CHAPTER 4

FEDERAL INDIAN LEGISLATION

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While federal Indian legislation forms the basic material of all the substantive chapters that follow, it may serve a useful purpose to present at this point a brief panorama of the more important general statutes in the field that have been enacted during the century and a half which this book covers. Such a panorama may convey some sense of the dynamic development of Indian legislation, and throw some light upon the basic purposes that have dominated Indian legislation at different periods in our history. Such historial perspective is of particular usefulness in the field of Indian law. Solicitor Margold, in his introduction to the Statutory Compilation of the Indian Law Survey.' comments on "the importance of the factor of history in this field of law" in the following terms:

> During the century and a half that this compilation covers, the groups of human beings with whom this law deals have undergone changes in living habits, institutions, needs, and aspirations. far greater than the changes that separate from our own *age* the ages for which Hammurabi, Moses, Lycurgus, or Justinian legislated. Telescoped into a century and a half, one may find changes in social, political, and property relations which stretch over more than thirty centuries of European civilization. The toughness of law which keeps it from changing as rapidly as social conditions change in our national life is, of course, much more serious where the rate of social change is twenty times as rapid. Thus, if the laws governing Indian affairs are viewed as lawyers generally view existing law, without reference to the varying times in which particular provisions were enacted, the body of the law thus viewed is a mystifying collection of inconsistencies 'and anachronisms. To recognize the different dates at which various provisions were enacted is the first step towards order and sanity in this field.
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> Not only is it important to recognize the temporal "depth" of existing legislation, it is also important to appreciate the past existence of legislation which has, technically, ceased to exist. For there is a very real sense in which it can be said that no provision of law is ever completely wiped out. This is particularly true in the field of Indian law. At every session of the Supreme Court, there arise cases in which the validity of a present claim depends upon the question: What was the law on such and such a point in some earlier period? ' Laws long repealed have served to create legal rights which endure and which can be understood only by reference to the repealed legislation. Thus, in seeking a complete answer to various questions of Indian law, one finds that he cannot rest with a collection of laws "still in force," but must constantly recur to legislation that has been repealed, amended, or superseded.'

Let this serve at the same time as an apology for including in this work a chronicle of Indian legislation and as an explanation of the rudimentary character of this chronicle. To analyze the legal problems raised by each of the statutes, noted is, after all, the main task of the rest of the book. For our present purposes it suffices simply to note what legislative problems in the field of Indian law have been faced in each decade of our national existence.[2]

[1] U. S. Dept. of the Interior. Office of the Solicitor, Statutory Compilation of the Indian Law Survey: A Compendium of Federal Laws and Treaties Relating to Indians, edited by Felix S. Cohen. Chief, Indian Law Survey, with a Foreword by Nathan R. Afargold, Solicitor, Department of tbe Interior (1940). 46 vols.

[2] On the interpretation of Indian statutes, see Chapter 8, sec. 9I.

SECTION 1. THE BEGINNINGS: 1789

During the first year of the first Congress. and indeed in the space of some 5 weeks, there were enacted four statutes which established the outlines of our Indian legislation for many years to come. The first of these was the Act of August 7, 1789.^3 establishing the Department of War, which provided that that Department should handle, in addition to its primary military affairs "such other matters * * * as the President of the United States shall assign to the said department * * * relative to Indian affairs." We have elsewhere noted how the authority thus conferred was later transferred to the Department of the Interior.[4] While the days have long passed when our military relations with the Indian tribes were the most

[3] 1 Stat. 49.

[4] See Chapter 2, sec. 1B, and Chapter 8, sec. 10A(3).

important aspect of Indian affairs' to the Federal Government, the types of administrative control established under the Act of August 7, 1789, still play a large part in Indian law.

The second statute ^5 referring to Indians enacted by the new Congress provided for the government of the Northwest Territory and in effect reenacted, with minor amendments, the Northwest Ordinance of 1787 containing the tallowing article on Indian affairs:.

> ART. 3. * * * The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent.; and id their property, rights, 'and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from, time to time be made, for preventing wrones being done to them, and for preserving peace and friendship with them.

This represented the first of many measures by which Congress, in administering the government of the territories, legislated over Indian affairs with "plenary" authority. Congres legislated for the territories with the same latitude' that the states enacted legislation to govern human conduct within state boundaries.[6]

The statute dealing with the Northwest Territory was followed by statutes establishing, territorial *or* state governments for 35 states admitted to the Union after the adoption of the Constitution. 'In these 35 states were located nearly all the Indians with whom the federal law on Indian affairs now deals. Here perhaps is one clue to the frequent use of the concept of "plenary power" vested in the Federal Government over Indian affairs.

The third act of Congress dealing with Indian affairs was the Act of August 20, 1789,[7] which appropriated a sum not exceeding $20,000 to defray '"the expense of negotiating and treating with the Indian tribes' and provided for the appointment of commissioners to manage such negotiations and treaties, This stat-' ute thus marks the beginning of a mode of dealing with Indian affairs that was to remain the primary mode of governmental action in this field for many decades to come.[8]

The fourth and last of the statutes enacted by Congress at its first session which dealt with Indian affairs was the Act of September 11, 1789,[9] which specified salaries to be paid to the "superintendent of Indian affairs in the northern department," a position held *ex officio* by the governor of the western territory.

Noteworthy is the fact that of the first 13 statutes enacted by the first Congress of the United States, four dealt primarily or partially with Indian affairs. In these four statutes we find the essential administrative machinery for dealing with Indian affairs established. and its expenses provided for. And we find four important sources of federal authority in dealing with Indian matters invoked: The power to make war (and, presumably, peace); the power to govern territories: the power to make treaties, and the power to spend money."

[5] Act of August 7, 1789, 1 Stat. 50; For a discussion of colonial dealings with the Indians concerning land, see Chapter 15, see. 9.
[6] See Chapter 5, sec. 5.
[7] 1 stat. 54.
[8] See Chapter 3.
[9] 1 Stat. 67.
[10] Also see Chapter 5, sec. 1.

SECTION 2. LEGISLATION FROM 1790 TO 1799

The first act of Congress specifically defining substantive rights and duties in the field of Indian affairs was the Act of July 22, 1790,[11] significantly titled, "An Act to regulate trade and intercourse with the Indian tribes." The significance of the title becomes clear when one notes that the act deals not only with the conduct of licensed traders, but also with the sale of Indian lands, the commission 'of crimes and trespasses against Indians and the procedure for punishing white men committing offenses against Indians. It seems fair to infer that the legislators who adopted this statute thereby gave a practical and contemporaneous construction to the clause of the Federal Constitution which gives to Congress

> * * * the power to regulate commerce * * * with the Indian tribes * * *.[12]

The Act of July 22, 1790, contained seven sections. The first three provided that trade or intercourse with the Indian tribes should be limited to persons licensed by the Federal Government; that such licenses might be revoked for violations of regulations governing such trade, prescribed by the President, and that persons trading without licenses should forfeit all merchandise in their possession."

