

United States, who is charged with the delivery of the annuities of the tribe to which the offending party belongs, whose duty it shall be to hear the proofs and allegations on either side, and determine between them; and the amount of his award shall be immediately deducted from the annuity of the tribe to which the offending party belongs, and given to the person injured, or to the chief of his village for his use.

Treaties provided for the withholding, for a year or for such time as an administrator should determine, of annuities of an Indian drinking intoxicating liquors or providing others with liquor in violation of treaty provisions.¹⁵⁶ Administrative determinations were also authorized for reducing annuities in cases of depredations¹⁵⁷ and horse stealing.¹⁵⁸

6. Termination of treaty-making.—The last stage of dependence is reached when a treaty-making power abandons the right to make further treaties. Such a provision is found in the Treaty of February 18, 1861¹⁵⁹ with the Arapahoe and Cheyenne Indians:

* * * And, in order to render unnecessary any further treaty engagements or arrangements hereafter with the United States, it is hereby agreed and stipulated that the President, with the assent of Congress, shall have full power to modify or change any of the provisions of former treaties with the Arapahoes and Cheyennes of the Upper Arkansas, in such manner and to whatever extent he may judge to be necessary and expedient for their best interests.

A similar result is achieved by treaties in which a tribe makes provision for the termination of its tribal existence.*

¹⁵⁶ Treaty of March 12, 1858, with the Poncas, 12 Stat. 997; Treaty of June 19, 1858, with the Sioux, Art. 7, 12 Stat. 1037. The use of congressional power in conjunction with the treaty-making power to impose prohibitions against the liquor traffic by treaties with the Indians is discussed in Chapter 17, sec. 2. Treaty provisions regarding the enforcement of liquor prohibition laws were common.

Article 12 of the Treaty of October 18, 1820, with the Choctaw Nation 7 Stat. 210, provided:

In order to promote industry and sobriety amongst all classes of the Red people, in this nation, but particularly the poor, it is further provided by the parties, that the agent appointed to reside here, shall be, and he is hereby, vested with full power to seize and confiscate all the whiskey which may be introduced into said nation, except that used at public stands, or brought in by the permit of the agent, or the principal Chiefs of the three Districts.

The Indians were sometimes required to aid in the enforcement of these laws. Thus provisions were sometimes made whereby the Indians promised to tell the agent of violations of liquor prohibitions. (Treaty of May 15, 1846, with the Comanche and other tribes, Art. 12, 9 Stat. 844.)

In some of the treaties the Indians promised "to use their best efforts to prevent the introduction and use of ardent spirits in their country." (Treaty of May 18, 1854, with the Sacs and Foxes, Art. 10, 10 Stat. 1074.) The Treaty of February 11, 1856, with the Menomonee Tribe, Art. 3(2), 11 Stat. 679, provided "That the Menomonees will suppress the use of ardent spirits among their people, and resist, by all prudent means, its introduction in their settlements."

The Treaty of February 22, 1855, with the Chippewas, Art. 9, 10 Stat. 1165 provides:

* * * that they will abstain from the use of intoxicating drinks and other vices to which they have been addicted.

¹⁵⁷ Treaty of September 30, 1809, with the Delawares and others, Art. 7, 7 Stat. 113.

¹⁵⁸ Treaty of June 26, 1794, with the Cherokee Nation, Art. 4, 7 Stat. 43, Article 7 of the Treaty of January 22, 1855, with the Willamette Indians, 10 Stat. 1143, provided that:

* * * any one of them who shall drink liquor, or procure it for other Indians to drink may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Also see Treaty of December 26, 1854, with the Nisquallys, Art. 9, 10 Stat. 1132.

¹⁵⁹ Art. 7, 12 Stat. 1163.

¹⁶⁰ See Chapter 14, secs. 1-2.

C. COMMERCIAL RELATIONS

Commercial dealings generally formed the substance of those treaties which were not specifically treaties of peace.

1. *Cessions of land.*—That which the Indians had which the United States most desired was, until very recently, land. The process of treaty-making was the first method of acquiring lands for, as well as from, the Indians.¹⁶¹ The United States and the Indians sometimes exchanged land,¹⁶² and land was sometimes ceded to the states.¹⁶³

The right to pass through the Indian territory in certain places was sometimes reserved by the United States,¹⁶⁴ as were rights to build roads and establish inns and ferrys,¹⁶⁵ or to permit telegraph lines or railroads¹⁶⁶ or a named railroad to have a right-of-way (provided just compensation is paid),¹⁶⁷ and options to purchase rights-of-way.¹⁶⁸

Considerable power was often given to the Federal Government by provisions relating to land. The Treaty of August 5, 1826,¹⁶⁹ granted to the United States the right to search for minerals.

Many treaties empowered the United States to allot land to Indians,¹⁷⁰ which, in a few cases was made "exempt from taxa-

¹⁶¹ See Chapter 15, sec. 5; Westwood, *Legal Aspects of Land Acquisition*, p. 2, *Indians and the Land*, Contributions by the Delegation of the United States, First Inter-American Conference on Indian Life, Patzcuaro, Mexico, published by Office of Indian Affairs, April 1940.

For an example of cession by the United States to Indians see Treaty of September 15, 1832, with the Winnebagos, Art. 2, 7 Stat. 370. For an example of a reservation for a tribe of land from a cession see Treaty of September 21, 1832, with the Sacs and Fox, Art. 2, 7 Stat. 374. Land was reserved to the Indians, including the right to lease salt lands. The salt was not to be sold at a higher price than \$7 per bushel of 50 pounds weight; otherwise the lease would be forfeited. Treaty of October 19, 1818, with the Chickasaws, Art. 4, 7 Stat. 192. It is well settled that good title to lands of an Indian tribe may be granted to Indians by a treaty between the United States and the tribe, without an act of Congress or any patent from the executive authority of the United States. Tribal land can be disposed of by treaty. 9 Op. A. G. 24 (1857).

Examples of treaty provisions on land cessions by the Indians to the United States will be found in the Treaty of August 27, 1804, with the Piankeshaws, Art. 1, 7 Stat. 83; Treaty of September 30, 1809, with the Delawares and others, Art. 1, 7 Stat. 113; Treaty of July 8, 1817, with the Cherokees, Art. 10, 7 Stat. 156.

¹⁶² Treaty of June 30, 1802, with the Senecas, 7 Stat. 70; Treaty of July 8, 1817, with the Cherokees, Arts. 1 and 2, 7 Stat. 156; Treaty of February 12, 1825, with the Creek Nation, Art. 2, 7 Stat. 237.

¹⁶³ Treaty of May 31, 1796, with the Seven Nations of Canada, 7 Stat. 55.

¹⁶⁴ Treaty of August 3, 1795, with the Wyandots and others, Art. 3, 7 Stat. 49. On provisions regarding free navigation for all through navigable streams, see Treaty of July 8, 1817, with the Cherokees, Art. 9, 7 Stat. 156.

¹⁶⁵ Treaty of September 29, 1817, with the Wyandots and others, Art. 14, 7 Stat. 160. Also see Treaty of November 11, 1794, with the Six Nations, Art. 5, 7 Stat. 44; Treaty of August 16, 1825, with the Kansas, Arts. 1, 2, and 3, 7 Stat. 270. Art. 5 provided for compensation for this privilege. Treaty of August 7, 1856, with the Creeks and Seminoles, Art. 19, 11 Stat. 699.

¹⁶⁶ Treaty of July 4, 1866, with the Delawares, Art. 13, 14 Stat. 793. Also see Treaty of June 22, 1855, with the Choctaws and Chickasaws, Art. 18, 11 Stat. 611.

¹⁶⁷ Treaty of January 22, 1855, with the Willamettes, Art. 8, 10 Stat. 1143.

¹⁶⁸ Treaty of November 15, 1861, with the Pottawatomies, Art. 5, 12 Stat. 1191. Also see Treaty of May 30, 1860, with the Delawares, Art. 3, 12 Stat. 1129.

¹⁶⁹ With the Chippewas, Art. 3, 7 Stat. 290.

