Commitling injures against Indians; (3) trespassers settling on Indian lands; (4) trespassers driving livestock upon Indian lands; and (5) trespassers hunting or trapping game on Indian lands.

Section 3 of the first Indian Intercourse Act, approved by President Washington on July 22, 1790, provided for the punishment of any person found in the Indian country "with such merchandise in his possession as are usually vended to the Indians, without a license first had and obtained." And this provision, with minor modifications, remains the law to this day. Section 5 of the same act contained a further provision making it an offense for any inhabitant of the United States to "go into any town, settlement, or territory belonging to any nation or tribe of Indians, and . . . there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district." This provision was likewise incorporated with minor modifications in subsequent statutes.

The first Indian Intercourse Act was temporary, to continue "in force for the term of two years, and from thence to the end of the next session of Congress, and no longer." The second Intercourse Act, that of March 1, 1783, introduced a new provision of importance. Section 5 of that act provided:

And be it further enacted, That if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe, or shall survey such lands, or designate their boundaries, by marking trees, or otherwise, for the purpose of settlement, he shall forfeit a sum not exceeding one thousand dollars, nor less than one hundred dollars, and suffer imprisonment not exceeding twelve months, in the discretion of the court, before whom the trial shall be: And it shall, moreover, be lawful for the President of the United States, to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon. (P. 330.)

The reference to "lands belonging to any Indian tribe" was simplified in later legislation to refer to "lands belonging, or secured, or granted by treaty with the United States, to any Indian tribe." Various other minor modifications are found in the language of this provision, but in essence it sets forth the present-day law on the subject.

The second Indian Intercourse Act, like the first, was a temporary act, to continue "in force, for the term of two years, and from thence to the end of the then next session of Congress, and no longer." 295

The Third Indian Intercourse Act, that of May 19, 1796, dealt for the first time with two new kinds of trespasser, the hunter and the ranger. Section 2 of that act provided:

And be it further enacted, That if any citizen of, or other person resident in the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary line, to hunt, or in any other manner destroy, or take and destroy, any wild beast, bird, fish, or other animal, or convey any stock of horses or cattle to range, on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.

These provisions, reaffirmed and made permanent in the second section of the fifth Indian Intercourse Act, were subsequently separated and elaborated in the Act of June 30, 1834, which was a comprehensive statute on Indian relations:

SEC. 8. And be it further enacted, That if any person, other than an Indian, shall, within the limits of any tribe with whom the United States shall have existing treaties, hunt, or trap, or take and destroy, any peltries or game, except for subsistence in or on Indian country, such person shall forfeit the sum of five hundred dollars, and forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and peltries so taken. (P. 730.)

The last of these provisions, which is still in force, has been interpreted to cover only the case where cattle are "driven to the reservation, or to the vicinity of the reservation." It has been held that sheep are "cattle" within the meaning of this section.

Following the 1834 act, Congress provided for the protection of Indian lands against trespass in various other statutes. Thus, the Act of July 20, 1807, entitled "An Act to establish Peace with certain Hostile Indian Tribes" provided that "all the Indian tribes now occupying territory east of the Rocky mountains, not now peacefully residing on permanent reservations under treaty stipulations" should be offered reservations. The In-

\[295\] Act of July 22, 1790, 1 Stat. 137.
\[296\] Act of March 1, 1793, 1 Stat. 329 ("without lawful license"); Act of May 19, 1796, 1 Stat. 489; M Arch 3, 1799, 1 Stat. 743; M Arch 30, 1802, 2 Stat. 139; ("That no such citizen, or other person, shall be permitted to reside at any of the towns, or hunting camps of any of the Indian tribes as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit . . . "); Act of July 31, 1882, 22 Stat. 179; a. 8. § 2123; 25 U. S. C. 264 ("Any person other than an Indian of the United States, who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit . . . Provided, That this section shall not apply to any person residing among the five civilized tribes, residing in said Indian country, and belonging to the Union Agency therein").
\[298\] Act of M Arch 1, 1793, 1 Stat. 329 ("and shall there commit murder, robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians"); Act of May 19, 1796, 1 Stat. 469, and Acts of March 3, 1799, 1 Stat. 743; M Arch 30, 1802. 2 Stat. 139 ("and shall there commit murder, robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which would be punishable, if committed within the jurisdiction of any state, against a citizen of the United States, or unauthorized by law, and with a hostile Intention, shall he found on any Indian land"); Act of June 30, 1834. 4 Stat. 729 ("That where, in the commission by a white person of any crime, offense, or misdemeanor, within the Indian Country, the property of any friendly Indian is taken, injured or destroyed, and for which no person can be held liable, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed."). cf. R. S. § 2142. 25 U. S. C. 212 (imposing penalty for OLCH殖 on Indian Country, R. S. § 2142, 25 U. S. C. 213 (imposing penalty for crime of assault in Indian country).
\[299\] See 7.
\[300\] 1 Stat. 329. See Chapter 4, sec. 2.
The protection of tribal possession rights has been recognized as a proper function of the Army of the Interior Department, and of the ‘Department of Justice.’ At the same time, the interest of the tribes themselves in self-protection has been recognized repeatedly in statutes.

