struction of roads[136] or for other public [137] or private work [138] on the reservations often require the employment of members of the tribe [139] or Indian labor.[140]

(*b*) *Purchase of Indian products.*—The Act of April 30, 1908,[141] provides that Indian labor shall be employed as far as practicable and that purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior. By subsequent amendments,[142] the portion of this provision regarding purchases was made applicable only to those purchases and contracts for supplies and services, except personal services, for the Indian Field Service, which exceed in amount $100 each.[143]

The Act of May 11, 1880,[144] authorizes the Secretary to purchase for use in the Indian Service articles manufactured at Indian manual and training schools.

(*c*) *Military service.*—The skill and bravery of Indians were utilized in fighting foreign foes [145] and other Indians.[146] Article III of the Treaty of September 17, 1778,[147] provided that the Delawares "* * * engage to join the troops of the United States aforesaid, with such a number' of. their. best and most expert warriors as they can spare.. * * *." The Act of March 5, 1792,[148] provided for the employment of Indians to protect the frontiers of the nation. Some of the' tribes agreed to furnish such warriors as "the president of the United States, or any officer having his authority therefor, may require," in prosecuting the War of 1812 against Great Britain.[149] A decade before the Civil War the Army contained a company of Shawnee and Delaware mounted volunteers,[150] Three full regiments of Indians were enlisted in the Union Army.[151] With the coming of peace, the President was authorized to employ in the territories and Indian country a maximum of 1,000 Indian scouts, to be paid like cavalry soldiers.[152] The Act of August 1, 1894,[153] permitted the enlistment of noncitizen Indians in the Army in times of peace.[154] Over 17,000 Indians served in the World War.[155] There are Indian scouts in the regular army 'of the United States.[156]

(*d*) *Youth.*—The Act of June 7, 1897,[157] requires the Commissioner of Indian Affairs to "employ Indian girls as assistant

---

[136] Act of May 1, 1888, Art. III, 25 Stat. 113, 114; Act of June 7, 1924, 43 Stat. 606, 607 (Navajos); Act of March 1, 1926, 44 Stat. 135. The Act of May 26, 1928, 45 Stat. 750, authorizes an appropriation for reservation roads not eligible for Government aid under the Federal Highway Act for which no other appropriation is available. $1,000,000 was appropriated for this purpose by the Act of July 21, 1932, sec. 301 (a) (2) (D), 47 Stat. 709, 717. The Act of May 27, 1930, c. 343, 46 Stat. 430, amended April 21, 1932, 47 Stat. 88, exempts from the requirement of employment of Indian labor roads built by funds provided by the State of Wyoming.

[137] Act of April 27, 1904, Art. 2, 33 Stat. 352, 354 (Crows), irrigation; Act of March 3, 1905, Art. 4. 33 Stat. 1016, 1017 (Shoshones); Act of April 19. 1926, 44 Stat. 303' (Quinaielts), water supply.

[138] Act of April 27, 1904, 33 Stat. 352, 354 (Crows), ditches, dams, canals, and fences; Act of June 28, 1906, 34 Stat. 547; Act of March 28, 1908, sec. 2, 35 Stat. 51, amended by Act of January 27,. 1925, 43 Stat. 793; timber work on' Menominee Indian reservation.

[139] Statutes cited in fn. 138, *supra*. Agreement with Shoshone and Arapahoe tribes on Shoshone reservation, 'Act of March 3, 1905. Art. 4, 33 Stat. 1016, 1017; Agreement with Indians of Crow Reservation, April 27, 1904, 33 Stat. 352, 354, "* * * no contract shall be awarded; nor employment given to other than Crow Indians, or whites intermarried with them, except that any -Indian employed in construction may hire white men to work. for him * * *."

[140] The' Act of June 27, 1902, 32 Stat. 400, 402 (Chippewas), provides that purchasers of timber shall be required "when practicable, to employ Indian labor in the cutting, handling, and manufacture of said timber." The proceeds' of such sales are received by the Indian Bureau and used for the benefit of the Indian children in the schools. 17 Op. A. G. 531 (1883). The Act of May 26, 1928, 45 Stat. 750, authorizes the employment of Indian labor on certain Shoshone Indian reservation roads; supplemented by Act of July 21, 1932, sec. 301(a) (2)(D), 47 Stat. 709, 717. The Act of May 27. 1930. c. 343, 46 Stat. 430, amended Act of April 21, 1932. 47 Stat. 88 (Wind River), excepts engineers and supervisors from the requirement for Indian labor.

[141] 35 stat. 70:

[142] Act of June 25, 1910, sec. 23, 36 Stat. 855, 861, 25 U. S. C. 47, 93; Act'of May 18. 1916. 39 Stat. 123, 126. Also see Act of January 12, 1927, 44 Stat. 934, 936, which creates an Indian Service supply fund.

[143] Sometimes appropriation acts contain special provisions empowering the Secretary of the Interior, when practicable, to buy Indian goods. For example, c. 290, see. 3, of the Act of August 15. 1894, 28 Stat. 286. 312. and the Act of March 2, 1895. 28 Stat. 876, 907, contain the following provisions: "* * * That purchase [of supplies] in open market shall, as far as practicable. be made from Indians, under the direction of the Secretary of the Interior. * * * That the Secretary of the interior may. when practicable, arrange for the manufacture by Indians upon the reservation Of shoes, clothing, leather, harness, and wagons."

[144] Sec. 1, 21 stat. 114, 131.

[145] Treaty of September 27, 1830, with the Choctaws, Art 21, 7 Stat. 333. 338.

[146] Treaty of September 24, 1857. with the Pawnees, Art. 11, 11 Stat. 729, 732. provides for compensation or replacement of property stolen from Pawnee scouts returning from an expedition with the American 'Army against the Cheyenne Indians.

[147] With the Delawares, 7 Stat. 13. The Treaty of December 2, 1794 with the Oneida, Tuscorora, and Stockbridge Indians, 7 Stat. 47, cites in its preamble the faithful assistance of a body of the Oneida, Tuscorora, and Stockbridge Indians who, because of their services during the Revolution, were driven from their homes, their houses and property destroyed. Arts. 1 and 5 of this treaty provided that $5,000 shall be distributed for individual losses and services in return for relinquishment of further claims. The Act of July 29. 1848, 9 Stat. 265, provided for the granting of a pension for widows of "Indian spies, who shall have served in the Continental line."

[148] 1 Stat. 241.

[149] Treaty of July 22, 1814, with the Wyandots and others, Art 2; 7 Stat. 118. Also see Treaty of September 29, 1817, 'with the Wyandots and others, Art 12, 7 Stat 160, providing for payment for. property destroyed during this war. Part of the Creeks assisted the British. See preamble to Treaty. of August 9, 1814, with the. Creeks, 7 Stat.. 120. Other tribes' did the same. For example see Treaty of September 8, 1815, with the Wyandots and others, 7 Stat 131.

Cherokee warriors fought against Great Britain and the southern Indians: See Act of April 14. 1842, 5 Stat 473. Shawnee 'warriors fought in the Florida War. See Joint Resolution March 3, 1845, 5 Stat 800; and Treaty of October 18, 1820, with the Choctaws, Art 11, 7 Stat. 210. The Navajos offered to fight the Apaches. See 16 Op. A. G. 451 (1880).

[150] Act of September 28. 1850, 9 Stat. 519.

[151] Bounties were provided for these regiments. Joint Resolution June 18, 1866, 14 Stat 360. Also see Joint Resolution July 14, 1870, 16 Stat. 390; Abel, The Slaveholding Indians (1919). vol. 2, p. 76, stating that the Secretary of War was opposed to having Indians in the Army during the Civil War.

[152] Act of July 28, 1866, sec. 6, 14 Stat 332. 333; *Treaty* of February 19.1867, with the Dakotas and, Sioux, Arts. 11–13, 15 Stat. 505, 507–508. Also see 16 OP. A. G. 451 (1880), and Act of August 12. 1876, 19 Stat 131; Act of February 24, 1891. 26 Stat. 770. 774. and R. S. §1094, repealed by Act of March 3. 1933, 47 Stat. 1428.

[153] Sec. 2. 28 Stat. 215. 216, amended June 14. 1920, 41 Stat 1077. Also see Act of April 22, 1898, sec. 5, 30 Stat 364.

[154] Repealed by Act of June 14, 1920, 41 Stat. 1077.

[155] Flickinger, A Lawyer Looks at the 'American Indian, Past and Present, Pt. 2 (1939), 6 Indians at Work, No. 9, pp. 26, 29.

[156] 10 U. S. C. 4, 786, R. S. § 1276, provides:

> Indians, enlisted or employed by 'order of the President as scouts. shall receive the pay and allowances of Cavalry soldiers.

10 U. S. C. 915 grants Indian scouts an allowance for horses. The Act of May 19, 1924, sec. 202(c), 43 Stat 121, grants adjusted compensation, commonly called a bonus, to Indian scouts who were veterans of the World War.

[157] Indian Appropriation Act, fiscal year ending June 30. 1898, 30 Stat. 62-83. For similar provisions in previous appropriation acts see Act of June 10, 1896. 29 Stat 321, 348. and Act of March 2. 1895. 28 Stat. 876, 906.

matrons and Indian boys as farmers and industrial teachers in all Indian schools when it is practicable to do so."

Sections 1 and 9 of the Act of June 28, 1937,[158] which establishes a permanent Civilian Conservation 'Corps, provide that camps may be established for a maximum of 10,000 Indian enrollees who need not be unemployed or in need of employment, and who may be exempted from the requirement that part of the wages shall be paid to dependents.[159]

[158] 50 Stat. ,319; 320. The original law, Act of March 31, 1933, c. 17, 48 Stat. 22, did not contain such a provision.