Section 4 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 preemption 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."

Sections 5 and 6 dealt with crimes and trespasses committed by non-Indians agalnst Indians within "any town, settlement or territory belonging to any nation or tribe of Indians * * *." Such offenders were to be subject to the same punishment to which they would be subject if the offenses had been committed against a non-Indian within the jurisdiction of the state or district from which the offender came, and the procedure applicable in cases involving crimes against the United States was made applicable to such offenders.[15]

The final section declared that the act should "be in force for the term of two years, and from thence to the end of the next session of Congress, and no longer."

It may be noted that each of the substantive provisions of the first Indian trade and intercourse act fulfilled some obligation assumed by the United States in treaties with various Indian tribes. In its first treaty With an Indian tribe, the Treaty of September 17, 1778, with the Delaware Nation,' the United States had undertaken to provide for the accommodation of the Delawares—

> * * * a well-regulated trade, under the conduct of an intelligent, candid agent, with an adequate sallery, one more influenced by the love of his country, and a constant attention to the duties of his department by promoting the common interest, than the sinister purposes of converting and binding all the duties of his office to his private emolument * * *. (Art. 5.)

Similar undertakings, providing for congressional action in the regulation of traders, had been undertaken in various other

[11] C. 33. 1 stat. 187.
[12] Art. 1 sec. 8 cl. 3. Also see Chapter 5, sec. 3.
[13] See Chapter 16. sec. 1.
[14] See Chapter 16, sec. 18C.
[15] See Chapter 18. see. 5.
[16] 7 stat. 13.

treaties which, by 1790, had been concluded with most of the tribes then within the boundaries of the United States.[17]

Section 4, limiting land sales to the United States, also supplemented provisions contained in various treaties."

The provisions with reference to the punishment of non-Indians committing crimes or trespasses within the territory of the Indiau tribes likewise carried out obligations which had been assumed as early as September 17. 1778, in the treaty of that date with the Delaware Nation." providing for fair and impartial trials of offenders against Indians,

> • • • The mode of such tryals to be hereafter fixed by the wise men of the United States in Congress assembled. with the assistance of such deputies of the Delaware nation, as may be appointed to act in concert with them in adjusting this matter to their mutual liking.

Similar provisions promising punishment of white offenders as a substitute for other methods of redress employed by Indian tribes had been included in practically all the treaties which were in force when the first Indian trade and intercourse act was adopted.[20]

The foregoing analysis of statutes as fulfillments of treaty obligations would probably. apply equally to each of the later Indian trade and intercourse acts, culminating in the permanent Act of June 30, 1834.[21]

Despite the caution of Congress in making the first Indian trade and intercourse act a temporary measure, the substance of each of the provisions contained in this act remains law to this day.

Minor amendments were made in the language of these provisions by the second Indian trade and intercourse act, that of March 1, 1793." This act also introduced a number of new provisions which have for the most part found their way into existing law. A prohibition against settlement on Indian lands and authority to the President to remove such settlers are contained in section 5 of this act. Section 6 deals with horse thieves and horse traders. Section 7 prohibits employees in Indian affairs from having "any interest or concern in any trade with the Indians" [22] Section 9 provides for the furnishing of various goods and services to the Indian tribes. Section 13 specifies that Indians within the jurisdiction of any of the individual states shall not be subject to trade restrictions.

This act, like the preceding act, was declared a temporary measure.[24]

The Act of May 19, 1796 [25] constitutes the third in a series of trade and intercourse acts. Generally it follows the 1793 act, with minor modifications. It adds a detailed definition of Indian country.[26] It adds a prohibition against the driving of livestock on Indian lands.[27] It requires passports for persons travelling into the Indian country.[28]

The 1796 act contained, for the first time, a provision (sec. 14) for the punishment of any Indian belonging to a tribe in amity with the United States who'shall cross into any state or territory and there commit any one of various listed offenses.[29] In the first instance, application for "satisfaction" was to be made to the nation or tribe to which the Indian offender belonged; If such application proved fruitless, after a reasonable waiting period fixed at 18 months, the President of the United States was authorized to take such measures as might be proper to obtain satisfaction for the injury. In the meantime, the injured party was guaranteed "an eventual indemnification" if he refrained from "attempting to obtain private satisfaction or revenge * • • " The only specific measure of redress which the President was authorized to take under this act was the withholding of annuities due to the tribe in question.

The fourth and last of the temporary Indian trade and inter course acts was the Act of March 3, 1799.[30] This act made only minor changes in the provisions of the 1796 act.

Apart from the four temporary Indian trade and intercourse acts passed during the decade from 1790 to 1799, the only statute of special importance was the Act of April 18, 1796,[31] which established Goveroment trading houses with the Indians, under the control off the President of the United States. While the institution of the Government, trading house was abolished in 1822,[32] some of the provisions designed to assure the honesty of employees of these establishments have been carried over into the law which now governs Indian Service, employees.[33] Control of the Government trading houses became the most important administrative function of the Federal Government in the field of Indian affairs, and when the Government trading houses were finally abolished it was only natural that the superintendent of Indian trade in charge of these establishments became the first head of the Bureau of Indian Affairs.[34]

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[17] *E. g.*, Article 9 *of* Treaty of *November* 28, 1785, with the Cherokees, 7 Stat. 18, 20: Art. 8 of Treaty of January 3, 1786. with the Choctaw Nation. 7 Stat. 21. 22; Art. 8 of Treaty of January 10, 1786, with the Chickasaws, 7 Stat. 24. 25 ; Art. 7 of Treaty of January 9, 1789, with the Wiandot, Delaware. Ottawa, Chippewa, Pattawattima, and Sac Nations, 7 Stat. 28, 30. See Chapter 3, sec. 3B(2).

[18] Art. 3 of Treaty of January 9, 1789, with the Wiandots and others had provided :

> • • But the said nations, or either of them, shall not be at liberty to sell or dispose of the same, or any part thereof, to any sovereign power, except the United States ; nor to the subjects or citizens of any other sovereign power. nor to the subjects or citizens of the United States.

The following treaties contained specific guarantees against settlement on Indian lands by citizens of the United States: Art. 5 of Treaty of January 21. 1786. with the Wiandot, Delaware, Chlppawa and Ottawa Nations. 7 Stat. 16. 17; Art. 5 of Treaty of November 28, 1785, with the Cherokees, 7 Stat. 18, 19 ; Art. 4 of Treaty of January 3, 1786. with the Choctaw Nation, 7 Stat. 21.22 : Art. 4 of Treaty of January 10, 1786, wlth the Chickasaws, 7 Stat. 24. 25; Art. 7 of Treaty of January 31, 1786, with the Sbawanoe Nation, 7 Stat. 26, 27. Other treaties provided generally for tbe protection of Indian lands.

[19] Art. 4. 7 Stat. 13. 14.

