

Yale Law School
Yale Law School Legal Scholarship Repository

Faculty Scholarship Series

Yale Law School Faculty Scholarship

1-1-1947

Original Indian Title

Felix S. Cohen
Yale Law School

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers



Part of the [Indian and Aboriginal Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Cohen, Felix S., "Original Indian Title" (1947). *Faculty Scholarship Series*. Paper 4355.
http://digitalcommons.law.yale.edu/fss_papers/4355

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

ORIGINAL INDIAN TITLE*

By FELIX S. COHEN**

I. *Indian Clouds on Land Grant Titles.*

RECENT decisions of the Supreme Court recognizing the validity of original Indian title¹ make the existence and extent of such aboriginal ownership a relevant issue in title examinations whenever a chain of title is traced back to a federal grant or patent. Grantees who have relied on the Great Seal of a federal department as assuring the validity of land grant titles have not infrequently discovered to their sorrow the truth of the old French saying, "Même le plus belle fille du monde ne peut donner que ce que l'a." Not even the Federal Government can grant what it does not have. The nature of Indian title and its extinguishment thus becomes, in those states that have been carved out of the Federal public domain, a matter of concern to real property lawyers generally.

The leading Supreme Court case that establishes the invalidity of federal grants that ignore Indian title is the case of *Moose Dung*² (such being the polite English translation of Chief Monsimoh's Chippewa name). Here a federal lease which appeared on its face to be perfectly valid, and which had been specially confirmed by a joint resolution of Congress,³ was held invalid by the Supreme Court, on the ground that neither the Secretary of the Interior nor the Congress of the United States had constitutional power to disregard Indian property rights. The right to dispose of this property, the Court held, was vested in the Indian owner, Chief Moose Dung the Younger. By tribal custom he was entitled to the land that had been promised⁴ to his father, Chief Moose Dung the Elder. The Court accordingly held that Jones, the lessee under, a lease executed and approved by the Department of the

*The views herein expressed are only those of the writer and do not necessarily reflect the views of any Government department or agency. F.S.C.

**Associate Solicitor and Chairman, Board of Appeals, U. S. Department of Interior; Visiting Lecturer, Yale Law School.

1. *United States as Guardian of the Hualpai Indians v. Santa Fe Pacific R.R.*, (1941) 314 U. S. 339; *United States v. Alcea Band of Tillamooks*, (1946) 329 U. S. 40.

2. *Jones v. Meehan*, (1899) 175 U. S. 1.

3. Joint Resolution of August 4, 1894, 28 Stat. 1018.

4. By Section 9 of the Treaty of October 2, 1863, 13 Stat. 667, 671.

Interior,⁵ could be evicted by the Meehans, who had relied on an unapproved lease, allowing the use of land for lumbering purposes, granted by the Indian owner, the younger Moose Dung. The Supreme Court summed up its decision in these words:

"The title to the strip of land in controversy, having been granted by the United States to the elder chief Moose Dung by the treaty itself, and having descended, upon his death, by the laws, customs and usages of the tribe, to his eldest son and successor as chief, Moose Dung the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or of Congress, or of the Executive Departments." (At p. 32.)

Standing by itself, the decision in *Jones v. Meehan* might be narrowly interpreted as applying only where Indian land rights were assured and recognized by treaty. But the case of *Cramer v. United States*,⁶ decided 24 years later, made it plain that the Supreme Court would not so limit the rule of respect for Indian title. For in the *Cramer* case the Indian title had never been recognized by treaty, act of Congress, or Executive order. What was involved was an area claimed by Indians by right of occupancy initiated before 1859. Yet the Supreme Court held that the Indian right of occupancy, even though it had not been formally recognized, was not terminated by a subsequent statutory grant. In this case the Court did not face the constitutional question of whether a valid grant divesting Indian title could have been made to the railroad, since it was able to put upon the Congressional grant a narrow construction that saved the land rights of the Indians. The railroad land grant statute⁷ in the *Cramer* case had excepted from the scope of the grant all lands "reserved . . . or otherwise disposed of." The Department of the Interior, in 1904, issued patents to the Central Pacific Railway Company, on the assumption that there was no reservation or other encumbrance to prevent the passage of full title to the grantee. Yet the Supreme Court, in

5. The Interior lease of 1894 had the approval of all the descendants of Moose Dung the Elder, but the Court considered this irrelevant, on the ground that the Interior Department had no authority to disregard tribal customs on questions of inheritance and that, according to Chippewa custom, the eldest son took the land and had full power to dispose of its use. The Court quoted with approval (at p. 31) the comment of Justice Brewer (then Circuit Judge) in a somewhat similar case, that the Secretary of the Interior "had no judicial power to adjudge a forfeiture, to decide questions of inheritance, or to divest the owner of his title without his knowledge or consent." *Richardville v. Thorp*, (C.C., D. Kans., 1866) 28 Fed. 52, 53.

6. (1923) 261 U. S. 219.

7. Act of July 25, 1866, 14 Stat. 239.

1923, held that this departmental action disregarding Indian rights was erroneous. "The fact that such [Indian] right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy." (at p. 229).

The policy on which the Supreme Court based its decision in the Cramer case it spelled out in these words:

"Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States. *Beecher v. Wetherby*, 95 U. S. 517, 525; *Minnesota v. Hitchcock*, 185 U. S. 373, 385. It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life. That such individual occupancy is entitled to protection finds strong support in various rulings of the Interior Department, to which in land matters this Court has always given much weight. *Midway Co. v. Eaton*, 183 U. S. 602, 609; *Hastings & Dakota R. R. Co. v. Whitney*, 132 U. S. 357, 366. That department has exercised its authority by issuing instructions from time to time to its local officers to protect the holdings of non-reservation Indians against the efforts of white men to dispossess them. See 3 L. D. 371; 6 L. D. 341; 32 L. D. 382. In *Poisal v. Fitzgerald*, 15 L. D. 19, the right of occupancy of an individual Indian was upheld as against an attempted homestead entry by a white man. In *State of Wisconsin*, 19 L. D. 518, there had been granted to the State certain swamp lands within an Indian reservation, but the right of Indian occupancy was upheld, although the grant in terms was not subject thereto. In *Ma-Gee-See v. Johnson*, 30 L. D. 125, Johnson had made an entry under Par. 2289, Rev. Stats., which applied to 'unappropriated public lands.' It appeared that at the time of the entry and for some time thereafter the land had been in the possession and use of the plaintiff, an Indian. It was held that under the circumstances the land was not unappropriated within the meaning of the statute, and therefore not open to entry. In *Schumacher v. State of Washington*, 33 L. D. 454, 456, certain lands claimed by the State under a school grant, were occupied and had been improved by an Indian living apart from his tribe, but application for allotment had not been made until after the State had sold the land. It was held that the grant to the State did not attach under the provision excepting lands 'otherwise disposed of by or under authority of an act of Congress.' Secretary Hitchcock, in deciding the case, said:

'It is true that the Indian did not give notice of his intention

to apply for an allotment of this land until after the State had made disposal thereof, but the purchaser at such sale was bound to take notice of the actual possession of the land by the Indian if, as alleged, he was openly and notoriously in possession thereof at and prior to the alleged sale, and that the act did not limit the time within which application for allotment should be made.'

"Congress itself, in apparent recognition of possible individual Indian possession, has in several of the state enabling acts required the incoming State to disclaim all right and title to lands 'owned or held by any Indian or Indian tribes.' See 25 Stat. 676, c. 180, Par. 4, par. 2; 28 Stat. 107, c. 138, Par. 3, par. 2.

"The action of these individual Indians in abandoning their nomadic habits and attaching themselves to a definite locality, reclaiming, cultivating and improving the soil and establishing fixed homes thereon was in harmony with the well understood desire of the Government which we have mentioned. To hold that by so doing they acquired no possessory rights to which the Government would accord protection, would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation."

As against these general indications of a policy to respect Indian occupancy rights, the defendant Cramer, the railroad's assignee, argued that in this particular case the Interior Department had concluded that the Indians had no rights to the land, had recognized the title of the railroad grantee, and had in fact negotiated a lease of the land from the defendant. This argument the Court rejected, with the comment:

"Neither is the Government estopped from maintaining this suit by reason of any act or declaration of its officers or agents. Since these Indians with the implied consent of the Government had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the Government had authority to deal with the land upon any other theory. The acceptance of leases for the land from the defendant company by agents of the Government was, under the circumstances, unauthorized and could not bind the Government; much less could it deprive the Indians of their rights." (At p. 234.)

The lower court was accordingly instructed "to amend its decree so as to cancel the patent in respect of the lands possessed by the Indians." (At p. 236.)

Such was the state of the law when, in 1925, the Department of the Interior sought to patent half of the Hualapai Indian Reservation in Arizona to the Santa Fe Pacific Railway. The theory of this transaction was that when the reservation was established in 1883 half of the land, i.e., the odd-numbered sections, already

belonged to the railroad grantee under the act of July 27, 1866 (14 Stat. 292). Congress implicitly ratified this view of the situation when it authorized the Secretary of the Interior to arrange an exchange of Indian and railroad lands within the reservation which would simplify the boundaries between railroad and Indian lands.⁸ But when the Interior Department tried to carry out the mandate of Congress, the Indians and their friends⁹ objected on the ground that the railroad, rightfully, had no lands to exchange, since aboriginal title long antedated the railroad grant. After some years of protests, charges, counter-charges, and administrative opinions rejecting the Indians' contentions,¹⁰ a suit was instituted in 1937 to vindicate the possessory rights of the Indians. (Here, as in the *Cramer* case, there was no treaty or act of Congress confirming or defining the Indians' rights). When the case reached the Supreme Court in 1941, after two decisions against the Indians in the lower courts, the Attorney General of Arizona filed a brief urging that "Any suggestion by this Court that Indian tribes might have rights in property enforceable in a court of law by the mere fact of occupancy would at least cast a cloud upon the title to the major portion of Arizona."¹¹

Despite this warning, the Supreme Court unanimously decided the issue in favor of the Indians, holding that Indian occupancy, even though unrecognized by treaty or act of Congress, established property rights valid against non-Indian grantees such as the defendant railroad. The Court did not have to face the constitutional issue which it decided in *Jones v. Meehan*, because here, as in the *Cramer* case, there was language in the Congressional granting act which could be interpreted as protecting and safeguarding Indian rights.

While the Court did not therefore pass on the validity of any legislation, it did necessarily pass on the validity of departmental action purporting to recognize railroad rights to the exclusion of Indian rights. With respect to this, the unanimous opinion of the Court declared:

"Such statements by the Secretary of the Interior as that 'title

8. Act of February 20, 1925, 43 Stat. 954.

9. See letters and resolutions of Indian Rights Association and other organizations printed in Walapai Papers, (1936) Sen. Doc. No. 273, 74th. Cong., 2d sess., at pp. 251, 254-271, 308-315.

10. See Opinion of E. C. Finney, Solicitor of the Department of the Interior, dated September 16, 1931, and letter of Assistant Attorney General Richardson, dated Nov. 12, 1931, printed in Walapai Papers, supra note 9, at pp. 319-327.

11. Brief for the State of Arizona, *et al.*, p. 2.

to the odd-numbered sections' was in the respondent [railroad] do not estop the United States from maintaining this suit. For they could not deprive the Indians of their rights any more than could the unauthorized leases in *Cramer v. United States, supra.*" (at p. 355).

At the same time the Court rejected various other contentions advanced by the railroad, such as the argument that Indian land rights had been wiped out by the Mexican cession treaty¹² or by acts of Mexican or Spanish sovereignty, or by a long course of Congressional statutes opening western lands to settlement. The upshot of the case was that on March 13, 1947, the trial court entered a decree, consented to by all parties, establishing Indian title to some 509,000 acres of land which two Departments of the Government had promised to the defendant railroad. Notwithstanding the fears expressed by the Attorney General of Arizona, there has been no substantial decline in Arizona realty values as a result of the decision.

The fears expressed by the Attorney General of Arizona were not, on the surface, unreasonable. Concern lest arguments in favor of the Indians might result in imposing vast liabilities on the Federal Government led the Attorney General of the United States in 1941, to decline to argue the case, so that the Indian side of the case had to be presented by the Solicitor of the Department of the Interior.