Although primary concern for the protection of Indian lands against trespass rests with the Indian tribe and the Federal Government, it has been held that the individual states have a legitimate interest in protecting Indian possession against trespass. Thus, it was early held by the Supreme Court that state laws protecting Indian lands against trespass were valid, and state decisions thereon entitled to great weight. Where a state patent to land included land reserved for Indians under state law, it was held that such patent was void as to the erroneously

Thus, in the case of Spalding v. Chandler, the Supreme Court declared:

- The general grant of authority conferred upon the President by the act of March 1, 1847, 9 Stat. 146, to set apart such portion of lands within the land district then created as were necessary for the public uses, cannot be considered as empowering him to interfere with reservations existing by force of a treaty. (P. 405.)

Likewise, school Land grants have never been made in disregard of tribal possessory rights. In the absence of an expressed intent of Congress to the contrary, railroad land grants have not affected tribal possessory rights. Even where Congress expressly stipulated to extinguish Indian title, railroad land grants conveyed only the naked fee, subject to tribal occupancy and possessory rights. Only where it was necessary to give emigrants possessory rights to parts of the public domain, has Congress ever granted tribal lands in disregard of tribal possessory rights.25

C. WHO MAY PROTECT TRIBAL POSSESSION

The protection of tribal possessory rights has been recognized as a proper function of the Army of the Interior Department, and of the ‘Department of Justice.’ At the same time, the interest of the tribes themselves in self-protection has been recognized repeatedly in statutes.

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The constitutionality of state legislation designed to protect Indian lands from trespass was upheld by the Supreme Court in *State of New York v. Dibble.*

In that case the court declared, *per Grier, J.*:

The statute in question is a police regulation for the protection of the Indians from intrusion of the white people, and to preserve the peace. *.* *.* The power of a State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered. (P. 370.)

D. EFFECT OF TITLE UPON POSSESSORY RIGHT

The protection which the Federal Government gives to tribal possession is not limited to the cases where title to tribal land is held in the name of the United States, but extends equally to lands where ultimate title is vested in the state. An illuminating analysis of this problem is found in a memorandum to the Assistant Attorney General dated April 29, 1925, regarding the Onondaga Reservation. Copious authority is cited to show that even where the United States does not own the ultimate fee in the land of an Indian reservation, its relation of guardian to the Indian tribe carries the power and duty of protecting the Indian possessory right against condemnation proceedings or other infringements by the state:

As guardian of the Indians there is imposed upon the Government a duty to protect these Indians in their property; it follows that this duty extends to protecting them against the unlawful acts of the State of New York. (P. 222.)

Likewise, it has been held that protection of tribal property by the Federal Government is not forsworn where a tribe incorporates under state law and thus achieves corporate capacity.

E. AGAINST WHOM PROTECTION EXTENDS

Tribal possessory right in tribal land requires protection not only against private parties but against administrative officers acting without legal authority and against persons purporting to act with the permission of such officers. Thus where Indians were induced by administrative authorities to settle on a given area and the area was designated as the "Old Winnebagoe and Crow Creek Reservation" on Indian office maps, it was held that such lands were a "reservation" within the meaning of a subsequent treaty which set "reservation" lands apart "for the absolute and undisturbed use and occupation of the Indians herein named and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." *.* *.* It was further held that a later Executive order of February 27, 1885, opening these lands to entry was invalid and inoperative.

It was likewise ruled by the Attorney General that an application for permission to construct a ditch across an Executive order reservation, without the consent of the Indians, could not be legally granted by Interior Department officials, even though the ditch was supposed to be beneficial to the Indians. The Attorney General declared:

But the petitioners allege the reservation is not a legal one and in consequence thereof the Indians for whom the reservation was made are only tenants at will of the Government. But the rights of tenants at will, so long as the landlord does not elect to determine the tenure, are as sacred as those of a tenant in fee.

It has also been held that the Federal Government is under an obligation to protect tribal lands even against fellow tribesmen.

The respect for tribal possessory rights shown by Congress and the courts has not always been shared by administrative authorities. In recent years, however, the Department of the Interior has strictly adhered to the view that a tribe may exclude from tribal property any nonmembers not specially authorized by law to enter thereon, that, having the right so to exclude outsiders, the tribe may condition the entry of such persons by requiring payments of fees, and that federal authorities, in the absence of specific legislative authorization, may not invite outsiders to enter upon tribal lands without tribal consent.

Indian possessory rights are enforceable against state authorities as well as against federal authorities. Thus, where a treaty between the United States and the Seneca Nation provided:

The United States acknowledge all the land within the aforementioned boundaries (which include the reservations in question) to be the property of the Seneca nation, and the United States will never claim the same nor disturb the Seneca nation, *.* *.* in the free use and enjoyment thereof; but it shall remain theirs until they choose to sell the same. *.* *.* (Pp. 700-707.)

The Supreme Court held that state taxation of tribal lands was inconsistent with the treaty and invalid. The court declared:

The tax titles purporting to convey these lands to the purchaser, even with the qualification suggested that the right of occupation is not to be affected, may well embarrass the occupants and be used by unworthy persons to the disturbance of the tribe. All agree that the Indian right of occupancy creates an indefeasible title to the reservations that may extend from generation to generation, and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption. He is the only party that is authorized to deal with the tribe in respect to their property, and this with the consent of the government. Any other party is an intruder, and may be proceeded against under the twelfth section of the act of 30th June, 1884. (P. 771.) * 4 Stat. at Large. 730. (P. 771.)

