CHAPTER 3

INDIAN TREATIES

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SECTION 1. THE LEGAL FORCE OF INDIAN TREATIES

One who attempts to survey the legal problems raised by Indian treaties must at the outset dispose of the objection that such treaties are somehow of inferior validity or are of purely antiquarian interest. These objections apparently spring from the belief that when the treaty method of dealing with the natives was abandoned in the Indian Appropriation Act of 1871 [1] the force of treaties in existence at that. time also disappeared.

Such'. an 'assumption is unfounded. Although treaty making itself. is a thing of the past, treaty enforcement continues.' As a matter of fact, the act in question expressly provides that there shall be no lessening of obligations already incurred.

The reciprocal obligations assumed by the Federal Government and by, the Indian tribes during a period of almost a hundred years constitute a chief source of present-day Indian law. As one legal commentator has pointed out:

> * * * The chief foundation [of federal power over Indian affairs] appears to have been tbe treaty-making power of the President and Senate with its corollary of Congressional power to implement by legislation the treaties made.
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> And by a broad reading of these treaties the national government obtained from the Indians themselves authority to legislate for them to carry out the purpose of the treaties."

That treaties with Indian tribes are of the same dignity as treaties with foreign nations is a view which has been repeat-

[1] Act of March 3. 1871, 16 Stat. 544, 566, R. S. § 2079. 25 U. S. C. 71.

[2] See, for. example, Act of June 15. 1935, sec. 4. 49 Stat. 378.

[3] See Rice, The Position of the American Indian in the Law of the United States (1934), 16 J. Comp. Leg. 78, 80–81. See also Chapter 5, sec. 1.

Justice Baldwin, in the case of *Cherokee Nation* v. *Georgia,* 5 Pet. 1 (1831), gives au interesting account of the negotiation of treaties by the Continental Congress with the Indians :

> The proceedings of the old congress will be found in 1 Laws U. S. 597, commencing 1st June 1775. and ending 1st September 1788, of which some extracts will be given. 30tb June 1775: "Resolved, that the committee for Indian affairs do prepare proper talks to the several tribes of Indians; *as* the Indians depend on the colonists for arms, ammunition and clothing which are become necessary for their subsistence." "That the commissioners have power to treat with tbe Indians ;" "to take to their assistance gentlemen of influence among the Indians." 'To preserve the confidence and friendship of the Indians. and prevent their suffering for want of the necessaries of life, 40.0001. sterling of Indian goods be imported." "No person shall be permitted to trade with the Indians. without a license;" "traders shall sell their goods at reasonable prices; allow them to the Indians for their skins, and take no advantage of their distress and intemperance;" "the trade to be only at posts designated by the commissioners." Specimens of the kind of intercourse between the congress and deputations of Indians may be seen in pages 602 and 603. They need no incorporation into a judicial opinion. (P. 34.)

edly confirmed by the federal courts and never successfully challenged.[4]

As late as 1828 Attorney General William Wirt, in an opinion to the President on Georgia and the Treaty of Indian Spring, found it necessary to answer the contention that treaties with Indians were not effective because they were not treaties with an independent nation, and because, even if independent, the Indians were' uncivilized. In discussing the first objection the Attorney General said, in part:

> If it be meant to say that, although capable of treating, their treaties are not to be construed like the treaties of nations absolutely independent, no reason is discerned for this distinction 'in the circumstance that their independence is of a limited character. If they are independent to the purpose of treating, they have all the independence 'that is necessary to the argument. * * • The point, then, once conceded, that the Indians are independent to the purpose of treating, their independence is, to *that purpose,* as *absolute* as that of any other nation.
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> • • * Nor can it be conceded that their independence as a nation is a limited independence. Like all other independent nations, they are governed solely by their own laws. Like all other independent nations, they have the absolute power of war and peace. Like all other independent nations, their territory is inviolable, by any other sovereignty. Questions have arisen as to the character of their title to that territory: but these discussions have resulted in this conclusion : that. whether their title be that of sovereignty in the jurisdiction or the soil, or a title by occupancy only, it is such a title as no other nation has a right to interfere with, or to take from them: and which no other nation can rightfully acquire, but by the same means by which the territory of all other nations, however absolute their independence, may be acquired-that is, by cession or conquest. * * * As a nation they are still free and independent. They are entirely self-governed—self-directed. They treat, or refuse to treat, at their pleasure: and there is no human power which can rightfully control them in the exercise of their discretion in this respect. In their treaties, in all their contracts with regard to their property, they are as free, sovereign, and independent as any other nation. And being bound, on their own part,' to the full extent of their contracts, they are surely entitled, on every principle of reason, justice, and equity to hold those with whom they thus treat and contract equally hound to them: Nor can I discover the slightest foundation for applying different. rules to the construction 'of their contracts from those which are applied to all other contracts, *because they reside within the local limits of the sovereignty of Georgia.* (Pp. 132–135.1

The Circuit Court for the Michigan District said :[6]

> • ✉ * It is contended that a treaty with Indian tribes has not the same dignity or effect, as a treaty with a for eign and independent nation. This distinction is not au thorized by the constitution. Since the commencement of the government, treaties bare been made with the Indians and the treaty-making power has been exercised in making them. They are treaties. within the meaning of the constitution, and, as such, are the supreme laws of the lanc (P. 346.)

It is clear that the Constitution recognized as part of th supreme law of the land treaties made with Indian tribes prior to its ratification.' The Supreme Court said with reference to th provisions of an Indian treaty :[8]

> * * * the Constitution declares a treaty to be the supreme law of the land; and Chief Justice Marshall, in *Foster and Elam* v. *Neilson,* 2 Pet. 314, Has said, "That a treaty is to be regarded, in courts of justice, as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." No legislation is required to put the seventh article in force; and it must become a rule of action, if the contracting parties had power to incorporate it in the treaty of 1863. About this there would seem to be no doubt. * * * (P. 196.)

Generally speaking, the incidents attaching to a treaty with a foreign power have been held applicable t o Indian treaties. Thus, in accordance with the general rule applicable to foreign treaties, the courts will not go behind a treaty which has been ratified to inquire whether or not an Indian tribe was properly represented by its head men, nor determine whether a treaty has been procured by duress or fraud, and declare it inoperative for that reason.[9]

> * * * the treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation, than they can behind an act of Congress.[10]

An Indian treaty, like a foreign treaty, may be modified by mutual consent.[11]

The fact that Congress has, by legislation, repealed, modified, or disregarded various Indian treaties has been thought by some to show that Indian treaties are of inferior legal validity. The fact is, however, that the power of Congress to enact legislation in conflict with treaties is well established in the field of foreign affairs, as well as in the field of Indian affairs.[12]

In upholding legislation contravening a treaty, the Supreme Court in *Lone Wolf* v. *Hitchcock*[13] said.:

> * * * Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of

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[4] *Holden* v. *Joy,* 17 Wall. 211. 242-243 (1872) ; Worcester v. *Georgi* 6 Pet. 515. 559 (1832) : *Turner* v. *American Baptist Missionary Unio* 24 Fed. Cas. No. 14251 (C. C. Mich. 1852).

[5] 2 Op. A. G. 110 (1828).

[6] *Turner* v. American *Baptist* Missionary Union, 24 Fed. Cae. No. 142 (C. C. Mich. 1852).

[7] *Worcester* v. *Georgia,* 6 Pet. 515. 559 (1832). Examples of suc treaties are found in the opinion of the Supreme Court in *Cherok Nation* v. *Georgia,* 5 Pet. 1. 32-38 (1831).

[8] *United States v. Forty-three Gallons of Whiskey,* 93 U. S. 188 (1876

[9] *United States* v. *New York Indians,* 173 U. S. *464 (1899)* ; *United States* v. *Old Settlers,* 148 U. S. 427. 466 (1893). See fn. 8, *supra,* and on the form of tribal government, see Chapter 7, sec. 3.

[10] *Fellows* v. *Blacksmith,* 60 U.. S. 366, 372 (1856).

[11] 14 Pet. 4 (1840). Justice McLean said in the Case of *Latimer* v. Poteet:

> It is argued that it was not in the power of the United States and the Cherokee nation. by the treaty of Tellico, in 1798. to vary in any degree the treaty line of Holston ; so as to affect private rights, or the rights of North Carolina. The answer to this is, that the Tellico treaty does not purport to alter the boundary of the Holston treaty, but by the acts of the parties. this boundary is recognized. Not that a new boundary was substituted, but that the old one was substantially designated. Will any one deny that the parties to the treaty are competent to determine any dispute respecting its limits. In what mode can a controversy of this nature be so satisfactorily determined as by the contracting parties. If their language in the treaty be wholly indefinite, or the natural objects called for are uncertain or contradictory, there is no power but that which formed the treaty which can remedy such defects. And it is a sound principle of national law, and applies to the treaty-making power of this government, whether exercised with a foreign nation or an Indian tribe. that all questions of disputed boundaries may be settled by the parties to the treaty. And to the exercise of these high functions by the government, within its constitutional powers, neither the rights of a state, nor those of an individual, can be interposed. We think it was in the due exercise of the powers of the executive and the Cherokee nation. in concluding the treaty of Tellico. to recognize in terms, or by acts, the boundary of the Holston treaty. (P. 13.)