¹⁷⁰ Treaty of July 8, 1817, with the Cherokees, Art. 8, 7 Stat. 156; Treaty of February 27, 1835, with the Winnebagos Art. 4, 10 Stat. 1172; Treaty of January 31, 1855, with the Wyandots, Arts. 3 and 4, 10 Stat. 1150. construed in *Hicks v. Butrick*, 12 Fed. Cas. No. 6,458 (C. C. Kan. 1875). Sometime a differentiation was made between full-bloods and half-bloods. Treaty of June 3, 1825, with the Kansas Nation, Art. 6, 7 Stat. 244. Treaty stipulations apply to half-bloods as well as full-bloods, unless otherwise specially provided. 20 Op. A. G. 742 (1894).

tion. **levy, sale,** or forfeiture, until otherwise provided by Congress." 171 There were also many other types of restrictive clauses such as the promise that land "shall be exempt from **levy, sale,** Or **forfeiture,** until otherwise provided by State legislation, with the assent of Congress," 172 or the granting to the chiefs for the use of a number of tribes tracts of land which "shall not be liable to **taxes** of any kind so long as such land continues the property of the said Indians." 173

The extent to which Indian treaties revolved about land cession will form a principal thread of inquiry in section 4 of this chapter.

2. Reserved rights in ceded lands.—By way of softening the shock of land cession, the Indian tribes were often guaranteed special rights in ceded lands, such as the exclusive right of taking **fish** in streams bordering on the reservation. 174 or "the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States," 175 or to hunt on lands ceded to the United States or "perpetual right of fishing" at a falls 176 "without hindrance or molestation, so long as they demean themselves peaceably, and offer no injury to the people of the United States," 177 or to hunt and make sugar on ceded land. 178

The nature of these rights forms a part of a later discussion of tribal property? 179

3. Payments and services to tribes.—In payment for lands ceded, and occasionally by way of compensation for other benefits or indemnification for injuries done to Indians, the Federal Government assumed extensive financial obligations to the Indian tribes. These obligations might be discharged either by lump sum or annuity payments of money or by payment in services and commodities. This is the source not only of the intricate legal problems in which tribal funds, 180 per capita payments, 181 and individual Indian moneys 182 are involved, but also of the federal services which today constitute the chief function of the Indian Service. 183

171 Treaty of October 3, 1859, with the Kansas Indians, Art. 3. 12 'Stat. 1111. See Chapter 13. sec. 3A.

172 Treaty of January 31, 1855, with the Wyandots, Art. 4. 10 Stat. 1159.

173 Treaty of September 29, 1817, with the Wyandots and others, Art. 15. 7 Stat. 160.

174 Treaty of June 11, 1855, with Nez Perce, Art. 3, 12 Stat. 957.

175 Treaty of October 4, 1842, with the Chippewas, Art. 2. 7 Stat. 691.

176 Treaty of June 16, 1820, with Chippewas Tribe, Art. 3. 7 Stat. 206. Also see Treaty of June 9, 1855, with the Walla-Wallas, Cayuses, and Umatilla Tribes, 12 Stat. 945, discussed in Memo. Sol. 1. D., June 15, 1937. Also see Chapter 15. sec. 21.

177 Treaty of August 3, 1795, with the Wyandots and others, Art. 7. 7 Stat. 40. : also see Art 5.

178 Treaty of September 29, 1817, with the Wyandots and others, Art. 11. 7 Stat. 160; Treaty of September 24, 1819, with Chippewa Nation, Art. 5. 7 Stat. 203.

179 See Chapter 15. sec. 21. See also Chapter 14. sec. 7.

180 See Chapter 15. sec. 22, 23, 24; Chapter 9. sec. 6.

181 Ibid. And see Chapter 10. secs. 4, 5.

182 Ibid.

183 See Chapter 12. The unpublished Treaty of April 23, 1792, with the Five Nations (Archives No. 19) provided :

THE UNITED STATES, in order to promote the happiness of the five nations of Indians, will cause to be expended annually the amount of one thousand five hundred dollars, in purchasing for them clothing, domestic animals and implements of husbandry, and for encouraging useful artificers to reside in their villages.

The Treaty of September 27, 1830, with the Choctaw Nation, 7 Stat. 333, provided :

* * * The U. S. agree also to erect a Council House for the Nation at some convenient central point, after their people shall be settled; and a House for each Chief, also a Church for each of the three Districts, to be used also as school houses, until the Nation may conclude to build others; and for these purposes ten thousand dollars shall be appropriated; also fifty thousand dollars (viz) twenty-five hundred dollars annually shall be given for the support of three teachers of schools for twenty years. Likewise there shall be furnished to the Nation three Blacksmiths one for each district for sixteen years, and a qualified Mill Wright for five

Frequently services of various kinds were provided for in treaties. Among the articles commonly specified in treaties were those which represented the differences between the white and the Indian civilizations—cattle, hogs, iron, steel, wagons, plows, and other farming tools. 184 The purpose of civilizing the Indians is apparent in the choice of goods and services which the tribe will receive. 185 Such services included the providing of "one grist-mill and one saw-mill * * * one blacksmith and one gunsmith * * * and * * * such implements of agriculture as he proper agent may think necessary" and "one hundred and sixty bushels of salt" annually; 186 farming utensils, cattle, black-

years; Also there shall be furnished the following articles, twenty-one hundred blankets, to each warrior who emigrates a rifle, moulds, wipers and ammunition; One thousand axes, ploughs, hoes, wheels and cards each; and four hundred looms. There shall also be furnished, one ton of iron and two hundred weight of steel annually to each District for sixteen years. (Art. 20.)

Article 4 of the Treaty of February 8, 1831, with the Menomonee Nation, 7 Stat. 342, provides :

* * * The above reservation being made to the Menomonee Indians for the purpose of weaning them from their wandering habits, by attaching them to comfortable homes, the President of the United States, as a mark of affection for his children of the Menomonee tribe, will cause to be employed five farmers of established character for capacity, industry, and moral habits, for ten successive years, whose duty it shall be to assist the Menomonee Indians in the cultivation of their farms, and to instruct their children in the business and occupation of farming. Also, five females shall be employed, of like good character, for the purpose of teaching young Menomonee women, in the business of useful housewifery, during a period of ten years.—The annual compensation allowed to the farmers shall not exceed five hundred dollars, and that of the females three hundred dollars. And the United States will cause to be erected, houses suited to their condition, on said lands, as soon as the Indians agree to occupy them, for which ten thousand dollars shall be appropriated; also, houses for the farmers, for which three thousand dollars shall be appropriated; to be expended under the direction of the Secretary of War. Whenever the Menomonees thus settle their lands, they shall be supplied with useful household articles, horses, cows, hogs, and sheep, farming utensils, and other articles of husbandry necessary to their comfort, to the value of six thousand dollars; and they desire that some suitable device may be stamped upon such articles, to preserve them from sale or barter, to evil disposed white persons: none of which, nor any other articles with which the United States may at any time furnish them, shall be liable to sale, or be disposed of or bargained, without permission of the agent. The whole to be under the immediate care of the farmers employed to remain among said Indians, but subject to the general control of the United States' Indian Agent at Green Bay acting under the Secretary of War. The United States will erect a grist and saw mill on Fox river, for the benefit of the Menomonee Indians, and employ a good miller, subject to the direction of the agent, whose business it shall be to grind the grain, required for the use of the Menomonee Indians, and saw the lumber necessary for building on their lands, as also to instruct such young men of the Menomonee nation, as desire to, and conveniently can be instructed in the trade of a miller. The expenses of erecting such mills, and a house for the miller to reside in, shall not exceed six thousand dollars, and the annual compensation of the miller shall be six hundred dollars, to continue for ten years. And if the mills so erected by the United States, can saw more lumber or grind more grain, than is required for the proper use of said Menomonee Indians, the proceeds of such milling shall be applied to the payment of other expenses occurring in the Green Bay agency, under the direction of the Secretary of War.

Article 13 of the Treaty of April 29, et seq., 1868, with the Sioux Nation, 15 Stat. 635, provides that :

The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons. (P. 640)

See also Chapter 151 sec. 23A. fn 608

184 Art. 4 of Treaty of October 23, 1826, 7 Stat. 300, 301 (Miami). See also Act of May 1, 1858, Art. 3. 21 Stat. 113, 114 (concerning use of sums due to Indians of the Blackfeet, Fort Peck, and Fort Belknap Reservations). Cf. Act of April 30, 1888, sec 17, 25 Stat. 94, 100 (Sioux). The Southern Utes were entitled to receive annuities in the form of sheep, Act of February 20, 1895, see 5. 28 Stat. 677, 678.