[20] See treatics cited in fns. 17 and 18. *supra.*

[21] 4 Stat. 729. See Chapter 8. sec. 3.

[22] 1 stat. 329.

[23] See Chapter 2, sec. 3B.

[24] Sec. 15. 1 Stat. 329, 332.

[25] 1 Stat. 469.

[26] Sec. 1. See Chapter 1. sec. 3.

[27] Sec. 2 See Chapter 15. sec. 10.

[28] Sec. 3 . See Chapter 3. sec. 3A(5) ; Chapter 8, sec. 10A(3).

[29] See Chapter 18. see. 4.

[30] C. 46. 1 Stat. 743.

[31] 1 Stat. 4.72.

[32] Act Of May 6, 1822. 3 Stat. 679.

[33] See Act of April 18, 1796. sec. 3. 1 Stat. 452. followed In Act of June 30. 1834, sec. 14. 4 Stat. 735, 738, R. S. § 2078, 25 U. S. C. 68. And see Chapter 2. sec. 3B.

[34] See Chapter 2 . sec. 1A

SECTION 3. LEGISLATION FROM 1800 TO 1809

The most important legislation enacted by Congress during the first decade of the nineteenth century was the permanent trade and intercourse act of March 30, 1802.[35] The four temporary Indian trade and intercourse acts adopted in 1790, 1793, 1796, and 1799 had, by a process of trial and error, marked out the main outlines of federal Indian law, and the Act of 1802 made few substantial changes in reducing to permanent form the provisions of the Act of March 3, 1799.[36] The only significant addition made by the 1802 act appears in section 21 of that act, which deals with the liquor problem in these terms :

> • • • That the President of the United States be authorized to take such measures. from time to time, as to him may appear expedient to prevent or restrain the vending or distributing of spirituous liquors among all or any of the said Indian tribes, any thing herein contained to the contrary thereof notwithstanding.

The circumstances under which this provision, urged by various Indian chiefs, was recommended by President Jefferson and enacted by Congress are elsewhere noted."

Apart from the permanent Indian trade and intercourse act, two legislative enactments during the decade from 1800 to 1809 deserve notice. Both of them imposed upon the Indian Service marks of its military origin which endured for more than a century.

The first of these statutes was the Act of January 17, 1800,[38] entitled "An Act for the preservation of peace with the Indian tribes." This act was apparently designed to prevent the European belligerents of that time, from inciting the Indian tribes on our western frontier to attacks against the United States. The Erst section of this act provides:

> • • * That if any citizen or other person residing within the United States, or the territory thereof, shall send any talk, speech, message or letter to any Indian nation, tribe, or chief, with an intent to produce a contravention or infraction of any treaty or other law of the United States, or to disturb the peace and tranquility of the United States, he shall forfeit a sum not exceeding two thousand dollars, and be imprisoned not exceeding two 'years.

After a long and checkered career, this provision of law [39] was repealed by the Act of May 21, 1934.[40]

Section 2 of this act prescribed penalties for the carrying or delivering of messages of the character prescribed by section 1 "to or from any Indian nation, tribe, or chief * * *."[41]

The third section of this act[42] dealt with seditious correspondence with foreign nations respecting Indian affairs, and also contained the following language which, considered apart from the circumstances of its enactment, imposed severe limits upon criticism of the Indian Service:

> * * * or in case any citizen or other person shall alienate, or attempt to alienate the confidence of the Indians from the government of the United States, or from any such persen or persons as are, or may be employed and entrusted by the President of the United States, as a commissioner or commissioners, agent or agents, in any capacity whatever, for facilitating or preserving a friendly intercourse with the Indians, or for managing the concerns of the United States with them, he shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

Another statute enacted by Congress during this decade which left a mark upon the Indian Service for many years was the Act of May 13, 1800,[43] which provided for the issuance of rations out of army provisions to Indians visiting the military posts of the United States. This is the first congressional statute supporting the system of inducing peace by paying tribute which characterized Indian Service policy for many years.[44]

The same statute likewise provided for repaying to Indian delegates the expense of their visits to Washington.[45]

During the decade from 1800 to 1809, there was no further Indian legislation of general and permane n t significance. Appropriation acts, acts extending Indian trading house legislation, legislation for the establishing of new states and territories, measures for executing treaty provisions, and laws dealing with the disposition of lands acquired from .the Indians by treaty make up the bulk of the legislation enacted during this decade in the field of Indian affairs.

[35] 2 stat. 139.
[36] C. 48, 1 Stat. 743. See sec. 2, *supra*.
[37] See Chapter 17, sec. 1.
[38] 2 Stat. 6.
[39] The provision in question was incorporated in the Act of June 30. 1834, sec. 13, 4 Stat. 729, 731, and became R. S. § 2111 and 25 U. S. C. 171.
[40] 48 Stat. 787. See 25 U. S. C. A. 171 (Supp.).
[41] Sec. 2, incorporated in Act of June 30, 1834, sec. 14, 4 Stat. 729, 731. R. S. § 2112, 25 U. S. C. 172; repealed by Act of May 21, 1934, 48 Stat. 787.
[42] Incorporated in Act of June 30, 1834, sec. 15, 4 Stat. 729, 731, R. S. § 2113, 25 U. S. C. 173, repealed by Act of May 21, 1934, 48 Stat. 787. On recent uses of this statute, prior to its repeal, see Chapter 8, sec. 10A(2).
[43] C. 68, 2 Stat. 85; incorporated in Act of June 30, 1934, sec. 16, 4 Stat. 735, 738, R. S. § 2110, 25 U. S. C. 141.
[44] See Chapter 2, sec. 2C; Chapter 12, secs. 1, 4.
[45] Sec. 2.

SECTION 4. LEGISLATION FROM 1810 TO 1819

Congressional legislation on Indian affairs in the decade from 1810 to 1819 continues the trends noted in the preceding decade. Two statutes of special significance deserve to be noted.

The Act of March 3, 1817,[46] established for the first time a system of criminal justice applicable to Indians as well as to non-Indians within the Indian country. The act provided that Indians or other persons committing offenses within the Indian country should be subject to the same punishment that would be applicable if the offense had been committed in any place under the exclusive jurisdiction of the United States. Federal courts were given jurisdiction to try such cases. The statute contained an important proviso (sec. 2), safeguarding the criminal jurisdiction of the Indian tribes:

> * • * nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offence committed by one Indian against another, within any Indian boundary.

The proviso, as well as the main provision of the statute, have found their way, with some modifications, into existing law."

[46] C. 92, 3 Stat 333.

• 7 See 26 U. S. C. 217, 218. Note, however, that the historical notes to these sections in the U. S. Code and the U. S. Code Annotated fail to show their actual origin. For further discussion of the significance of these sections, see Chapter 5, sec. 1 ; Chapter 7, sec. 9 ; Chapter 18, secs. 3, 4.

A second important statute adopted during this decade was the Act of March 3, 1819^48 entitled "An Act making provision for the civilization of the Indian tribes adjoining the frontier settlements."