[12] The Supreme Court in *Ex parte Webb.* 225 U. S. 663 (1912), said :

> Of course, an act of Congress may repeal a prior treaty as well as it may repeal a prior act. *The Cherokee Tobacco, 11* Wall. 616; *Fong Yue Ting* v. *United States,* 149 U. S. 698. 720 : *Ward* v. *Race Horse,* 163 U. S. 504. 511: *Draper v. United States.* 164 U. S. 340. 243. (P. 683.)

[13] 187 U. S. 553.565–566 (1903). Also see Cherokee *Tobacco,* 11 Wall. 616 (1870) ; *Ward* v. *Race Horse,* 163 U. S. 504 (1896) ; *Thomas* v. *Gay,* 169 U. S. 264 (1898) ; 16 Op. A. G. 300 (1879). Accord : 26 Op. A. G. 340, 347 (1907) ; 54 I. D. 401 (1934).

At one time this principle was not well established. This is shown by the following excerpt from H. Rept. No. 474, Comm. on Indian Affairs, 23d Cong., 1st seas., May 20, 1834 :

> It was not competent for an act of Congress to alter the stipulations of the treaty or to change the character of the agents appointed under it. (P. 5.)

course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But. as with treaties made with foreign nations, *Chinese Exclusion Case,* 130 U. S. 581, 600, the legislative power might pass laws in conflict with treaties made with the Indians. *Thomas* v. *Gay,* 169 U. S. 264, 270; *Ward* v. *Race Horse, 163* U. S. 504, 511; *Spalding* v. *Chandler,* 160 U. S. 394, 405 ; *Missouri,* Kansas & Texas *Ry. Co.* v. *Roberts,* 152 U. S. 114, 117 ; *The Cherokee Tobacco,* 11 Wall. 616.

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding. the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States 'and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. . * *

The Attorney General has ruled : [14]

> By the 6th article of the Constitution, treaties as well as statutes are the laws of the land. There is nothing in the Constitution which assigns different ranks to treaties and to statutes. The Constitution itself is of higher rank than either by the very structure of the Government. A statute not inconsistent with it, and a treaty not inconsistent with it, relating to subjects within the scope of the treaty-making power, seem to stand upon the same level, and to be of equal validity; and as in the case of all laws emanating from an equal authority, the earlier in date yields to the later. (P. 357.)

This doctrine has been qualified by some cases. In the case of *Jones v. Yeehan* [15] if was held that title to land granted to an Indian by treaty cannot be divested by any subsequent action of the lessor, Congress or the Executive department.

> The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself. *Wilson v. Wall, 6* Wall. *83, 89; Reichart v. Felps* 6 Wall. 160 ; *Smith* v. *Stevens,* 10 Wall. 321,327 ; *Holden* v. Joy, 17 Wall. 211, 247 (P. 32).

Thus the issuance of a patent by the General Land Office upon lands reserved by a treaty with Indian tribes is void."

The Supreme Court has often coupled a statement about the absolute power of Congress to supersede a treaty obligation with a discussion of the moral obligation of the Government to redress such a violation. In holding that an act of Congress extended revenue laws over the Indian Territory, despite a prior treaty exempting tobacco raised on Indian reservations, the Court wrote : [17]

> A treaty may supersede a prior act of Congress,* and an act of Congress may supersede a prior treaty.# In the cases referred to these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere *of* judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief. (P. 621.)
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> * *Foster & Elam* v. *Neilson,* 2 Peters, 314.
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> # *Taylor* v. *Morton,* 2 Curtis, 454; *The* Clinton Bridge, 1 Walworth, 155.

By many statutes and occasionally by treaties, the Court of Claims has been authorized to determine many claims for treaty violations

In construing a jurisdictional act,[19] the Supreme Court discussed the liability of the United States for a violation of a treaty with the Creek tribe:

> * * * But we think it plain that that act only gave authority to the Court of Claims to hear and determine claims "for the amount due or claimed to be due said bands from the United States under any treaties or laws of Congress." It does not purport to alter or enlarge any rights conferred on petitioners by the treaties or laws of the United States or authorize any recovery except in accordance with the legal principles applicable in determining those rights under laws and treaties of the United States. See *United States* v. *Old Settlers,* 148 u. s. 427; 468, 469; *United States v. Mille Lac* Chippeawas, 299 U. S. 498, 500. (P. 436.)

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[14] 13 OP. A. G. 354 (1870).

* * congress has never abrogated treaties promiscuously by legislation. those with Indians. Chinese, and the French treaty of 1778, being the chief ones in point.

Boyd, The Expanding Treaty Power. in Selected Essays on Constitutiona Law, vol. 3, The Nation and The States (1938), pp. 410, 414.

The Solicitor of the Department of the Interior has said :

> Congress has paramount authority over such reservations and the Indians occupying them (*Lone Wolf* v. *Hitchock,* 187 U. S. 553, 565), and may, if it sees fit so to do, provide game laws to restrict the Indians in their natural and immemorial rights of fishing and hunting. *In re Blackbird, supra* [109 Fed. 139 (D. C. W. D. Wis. 1901). And even though such laws should conflict with the provisions of prior treaties with the Indians, there is respectable authority for upholding their validity. Thus in *The Cherokee Tobacco Case* (11 Wall. 616). it was held that a law of Congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was paramount to the treaty. And in *Ward* v. *Race Horse* (163 U. S. 504), the court ruled that the provision in treaty of February 24, 1869, with the Bannock Indians, whose reservation was within the limits of what is now the State of Wyoming, that "they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon", was superseded by the provisions of the Enabling Act admitting Wyoming into the Union, and that the treaty provision did not give the Indians the right to exercise the hunting privilege within the limits of the State in violation of its laws. (54 I. D. 517, 520 (1934).)

[15] 175 U. S. 1 (1899), holding unconstitutional Joint Resolution o August 4, 1894, 28 Stat. 1018. authorizing departmental approval of a lease after the execution of a different lease by the Indian landowner.

[16] *United States* v. *Carpenter.* 111 U. S. 347 (1884). Also see *Spalding* v. *Chandler,* 160 U. S. 394 (1896). It has been held that an Executiv order which purports to restore to the public domain land granted by treaty to Indians is inoperative. 18 Op. A. G. 141 (1885).

[17] *Cherokee Tobacco.* 11 Wall. 616 (1870). For an example of the superseding of a treaty by the General Allotment Act see Op. Sol. I. D., M. 25930, June 30, 1930, 53 I. D. 133.

The moral obligation to perform treaties faithfully was recognized in the preamble to the Treaty of August 9. 1814, with the Creek Nation. 7 Stat. 120, which referred to the fulfillment "with punctuality and good faith" by the United States of former treaties with the Creeks up to the time of their waging war against the United States. Also see Chapter 14. sec. 2, fn. 41.

An example of a treaty superseding a statute is noted in Choctaw Indians, 13 Op. A. G. 354 (1870).

[18] See Chapter 14, sec. 6, and Chapter 19, sec. 3; Ray A. Brown, The Indian Problem and the Law (1930), 39 Yale L. J. 307, 323–324, and Meriam, Problem of Indian Administration (1928), pp. 805–811. Treaties are often the foundation for claims. *United States* v. *Old Settlers,* 148 U. S. 427, 467–468 (1893). Congress may waive the benefit of the rule of *res adjudicata* by allowing another trial *of* a claim against the United States. *Cherokee Nation* v. *United States,* 270 U. S. 476 (1926). or disregarding laches, *United States* v. *Old Settlers,* 148 U. S. 42'7, 473 (1893).

[19] *Sioux* Indians v. *United States,* 277 U. S. 424 (1928). The Act of April 11, 1916, 39 Stat. 47 (Sisseton and Wahpeton bands of Sioux), authorizes the Court of Claims to hear and determine claims "for the amount due or claimed to be due said bands from the United States under any treaties or laws of Congress."

The Supreme Court in *United States* v. *Blackfeather,* 155 U. S. 180 (1894). held that when the United States undertook by treaty to "expose to sale to the highest bidder" the land ceded to the United States by the Indians, and disposed of a large part of such land at private sale, the Federal Government was guilty of a violation of trust.