[159] Sec. 7, 50 Stat. 319. On regulations regarding operations of Indian Division of C C. C.. see 25 C F. R. 18.1–18.29.

SECTION 5. ELIGIBILITY O R STATE ASSISTANCE [160]

Some state administrators are unaware that Indians maintaining tribal . relations or living on reservations are citizens,[161] or mistakenly assume that they are supported by the Federal Government,[162] and deny them relief. This discrimination in state aid has made more acute the economic distress of many Indians who are poor and live below any, reasonable standard of health and decency.[163]

It has been administratively held, that Indians are entitled to share in the aids and services provided by state laws, subsidized by federal, grants-in-aid under, the Social Security Act,[164] or direct or, work-relief statutes.[165]

The Solicitor for the Department of the Interior in a memoraudum dated April 22, 1936, holding that the Social Security Act was applicable to Indians, stated;

> * * * An Indian ward votes or is entitled to vote. *United States* v. *Dewey County, supra; Anderson* v. *Mathews,* 174 Cal. 537, 163 Pac. 902; *Swift* v. *Leach,* 45 N. D. 437, 178 N. W. 437. His children are entitled to attend public schools even though a Federal Indian school is available. *LaDuke* v. *Melin, supra; United States* v. *Dewey County, supra; Piper* v. *Big Pine School Dist.,* 193 Cal. 664, 226 Pac. 926. He may sue and be sued in State courts. *In re Celestine,* 114 Fed. 551. (D. Wash. 1902); *Swift* v. *Leach, supra, Brown* v. *Anderson,* 61 Okla. 136, 160 Pac. 724. His ordinary contracts and engagements are subject to. State law, *Luigi Marre* and *Cattle Co.* v. *Roses,* 34 P. (2) 195 (Cal. 1934), and his personal conduct. is subject to State law except. upon reserved land. *State* v. *Morris,* 136 Wis. 552, 117 N. W. 1006. He must pay State taxes on all non-trust property which he may own. and all fees and taxes for the enjoyment of State privileges, such as driving on State highways, and all taxes, such as sales taxes, which reach the-entire population. Where the taxes paid by the Indians are insufficient to provide necessary support for State schools, hospitals, and other institutions caring for Indians, the Federal Government often pays for such services with trust or tribal funds or with gratuity appropriations. (See, e. g., act of April 16, 1934, 48 Stat. 596). 17 Decisions of the Comptroller of the Treasury 678. And Indian wards are constantly receiving care in State institutions either without charge or. with payment from their unrestricted resources. Furthermore, the United States has not provided any old-age pension system for the Indians nor has it made any general provision for Indians for the types of services which it is assisting the States to render under the Security Act. (Pp. 5–6.)

Federal Relief Administration to State Emergency Relief Administration:

[160] For a discussion of their right to federal assistance, see Chapter 12, sec. 5; on right to rations, clothing, etc., under treaties, see Chapter. 15. sec. 23. For a discussion of rations, see Schmeckebier, The Office of Indian Affairs, Its History. Activities, and Organization (1927), pp. 66–70; for a discussion of support of Indians, see pp. 252–255.

Often treaties provided that the United States would give an Indian tribe provisions and clothing. See Chapter 3. sec. 3C(3). This was generally a partial consideration for the cession of land by the Indians and' sometimes a recognition of a moral obligation as guardian. Sometimes Congress provided 'food and clothing in lieu of annuities. For an example of a statute providing subsistence to Indians. see Act of April 29, 1902, 32 Stat. 177 (Choctaws and Chickesaws). On regulations regarding the operations of the Indian Division of the Civilian Conservation Corps; see C. F. R. 18.1–18.29.

[161] Op. Sol. I. D., M. 28869, February 13, 1937, p. 5.

[162] See Chapter 12.

[163] Annual Report of Secretary of 'Interior (1938), p. 237. "The income of the typical Indian family is low and the earned income extremely low"; Meriam, Problem of Indian Administration (1928), p. 4; for a discussion of the general economic condition of. the Indians, see pp. 3–8, and pp. 430–546; on health conditions, pp. 189–345; also see Schmeckebier, *op. cit.* pp. 227–236.

[164] Memo. Sol. I. D., April 22, 1936; Act of August 13, 1935, 49 Stat. 612, 620, amended August 10, 1939, Public No.. 379. 76th Cong., 1st sess. See Chapter 12, sec. 5.

[165] Act of May 12, 1933, 48 Stat. 55; Resolution of April 8. 1935, 49 Stat. 115; Letters of' July 17, 1933, and November 1, 1934, of the

SECTION 6. RIGHT TO SUE

Even before attaining citizenship, Indians had the capacity to sue and be sued in state and federal courts[166] Though some writers [167] have sought to deny the right of reservation Indians to sue,[168] this view is, rejected by. the weight of authority[169]

[166] Ray A. Brown, the Indian Problem & the Law (1930), 39 Yale L. J. 307. 315. In *Felix* v. *Patrick,* 145 U. S. 317, 332 (1892). the court said that there was no doubt that before be became a citizen the Indian was capable of suing in the state courts which were open to all persons irrespective of race or color, and that upon becoming a citizen he could also sue in the federal courts. Also see *Yick Wo* v. *Hopkins,* 118 U. S. 356. 367 (1886). and holding that aliens bad access to the courts for the protection of their person and property and a redress of their wrongs. Accord : *Deere v. St. Lawrence River Power Co., 32* F. 2d 550 (C. C. A. 2, 1929) : *Missouri Pacific Ry. Co.* v. *Cullers,* 81 Tex. 382, 17 S. W. 19 (1891), discussed in 13 L. R. A. 542 (1891) ; *Johnson* v. *Pacific Coast S.* S. Co., 2 Alaska 224, 239 (1904) ; *Keokuk v. Ulam,* 4 Okla. 5, 14 (1895) ; Canfield, Legal Position of the Indian (1881), 15 Am. L. Rev. 21, 33. *Also* see Chapter 23. sec. 4.

Indians may sue out a writ of habeas corpus. United States *ex rel. Standing* Bear v. Crook, 25 Fed. Cas. No. 14891 (C. C. Nebr. 1879). Also see *United 'States em rel. Kennedy* v. *Tyler,* 269 U. S. 13 (1925) ; and *Bird* v. Terry, 129 Fed. 472 (C C.. Wash. 1903). app. dism. 129 Fed. 592 (C. C. A. 9, 1904). A judgment may be obtained against an Indian for breach of contract even though unenforceable because his property is restricted. *Stacy* v. *La Belle, 99* Wis. 520, 75 N. W. 60 (1898).

[167] Canfield contended that the common law did not prevail, on the reservations and that since Indian tribes were distinct political entities. Indians should not be able to enforce in state courts rights acquired under Indian laws or customs. Legal Position of the Indian (1881), 15 Am. L. Rev. 21, 32, 33.

[168] Suits by and against tribes are elsewhere analyzed. See Chapter 14, sec. 6. *Cf. Johnson v. Long Island Railroad Company,* 162 N. Y 462, 56 N. E. 992 (1900). Plaintiff, a member of the Montauk Tribe, brought an action of ejectment on behalf of himself and any members of the tribe who would come in and contribute to the expenses. The court held (two judges dissenting) that Indian tribes are Wards Of the state and are only possessed of such rights to litigate in courts of justice as are conferred on them by statutes. Accord : *Onondago Nation v. Thacher, 169 N. Y. 584, 62 N.* E. 1098 (1901). aff'g 53 App. Div. 561. 65 N. Y. Supp. 1014 (1900). A New York statute giving Indians such power was not questioned. McKinney, New York Consol. Laws (1917), book 25. sec. 5 ; *George* v. *Pierce, N.* Y. Sup. *Ct. 85* Misc. 105, 148 N. Y. Supp. 230 (1914).

[169] Pound, Nationals without 'a Nation (1922), 22 Col. L. Rev. 97, 101. 102.

on the ground that Indians: are not extraterritorial but only subject to special rules of substantive law.[170] An Indian has the same right as anyone. else to be represented by. counsel of his own selection, who may not be subordinated to counsel appointed by the court.^171 As an additional protection, the United States District Attorney has the duty to represent him in all suits at law or in equity.[172]

As a practical matter, the Indians have frequently been at a decided disadvantage in safeguarding their legal rights.

The courts were often at such a distance that the Indians could not avail themselves of their right to sue.[173] Their ignorance of the language, customs, usages, rules of law, and forms of procedure Of the white man, the disparities of race, the animosities caused by hostilities, frequently deprived them of a fair trial by jury.[174] They were sometimes barred by state statutes from serving on juries,[175] and deemed incompetent as witnesses.[176]

The Committee on Indian Affairs of the House of Representatives, in a report[177] on the Trade and Intercourse Act of 1834 said:

> Complaints have been made by Indians that they are . . . not admitted to testify as witnesses; and it is understood that they are in some of the States excluded by law. Those laws, however, do not bind the courts or tribunals of the United States. The committee have made no provision on. the subject, believing that none is necessary: that the rules of law are sufficient, if properly applied, to remove every ground of complaint. (P. 13.)

Even at the present time, many' Indians, particularly the older people, do not know any language but their native Indian tongue; and lack familiarity with most of the customs and ideas of the white people.[178] Most of the Indians live far from the county seats and cities where courts meet and legal business is transacted.^179 Prejudice,[180] lack of education,[181] of money,[182] and of a sufficient number of. lawyers of their race who have their confidence also hamper them in securing adequate legal advice and enforcing their rights. Prof. Ray A. Brown, an eminent authority on Indian Law, has written: "* * *. The majority of- these people are not able either 'in understanding or financial ability. to take' advantage of the courts of justice * * *."[183]

In order to minimize the foregoing disadvantages a number Of statutes have been enacted, establishing a separate administrative procedure to safeguard the rights of the Indians. One Of the most important laws of this nature is the Act of June 25, 1910,[184] which vests in the Secretary 'of the Interior conclusive power 'to ascertain the heirs of a deceased allottee.