Section 1 of this act, which is law to this day,[49] provides:

> * * * That for the Purpose of providing against the further decline and final extinction of the Indian tribes, adjoining the frontier settlements of the United States, and for introducing among them the habits and arts of civilization, the President of the United States shall be, and he is hereby authorized, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, to employ, capable persons of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic, and performing such other duties as may be enjoined, according to such instructions and rules as the President may give and prescribe for the regulation of their conduct, in the discharge of their duties.

Section 2 of this act established a permanent annual appropriation of $10,000 for carrying out the provisions of section 1.[50]

[48] C. 85. 3 Stat. 516.
[49] R. S. § 2071, 25 U. S. C. 271.
[50] See Chapter 12, sec. 2 for a discussion of the use made of these appropriations.

SECTION 5. LEGISLATION FROM 1820 TO 1829

By the Act of May 6, 1822,[51] the United States trading houses with the Indian tribes were abolished. On the same day a law was enacted specifying the conditions under which licensed Indian traders were to operate.[52] The act imposed various conditions upon the activities of licensed traders and conferred broad authority over such traders upon administrative officials. The act also provided (see. 3) for the regular settlement of accounts of Indian agents Section 4 of this act established a rule, which is still law, which in its present code form declares:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.[53]

Apart from the foregoing general acts, treaties and legislation providing for the enforcement of treaty provisions continued to represent the main growing point of Indian law.

[51] 3 Stat. 679.
[52] Act of May 6. 1822, c. 58, 8 Stat. 682.
[53] 25 U. S. C. 194, derived from Act of June 30, 1834. sec. 22, 4 Stat 729, 733; R. S. § 2126.

SECTION 6. LEGISLATION FROM 1830 TO 1839

The decade of the 1830's is marked by five statutes of great importance, the Act of May 28, 1830, governing Indian removal, the Act of July 9, 1832, establishing the post of Commissioner of Indian Affairs, the Indinn Trade and Intercourse Act of June 30, 1834, the act of the same date providing for the organization of the Department of Indian Affairs, and the Act of January 9, 1837, regulating the disposition made of proceeds of ceded Indian lands.

The first of these acts [54] established in general terms the policy, which had theretofore been worked out in several specific cases,^55 of exchanging federal lands west of the Mississippi for other lands then held by Indian tribes. The act provided that such exchanges should be voluntary; that payment should be made to individuals for improvements relinquished, and that suitable guaranties should be given to the Indians as to the permanent character of the new homes to which they were migrating.

Section 3 provided:

> * * * That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure nnd guaranty to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant, to be made and executed to them for the same: *Provided always,* That such lands shall revert to the United States, if the Indians become extinct, or abandon the same.

Sections 6 and 7 defined the administrative authority of the President and the duty of protection owing to migrating tribes in the following terms:

> SEC. 6. * * * That it shall and may be lawful for the President to cause such tribe or nation to be protected at their new residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever.
>
> SEC. 7. * * * That it shall and may be lawful for the President to have the same superintendence and care over any tribe or nation in the country to which they may remove, as contemplated by this act. that he is now authorized to have over them at their present places of residence: *Provided,* That nothing in this act contained shall be construed as authorizing or directing the violation of any existing treaty between the United Stntes and any of the Indian tribes.[56]

The Act of July 9, 1832,^57 entitled "An Act to provide for the appointment of a commissioner of Indian Affairs, and for other purposes," represents the first legislative authorization for the post of Commissioner of Indian Affairs. Its significance in the development of Indian administration has been discussed elsewhere.[58]

Section 1 of this act,[59] which is still invoked as a basis for the administrative authority of the Commissioner of Indian Affairs, declared:

> * * * That the President shall appoint, by and with the advice and consent of the Senate, a commissioner of Indian affairs, who shall, under the direction of the Secretary of War, and agreeably to such regulations as the President may, from time to time, prescribe, have the direction and management of all Indian affairs, and of all matters arising out of Indian relations, and shall receive a salary of three thousand dollars per annum.

Other sections of the act dealt with the appointment of clerks to the office of the Commissioner of Indian Affairs, the supervision of accounts by the Commissioner, and the discontinuance of

[54] Act of May 28. 1830. 4 Stat. 411. Secs. 7 and 8 were later incorporated in R. S. § 2114. 25 U. S. C. 174.
[55] See Chapter 2. sec. 2A; Chapter 8, sec. 4E.
[56] R. S. § 2114. 25 U. S. C. 174.
[57] C. 174. 4 Stat. 564.
[58] See Chapter 2. sec. 1B.
[59] R. S. §§ 462–463, 25 U. S. C. 1–2. See Chapter 5. sec. 6.

"* * * the services of such agents, subagents, interpreters, and mechanics, as may from time to time become unnecessary, in consequence of the emigration of the Indians, or other causes" [60] --an illuminating commentary upon the aura of impermanence which even then surrounded the treatment of the Indian problem.

Included in this act was a general prohiblion against the introduction of ardent spirits into the Indian country,[61] which is part of the law to this day.

June 30, 1834, is perhaps the most significant date in the history of Indian legislation. On this day there were enacted two comprehensive statutes which, in large part, form the fabric of our law on Indian affairs to this day. Of these two statutes one stands as the final act in a series of acts "to regulate trade and intercourse with the Indian tribes." [62] The other, approved on the same day, is entitled "An Act to provide for the organization of the department of Indian Affairs." [63] The two statutes" *were* dealt with in a single report of the House Committee on Indian Affairs,[64] which contains an illuminating analysis of the entire legislative situation with respect to Indian affairs.

The difficulties and the general objectives in terms of which this legislation of 1834 was drafted are suggested in the following statements of the Committee report:

> The committee are aware of the intrinsic difficulties of the subject--of providing a system of laws and of administration, simple and economical, and, at the same time, efficient and liberal--that shall be suited to the various conditions and relations of those for whose benefit it is intended; and that shall, with a due regard to the rights of our own citizens, meet the just expectations of the country in the fulfillment of its proper and assumed obligations to the Indian tribes. Yet, so manifestly defective and inadequate is our present system, that an immediate revision seems to be imperiously demanded. What is now proposed is only an approximation to a perfect system. Much is necessarily left for the present to Executive discretion, and still more to future legislation.[65]
>
> The Indians, for whose protection these laws are proposed, consist of numerous tribes, scattered over an immense extent of country, of different languages, and partaking of all the forms of society in the progression from the savage to an approximation to the civilized. With the emigrant tribes we have treaties, imposing duties of a mixed character, recognising them in some sort as dependent tribes, and yet. obligating ourselves to protect them, even against domestic strife, and necessarily retaining the power so to do. With other tribes we have general treaties of amity: and with a considerable number we have no treaties whatever. To most of the *tribes* with whom we have treaties, we have stipulated to pay annuities in various forms. The annexed tables (A, B, I, J, K, L) exhibit a condensed view of these relations, and will assist in determining the nature and extent of the legislation necessary for the Indian Department. These, though a part of the consideration of the cessions of land, are intended to promote their improvement and civilization, and which may now be considered as the leading principle of this branch of our legislation.[67]