The question of how far Indian possessory rights are protected against Congress raises a problem of constitutional law considered earlier in Chapter 5.

With the establishment of the right of Indian tribes to the protection of federal and state governments (as well as self-protection) against trespass, whether by private parties or by state or federal officers, it becomes pertinent to consider the exact extent of the possessory right to which this protection attaches.

SECTION 11. EXTENT OF TRIBAL POSSESSORY RIGHTS

The extent of possessory right vested in an Indian tribe may differ in important respects from that of ordinary private possessory rights. Some of these differences run to the advantage of the Indian tribe; others, to its disadvantage.
section 12. the territorial extent of indian reservations

In determining the extent of Indian tribal lands, first importance naturally attaches to the treaty, statute, or other document upon which tribal ownership is predicated or by which it is defined. The fixing of boundaries of Indian reservations was a major part of early governmental policy in Indian affairs, as a means of securing peace between Indians and whites and among the Indian tribes themselves. Both by treaty and by statute the United States has endeavored to settle conflicting claims and to resolve ambiguities in the definition of reservation boundaries.

Where the delimitation of tribal lands has proved to be of special difficulty, Congress has occasionally referred the determination of such boundaries to the Court of Claims, or the Secretary of the Interior, or has established a special tribunal to determine such questions.

In interpreting treaties and statutes defining Indian boundaries, the Supreme Court has said:

"... our effort must be to ascertain and execute the intention of the treaty makers, and as an element in the

ferring upon state or private agencies the power to condemn tribal land is established beyond question.

Tribal possessory rights may, as we have already noted, be expressly qualified by the statute, treaty, or Executive order establishing the right, and in this way made subject, for instance, to entry under public land mineral laws.

Except for special limitations and special advantages of the type above noted, tribal possessory rights are equivalent in extent to the possessory rights of private persons.

Stat. 1906, authorizing condemnation of lauds of Captain Grande Reservation by the City of San Diego, subject to the approval of the terms of the judgment by the Secretary of the Interior. Accord: Act of June 28, 1898, sec. 11. 30 Stat. 495. 498 (authorizing towns and cities in Indian Territory to condemn tribal lands).

The extent and basis of this power is analyzed in Federal Eminent Domain (1839), Secs. 9 and 16N. See also Randolph, Eminent Domain (1894) sec. 30 and cases cited.

Op. Sol. I. D.. M. 28183. October 16, 1935, holding that prospectors taking by claim on Papago Indian lands under 'public land mineral laws,' may pay tribute for surface use if claim was taken up after passage of Act of June 18, 1934. 48 Stat. 984, but not if claim was taken up prior to such act.

See Act of July 14, 1862. 12 Stat. 566. granting to white settlers the value of improvements on lands occupied by them which are reserved for Indian use, showing Congress' assumption that the establishment of the Indian reservation wiped out the claims of the prior settlers. Accord: Act of June 28, 1898, 23 Stat. 677 (Duck Valley). See also Act of August 4, 1886. 24 Stat. 876 (refund to entryman of payments made to land office where entry on Indian reservation was subsequently canceled). Cf. Joint Resolution, of February 8, 1887. 14 Stat. 640 (Sioux); Act of February 11, 1920. 44 Stat. 1459 (Sioux); Act of March 3, 1925. 43 Stat 1986 (L'Anse and Vieux Desert).

In determining the extent of Indian tribal lands, first importance naturally attaches to the treaty, statute, or other document upon which tribal ownership is predicated or by which it is defined. The fixing of boundaries of Indian reservations was the chief purpose of certain treaties. e.g., Treaty of August 19, 1825, with Chippewa et al., 7 Stat. 272; see 5 Op. A. G. 31 (1848).

See Chapter 3, sec. 3A(2). The fixing of intertribal boundaries was the chief purpose of certain treaties. e.g., Treaty of August 19, 1825, with Chippewa et al., 7 Stat. 272; see 5 Op. A. G. 31 (1848).

See Chapter 3, sec. 3A(2).

Act of March 3, 1875, 16 Stat 476 (boundary between State of Arkansas and Indian country); Act of June 6, 1894. 28 Stat 86 (Warm Springs Reservation); Act of June 6, 1900. 31 Stat 672 (conflicting tribal claims of Choctaw-Chickasaw and Comanche, Kiowa, and Apache).

To the effect that the parties to a treaty are authorized to determine its meaning, and to define boundaries which the terms of the treaty leave unclear. see Lattimer v. Potteet, 14 Pet. (1840).


Act of june 28, 1892, 17 Stat. 281 (Shoshone and Washteton).


Our effort must be to ascertain and execute the intention of the treaty makers. and as an element in the
by treaty or otherwise do not pass to a state subsequently created, as do public lands similarly situated. Where the high-water mark is referred to in designating the boundaries of an Indian reservation, there is no implied reservation of tide lands.

