [425]

In 'the first place, we think it manifest, that this law was made for the personal relief and protection of the Indians, and is' to he so limited in its operation: It is to be used as a shield, not as a sword.

[422] 17 Op. A. G. 306 (1882). See sec. 6, fn. 101, this chapter.

[423] The law of real property is to be found in the law of the situs. The law of real property in the Cherokee country therefore is to be found in the constitution and laws of the Cherokee Nation.

Delaware Indians v. *Cherokee Nation*, 38 C. Cls. 234, 251 (1903).

* * * that neither the establishment of town sites nor the purchase nor the occupancy by noncitizens of lots therein withdraws those lots or the town sites or their occupants from the jurisdiction of the government of the Creek Nation * * * (P. 953.)

[424] See fn. 403, *supra*.

Buster v. *Wright*, 135 Fed. 947 (C. C. A. 8, 1905). app. dism. 203 U. S. 599 (holding' that deeded land is -subject to tribal jurisdiction where tribe holds determinable fee).

[425] *Clark* v. *Williams*, 36 Mass. 499, 501 (1837).

SECTION 19. TRIBAL LEASES

The question whether lenses of tribal lands executed by tribes are valid in the absence of statutory prohibition or invalid in the absence of positive statutory authorization can be answered only on the basis of an analysis of the entire course of federal legislation and litigation on the subject.

The first explicit statutory limitation upon the power of a tribe to lease tribal land is found in section 12 of the Act of May 19, 1796, [426] reading as follows:

And be it further enacted, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same, be made by treaty, or convention, entered into pursuant to the constitution: * * *.

[426] 1 Stat. 469, ,472. The background of- the 1796 act is indicated by the two following quotations. The first is from a resolution proposed by the Indian Affairs Committeee of the House of Representatives. in 1795 with reference to the rights of states and, individuals to extinguish the right of possession and occupancy held by the Indians :

That, it appears to your committee, that the Legislature of the State of Georgia, by an act of the 7th day of January last. have contracted and rovided for an absolute conveyance of certain portions of lands held by the Creek and other Indian tribes, within the limits claimed by that State, under the sanction of treaties made with the United States, amounting to three-fourths of the lands so held by said Indians.

That your committee cannot but foresee great danger to the peace of the United States, in vesting interests in individuals the enjoyment of which is to depend on the extinguishment of the Indian titles. from the constant excitement which they produce, to embroil the Government with the neighboring Indians in hope of -their extinction or banishment.

That rights. so dangerous to the general happiness. should reside only in 'the bodies constituted for the guardianship of the general good of society, as being alone capable of comparing the various interests, alone disposed to promote a happy result to the community.

That your committee are of opinion. that it is highly incumbent -on the United States 'to secure to the neighboring Indians, the rights acquired by treaty, not only for obtaining their confidence in our Government, but, for preserving an Inviolate respect in the citizens of the United States, to its constitutional acts.

Four committee, therefore, submit the following resolutions :

Resolved, That it be recommended to the President of the United States. to use all constitutional and legal means, to prevent the infraction of the treaties made with the Indian' tribes by the citizens of the United States, with an assurance, that Congress will cooperate in such other acts, as will be proper' for the same end.

Resolved, That it be further recommended to the President of the United States, not to permit treaties for the extinguishment of the Indian title to any lands, to be holden at the instance of individuals or of States, where it shall appear that the property of such lands, when the Indian title shall be extinguished, will be in particular persons: And that, wherever treaties are held for the benefit of the United States, individuals claiming rights of pre-emption, shall be prevented from treating with Indians, concerning the same; and that, generally, such private claims be postponed to those of the several States, whenever the same may be consistent with the welfare and defence of the United States.

Resolved, That the President of the United States be authorized. whenever claims under prior contracts may cease to exist, to obtain a cession of the State of Georgia, of their claim to the whole or any part of the land within the present Indian boundaries. and that ---------- dollars ought to be appropriated to enable him to effect the same.