During the era of the westward expansion of railroads, statutes authorizing the construction and operation of railways through the Indian Territory usually provided that in case of the failure of the railroad to make amicable settlements with the Indian occupants of the land a commission 'of three disinterested referees should be appointed as appraisers, the chairman by the President, one by 'the chief of the nation to which the occupant belongs, and the other by the railway.[185]

In the absence of statute, Indian litigants are subject to the same defenses as other people. Except with respect to restricted property,[186] they may lose their rights because of laches, and the running of the statute of, limitations.[187] They are also subject to the restrictions against suing sovereigns without their consent.

---

[170] Rice, The Position of the American Indian' in the Law of the United States (1934), 18 J. Comp. Leg. 78; 14 Col. L. Rev.. pp. 587–590 (1914).

^171 Roberts v. *Anderson*, 66 F. 2d 874 (C. C. A. 10, 1933).

[172] Act of March 3. 1893, 27 Stat. 612, 631, 25 U. S. C. 175, 178. On the interpretation of this law. see Chapter 12, sec. 8.

[173] Abel, vol. 1, op. *cit.*, p. 23. fn. 14. Toward the close of the nineteenth century, many writers criticized the government for not giving the Indians courts for. the redress of their wrongs, especially the arbitrary action of administrators. Thayer, A People Without Law (1891), 68 Atl. Month, 540, 542, 676, 683. Wise describes the disadvantages under which Indians labor in their legal struggles with the Federal Government, Indian Law and Needed Reforms (1926). 12 A. B. A. J. 37, 39–40.

[174] Abbot, Indians and the Law (1888). 2 Harv. L. Rev. 167. 175–176; Harsha, Law for the Indians (1882), 134 N. A. Rev. 272, 274–275; Kyle, How Shall the Indians be Educated (1894), 159 N. A. Rev. 434.

[175] See Const. Idaho, Art. 6, sec. 3: *Kie* v. *United States*, 27 Fed. 351, 357-358 (C. C. Ore. 1886); *People* v. *Howard*, 17 Calif. 64 (1860).

[176] For early texts discussing their incompetency as witnesses, see Rapalje, A Treatise on the Law of Witnesses (1887). p. 26; Appleton, Rules of Evidence. (1860), pp. 271-272. *Pumphrey* v. *State*, 84 Nebr. 636, 122 N. W. 19 (1909). Sometimes their incompetency as witnesses was restricted to cases where whites were parties. *People* v. *Hall*, 4 Calif. 399 (1854). aff'd by *Speer* v. See *Yup* Co., 13 Cal. 73 (1859), held that the term "Indian" as used in section 394 of the Civil Practice Act (Calif. Stats. 1850, p. 230, subsequently reenacted) excluded a Chinese from testifying as a witness. See Goodrich, The Legal Status of the California Indian (1926). 14 Calif. L. Rev. 83, pp. 156 and 174; Carter v. *United States*, 1 Ind. T. 342 (1896). Even when competent, prejudice against their testimony was not infrequent. See *Shelp* v. *United States*, 81 Fed. 694 (C. C. A. 9. 1897). The Confederate States signed treaties with many of the southern tribes giving the members the right to be competent as witnesses in state courts and if indicted to subpoena witnesses and employ counsel. Abel, vol.' 1. The American Indian as Slaveholder & Secessionist (1915), pp. 172-173. The Act of March 1. 1889, sec. 15, 25 Stat. 783, limited jurors in criminal cases in the United States courts in the Indian Territory in which the defendant is a citizen to citizens and thus excluded most Indians.

[177] 23d Cong., 1st sess., Repts. of Committees. No. 474, May 20. 1834.

[178] Meriam, Problem of Indian Administration (1928), pp. 777. 783. 790.

^179 Ibid., pp. 713-714.

[180] *Ibid.*, p. 776.

[181] *Ibid.*, pp. 346–429.

[182] *Ibid.*, p. 776.

[183] The Indian Problem and the Law, 39 Yale L. J. 307, 331 (1930).

[184] 36 Stat. 855, amended March 3. 1928, 45 Stat; 161. April 30, 1934. *48* Stat. *647. 25* U. S. *C. 372*, discussed in *Hallowell* v. *Commons*, *239* U. S. 506 (1916). aff'g 210 Fed. 793 (C. C. A. 8. 1914); Knoepfler, Legal Statue of American Indian & His Property (1922), 7 Ia. L. B. 232, 247, 248; Meriam, Problem of Indian Administration (1928). pp. 787–795; Schmeckebier, The Office of Indian Affairs, Its History; Activities. and Organization (1927). pp. 166-175.

[185] For an example of such a provision. see Act of September 26. 1890. 26 Stat. 485,' 486. The Act of May-21, 1934. 48 Stat. 787. repealed sec. 186 of title 25, U. S. C., derived from sec. 2 of the Act of June 14. 1862, 12 Stat. 427, which empowered the superintendent or agent to ascertain the damages caused by a tribal Indian trespassing upon the allotments of an Indian; to deduct from the annuities due to the trespassing Indian the amount ascertained and, with the approval of the Secretary, to pay it to the party injured.

[186] See Chapter 11; Chapter 19; sec. 5.

[187] *Felix* v. *Patrick*, 145 U. S. 317, 331 (1892), discussing laches, aff'g 36 Fed. 457, discussing the statute of limitations. Also see *Lemieux* v. *United States*, 15 F. 2d 518 (C C. A. 8, 1926). cert. den. 273 U. S. 749: 14 Col. L. Rev. 587-589 (1914). Also see Act of May 31, 1902, sec. 1. 32 Stat. 284, 25 U. S. C. 347. which provides for the application of the state statute of iimitations in certain suits involving lands patented in severalty under treaties. While a deed of an Indian who received patent prohibiting alienation of property without the approval of the Secretary of Interior is void and the statute of limitations does not run against him and his heirs so long as the condition of incompetency remains, when by treaty subsequent to the issuance of the deed ail restrictions were removed and the Indian became a citizen, the Statute of limitations began to run against the grantor and his heirs. *Schrimpscher v. Stockton*, 183 U. S. 290 (1902). Also see *Bluejacket* v. *Ewert*, 265 Fed. 823 (C. C. A. 8, 1920). aff'd in part and rev'd in part, 259 U. S. 129 (1922). Cf. Op. Sol. I. D., M.20858, January 14. 1927. p. 2, to the effect that in view of the guardianship relation existing between the Government and the Indians, and the fact that so long as they maintain tribal relations, they are perhaps not chargeable with laches, the Department [of Interior) has been slow to establish a definite rule limiting the reopening of heirship proceedings or invoking the maxims of *res adjudicata* and *stare decisis*.

The right to sue is not conferred upon an individual member by a statute granting to a tribe' the right to sue to recover tribal property.[188] In the absence of 'congressional legislation bestowing upon individual Indians the right to litigate in. the federal courts internal questions relating to tribal property, the courts will not assume jurisdiction.[189]

[188] *Blackfeather* v. *United States,* 190 U. S. 368 (1903), aff'g 37 C. Cls. 233 (1902) ; *Casteel* v. *McNeely,* 4 Ind. T. 1 (1901).

[189] *United States v. Seneca Nation of New York Indians,* 274 Fed. 946 (D. C. W. D. N. Y. 1921). Also *see Lane v. Pueblo of Santa Rosa,* 249 U. S. 110 (1919).

The judgment entered in a suit against an Indian may be enforced against any unrestricted property which the Indian judgment debtor may own free from federal control. The restricted property of the judgment debtor is exempt from levy and sale under such a judgment.[190]

The Secretary of the Interior has authority to make payment of a judgment obtained in a state court against a restricted member of the Osage tribe of Indians or his estate.^191

[190] *Mullen* v. *Simmons,* 234-U. S. 192 (1914).

[191] Act of. February 27, 1925, 43 Stat 1008 (Osage).

SECTION 7. RIGHT TO CONTRACT

Indians may make' contracts in the same way as any other people,^192 except where prohibited by statutes which primarily regulate contracts affecting trust property.^193

The contractual capacity of Indians is discussed in the case of *Gho* v. *Julles:*[194]

> We are unable to see why an Indian alien, preservixig his tribal relations, is not as capable of making a'binding contract (other than such as we have defined to be void by Statute), as an Englishman, or Spaniard, or a Dane, who while still retaining his natlve'alleglance-makes contracts here. (P . 3 2 8)

Similarly, a more recent opinion[195] holds:

> * * * The fact that one of the parties to the contract was a full-blood Indian did not incapacitate him or impair his right to enter into this contract. He had the same right as other persons to make contracts generally. The only restriction on this right peculiar to an Indian was in regard to contracts affecting his allotment. These. he could not make without the consent and approval provided by law. * * * (P. 156.)

Some treaties contained contractual restrictions.[196]

The most important limitation on the alienability of land is found in the. Allotment Act of February 8, 1887,[197] which prevents an Indian allottee from making a binding contract in respect to land which' the United States holds for Lim as trustee.?

The Act of May 21, 1872,[199] imposing restrictions on the contractual rights of noncitizen Indians, which has lost most 'of its importance because of the passage of 'the Citizenship Act, voids any contract with a noncitizen Indian (or an Indian tribe) for services concerning his lands or claims against the United States, unless it is exe&ted in accordance with prescribed formalities and approved by the Secretary of the Interior.

An important statute restricting. the contractual power of Indians with respect to certain types of property is the Act of June 30, 1913,[200] which provides:

> No contract made with any Indian, where such contract relates to the tribal funds or property in the hands of the United States, shall be valid, nor shall any payment for services rendered in relation thereto be made unless the consent of the United States has previously been given.