The Indian Trade and Intercourse Act of 1834 followed in many respects the similar act of March 30, 1802,[68] and incorporated provisions of other acts which have already been noted.[69]

By its first section it substituted a general definition of Indian country for the definition by metes and bounds that had been contained in the 1802 act and that had become largely obsolete as a result of treaty cessions.[70]

Sections 2 to 5 of the act deal with licensed traders and impose a more detailed system of control over such traders than had been previously in force. These controls constitute, in large part, the present law on the subject and are elsewhere analyzed.[71] The purpose of the legislation with respect to control of traders is set forth in the following terms in the House Committee report:

> The Indian trade, as heretofore, will continue to be carried on by licensed traders. The Indians do not meet the traders on equal terms, and no doubt have much reason to complain of fraud and imposition. Some further provision seems necessary for their protection. Heretofore, it has been considered that every person (whatever might be his character) was entitled to a license on offering his bond. It has been the source of much complaint with the Indians. Power is now given to refuse licenses to persons of bad character, and for a more general reason, "that it would be improper to permit such persons to reside in the Indian country;" and to revoke licenses for the same reasons. The committee are aware that this is granting an extensive power to the agents, and which may be liable to abuse; yet, when it is recollected that the distance from the Government at which the traders reside, will prevent a previous consultation with the head of the department; that what is necessary to be done should be done promptly; that the agents act under an official responsibility; that they are required to assign the reasons of their conduct to the War Department; that an appeal is given to the party injured; and that the dismissal of the agent would be the consequence of a wanton act of injustice, the rights of the traders will be found as well secured as is compatible with the security of the Indians.
>
> The report of the commissioners, appended to this report, contains a detailed statement of the exorbitant prices demanded by the Indian traders. As a remedy in part, they rec ommend, first, a substitution of goods for money in the payment of annuities. This suggestion has been adopted so far as to authorize it to be done by the consent of the tribe. In addition to the direct benefit, it will furnish them with something like a standard of the value of goods, and enable them to deal on more equal terms with the Indian traders. * * *[72]

Section 6 of the act relaxes the prior requirement that all persons going into the Indian country must bear a passport, so as to make the requirement applicable only to foreigners.[73]

Sections 7 to 12 of the 1834 Trade and Intercourse Act reenact with minor modifications provisions of the 1802 Trade and Intercourse Act.[74]

Sections 13 to 15 of the act reenact provisions of the Act of January 17, 1800,[75] relating to subversive activities among Indian

[60] Sec. 5. R. S. § 2073, 25 U. S. C. 65.
[61] Sec. 4. R. S. § 2139. 25 U. S. C. 241. See Chapter 17. sec. 3. fn. 35.
[62] 4 stat. 729.
[63] 4 Stat. 735.
[64] This report also dealt with a third proposed bill, relating to the tribes of the proposed "western territory." which was never enacted.
[65] H. Rept. No. 474, 23d Cong., 1st sess. (May 20, 1834).
[66] *Ibid.*, p. 1.
[67] *Ibid.*, p. 2.
[68] 2 Stat. 139. See sec. 3, *supra.*
[69] *See* fns. 38, 46, 51, *supra.*
[70] Act of June 30, 1834, 4 Stat. 729. For a discussion of the significance of the 1834 definition see Chapter 1, sec. 3.
[71] See Chapter 16.
[72] H. Rept., op. cit., p. 11.
[73] "Other nations have excluded foreigners from trade and intercourse with the Indians within their territories. We have adopted the same policy as the only one safe for us, or beneficial to the Indians. The provision is therefore continued, that no foreigner shall enter the Indian country without a passport. But it is not deemed necessary that all the restrictions of the former laws as to our own citizens should be retained. Of them, as mere travellers in or through the Indian country. we ought not to have the same, or even any jealousy. And so frequent and necessary are the occasions of our citizens to pass into the Indian country, that of them no passports will be required for such objects. Such has been the inconvenience of obtaining passports, that, for years, the provision in the act of 1802, requiring them, has been a dead letter. If, however, our citizens desire to *trade* or *to* reside in the Indian country for any purpose whatever, a license for that particular purpose is required." H. Rept., op. *cit.*, p. 11.
[74] See fn. 35. *supra.*
[75] 2 Stat. 6, discussed In sec. 3. *supra.* See 25 U. S. C. 171. 172. 173.

tribes. On the question of allowing the executive power to remove undesirable non-Indians the Committee declared :

> To facilitate the negotiations of treaties, it is deemed absolutely necessary that the commissioners should have power to control or remove all white persons who may attempt to prevent or impede the negotiations, and that they should have, if necessary, the aid of a military force."

Section 17 reenacts and amplifies provisions of the 1802 act relating to Indian depredations.

The remaining provisions of the statute deal primarily with the prosecution of crimes. Officials of the Indian Department are empowered to make arrests.[77] The liquor prohibition provisions of the 1832 act[78] are reenacted and amplified.[79] The provision in the Act of May 6, 1822[80] relating to Indian witnesses is likewise reenacted (Section 22) .[81]

Provisions on criminal jurisdiction are thus summarized in the House Committee report :

> In consequence of the change in our Indian relations, the laws relating to crimes committed in the Indian country, and to the tribunals before whom offenders are to be tried, require revision. By the act of 3d March, 1817, the criminal laws of the United States were extended to *all persons* in the Indian country. without exception, and by that act, as well as that of 30th March, 1862, they might be tried wherever apprehended. It will be seen that we cannot, consistently with the provisions of some of our treaties, and of the territorial act, extend our criminal laws to offences committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens. And this provision is retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their Government. It is not perceived that we can with any justice or propriety extenh our laws to offences committed by Indians against Indians, at *any place* within their own limits.
>
> Some doubts have been suggested as to the constitutionality of so much of these acts as provides for the trial of offenders wherever apprehended : without expressing any opinion on that subject, it is thought that provisions more convenient to all parties, and at the same time free from all constitutional doubts, might be adopted. And for this end it is proposed, *for the sole purpose of executing tltis act,* to annex the Indian country to the judicial districts of the adjoining Territories and States. This is done principally with a view to offences that are to be prosecuted by indictment. In all cases of offences, when the punishment, by former laws, was fine or imprisonment, the imprisonment is now omitted, leaving the penalty to be recovered in an action of debt, prosecuted in any district where the offender may be found.[82]

The second [83] of the basic 1834 acts was intended to deal comprehensively with the organization and functions of the Indian Department. This purpose is developed in the sponsoring House Committee's report in the following terms:

> The present organization of this department is of doubtful origin and authority. Its administration is expensive. inefficient, and irresponsible.
>
> The committee have sought, in vain, for any lawful authority for the appointment of a majority of the agents and subagents of Indian affairs now in office. For years, usage, rendered colorably lawful only by reference to indirect and equivocal legislation, has been the only sanction for their appointment. Our Indian relations commenced at an early period of the revolutionary war. What was necessary to be done, either for defence or conciliation, was done; and being necessary, no inquiry seems to have been made as to the authority under which it was done. This undefined state of things continued for nearly twenty years. Though some general regulations were enacted, the government of the department was chiefly left to Executive discretion. In the subsequent legislation, what was, in fat, mere usage, seems to have been taken as having been established by law. It does not appear that the origin or history of the department has ever attracted the attention of Congress. No report of its investigation is found in its records. In ascertaining the authority of the appointment of the officers in the department, the committee hue referred to the acts of the Government, of which they will now present a brief history, and which, it is believed, will fully sustain the position that a majority of the agents and subagents of Indian affairs have been appointed without lawful authority. This position is not taken w th a view to put any particular administration in fault, for it applies to every administration for the last thirty ye ars.'

The conclusion as to the lack of legal authority for various positions actually maintained in the office of Indian Affairs was borne out by a detalled review of the legislation of. Congress beginning with ordinances enacted prior to the Declaration of ndependence. The statute substitutes for the patchwork thereofore existing, a comprehensive schedule of departmental officers nd makes all such officers responsible to the President of the Jnited States and to regulations promulgated by him.[85]

Other sections of the 1834 act providing for the organization f the department of Indian Affairs seek to restore and guarantee ribal rights upon which administrative encroachments had apparently been made, and to encourage Indians to take over an ncreased measure of responsibility for the administration of he Indian Service. In matters of annuity payments, the 1834 ct establishes the principle that all such payments are to be nade to the chiefs of the respective tribes or to such other epresentatives as the tribes themselves may appoint. In explaation of this provision (sec. 11), the Committee declared :

> In the course of their investigations, the committee have become satisfied that much injustice has been done to the Indians in the payment of their annuities. The payments are required, by the terms of the treaties, to be paid to the tribe as a political body capable of acting as a nation; and it would seem, as a necessary consequence, that the payments should he made to the constituted authorities of the tribe. If those authorities distribute the annuities thus paid with a partial hand, they alone are responsible. If injustice shall be done, we are not the instruments; we have discharged our obligation. With what propriety can our Government undertake to apportion the annuities among the individuals of the tribes? And in what manner can it be done, with safety or convenience? If distributed to heads of families in proportion to the number of each family, it would require an annual enumeration, or a register of the changes. If paid to the individuals at their residences, it would be troublesome and expensive: if the individuals were required to travel to the agency, to receive the pittance of their share, to many it would not be worth going for. What security can be given against the frauds of the agents? What vouchers shall he produce to account for the payments? The payment to the chiefs is a mode simple and certain, and the only mode that will render the annuities beneficial to the tribe, by enabling it to apply them to the expenses of their Government, to the purpose of education, or to some object of general concern. When distributed to individuals, the amount is too small to be relied on as a support, yet sufficiently large to induce them to forego the labor necessary to procure their supplies. And it is found that those are the most industrious and thrifty who have no such aid.
>
> Individual payments were introduced probably with a view to induce emigration, by paying those who choose to

[76] H. Rept., op. *cit.*, p. 14.
[77] sec. 19.
[78] See fn. 61. *supra.*
[79] Secs. 20 and 21.
[80] See fn. 53. *supra.*
[81] 4 Stat. 729. 733.
[82] H. Rept., *op* cit., pp. 13. 14.
[83] Act of June 30, 1834. 4 Stat. 735.
[84] H. Rept., *op. cit.*, pp. 2, 3. See Chapter 2, sec. 1B.
[85] Secs. 1, 2, 8.

emigrate their supposed share of the annuity. Whatever may have been the policy which gave rise. to it, neither policy nor justice requires its continuance.

With a view to prevent frauds of another kind, in reference principally to the payment of goods, the President is authorized to appoint an officer of rank to superintend the payment of annuities. This, and the provision relating to the purchase of goods for the Indians, will place sufficient guards to prevent fraudulent payments.

The committee have reason to believe abuses have existed in relation to the supply of goods for presents at the making of treaties, or to fulfil treaty stipulations. Those for presents are at the loss of the Government. Those under treaty stipulations are at the loss of the Indians. The goods for presents have been usually furnished by the Indian traders, and at an advance of from 60 to 100 per cent. This the Government has been obliged to submit to, or the trader will make use of his influence to prevent a treaty. Should this in future be attempted, the Government will now have a sufficient remedy by revoking the license. The goods furnished under treaties have been charged at (what has been represented as a moderate rate) an advance of 50 per cent, and at that rate delivered to the Indians. It is now provided that the goods in both cases are to be purchased by an agent of the Government: and where there is time (as in case of goods purchased under treaties) they are to be purchased on proposals based on previous notice.[88]

The objective of staffing the Indian Service itself with Indians was embodied in a provision of section 9 of this act reading:

> And in all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties."

A related objective was to be achieved by the following provision in section 9, which is law to this day (except that the secretary of the Interior has succeeded to the powers of the Secretary of War) :

> And where any of the tribes are, in the opinion of the Secretary of War, competent to direct the employment of their blacksmiths, mechanics, teachers, farmers, or Other persons engaged for them, the direction of such persons may be given to the proper authority of the tribe.

The purpose behind these provisions is illuminated by a passage in the Committee report which declares:

> The education of the Indians is a subject of deep interest to them and to us. It is now proposed to allow them some direction in it, with the, assent of the President, under the superintendence of the Governor, so far as their annuities (K) art concerned; and that a preference should be given to educated youth, in all the employments of which they are capable, as traders, interpreters, schoolmasters, farmers, mechanics, &c.; and that the course of their education should be so directed as to render them capable of those employments. Why educate the Indians unless their education can be turned to some practical use? and why educate them even for a practical use, and yet refuse to employ them? [89]

Other provisions of the act in question prohibit employees of the Indian Depnrtment from having "any interest or concern in any trade with the Indians, except for, and on account of, the United States." [90]

Provisions of earlier acts with respect to supplies and rations are reenacted (secs. 15 and 16). The latter provision is a reenactment of section 2 of the Act of May 13, 1800, authorizing issuance of rations to Indians at military posts.[91]

Section 17 centralizes responsibility for regulations authorized by law in the following terms:

> That the President of the United States shall be, and he is hereby, authorized to prescribe such rules and regulations as he may think fit, for carrying into effect the various provisions of this act, and of any other act relating to Indian affairs, and for the settlement of the accounts of the Indian department.[92]

The purpose of this section is set forth in the following language of the Committee report:

> The President is authorized to make the necessary regulations for carrying into effect the several acts relating to Indian affairs. In 1829 such regulations having reference to the laws then in force, were reported to the House by Messrs. Clark and Cass, commissioners appointed for that purpose. They appear to have been drawn with great care, and, with such alterations as the bills reported require, would, in the opinion of the committee; be proper and efficient; and should the acts reported pass, it would be proper to have the regulations reported to Congress at the next session, when they can be adopted by an act of Congress, or go into operation under the general provision referred to.[93]

The fifth important segment of the existing law on Indian affairs that took shape under legislation of the 1830's is that relating to payments made to tribes, by reason of treaty provisions, by the Federal Government from proceeds, derived from the disposition of ceded Indian lands. The Act of January 9, 1837,[94] comprises three sections containing provisions of substantive law. The first section[95] requires the deposit in the United States Treasury of moneys received from the sale of lands ceded to the United States by treaties providing either for the investment or for the payment of such proceeds to the Indians.