The principles of international law applicable to boundaries

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SECTION 13. THE TEMPORAL EXTENT OF INDIAN TITLES

The question of when Indian possessory rights in a given tract of land come to an end, or, in technical terms, the question of the quantum of the tribal estate in land, has generally been raised in connection with such title as depends upon actual occupancy. The assumption that all possession of lands by Indian tribes is of an identical type has elsewhere been discussed and criticized and need not be reexamined at this point.

Within the diversity of tenures by which tribal lands are held, there undoubtedly exists a type of ownership that ceases when the tribe becomes extinct or abandons the land. Although this circumstance is commonly cited as indicating a peculiar tenure by which Indian lands are held, an examination of the prevailing doctrines of real property law at the time when the theory of "Indian title" was first advanced, shows that there is nothing novel or peculiar about the legal justification or the practical significance of the doctrine. Under the feudal theory of English law, where the owner of land died without heirs or committed a felony, the land escheated to the Crown, or to the mesne lord. This right of escheat was not, strictly speaking, a form of inheritance but was a sovereign right superior to the property right of any landlord. The right of escheat became less valuable, with respect to individual landowners, when the statutory right of testamentary disposition was extended to real property. An Indian tribe, however, could not, under British or American law, alienate its land without the consent of the Crown or the Federal Government. Therefore, the possibility that land would be left vacant when a tribe disintegrated or abandoned the land was a real possibility and the rule of escheat served the same purpose that it served under early feudal conditions in England. Land held by a tribe in fee simple would subject to escheat and it is unnecessary to assume any peculiarity of "Indian title" to explain this result.

Although technically the right of escheat was something entirely distinct from a possibility of reverter, there is ample precedent for confusing the two institutions. Thus, although one might say with perfect accuracy that land held by an Indian tribe in fee simple would escheat to the United States when the tribe became extinct or abandoned the property, it became fashionable to refer to this incident as a possibility of reverter, rather than escheat. This use of language was not restricted to Indian tribes, but was applied, in the early nineteenth century, to all corporations under the doctrine that a corporation had "only a determinable fee for the purposes of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs." It was generally agreed that "corporations have a fee simple for the purpose of alienation," but this portion of the doctrine was, of course, inapplicable to Indian tribes.

If these observations are well taken, we should conclude that it makes little practical difference whether we describe an Indian estate as a fee simple absolute subject to the ordinary sovereign right of escheat, or call the Indian's estate a determinable fee with a possibility of reverter in the sovereign, or refer to "Indian title of use and occupancy."

The only Point at which these various theories may perhaps diverge lies in the test to be applied to determine when land has been "abandoned."

In Holden v. Joy the Indian estate in question was to be, according to the governing treaty, a fee simple, but the patent issued by the President included the condition "that the lands hereby granted shall revert to the United States, if the said Cherokees become extinct, or abandon the same." The Supreme Court rejected the argument that such abandonment took place by reason of (a) Cherokee participation in the Civil War on the part of the Confederacy, or (b) an agreement whereby the Cherokees allowed Congress to sell the land for their benefit. The Court held that the Cherokee title continued until, by the agreement in question, title became vested in the United States. The Court further declared:

Beyond doubt the Cherokees were the owners and occupants of the territory where they resided before the first approach of civilized man to the western continent, deriving their title, as they claimed, from the Great Spirit, to whom the whole earth belongs, and they were unquestionably the sole and exclusive masters of the territory, and claimed the right to govern themselves by their own laws, usages, and customs.

Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held by the Cherokees under their original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man. Unmistakable

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Note: The text contains numerous citations to legal authorities, which are not transcribed here.
ably their title was absolute, subject only to the pre-
emption right of purchase acquired by the United
States as the successors of Great Britain, and the right
also on their part as such successors of the discoverer to
prohibit the same of the land to any other governments
or their subjects, and to exclude all other governments
from any interference in their affairs. (Pp. 243-244.)

Again, the Supreme Court held in New York Indians v. United
States, that delay in the settlement of new lands did not
constitute abandonment. On the other hand, the Supreme
Court, holding that the Pottawatomies do not own a large part of
the city of Chicago, indicated as one basis for its decision
the fact that the Pottawatomies had, after conveying at least
all the lands above the lake level, abandoned the district for

more than half a century. It appears to be settled law that
actual removal of an entire tribe from one reservation to
another, where such removal is voluntary, constitutes abandonment.

Although various dicta may be found asserting that the title
Of Indian tribes is less, in point of temporal extent, than a fee
simple, reliance upon such dicta has proven extremely
hazardous. A realistic analysis of the cases suggests that the only
clear distinction between “Indian title” and “fee simple title” lies
in the fact that Indian lands are subject to statutory restrictions
upon alienation.

SECTION 14. SUBSURFACE RIGHTS

Whether the possessory right of an Indian tribe includes min-
erals depends, as does every other question relating to the extent
of Indian possessory rights, upon the treaty, statute, Executive
order or other document or course of action upon which the right is
based. Where a treaty, statute, or Executive order specifically
provides that minerals on Indian land shall be reserved to the United
States or where a statute specifically title to land purchased
for an Indian tribe shall not extend to mineral rights, no
question is likely to arise. So, too, a treaty or statute may
provide that the Indian tribe shall have specified rights of mining
or quarrying in land belonging to the United States.