A. POWER OF ATTORNEY

Though an Indian may grant a power of attorney to another, and such grants of power have been extensively used' in the award of grazing permits in allotted lands,[201] such a power will not 'ordinarily be implied.[202] If there is any doubt about the method of exercising the power, it will be resolved in favor of thegrantorsofthepower.?

The government examines closely the circumstances surrounding the issuance and exercise of a power of attorney in order

[193] An Indian may contract freely concerning unrestricted real and personal property, *Jones* v. *Meehan,* 175 U. S. 1 (1899) : also Bee *United States* v. *Paine* Lumber Co.,- 206 U. S. 467 (1907). Accord: *Ke-tuo-e-mun-guah* v. *McClure,* 122 Ind. 541, 23 N. E. 1080 (1890); *Stacy* v. *La* Belle, *99 Wis.* 520, 75 N. *W.* 60 (1898). Recognition *of* this capacity was contained in the Act of May 2, 1890, sec. 29, 26 Stat. 81, 93, which -gave to, the United States Courts in the Indian Territory jurisdiction of all contracts. between citizens of Indian nations and citizens of the United States, provided such contracts were made in good faith and in . accordance. with the laws of such tribe -or nation. As to individual rights in restricted personalty, see Chapter 10.

[194] Op. Sol. I. D.. M.28869. February 13, 1937, p. 8 : "it should be pointed *out that* an Indian, although a tribal member and a ward of the Government, is capable of making contracts and that these contracts require. supervision. only insofar as they may deal with' the disposition of property held in trust by the United States." *Cf.* Gwsn v. *Dudley,* 217 U. S. 488 (1910). Questions frequently arise as to whether property is restricted. For example, crops growing on Indian trust land are considered trust property. *United States* v. *First National Bank,* 282 Fed. 330' (D. C. E. D. Wasb. 1922), repudiating the case of *Rider* v. *LaClair,* 77 Wash. 488. 138 Pac. 3 (1914). which held that Indians could mortgage crops growing on allotments without the Government's consent. Also see Act of May 31, 1870, sec. 16, 16 Stat. 140, 144, guaranteeing the right to enforce contracts to all persons "within the jurisdiction of the United States." The Act *of* February *27* 1925, sec. 6, 43 Stat. 1008, 1011. exemplifies a restriction of the r&&to contract It requires the approval of the Secretary of the Interior for contracts of debts of Osage tribesmen not having a '.~rtKicate of competency. And see Act of February 21, 1863, 12 Stat.. 658 (Winnebago).

[195] 1 Wash. Terr. (new series) 325 (1871).

[196] *Postoak v. Lee, 46* Okla. 477, 149 Pac. 155 (1916).

[198] Section 15 of the Treaty of March 3, 1863, 12 Stat. 819, 820 provided that the Sioux Indians shall be incapable of making any valid civil contract with anyone other than a native member of their tribe 'without consent of the President. The Cherokees obtained an interesting provision in Article X of the Treaty of July 19, 1866, 14 Stat. 799, 801, permitting their members and resident freedmen to sell their farm or. manufacured products and to ship' and drive them to market without restrahIt..

[197] Sec. 5, 24 Stat. 388,. 389. Also see Act of June 25, 1910, 36 Stat., 855. See Chapter 11.

[198] See Chapter 11. A few treaties also restrict the alienability of and. The. Treaty with the Nez Perce of June 9. 1863, Art. III. 14 Stat. 647. 649. provides that lands belonging to individual Indians shall be inalienable without the permission of the President and shall be subject' to regulations of the Secretary of the Interior.

[199] 17 Stat. 136. 25 U. S. C. 81. amended by Act of June 26, 1936. 49 Stat. 1984. The. Act of April 29, 1874. 18 Stat. 35. contains similar provisions for contracts, made prior to May 21, 1872. Also see prior stat9te restricting contracts-Act of March 3, 1871, 16 Stat; 544, 570. To the effect that a contract by which Indian residents and subjects of the Dominion of Canada propose to employ an attorney to prosecute claims against the United States is not subject to the approval of the Secretary of the Interior and the Commissioner of Indian Affairs, see Op. Sol. I. D.. M.30146, February 8, 1939. On the application of this law to tribes, see Chapter 14, sec. 5.

[200] Sec. 18, 38 Stat. 77. 97, 25 U. S. C. 85.

[201] See 25 C. F. R. 71.10–71.19.

[202] *Richardville* v. *Thorp,* 28 Fed. 52, 53 (C. C. Kan. 1886).

[203] 18 Op. A. G. 447, 497 (1886) ; 5 Op. A. G. 36 (1848).

to safeguard the interests of the Indian.[204] Subterfuges whereby such powers are used to take away control of restricted lands are held invalid [205] because "the restraints upon alienation and incumbrance were intended by Congress to instill into the Indians habits of thrift and industry and a sense of independence, and to protect them in the meantime from improvident contracts." (P. 799.)

B. COOPERATIVES AND BUSINESS ORGANIZATIONS

In some types of work, Indians, like other people, cannot compete with large aggregations of capital which dominate an increasing number of types of business, unless many of them combine their resources and energies.[206] Indian cooperatives have been chartered by the Secretary of the Interior, by organized tribes, and by states.[207]

Many recent statutes encourage the formation of cooperatives, including the Wheeler-Howard Act,[208] the Act of May 1, 1936,[209] applying its main provisions to Alaska, the Oklahoma Welfare Act,[210] and the Alaskan Reindeer Act.[211] Other legislation permitting loans to cooperatives is discussed under another heading.[212]

Thus encouraged by the Federal Government, Indians have established many different kinds of cooperatives.[213] Several statutes and tribal ordinances are designed to encourage Indian cooperatives in a particular tribe.[214]

The Constitution of the Blackfeet Tribe contains provisions typical of many tribal constitutions. Article VII, section 3, gives preference in the leasing of tribal land to members and associations of members, such 'as oil producers' cooperatives.[215] Section lh of Article VI authorizes the Tribal Business Council to regulate and license all business or professional activities upon the reservation, subject to the -approval 'of the Secretary of the Interior.[216]

Indian business organizations have been aided by some important laws relating to both Indians and non-Indians, such as the Taylor Grazing Act,[217] which provides for the granting of privileges to stockowners, including groups, associations, or corporations, authorized to conduct business under the laws of the state in which a grazing district is located. An Indian or group of Indians is capable of applying for grazing privileges under this act without the intervention of agency officials.[218]

C. RIGHTS OF CREDITORS

In the absence of statutory authorization, a third person may not discharge the duty of the Government and then recover the expenses, incurred in performing such governmental duty.[219] Governmental liability for the debts of Indians arises solely from acts of Congress or treaties with the tribes. Treaties often provided payments even for substantial debts.[220]

The treaty provisions were often worded in Justification for 'the payments of claims. The Indians were "anxious" to pay the claims, [221] or the payments were made at the "request" of the Indians. and the money was acknowledged by them to be due or to be a just claim.[222] The good deed of the creditor or a friend of the tribe would be glowingly described.^223

---

[204] *United States* v. *Sands,* 94 F. 26 156 (C. C. A. 10, 1938). Individual Indian owners frequently empower superintendents to issue leases or, permits for them. Also see Chapter 11, sec. 5.

[205] *Williams* v. White, 218 Fed. 797 (C. C. A. 8, 1914).

[206] Senator O'Mahoney, Chairman of the Temporary National E&mmlc Committee, alluded to one of the many Causes for the trend toward concentration of economic power :

> * * * it is a common experience that the large aggregations of capital are able to secure money at a very much lower rate and for longer terms and on better conditions than the small business corporation may, and that in itself is an inherent difficulty which tends to magnify the big and reduce the little. Hearings before the Temporary National Economic Committee, Pt. V, p. 1669 (1939).

These hearings report the growth of monopoly in general and in specific industries. Also see Berle 'and Means, The Modern Corporation and Private Property (1932). pp. 18–46.

[207] In Oklahoma the Secretary may issue Charters of incorporation to Indian cooperatives; in other states they. generally operate as unincorporated associations. J. E. Curry, Principles of Cooperation, 4 Indians at Work. No. 16 (April 1. 1937), p. 8. For regulations on cooperatives see 25 C. F. R 21.1–25.26.

[208] Secs. 10 (25 U. S. C. 470) and 17 (25 U. S. C. 477), June 18, 1934, 18 Stat. 984. The regulations governing the administration of the revolving credit fund make special provision *for* loans by incorporated tribes to Indian, cooperatives. For example, see 25 C. F. R. 22.1–23.27 relating to &operatives in Oklahoma.

[209] 49 stat. 1250.

[210] Act of June 26, 1936, sec. 4, 49 Stat. 1967, 25 U. S. C. 504.

[211] Act of 'September 1, 1937, sec. 10, 50 Stat. 900, authorizing transfer of reindeer to cooperative associations or other organizations.

[212] See Chapter 12. sec. 6A.

[213] Some of these enterprises were discussed by John Collier, Commissioner of Indian Affairs. in a radio address on December 4. 1939, entitled "America's Handling of its Indigenous Indian Minority." and in the Annual Report of the Secretary of the Interior (1939), pp. 30–31, and (1938), pp. 251-552.

> The most important development in the Indian livestock field, perhaps, has been the marked increase in Indian initiative and management. Indians, through cooperative livestock- associations, are managing controlled grazing, round-ups, sales, and other business affecting their livestock enterprises. Cooperative livestock associations have increased from a comparatively small number in 1933 to 53 in 1935 and to 119 in 1936. (Annual Report of Secretary of Interior (1937). p. 213.)