In a subsequent case the Court held that provisions granting claims against the United States are strictly construed. *Blackfeather* v. *United States,* 190 U. S. 368, 376 (1903). The Court said :

> * * * The moral obligations of the Government toward the Indians, whatever they may be, are for Congress alone to recognize,

Certain treaties with the Indians were invalidated by hostilities.* During the Civil War Congress expressly authorized the President to declare all treaties with a tribe engaged in hostility toward the United States abrogated by such tribe, "if in his opinion the same Can be done consistently with good faith and legal and national obligations." [21]

While the United States often abrogated treaty provisions,[22] some treaties contained drastic penalties for Indians who might commit violations. Article 4 of the Treaty of June 19, 1818,[23] required the chiefs and warriors of the tribe to deliver "to the authority of the United States, (to be punished according to law,) each and every individual of the said tribe, who shall, at any time hereafter, violate the stipulations of the treaty * * *." The Treaty of August 9, 1814,[24] after denouncing them as violators or instigators of violation, required the "caption and surrender of all the prophets and instigators of the war, whether foreigners or natives, who have not submitted to the arms of the United States * * *." The Treaty of March 2, 1868,[25] provided that a chief violating an essential part of the treaty shall forfeit his position.

Some treaties provided for the modification [26] or abrogation of previous provisions [27] or declared previous treaties null and void and canceled claims under them,[28] or nullified preemption rights and reservations created under them,[29] or expressly recognized former treaties.*

Treaties sometimes provided saving clauses in the event of rejection of some of the articles. For example, article 7 of the Treaty of August 5, 1826, with the Chippewas,[31] provides among other things:

> * * * But it is expressly understood and agreed, that the fourth, fifth, and sixth articles, or either of them, may be rejected by the President and Senate, without affecting the validity of the other articles of the treaty.

Future contingencies sometimes provided for included violation by a chief of an essential part of the treaty [32] or relinquishment by chiefs of land reserved by treaty,[33] nonratification," nonremoval of the Indians,[35] abandonment of land [36] and insufficiency of "good tillable land" ceded to the tribe.[37]

The legal force of Indian treaties did not insure their actual enforcement. Some important treaties were negotiated but nerer ratified by the Senate,[38] or ratified only after a long delay.[39] Treaties were sometimes consummated by methods amounting to bribery,[40] or signed by representa tives of only a small part of the signatory tribes.[41] The Federal Government failed to fulfill the terms of many treaties,[42] and was sometimes unable or unwilling to prevent states,[43] or white people,[44] from violating treaty rights of the Indians.

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and the courts can exercise only such jurisdiction over the subject as Congress may confer upon them. (P. 373.)

[20] See Preamble to Treaty of August 9, 1314 with the Creeks. 7 Stat. 120. Also see Leighton v. *United States,* 161 U. S. 291. 296 (1895). On what constitutes war between the United States and a tribe see *Marks* v. United *States,* 161 U. S. 297 (1896); *McCandless v. United States* ex rel. *Diabo.* 25 F. 2d 71 (C. C. A. 3, 1928).

[21] Act of July 5, 1862. 12 Stat. 612. 628. R. S. § 2080. 26 U. S. C. 72. discussed in *Holden* v. *Joy,* 17 Wall. 211, 216 (1872).

[22] See fn. 14, *supra.*

[23] With the Pitavirate Noisy Pawnees. 7 Stat. 173, 174. The same provision was contained in other treaties, such as the Treaty of June 18. 1818, with the Grond Pawnee Tribe, Art. 4, 7 Stat. 172; Treaty of June 22, 1818. with the Pawnee Marbar Tribe, Art. 4. 7 Stat. 175.

[24] With the Creeks. Art. 6, 7 Stat. 120.

[25] *With* the Utes, Art. 17. 15 Stat. 619

[26] For example. see Treaty of January 20. 1826, with the Choctaws, 7 Stat. 234, Sometimes permanent additions to treaties in force were made (Treaty of September 25, 1818, with the Osages, *Art.* 3. 7 Stat. 183) and rights under previous treaties were preserved (Treaty of July 16, 1830. with the Sacs and others, *Art.* 12, 7 Stat. 328).

[27] The Treaty of August 31. 1822, with the Gsagea. 7 Stat. 222, abrogates the Treaty of November 10, 1808, Art. 2, 7 Stat. 107 : the Treaty of September 3. 1822. with the Sac and Fox Tribes, 7 Stat. 223, abrogates the Treaty of November 3, 1864, 7 Stat. 84: the Treaty of February 27, 1867, with the Pottawatomies. Art. 13. 15 Stat. 531, 634. voids all provisions of former treaties inconsistent with the provisions of this treaty.

The Treaty of April 1. 1850, with the Wyandots, Art. 11, 9 Stat. 987 abrogated and declared null and void all former treaties between the United States and the Wyandots, except Provisions previously made for the benefit of individuals "by grants of reservations of lands, or otherwise, which are considered as *vested* rights, and not to be affected by any thing contained in' this treaty."

Article 21 of the Treaty of June 22, 1865, with the Choctaws and Chickasaws. 11 Stat. 611. provided:

> This convention shall supersede and take the place of all former trestles between the United States and the Choctaws, and ala. of all treaty stipulations between the United States and the Chickasaws, and between the Choctaws and Chickasaws. inconsistent with this agreement, and shall take effect and be obligatory upon the contracting parties. from the date hereof, whenever the same shall be ratified by the respective councils of the Choctaw *and* Chickasaw tribes. and by the President and Senate -of the United States.

Also see Treaty of August 7, 1866, with the Creeks. Art. 26. 11 Stat. 699.

[28] Treaty of January 24. 1826. with the Creeks. Art. 1. 7 Stat. 286.

[29] Supplementary articles to the Treaty of December 29. 1836, with the Cherokees. 7 Stat. 488; Treaty of May 18, 1854, with the Sacs and Foxes, Art. 1, 10 Stat. 1074; Treaty of May 18, 1854, with the Kickapoos. Art. 8, 10 Stat. 1078; Treaty of July 31, 1865, with the Ottawas and Chippewaa, Art. 3, 11 Stat. 621.

[30] Treaty of October 25, 1805, with the Cherokees. Art. 1. 7 Stat. 93: Treaty of July 18, 1815, with the Potawatamies, Art. 4. 7 Stat 123; Treaty of July 18, 1815, with the Piankishaws, Art. 3, 7 Stat. 124; Treaty of September 25, 1318, with the Illinois Nation, Art. 2, 7 Stat. 181.

[31] 7 stat. MO.

[32] Treaty of March 2, 1868. with the Utes, Art. 13, 15 Stat. 619.

[33] Treaty of September 18. 1823, with the Florida Indians. Additional Art., 7 Stat. 224, 226.

[34] By Art. 16. the rejection of any article would not affect the other. provisions in the Treaty of June 28. 1862, with the Kickapoos, 13 Stat. 623; Art. 6 of the Treaty of November 23, 1838, with the Creeks, 7 Stat. 574. provided that the rejection of a certain article would not affect the other provisions.

[35] For example, see Treaty of November 16, 1864, with the Rogue River Tribe, Art. 4, 10 Stat. 1119.

[36] Treaty of September 21, 1833, with the Otoes and Missourias, Art. 8, 7 Stat. 429.

[37] Treaty of September 18, 1823, with the Florida Tribes, Art. 9, 7 Stat. 224.

[38] Hoopes, Indian Affairs and their Administration, with Special Reference to the Far West (1932), p. 86.

[39] *Ibid.,* p. 116.

[40] Kinney, A Continent Lost—A Civilisation *Won* (1937), pp. 37. 33, 52, 56, 71, 94; Schmeckebier, The Office of Indian Affairs, Its History. Activities, and Organization (1927), p. 31.

[41] Kinney, *op. cit.* pp. 44, 45.

[42] Kinney, *op. cit.* p. 68; Hoopes, *op. cit.* pp. 180, 21.8, 219; Schmeckebier describes this condition:

> One of the defects of the treaty system was that agreements were continually being made which were not carried into effect. This was due in part to inefficient administration, *in* part to the failure of Congress to make the necessary appropriations, and in part to the inherent difficulties presented by the nature of the problem.
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> Some of the stipulations of almost all. treaties which it was impossible to carry out were those guaranteeing the. Indians against the intrusion of the white settlers and providing for the punishment of white persons committing offenses against the Indians. As the exterior boundaries reserved to the Indians were thousands of miles in extent, it was impossible to police this area in such a way as to prevent trespass or to secure evidence against offenders. (P. 62.)

[43] See Kinney, *op. cit.* p. 71.

[44] *Ibid.,* pp. 148, 149, 174, 184, 208; Hoopes, *op. cit.* pp. 84. 226. 228-232, 236; Schmeckebier *op.* oft. p. 44.