185 Cf. Treaty of September 24, 1837, with the Pawnee, Art. 4. 11 Stat. 729.

186 Treaty of October 6, 1818 with the Miami Nation, Art. 5. 7 Stat. 189; Cf. Treaty of June 29, 1796 with the Creeks, Art. 8. 7 Stat. 56; Treaty of June 7, 1803, with the Delawares and others, Art. 3. 7 Stat. 74; Treaty of November 14, 1805 with the Creeks, Art. 4. 7 Stat. 50; Treaty of September 18, 1823, with the Floridas, Art. 6. 7 Stat. 224; Treaty of February 12, 1825, with the Creeks, Art. 7. 7 Stat. 237.

smith and such agricultural assistants as the President may deem expedient; ¹⁸⁷ two boats, ¹⁸⁸ horses, perogues and provisions; ¹⁸⁹ rifles, guns, ammunition, etc., in compensation for homes left by Indians who were removed; ¹⁹⁰ to each warrior removing, "a blanket, kettle, rifle gun, bullet moulds and nippers, and ammunition sufficient for hunting and defence, for one year," plus corn; ¹⁹¹ 200 cattle, 200 hogs, plus 2,000 pounds of iron, 1,000 pounds of steel and 1,000 pounds of tobacco annually, and the assistance of laborers; ¹⁹² the payment of annuities in the form of money, merchandise, provisions, or domestic animals, at the option of the Indians; ¹⁹³ the building of houses for chiefs; ¹⁹⁴ mills and millers for a period of 3 years; ¹⁹⁵ annuities and money for the repair of mill and schoolhouse; ¹⁹⁶ the building of a church and an allowance for a Catholic priest."

The United States agreed in treaties with most of the tribes to pay annuities in various forms: for education, blacksmiths, farmers, laborers, millers, millwrights, iron, coal, steel, salt, agricultural implements, tobacco, and transportation.¹⁹⁶

Many treaties contained clauses providing for additional annuities,¹⁹⁷ or for the commutation of annuities,¹⁹⁸ or for presents and annuities,¹⁹⁹ and goods,²⁰⁰ rations,²⁰¹ and clothing.*

By treaties, the United States also agreed to make payments to enable the raising of a tribal corps of light horse;²⁰² to pay a state for a balance due by a tribe;²⁰³ to provide money for poor Indians; to pay demands for slaves and other property alleged

¹⁸⁷ Treaty of September 24, 1819, with the Chippewas, Art. 8, 7 Stat. 203.

¹⁸⁸ Treaty of July 30, 1819, with the Kickapoos, Art. 8, 7 Stat. 200.

¹⁸⁹ Treaty of October 3, 1818, with the Delawares, Art. 3, 7 Stat. 188.

¹⁹⁰ Treaty of July 8, 1817, with the Cherokees, Art. 6, 7 Stat. 166.

"Treaty of October 18, 1820, with the Choctaws, Art. 5, 7 Stat. 210

¹⁹² Treaty of October 23, 1826, with the Miamis, Art. 4, 7 Stat. 300.

¹⁹³ Treaty of June 2, 1826, with the Osages, Art. 3, 7 Stat. 240.

¹⁹⁴ Treaty of June 2, 1825, with the Osages, Art. 4, 7 Stat. 240. Also see Treaty of November 10, 1808, with the Osages, Art. 3, 7 Stat. 107.

¹⁹⁵ Treaty of December 2, 1794, with the Oneidas and others, Arts. 2 and 3, 7 Stat. 47. Cf. Treaty of January 7, 1806, with the Cherokees, Art. 2, 7 Stat. 101.

¹⁹⁶ Treaty of June 5, 1854, with the Miamis, Art. 13, 10 Stat. 1093.

¹⁹⁷ Treaty of August 13, 1803, with the Kaskaskias, Art. 3, 7 Stat. 78.

¹⁹⁸ Repts. of Committees, No. 474, 23d Cong., 1st sess., May 20, 1834, vol. IV (pp. 53-60), lists these as the most important, but contains references to other types. For examples, see Treaty of November 17, 1807, with the Ottoways and others, Art. 2, 7 Stat. 105; Treaty of August 5, 1826, with the Chippewas, Art. 6, 7 Stat. 290; Treaty of June 9, 1855, with the Walla-Wallas and others, Art. 4, 12 Stat. 945; Treaty of April 19, 1858, with the Yancton Sioux, Art. 4, 11 Stat. 743. Some treaties prohibited the use of annuities for the payment of debts of individuals. Treaty of November 18, 1854, with the Chastats and others, Art. 7, 10 Stat. 1122; Treaty of November 29, 1854, with the Umpquas and others, Art. 7, 10 Stat. 1125.

¹⁹⁹ The Treaty of December 30, 1895, with the Plankshaws, Art. 3, 7 Stat. 100, provided for annuities and added that "the United States may, at any time they shall think proper, divide the said annuity amongst the individuals of the said tribe." Also see Treaty of August 13, 1803, with the Kaskaskias, Art. 3, 7 Stat. 78.

²⁰⁰ Treaty of November 17, 1807, with the Ottoways and others, Art. 3, 7 Stat. 105.

²⁰¹ Treaty of November 11, 1794, with the Six Nations, Art. 6, 7 Stat. 44. Also see Treaty of March 24, 1832, with the Creeks, Art. 13, 7 Stat. 366.

"Treaty of January 21, 1785, with the Wiandots and others, Art. 10, 7 Stat. 16; Treaty of June 26, 1794, with the Cherokees, Art. 3, 7 Stat. 43; Treaty of December 29, 1835, with the Cherokees, Art. 18, 7 Stat. 476

²⁰³ Treaty of December 21, 1855, with the Motels, Art. 5, 12 Stat. 981.

²⁰⁴ Treaty of May 7, 1868, with the Crows, Art. 9, 15 Stat. 649. Also see Treaty of May 10, 1868, with the Cheyennes and others, Art. 6, 15 Stat. 655. For some other types of provisions relating to annuities see Treaty of July 1, 1835, with the Caddo Nation and the State of Louisiana, Art. 4, 7 Stat. 470; Treaty of November 23, 1838, with the Creeks, Art. 6, 7 Stat. 574.

²⁰⁵ Treaty of October 18, 1820, with the Choctaws, Art. 13, 7 Stat. 210.

²⁰⁶ Treaty of January 8, 1821, with the Creeks, Art. 4, 7 Stat. 215.

²⁰⁷ Treaty of October 23, 1826, with the Miamis, Art. 6, 7 Stat. 300.

to have been stolen by the Indians;²⁰⁸ to pay debts or other obligations owed by the nation;²⁰⁹ to pay the Indians for land ceded to a state;²¹⁰ for expenses incurred by the sachem and headmen in attending to tribal business for 5 years;²¹¹ "to indemnify the individuals of the Cherokee nation for losses sustained by them in consequence of the march of the militia and other troops in the service of the United States through that nation * * *."²¹²

D. JURISDICTION

1. *Criminal jurisdiction.*—Many treaties deal with the difficult political problems created by offenses of Indians against whites or whites against Indians.

Some of the earliest treaties adopt the rule usual in treaties between equals. Whites committing offenses within the Indian country against Indian laws are subjected to punishment by the Indian tribe, just as Indians committing offenses against state or federal laws outside the Indian country are subjected to punishment by state or federal courts."

A number of treaties adopt a modified rule, similar to that found in treaties between the United States and various Oriental nations,²¹⁴ whereby the United States is granted jurisdiction over its citizens in the Indian country, to punish them for offenses they may commit, and the Indian tribe undertakes to deliver such offenders to agents of the Federal Government.²¹⁵

Finally, a number of treaties confer upon the Federal Government authority to punish Indians who commit offenses against non-Indians even within the Indian country.²¹⁶

Not until some time after the end of the treaty-making period did the Federal Government take the ultimate step of asserting jurisdiction over offenses committed by Indians against Indians within the Indian country.²¹⁷

2. *Civil jurisdiction.*—Most treaties contain no express provisions on civil jurisdiction and therefore, by implication, confirm the rule that tribal law governs the members of the tribe within the Indian country, to the exclusion of state law.²¹⁸

A few treaties, however, make explicit and emphatic the assurance that state laws will not be applied to the Indians. These clauses are usually found in treaties with tribes that have had sad experiences with state jurisdiction, and the intensity of Indian feeling on the subject is sometimes reflected in the language of the treaty. Thus the purpose of the Treaty of May 6, 1828, with the Cherokee Nation²¹⁹ is stated to be the securing to the Cherokees migrating westward of

* * * a permanent home, and which shall, under the most solemn guarantee of the United States, be, and remain, their's forever—a home that shall never, in all future time, be embarrassed by having extended around it the

²⁰⁸ Treaty of May 9, 1832, with the Seminoles, Art. 6, 7 Stat. 368.