Also see Indian Land Tenure, Economic Status, and Population Trends, Pt. X of the Supplementary Report of the Land Planning Committee to the National Resources Board (1935). pp. 24-25. 56.

[214] The Act of August 15. 1935. 49 Stat 654. authorizes the loaning of tribal moneys as a capital fund to the Chippewa Indian Cooperative Marketing Association.

[215] Discussed in Memo. Sol. I. D.. March 16, 1939,

[216] It has been held that this provision does not require a group of. Indians forming au unincorporated or incorporated cooperative association to secure departmental approval of the articles of association and bylaws. Memo. Sol. I. D.. March 14. 1938.

[217] Act of Juno 28, 1934, 48 Stat. 1269, amended Act of June 26, 1936, 49 Stat. 1967, 1976.

[218] Op. Sol. I. D.. M.28869. February 13. 1937.

[219] *McCalib, Adm'r* v. *United States,* 83 C. Cls. 79 (1936).

[220] The Treaty of September 26. 1833, with the United Nation *of* Chippewa, Ottowa, and Potawatamie, Art. 3, 7 Stat. 431. 432, provided 'for the, payment of $100,000 and the supplementary Treaty of September 27, 1833, Art. 7, 7 Stat. 442, provided for an additional sum of $25,000.

[221] Treaty of October 23. 1826, with the Miami Tribe, Art. 5, 7 Stat. 300, 301.

[222] To show satisfaction of claims acknowledged to be due, see Treaty *of* July 29, 1929. with the United Nation of Chippewa. Ottawa, and Potawatamie Indians, Art. 5, 7 Stat. 320 ; Treaty of August 1, 1829, with the Winnebaygo Indians, Art. 4. 7 Stat. 323, 324 ; Treaty of September 15. 1832, with the Winnebago Nation, Art. 8. 7 Stat. 370, 374 ; payment of debts acknowledged to be due, Treaty of October 26, 1832, with the Shawnoes and Delawares, Art. 3. 7 Stat. 397, 398; also see Treaty of October 16. 1826, with the Potawatamie Tribe, Art. 5. 7 Stat. 295, 296; and (at the request of Indians) Treaties of August 5, 1836, with the Potawattimie Tribe, 7 Stat. 505, and of September 20, 1836. with the, Patawattimie Tribe, Art. 4, 7 Stat. 513.

[223] Treaty of February 18, 1833, with the Ottawa Indians. Art. 2, 7 Stat. 420. 421. 422. land was ceded to people who had resided wlth or been kind to the tribe; Treaty of September 28, 1836. with the Sac and Fox Tribe, Art. 4, 7 Stat. 517. 525, 526. compensation was provided in view of liberality of individuals extending large credit to the chiefs or braves; Treaty of October 15. 1836 (articles of a convention) with the Otoes, Missouries, and others, Art. 4, 7 Stat. 524, 525:

> * * * feeling sensible of the many acts of kindness and liberality manifested towards them, and their respective tribes by their good friends * * * during an intercourse of many years; aware of the heavy losses sustained by them at different times by their liberality in extending large credits to them and their people, which have never been paid, and which (owing to the impoverished situation of their country and their scanty means of living) never can be; are anxious to evince some evidence of gratitude for such benefits and favours, and compensate the said individuals in some measure for their losses. * * *

Often the United States would agree to pay creditors [224] of the Indians for some consideration or partial consideration. such as the cession of land,[225] reduction or omission of annuities,[226] or relinquishment of claims against the United States,[227] or described services and goods.^228

The names of the creditors were often enumerated in an attached schedule [229] or separate schedule,[230] but sometimes they were listed in the body of the treaty.[231]

Other provisions included an acknowledgment of special services and a provision for their payment. One, for example, provided that money should be paid to. a designated captain to repay him for expenditures in defending Chickasaw towns against the invasion of the Creeks.[232]

Sometimes claims already brought against the Indians were acknowledged as due and the United States agreed to make payments for them.[233] Occasional provisions include a prohibition against the payments of debts of individuals^234 or payments for depredations ; [235] a requirement that. the superintendent shall pay the debts; [236] a prohibition against the sale of land. for prior debts.[237]

The limitation of the rights of creditors is in accordance with the well established policy of the Federal Government to protect Indians from their own improvidence.[238]

A number of restrictive statutes hamper creditors from executing . on -their judgments.[239] An important general provision of this type is contained in the Appropriation Act of June 21, 1906,[240] which amended the General Allotment Act [241] by adding the following :

> No lands acquired under the provisions of this Act shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent , in fee therefor.

The same principle is also applicable to restricted money.[242]

The United States cannot restrain the enforcement, in a state court, of claims against property of Indian allottees for which they had received patents in fee,^243 but it can restrain .a state receiver from disposing of the proceeds of a lease of restricted lands,[244] and of a growing crop on allotted lands.[245]

In holding that a mortgage by an allottee of growing crops is void, the District Court -said: [246]

> The crops growing upon an Indian allotment are a part of the land and are held in trust by the government the same as the allotment itself, at least until the crops are severed from the land The use and occupancy of these lands by the Indians, together with the crops grown thereon, are a part of the means which the government has employed to carry out its policy of protection, and I am satisfied that a mortgage of any of these means by the Indian, without the consent of the government, is necessarily null and void. If the lien is valid, it carries with it all the incidents of a valid lien, including the right to appoint a *receiver to* take charge of and garner the crops, if- necessary, and the right to send an officer upon the allotment armed with process to seize and sell the crops without the consent and even over the protest of the government 'and its agents. That this cannot be done does not, in my opinion, admit of question. (P. 332)

Though an Indian may be a bankrupt, land allotted to him does not pass to a trustee in bankruptcy.^247 This decision. is based on the fact that it is not the policy of the Bankruptcy Act to interfere with congressional statutes relating to the disposiion and control of property which is set apart for the benefit of the bankrupt, and that a man presumably deals with an Indian with full knowledge of his disability, and does not give credit on his allotments,[248] or his other restricted property.

---

[224] For early opinions on method of determining amount of claims against Indians, see 5 Op. A. G. *284* (1851) *and* 572 (1852). Treaty of October 27.1822 with the Potowatomies, Art. 4, 7 Stat. 399, 401.

[225] Treaty of August 30, 1831, (articles of. agreement and convention), with Ottoway Indians, Arts. 2 and 6, 7 Stat. 359, 360–361; Treaty of 'October 27, 1832; with the Potowatomies, Art. 4, 7 Stat. 399, 401; Act of February 21. 1863, Art. 4. 12 Stat. 658, 659 (Winnebago).
*Treaty of May 13. 1833 (articles *Of* agreement), with the Quapaw Indians. Art. 4. 7 Stat. 424, 425–426.

[227] Treaty of January 20, 1825 (articles of a convention), with the Choctaw Nation, Art. 5, 7 Stat. 234. 235 ; Treaty of October 16, 1826, with the Potawatamie Tribe, Art. 4, 7 Stat 295, 296; Treaty of October 23, 1826, with the Miami Tribe, Art. 4, 7 Stat 300, 301.

[228] Treaty of July 23, 1805, with the Chickasaw Nation, Art 2, 7 Stat. 89, 90 ; Treaty of February 11; 1828. with the Eel River, or Thorntown party of 'Miami Indians. Art. 3. 7 Stat 309, 310 ; Treaty of March 24, 1832. with the Creek Tribe, Art. 9.7 Stat 366, 367.

[229] Treaty of October 11, 1842, with the Sac and Fox Indians, Art. 2, 7 Stat. 596.

[230] Treaty of October 16. 1826. with the Potawatamie. Art. 5. 7 Stat. 295, 296, 297.

[231] Treaty of July 23, 1865, with the' Chickasaw Nation, Art, 2, 7 Stat. 89, 90 ; Treaty of October 19, 1818. with the Chickasaws, Art. 3. 7 Stat. 192, 193 ; Treaty of February 11, 1828, with the Eel River, or Thorntown party of Miami Indians, Art 3, 7 Stat. 309, 310.

[232] Treaty of October 19, 1818. with the. Chickasaws, Art 3, 7 'Stat. 192, 193. Also see Treaty of July 23, 1805, with the Chickasaw Nation, Art. 2, 7 Stat 89, 90.

[233] Treaty of July 29, 1829, with the United Nations of Chippewa, Ottowa, and Potawatamie, Art. 5. 7 Stat. 320, 321: Treaty of August 1, 1829, with the Winnebaygo, Art. 4. 7 Stat. 323. 324.'

^234Treaty of October 17, 1855, with the Blackfoot, Art. 15, 11 Stat *657, 660.*

[235] Treaty of November 1, 1837, with the Winnebago Nation, Art 4, *7 stat. 544.* 545.

[236] Treaty of October 26. 1832, with the Shawnoes and Delawares, Art. 3, 7 Stat 397, 398.

[237] Act of June 1, 1872. Art 4, 17 Stat 213, 214 (Miami)..

[238] Knoepfler, Legal Status of American Indian & His Property (1922), 7 Ia. L. B. 232, 245. On creditor's rights against restricted money and estates of allottees. see Chapter 11. sec. 6, and.25 C. F. R. 81.23, 81.46–81.49, 221.1-221.39.

[239] Act of May 2, 1809, 26 Stat. 81, 94 (Indian Territory), discussed in *Crowell* v. *Young,* 4 Ind. *T. 36* (1901). mod. 4 Ind. T. 148 (1902). Also see *In re Grayson,* 3 Ind. T. 497 (1901), concerning foreclosure o f mortgage.

[240] 34 Stat. 325. 327.

[241] Act of February 8, 1887, 24 Stat. *3 8 8.*

[242] See Chapter 5, sec. 5B and. D.
3 United States v. *Parkhurst-Davis Co., 176 U. S* 317 (1900).