A similar fear was recently expressed by the three justices of the Supreme Court who dissented from the decision of the Court in the Alcea case¹³ on the ground that this decision, awarding compensation for a taking of original Indian title, would set a precedent compelling the United States to pay other tribes for other areas so taken, which "must be large" (at p. 56).

The fear that recognizing Indian title, or paying Indians for land, would unsettle land titles everywhere and threaten the Federal Government with bankruptcy would be well grounded if there were any factual basis for the current legend of how we acquired the United States from the Indians. If, as the cases hold, federal grants are normally subject to outstanding Indian titles, and if, over extensive areas where such grants have been made, Indian title has in fact never been lawfully extinguished, then a vast number of titles must today be subject to outstanding Indian possessory rights. The fact, however, is that except for a few tracts of land

12. Treaty of Guadalupe Hidalgo, February 2, 1848, 9 Stat. 922.

13. Cited *supra* note 1.

in the Southwest, practically all of the public domain of the continental United States (excluding Alaska) has been purchased from the Indians. It was only because the Hualapai case fell within an area where no Indian land cessions had been effected that the railroad title was held invalid. This means, of course, that the titles of railroads and other grantees of the Federal Government elsewhere in the United States may likewise depend upon whether the Federal Government took the precaution of settling with Indian land owners before disposing of their land.

Fortunately for the security of American real estate titles, the business of securing cessions of Indian titles has been, on the whole, conscientiously pursued by the Federal Government, as long as there has been a Federal Government. The notion that America was stolen from the Indians is one of the myths by which we Americans are prone to hide our real virtues and make our idealism look as hard-boiled as possible. We are probably the one great nation in the world that has consistently sought to deal with an aboriginal population on fair and equitable terms. We have not always succeeded in this effort but our deviations have not been typical.

It is, in fact, difficult to understand the decisions on Indian title or to appreciate their scope and their limitations if one views the history of American land settlement as a history of wholesale robbery. The basic historic facts are worth rehearsing before we attempt analysis of the cases dealing with the character and scope of original Indian title.

II. *How We Bought the United States*¹⁴

Every American schoolboy is taught to believe that the lands of the United States were acquired by purchase or treaty from Britain, Spain, France, Mexico, and Russia, and that for all the continental lands so purchased we paid about 50 million dollars out of the Federal Treasury. Most of us believe this story as unquestioningly as we believe in electricity or corporations. We have seen little maps of the United States in our history books and big maps in our geography books showing the vast area that Napoleon sold us in 1803 for 15 million dollars and the various other cessions that make up the story of our national expansion. As for the original Indian owners of the continent, the common impression is that we took the land from them by force and pro-

14. Some of the material in this section appears in "How We Bought the United States," *Collier's*, Jan. 19, 1946, pp. 23, 62, 77, and in an adaptation thereof in *This Month*, May, 1946, pp. 106-110.

ceded to lock them up in concentration camps called "reservations."

Notwithstanding this prevailing mythology, the historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian owners.¹⁵ What we acquired from Napoleon in the Louisiana Purchase was not real estate, for practically all of the ceded territory that was not privately owned by Spanish and French settlers was still owned by the Indians, and the property rights of all the inhabitants were safeguarded by the terms of the treaty of cession.¹⁶ What we did acquire from Napoleon was not the land, which was not his to sell, but simply the power to govern and to tax, the same sort of power that we gained with the acquisition of Puerto Rico or the Virgin Islands a century later.

It may help us to appreciate the distinction between a sale of land and the transfer of governmental power if we note that after paying Napoleon 15 million dollars for the cession of political authority over the Louisiana Territory we proceeded to pay the Indian tribes of the ceded territory more than twenty times this sum for such lands in their possession as they were willing to sell. And while Napoleon, when he took his 15 million dollars, was thoroughly and completely relieved of all connections with the territory, the Indian tribes were wise enough to reserve¹⁷ from

15. This discrepancy between common opinion and historic fact was commented upon by Thomas Jefferson:

"That the lands of this country were taken from them by conquest, is not so general a truth as is supposed. I find in our historians and records, repeated proofs of purchase, which cover a considerable part of the lower country; and many more would doubtless be found on further search. The upper country, we know, has been acquired altogether by purchases made in the most unexceptional form." (Thomas Jefferson, "Notes on the State of Virginia, 1781-1785," reprinted in Padover, *The Complete Jefferson*, (1943) p. 632.)

16. The Treaty of April 30, 1803, for the cession of Louisiana, provided: "Art. III. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

"Art. VI. The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians, until by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon."

17. "Indian reservations" acquired their name from the fact that when Indians ceded land they commonly made "reservations" of land to be retained in Indian ownership. This practice goes back at least to 1640, when Uncas, the Mohican chief, deeded a large area to the Colony of Connecticut, out of which he carved a reservation for himself and his tribe. See 1 Trumbull, *History of Connecticut*, (1818) p. 117.

their cessions sufficient land to bring them a current income that exceeds each year the amount of our payment to Napoleon. One of these reservations, that of the Osages, has thus far brought its Indian owners 280 million dollars in oil royalties. Some other Indian tribes, less warlike, or less lucky, than the Osages, fared badly in their real estate transactions with the Great White Father. But in its totality the account of our land transactions with the Indians is not small potatoes. While nobody has ever calculated the total sum paid by the United States to Indian tribes as consideration for more than two million square miles of land purchased from them, and any such calculation would have to take account of the conjectural value of a myriad of commodities, special services, and tax exemptions, which commonly took the place of cash, a conservative estimate would put the total price of Indian lands sold to the United States at a figure somewhat in excess of 800 million dollars.

In some cases payment for ceded land has been long delayed. Most of the State of California falls within an area which various Indian tribes of that region had undertaken to cede to the United States in a series of treaties executed in the 1850's. The treaties called for a substantial payment in lands, goods, and services. The Federal Government took the land but the Senate refused to ratify the treaties, which were held in secret archives for more than half a century. Eventually Congress authorized the Indians to sue in the Court of Claims for the compensation promised under the unrati-fied treaties,¹⁸ and that Court found that the Indians were entitled to receive \$17,053,941.98, from which, however, various past expenditures by the Federal Government for the benefit of the California Indians had to be deducted. The net recovery amounted to \$5,024,842.34.

