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 of either side, and determine between them: and the amount of his award shall he 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. Administrative determinations were also authorized for reducing annuities in cases of depredations and horse stealing.

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, 1861, 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 consent 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.*

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*See Chapter 15, sec. 5; Westwood, Legal Aspects of Land Acquisition, p. 2. Indian Beneficial Ownership by Treaty. First Inter-American Conference on Indian Life. Patscuaro, Mexico, published by Office of Indian Affairs. April 1940:

For an example of cession by the United States to Indians see Treaty of September 18, 1832, with the Winnebagoes, Art. 2, 7 Stat. 370. For an example of a reparation 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 Plankeshaws, 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 Cherokee, Art. 10, 7 Stat. 156.

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.

Treaty of May 31, 1796, with the Seven Nations of Canada, 7 Stat. 160.

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. 9 Stat. 156.

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. 4, 7 Stat. 690.

Treaty of July 4, 1866, with the Delawares, Art. 13, 7 Stat. 793. Also see Treaty of July 22, 1855, with the Chocawats and Chicasaws, Art. 18, 11 Stat. 684.

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


Treaty of July 8, 1817, with the Cherokees, Art. 8, 7 Stat. 156: 27, 1835, with the Winnebagoes Art. 4, 10 Stat. 1172; 31, 1855, with the Wyandots. Arts. 3 and 4, 10 Stat. 1172.

**This provision was made between full-bloods and half-breeds of June 3, 1825, with the Kansas Nation. Art. 6. 7 Stat. 244. Treaty stipulations apply to half-breeds as well as full-bloods, unless otherwise specially provided. 20 Op. A. G. 742 (1894).
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 Indian civilizations—cattle, hogs, iron, steel, wagons, plows, and other farming tools. The purpose of civilizing the Indians was apparent in the choice of goods and services which the tribe would receive. Such services included the providing of "one grist-mill and one saw-mill... one blacksmith and one gunsmith... such implements of agriculture as he proper agent may think necessary" and "one hundred and sixty bushels of salt" annually; farming utensils, cattle, black-

110 Treaty of October 3, 1859, with the Kansas Indians, Art. 3. 12 Stat. 111. See Chapter 13. sec. 3A.
111 Treaty of January 31, 1855, with the Wyandots, Art. 3. 10 Stat. 119.
112 Treaty of September 29, 1817, with the Wyandots and other, Art. 15. 7 Stat. 160.
113 Treaty of June 11, 1855, with Nez Perce, Art. 3. 12 Stat. 957.
114 Treaty of October 4, 1842, with the Chippewas, Art. 2. 2 Stat. 691.
115 Treaty of June 16, 1820, with Chippewas, Art. 3. 7 Stat. 206. Also see Treaty of June 9, 1855, with the Walla-Wallas, Cayuses, and Unmitla Tribes, 12 Stat. 945, discussed in Memo. Sol. 1. D. June 15, 1897. Also see Chapter 15, sec. 21.
116 Treaty of August 3, 1893, with the Wyandots and others, Art. 7. 7 Stat. 40. Also see art. 5.
117 Treaty of September 29, 1817, with the Wyandots and others, Art. 11. 7 Stat. 160; Treaty of September 24, 1819, with Chippewas, Art. 5. 7 Stat. 203.
118 See Chapter 15, sec. 21. See also Chapter 14, sec. 7.
119 See Chapter 15, sec. 22. 23. 24; Chapter 9, sec. 6.
120 Ibid. And see Chapter 10, sec. 4. 5.
121 Ibid.
122 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 sum of one thousand five hundred dollars, in purchasing for them clothing, domestic animals and implements of husbandry, and for encouraging useful artists to reside in their villages.

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

"... The I. 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,... and for erecting useful artificers to reside in their villages.

Another article accorded:

The Treaty of October 6, 1818 with the Miamis Nation, Art. 5. 7 Stat. 159. Cf. Treaty of June 29, 1796, with the Creeks, Art. 8. 7 Stat. 56; Treaty of June 7, 1863, 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.
and such agricultural assistants as the President may deem expedient; 150 horses, perrogues and provisions; 150 rifles, guns, ammunition, etc., in compensation for homes left by Indians who were removed; 150 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: 15000 cattle, 200 hogs, plus 2000 pounds of iron, 1000 pounds of steel and 1000 pounds of tobacco annually, and the assistance of laborers; the payment of annuities in the form of money, merchandise, provisions, or domestic animals, at the option of the Indians; the building of houses for chiefs; mills and millers for a period of 3 years; annuities and money for the repair of mill and schoolhouse; the building of a church and an allowance for a Catholic priest.

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

Many treaties contained clauses providing for additional annuities, or for the commutation of annuities, or for presents and annuities, and goods, rations, and clothing. But treaties, the United States also agreed to make payments to enable the raising of a tribal corps of light horse, to pay a state for a balance due by a tribe, to provide money for poor Indians; to pay demands for slaves and other property alleged to have been stolen by the Indians; to pay debts or other obligations owed by the nation; to pay the Indians for land ceded to a state, for expenses incurred by the sachem and headmen in attending to tribal business for 5 years, 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.

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, 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.

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.

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.

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.