> Treaty guarantees of land to the Indians were often violated. In 1789 Secretary of War McHenry, in his instructions to the Commissioners for negotiating a treaty with the Cherokees. made the following comment: "The arts and practices to obtain Indian land. in defiance of treaties and the laws, and at the risk of involving the whole country in war. have become so daring. and received such countenance. from persons of prominent influence. as to render it necessary that the means to countervail them shall be augmented." Am. St. Papers. Indian Affairs. vol. 1. p. 639, quoted by Schmeckebier, *ibid.,* pp. 24-25.

SECTION 2. INTERPRETATION OF TREATIES [45]

A cardinal rule in the interpretation of Indian treaties is that ambiguities are resolved in favor of the Indians.[46]

For example, a proviso in an Indian treaty which exempts lands from "levy, safe, and forfeiture" is not, in the absence of expressions so limiting it, confined to the levy and sale under ordinary judicial proceedings, but also includes the levy and sale by county officers for the nonpayment of taxes."

An agreement embodied in an act of Congress which In terms "ceded, granted, and relinquished" to the United States all of their "right, title, and interest," did not make the lands public lands in the sense of being subject to sale or other disposition under the general land laws, but only in the manner provided for in the special agreement with the Indians.[48]

The best Interests of the Indians,* however, do not necessarily coincide with a grant to them of the broadest-power over lands. The Supreme Court has held that the best interests of the Indians do not require that they should be allotted lands in fee rather than lands held in trust by the government for them."

While trying to 'serve the Indians' best interests, the courts have indicated that they will not dispense with any of the conditions or requirements of the treaties upon any notion of equity or general convenience or substantial justice. Justice Harlan, in the case of *United States* v. Choctaw *Nation*,[51] said:

> But in no case has it been adjudged that the courts could by mere interpretation or In deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may he disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the Government. Congress did not intend, when passing the act under which. this litigation was inaugurated, to invest the Court of Claims or this court with authority to determine whether the United States had, in its treaty with the Indians, violnted the principles of fair dealing. What was said in' *The Amiable Isabella*, 6 Wheat. 1, 71, 72, is evidently applicable to treaties with Indians. Mr. Justice Story, speaking for the court, said: "In the first place, this court does not possess any treaty-making power. That power belongs by the Constitution to another department of the Government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial. would be on our part an usurpation of power and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. * * * In the next place, this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal part of the treaty, equally give the rule to the judicial tribunals." (Pp. 532–533.)

So, too, it has been held that the reservation of a privilege to sh and hunt on lands transferred by a contract ratified by a reaty does not prevent the prosecution of tribal Indians violating a conservation law on such lands, since the transfer does not xpressly or impliedly limit the right of the state to enact conervation measures.[52]

A somewhat different, although related, rule of treaty interpretation is to the effect that, since the wording in treaties was esigned to be understood by the Indians, who often could not ead and were not learned in the technical language. doubtful lauses are resolved in a nontechnical way as the Indians would ave understood the language.'

"*Also* see Chapter 15, sec. 5C. Agreements with Indians are interpreted according to the same principles as treaties. (See sec. 6. *infra*.) *Marlin v. Lewallen*, 276 U. *8. 58. 64 (1928).* Mr. Justice Stone said in the case of Carpenter v. *Shaw*, 280 U. S. 363 (1930):

> While in general tax exemptions arc not to be presumed and statutes tonferring them are to be strictly construed, *Heiner* v. *Colonial Trust* Co., 275 U. S. 232. the contrcy is the rule to be applied to tax exemptions secured *to* the Indians by agreement between them and the national government. *Choate* v. *Trapp*, *supra*, 675. Such provisions are to be liberally construed. Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall, "The language used in treaties with the Indians should never he construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import. as connected with the tenor of the treaty, they should be considered as used only io the latter sense." *Worcester* v. *The State of Georgia*. 6 Pet. 515, 582. See *The Kansas Indians* 5 Wall. 737. 760. And they must be construed not according tc their technical meaning but "in the sense in which they would naturally be understood hv the Indinns." *Jones* v. *Meehan*, 17E U. S. 1, 11. (Pp. 366–367.)

[46] *Winters v. United States. 207* U. S. 564 (1908) : 34 Op. A. G. 43(11925) : 6 Op. A. G. 658 (1854) ; *Worcester* v. *Georgia*. 6 Pet. 515. 58((1832). And see Art. 11 of Treaty of September 9. 1849, with Navajo 9 stat. 974.

[47] The *Kansas Indians*. 5 Wall. 737 (1666).

[48] The Act of April 27, 1904, 33 Stnt. 352 (Crow Reservation) interpreted in *Ash Sheep* Co. v. United *States*, 252 U. S. 159 (1920).

[49] See 32 Op. *A.* G. 586 (1921).

"*Starr* v. *Long Jim. 227* U. S. 613. 623 (1913).

[51] 179 U. S. 494 (1909). Also see *United States* v. *Minnesota, 270* U. S 181 (1926).

[52] *Kennedy* v. *Becker*, 241 U. S. 556 (1916). The clause "Also, excepting and reserving to them * * * the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed" (Treaty of eptember 15, 1797, with the Seneca Nation, 7 Stat. 601, 602) was nterpreted as

> * * * reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation. as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. (Pp. 563–564.)

Interpretations of other clauses are noted in sec. 4 of this Chapter nd Chapter 6, sec. 3B. and Chapter 14, sec. 7.

[53] *Fleming* v. *McCurfain*, 214 U. S. 56, 60 (1909) ; Chapter 8. sec. 91. ee *Worcester* v. *Georgia*, 6 Pet. 515, 551-553 (1832). In commenting n frequent mistakes one writer said:

> * * * As the Indians had no written language and few of the chiefs even had a knowledge of English, the negotiations were carried on generally through interpreters, many of whom were inefficient. The description of the lands ceded was also a source of misunderstanding. In the region east of the Mississippi. the geography was fairly well known, and it was possible to describe areas with a fair degree of accuracy by reference to the streams and ridges; the area west of the Mississippi, however, was little known when many of the treaties were made, and the descriptions were of the most indefinite character.
>
> The method of making the treaties varied according to the character of the commissioners negotiating for them. Some were manifestly fraudulent; notably the treaty with the Creeks made in 1825. Others were signed by the Indians practically under duress. For instance, George C. Sibley, factor at Fort Osage. gives the following account of the negotiations with that tribe in 1808:
>
> "* * * On the 8th of November. 1808. Peter Chouteau, the United States' agent for the Osnges. arrived at Fort Clark. On the 10th he assembled the Chiefs and warriors of the Great and Little Osages in council, and proceeded to state to them the substance of a treaty. which. he said. Governor Lewis had deputed him to offer the Osages. and to execute with them. Having briefly explained to them the purport of the treaty. he addressed them to this effect. in my hearing. and very nearly in the following words: 'You have heard this treaty explained to you. Those who now come forward and sign it, shall be considered friends of the United

The Supreme Court in the case of *Jones v. Meehan* [54] said :

> In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. (Pp. 10–11.)

These principles received many applications in decisions interpreting terms derived from private conveyances which were often used in treaties with the Indians.[55] For example, the word "grant" is not construed as an absolute fee simple, unless the treaty by some other words clearly indicates that the tribe so understood the nature of the conveyance."

The United States Supreme Court,[57] interpreting the clause,

> The United States shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it; * * * (P. 58.)

held that this did not create a trust for the individuals then comprising the nation and their respective descendants.

Although an interpretation of a treaty should be made in the light of conditions existing when the treaty was executed, as often indicated by its history before and after its making,[58] the exact situation which caused the inclusion of a provision is often difficult to ascertain.[59] New conditions may arise which could not be anticipated by the signatories to a treaty. A practical administrative construction of a treaty which has long been acquiesced in by congressional inaction is usually followed by the courts.[60]

States, and treated accordingly. Those who refuse to come forward and sign it shall be considered enemies of the United States, and treated accordingly.' The Osages replied in substance, 'that if their great American father wanted a part of their land he must have it, that he was strong and powerful, they were poor and pitiful, what could they do? he had demanded their land and had thought proper to offer them something in return for it. They had no choice; they must either sign the treaty or be declared *enemies* of the United States.' " Schmeckebier, The Office of Indian Affairs, Its History, Activities, and Organization (1927), pp. 59–60.

In discussing the status of Indian tribes during the Civil War, one writer stated :

> • • • Moreover, the Indians fought as solicited allies, some as nations, diplomatically approached. Treaties were made with them as with foreign powers and not in the farcical, fraudulent way that had been customary in times past. Abel, The American Indian as Slaveholder and Secessionist, vol. 1, The Slaveholding Indians (1915). p. 17.

[54] 175 U. S. 1. (1899).