The settlement of the California land claims closes a chapter in our national history. Today we can say that from the Atlantic to the Pacific our national public domain consists, with rare exceptions,¹⁹ of lands that we have bought from the Indians. Here and there we have probably missed a tract, or paid the wrong Indians for land they did not own and neglected the rightful owners. But the keynote of our land policy has been recognition of

18. Act of May 18, 1928, 45 Stat. 602.

19. The most significant exception is Alaska, where the Federal Government has not yet acquired any land from any of the native tribes. *Cf. Miller v. United States*, (C.C.A. 9th, 1947) 159 F. (2d) 997. Other areas for which no compensation appears to have been made are found in Southeastern California, Southern Nevada, Arizona and New Mexico. See Frontispiece to 4th ed. of Cohen, *Handbook of Federal Indian Law* (1945).

Indian property rights.²⁰ And this recognition of Indian property rights, far from hampering the development of our land, was of the greatest significance in such development. Where the Govern-

20. The Report of the Commissioner of Indian Affairs for 1872 contains the following illuminating comments:

"Such being the right of the Indians to the soil, the United States for more than eighty-five years pursued a uniform course of extinguishing the Indian title only with the consent of those Indian tribes which were recognized as having claim by reason of occupancy: such consent being expressed in treaties, to the formation of which both parties approached as having equal rights of initiative, and equal rights in negotiation. These treaties were made from time to time (not less than 372 being embraced in the General Statutes of the United States) as the pressure of white settlements or the fear or the experience of Indian hostilities made the demand for the removal of one tribe after another urgent imperative. Except only in the case of the Indians in Minnesota, after the outbreak of 1862, the United States Government has never extinguished an Indian title as by right of conquest; and in this latter case the Government provided the Indians another reservation, besides giving them the proceeds of the sales of the lands vacated by them in Minnesota. So scrupulously up to that time had the right of the Indians to the soil been respected, at least in form. It is not to be denied that wrong was often done in fact to tribes in the negotiation of treaties of cession. The Indians were not infrequently overborne or deceived by the agents of the Government in these transactions; sometimes, too, unquestionably, powerful tribes were permitted to cede lands to which weaker tribes had a better claim, but, formally at least, the United States accepted the cession successively of all lands to which Indian tribes could show color of title, which are embraced in the limits of any of the present States of the Union, except California and Nevada. Up to 1868, moreover, the greater portion of the lands embraced within the present Territories of the United States, to which Indians could establish a reasonable claim on account of occupancy, had also been ceded to the United States in treaties formally complete and ratified by the Senate

* * * * *

"This action of Congress [terminating the process of making treaties with Indian tribes] does, however, present questions of considerable interest and of much difficulty, viz: What is to become of the rights of the Indians to the soil, over portions of territory which had not been covered by treaties at the time Congress put an end to the treaty system? What substitute is to be provided for that system, with all its absurdities and abuses? How are Indians, never yet treated with, but having every way as good and as complete rights to portions of our territory as had the Cherokees, Creeks, Choc-taws, and Chickasaws, for instance, to the soil of Georgia, Alabama, and Mississippi, to establish their rights? How is the Government to proceed to secure their relinquishment of their lands, or to determine the amount of compensation which should be paid therefor? Confiscation, of course, would afford a very easy solution for all difficulties of title, but it may fairly be assumed that the United States Government will scarcely be disposed to proceed so summarily in the face of the unbroken practice of eighty-five years, witnessed in nearly four hundred treaties solemnly ratified by the Senate, not to speak of the two centuries and a half during which the principal nations of Europe, through all their wars and conquests, gave sanction to the rights of the aborigines.

"The limits of the present report will not allow these questions to be discussed; but it is evident that Congress must soon, if it would prevent complications and unfortunate precedents, the mischiefs of which will not be easily repaired, take up the whole subject together, and decide upon what principles and by what methods the claims of Indians who have not treaty relations with the Government, on account of their original interest to the soil, shall be determined and adjusted * * *."

ment had to pay Indians for land it could not afford to give the land away to favored retainers who could, in turn, afford to hold the land in idleness. Because land which the Government had paid for had to be sold to settlers for cash or equivalent services, our West has escaped the fate of areas of South America, Canada, and Australia, which, after being filched from native owners, were turned over, at the same price, to court favorites, Government bureaus, or other absentee owners incapable of, or uninterested in, developing the potential riches of the land.

Granted that the Federal Government bought the country from the Indians, the question may still be raised whether the Indians received anything like a fair price for what they sold. The only fair answer to that question is that except in a very few cases where military duress was present the price paid for the land was one that satisfied the Indians. Whether the Indians should have been satisfied and what the land would be worth now if it had never been sold are questions that lead us to ethereal realms of speculation. The sale of Manhattan Island for \$24 is commonly cited as a typical example of the white man's overreaching. But even if this were a typical example, which it is not, the matter of deciding whether a real estate deal was a fair bargain three hundred years after it took place is beset by many pitfalls. Hindsight is better than foresight, particularly in real estate deals. Whether the land the Dutch settlers bought would become a thriving metropolis or remain a wilderness, whether other Indian tribes or European powers would respect their title, and how long the land would remain in Dutch ownership were, in 1626, questions that were hid in the mists of the future. Many acres of land for which the United States later paid the Indians in the neighborhood of \$1.25 an acre, less costs of surveying, still remain on the land books of the Federal Government, which has found no purchasers at that price and is now content to lease the lands for cattle grazing at a net return to the Federal Government of one or two cents per annum per acre.

Aside from the difference between hindsight and foresight, there is the question of the value of money that must be considered wherever we seek to appraise a 300-year-old transaction. There are many things other than Manhattan Island that might have been bought in 1626 for \$24 that would be worth great fortunes today. Indeed if the Indians had put the \$24 they received for Manhattan at interest at 6 per cent they could now, with the accrued interest, buy back Manhattan Island at current realty valua-

tions and still have four hundred million dollars or more left over. Besides which, they would have saved the billions of dollars that have been spent on streets, harbors, aqueducts, sewers, and other public improvements to bring the realty values of the island to their present level.