[244] *United States* v. *Inaba,* 201 Fed. 416 (D. C. E. D. Wash. 1923). On the right of the United States to sue on behalf of Indians, see Chapter 19, sec. 2A(1).

[245] See *United States* v. *First Nat. Bank,* 282 Fed. 330 (D. C. E. D. Wash. 1922). On the rights of conveyees-of allotted lands, see Chap ter 11. sec. 4H.

[246] *Ibid.* For. a decision holding invalid a mortgage executed by a tribal member of his interest in the tribal lands, see *United States* v. *Boylan,* 265 Fed. 165 (C. C. A. 2. 1920).

[247] *In re Russie,* 96 Fed. *609* (D. C. Ore. 1899). See Chapter 11, sec. '4A. State laws relating to assignments for the benefit of creditors. were extended to the Indian debtor by the Act of May 2, 1890, 26 Stat. 81 (Indian Territory), discussed in Robinson & Co. v. *Belt,* 187 U. S. 41 (1902). aff'g 100 Fed. 718 (C. c. A. 8, 1900).

[248] *In re Russie, 96* Fed. 609 (D. C. Ore. 1899).

SECTION 8. THE MEANINGS OF "INCOMPETENCY"

The word "incompetency" has varied applications in many branches of law. Thus a person may be incompetent to serve on a jury, or evidence may be inadmissible as incompetent. Perhaps the most common meaning of the term is lack of capacity to enter into legally binding contracts.[249]

In addition to its ordinary legal meaning, the term "incompetency," as used in Indian law, has several special or restricted meanings, relating to particular types of transactions, such as land alienation.

A. GENERAL LACK OF LEGAL CAPACITY[250]

Treaties and statutes contain numerous illustrations of the ordinary use of the term "incompetency," and various provisions to safeguard the interests of Indians who are deemed unfit to manage their own affairs. They empower guardians or other persons authorized by the Department of the Interior,[251] parents or guardians,[252] heads of families,[253] chiefs,[254] collectors of customs,[255] and agents,[256] and superintendents or other bonded officers of the Indian Service,[257] to select allotments,[258] or homestead entries,[259] receive payments due,[260] appraise property in condemnation proceedings, or perform other functions for minors or persons *non compos mentis*.[261]

Special provisions were often made for minor orphan children,[262] such as making the chiefs responsible for the school attendance of orphan children between 7 and 18 who had no guardians.[263]

Congress has conferred on parents certain rights with respect to the property of minor children.[264] The administrative practice of the Department of the Interior requires that a minor be represented in some cases, such as the relinquishment or inheritance of Indian trust lands.[265]

B. RESTRICTED MEANINGS

(1) Inability to alienate land.[266]—Perhaps the most frequent special use of the term "incompetency" is to describe the status of an Indian incapable of alienating some[267] or all of his real property. Such an Indian may be competent in the ordinary legal sense. An outstanding example is Charles Curtis, who, though he became Senator and Vice President of the United States, remained all his life an incompetent Indian, incapable of disposing of his trust property by deed or devise, without securing the approval of the Secretary of the Interior.

This striking example indicates that a determination of general competency is not always sufficient to cause the Secretary to issue a certificate of competency permitting the Indian to dispose of his restricted property. In determining whether to remove restrictions, the Secretary must decide, not only the "competency" of the Indian, but also whether such removal would be for the best interest of the Indian.[268]

---

[249] See *In re Blochowitz Guardianship*, 135 Neb. 163, 169, 280 N. W. 438, 441 (1938); *In re Mathews*, 174 Cal. 679, 164 Pac. 8 (1917).

[250] See *Stewart* v. *Keyes*, 295 U. S. 403 (1935). Pet. for rehearing den. 296 U. S. 661 (1935).

[251] Act of March 3.1885. a stat. 340, 341 (Umatilla Reservation).

[252] Treaty of April 28, 1866, with the Choctaws and Chickasaws, Art. 15, 14 Stat. 769, 775.; Treaty of July 4. 1866, with the Delawares, Art. 3, 14 Stat. 793, 794; Act of February 13, 1891, Art. 2, 26 Stat. 749, 750, 751 (Sac and Fox).

[253] Act of April 11, 1882, 22 Stat. 42 (Crow); Act of August 7; 1882, sec. 5, 22 Stat. 341, 342 (Omahas).

[254] Act of March 2, 1889, sec. 2, 25 Stat. 1013, 1015 (Peorias and Miamies).

[255] Act of June 10, 1872, sec. 6, 17 Stat, 381, repealed by Act of March 3, 1933, 47 Stat. 1428.

[256] The agents often made selections for- orphans, Act of March 2, 1889, sec. 9, 25 Stat 888, 891 (Sioux); Act of February 23, 1889, Art. 4, 25 Stat. 687, 688 (Shoshones and others).

[257] Act of February 25, 1933, 47 stat. 907, 25 U. S. C. 14.

[258] Treaty of April 28, 1866, with the Choctaws and Chickasaws, Art. 15, 14 stat: 769, 775.

[259] Act of June 10, 1872, sec. 6. 17 Stat. 381.

[260] Act of June 10, 1872, sec. 6, 17 Stat. 381. Also see 'Appropriation Act of July 5, 1862, sec. 6, 12 Stat. 512, 529, R. S. § 2108, 25 U. S. C. 159, providing for. payment to persons appointed by Indian councils to receive money due to Incompetent' or orphan Indians.

[261] Allotments to minors were sometimes not selected until their majority or marriage, Treaty of June 19, 1858, with the Sioux, Art. 1, 12 Stat 1031: Treaty of June 19, 1858, with the Sioux, Art. 1, 12 the stat. 1037.

[262] Treaty of May 10, 1854, with the Shawnees, Art. 2, 10 Stat. 1053, providing that the selections for incompetents: and minor orphans shall he made as near as practical to their friends by some disinterested re person appointed by the council and approved by the United States agent. Also see Treaty of January 31. 1855, with the Wyandotts, 10 Stat. 1159; Treaty of August 2. 1855. with the Chippewas, Art. 1, 11 Stat. 633; Act of June 28. 1898, 30 Stat. 495. 513 (Indian Territory); Act of April 11. 1882, 22 Stat. 42 (Crow); Act of August 7, 1882, sec. 5. 22 Stat. 341, 342 (Omaha Tribe). The Act of March 2, 1889, sec. 2, 25 Stat. 1013. 1015 (Peorias and Miamies), empowers the father to make grazing lease not exceeding 3 years for minors; and chiefs, for orphans. No allotment to orphan until 21 or married. Act of February 13, 1891, Art. 3, 26 Stat. 749, 751 (Sac and Fox Nation and Iowa Tribe). Heads of family choose lands for minor children. but agent chooses lands for ten orphans and persons of unsound mind. Treaty of November 15, 1861, with the Pottawatomks, Art. 2. 12 Stat. 1191, 1192: Treaty of October 18, *1864*. with the Chippewas, Art. 3, 14 Stat. 657, 658; Act of February 8, 1887, 24 Stat. 388.

[263] Treaty of September 24, 1857, with the Pawnees, Art. 3, 11 Stat. 729, 730.

[264] See Act of June 28, 1906, sec. 7, 34 Stat. 539, 545 (Osage), which confers on parents of minor members of the tribe the control and use of their lands, together with its proceeds, until the minors reach majority.

Allotments to minor children under 'sea 4 of the General Allotment Act, as amended, are made when the parent has settled upon the public lands, is himself entitled to an allotment, and is a recognized member of an Indian tribe or entitled to such recognition according to the tribal laws and usages. 35 L. D. 549 (1907); 40 L. D. 148 (1911); 41 L. D. 626 (1913); 43 L. D. 149 (1914).

An administrative finding that an Indian had reached majority is not conclusive upon a determination of whether a deed of land made by him after the issuance of a Patent was subject to a state law permitting disaffirmance of a contract made in infancy. *Dickson* v. *Luck Land Co.*, 242 U. S. 371 (1917).

The rights of minors are discussed in 13 L. D. 318 (1891), 30 L. D. 532, 536 (1901), 35 L. D. 145 (1906), 38 L. D. 422 (1910), and 43 L. D. 125 (1914).

The rights of heirs upon death of allottee before expiration of trust period and before issuance of fee simple patent without having made will, are discussed in 40 L. D. 120 (1911). Also see 38 L. D. 422 (1910); 38 L. D. 427 (1910).

For interpretation of sec. 4 of the General Allotment Act, authorizing the allotment of public lands on behalf of minor children where the Parent settled and made his home on public domain. see 40 L. D. 148 (1911); 43 L. D. 125, 128 (1914). This section includes step children and all other children to whom the settler stands *in loco parentis*, 41 L. D. 626 (1913), 43 L. D. 149. (1914). 44 L. D. 520 (1916); who are recognized members of the tribe or entitled to be recognized, 35 L. D. 549 (1907); but orphan children under 18 are not. entitled to benefits, 8 L. D. 647 (1889); nor children of parents who are disqualified from benefits, 44 L. D. 188 (1915). For interpretations of other allotment acts affecting minors, see: 15 L. D. 287 (1892); 24 L. D. 511 (1897); 40 L. D. 4. 9 (1911); 43 L. D. 125. 149, 504 (1914).

[265] This practice has been upheld by the courts. *Henkel* v. *United States*, 237 U. S. 43 (1915), aff'g 196 Fed. 345 (C. C. A. 9, 1912).

[266] On restrictions on alienation, see Chapter 11. sec. 4; on leasing, sec. 5 and *Smith* v. *McCullough*, *270* U. S. *456* (1926).

[267] The Act of April 18, 1912. sec. 9. 37 Stat. 86, defined "competent" as used therein to "mean a person to whom a certificate 'has been issued authorizing alienation of all the lands comprising his allotment, except his homestead."