[55] *Fleming* v. *McCurtain,* 215 U. S. 56, 59 (1909). For example, by Art. 4 of the Treaty of September 18, 1823, 7 Stat. 224, the United States promised to guarantee the signatory Florida tribes "the peaceable possession of the district of country" assigned them, and the Treaty of *September* 26, 1833, with the Chippewas and others. Art. 2. 7 Stat. 431. provides that in consideration of the cession of land, "the United States shall grant to the said United Nation of Indians to be' held as other Indian lands are held which have lately been assigned to emigrating Indians, a tract of country west of the Mississippi river, to be assigned to them by the President of the United States * • *."

[56] 3 Op. A. G. 322 (1838). And see Chapter 15, sec. 5C.

[57] *Fleming* v. *McCurtain,* 215 U. S. 56, 58–60 (1909).

[58] *Seminole Nation* v. *United States,* 78 C. Cls. 465, 458 (1933). Also see *Ayres* v. *United States,* 44 C. Cls. 48, 85, 95 (1908).

[59] 32 Op. A. G. 586 (1921). See *Fish v. Wise, 62* F. 2d 544 (C. C. A. 10, 1931), cert. den. 282 U. S. 903 (1931), in which the court declined to permit the testimony of interested witnesses 30 years, after its execution to thwart the object of an agreement as interpreted by the courts.

[60] *Hicks* v. *Butrick,* 12 Fed. Cas. No. 6458 (C. C. Kan. 1878). Also see *Ayres* v. *United States, supra,* fn. 58, and see Chapter 6, see. 7.

SECTION. 3. THE SCOPE OF TREATIES

In the Constitution [61] the President was given power to make treaties, with the advice and consent of the Senate, provided, two-thirds, of the Senators present concur.: The Supreme Court, in interpreting this provision, said : [62]

> * * * inasmuch as the power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States; (Holmes v. *Jennison et* al., 14 Peters, 569; 1 Kent, 166; 2 Story on the Constitution, § 1508; 7 Hamilton's Works, 591; Duer's Jurisprudence, 229.)

Again, the scope of this power was described by the Supreme Court in the case of *United States v. Forty-three Gallons of Whiskey:* [64]

> Besides, the power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy. * * * (P. 197.)

During the last period of treaty making, amendments by the Senate were frequent.[65]

A special limitation of the treaty-making power is that it cannot appropriate money.- Referring to-thisfact, the Circuit Court for the District of Michigan [67] said that a treaty

> * * * cannot-bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required. (P.346.)

[61] Treaties already made were recognized by. the Constitution. *Cherokee Nation v. Georgia,* 5 Pet. 1 (1831) ; *Worcester v. Georgia, 6* Pet. 616, 559 (1832).

[62] Art. 2, see. 2, cl. 2. An amendment to a treaty adopted by the Senate which did not receive Presidential approval and was not embodied in his proclamation cannot be regarded as part of the treaty. *New* York *Indians v. United States,* 170 U. S. 1, 23 (1898): Professor Willoughby writes of the early practice :

> During the first years under. the Constitution' the relations between the President and the Senate were especially close. In . 1'789 President Washington notified the Senate that he would confer with them with reference to a treaty with certain of the Indian tribes, and, on the next day, and again two days later, went with General Knox before that body for that purpose. Again, in 1790, President Washington in a written communication asked the advice of the Senate as to a new boundary treaty to be entered into with the Cherokee. Willoughby, The Constitutional Law of the United States, (2d ed. 1929) vol. I, p. 521.

[63] *Holden* v. *Joy,* 17 Wall. 211, 242–243 (1872).

[64] 93 U. S. 188 (1876). Also see *Geofroy* v. *Riggs, 133* U. S. 258, '266 (1890).

[65] See, for example, Treaty of February 18, 1867, with Sac and Fox Indians, 15 Stat. 495 ; Treaty of February 23,. 1867, with the Senecas, and others, Art. 40, 15 Stat. 513, 523.

[66] 24 Op. A. G. 623 (1903) ; 25 Op.'& G. 163 (1904).

[67] *Turner* v. *American Baptist Missionary Union,* 24 Fed. Cas. No. 14251 (C. C. Mich. 1852).

However, as Boyd has pointed out : [68]

> Although in regard to treaties calling for appropriations congress has seemed reluctant to act without making it plain that there was a discretionary right vested in congress in the premises, such appropriations have always been forthcoming.

Apart from this limitation, treaties may contain provisions which could not constitutionally be included in acts of Congress."

Within the broad scope of "all the usual subjects of diplomacy," the Federal Government and the Indian tribes adopted treaties covering not only all aspects of intercourse between Indians and whites but also some of the internal affairs of the tribes themselves. Among the most important of the subjects covered were : [70]

A. The international status of the tribe.
   1. War and peace.
   2. Boundaries.
   3. Passports.
   4. Extradition.
   5. Relations with third powers.

B. Dependence of tribes on the United States.
   1. Protection.
   2. Exclusive trade relations.
   3. Representation in Congress.
   4. Congressional power.
   5. Administrative power.
   6. Termination of treaty-making.

C. Commercial relations.
   1. Cessions of land.
   2. Reserved rights in ceded land.
   3. Payments and services to tribes.

D. Jurisdiction.
   1. Criminal jurisdiction.
   2. Civil jurisdiction.

E. Control of tribal affairs.

A. THE INTERNATIONAL STATUS OF THE TRIBE

Until the last decade of the treaty-making period, terms familiar to modern international diplomacy were used in the Indian treaties.

The United States sometimes guaranteed the integrity of the territory, of a nation ; [71] unprovoked war was "* * * repelled prosecuted and determined * * * in conformity with principles of national justice and honorable warfare" ; [72] some of the Creek Nation acted "contrary to national faith" and "suffered themselves to be instigated to violations 'of their national honor" ; [73] the United States desired that "* * * perfect peace shall exist between the nations or tribes * * *" named and the republic of Mexico."

Many provisions show the international status of the Indian tribes," through clauses relating to war, boundaries, passports estradition, and foreign relations.

1. *War and peace.*—The capacity of Indian tribes to make war was frequently recognized.[76] Most of the very early treaties were treaties of peace and friendship." and often provided for the restoration or exchange of prisoners,[78] and sometime for hostages until prisoners were restored.[79]

Indian tribes have also waged wars with states. The state of Georgia and the Creek Nation were engaged in several wars towards the close of the eighteenth century.[80]

The Supreme Court [81] commented on the status of Indian wars in these terms:

> * * * We recall no instance where Congress has made a formal declaration of war against an Indian nation or tribe; but the fact that Indians are engaged in acts of general hostility to settlers, especially if the Government has deemed it necessary to dispatch a military force for their subjugation, is sufficient to constitute a state of war. *Marks* v. *United States*, 161 U. 5.297. (P.267.)

A few treaties included mutual assistauce pacts. By Article 3 of the Treaty of January 9, 1739 with the Wlandot and others,[82] the parties agreed to give notice of war or any harm that might be meditated against the other party, "and do all in their power to hinder and prevent the same * * *." Article 2 of the Treaty of July 22, 1814, with the Wyandots and others [83] provided that:

> The tribes and bands abovementioned, engage to give their aid to the United States in prosecuting the war against Great-Britain, and such of the Indian tribes as still continue hostile; and to make no peace with either without the consent of the United States.

In some treaties the Indians agreed to suppress insurrections and permit the military occupation of their country by the United States,[84] or the establishment of garrisons or forts by the

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[68] Boyd, The Expanding Treaty Power, in Selected Essays on Constitutional Law, vol. 3, The Nation and the States. (1938), p. 410, 414.

[69] *Missouri* v. *Holland*, 252 U. S. 416 (1920). Also see Selected Essay on Constitutional Law', vol. 3, op. cit. fn. 68. PP. 397-435.

[70] For discussion of removal provisions see sec. 4E of this Chapter Relevant treaty provisions are discussed in other chapters.

[71] Treaty of September 17, 1778, with the Delawares, Art. 6, 7 Stat. 13 15; Treaty of August 9. 1814. with the Creeks, Art. 2. '7 Stat. 120, 121.

[72] Preamble to Treaty of August 9. 1814, with the Creaks, 7 Stat. 120

[73] Ibid.

[74] Treaty of August 24. 1835. with the Comanche and others. Art. 9 7 stat. 474. 475.

[75] Also see Chapter 14, see. 7.

[76] *E. g.*, Treaty of Dancing Rabbit Creek of September 27, 1830. with he Choctaw Nation, 7 Stat. 333. 334:

> * * * no war shall be undertaken or prosecuted by said Choctaw Nation but by declaration made in full Council, and to be approved by the U. S. unless it be in self-defence * * * (Art. V).

For a discussion see *Fleming* v. *McCurtain*, 216 U. S. 56, 60 (1909).