Again in appraising the value of \$24 worth of goods in 1626 one must take account of the cost of delivery. How much did it cost in human life and labor to bring \$24 worth of merchandise from Holland to Manhattan Island across an almost unknown ocean? What would \$24 worth of food f.o.b. New York be worth to an exploring party at the South Pole today that needed it?

These are factors which should caution against hasty conclusions as to the inadequacy of payments for land sales made hundreds of years ago, even when such sales were made between white men. But in the earliest of our Indian land sales we must consider that representatives of two entirely different civilizations were bargaining with things that had very different values to the different parties. It is much as if a representative of another planet should offer to buy sea water or nitrogen or some other commodity of which we think we have a surplus and in exchange offer us pocket television sets or other products of a technology higher than our own. We would make our bargains regardless of how valuable nitrogen or sea water might be on another planet and without considering whether it cost two cents or a thousand dollars to make a television set in some part of the stellar universe that we could not reach. In these cases we would be concerned only with the comparative value to us of what we surrendered and what we obtained.

So it was with the Indians. What they secured in the way of knives, axes, kettles and woven cloth, not to mention rum and firearms,²¹ represented produce of a superior technology with a use value that had no relation to value in a competitive market three thousand miles across the ocean. And what is probably more important, the Indians secured, in these first land transactions, something of greater value than even the unimagined products of European technology, namely, a recognition of the just principle that free purchase and sale was to be the basis of dealings between the native inhabitants of the land and the white immigrants.

Three years after the sale of Manhattan Island the principle

21. In addition to the items listed above, items commonly listed in the earliest treaties are: flints, scissors, sugar, clothing, needles and hoes. Later treaties commonly mention horses, cattle, hogs, sheep, farm implements, looms, sawmills, flour mills, boats, and wagons.

that Indian lands should be acquired only with the consent of the Indians was written into the laws of the Colony of New Netherlands:

"The Patroons of New Netherlands, 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."²²

Connecticut, New Jersey, and Rhode Island were quick to adopt similar laws and within a short time all of the colonies had adopted laws in the same vein. Only in Massachusetts and North Carolina were there significant departures from this just and honorable policy. In North Carolina generally anarchic conditions left individual settlers relatively free to deal with or dispose of Indians as they pleased, with the result that less than half of the State was actually purchased from the natives. In Massachusetts, although Plymouth Colony "adopted the just policy of purchasing from the natives the lands they desired to obtain" (Royce, *op. cit.* p. 601), Puritan Massachusetts, with much pious citation of Old Testament precedents, asserted the right to disregard Indian claims to unimproved and uncultivated lands. Despite this claim, the Puritans were prudent enough to purchase considerable areas of land from the native inhabitants.

In 1636 one of the most famous real estate transactions in American history took place when Chief Canonius of the Narragansetts granted to Roger Williams and his 12 companions,

"all that neck of land lying between the mouths of Pawtucket and Moshasuck rivers, that they might sit down in peace upon it and enjoy it forever."

Here, as Williams observed to his companions,

"The Providence of God had found out a place for them among savages, where they might peaceably worship God according to their consciences; a privilege which had been denied them in all the Christian countries they had ever been in."

Perhaps it was only natural that the first settlers on these shores, who were for many decades outnumbered by the Indians and unable to defeat any of the more powerful Indian tribes in battle, should have adopted the prudent procedure of buying lands that the Indians were willing to sell instead of using the more direct methods of massacre and displacement that have commonly prevailed in other parts of the world. What is significant, however,

22. New Project of Freedoms and Exemptions, Article 27, reprinted in Royce, *Indian Land Cessions in the United States* (18th Annual Report, U. S. Smithsonian Institute, 1900) p. 577.

is that at the end of the 18th Century when our population east of the Mississippi was at least 20 times as great as the Indian population in the same region and when our army of Revolutionary veterans might have been used to break down Indian claims to land ownership and reduce the Indians to serfdom or landlessness, we took seriously our national proclamation that all men are created equal and undertook to respect the property rights which Indians had enjoyed and maintained under their rude tribal governments. Our national policy was firmly established in the first great act of our Congress, the Northwest Ordinance of July 13, 1787, which declared:

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

Here was a principle of government far higher than contemporary standards of private dealing. During much of this period pioneers were shooting Indians and denouncing the long arm of the Federal bureaucracy that tried to protect Indian lands from trespass and Indians from debauchery.²³ The most famous of all Indian cases²⁴ was one in which the Supreme Court of the United States denied the power of the State of Georgia to invade the territory of the Cherokees, guaranteed by Federal treaty, and the State of Georgia defied the mandate of the Court, whereupon the tough Indian fighter in the White House grimly declared: "John Marshall has made his decision; now let him enforce it."²⁵ But the Congress and the Federal Courts stood by the principle of respect for Indian possessions until it won common acceptance.

As far back in our national history as 1794 we find the United State agreeing to pay the Iroquois, for a cession of land, the sum of \$4,500 annually forever, in "clothing, domestic animals, implements of husbandry, and other utensils * * * and in compensating useful artificers who shall * * * be employed for their benefit."²⁶

23. This refrain is still heard in remote mining towns of Arizona and in Alaska, particularly among survivors of the Alaskan Gold Rush, who knew what to do when they saw an Indian.

24. *Worcester v. Georgia*, (1833) 6 Pet. 515.

25. Greeley, *American Conflict* (1864), vol. 1, p. 106.

26. Treaty of November 11, 1794, 7 Stat. 44.

The payments are still being made, with much ceremony. In 1835 we find the Federal Government buying a tract of land from the Cherokees for 5 million dollars,²⁷ a very large part of the annual national budget in those days.²⁸ In 1904 the Turtle Mountain Chippewa, sold a large part of North Dakota to the United States for one million dollars.²⁹ To this day we are paying Indians for lands long ago conveyed. Only occasionally does this payment take the form of cash. Far-seeing Indian chiefs knew that cash would soon be dissipated and leave later generations helpless in an alien world that had no place for ancient skills of hunters. Regularly the old treaties called for payments in goods, chiefly agricultural implements and cattle, in services—above all medical services and education—and in such special privileges as exemption from certain land taxes, because of which the Federal Government must now furnish to Indians many services which States and counties refuse to provide. It was to furnish these services that the Indian Bureau was established, and to this day the appropriations to that Bureau go primarily to paying for these promised services. We have already spent at least one and a half billion dollars on our Indian population, and more than half of this sum is traceable to obligations based on land cessions.