Questions as to the Indian right to minerals have generally arisen
where nothing specific appears in the treaty, statute, or
other document upon which the Indian claim is based, or where
the Indian claim is based simply on aboriginal occupancy. Con-
firmation of the view that aboriginal occupancy may include subsurface
rights as well as surface rights is found in the case of
Chouteau v. Molony. A treaty provision by which designated
lands were “set apart for the absolute and undisturbed use
and occupation of the Shooshone Indians” was held to convey to the
Indians full mineral, as well as timber, rights, in the case of
United States v. Shooshone Tribe.

Further analysis of the extent of Indian mineral rights is
found in the opinion of Attorney General (afterwards Justice)

Stone rendered on May 27, 1924, with reference to the proposal
of Secretary of the Interior to Fall open Executive order reservation
lands to mineral entry under the laws governing minerals
within the public domain. After analyzing the terms of the
general mining laws, the Attorney General declared:

The general mining laws never applied to Indian reser-

vations, whether created by treaty, Act of Congress, or
393; Kendall v. San Juan Silver Mining Co., 144 U. S. 658;
M'Padden v. Mountain View M. & M. Co., 97 Fed. 670;

In support of this conclusion, based upon the language of the
general mining laws, the Attorney General presented an analysis
of Indian mineral rights which may well be set forth in full,
without comment, as a complete exposition of the subject.

If the extent of the Indian rights depended merely on
definitions, or on deductions to be drawn from descriptive
terms, there might be some question whether the right
Of “occupancy and use” included any right to the hidden
or latent resources of the land, such as mineral or potential
water power, of which the Indians in their
original state had no knowledge. As a practical matter,
however, that question has been resolved in favor of
the Indians by a uniform series of legislative and treaties pro-
visions beginning many years ago and extending to the
Present time. Thus the treaty provisions for the allotment
of reservation lands all contemplate the final passing of a
perfect fee title to the individuals of the tribe. And that
meant, of course, that minerals and all other hidden or
latent resources would go with the fee. The same is true of the
General Allotment Act of 1887, which applies ex-
pressly to executive order reservations as well as to others.
Then, beginning years ago, many special acts were
passed (with or without previous agreements with the Indians
concerned) whereby the Indians were allowed to sell their
lands after completion of the allotments were to be sold for
their benefit. In all these instances Congress has recognized
the right of the Indians to receive the full sales
value of the land, including the value of the timber, the
minerals, and all other elements of value. Less only of the
expenses of the Government in surveying and selling the
land. Legislation and treaties of this character were
dealt with in Frost v. Weinie, 157 U. S. 46; 50; Minnesota v.
Richardson, 185 U. S. 124; Michigan v. Hitchcock, 187
U. S. 553; United States v. Blendaar, 128 Fed. 910, 913;
Ash Sheep Co. v. United States, 252 U. S. 159.

Similar provisions have been made in many other cases
for the sale of surplus tribal lands, all the proceeds of all
of elements of value to go to the tribe. In a recent Act
for further allotment of Crow Indian lands (41 Stat. 751),
the minerals are reserved to the tribe instead of passing
to the allottees (Sec. 6); and moreover, unallotted lands
chiefly valuable for the development of water Power are
reserved from allotment for the benefit of the Crow Tribe of Indians" (Sec. 10). The Federal Water Power Act of June 10, 1920 (41 Stat. 1063), applies to tribal lands in Indian reservations of all kinds, but it provides (Sec. 17) that "all proceeds from any Indian reservation shall be placed to the credit of the Indians," etc.  Again, by a provision in the Indian Appropriation Act of June 30, 1919, the Secretary of the Interior was authorized to lease, for the purpose of mining for deposits of gold, silver, copper, and other valuable metallic ores, any part of the unallotted lands within "any Indian reservation" within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming hereafter withdrawn from entry under the mining laws. These States contain numerous executive order reservations, and yet the Act declares that all the royalties accruing from such leases shall be paid to the United States "for the benefit of the Indians." (41 Stat. 3, 31-33.)

The opening to entry by Congress of a part of the Colville Reservation established in Washington by executive order has been cited as an exception to this line of precedents. (Act July 1, 1892, 27 Stat. 62.) But the exception is more apparent than real; for Congress, though it expressly declined to recognize affirmatively any right of entry to any part of that reservation (Sec. 8), yet, in fact, preserved the right of allotment required the entrymen to pay for the lands, and set aside the proceeds for the benefit of the Indians for an indefinite period. "Later, the proceeds of timber sales from the former reservation lands were secured to the Indians, but the mineral lands were subjected to the mineral laws without any express direction for the disposal of the proceeds, if any. (Act July 1, 1890, 30 Stat. 571. 593.) The Committee reports that the reservation was considered as made in error, excessive in area, and that the action was really for the best interests of the Indians. (Senate Report No. 664, 62d Cong., 1st sess., vol. 3 House Report No. 1035, 62d Cong., 1st sess., vol. 4.) In respect to legislation and treaties of this character two views are possible. First, that the right of occupancy to the latter; mainly because title to land purchased for Indians may be taken subject to existing provision in the Indian Appropriation Act of June 17, 1898. (See Martin, Mining Rights v. Four Bottle Sour-Mash Whiskey, 90 Fed. 720 (D. C. Wash. 1898).) Also, also Act of August 14, 1845; 9 Stat. 741 (Ottawa, Potawatomi, Chippewa, etc.).