[77] See Treaty of September 17, 1778, with the Delaware Nation, 7 Stat. 3. "That a perpetual peace and friendship shall from henceforth take place * * *" (Art. 2). Later treaties "gave peace." That this was intended to cover "peace and friendship" is made clear in Treaty of January 9, 1789, with the Wiandots, etc., Art. XIII, 7 Stat. 28, which "renewed and confirmed the peace and friendship" entered into in an earlier treaty. That earlier treaty merely gave peace. Treaty of January 21, 1785, with the Wiandots, etc., Preamble, 7 Stat. 16. See, for example. 'A Treaty of Peace and Friendship" with the Sacs, May 13. 1816, 7 Stat. 141, and Treaty of September 20. 1816. with the Chickasaws, Art. 1, 7 Stat. 150.

[78] Treaty of November 28, 1785. with the Cherokees, Arts. 1 and 2. 7 Stat. 18 ; Treaty of July 2, 1791, with the Cherokees, Art. 3. 7 Stat. 39.

[79] Treaty of October 22, 1784. with the Sir Nations, Art. 1. 7 Stat. 15 ; Treaty of January 21, 1785, with the Wiandots and others, Art. 1. 7 Stat. 16.

[80] See 2 Op. A. G. 110 (1828).

[81] *Montoya* v. *United States*, 180 U. S. 261 (1901). See Chapter 14, sec. 3.

[82] 7 Stat. 28. See also Treaty of August 3, 1795, with the Wyandots. Art. 9. 7 Stat. 49 ; Treaty of November 28, 1785, with the Cherokees, Art. 11. 7 Stat. 18 ; Treaty of January 3, 1786, with the Choctaws, Art. 10, 7 Stat. 21 ; Treaty of January 31, 1786, with the Shawanoe Nation, Art. 4, 7 Stat. 26.

[83] 7 Stat. 118. Article 12 of the Treaty of November 10, 1808, with the Great and Little Osage Nations, 7 Stat. 107, provided :

> And the chiefs and warriors as aforesaid, promise and engage that neither the Great nor Little Osage nation will ever, by sale, exchange or as presents, supply any nation or tribe of Indians, not in amity with the United States, with guns, ammunitions or other implements of war.

Also see Treaty of July 30. 1825. with the Belantse-etoa or Minnetsaree Tribe. Art. 7, 7 Stat. 261.

[84] Treaty of March 21, 1866, with the Seminoles. Art. 1, 14 Stat. 755.

President; [85] or to prevent other tribes from making hostile demonstrations against the United States government or people.[86]

2. Boundaries."-Nations are usually separated by frontiers. Many treaties fixed the boundaries between the United States and Indian tribes [88] and between Indian tribes.[89] Old boundaries were. sometimes altered,- and during the removal period,[91] treaties generally described the new territory granted to the Indians.*

Frequently treaties prohibited the trespass [93] or settlement [94] of American citizens on Indian territory, unless licensed to trade."

Such provisions were supplemented by statutes.[96]

3. *Passports.*—Additional evidence of the national character of the Indian tribes appears in the provisions requiring passports for citizens or inhabitants of the United States to enter the 'domain' of an Indian tribe. The Treaty of August 7, 1790,[97] with the Creek Nation provided in Part:

> * * * Nor shall any such citizen or inhabitant go into the Creek country. without a passport first obtained from the Governor of some one of the United States, or the officer of the troops of the United States commanding at the nearest military post on the frontiers, or such other person as the President of the United States may, from time to time, authorize to grant the same.

Such provisions were supplemented by statutes which required citizens of the United States, as well as foreigners, to secure passports'before entering the Indian country, this statutory requirement being later waived in the case of citizens.

4. Extradition.-The surrender of fugitives from justice by one nation to another is usually covered by treaty; similarly with the Indians and the United States.

Some treaties required the Indian tribes to deliver up persons committing crimes who were on their land, to be punished by the United States.[99] A few treaties provided for the extradition of such persons for punishment by the states,[100] or by the "states or territory of the United States northwest of the Ohio." [101] A few early treaties provided for the punishment of United States citizens in the presence of the Indians.= A particularly broad provision in regard to extradition was contained in the Treaty of June 19, 1858, with the Sioux,[103] which requires the extradition of violators of treaties, laws, and regulations of the United States, or of the laws of the State of Minnesota. Other treaties provided that the Indians shall prevent fugitive slaves from taking shelter among them and shall deliver such fugitives to the Indian agent.[104]

5. *Relations with third powers.*—During the first few decades of the Republic, the political relations of many of the Indian tribes were not confined to the United States. As late as 1835 [105] the "friendly relations" existing between some Indian tribes and the Republic of Mexico,[106] the Republic of Texas," and among the several Indian tribes were formally recognized by the United States.[108]

B. DEPENDENCE OF TRIBES ON THE UNITED STATES

While the national character of Indian tribes has been frequently recognized in treaties [109] and statutes,[110] numerous treaty provisions establish their status as *dependent* nations."[111]

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[85] Treaty of June 16. 1802, with the Creek Nation, Act. 3, 7 Stat. 68; Treaty of November 10, 1808. with the Osages, Art. 1, 7 Stat. 107.

[86] Treaty of October 20, 1865, with the Dakotas, Art. 1. 14 Stat. 731.

[87] See Chapter 15, sec. 12. and sec. 4C of this Chapter.

[88] See Chapter 1, sec. 3. fn. 46. The primary purpose of some treaties was to establish boundaries, 5 Op. A. G. 31 (1848).

[89] Treaty of August 19, 1825, with the Sioux and others, 7 Stat. 272, Article 1 provided for peace between Sioux and Chippewas. Sacs and Foxes and the Ioways.

[90] Treaty of July 2. 1791. with the Cherokees, Art. 4, 7 Stat. 39; Treaty of October 17, 1802, with the Choctaws, Art. 3, 7 Stat. 73.

[91] See sec. 4E, *infra*. Also see Treaty of December 29, 1835. with the Cherokees, Art. 16, 7 Stat. 478. providing for removal in 2 years. Article 5 of the Treaty of January 19. 1832. with a band of the Wyandots, 7 Stat. 364, provides that the band may

> * * * remove to Canada, or to the river Huron In Michigan. where they own a reservation of land, or to any place they may obtain a right or privilege from other Indians to go.

[92] See sec. 4E. *infra:* and see Chapter 15. sec. 5.

"Article 3 of the Treaty of May 24, 1834, with the Cbickasaws, 7 Stat. 450, provides that

> * * * the agent of the United States. upon the application of the chiefs of the nation, will resort to every legal civil remedy, (at the expense of the United States.) to prevent intrusions upon the ceded country; * *.

Article 7 of the Treaty of March 6. 1861. with the Sacs and others, 12 Stat. 1171, provided that no nonmember of a tribe. except Government employees or persons connected with Government services, shall go on the reservation except With the permission of the agent or the Superintendent of Indian Affairs.

[94] Treaty of January 21, 1785. with the Wiandots and others, Art. 5, 7 Stat. 16; Treaty of July 2, 1791. with the Cherokee Nation, Art. 8, 7 Stat. 39. Also see sec. 4C *infra*.

[95] See Chapter 16.

[96] Act of May 19, 1796. 1 Stat. 469; also see Act of March 3. 1799, sec. 2, 1 Stat. 743 and Act of March 30. 1802, sec. 2, 2 Stat. 139. See fn. 47, Chapter 1.

[97] Art. 7, 7' Stat. 35. 37. See also Treaty of July 2. 1791, with the Cherokees. Art. 9. 7 Stat. 39.

[98] See Chapter 4. sec. 6.

[99] Article 9 of the Treaty of January 21, 1785, with the Wiandots and others, 7 Stat. 16, provides:

> If any Indian or Indians shall commit a robbery or murder on any citizen of the United States, the tribe to which such offenders may belong shall be bound to deliver them up at the nearest post, to be punished according to the ordinances of the United States.

Also see Treaty of September 27, 1830, with the Choctaws, Art. 8, 7 Stat. 333.

[100] Treaty of July 2. 1791, with the Cherokee Nation, Art. 11, 7 Stat. 39.

[101] Treaty of January 9, 1789. with the Wiandots and others, Art. 6, 7 Stat. 28.

[102] Treaty of November 28, 1785, with the Cherokees, Art. 7. 7 Stat. 18; Treaty of January 3, 1786. with the Choctaw Nation, Art. 6. 7 Stat. 21. Article 7 of the Treaty of May 15, 1846. with the Comanches and other tribes, 9 Stat. 844, provided that Indians guilty of insurrection shall be delivered up to the United States.

[103] Art. 6, 12 Stat. 1037. Also see Treaty of March 12, 1858, with the Poncas, Art. 7, 12 Stat. 997. For an example of a provision providing for extradition between tribes see Treaty of August 7, 1856. with the Creeks and Seminoles. Art. 14, 11 Stat. 699.