This is not to say that our Indian record is without its dark pages. We have fallen at times from the high national standards we set ourselves.

The purchase of more than two million square miles of land from the Indian tribes represents what is probably the largest real estate transaction in the history of the world. It would be miraculous if, across a period of 150 years, negotiations for the purchase and sale of these lands could be carried on without misunderstandings and inequities. We have been human, not angelic, in our real-estate transactions. We have driven hard Yankee bargains when we could; we have often forgotten to make the payments that we promised, to respect the boundaries of lands that the Indians reserved for themselves, or to respect the privileges of tax exemption, or hunting and fishing, that were accorded to Indian tribes in exchange for the lands they granted us. But when Congress has been fairly apprised of any deviation from the plighted word of the United States, it has generally been willing to submit to

27. Treaty of December 29, 1835, 7 Stat. 478.

28. The total expenditures of the Federal Government in 1835 amounted to 17.6 million dollars. See Report of Secretary of the Treasury (1946), p. 366.

29. Act of April 21, 1904, 33 Stat. 189, 195.

court decision the claims of any injured Indian tribe.³⁰ And it has been willing to make whatever restitution the facts supported for wrongs committed by blundering or unfaithful public servants. There is no nation on the face of the earth which has set for itself so high a standard of dealing with a native aboriginal people as the United States and no nation on earth that has been more self-critical in seeking to rectify its deviations from those high standards.

The 5 million dollar judgment won by the California Indians is only the most recent of a series of awards won by Indian tribes in the Federal Courts. In 1938 the Supreme Court awarded the Shoshone Tribe of Wyoming a judgment of \$4,408,444.23, as compensation for the loss of a part of the Shoshone Reservation which Federal authorities illegally (i.e. without the consent of the Shoshone owners of the reservation) assigned to Indians of another tribe.³¹ The same session of the Court affirmed a judgment in favor of the Klamath Indians for \$5,313,347.32, the value of lands reserved by the Klamaths for their own use which the United States erroneously conveyed to the State of Oregon.³² What is important about these cases is that they represent an honest, if sometimes belated, effort to make good on the promises that the Federal Government has made to Indian tribes in acquiring the land of this nation. And, as a great leader of the 30 million Indians who dwell south of our borders has said, what is great about democracy is not that it does not make mistakes, but that it is willing to correct the human mistakes it has made.³³

III. *The Doctrinal Origins of Indian Title.*

The decisions on Indian title can hardly be understood unless it is recognized that dealings between the Federal Government and the Indian tribes have regularly been handled as part of our international relations. As in other phases of law which turn on international relations, common law concepts have become heavily overlaid with continental jurisprudence. Our concepts of Indian title derive only in part from common law feudal concepts. In the

30. For many decades such cases were tried under special jurisdictional acts. By the act of August 6, 1946, all existing tribal claims against the Government were referred to a special Indian Claims Commission, and jurisdiction was granted to the Court of Claims to hear and decide all future tribal claims. See 60 Stat. 1049, 25 U. S. C. A. (1946 Supp.) 70, 28 U. S. C. A. (1946 Supp.) 259a.

31. United States v. Shoshone Tribe, (1938) 304 U. S. 111.

32. United States v. Klamath Indians, (1938) 304 U. S. 119.

33. Padilla, Free Men of America (1943) 71.

main, they are to be traced to Spanish origins, and particularly to doctrines developed by Francisco de Vitoria, the real founder of modern international law.³⁴

The argument that Indians stood in the way of civilization and that progress demanded that they be pushed from the lands they claimed, fell as lightly from the lips of 16th century pirates and conquistadores as it does from those of the 20th century. The contrary suggestion, first advanced by Vitoria, a university professor at Salamanca, that Indians were human beings and that their land titles were entitled to respect even when not graced by seals and ribbons, was denounced as "long haired idealism" by "practical minded" men in the 16th century, as it is today. But, in the long run, this idealistic and supposedly impractical concept of human rights helped to build the greatest state and the strongest economy in the world. The conquistadores and pirates of 16th century Spain and their lawyer spokesmen, in attempting to justify a wholesale seizure of Indian lands in the New World, urged that Indians were heretics, tainted with mortal sin, and irrational. To this argument Vitoria replied that even heretics and sinners were entitled to own property and could not be punished for their sins without trial, and that the Indians were at least as rational as some of the people of Spain. Vitoria cites as precedents, in support of Indian property rights, cases of heretics and sinners in Europe and in ancient Palestine whose rights were acknowledged by the highest Church authorities. Implicit in the argument is the doctrine that certain basic rights inhere in men *as men* not by reason of their race, creed, or color, but by reason of their humanity.

To the argument that the Pope had given Indian lands to the Kings of Spain and Portugal, Vitoria replied that the Pope had "no temporal power over Indian aborigines" (*De Indis* II, 6). Thus a division of the New World by the Pope could serve only as an allocation of zones for trading and proselytizing purposes, not as a distribution of land (*De Indis* III, 10).

The shibboleth of "title by discovery" Vitoria disposes of sum-

34. James Brown Scott, former Solicitor for the Department of State and President of the American Institute of Law, the American Society of International Law, and the Institut de Droit International, in his brochure on *The Spanish Origin of International Law* (1928), comments: "In the lecture of Vitoria on the Indians, and in his smaller tractate on War, we have before our very eyes, and at hand, a summary of the modern law of nations." The Seventh Pan-American Conference, on December 23, 1943, acclaimed Vitoria as the man "who established the foundations of modern international law."

marily. Discovery gives title to lands not already possessed. But as the Indians "were true owners, both from the public and the private standpoint," the discovery of them by the Spaniards had no more effect on their property than the discovery of the Spaniards by the Indians had on Spanish property.³⁵

The doctrine of Vitoria was given papal support in 1537 by the Bull *Sublimis Deus*, in which Pope Paul III proclaimed:

"We, who, though unworthy, exercise on earth the power of our Lord and who seek with all our might to bring those sheep of His flock who are outside, into the fold committed to our charge, consider, however, that the Indians are truly men and that they are not only capable of understanding the Catholic faith but, according to our information, they desire exceedingly to receive it. Desiring to provide ample remedy for these evils, we define and declare by these our letters, or by any translation thereof signed by any notary public and sealed with the seal of any ecclesiastical dignitary, to which the same credit shall be given as to the originals, that, notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect."