As noted in Attorney General Stone’s opinion, the authorities are uniform in holding that minerals underlying Indian lands which have not been expressly reserved to the United States are not subject to disposition under the general mining laws. Under the foregoing authorities it must be held that Indian title to minerals is valid against federal administrative authorities, as well as against private parties. 32

Various special acts relating to the disposition of minerals on Indian reservations proceed on the assumption that, in the absence of a clear expression to the contrary, tribal possession extends “to the center of the earth.” Generally such statutes provide that the proceeds of such disposition shall inure to the benefit of the tribe concerned. 33

Recognition of Indian mineral rights is also found in special statutes authorizing Indian tribes to execute mineral leases. 34 Further recognition of tribal mineral leases is found in the statutes referred to in Attorney General Stone’s opinion, which, in allotting lands, reserved to the tribe the underlying mineral rights. 35

Further recognition of Indian mineral rights is found in various jurisdictional acts. 36

As noted in Attorney General Stone’s opinion, the authorities are uniform in holding that minerals underlying Indian lands which have not been expressly reserved to the United States are not subject to disposition under the general mining laws. 37

Further recognition of Indian mineral rights is found in various jurisdictional acts. 38

With respect to every concrete question of tribal ownership of timber, as with all other questions relating to the extent of tribal possessory right, our starting point must be the language of the treaty; statute, or other document which establishes that right. Where by treaty the United States expressly reserves the right to use timber on tribal land, 39 or where the treaty specifically confirms the interest of the Indian tribe in timber, 40 no question is likely to arise as to the extent of the tribal possessory right. 41 Serious questions have arisen, however, where

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30 For general forest regulations, see 25 C. F. R. 61.1-61.29.
31 Art. 9 of Treaty of April 13, 1859, with Yankton Tribe of Sioux. 11 Stat. 742.
35 Act of February 20, 1925, 45 Stat. 1249 (Nez Perce jurisdictional act recognizing propriety of tribal claim for gold mined by trespassers).
36 French v. Lancaster, 2 Dak. 346 (1880) and cases cited in text quotation. See Martin, Mining Law and Land-Office Procedure (1908), sec. 46, and authorities cited in support of the conclusion, “Lands embraced in an Indian reservation are not subject to mining laws, or to mineral exploration and entry.” Accord: Morrison’s Mining Rights (1866 ed.), pp. 426-427; Costigan, American Mining Law (1908), sec. 23, and see early Land Office rulings cited in Comp. United States Mineral Laws (1881), 142, 253.
37 See Memo. S. R. 1, L. D., July 1, 1936 (holding Government officials are not authorized to mine coal on the Navajo Reservation without the consent of the Indians).
39 Nor is this question likely to arise where a statute specifies that title to land purchased for Indians may be taken subject to existing contracts for sale of timber. Act of February 15, 1929, 45 Stat. 1186 (Alabama and Coushatta).
the treaty or statute establishing the reservation has referred to "Indian use and occupancy" or used some similar phrase. These questions were seriously complicated by the interpretations placed on language of the Supreme Court in the cases of United States v. Cook and Pine River Logging Co. v. United States.

In the former of these cases, timber standing on tribal land was cut by individual Indians, without the authority of the Interior Department. The United States brought an action of replevin against the vendee, and the Supreme Court held that the United States was entitled to recover possession of the timber. The Court based its decision upon the argument that since the timber while standing is a part of the realty, standing timber cannot be sold by the Indians, and only timber rightfully severed from the soil can be legally sold. Whether timber was rightfully severed depended upon whether its cutting resulted in improvement of the land or on the contrary, amounted to waste. Since the facts of the case established the latter situation, the Court held that the possession of the vendee was illegal. The Court did not decide whether, in recovering the timber or its value, the United States was to hold such timber or funds in trust for the Indian tribe concerned, or whether such recovery was to accrue to the general funds of the United States Treasury.

In the course of its opinion, the Supreme Court, per Waite, C.J., declared:

These are familiar principles in this country and well settled, as applicable to tenants for life and remaindermen. But a tenant for life has all the rights of occupancy in the lands of a remainder-man. The Indians have the same rights in the lands of their reservations. What a tenant for life may do upon the lands of a remainder-man, the Indians may do upon their reservations, but no more. (P. 594.)

The view thus expressed was confirmed by the Supreme Court in the Pine River Logging Co. case, where an action in the nature of trover, brought by the United States against the vendees of unlawfully cut timber, was upheld by the Court. In the course of its opinion, the Court, per Brown, J., declared:

The argument overlooks the fact that the Indians had no right to the timber upon this land other than to provide themselves with the necessary wood for their individual use, or to improve their land, United States v. Cook, 19 Wall. 591, except so far as Congress chose to extend such right; that they had no right even to contract for the cutting of dead and down timber, unless such contracts were approved by the Commissioner of Indian Affairs; that the Indians in fact were not treated as such tenants, but every movement made by them, either in the execution or performance of the contract, was subject to government supervision for the express purpose of securing the latter against the abuse of the right given by the statute. (P. 290.)