[104] Treaty of September 18, 1823. with the Floridas, Art. 7, 7 Stat. 224.

[105] Treaty of August 24, 1835, with the Comanche and others, 7 Stat. 474.

[106] *Ibid.*, Art. 9.

[107] Treaty of May 26, 1837, with the Kioway and others. 7 Stat. 533.

[108] See fn. 105, Art. 1. Indian tribes also made treaties with the states and.with the Confederacy. The Federal Government sometimes supervised state dealings with Indians. While states entered into treaties with Indians prior to the ratification of the Constitution (W. A. Duerr. Course of Lectures on the Constitutional Jurisprudence of the United States, 2d ed. (1856), p. 281), the Constitution forbids a state from entering "into any treaty, alliance, or federation * * *." (Art. 1, sec. 8. See *Coffee* v. *Groover*, 123 U. S. 1, 13–14 (1887).) Many states like New York entered into numerous treatles with Indian tribes subsequent to the Constitution with the consent of the United States. The Supreme Court in *Worcester* v. *Georgia*, 6 Pet. 515. 581. said: "Under the constitution no state can enter into any treaty: and it is believed, that. since its adoptiOn. no state, under its own authority, has held a treaty with the Indians." *Accord: Coffee* v. *Groover*, 123 U. S. 1. 13 (1887). See Chapter 8. sec. 11. On the view of the South that each state succeeded to the property rights of Great Britain and could treat with the Indians as it pleased, see *United States* v. *Swain County, N. C.*, 46 F. 2d 99 (D. C. W. D. N. C. 1930), rev'd sub nom. *United States* v. *Wright, et al.*, 53 F. 2d 300 (C.C. A. 8. 1931). cert. den. 285 U. S. 539.

[109] Treaty of January 21, 1785. with the Wiandots and others. Art. 2. 7 Stat. 16; Treaty of November 28. 1785. with the Cherokees. Art. 3. 7 Stat. 18; Treaty of January 3. 1786, with the Choctaw Nation, Art. 2. 7 stat. 21.

[110] See Chapter 14, sec. 3.

[111] The relationship of the United States to the Indians has been likened to suzerainty. Wilson and Tucker, International Law (1935), p. 63.

1. Protection.-For example, article 2 of the Treaty of August 13, 1803, with the Kaskaskias"' provides that—

> The United States will take the Kaskaskin tribe under their immediate care and patronage, and will afford them a protection as effectual against the other Indian tribes and against all other persons whatever as is enjoyed by their own citizens. And the said Kaskaskia tribe do hereby engage to refrain from making war or giving any insult or offence to any other Indian tribe or to any foreign nation, without having first obtained the approbation and consent of the United States. (P. 78.)

Similar provisions are contained in other treaties."'

In construing a similar provision, the Supreme Court said: [114]

> * * * By this treaty [Treaty of Hopewell] the Cherokees were recognized as one people, composing one tribe or nation, but subject, however, to the jurisdiction and authority of the Government of the United States, which could regulate their trade and manage all their affairs. (P. 295.)

Treaties with many of the other tribes left no doubt of the protectorate of the United States over them.[115]

In many respects this relationship is similar to that established in a great variety of cases between great powers and small, weak or backward states. Thus the limitations upon Indian law making and enforcement which appear in some treaties, may be likened to the limitations imposed upon the jurisdiction of certain oriental states, such as China, over the nationals of western countries residing within their territories."'

The practical inequality of the partiesmust be borne in mind in reading 'Indian treaties. It explains the presence of many clauses and the frequency with which similar or identical provisions appear in many Indian treaties during certain periods.[117]

2. *Exclusive trade relations.*[118]- The political dependence of the Indian tribes upon the Federal Government implied, and was implied by, their economic dependence. This economic dependence found expression in agreements by the tribes not to sell real or personal property or otherwise have commercial dealings with other sovereignties than the Federal Government or with their citizens or even with citizens Of the United States not authorized by the Federal Government to engage in such transactions.

In some cases, these undertakings were explicit, as in Article 10 of the Treaty of November 10, 1808,[119] whereby the Osages disclaimed all right to

> * * * cede, sell or in any manner transfer their lands to any foreign power, or to citizens of the United States or inhabitants of Louisiana, unless duly authorised by the President of the United States to make the said purchase or accept the said cession on behalf of the government.

In other cases, the exclusiveness of economic relations with the Federal Government was implicit in agreements that the United States "shall have the sole and exelusive right of regulating the trade with the Indians." [120]

Occasionally a tribe was given power to regulate trade and intercourse, "so far as may be compatible with the constitution of the United States and the laws made in pursuance thereof regulating trade and intercourse with the Indians," [121] or was empowered to veto the granting of a trading-license to trade within certain areas.[122]

Some treaties provided for the appointment of an agent to trade with the Indians,[123] and established trading posts- or designated places for trade.[125] Occasionally Indians were prohibited from trading outside the limits of the United States,[126] or were required to apprehend foreigners or other unauthorized persons coming "into their district of country, for the purposes of trade or other views," and to deliver them to federal officials.[127]

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[112] 7 Stat. 70.

[113] The Treaty of August 7, 1790, with the Creek Nation, Art. 2, 7 Stat. 35. provides that :

> The undersigned Kings, Chiefs, and Warriors, for themselves and all parts of the Creek Nation within the limits of the United States, do acknowledge themselves, and the said parts of the Creek Nation, to be under the protection of the United States of America, and of no other sovereign whosoever: and they also stipulate that the said Creek Nation will not hold any treaty with an individual State, or with individuals of any State. (P. 35.)

The Treaty of November 17, 1807, with the Ottoways and others, Art. 7, 7 Stat. 105, provides that:

> The said nations of Indians acknowledge themselves to be under the protection of the United States, and no other Power. and will prove by their conduct that they are worthy of so great a blessing.

Compare the following excerpt from the. first section of a law passed by the Georgia legislature on October 31, 1787, quoted in 2 Op. A. G. 110, 124 (1828) :

> * * * That from and immediately after the passing of this act, the Creek Indians shall be considered as out of the protection of this State; and it shall be lawful for the government and people of the same to put to death or capture the said Indians, wherever they may be found within the limits of the State * * *. (Pp. 124-125.)

[114] *Eastern Band of Cherokee Indians* v. *United States*, 117 U. S. 288 (1886).

[115] For example. Treaty of December 30, 1849, with the Utah Indians, Arts. 1 and 4. 9 Stat. 984.

[116] E. D. Dickinson, The Equality of States in International Law (1920), p. 224.

[117] For example Treaty of September 26. 1825. with the Ottoes and Missourias, 7 Stat. 277. and the Treaty of September 30. 1825, with the Pawnees, 7 Stat. 279; Treaty of October 28. 1867. with the Cheyenne-Arapnhoe Tribes, Art. 11, 15 Stat. 593. and Treaty of April 29, et. *seq.*, 1868. with the Sioux, Art. 11, 16 Stat. 635. Also see Chapter 8, sec. 11.

[118] *Cf.* Chapter 16.

[119] 7 stat. 107, 109. Also see Treaty of January 9, 1789, with the Wiandots and others, Art. 3. 7 Stat. 28; Treaty of September 21. 1832. with Sacs and Foxes, Art. 8, 7 Stat. 374. Treaty of May 15, 1846, with the Comanches and others, Art. 2, 9 Stat. 844.

[120] Treaty of November 28, 1785, with the Cherokees. Art. 9, 7 Stat. 18; Treaty of January 10, 1786, with the Chickasaws, Art. 8, 7 Stat. 24,

Article 1 of the Treaty of June 9, 1825, with the Poncar Tribe, 7 Stat. 247, contains another type of trade clause :

> * * * The said tribe also admit the right of the United States to regulate ail trade and intercourse with them. ,

Also see Treaty of January 3, 1786, with the Choctaw Nation, Arts. 8, 9, 7 Stat. 21.

Sometimes this power was granted for mutual considerations. Treaty of July 6, 1825, with the Chayenne Tribe, *Art. 4*, 7 Stat. 255; Treaty of July 30, 1825, with the Belantse-etoa or Minnetsaree Tribe, Art. 5, 7 Stat. 261.

The Treaty of December 30. 1849, Arts. 1 and 4, 9 Stat. 984, provided for the submission of the Utah Indians to the power and authority of the United States and extended to these Indians the trade and intercourse laws already applicable to other tribes. Also see Treaty of September 9, 1849, with the Navajos, Art. 3. 9 Stat. 974. Some of the treaties did not contain such sweeping provisions, but merely provided that "the United States agree to admit and licence traders to hold intercourse with said tribe [the signatory tribe], under mild and equitable regulations." Treaty of June 9, 1825, with the Poncar Tribe, Art. 4, 7 Stat. 247. For Cmilar provisions see Treaty of June 22, 1825, with the Teton, Yancton, ly ld Yanctonies bands of Sioux, Art. 4, 7 Stat. 250: and Treaty of July 5, at 825, with the Sioune and Ogallala Tribes of Sioux, Art. 4, 7 Stat. 252. at

[121] Treaty of A gust 7, 1856, with the Creeks and Seminoles, Art. 15, 11 Stat. 699. But St 1 Op. A. G. 645 (1824).