Almost word for word, this declaration of human rights is echoed in the first important law of the United States on Indian relations, the Northwest Ordinance of 1787, adopted two years before the Federal Constitution.³⁶

Vitoria's doctrine of respect for Indian possessions became the guiding principle of Spain's Laws of the Indies; the parallel promise of the Northwest Ordinance became the guiding principle of our Federal Indian law.³⁷ Conquistadores, pirates, and even administrative officials sworn to obey the law have not always adhered to this high principle. But if the principle of respect for Indian possessions has not been applied at 100 percent of its face value, it has been applied at least to the extent that \$800,-

35. *De Indis II*, 7. Cf. Marshall, C. J., in *Worcester v. Georgia*, (1832) 6 Pet. 515: "It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors." (At p. 543.)

36. See *supra* p. 41.

37. See F. S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, (1942) 31 *Geo. Law Jr.* 1.

000,000.00 or so of Federal funds has so far been appropriated for the purchase of Indian lands. To pay \$800,000,000.00 for a principle is not a common occurrence in the world's history, but in the long run this impractical "long haired" expenditure has probably proved the wisest investment the United States ever made.

Fair dealing by the Federal Government cemented the loyalty of Indians to the United States, a loyalty which has been an important factor in every war we have fought, and as well in all our years of peace. Fair dealing by the Federal Government assuaged the outrages committed on Indians by their neighbors³⁸ and helped to preserve a people who, without Federal protection, might have succumbed to the rapacity of European civilization. Each year Indian contributions to our economy run to many times the amount we have paid the Indians for their lands, and the Indian contribution to our economy and our American way of life is far from being exhausted. Though we owe to the Indian many of our sports, recreations, highways, drugs, food habits, and political institutions,³⁹ and most of our agricultural staples,⁴⁰ we have still to acquire from the Indian many skills and intangible resources that would be lost forever if Indian cultures were forthwith destroyed, as many chauvinists advocate.⁴¹

It is against this historical background of fact and doctrine that the cases on Indian title must be viewed if they are to be understood. Only against such a background is it possible to distinguish between those cases that mark the norms and patterns of our national policy and those that illustrate the deviations and pathologies resulting from misunderstanding and corruption. It

38. "Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." *United States v. Kagama*, (1886) 118 U. S. 375, 384. Denial of the right of Indians to vote and receive social security benefits is found today only in the two states most recently admitted to the Union, Arizona and New Mexico. Efforts of the Federal Government to end these discriminations have met much local hostility, as have Federal efforts to protect native land rights in Alaska where the frontier spirit still prevails.

39. See the essay of Lucy M. Kramer on "Indian Contributions to American Culture," in *Indians Yesterday and Today*, (U.S. Dept. of Interior, 1941).

40. It has been estimated by competent authorities that four-sevenths of the total agricultural production in the United States (in farm value) consists of plants domesticated by Indians and taken over by whites, and it has been noted that where the whites took over plants they also took over Indian method of planting, irrigation, cultivation, storage, and use. See *Edwards, Agriculture of the American Indian*, (U.S. Dept. of Agriculture, 1933) p. v.; *Bureau of American Ethnology Bulletin No. 30*, vol. 1, p. 25.

41. The 1890 Census Report on Indians, at p. 57, shows the high-water mark of such chauvinism. See F. S. Cohen, "Indian Claims," (1945) *The American Indian*, vol. 2, No. 3, pp. 4-5.

is perhaps inevitable that any high ideal should prove too hard to live by in times of stress, but when a principle has survived the stresses of many wars, financial panics, and outbreaks of chauvinism, it becomes important to distinguish the basic principle from the "scattering" forces, just as it becomes important to distinguish in physics between the principle of gravitation and the deflecting forces of air friction, air pressure, terrestrial motion, etc., that make some bodies drop slantwise or rise instead of dropping. Indeed, it is only with some understanding of the norms of institutional conduct that one can determine whether the norms of the past are continuing to exert their influence, or whether the deviations of yesterday will be the norms of tomorrow.

IV. *The Cases.*

The cases on original Indian title show the development across twelve decades of a body of law that has never rejected its first principles. The law of Indian title is thus particularly susceptible to historical analysis. Ten cases fix its outlines.

1. The Sovereign's Title: *Johnson v. McIntosh*.⁴²

The first important Indian case decided by the Supreme Court established the proposition that a private individual claiming title to land by reason of a private purchase from an Indian tribe not consented to by the sovereign, could not maintain that title against the United States or its grantees, where the United States had acquired the land in question from the Indians by treaty. The dismissal of the plaintiffs' complaint in this case was not based upon any defect in the Indians' title, but solely upon the invalidity of the Indian deed through which the white plaintiffs claimed title. When the case was decided, the land (on the Wabash River) had not been occupied by Indians for some fifty years. They had received more than \$55,000.00 for the land from the original vendees, Moses Franks, Jacob Franks and their associates, they had then sold the same land to the United States,⁴³ and they had removed from the tract that they had sold. At the time of the Federal grant to the defendants, in 1818, there was no Indian title to encumber the grant. The decision of the court that a private sale of Indian lands not consented to by the sovereign gave the purchaser no valid title against the sovereign, has never been questioned in the years since this decision was rendered, nor has there been any

42. (1923) 8 Wheat. 543.

43. Treaty of August 3, 1795, 7 Stat. 49; Treaty of June 7, 1803, 7 Stat. 74.

successful challenge of the rule which the court then formulated, viz., that Indian title could be extinguished only by, or with the consent of, the Government. Justice Marshall's opinion in the case makes it clear that while the sovereign could extinguish Indian title by treaty or by war, Indian title would not be extinguished by a grant to private parties and that such a grantee would take the land subject to Indian possessory rights.

"* * * the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and *their power to dispose of the soil at their own will, to whomsoever they pleased, was denied* by the original fundamental principle that discovery gave exclusive title to those who made it.