In the Pine River Logging Co. case (and probably in the Cook case) the Department of the Interior and the Department of

Justice apparently construed the decision as implying that the tribe concerned had no property interest in the timber or in the funds recovered. In an opinion rendered in 1888, the Attorney General answered in the negative the following question presented by the Secretary of the Interior. (P. 194-195.)

(1) Whether the Indians occupying reservations, the title to which is in the United States, have the right, in view of the opinion of the Supreme Court in the case of United States v. George Cook (10 Wall. 591), to cut and sell for their use and benefit the dead and down timber which is found to a greater or less extent on many of the reservations and which will go to waste if not used? (Pp. 194-195.)

Two years later the Attorney General ruled that where timber on land of the Fond du Lac tribe was cut by trespassers, with the connivance of Indian Service officials, the timber should be sold by the Commissioner of the General Land Office, the proceeds to "belong to the Government absolutely."

This view was supported by the argument that, under the Cook case, the Indians have "the mere right to use and enjoy the land as occupants" and that, therefore, "the Indians have no interest in this timber." The Board of Indian Commissioners had protested immediately after the decision in the Cook case, against an interpretation of that case which would prevent the Indians from cutting and marketing their timber, alleging that such a construction, particularly when applied to dead and down timber, "would prove not only a loss to the Indians, but an absolute damage to the United States." In 1889 Congress enacted a statute authorizing the sale of dead timber on Indian reservations by the Indians of the reservation, under Presidential regulations, thus recognizing an Indian possessory right but leaving its extent still uncertain.

In a later opinion of the Attorney General, it was held that the Indian occupants of an Executive order reservation were entitled to the proceeds of timber sales.

In the case of the Shoshone Indians v. United States, the Court of Claims pointed out that the interpretation of the Cook case as denying the validity of the Indian interest in timber was unnecessary and unjustifiable. In the Cook case, it was pointed but, "The court decided that the members of the Oneida Tribe had no right to cut the timber on the land solely for the purpose of sale; that to do so was waste as in the case of the cutting of timber by a trespasser; and that the United States as the owner of the fee became the owner of the logs." The court further declared:

In that case two points were decided: first, it was decided by analogy to the law relating to the respective rights of life-tenant and remainder-man, that the Indians have no right to cut the timber on an Indian reservation for the purpose of sale only; that to do so is waste, and that the

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19 Wall. 591 (1873).
186 U. S. 279 (1902).
Apparantly the Interior Department took the Position at this time that timber could be sold by the Indian agent for the benefit of the tribe and that the tribe itself might give a valid permit for the cutting and marketing of timber. Sen. Ex. Doc. No. 72, 40th Cong., 2d sess. vol. 2, p. 6996, 1868.

As was said in the case of Stacy v. Campbell, 208 U. S. 527 (1905) involving timber on allotted lands:

It is alleged that the value of the land, exclusive of the timber, is no more than $1,000; fifteen thousand dollars' worth of timber has been cut from the land. The restraint upon alienation would be one designed to prevent the same right of occupancy in the value of the land and fifteen thousand dollars' worth of timber, the latter being left to the unrestricted or unqualified disposition of the Indian. Such is not the legal effect of the patent. (P. 534.)


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Letter from the Secretary of the Interior, House Ex. Doc. No. 61, 43d Cong., 2d sess. vol. 12, December 17, 1874.

Sales of Timber from Unallotted Lands of Indian Reservation. 29 Op. A. G. 239 (1911) (White Mountain Apache).
83 C. C. 331 (1937) and 304 U. S. 111 (1938).
title to timber and cut wood in the United States as the owner of the fee or "ultimate domain"; second, that the Indians had an exclusive right of use and occupancy of unlimited duration, and the right to cut the standing timber during the whole period of such occupancy not only for use upon the premises but for the purpose of improving the land or to better adapt it to present occupation; also the right to sell all timber cut for the latter purpose. It is clear, therefore, that this decision did not hold the right to cut or sell timber to the Indians; nor the right of the Indians to Indian Reservations, or to sell Indian lands, for its own use and benefit, without accounting therefor to the Indian tribe. When a reservation is definitely set apart for an Indian tribe by treaty or statute, the government has only the right to control and manage the property and affairs of the Indians in good faith for their betterment, but as stated by the court in Shoshone Tribe of Indians v. United States, 299 U. S. 478, "the power does not extend so far as to enable the government to give the tribal lands, or to appropriate them to its own purposes, without rendering or assuming an obligation to render, just compensation; for that would not be an exercise of power to control, manage, and improve the property and affairs of Indians in good faith for their betterment and welfare." Again Congress, by the Act of April 25, 1876, sought to sell timber on tribal land by providing for payments to the Indians for the timber growing upon their reservation of Indian timber is no more a denial of the Indian power to control and manage the property and affairs of Indians in good faith, but an attempt to appropriate to the government the right to sell timber for its own use and benefit, without accounting therefor to the Indian tribe. This view was taken by the court in United States v. Cook, supra, that the interest of the Indians in the reservation lands and timber thereon is that of a life-tenant and no more. In that case the court did say that "What a tenant for life may do upon the lands of a remainderman— the Indians may do upon their reservations, but no more." But in thus comparing the position of the Indian with that of a life-tenant for the purpose of stating what the Indians may or may not do on their reservations, we think the court did not intend definitely "to hold that the timber growing upon the lands of the Indians and their reservations is only that of a tenant for life. Such a holding would have been in conflict with the statement of the court after reviewing prior cases concerning the nature of Indian title, that the Indians have the right of use and occupancy of unlimited duration. We think also that the contention of counsel for defendant is inconsistent with the holding of the Supreme Court in the case at bar—that the power of the government to control and manage the property and affairs of the Indians in good faith for their betterment and welfare does not extend so far as to enable the government to give the land to others or to appropriate it to its own purposes.