[122] Treaty of J y 19, 1866, with the Cherokees, Art. 8, 14 Stat. 799.

[123] *E. g.*, Trea of September 17. 1778. with the Delawares, Art. 5, ep

[124] Treaty of 27 uary 9. 1789, with the Wiandots and others, Arts. 10. 7 Stand 12. 7 St 428 ; Treaty of June 29, 1796, with the Creeks, Art. 3. 7 Stat. 56. See hapter 16.

[125] Treaty of Ju y 5. 1825, with the Sioune and Ogallala Tribes, Art. 3. 7 Stat. 252; Tre ty of July 6, 1825. with the Chayenne Tribe, Art. 4. 7 Stat. 255; Treaty of January 9, 1789. with the Wiandots and others. Art. 7, 7Stat. 8; Treaty of August 3, 1795, with the Wlandots and others, Art. 8, 7 tat. 49.

[126] Treaty of De ember 26, 1854, with the Nisquallys and others, Art 12. 10 stat. 1132.

[127] Treaty of Se otember 26, 1825. with the Ottoe and Missouri Tribe, Art. 4, 7 Stat. 277 ; Treaty of September 30, 1825, with the Pawnees, Art. 4, 7 Stat. 27

3. Representation *in* Congress.-Further light on the relations between the tribes and the Federal Government may be found in treaties which provided for the sending of Indian delegates to Congress'" This practice was explained in the report of the House Committee on Indian Affairs on the Trade and Intercourse Act of 1834.[129]

> The proposition for allowing Indians a delegate is not now for the first time brought forward.
>
> It was first suggested in 1778, and in the first treaty ever formed by the United States with any Indian tribe. The treaty with the Delawares of the 17th September, 1778, contains the following article: "And it is further agreed on, by the contracting parties, (should it, for the future, be found conducive for the interests of both parties,) to invite any other tribes who have been friends to the interests of the United States, to join the present confederation, and to form a State, whereof the Delaware nation shall be the head, and have a representative in Congress : Provided, Nothing contained in this article is to be considered as conclusive until it meets with the approbation of Congress."
>
> In the treaty of Hopewell, of 1785, is the following article: "Article 12. That the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress."
>
> In the treaty with the Choctaws, of September, 1830, they requested the privilege of having a delegate in the House of Representatives; and the treaty states that "the commissioners do not feel that. they can, under a treaty stipulation, accede to the request, but at their desire present it in the treaty, that Congress may consider of and decide the application."
>
> The proposition is now presented to Congress, with the decided opinion of the committee that it ought to receive a favorable consideration. (Pp. 21-22)

This recommendation was never effectuated.

4. Congressional power.-The extent to which Indian treaties conferred or confirmed congressional power to legislate over Indian affairs is the subject of a separate inquiry.[130] For the present it is sufficient to note that federal statutes have been extended over Indian country by the mere force of a treaty,[131] and that treaties sometimes provided for the creation of United States courts in the Indian country.[132] Thus, for example, Article 2 of the Treaty of October 4, 1842,[133] with the Chippewa Indians provides in part:

> The Indians stipulate * * *- that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until other, wise ordered by Congress.

Article 7 of the Treaty of ,October 2, 1863,[134] with the Chippewa Indians reads :

> • * * The laws of the United States now in force, or that may hereafter. be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country shall be in full force and effect throughout the country hereby ceded, until otherwise directed by congress or the President of the United States.

The Treaty of February 27, 1855,[135] with the Winnebago Indians provided :

> The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, shall continue and be in force within the country herein provided to be selected as the future permanent home of the Winnebago Indians, and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, in the Indian country, shall continue and be in force within the country herein ceded to the United States, until otherwise provided by Congress.

5. *Administrative* power.--The President was frequently granted considerable power by treaties. He was authorized to establish trading posts ;[136] military posts or garrisons on Indian lands ;[137] to designate places for trade ;[138] to appoint agents ;[139] to arbitrate claims of whites against Indians and Indians against whites ;[140] to arbitrate territorial[141] and other difficulties between tribes ;[142] to prescribe the time of the removal and settlement of Indians ;[143] to determine whether grants of land to certain Indians shall be conveyed ;[144] to dispose of certain reserved lands as he sees fit ;[145] to give reservations to the headmen of a tribe,'* or cattle,"' or agricultural aid ;[145] to extend to an Indian tribe "from time to time, such benefits and acts of kindness as may be convenient, and seem just and proper" to him ;[149] to decrease the amount of annuities in proportion to any annual decrease of the Poncas, and stop the payment of annuities in the event that satisfactory efforts to advance and improve their condition were not made ;[150] to approve attorneys chosen by the chiefs and headmen ;[151] to invest tribal money in stocks ;[152] to make payments to the relations and friends of Indians ;[153] and to receive complaints of injuries done by individuals to the Indians and use such prudent means "as shall be necessary to preserve the said peace and friendship" with an Indian tribe.[154]

Article 7 of the Treaty of September 30, 1809,[155] with the Delawares and others provided in part :

> * * * when any theft or other depredation shall be committed by any individual or individuals of one of the tribes above mentioned, upon the property of any individual or individuals of another tribe, the chiefs of the party injured shall make application to the agent of the

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[128] See sec. 4B. *infra.*

[129] H. RePt. No. 474. Comm. on Ind. Aff., 23 Cong.. 1st sess., May 20 1834.

[130] See Chapter 5. sec. 2.

[131] *Ex Parte Crow Dog. 109 U. S. 566. 567* (1883).

"Treaty of July 19, 1866. with the Cherokees, Art. 7, 14 Stat. 799.

[132] 7 Stat. 591.

[133] 13 Stat. 667. See Chapter 17. sec. 1. fn. 14.

[134] Art. 8. 10 Stat. 1172.

"Treaty of June 29, 1796. with the Creek Nation, Art. 3(a), 7 Stat. 56.

[137] Treaty of June 16, 1802, with the Creek Nation, Art. 3. 7 Stat. 68. Other federal officials like the Secretary of the Interior and the Commissioner of Indian Affairs were also granted power by treaty.

[138] Treaty of July 5, 1825. with the Sioune and Ogallala Tribes, Art. 4. 7 Stat. 252: Treaty of July 6, 1825, with the Chayenne Tribe, Art. 3. 7 Stat. 255.

[139] Treaty of October 20, 1832, with the Chickasaw Nation, Art. 9. 7 Stat. 381.

**Treaty of January 8. 1821. with the Creek Nation, 7 Stat. 217.

[141] Treaty of August 11, 1827, with the Chippewa and others, Art. 2, 7 Stat. 303.

[142] Treaty of September 21, 1833, with the Otoes and Missourias, Art. 8. 7 Stat. 429.

[143] Treaty of February 8, 1831. with the Menomonies, Art. 1, 7 Stat. 342.

[144] Treaty of September 17, 1818, with the Wyandots and others. Art. 3, 7 Stat. 178; Treaty of October 2, 1818, with the Potawatamie Nation, Art. 4, 7 Stat. 185.

[145] Treaty of June 2, 1825, with the Osages, Art. 10, 7 Stat. 240.

[146] Treaty of October 1, 1863, with the Western Band of Shoshonees. Art. 6, 18 Stat. 689.

[147] *Ibid.*, Art: 7.

[148] Treaty of September 24, 1819, with the Chippewa Nation, Art. 8, 7 Stat. 203.

[149] Treaty of June 6, 1825. with the Chayenne Tribe, Art. 2. 7 Stat. 255.

*Treaty of March 12, 1858. with the Poncas, Art. 2. 12 Stat. 997; also see Treaty of February 18, 1861, with the Arapahoe and Cheyenne Indians, Art. 4, 12 Stat. 1163.

[151] Treaty of November 5, 1857, with the Tonawanda Band of Senecas, Art. 5. 12 Stat. 991.

[152] *Ibid.*, Art. 6. Also see Treaty of October 1, 1859. with the Sacs and Foxes of the Mississippi, Art. 11, 15 Stat. 467. giving the Secretary power over tribal money.

[153] Treaty of November 1, 1837, with the Winnebago Nation, Art. 4, 7 Stat. 544. interpreted in 3 Op. A. G. 471 (1839).

[154] Treaty of August 3, 1795, with the Wyandots and others. Art. 9. 7 Stat. 49.

[155] 7 Stat. 113.