[268] Williams *v. Johnson*, *239* U. S. 414. 418. 419, (1915). While the Secretary may permit the sale of trust lands, he may retain control

An Indian. 'may be declared competent to alienate his land, and then, having become landless, may inherit property in a restricted estate and thus become incompetent again.[269]

An administrative holding analyzes the material difference between the removal 'of restrictions against alienation and the issuance of a certificate of competency:[270]

> * * * At times and under given circumstances restrictions against alienation as applied to lands allotted to the Indians, savor largely of covenants running with the land. Competency, of course, is a personal attribute or equation. These two, competency and the power to alienate certain lands are not synonymous or even coexistent factors in all cases. Frequently they go hand in hand but not necessarily always so. Congress itself, at times, has lifted restrictions against alienation, in masse, without special regard to the competency of the individual Indian land owners. With respect to the Osages, as previously shown, under the act of 1906, the issuance of a certificate of competency did not remove the restrictions against alienation of the homestead' and under other legislation dealing with these people, the Secretary of the Interior is empowered to lift the restrictions against alienation on part or all of their allotted lands including the homesteads even in the hands of incompetent members of the tribe: act of March 3, 1909 (35 Stat. 778); act of May 25, 1918 (40 Stat. 561-579). This but again emphasizes the fact "that removal of restrictions against alienation is not synonymous with competency, or the right to a certificate of that character. (Pp. 8-9.)

(a). *Statutes.*—The following provision of the Act of May 8, 1906,[271] illustrates this use of the term:

> * * * *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said 'land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: * * *

The Circuit of Appeals,[272] in construing this provision, said that the Indian "shall have at least sufficient ability, knowledge, experience, and judgment to, enable him to conduct the negotiations for the sale of his land and to' care for, manage, invest, and dispose of its proceeds with such a reasonable degree of prudence and wisdom as will be likely to prevent him from losing the benefit of his property or its proceeds."

The same court, in another case,[273] said:

> * * * The chief purpose and main object of the restriction upon alienation' is not to prevent the incompetent Indian from selling his land for a price too low, but to prevent him from selling it at all, to the end that he shall be prevented from losing, giving away, or squandering its proceeds and thus be left dependent upon the government or upon charity for his support. * * * (P. 776.)

Another important act, illustrating a somewhat similar concept of incompetency is the Act of March 1, 1907,[274] which provides:

> That any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law or treaty, or who may have an interest in any allotment by inheritance, may sell or convey all or any part of such allotment or such inherited interest on such terms and conditions and under such rules and regulations as the Secretary of the Interior 'may prescribe, and, the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or interest, under the supervision of the Commissioner of Indian Affairs; * * *

A federal district court[275] in construing this provision at first treated the term "noncompetent" as equivalent to "incompetent," and as implying the ordinary legal meaning of incompetency "legal incapacity, due to nonage, imbecility, or insanity." Upon reconsideration the court thought such restriction of its meaning was too narrow. It also discussed the provisions of section 1 of the Act of June 25, 1910,[276] which authorizes the Secretary of the Interior-

> * * * petency, upon application therefor, to any Indian, or, in case of his death, to his heirs, to whom a patent in fee containing restrictions on alienation has been or may hereafter be issued, and such certificate shall have the effect of removing the restrictions on alienation contained in such patent. (P. 497.)

The court concluded:

> * * * while as applied to Indians the terms "competency" and "nonccompetency" or "incompetency" are used in their ordinary legal sense, there is a presumption, conclusive upon the courts, that until the restriction against alienation is removed in the manner provided by' law, either through the lapse of time or the positive action of the Secretary of the Interior, the allottee continues to be an "incompetent" Indian, at least in so far as concerns the land to which the restriction relates. (Pp. 497-498.)

Under the 1910 act the determination of competency and the issuance of a patent in fee simple were both conditions precedent to the removal Of restrictions on alienation and "the issuance of a patent in fee simple by the Secretary is not mandatory upon his being satisfied that a trust allottee is competent and capable of managing his own affairs."[277]

---

over the investment of the proceeds. *Sunderland* v. *United States*, 266 U. S. 226 (1924), aff'g 287 Fed. 468. (C. C. A. 8, 1923). Also see Chapter 5, sec. 11.

[269] Indian Land Tenure, Economic Status, and Population Trends, Pt. X, of the Supplementary Report of 'the Land Planning Committee to the National Resources Board (1935), p. 1.

[270] Op. Sol. I. D., M.19190, June 2, 1926.

[271] 34 Stat. 182. 183, 25 U. S. C. 349. For regulations regarding this statute see 25 C. F. R. 241.1-241.2.

[272] *United States* v. *Debell*, 227 Fed. 760, 770 (C. C. A. 8. 1915). This case held that the Secretary may not determine such competency by an arbitrary test, such as the Indian's *awareness* of the effect of his deeding restricted property, saying, "* * * a person might know he was making a deed to his property, and that after he made, end delivered the deed be could not regain his property, and yet be utterly incapable of managing his affairs, the sale of his property, or the care or disposition of the proceeds; * * *." (P. 770.) Also see *Miller* v. *United* States, 57 F. 2d 987 (C. C. A. 10, 1932).

[273] *United States V. Debell.* 227 Fed. 775' (C. C. A. 8. 1915).

[274] 34 Stat. 1015. 1018, 25 U. S. C. 405.

[275] *United States* v. *Nez Perce County, Idaho*, 267 Fed. 495. 497 (D. C. D. Idaho 1917).

[276] 36 Stat. 855. 25 U. S. C. 372. For regulations regarding certificates of competency see 25 C. F. R. 241.3-241.7.

[277] *Ex parte Pero*, 99 F. 2d 28. 34 (C. C. A. 7, 1938). cert. deo. 306 ct. s. 643.

Statutory[278] and administrative[279] distinctions in the determination of competency to alienate freely often hinge on the quantum of the Indian blood of the allottee.[280]

(*b*) *Treaties.*—Many treaties contain special provisions providing for the separation of competent and incompetent Indians.[281] The Treaty of October 18, 1864,[282] between the United States and the Chippewas provides that the agent shall divide the Indians who have selected lands into two classes:

> Those who are intelligent, and have sufficient education, and are qualified by business habits to prudently manage their affairs, shall be set down as "competents," and those who are uneducated, or unqualified in other respects to prudently manage their affairs, or who are of idle, wandering, or dissolute habits, and all orphans, shall be set down as "those not so competent."

The United States agreed to issue fee patents to the competent Indians, but the incompetents could not alienate their land without the consent of the Secretary of the Interior.

(2) Inability to receive or spend funds.—Another special meaning of "incompetency" is inability to control funds, illustrated by the Act of March 2, 1907,[283] which authorizes the Secretary of the Interior to designate any individual Indian belonging to any tribe whom he deems capable of managing his affairs to be apportioned his pro rata shares of tribal funds.[284]

[278] For example the Act of February 27, 1925, 43 Stat. 1008 (Osage), distinguishes between a member of the Osage tribe of more than one-half blood and one with less. Also see Act of March 1, 1907, 34 Stat. 1015, 1034, which removed the restrictions upon alienation of allotments of Chippewas of mixed blood imposed by the General Allotment Act; Act of May 27, 1908, 35 Stat. 312 (Five Civilized Tribes), discussed in *United States* v. *Bartlett*, 235 U. S. 72 (1914), aff'g 203 Fed. 410 (C. C. A. 8, 1913), and *Whitchurch* v. *Crawford*, 92 F. 2d 249 (C. C. A. 10, 1937), aff'g sub nom. *Whitchurch* v. *Burge*, 17 F. Supp. 234 (D. C. Okla. 1936). Act of June 21, 1906, 34 Stat. 325, 353, interpreted in *United States* v. *First National Bank*, 234 U. S. 245 (1914), aff'g 208 Fed. 988 (C. C. A. 8, 1913). Act of June 25, 1910, sec. 1, 36 Stat. 855, 25 U. S. C. 372, interpreted in *United States* v. *Sherburne Mercantile Co.*, 68 F. 2d 155, 156 (C. C. A. 9, 1933).

The courts have justified these distinctions. The court in *United States* v. *Shock*, 187 Fed. 862 (C. C. E. D. Okla. 1911), said:

> * * * The varying degrees of blood most naturally become the lines of demarcation between the different classes, because experience shows that generally speaking the greater percentage of Indian blood a given allottee has, the less capable he is by natural qualification and experience to manage his property. * * * (P. 870.)

Also see *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 306, 308 (1911); *United States* v. *Waller*, 243 U. S. 452, 462 (1917); *United States* v. *Ferguson*, 247 U. S. 175 (1918), aff'g 225 Fed. 974 (C. C. A. 8, 1915); 34 Op. A. G. 275, 281 (1924).

[279] Annual Report of Commissioner of Indian Affairs, p. 3 (1917):

> While ethnologically a preponderance of white blood has not heretofore been a criterion of competency, nor even now is it always a safe standard, it is almost an axiom that an Indian who has a larger proportion of white blood than Indian partakes more of the characteristics of the former than of the latter. In thought and action, so far as the business world is concerned, he approximates more closely to the white blood ancestry.

[280] The determination of competency is often a difficult administrative decision. Leupp, The Indian and His Problem (1910), pp. 67–78. Also see Schmeckebier, The Office of Indian Affairs, Its History, Activities, and Organization (1927), p. 29. During some Periods. the Indian Service was desirous of declaring Indians competent. Annual Report of the Commissioner. of Indian Affairs (1918), pp. 22, 47, id. (1917), p. 11. Congress sometimes authorizes the Secretary of the Interior to appoint a commission to classify the competent and incompetent Indians of an Indian tribe (Crow Act of June 4, 1920, sec. 12, 41 Stat. 751). For further discussion see Chapter 5, sec. 13, and Chapter 12, sec. 2.