Section 2 of the act[96] provides:

> That all sums that are or may be required to be paid, and all moneys that are or may be required to be invested by said treaties, are hereby appropriated in conformity to them and shall be drawn from the Treasury as other public moneys are drawn therefrom, under such instructions as may from time to time be given by the President.

Section 3[97] declares:

> That all investments of stock, that are or may be required by said treaties. shall be made under the direction of the President; and special accounts of the funds under said treaties shall be kept at the Treasury, and statements thereof be anually laid before Congress.

These provisions of law established what was for a long time the basis of handling Indian tribal funds derived from sales of ceded land. As the sums involved increased year by year the handling of them became more and more important as providing the sustenance upon which the activities of the Indian Service were based.

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[88] H. Rept., *op. cit.*, pp. 9, 10.

[89] Sec. 14, 4 Stat. 735, 738. See Chapter 2, sec. 3B, fn. 335.

[90] Sec. 9. 4 Stat. 735, 737, R. S. § 2069, 25 U. S. C. 45. See Chapter 8. sec. 4B. *as Ibid. See* Chapter 7, sec. 10.

[91] See fos. 43-4 5 *supra.*

[92] R. S. § 465. 25 U. S. C. 9. See Chapter 5, sec. 8.

[93] H. Rept., *op. cit.*, pp. 22, 23.

[94] C. 1, 5 stat. 135.

[95] R. S. § 2093. 25 u. s. c. 152

[96] R. S. § 2094, 25 u. s. c. 153.

[97] R. S. § 2095, 25 u. s. c. 157.

SECTION 7. LEGISLATION FROM 1840 TO 1849

During the decade of the 1840's two statutes were enacted which have impressed a lasting mark upon federal Indian law. The first of these was the Act of March 3, 1847,[98] which amended in various respects the comprehensive legislation of June 30, 1834.[99] These amendments inoluded a broadening of the language of the Indian liquor legislation." Section 3 of the 1847 [100] act relaxed the requirement that had been established by the 1834 legislation to the effect that moneys due tribes should be paid to tribal officers, and authorized payment of such moneys "to the heads of families and other individuals entitled to participate therein." This, in effect, substituted the judgment of federal officials for that of tribal governments on the question of tribal membership, so far as the disposition of funds was concerned. This provision was the first in a long series of statutes designed to individualize tribal property.[102]

The same section of the 1847 act contains a prohibition against the payment of annuities to Indians while there is liquor in the vicinity.[103]

A second statute of the 1840's which has had nn important bearing upon Indian administration is the Act of March 3, 1849,[104] establishing "a new executive department of the government of the United States, to be called the Department of the Interior; the head of which department shall be called the Secretary of the Interior * * *." [105] Section 5 of this act declared:

> That the Secretary of the Interior shall exercise the supervisory and appellate powers now exercised by the Secretary of the War Department, in relation to all the acts of the Commissioner of Indian Affairs; and shall sign nll requisitions for the advance or payment of money out of the treasury, on estimates or accounts, subject to the same adjustment or control now exercised on similar estimates or accounts by the Second Auditor and Second Comptroller of the Treasury.

This marked the termination of direct War Department control over the Indlian problem.

[98] 9 Stat. 203.
[99] See sec. 6.. *supra*.
[100] Sec. *2* of the *1847* act amended. sec. 20, Act of June 30, 1834, 4 stat. 729.
[101] Amending sec. 11, Act of June 30, 3834. 4 Stat. 736.
[102] See' Chapter 2, secs. 2C, 2E, for a discussion of official policy on that point.
[103] See Chapter 15, sec. 23B.
[104] 9 Stat. 395. See Chapter 2, sec. 1B.
[105] Sec. 1.

SECTION 8. LEGISLATION FROM 1850 TO 1859

Throughout the decade of the 1850's treaties rather than legislation formed the growing point of Indian law, and little legislation of a general and permanent character was enacted. Three minor statutory provisions which date from this period deserve note.

Section 3 of the Appropriation Act of March 3.1853 [106] prohibits the payment to attorneys or agents of sums due to Indians or Indian tribes and prohibits the executive branch of the Government from recognizing any contract between Indians and their attorneys or agents for the prosecution of claims against the United States.

The Act of March 27, 1854,[107] contained an important amendment of sections 20 and 25 of the Act of June 30, 1834 [108] which had the effect of removing from the jurisdiction of the federal courts Indians committing various offenses against non-Indians in the Indinn country who have "been punished by the local law of the tribe * * *." [109]

Sections 4 and 5 of this act mark the beginnings of a rudimentary criminal code for the Indian country. It covered arson"' and assault by a white man against an Indian or by an Indian against a white man, with a deadly weapon and with intent to kill or maim.[111]

A third statutory provision enacted in this decade was section 2 of the Appropriation Act of June 12, 1858.[112] This section, symbolic of the growing concentration of power in the hands of the Commissioner, declared that that officer might

> * * * remove from any tribal reservation any person found therein without authority of law, or whose presence within the limits of the reservation may, in his judgment, be detrimental to the peace and welfare of the Indians. * * *

That aggrandizement of power by the administrative authorities was feared by Congress even at the time extreme powers were being conferred upon such administrative authorities, is indicated by section 7 of the Act of February 28, 1859 [113] authorizing the Commissioner of Indian Affairs, under the direction of the Secretary of the Iuterior,

> to prepare rules and regulations for the government of the Indian service, and for trade and intercourse with the Indian tribes and the regulations of their affairs; and when approved by the President shall be submitted to the Congress of the United States for its approval: *Provided*, That such laws, rules, and regulations proposed shall not be in force free until enacted by Congress.

It does not appear that this mandate was ever executed.

The same statute which carried the foregoing direction also contained a provision repealing prior legislation under which the United States had undertaken to indemnify whites suffering from Indian trespasses.[114]

Important legislation enacted during this decade relating to the pueblos is elsewhere discussed."'