²⁰⁹ Treaty of November 10, 1808, with the Osages, Art. 4, 7 Stat. 107.

²¹⁰ Treaty of March 22, 1816, with the Cherokees, Art. 2, 7 Stat. 138.

²¹¹ Treaty of November 24, 1848, with the Stockbridge Indians, Art. 18, 9 Stat. 955.

²¹² Treaty of March 22, 1816, with the Cherokees, Art. 5, 7 Stat. 139.

²¹³ See Chapter 1, sec. 3, fn. 48.

²¹⁴ See e. g., Art. 21 of Treaty of July 3, 1844, with China, 8 Stat. 592, 396.

²¹⁵ See e. g., Art. 6 of Treaty of August 24, 1818, with the Quapaw Tribe, 7 Stat. 176, 177. Cf. Treaty of May 15, 1846, with the Comanche and others, Art. 12, 9 Stat. 844, providing that any person introducing intoxicating liquors among these Indians "shall be punished according to the laws of the United States."

²¹⁶ See e. g., Art. 9 of Treaty of January 21, 1785, with the Wiandots and others, 7 Stat. 16, 17; Art. 6 of Treaty of November 28, 1785, with the Cherokee, 7 Stat. 18.

²¹⁷ See Chapter 7, sec. 9; Chapter 13.

²¹⁸ See Chapter 7, sec. 1, 2.

²¹⁹ 7 Stat. 311. Accord: Art. 5 of Treaty of New Echota, December 29, 1835, with the Cherokee Tribe, 7 Stat. 478.

lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the 'extension, in any way, of any of the limits of any existing Territory or State; • * *

Various other treaties contained similar pledges.²²⁰ Some treaties contained specific guarantees against taxation.²²¹

E. CONTROL OF TRIBAL AFFAIRS

From 1776 to 1849 we find no treaty provision which limits the powers of self-government of any tribe with respect to the internal affairs of the *tribe*. All limitations upon tribal power, during this period, are in some way related to intercourse with non-Indians. Even the sporadic treaty provisions authorizing allotment of tribal land either list, as part of the treaty itself, the individuals, or define the class of individuals, who are to receive allotments,²²² or provide for the issuance of patents by the authorities of the *tribe*.²²³

In the wake of the War with Mexico, several treaties were imposed upon tribes of the newly acquired territory in which the long-established distinction between internal and external affairs of the tribes was abandoned and the internal affairs of the tribes were declared *subject* to federal control.

The language contained in the Treaty of September 9, 1849, with the Navajo,²²⁴ whereby that tribe agreed that the United States "shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians"²²⁵ is symptomatic rather than legally important. It symbolizes a tendency to disregard the national character of the Indian tribes, a tendency that was perhaps stimulated by the loose organization and backward culture of the Southwestern nomadic tribes.

²²⁰ See, e. g., Art. 14 of the Treaty of March 24, 1832, with the Creek Tribe, 7 Stat. 366, 363; Art. 11 of the Treaty of July 20, 1831, with the Wyandots, Senecas, and Shawnees, 7 Stat. 351, 353.

²²¹ For example, Treaty of September 29, 1817, with the Wyandots and others, Art. 15, 7 Stat. 160, 166.

²²² Treaty of August 9, 1814, with Creek Nation, 7 Stat. 120; Treaty of September 29, 1817, with the Wyandot, Seneca, Delaware, and other tribes, 7 Stat. 160.

²²³ Treaty of November 6, 1838, with the Miami Tribe, 7 Stat. 569. And cf. Act of March 3, 1839, 5 Stat. 349 (Brothertown), providing for allotment by chiefs of tribe, who were to observe "the existing laws, customs, usages, or agreements of said tribe." *Accord*: Act of March 3, 1843, 5 Stat. 645 (Stockbridge).

²²⁴ 9 Stat. 974.

²²⁵ *Ibid.*, Art. 9. *Accord*: Art. 7 of Treaty of December 30, 1849, with the Utah Indians, 9 Stat. 984.

A year later, in 1850, began a series of treaties by which various tribes undertook to abandon their tribal existence.=

In 1851, a new breadth of authority was conferred upon the executive branch of the Federal Government by such clauses as the following :

Rules and regulations to protect the rights of persons and property among the Indians, parties of this Treaty, and adapted to their condition and wants, may be prescribed and enforced in such manner as the President or the Congress of the United States, from time to time, shall direct.

This provision, taken from the Treaty of July 23, 1851, with the See-see-toan (Sisseton) and Way-pay-toan (Wahpeton) Sioux,²²⁶ was copied bodily in several later treaties.²²⁷

The most important breach in the scope of tribal self-government made by treaty was made in 1854 and thereafter, by those treaties which conferred upon the President power to allot tribal lands to individual Indians.²²⁸

Along with this encroachment upon the powers of the tribes to apportion rights in tribal land among the members of the tribe, there came other extensions of federal authority over the handling and distribution of tribal funds and other incidental matters.²²⁹

The Civil War brought new occasions for the use of federal power in tribal affairs as a result of conflicts between different factions of a tribe. The Treaty of June 14, 1866, provided for "a general amnesty of all past offences against the laws of the United States, committed by any member of the Creek Nation * * *" and "an amnesty for all past offences against their government, * * *."²³¹

Thus during the last decade or so of the treaty-making period, the basis upon which treaties had been made was gradually undermined by successive specific encroachments upon the autonomy of various tribes.

²²⁶ Treaty of April 1, 1850, with the Wyandot Indians, 9 Stat. 987. And see Chapter 14, sec. 2.

²²⁷ 10 Stat. 949, 950.

²²⁸ E. g., Treaty of August 5, 1851, with the Med-ay-wa-kan-toan, etc., Sioux, 10 Stat. 954.

²²⁹ See Treaty of March 15, 1854, with the Ottoo and Missouri Indians, 10 Stat. 1038, and Treaty of March 16, 1854, with the Omaha Tribe, 10 Stat. 1043, discussed in sec. 4G, *infra*.

²³⁰ See sec. 3B(5), *supra*.

²³¹ Art. 1, 14 Stat. 785. Also see Chapter 8, sec. 11. Also see the pre-Civil War Treaty of August 6, 1846, with the Cherokee Nation, "Treaty Party," and "Old Settlers," Art. 2, 9 Stat. 871, whereby the Cherokee Nation declared a general amnesty for all past offenses after a period of civil strife, and agreed to a bill of rights.

SECTION 4. A HISTORY OF INDIAN TREATIES

A. PRE-REVOLUTIONARY PRECEDENTS: 1532-1776

First mention of the necessity of a civilized nation treating with the Indian *tribes* to secure Indian consent to *cessions of land* or changes of political status²³² was made in 1532 by Francisco de Victoria,²³³ who had been invited by the Emperor of Spain to advise on the rights of Spain in the New World.

After considering in detail the argument that barbarians could not own land by reason of the sin of unbelief or other mortal sin, or by reason of "unsoundness of mind," Victoria reached the conclusion that :

* * * the aborigines in question were true owners, before the Spaniards came among them, both from the public and the private point of view.²³⁴

²³² Victoria, *De Indis et De Jure Belli Relectiones* (Trans. by John Pawley Bate, 1917), 1557, sec. 2, titles 6, 7.

²³³ *Ibid.*, Introduction (Nys), p. 71.

²³⁴ *Ibid.*, sec. 1, title 24, p. 128.

Since the Indians were true owners, Victoria held, discovery could convey no title upon the Spaniards, for title by discovery can be justified only where property is ownerless.²³⁵ Nor could Spanish title to Indian lands be validly based upon the divine rights of the Emperor or the Pope,²³⁶ or upon the unbelief or sinfulness of the aborigines.= Thus, Victoria concluded, even the Pope had no right to partition the property of the Indians, and in the absence of a just war only the voluntary consent of the aborigines could justify the annexation of their territory.²³⁷ No less than their property, the government of the aborigines was entitled to respect by the Spaniards, according to the view of Victoria. So long as the Indians respected the natural rights of Spaniards, recognized by the law of nations, to travel in their

²³⁵ *Ibid.*, sec. 2, p. 139.

²³⁶ *Ibid.*, sec. 2, titles 1-6.