President Washington in the same year and shortly thereafter addressed a communication to the United States Senate with reference to certain treaties requested by the State of Georgia:

Gentlemen of the Senate:

Just at the close of the last session of Congress, I received from one of the Senators and one of the Representatives of the State of Georgia, an application for a treaty to be held with the tribes or nations of Indians claiming the right of soil to certain lands lying beyond the present temporary boundary line of that State. and which were described in an act of the Legislature of Georgia, passed on the 28th of December last, which has already been laid before the Senate. This application, and the subsequent correspondence with the Governor of Georgia, are herewith transmitted. The subject being very important, I thought proper to postpone a decision upon that application. The views I have

This provision amplifies earlier provisions relating to the alienation of Indian lands.[427]

The foregoing provision was reenacted as section 12 of the Act of March 3. 1799,[428] and as section 12 of the Act of March 30, 1802.[429] The Act of March 30, 1802, was the first piece-of permanent legislation on the subject, the earlier statutes having been limited in duration to a term of years.

The Act of June 30, 1834,[430] which, as elsewhere noted.[431] represented. in a measure, a codification of general Indian legislation. copied the language of the earlier acts, except that it omitted from its scope any reference to leases by individual Indians.[432] This omission apparently took account of the beginnings of the allotment system, and the encouragement, under that system, of leases by individual Indians to whom "reservations," later called "allotments," had been made

The provision denying legal validity to tribal leases out made by treaty, contained in the Act of June 30, 1834. was embodied in Section 2116 of the Revised Statutes and lo the United States Code in section 177 of title 25. This enactmeat is law today, except for (*a*) incorporated tribes which have been given general power to lease tribal lands, pursuant to the Act of June 18, 1934,[433] (*b*) other tribes authorized by special law or treaty to execute Leases of tribal land, and (*c*) various types of lease generally authorized by act of Congress.[434]

This Statutory iimitation of the power to lease tribal lands, according to an opinion of the Attorney General, is not dependent upon the nature of the tribal possessory right In the land,[435] nor can the Interior Department by its approval, bestow validity upon a lease of tribal land declared invalid by the statute.[436]

The drastic character of the statute cited raises questions upon which history may throw some light. Today we are likely to think of a lease, particularly a lease of agricultural lands, as a short-term transaction. This is in part the result of widespread state legislation outlawing long-term agricultural leases. In 1796, however, leases having the practical effect of outright grants were common,[437] and even as late as 1855 an agreement was made by treaty between the Choctaw and Chickasaw tribes and the United States whereby these tribes agreed to "lease to the United States * * * for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein." [438]

Under these circumstances a statute denying validity to Indian grants not made pursuant to treaty would be ineffective unless leasing were brought within its scope. We have already noted the insistence of the Federal Government that all grants of Indian land should be made by treaty, this being considered necessary to prevent frauds on non-Indian vendees as well as on Indian vendors. So long as it was possible to grant or lease tribal land by treaty,[439] the statute which declared this to be

since taken of the matter, with the information received, of a more pacific disposition on the part of the Creeks. have induced me, now, to accede to the request. but with this ex licit declaration: That neither my assent. nor the treaty which may be made, shall be considered as affecting any question which may arise, upon the supplementary act. passed by the Legislature of the State of Georgia, on the 7th of January last. upon which inquiries bare been instituted., in pursuance of a resolution of the Senate and House of Representatives; and that any cession or relinquishment of the Indian claims, shall be made in the general terms of the treaty of New York. which are contemplated as the form Prope· to be generally used on such occasions; and on the condition that one half of the expense of the supplies of provisions for the Indians assembled at the treaty he borne by the State of Georgia.

Having concluded to hold the treaty requested b that State, I was willing to embrace the opportunity it would present. of inquiring into the causes of the dissatisfactioo of the Creeks.. which has been manifested since the treaty of New York. by their numerous and distressing depredations on our Southwestern frontiers. Their depredations on the Cumberland have been so frcquent, and so peculiarly destructive. as to lead me to think they must originate in some claim to the lands upon that river. But. whatever may have been the cause. it is Im rtant to trace it to its source: for. Independent of the destruct ion of lives and property, it occasions a very serious annual expense to the United States. The commissioners for holding the proposed treaty will, therefore. be Instructed to inquire into the causes of the hostilities to which I have referred. and to enter into such reasonable stipulations as will remove them. and give permanent peace to those parts of the United States.

I now nominate Benjamin Hawkins, of North Carolina, George Clymer, of Pennsylvania, and Andrew Pickens, of South Carolina, to be commissioners to hold a treaty with the Creek nation of Indians. for the purposes hereinbefore expressed.

(American State Papers, vol. 7 (Indian Affairs, class 2. vol. 1), pp. 558, 560.)