[106] 10 Stat. 226. 239.
[107] C. 26, see. *3. 10 Stat. 269.*
[108] 4 stat. *729.* See *sec. 6, supra.*
[109] See Chapter 18. sec. 4.
[110] Sec. 4, 10 Stat. 269, 270, R. S. § 2143, 26 U. S. C. 212.
[111] Sec. 5. R. S. § 2142, 26 U. S. C. 213.
[112] 11 Stat. 329. 332. R. S. § 2149, 25 U. S. C. 222, repealed by Act of May 21, 1934, 42 Stat. 787.
[113] c. 66, 11 Stat. 388. 401.
[114] Sec. *8,* R. S. § 2156. 25 U. S. C. 229, repealing sec. 17 of Act of June 30, 1834, 4 Stat. 729. 731-732.
[115] See discussion of Act of December 22, 1858, 11 Stat. 374. in Chapter 20, sec. 3A.

SECTION 9. LEGISLATION FROM 1860 TO 1869

The decade of the 1860's is marked by an increasing volume of general Indian legislation, coincident with a decline in the use of Indian treaties as an instrument of national policy. These statutes for the most part strengthened or modified earlier provisions affecting Indian trade and intercourse. To a certain extent they mark new advances along the path of individualization of Indian property.[116]

The Act of, February 13, 1862,[117] contains a comprehensive restatement of the Indian liquor law.

The Act of June 14, 1862,[118] entitled "An act to protect the property of Indians who have adopted the habits of civilized life," included three sections which have remained law to this day. The first section provides that when a member of a tribe has had a portion, of tribal land allotted to him in severalty the superintendent "shall take such measures, not inconsistent with law, as may be necessary to protect such Indian in the quiet enjoyment of the land so allotted to him." [119] The second section of the act provides for punishment of any unallotted Indian who trespasses upon an allotment, through a deduction of damages from future annuities and payment thereof to the injured party.[120] The third section provides that if the trespasser is a chief or headman he shall be removed from office for 3 months.[121] This legislation is evidence of the resistance which the new allotment system was already encountering from tribal Indians who did not wish to see tribal lands checker-boarded with private boundary lines.[122]

A proviso in the first section of the Appropriation Act of July 5, 1862,[123] authorizes the President,

> * * * in cases where the tribal organization af any Indian tribe shall be hi actual hostility to the United States, * * * to declare all treaties with such tribe to be abrogated by such tribe, if, in his opinion, the same can be done consistently with good faith and legal and national obligations.

Section 6 of the same act deprives guardians appointed by the several Indian tribes of the right to receive "moneys due to incompetent or orphan Indians."[124]

The Appropriation Act of March 3, 1865,[125] contains, as do most of the appropriation acts enacted in this period, a number of provisions of substantive law which have little or no relation to appropriations. Sections 8 and 9, emanating no doubt from the disturbed conditions attending the conclusion of the Civil War and the re-uniting of the sadly divided tribes of the Indian Territory, provide:[126]

> SEC. 8. That any person who may drive or remove, except as hereinafter provided, any cattle, horses, or other stock from the Indian Territory for the purposes of trade or commerce, shall be guilty of a felony, and on conviction be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding three years, or by both such fine and imprisonment.
>
> SEC. 9. That the agent of each tribe of Indians, lawfully residing in the said Indian Territory, be, and he is hereby, authorized to sell for the benefit of said Indians any cattle, horses, or other live stock belonging to said Indians, and not required for their use and subsistence, under such regulations as shall be established by the Secretary of the Interior: *Provided*, That nothing in this and the preceding section shall interfere with the execution of any order lawfully issued by the Secretary of War, connected with the movement or subsistence of the troops of the United States.

Both these provisions are still law.

The Joint Resolution of March 3, 1865,[127] marked a step in the fulfillment of a promise made by President Lincoln that upon the conclusion of the Civil War, if he survived, the Indian system should be reformed.[127a] This resolution directed a thoroughgoing inquiry into the treatment of the Indian tribes by the civil and military authorities. The results of this investigation are elsewhere discussed.[128]

The Act of July 27, 1868,[129] marks a final step in the consolidation of administrative control over Indian affairs in the Department of the Interior. Section 1 of, this act[130] transfers to the Secretary of the Interior all "supervisory and appellate powers and duties in regard .to Indian affairs, which may now by law be vested in the said Secretary of the Treasury * * *."

[116] For history of allotment policy, see Chapter 11, sec. 1. On treaty provisions on allotments see Chapter 2, sec. 4G.
[117] C. 24, 12 Stat. 338.
[118] 12 Stat. 427.
[119] R. S. § 2119, 25 U. S. C!. 185.
[120] R. S. § 2120, 25 U. S. C. 186.
[121] R. S. § 2121, 25 U. S. C. 187.
[122] See Chapter 2, secs. '2 B, C, and D.
[123] 12 Stat. 512, 528, R. S. § 2080, '26 U. S. C. 72.
[124] R. S. § 2108, 25 U. S. C. 159.
[125] 13 Stat. 541, 563.
[126] Sec. 8, R. S. § 2138, amended by Act of June 30, 1919, sec. 1, 41 Stat.), 25 U. S. C. 214; sec. 9, R. S. § 2127, 25 U. S. C. 192.
[127] No. 33, 13 Stat. 572.
[127a] See H. B. Whipple, Lights and Shadows of a Long Episcopate (1899), p. 137.
[128] See Chapter 2, sec. 1B, fn. 42 and sec. 2C.
[129] 15 Stat. 228.
[130] Embodied in part in R. S. § 463, 25 U. S. C. 2.

SECTION 10. LEGISLATION FROM 1870 TO 1879

The 1870's markrd the first decade in which the growth of federal Indian law was entirely a matter of legislation rathed than of treaty. The decade is marked by a steady increase in the statutory powers vested in the officials of the Indian Service and hy a steady narrowing of the rights of individual Indians and Indian tribes."[131] Nevertheless, as we have elsewhere noted, the termination of treaty-making did not stop the process of treating with the Indians by agreement.[132]

The Appropriation Act of March 3, 1871, provided not only for the termination of treaty-making with Indian tribes," but also, (see. 3), for the withdrawal from noncitizen Indians and from Indian tribes of power to make contracts involving' the payment of money for services relative to Indian lands or claims against the United States, unless such contracts should be approved by the Commissioner of Indian Affairs and the Secretary of the Interior. Since many of the grievances of the Indians were grievances against these officers, the Indians were effectually deprived by this statute of one of the most basic rights known to the common law, the right to free choice of counsel for the redress of injuries. These prohibitions were amplified by the Act of May 21, 1872.[134]

[131] See Chapter 2, sec. 2C.
[132] Chapter 3. secs. 5 and 6: Chapters 2, sec. 2C.
[133] "16 Stat. 514. 566, R. S. § 2079. 25 U. S. C. 71. See Chapter 3, sec. 5.
[134] 17 Stat. 136. sea. 1. R. S. 6 210% 25 U. S. C. 81; see. 2. R. S. § 2104. 25 U. S. C. 82, and R. S. § 2106, 25 U. S. C. 84; sec. 3, R. S! § 2105, 25 U. S. C. 83.