²³⁷ *Ibid.*, sec. 2, titles 8-16.

²³⁸ *Ibid.*

lands and to sojourn, trade, and defend their rights therein, the Spaniards could not wage a just War against the Indians,²³⁹ and therefore could not Claim any rights by conquest. In that situation, however, sovereign power over the Indians might be secured through the consent of the Indians themselves.

Another possible title is by true and voluntary choice, as if the Indians, aware alike of the prudent administration and the humanity of the Spaniards, were of their own motion, both rulers and ruled, to accept the King of Spain as their sovereign. This could be done and would be a lawful title, by the law natural too; seeing that a State can appoint any one it will to be its lord, and heretofore the consent of all is not necessary, but the consent of the majority suffices. For, as I have argued elsewhere, in matters touching the good of the State the decisions of the majority bind even when the rest are of a contrary mind; otherwise naught could be done for the welfare of the State, it being difficult to get all of the same way of thinking. Accordingly, if the majority of any city or province were Christians and they, in the interests of the faith and for the common weal, would have a prince who was a Christian, I think that they could elect him even against the wishes of the others and even if it meant the repudiation of other unbelieving rulers, and I assert that they could choose a prince not only for themselves, but for the whole State, just as the Franks for the good of their State changed their sovereigns and, deposing Childeric, put Pepin, the father of Charlemagne, in his place, a change which was approved by Pope Zacharias. This, then, can be put forward as a sixth title.²⁴⁰

The Emperors of Spain and their subordinate administrators, like many able administrators since, did not consistently carry out Fra Victoria's legal advice. They did, however, adopt many laws and issue many charters recognizing and guaranteeing the rights of Indian communities,²⁴¹ and the theory of Indian title put forward by Victoria came to be generally accepted by writers on international law of the sixteenth, seventeenth, and eighteenth centuries who were cited as authorities in early federal litigation on Indian property rights.²⁴²

The idea that land should be acquired from Indians by treaty involved three assumptions: (1) That both parties to the treaty are sovereign powers; (2) that the Indian tribe has a transferable title, of some sort, to the land in question; and (3) that the acquisition of Indian lands could not safely be left to individual Colonists but must be controlled as a governmental monopoly. These three principles are embodied in the "New Project of Freedoms and Exemptions," drafted about 1630 for the guidance of officials of the Dutch West India CO., which declares:

The Patroons of New Netherland, shall be bound to purchase from the Lords Sachems in New Netherland, the soil where they propose to plant their Colonies, and shall acquire such right thereunto as they will agree for with the said Sachems.²⁴³

The Dutch viewpoint was shared by some of the early English settlers. In the spring of 1636, Roger Williams, who insisted that the right of the natives to the soil could not be abrogated by an English patent, founded the Rhode Island Plantations.²⁴⁴ This was the territory inhabited by the Narragansetts and for which Williams had treated.

²³⁹ *Ibid.*, sec. 3, title 1, *et seq.*

²⁴⁰ *Ibid.*, sec. 3, title 16, p. 159.

²⁴¹ See Chapter 20, sec. 1.

²⁴² Victoria, *supra*, Introduction (Nys). See also Vattel, *Le Droit des Gens*, vol. 1, bk. 1, c. 18, sec. 209, and other authorities cited by counsel for both parties in *Johnson v. McIntosh*, 8 *Wheat.* 543 (1823). And see Chapter 15, sec. 4.

²⁴³ J. R. Brodhead, Documents Relative to the Colonial History of the State of New York (Holland Documents-II, No. 27) (1855, O'Callaghan, ed.), vol. 1, p. 99.

²⁴⁴ Kinney, *A Continent Lost-A civilization Won* (1937), pp. 11-12

From time to time other British colonies became parties to treaties with the Indians.²⁴⁵ Unauthorized treating for the purchase of Indian land by individual colonists was prohibited in Rhode Island as early as 1651.²⁴⁶ By the middle of the eighteenth century, eight other colonies had laws forbidding such purchase unless approved by the constituted authorities.²⁴⁷ The effect of such laws was to eliminate conflicts of land titles that otherwise resulted from overlapping grants by individual Indians or tribes, to protect the Indians, in some measure, against fraud, and to center in the colonial governments a valuable monopoly.

With the outbreak of the French and Indian War the problem of dealing with the natives which had been left largely to the individual colonies was temporarily returned to the control of the mother country.²⁴⁸ Later, treaties with the Indians were again negotiated by the colonies.²⁴⁹

On several occasions the Crown indicated its belief in the sanctity of treaty obligations.²⁵⁰ Some of the treaties contained definite stipulations regarding land tenure.²⁵¹

B. THE REVOLUTIONARY WAR AND THE PEACE: 1776-83

From the first days of the organization of the Continental Congress great solicitude for the natives was evidenced. The Congress pledged itself to unusual exertions in securing and preserving the friendship of the Indian nations.²⁵² First fruit of this effort was the treaty of alliance with the Delaware Indians of September 17, 1778.²⁵³ Its provisions are so significant that Chief Justice Marshall's analysis in this respect should be noted:

The first treaty was made with the Delawares, in September 1778. The language of equality in which it is drawn, evinces the temper with which the negotiation was undertaken, and the opinion which then prevailed in the United States. * * * 6. The sixth article is entitled to peculiar attention, as it contains a disclaimer of designs which were, at that time, ascribed to the United States, by their enemies, and from the imputation of which congress was then peculiarly anxious to free the government. It is in these words: "Whereas, the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion, that it is the design of the states aforesaid to extirpate the Indians, and take possession of their country; to obviate such false suggestion, the United States do engage to guaranty to the aforesaid nation of Delawares, and their heirs, all their terri-

²⁴⁵ In Pennsylvania, in advance of settlement, William Penn sent several commissioners to confer with the Indians and conclude with them a treaty of peace (18th Annual Report, Bureau of Ethnology, 1896-97, pt. II, pp. 591-599). Also see Chapter 15, sec. 4.

²⁴⁶ Kinney, *op. cit.*, p. 14. As early as 1609 English colonists in Virginia purchased land directly from the Indians in that territory. (P. 12.)

²⁴⁷ *Ibid.* The colonies were Massachusetts, Virginia, New Jersey, Pennsylvania, Maryland, North Carolina, South Carolina, and Georgia.

²⁴⁸ Mohr, *Federal Indian Relations* (1933), pp. 4-9.

²⁴⁹ See, for example, the Treaty of Hard Labor on October 14, 1768, which defined the boundary of Virginia, and the Treaty of Fort Stanwix, November 5, 1768, defining the boundary of the northern district (Mohr, *op. cit.*, pp. 9-10).

²⁵⁰ See, e. g., *Worcester v. Georgia*, 6 Pet. 515, 546, 548 (1832).

²⁵¹ In 1783 Sir John Johnson, prominent representative of the British Government, referring to the boundaries established by the treaty of peace with the United States of that year, told the Six Nations:

You are not to believe or even think that by the line which has been described it was meant to deprive you of an extent of country of which the right of soil belongs to you and is in yourselves as sole proprietors as far as the boundary line agreed upon [by treaty of 1768] and established in the most solemn and public manner in the presence and with the consent of the governors and commissioners deputed by the different colonies for that purpose . . . (Mohr, *op. cit.*, p. 118.)

²⁵² *Jour. Cont. Cong.* (Library of Congress ed.) 1775, vol. II, p. X74.

²⁵³ Treaty of September 17, 1778, 7 Stat. 13.

torial rights, in the fullest and most ample manner, as it hath been bounded by former treaties, as long as the said Delaware nation shall abide by, and hold fast the Chain of friendship now entered into." The parties further agree, that other tribes, friendly to the interest of the United States, may be invited to form a state, whereof the Delaware nation shall be the heads, and have a representation in congress. This treaty, in its language, and in its provisions, is formed, as near as can be, on the model of treaties between the crowned heads of Europe. The sixth article shows how congress then treated the injurious calumny of cherishing designs unfriendly to the political and civil rights of the **Indians**.²⁵⁴

Articles 4 and 5 are also noteworthy. By Article 4, any offenders of either party against the treaty of peace and friendship were not to be punished, except

* * * by imprisonment, or any other competent means, until a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice . * * .

Article 5²⁵⁵ provided for a

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

C. DEFINING A NATIONAL POLICY: 1783-1800

Following the close of the Revolutionary War the United States entered into a series of treaties with Indian tribes by which the "hatchet" was "forever buried."²⁵⁶

In the spring of 1784 Congress appointed commissioners to negotiate with the Indians. Full power was given them to draw boundary lines and conclude a peace, with the understanding that they would make clear that the Indian territory was forfeit as a result of the military victory." This idea was not novel. General Washington, on September 7, 1783, had expressed himself as agreeable to regarding the territory held by the Indians as "conquered provinces," although opposed to driving them from the country altogether. The commissioners met at Fort Stanwix and on October 22 concluded a treaty with the hostile tribes of the Six Nations.²⁵⁷ In the opening paragraph the United States receives the Indians "into their protection." This has

²⁵⁴ *Worcester v. Georgia*, 6 Pet. 515, 548, 549 (1832). See also Art. 12, Treaty with the Cherokees of November 28, 1785, 7 Stat. 18, discussed below, which granted to the Cherokees the right to send a deputy of their own choice to Congress whenever they think fit. This, however, was never carried into effect. See also sec. 3B(3), *supra*.

²⁵⁵ See Chapter 4, sec. 2, and Chapter 16.

²⁵⁶ The phrase appears in the Treaties at Hopewell with the Cherokees, November 28, 1785, Art. 13, 7 Stat. 18; with the Choctaws, January 3, 1786, Art. 11, 7 Stat. 21; and with the Chickasaws, January 10, 1786, Art. 11, 7 Stat. 24.

This phrase was later supplanted by the phrase "all animosities for past grievances shall henceforth cease." See fn. 288, *infra*. As the disturbances caused by the Revolutionary War settled, this phrase disappeared.

²⁵⁷ Mohr, *op. cit.*, p. 108. In 1786 the Continental Congress, through its chairman, David Ramsay, again tried to make it clear, this time to the Seneca Indian, Cornplanter, that

* * * the United States alone possess the sovereign power within the limits described at the late Treaty of peace between them and the King of England. * * * You may also assure the Indians that they tell lies, who say that the King of England has not in his late Treaty with the United States given up to them the lands of the Indians. (Jour. Cont. Cong., Library of Congress ed., 1786, vol. XXX, p. 235.)

²⁵⁸ 10 Ford. Washington Writings, vol. X (1891), pp. 303312.

²⁵⁹ Treaty of October 22, 1784, 7 Stat. 15. The Treaty was construed in *New York Indians*, 5 Wali. 761 (1866) and in *Commonwealth v. Cozz*, 4 Dall. 170 (1800).

been cited as the source of the concept of the Federal Government as the guardian of Indian tribes.'

Article 2 provides that "Oneida and Tuscarora Nations shall be secured in the possession of the lands on which they are settled."²⁶¹

Article 4 orders

* * * goods to be delivered to the said Six Nations for their use and comfort.

Thus began a practice which later developed into a comprehensive system of supplying promised goods and services to Indian tribes.²⁶²

Soon afterwards another treaty was agreed upon with the Wiamdots, Delawares, Chippawas, and Ottawas at Fort McIntosh on January 21, 1785.²⁶³ The next year the Shawnee chiefs signed a treaty at the mouth of the Miami.²⁶⁴ These three treaties, which are the only ones entered into with the northern tribes before the adoption of the Constitution, are very similar in nature. All of them recite the conclusion of hostilities and the extension of the protective influence of the United States.²⁶⁵

In the Treaty of January 21, 1735, at Fort McIntosh,²⁶⁶ and the Treaty of January 31, 1736, at the Miami,²⁶⁷ the boundaries between the Indian nations and the United States are defined and the lands therein are allotted to the said nations to live and hunt on, with the provision that if any citizen of the United States should attempt to settle on their territory, he would forfeit the protection of the United States.²⁶⁸ In addition both treaties²⁶⁹ provided for the return to the United States of Indian robbers and murderers. In the treaty with the Shawnees²⁷⁰ there is a similar provision with regard to United States offenders against the Indians.

Congress was slower in taking action regarding the southern tribes. It was not until March 15, 1785,²⁷¹ that a resolution was

²⁶⁰ *United States v. Douglas*, 190 Fed. 482 (C. C. A. 8, 1911).

²⁶¹ An illuminating statement regarding title claimed under the Treaty of Fort Stanwix is found in *Deers v. State of New York*, 22 F. 2d 851 (D. C. N. D. N. Y. 1927):

* * * The source of title here is not letters patent or other form of grant by the federal government. Here the Indians claim immemorial rights, arising prior to white occupation, and recognized and protected by treaties between Great Britain and the United States and between the United States and the Indians. By the treaty of 1784 between the United States and the Six Nations of Indians, and the treaty of 1796 between the United States, the state of New York and the Seven Nations of Canada, the right of occupation of the lands in question by the St. Regis Indians, was not granted, but recognized and confirmed. (P. 854.)

²⁶² See, for a similar provision, the Treaty of Fort McIntosh with the Wiamdots, Delawares, etc., January 21, 1785, 7 Stat. 16.

²⁶³ Treaty of January 21, 1785, 7 Stat. 16. By this treaty the United States Supreme Court states, in *Jones v. Meehan*, 175 U. S. 1 (1899):

* * * the United States relinquished and quitclaimed to the said nations respectively all the lands lying within certain limits, to live and hunt upon, and otherwise occupy as they saw fit; but the said nations, or either of them, were not to be at liberty to dispose of those lands, except to the United States. (P. 9.)

See also *Commonwealth v. Coxe*, 4 Dall. 170 (1800).

²⁶⁴ Treaty of January 31, 1786, 7 Stat. 26.

²⁶⁵ The Fort McIntosh treaty in its 10th article introduces a technique of giving presents upon the signing of the Instrument which is soon to become standard practice in negotiating agreements with the Indians. Also to be noticed is the reserving for the first time of land within Indian boundaries for establishment of United States trading posts which is provided in Article 4 of the same treaty.

²⁶⁶ Arts. 3, 4, 5, 7 Stat. 16.

²⁶⁷ Arts. 6, 7, 7 Stat. 26.

²⁶⁸ For a discussion of the significance of this stipulation see Treaty of July 2, 1791, with the Cherokees, 7 Stat. 39; and fn. 294 and 295, *infra*.

²⁶⁹ Art. 9, 7 Stat. 16; Art. 3, 7 Stat. 26.

²⁷⁰ Art. 3, Treaty of January 31, 1786, 7 Stat. 26. The Treaties at Hopewell, *infra*, contain a similar provision with the Cherokee. November 28, 1785, Art. 7, 7 Stat. 18; the Choctaw, January 3, 1786, Art. 6, 7 Stat. 21; the Chickasaw, January 10, 1786, Art. 6, 7 Stat. 24.

²⁷¹ Jour. Cont. Cong. (Library of Congress ed.), 1785, vol. XXVIII, pp. 160-162.

passed for the appointment of commissioners to deal with the Indian nations in the southern part of the country.

The federal commissioners met with the Cherokees at Hopewell on the Keowee, and concluded a treaty on November 23, 1785,²⁷² which declared that the United States " * * * give peace to all the Cherokees, and receive them into the favour and protection of the United States of America, on the following conditions."

In *Worcester v. Georgia*,²⁷³ Chief Justice Marshall gave the following answer to the argument that this language put the Indians in an inferior status:

* * * When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us, that the United States were at least as anxious to obtain it as the Cherokees? We may ask further, did the Cherokees come to the seat of the American government to solicit peace; or, did the American commissioners go to them to obtain it? The treaty was made at Hopewell, not at New York. The word "give", then, has no real importance attached to it.

Marshall, at the same time, also called attention to Article 3 of the Hopewell agreement which acknowledges the Cherokees to be under the protection of no other power but the United States, saying:²⁷⁴

The general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things, in time of peace. It was sometimes changed in war. The consequence was, that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands—no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection without involving a surrender of their national character. This is the true meaning of the stipulation, and is, undoubtedly, the sense in which it was made.

Article 9 of the Hopewell treaty with the Cherokees holds that

* * * the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper.

In *Worcester v. Georgia* it was argued that in this article the Indians had surrendered control over their internal affairs. This interpretation was vigorously rejected by the Supreme Court.