The Circuit Court of Appeals in *Cully* v. *Mitchell*, 37 F. 2d 493 (C. C. A. 10, 1930), wrote:

> If Congress were concerned alone with incompetency in fact, some intelligence tests would have been more appropriate, for Indians, like whites, differ in mental stature, and some full-bloods are actually more competent than other half-bloods. (P. 498.)

Also see *United States* v. *First National Bank of Detroit*, 234 U. S. 245 (1914).

[281] Treaty of May 24, 1834, with the Chickasaws, Art. 4, 7 Stat. 450; Treaty of January 31, 1855, with the Wyandotts, Art. 2, 10 Stat. 1159, interpreted in 11 Op. A. G. 197 (1865). Treaty of October 18, 1864, with the Chippewa, Art. 3, 14 Stat. 657, 658. Treaties providing for restrictions on alienation: Treaty of July 16, 1859, with the Swan Creek and Black River Chippewa and the Munsee or Christian Indians, 12 Stat. 1105; Treaty of October 5, 1859, with the Kansas Tribe, Art. 3, 12 Stat. 1111, 1112; Treaty of February 18, 1861, with the Arapahoes and Cheyenne Indians, Art. 3, 12 Stat. 1163, 1164.

[282] 14 Stat 657. 658.

[283] 34 Stat. 1221.

[284] Another use of the term is to describe the legal incapacity of an Osage to expend his income. See Chapter 23, sec. 12B. *Ex parte Pero*, 99 F. 2d 28, 34 (C. C. A. 7, 1938) cert. den. 306 U. S. 643. Also see *Darks* v. *Ickes*, 69 F. 2d 231 (App. D. C. 1934), *Barnett* v. *United States*, 82 F. 2d 765 (C. C. A. 9, 1936), cert. den. 299 U. S. 546, rehearing den. 299 U. S. 620.

SECTION 9. THE MEANINGS OF "WARDSHIP"

The relationship of guardian and ward, at common law, is a relation under which, typically, the guardian (a) has custody of the ward's person and can decide where the ward is to reside,. (*b*) is required to' educate and maintain the ward, out of the ward's estate, (*c*) is authorized to manage the ward's property, for the 'benefit of the ward, (*d*) is precluded from profiting at the expense Of the ward's estate, or acquiring any interest therein, (*e*) is responsible to the courts and to the ward, at such time as the ward may become *sui juris*, for an accounting with respect to the conduct. of the guardianship.[285]

It is clear that this relationship does not exist between the United States and the Indians, although there are important similarities and suggestive parallels between the two relationships. The relationship of the United States to the Indian tribes and their members is analyzed in many other sections and chapters of this work, and it would be futile to treat under the heading of "wardship" the many aspects of that relation which are analyzed elsewhere under more' precise topical headings. Rather we shall attempt in the present section to clarify and separate the various questions that have frequently been fused or confused under' the term "wardship."

The term "ward" has been applied to Indians in many different senses and the failure to distinguish among 'these different senses is responsible for a considerable amount of confusion. Today a careful draftsman of statutes will not use the term "ward Indian" or, if he uses the term at all, will expressly. define it for the purposes of the statute. The fact remains, however, that the term "ward Indian" has been used in several statutes.[286]

[285] 1 Schouler. Marriage, Divorce. Separation, and Domestic Relations (6th ed., 1921), pt. IV.

[286] See, for example, Act of June 15, 1938; sec. 1. 52 Stat. 696. 25 U. S. C. A. 241. amending R. S. sec. 2139; Act of May 27, 1908, 35 Stat. 312 (Five Civilized' Tribes). The Act of February 25, 1933. 47 'Stat. 907, 25 U. S. C. 14. refers to Indians "who are recognized wards of the Federal Government," and the Act of February 14, 1920, 41 Stat. 408, 410, 25 U. S. C. 292. refers to "Indian children who are wards of the Government."

a few treaties,[287] and many judicial opinions.[288] It may help us to avoid some of the fallacies that result from a shuffling of the different meanings of the term "wardship" to survey these various meanings. We shall find at least 10 distinct connotations, (c) of the. term in various contexts.[289]

A. WARDS AS. DOMESTIC DEPENDENT NATIONS

Like so many other concepts in Indian law, the idea of "wardship" appears to have 'been first utilized by Chief Justice Marshall.[290] In fairness to the great Chief Justice, however, it must be said that he used the term with more respect for its accepted legal significance than some of his successors have shown. He did not -apply the term "ward" to individual Indians; he applied the term to' Indian tribes. He did not say that Indian tribes were wards of the Government but only that the relation to the . United States of the Indian tribes within its territorial limits' *resembles* that of a ward to his guardian^291 The Chief Justice hastened to explain this sentence by offering a bill of particulars (pp. 17–18):

> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great-father. They and their country are considered by foreign nations, as well as by, ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by alias an invasion of our territory and an act of hostility.

The court went on to say (p. 18):

> These considerations go far to support the opinion, that the framers of our constitution had not the Indian tribes in view; when they opened the courts of the Union to controversies between a state or the citizens thereof and foreign states:

The question in the case was whether the Supreme Court had jurisdiction to entertain a suit by the Cherokee Nation against the State of Georgia' under that provision of the Constitution (Art. III, sec. 2) which provides for the extension of the federal judicial power "to controversies * * * between a State * * * and foreign States * * *." To that question the 'following answer was given:

> The Court 'has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion, that an Indian tribe or nation within the United States is not. a foreign state, in the sense of the constitution; and cannot maintain an action in the courts of the United States. (P. 20.)

Thus in its original and most precise signification the term "ward" was applied (a) to tribes rather than to individuals (b) as a suggestive analogy 'rather than as an exact description, and (c) to distinguish an Indian tribe from a foreign state.

It should be noted that the basis. upon which the Supreme Court applied the concept of wardship was the acceptance of that status, in effect, by the Indian tribes themselves: "They look to our government for protection * • ● ." For many years. after the decision in *Cherokee Nation* v. *Georgia*, the Indian 'tribes continued to. emphasize, in their treaties, with the United States, their dependence upon the protection of. the Federal Government[292]

I

B. WARDS AS TRIBES SUBJECT TO CONGRESSIONAL POWER

By a natural extension of the term, "wardship" came to be commonly used to connote the submission 'of Indian tribes to congressional legislation. The power of Congress to legislate in matters affecting the Indian tribes was expressly recognized by the tribes themselves in many early treaties.[293] Thus, quite apart from the specific power given by the Constitution to Congress to regulate commerce with the Indian tribes, there came to be recognized, as an outgrowth of the federal treaty-making power and the power of Congress to legislate for the effectuation of treaties, a broad and vaguely defined congressional power over Indian affairs.[294] By virtue of this power, congressional legislation that would have been unconstitutional if applied to non-Indians was held to be constitutional when limited in its application to Indiana: In this sense, "wardship" was still a concept applicable primarily to the Indian tribe, rather than to the individual members thereof, since it was the tribe as such that entered into treaties. As with the original meaning of the term "wardship," the justification of' the result reached, in this' case the extension of,' congressional Power, was found in a course of action to which the Indian tribes themselves had expressly consented.

The effective meaning of the term "wardship," in the sense of special subjection to congressional Power, is to be found entirely in the realm of constitutional law. The extent of this constitutional power is a matter dealt with in other. chapters. For the present it fs enough to note that this power is utilized in two general ways: (I) as a justification for congressional legislation in matters ordinarily within the exclusive control of the states,[295] and (2) as a justification for federal legislation which would be considered "confiscatory" if applied to non-Indians.[296]

In upholding the power of Congress to confer jurisdiction upon the federal courts over certain crimes committed on Indian reservations within a state, the Supreme Court of the United. States said:[297]

> * * These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights; They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their

---

[287] Art. 10 of' the Treaty of April 1, 1850. with the Wyandots, 9 Stat; 987, which provides that "persons adjudged to be incompetent to take care of their property • * • shall become the wards of. the United States * * *."

[288] Often the courts have described specific tribes of Indians as wards. See *Oregon* v. *Hitchcock*, 202 U. S. 60. 70 (1906) (Kiamath): *Ex parte* Webb, 225 U. S. 663, 684 (1912) (Five Civilized Tribes): *LaMotte* v. *United States*, 254 U. S. 570, 575 (1921) (Osage); *Jaybird* Mining Co. v *Weir*, 271 U. S. 609, 612 (1926) (Quapaw); *United States* v. *Candelaria*, 271 U. S. 432; 443 (1926) (pueblo); *British-American* Co. v. *Board*, 299 U.' S. 159, 160 (1936) (Blackfeet).

[289] The number of ways in which these 10 meanings can be combined is two to the tenth power minus one, that is to say. 1,023. It would be obviously impossible to analyze all of these combinations within the confines of this work.

[290] Analogies to the common law concept of wardship may be found in tbe early Spanish and French recognition that the Indians were not able to deal with the whites on an equal footing and required special governmental protection. See *Choteau* v. *Molony*, 16 *How.* 203 *(1853)*. Also see *United States* v. *Douglas*, 190 Fed. 482 (C. C. A. 8, 1911), for a theory of the origin of guardianship.

[291] *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17, 18. 20 (1831).

[292] See Chapter 3. sec. 3B(1).

[293] See Chapter 3; sec. 3B(4) and Chapter 5, see. 2.

[294] See Chapter 5, sec. 2.

[295] See Chapters 5 and 6.

[296] See Chapter 5. sec. 1.

[297] *United States* v. *Kagama*, 118 U. S. 375 (1886); also see *United States V. McBratney*, 104 U. S. 621 (1881). See Introduction. foot-/ note *22*.