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 Nation is stated to be the securing to the Cherokee migrating westward of

1. • a permanent home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended it the

24 Treaty of September 24, 1819, with the Chipewa, Art. 8, 7 Stat. 203.
25 Treaty of July 30, 1819, with the Kickapoos, Art. 8, 7 Stat. 300.
26 Treaty of October 3, 1818, with the Delawares, Art. 3, 7 Stat. 188.
27 Treaty of October 13, 1817, with the Creeks, Art. 6, 7 Stat. 166.
30 Treaty of October 23, 1826, with the Miami, Art. 6, 7 Stat. 300.
Various other treaties contained similar pledges. Some treaties contained specific guarantees against taxation.

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, or provide for the issuance of patents by the authorities of the tribe.

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, 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" 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.

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. Nor could Spanish title to Indian lands be validly based upon the divine rights of the Emperor of Spain to advise upon 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 "inescapable of God," 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.

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, was copied bodily in several later treaties.

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.

Along with this encroachment upon the powers of the tribes to assert 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.

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 offenses 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, in all cases, etc."

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.

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 status was made in 1532 by Francisco de Victoria, who had been invited by the Emperor of Spain to advise upon 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 "inescapable of God," 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.

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. Nor could Spanish title to Indian lands be validly based upon the divine rights of the Emperor or the Pope, 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. 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
lands and to sojourn, trade, and defend their rights therein, the Spaniards could not wage a just War against the Indians, 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 herefor 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, disposing 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.

The Emperors of Spain and their subordinate administrators, like many able administrators since, did not consistently carry out Præ Victoria's legal advice. They did, however, adopt many laws and issue many charters recognizing and guaranteeing the rights of Indian communities, 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.

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 1650 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.

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. This was the territory inhabited by the Narragansetts and for which Williams had treated.

From time to time other British colonies became parties to treaties with the Indians. Unauthorized treating for the purchase of Indian land by individual colonists was prohibited in Rhode Island as early as 1651. By the middle of the eighteenth century, eight other colonies had laws forbidding such purchase unless approved by the constituted authorities. 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. Later, treaties with the Indians were again negotiated by the colonies.

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

B. THE REVOLUTIONARY WAR AND THE PEACE:

From the first days of the organization of the Continental Congress great solicitude for treaties has been evidenced. The Congress pledged itself to unusual exertions in securing and preserving the friendship of the Indian nations. First fruit of this effort was the treaty of alliance with the Delaware Indians of September 17, 1778. 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, even with the temper with which the negotiation was undertaken, and the opinion which then prevailed in the United States. 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 endeavors, 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

See citations at end of chapter.
torial rights, in the fullest and most ample manner, as it had 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 may be, upon 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.

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 mean, as till 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 5 provided for a

* * * 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." 54

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 take 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. 55 In the opening paragraph the United States receives the Indians "into their protection." This has been cited as the source of the concept of the Federal Government as the guardian of Indian tribes.

Article 2 provides that "the Oneida and Tuscarora Nations shall be secured in the possession of the lands on which they are settled." 56

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. 57

Soon afterwards another treaty was agreed upon with the Indians, Delawares, Chippewas, and Ottawas at Fort McIntosh on January 21, 1785. 58 The year the Shawnee chief signed the treaty at the mouth of the Miami. 59 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.

In the Treaty of January 21, 1785, at Fort McIntosh, 60 and the Treaty of January 31, 1786, at the Miami, 61 the boundaries between the Indian nations and the United States are defined and the lands thereto 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. 62 In addition both treaties provided for the return to the United States of Indian robbers and murderers. In the treaty with the Shawnees, 63 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, 64 that a resolution was.

54 Worcester v. Georgia, 6 Pet. 515, 548, 549 (1832). See also Art. 12, Treaty with the Creeks of November 28, 1785, 7 Stat. 18, discussed below, which granted to the Creeks 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(5), supra.

55 See Chapter 4, see. 2, and Chapter 16.

56 The phrase appears in the Treaties at Hopewell with the Cherokees, November 28, 1785, Art. 13, 7 Stat. 18; with the Chocawas, January 3, 1786, Art. 11, 7 Stat. 21; and with the Chickasaws, January 10, 1786, Art. 11, 7 Stat. 26.

57 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.

58 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. Complainant, 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 all 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., 1780, vol. X, p. 235.)


60 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).
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 28, 1785, 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, 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:

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 depredations and licentiousness from intrusions into their country, from encroachments on their lands, and from the acts of violence which were often attended by reciprocal murder. The Indians protected in this situation, not as conquerors, but as dependents, claiming the protection of a powerful friend, and reaping 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, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put upon 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 assurance 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 with respect to 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 recognize 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.

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

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, 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. Acting on this suggestion, Congress appropriated $20,000.00 on July 2, 1789, which, together with the balance remaining from the sum allocated on October 22, 1787, 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, and with the Six Nations, entered into early in 1789, 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 quiet claiming certain described territory to the Indian nations. However, article 3 of the Fort Harmar treaty with the Wyandots, Delawares, Chippewas, and Ottawas, 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 any 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 deprivations, 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...
under the Constitution, and transmitted to the Senate of the United States on May 23, 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. *

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. 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.

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 the treaty the United States proceeded to implement in section 2 of the Indian Intercourse Act of May 19, 1790, 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

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Treaties

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

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.

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. 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, the Cherokee 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 guarantee 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. * * *

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

The Seven Nations of Canada on May 31, 1790, released all territorial claims within the State of New York, with the exception of a tract of land 6 miles square.

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.

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

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.

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