To construe the expression "managing all their affairs," into a surrender of self-government, would be, we think, all perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade; the influence it gave, made it desirable that congress should possess it. The commissioners brought forward the claim, with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true, as respects the management of all their affairs. The most important of these are the cession of their lands and

security against intruders on them. Is it credible, that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognise the right of the Cherokees to declare hostilities, and to make war. It would convert a treaty of peace, covertly, into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.²⁷⁵

Article 12, permitting Cherokee representation in Congress, is of particular interest, although it was never fulfilled.²⁷⁶

During the last year of the Confederation—the dissatisfaction among the Indians resulting from using the "conquered province" concept as the basis for treaty deliberations became apparent. The Secretary of War, therefore, on May 2, 1788,²⁷⁷ recommended a change in policy which would permit the outright purchase of the soil of the western territories described in former treaties with such additions as might be affected by further negotiations.²⁷⁸ Acting on this suggestion, Congress appropriated \$20,000.00 on July 2, 1788,²⁷⁹ which, together with the balance remaining from the sum allocated on October 22, 1787,²⁸⁰ was earmarked for use in extinguishing Indian Claims to land already ceded.

The immediate result of this step were the treaties of Fort Harmar with the Wyandot, Delaware, Chippewa, and Ottawa Indians,²⁸¹ and with the Six Nations, entered into early in 1789,²⁸² which reaffirmed many of the original terms of the Fort Stanwix and Fort McIntosh treaties. Both of these agreements provide for the United States relinquishing and quitclaiming certain described territory to the Indian nations. However, article 3 of the Fort Harmar treaty with the Wyandots, Delawares, Chippewas, and Ottawas,²⁸³ added that the said nations should not be at liberty

* * * to sell or dispose of the same, or any part thereof, to any sovereign power, except the United States; nor to the subjects or citizens of any other sovereign power, nor to the subjects or citizens of the United States.

Article 7 also provided for the opening up of trade with Indians, establishing a system of licensing with guarantees of protection to certified traders, and a promise by the Indians to apprehend and deliver to the United States those individuals who intrude themselves without such authority. Article 6 makes first mention of depredations, and binds both parties to a method of handling claims arising therefrom.

Although the Fort Harmar conferences were held during the life of the Confederation, the report of the results obtained was received in the first months of the new government operating

²⁷² Ibid., pp. 553–554.

²⁷³ See Art. 6, Treaty with the Delawares of September 17, 1778, 7 Stat. 13, and fn. 254, *supra*.

²⁷⁴ Mohr, *op. cit.*, p. 132.

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁸¹ Treaty of January 9, 1789, 7 Stat. 28.

²⁸² Treaty of January 9, 1789 (unratified), 7 Stat. 33. See also fn. 263 *supra*, for interpretation of this treaty in *Jones v. Meehan*, 175 U. S. 1. 9 (1899).

²⁸³ Treaty of January 9, 1789, 7 Stat. 28.

²⁷² 7 stat. 18.

²⁷³ 6 Pet. 515, 551 (1832).

²⁷⁴ Ibid., p. 551.

under the Constitution, and transmitted to the Senate of the United States on May 25, 1789, for its approval.=

Puzzled over the proper procedure, George Washington wrote to the Senate asking what it meant by advising him to "execute and enjoin" the observance of the treaties.

It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty negotiated and signed by such officers, as final and conclusive, until ratified by the sovereign or government from whom they derive their powers. This practice has been adopted by the United States respecting their treaties with European nations, and I am inclined to think it would be advisable to observe it in the conduct of our treaties with the Indians. * * * .²⁸⁵

Not unmindful of the significance of the ratification of Indian treaties, the Senate appointed a special committee to investigate the matter. After several days of debate the Senate advised formal ratification.-

On August 22, 1789, George Washington appeared in the Senate chamber to point out to the assembled group the gravity of the Indian situation in the South. North Carolina and Georgia, the President said, had not only protested against the treaties of Hopewell but had disregarded them. Moreover, open hostilities existed between Georgia and the Creek Nation. All of this, the President continued, involved so many complications that he wished to raise particular issues for the "advice and consent" of the Senate. Accordingly, he put seven questions which resulted in instructions to deal with the Creek situation first and, if need be, to use the whole amount of the current appropriation for Indian treaties for this purpose.²⁸⁷

On August 7, 1790, articles of agreement were concluded between the President of the United States and the kings, chiefs, and warriors of the Creek Nation." Article 5 is a solemn guarantee to the Creeks of all their lands within certain described limits. Article 7 stipulated that—

No citizen or inhabitant of the United States shall attempt to hunt or destroy the game on the Creek lands: Nor shall any such citizen or inhabitant go into the Creek country, without a passport first obtained from the Governor of some one of the United States. * * *

The obligation thus assumed by treaty the United States proceeded to implement in section 2 of the Indian Intercourse Act of May 19, 1796,²⁸⁹ which made it a criminal offense for strangers to hunt, trap, or drive livestock in the Indian country.

It was found necessary to attach secret articles providing for transportation of merchandise duty free into the Creek Nation

by the United States in the event of hostilities between the Creeks and Spaniards.²⁹⁰

In Article 5 of the secret treaty, the United States, for the first time,

* * * agree to educate and clothe such of the Creek youth as shall be agreed upon, not exceeding four in number at any one time.²⁹¹

In the following year, 1791, the commissioners turned their attention to the difficulties between the Cherokees and the State of Georgia. Finally, on July 2, near the junction of the Holston River and the French Broad, the Cherokee Nation abandoned its claims to certain territories in return for \$1,000 annuity.²⁹² The instrument signed on that occasion was well described by the court in *Worcester v. Georgia*:

The third article contains a perfectly equal stipulation for the surrender of prisoners. The fourth article declares, that "the boundary between the United States and the Cherokee nation shall be as follows, beginning," etc. We hear no more of "allotments" or of "hunting-grounds." A boundary is described, between nation and nation, by mutual consent. The national character of each—the ability of each to establish this boundary, is acknowledged by the other. To preclude forever all disputes, it is agreed, that it shall be plainly marked by commissioners, to be appointed by each party; and in order to extinguish forever all claims of the Cherokees to the ceded lands, an additional consideration is to be paid by the United States. For this additional consideration, the Cherokees release all right to the ceded land, forever. By the fifth article, the Cherokees allow the United States a road through their country, and the navigation of the Tennessee river. The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them. By the sixth article, it is agreed, on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade. No claim is made to the management of all their affairs. This stipulation has already been explained. The observation may be repeated, that the stipulation is itself an admission of their right to make or refuse it. By the seventh article, the United States solemnly guaranty to the Cherokee nation all their lands not hereby ceded. The eighth article relinquishes to the Cherokees any citizens of the United States who may settle on their lands; and the ninth forbids any citizen of the United States to hunt on their lands, or to enter their country without a passport. The remaining articles are equal, and contain stipulations which could be made only with a nation admitted to be capable of governing itself.*

This treaty of July 2, 1791, again includes a provision (Article 8) noticed before, viz: that any citizen settling on Indian land " * * * shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they please." ²⁹⁴ This

²⁸⁴ "Treaty of August 7, 1790. Archives No. 17, Debates and Proceedings, vol. 1, p. 1029 (*supra*, fn. 284).

The Creek Treaty was amended on June 29, 1796, by a treaty which among other things provided that the United States give to the Creek Nation "goods to the value of six thousand dollars, and . . . send to the Indian nation two blacksmiths, with strikers, to be employed for the upper and lower Creeks with the necessary tools." Art. 8, Treaty of June 29, 1796, 7 Stat. 56.

²⁹¹ See Art. 3, Treaty with the Kaskaskias, August 13, 1803, 7 Stat. 78. *infra*, for the first contribution by the United States for organized education in the support of a priest " * * * to instruct . . . in the rudiments of literature." See also Chapter 12, sec. 2.

²⁹² Art. 4, Treaty of July 2, 1791, 7 Stat. 39. This sum was increased later to \$1,500 by the Treaty at Philadelphia of February 17, 1792, 7 Stat. 42. The Holston Treaty was further amended by the Treaty of Tellico of October 2, 1798, 7 Stat. 62, construed in *Preston v. Browder*, 1 Wheat. 115 (1816); *Lattimer v. Poteet*, 14 Pet. 4, 13 (1840).

²⁹³ *Worcester v. Georgia*, 6 Pet. 515, 565-556 (1832).

²⁹⁴ See fn. 268 *supra*. A similar provision appears in the Treaties of January 21, 1785, with the Wiandots, Delawares, Chippawas, and Otta

²⁸⁵ The Debates and Proceedings in the Congress of the United States (1789-90), vol. 1, pp. 40-41. (Hereinafter referred to as Debates and Proceedings.)

²⁸⁶ *Ibid.*, p. 33.