304 U. S. 111 (1938). Commenting on the Cook case, the Supreme Court declared, per Butler, J. (reeed, J. dissenting):

United States v. Cook, supra, gives no support to the contention that in ascertaining just compensation for the Indian timber taken, the timber and the reservation should be excluded. That case did not involve adjudication of the scope of Indian title to land, minerals or standing timber, but only the right of the United States to replant cut timber and settle it by an unauthorized member of the tribe. Held that, as against such purchaser from the wrongdoers, the tribe had a prior title to the ship of the land or minerals deposited or standing timber upon the reservation. But the tribe's right was the mere equivalent of that of the tenant.


The tribe declared that the district retained should, until otherwise provided for by the Congress, be as a reserved area for the Indians and held and regarded as an Indian reservation, clearly defined from the tribal lands, and being worth attributable to the title was the value of the land upon which it was standing. (P. 123.)
interest in such timber than is the equally large measure of control over alienation of Indian lands a denial of the Indian interest in such lands. On the contrary, the underlying purpose of such regulation, for many years, has been the protection of the interests of the tribe as a whole against overaggressive individuals and generations heedless of posterity. It is believed that the first federal law establishing the principle of sustained yield timber production was the Act of March 28, 1908, relating to timber-cutting on the Menominee Reservation.

Federal control over the disposition of tribal timber applies even where the tribe concerned holds the land in fee simple, which is a clear indication that limitations upon the disposition of Indian tribal timber are in no way inconsistent with a recognition that the full beneficial interest therein is vested in the Indian tribe.

The tribal possession right in timber may be protected both by civil and by criminal proceedings. Actions in the nature of replevin or trover and injunction suits have been brought by the United States, as already noted, where timber has been disposed of unlawfully. In addition, criminal sanctions have been applied.

Section 5388 of the Revised Statutes, making it an offense to cut timber on lands of the United States reserved for military or other purposes, was apparently the only statute on the books that might be construed to make unlawful cutting of Indian tribal timber a criminal offense, until June 4, 1888, when an amendment to the Act of April 19, 1888, adding the words "or upon any Indian reservation, or lands belonging or occupied by any tribe of Indians under authority of the United States." In 1909, this statute was incorporated, with slight verbal changes, in the Penal Code, as section 50. The provision in question, as subsequently amended, reads:

Sec. 50. Whoever shall unlawfully cut, or aid in unlawfully cutting, or shall wantonly injure or destroy, or procure to be wantonly injured or destroyed, any tree, growing, standing, or being upon any land of the United States which, in pursuance of law, has been reserved or purchased by the United States for any public use, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both.

The validity of federal penality legislation in this field appears to be beyond question, and its applicability to individual members of the tribe that owns the timber has been maintained even in an extreme case where the court was forced to say: It is plain that by cutting trees on the reservation Konka-pot brought himself within the letter of the section as amended. He did not, however, cut the trees for sale or profit. To occupy and cultivate the tract allotted to him in severalty be needed a house and barn, and the trees were cut for the sole purpose of erecting such buildings upon his premises. It seems harsh to visit upon him the penalty of the statute for this act; but the court must administer the law as it finds it.

SECTION 16. TRIBAL WATER RIGHTS

Whether water rights inure to a tribe and to what extent is largely a matter of judicial interpretation. The early treaties with the Indians seldom mentioned and never defined water rights. And yet, since the Indian economy was built at that time in part on fishing and later on agriculture, it was essential that a tribe be assured some right to the water within or bordering the reservation.

That the Federal Government had the power to reserve the waters flowing through the territories and except them from appropriation under the state laws had early been decided. Thus, when the question of tribal water right first arose the Supreme Court in the case of Winona v. United States held to this section was adopted which added to the section the words "or upon any Indian reservation, or lands belonging or occupied by any tribe of Indians under authority of the United States." In 1909, this statute was incorporated, with slight verbal changes, in the Penal Code, as section 50. The provision in question, as subsequently amended, reads:

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United States v. Powers, 305 U.S. 527 (1939); affg. 95 F. 2d 782 (C. C. A. 9, 1938).


United States v. Konkapot, 43 Fed. 64, 66 (C. C. Wis. 1890); Labrador v. United States 6 Okla. 400, 1893. In the former case, the court held erroneous the conviction of a second Indian defendant who had removed and used tribut timber unlawfully Cut by the first defendant.

The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a