And see American State Papers. vol. 7 (Indian Affairs. class 2. vol. 1), pp. 165. 585. 626. 655. 663. 665 : vol. 2. p 323 The Memorandum of the Justice Department. dated May 13, 1935 (5 f.. D. Memo 248), from which the foregoing citations are taken. comments:

> The procedure as above outlined was followed consistently by the Federal Government until Congress assumed full control over the Indians in 1871. (P. 253.)
>
> It should he noted that ail treaties made pursuant to Section 12 of the Act of March 30. 1802. show on their face the attendance of a United States Commissioner appointed under the authority of he United States to hold such treaty (See Appendix pp 39-44). This particular form was approved by President Washington. (See his letter to the Senate at pp. 16-17 hereof). (P. 258.)

[427] See sec. 4. Act of July 24. 1790. 1 Stat. 137. 138. reenacted as sec 8 of the Act of March 1. 1793, 1 Stat. 329, 330. A similar provision under the Articles of Confederation is noted in 18 Op A G 235 at P 236. (1885).

[428] I stat. 743, 746.

[429] 2 Stat. 139, 143.

[430] 4 stat. 729.

[431] See Chapter 4. sec. 6.

[432] Sec. 12:

> That no purchase. grant. lease, or other conveyance of lands, or of any title or claim thereto. from any Indian nation or tribe of Indians. shall be of any validity in law or equity. unless the same be made by treaty or convention entered into pursuant to the constitution. * * *

[433] Sec. 17, 48 Stat. 984. 986, 25 U. S. C. 477.

[434] See pp. 327-332 intro.

[435] This statutory provision is very general and comprehensive Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be a fee simple. or a right of occupancy merely. is not material; la either case the statute applies. It is not therefore deemed necessary or important, in connection with the subject under consideration, to inquire into the particular right or title to the above-mentioned reservations held by the Indian tribes or nations respectively which claim them. Whatever the right or title may be, each of these tribes or nations is precluded. by the force and effect of the statute. from either alienating or leasing any part of its reservation, or imparting any interest or claim in or to the same. without the consent of the Government of the United States. A lease of the land for grazing purposes is as clearly within the statute as a lease for any other or for general purposes. and the duration of the term is immaterial. One who enters with cattle or other livestock a on an Indian reservation under a lease of that description, made In violation of the statute, is an intruder, and may be removed therefrom as such, notwithstanding his entry is with consent of the tribe. Such consent may exempt him from tile penalty Imposed by section 2117. Revised Statutes, for taking his stock there. but it cannot validate the lease or confer upon him any legal right whatsoever to remain upon the land: and to this extent and no further was the decision of Judge Brewer in *United States v. Hunter, 21* Fed. Rep., 615.

> But the present inquiry In substance is. (1) whether the Department of the Interior can authorize these Indians to make leases of their lands for grazing purposes or whether the approval of such leases by the President or the Secretary of the Interior would make them lawful and valid: (2) whether the President or the Department of the Interior has authority to lease for such purposes any part of an Indian Reservation.
>
> I submit that the power of the Department to authorize such leases to be made. or that of the President or Secretary to approve or to make the same. If It exists at all. must rest upon some *law*, and therefore be derived from either a treaty or a statutory provision. * * *
>
> In my opinion. therefore. each of the questions proposed In your letter should be answered in the negative, and I so answer them. (16 Op. A. G. 235. 237-238 (1885).

[436] Ibid.

[437] See *Goodell v. Jackson. 20* Johns. 693. 728 (N Y 1823).

[438] Art. IX of the Treaty of June 22. 1855. 11 Stat 611. 613. carried into effect In Acts of June 19. 1860. 12 Stat 44. 56 and March 2. 1861. 12 Stat. 221. 236. For an analysis of this lease see United *States v. Choctaw etc., Nations*, 179 U. S. 494. 510 (1900) ; *Chickasaw Nation v. United States*, 75 C. Cls. 426 (1932), cert. den. 287 U. S. 643.

[439] Leasing provisions are to be found in some of the earlier treaties : Art. IV of the Treaty of October 19. 1818. with the Chickasaws. 7 Stat. 192. provided for a lease of tribal salt springs by trustees for the benefit of the tribe. with a limit of $1 per bushel upon the selling price of the salt mined by the lessee. Such lease needed no approval by federal authorities. The Treaty of February 27. 1819. with the Cherokees. 7 Stat. 195. provided for a lease or license of a roadway. adjacent land and a ferry site.