²⁸⁷ *Ibid.*, p. 84. It is interesting to note that the committee report (p. 82) which was rejected drew a distinction between treaties with European powers and treaties with the aborigines insisting that solemnities were not necessary in the latter case.

²⁸⁸ *Ibid.*, pp. 66-71. Washington asked the Senate " * * * if all offers should fail to induce the Creeks to make the desired cessions to Georgia, shall the Commissioners make it an ultimatum." (P. 70.) The Senate answered "No." (P. 71.)

²⁸⁹ 7 Stat. 35. A recital often found in Indian treaties is the following, which appears in Art. 13: "All animosities for past grievances shall henceforth cease." (See also Treaty of July 2, 1791, Art. 15, 7 Stat. 39; Treaty of June 29, 1796, Art. 9, 7 Stat. 56.) It should be further noted that Art. 2 pledges the Creeks to refrain from treating with any individual State, or the individuals of any State. *Patterson v. Jenks*, 2 Pet. 216 (1829), construes provisions of this treaty relative to grants of land within the territorial limits of the State of Georgia.

²⁹⁰ 1 Stat. 469.

article, the court in *Raymond v. Raymond*²⁶⁶ cites as the basis for the lack of jurisdiction of the federal judiciary in suits between members of the Cherokee Nation, saying:

It is not material to the present issue that this provision has been subsequently modified. It shows, as do subsequent treaties, that for more than a century this tribe of Indians had claimed and exercised, and the United States have guaranteed and secured to it, the exclusive right to regulate its local affairs, to govern and protect the persons and property of its own people, and of those who join them, and to adjudicate and determine their reciprocal rights and duties. * * * (P. 722.)

Despite efforts at conciliation, dissatisfaction was spreading among the Indian tribes. Word was received that the Indians of the Northwest Territory were preparing to cooperate with the Six Nations in a major war. Washington dispatched instructions to Colonel Pickering to hold a council with the Six Nations. At the same time preparations were made to take military action on the western frontier and General Wayne; a Revolutionary War veteran, was put in charge of the troops, who on August 26, 1794, routed the natives in the battle of Fallen Timbers.

A new treaty was made with the Six Nations on November 11, 1794.²⁶⁶ In this agreement the lands belonging to the Oneidas, Onondagas, Cayugas, and Senecas were described and acknowledged by the United States as the property of the aforementioned Indian nations and in addition the United States pledged to add the sum of \$3,000 to the \$1,500 annuity already allowed by the Treaty of April 23, 1792,²⁶⁷ with the Five Nations.

Shortly thereafter, a treaty²⁶⁸ was concluded with the nations which had participated in the ill-fated expedition against General Wayne. This agreement provides for the cession of an immensely important area which today comprises most of the State of Ohio and a portion of Indiana. At the same time the United States stipulates (Article 5) :

The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same.

The exact meaning of this recital was at issue in *Williams v. City of Chicago*. After examining the instrument in detail the court held :

* * * We think it entirely clear that this treaty did not convey a fee simple title to the Indians; that under it no tribe could claim more than the right of continued occupancy; and that when this was abandoned all legal

was, Art. 5. 7 Stat. 16: November 28, 1785, with the Cherokees, Art. 5 7 Stat. 18: January 3, 1786, with the Choctaws, Art. 4, 7 Stat. 21; January 10, 1786, with the Chickasaws, Art. 4. 7 Stat. 24 : January 31, 1786 with the Shawnees, Art. 7. 7 Stat. 26: January 9, 1789, with the Wyandots, Delawares, Chippewas, and Ottawas, Art. 9, 7 Stat. 28: August 7, 1700, with the Creeks, Art. 6, 7 Stat. 35; August .3, 1795, with the Wyandots, Delawares, Chippewas, Ottawas, etc., Art. 6. 7 Stat. 49. See also Chapter 1, sec. 3.

²⁶⁶ *Raymond v. Raymond*, 83 Fed. 721 (C. C. A. 8. 1897).

²⁶⁷ 7 Stat. 44. An earlier treaty had been concluded October 22, 1784 7 Stat. 15.

²⁶⁸ Unpublished treaty (Archives No. 19).

²⁶⁹ Treaty with the Wyandots, Delawares, Shawanoes, etc., August 3 1795, at Greenville. 7 Stat. 49. "The ratification of this treaty is to be considered as the terminus a quo a man might safely begin a settlement on the Western frontier of Pennsylvania: *Morris's Lessee v. Neighman* 4 Dall. 209, 210 (1800). For provisions under this treaty relating to disposal of land by Indians see *Patterson v. Jenks*, in. 288, *supra* Chippewa Indians were treated as a single tribe in this treaty. *Chippewa Indians of Minnesota v. United States*, 301 U. S. 358 (1937).

right or interest which both tribe and its members had in the territory came to an end. * * *²⁶⁹ (Pp. 437-438.)

The Seven Nations of Canada on May 31, 1796,²⁶⁹ released all territorial claims within the State of New York, with the exception of a tract of land 6 miles square.²⁶¹

D. EXTENDING THE NATIONAL DOMAIN: 1800-17

By 1800 the rapid growth of the nation had given impetus to the drive to add to the territory under federal ownership. This could be done effectively by extinguishing native title to desired lands. The treaty makers of this period may be said to have had a single objective—the acquisition of more land.

Success in this direction was almost immediate and by 1803 the President of the United States was able to report to Congress:

The friendly tribe of Kaskaskia Indians * * * has transferred its country to the United States, reserving only for its members what is sufficient to maintain them in an agricultural war. * * * This country, among the most fertile within our limits, extending along the Mississippi from the mouth of the Illinois to and up the Ohio, though not so necessary as a barrier since the acquisition of the other bank, may yet be well worthy of being laid open to immediate settlement, as its inhabitants may descend with rapidity in support of the lower country, should future circumstances expose that to foreign enterprise.²⁶²

Article 3 of the Kaskaskia treaty²⁶² contains the first provision for contributions by the United States for organized education,²⁶⁴ for the erection of a new church,²⁶⁶ and for the building of a house for the chief as a gift.²⁶⁸

The Indians pledge themselves to refrain from waging war or giving any insult or offense to any other Indian tribe or to any foreign nation without first having obtained the approbation and consent of the United States (Art. 2). The United States in turn take the tribe under their immediate care and patronage, and guarantee a protection similar to that enjoyed by their own citizens. The United States also reserve the right to divide the annuity promised to the tribe " * * * amongst the several families thereof, reserving always a suitable sum for the great chief and his family." (Art. 4.)

President Jefferson selected William Henry Harrison, Governor of Indiana Territory, to represent the United States Government in its negotiations with the Indian tribes of the West.²⁶⁷

After protracted negotiations at Fort Wayne with the Delawares, Shawnees, and other tribes of the Northwest Territory, a substantial cession of territory was secured by the Treaty of June 7, 1803.²⁶⁸

An interesting provision is found in Article 3, whereby the United States guaranteed to deliver to the Indians annually salt

²⁶⁰ 242 U. S. 434 (1917).

²⁶¹ Treaty of May 31, 1796, 7 Stat. 55. "The 7 tribes signified are the Skighquan (Nipissing), Estjage (Saulteurs), Assisagh (Missisauga), Karchadage, Adgenauwe, Karrihaet, and Adirondax (Algonkings). The 4th, 5th, and 6th are unidentified." Bull. No. 30, Bureau of American Ethnology, Handbook of American Indians, pt. 2, p. 515.

²⁶² This tract was reserved for the Indians of St. Regis village, and is now the St. Regis Reservation. See Chapter 22, sec. 2c.

²⁶³ Message of October 17, 1803, in Debates and Proceedings (1803-4), vol. 13, pp. 12-13.

²⁶⁴ Treaty of August 13, 1803, 7 Stat. 78.

²⁶⁵ See Unpublished Treaty of August 7, 1790 (Archives No. 17), fn. 290 *supra*, and Chapter 12, sec. 2.

²⁶⁶ In 1794 the United States agreed to contribute \$1,000 toward rebuilding a church for the Oneidas destroyed by the British in the Revolutionary War Treaty of December 2, 1794, Art. 4, 7 Stat. 47.

²⁶⁷ Gifts to the chief were continued in later treaties.

²⁶⁸ Oskison, Tecumseh, and his Times (1938), p. 96.

²⁶⁹ 7 Stat. 74. While certain commercial concessions have been noticed before this, for the first time the United States is granted (Art. 4) the