"While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. *These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.*" (At p. 574.)

It is perhaps Pickwickian to say that the Federal Government exercised power to make grants of lands still in Indian possession as a consequence of its "dominion" or "title." A realist would say that Federal "dominion" or "title" over land recognized to be in Indian ownership was merely a fiction devised to get around a theoretical difficulty posed by common law concepts. According to the hallowed principles of the common law, a grant by a private person of land belonging to another would convey no title. To apply this rule to the Federal Government would have produced a cruel dilemma: either Indians had no title and no rights or the Federal land grants on which much of our economy rested were void. The Supreme Court would accept neither horn of this dilemma, nor would it say, as a modern realist might say, that the Federal Government is not bound by the limitations of common law doctrine and is free to dispose of property that belongs to Indians or other persons as long as such persons are paid for their interests before their possession is impaired. But such a way of putting the matter would have run contrary to the spirit of the times by claiming for the Federal Government a right to disregard rules of real property law more sacred than the Constitution itself. And this theoretical

dilemma was neatly solved by Chief Justice Marshall's doctrine that the Federal Government and the Indians both had exclusive title to the same land at the same time. Thus a federal grant of Indian land would convey an interest, but this interest would not become a possessory interest until the possessory title of the Indians was terminated by the Federal Government. The Indians were protected. The grantees were protected,—assuming that the Federal Government went ahead to secure a relinquishment of Indian title. The power of the Federal Government was recognized. And the needs of feudal land tenure theory were fully respected. Even if we are no longer interested in the niceties of theory, the reconciliation of Indian rights and grantee rights which Marshall worked out must command our respect.

2. Indian Title *vs.* Colony and State: *Worcester v. Georgia*.⁴⁴

The second great landmark in the law of Indian title is established by Chief Justice Marshall's opinion in *Worcester v. Georgia*, where the land involved in suit was in the present possession of Indians. The Supreme Court in this case decided that the State of Georgia could not exercise jurisdiction over Indian lands, i.e. that Indian title could not be ignored by a State. The Chief Justice took great care to point out that neither *Johnson v. McIntosh* nor any other decision had denied the validity of Indian title, and that the principle of sovereign title by "discovery" was in no way inconsistent with Indian title.

"This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those [Europeans] who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell." (at p. 544)

Much of Chief Justice Marshall's opinion in this case may be dismissed as unnecessary to the decision, and of course, strictly speaking, no opinion or rule is ever logically necessary to any decision.⁴⁵ But certainly an important step in the process by which

44. (1932) 6 Pet. 515.

45. See F. S. Cohen, *Ethical Systems and Legal Ideals*, (1933) 34-35.

the Supreme Court came to its decision in *Worcester v. Georgia* was the conclusion that when the Crown gave to the Colony of Georgia whatever rights and powers the Crown had in Cherokee lands, this did not terminate or alter the Cherokee Nation's original title, which survived the Crown grant and later became the basis of Cherokee treaties with the Federal Government. The case thus stands squarely for the proposition adumbrated in *Johnson v. McIntosh*,⁴⁶ that a grant by the sovereign of land in Indian occupancy does not abrogate original Indian title.

3. The Transferability and the Scope of Indian Title: *Mitchel v. United States*.⁴⁷

Whereas *Johnson v. McIntosh* had held that an unauthorized Indian sale could not give a title superior to that later obtained by treaty, the case of *Mitchel v. United States* dealt with the obverse situation where the Indian sale relied upon had been made with the consent of the sovereign. In such case, the Court held, the purchaser from the Indians secured a title superior to any title which the United States could assert. The United States, the Court held, could not acquire from the King of Spain what was not the King's property, and the property of Indians or their grantees could not become royal or government property without formal judicial action.⁴⁸ Indian property was no different in this respect from the property of white men:

"* * * One uniform rule seems to have prevailed from their first settlement, as appears by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots.

"Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians, though *possession could not be taken without their consent.*" (9 Pet. 711, at 745)

What had been conceded, by way of dictum, in *Johnson v. McIntosh*, namely that Indian title included power to transfer as well as to occupy, is the core of the decision in the *Mitchel* case.

Finally the *Mitchel* case clarifies the scope of the rule of re-

46. (1823) 8 Wheat. 543, at 591.

47. (1835) 9 Pet. 711.

48. "If the king has no original right of possession to lands, he cannot acquire it without office found, so as to annex it to his domain." 9 Pet. at 743.

spect for Indian possessions by expressly rejecting the view that such possession extended only to improved lands. Said the Court:

“Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.” (At p. 745.)

4. Indian Title *vs.* The Sovereign in Louisiana Territory: *Choteau v. Molony*.⁴⁹

The *Choteau* case presents facts very similar to those in *Johnson v. McIntosh*, and reaffirms the holding of that case that one who claims under an unauthorized grant of Indian lands cannot prevail against a grantee whose title is based upon an Indian treaty cession and a subsequent Federal grant. In the *Choteau* case, however, the plaintiff's invalid grant was not invalid because it lacked government consent. It was invalid because it lacked Indian consent. The Court held that under the Spanish law applicable in the Louisiana Territory the possessory rights of the Fox Tribe of Indians in lands aboriginally occupied by them were such that any grants made by the Spanish Governor would be “subject to the rights of Indian occupancy. They would not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish Governor to authorize anyone to interfere with it” (p. 239). Thus the case recognizes, as did the *Mitchel* case, that even a king cannot lawfully take possession of Indian lands without Indian consent.

5. Indian Titles *vs.* Homesteaders: *Holden v. Joy*.⁵⁰

The contention that Indian lands are public lands subject to disposition as such, a contention which the Court had squarely rejected in *Worcester v. Georgia*, *Mitchel v. United States*, and *Choteau v. Molony*, was again made, in a somewhat novel guise, in *Holden v. Joy*, and was again rejected by the Court. In this case the defendant, Joy, claimed under certain Indian treaties, while the plaintiff, Holden, claimed under preemption acts of Congress. On behalf of the plaintiff's claim it was argued that the Constitution expressly vests in Congress control over public property and that a series of treaties made by the President and Senate with Indian tribes could not constitutionally dispose of public land to the de-

49. (1853) 16 How. 203.

50. (1872) 17 Wall. (84 U.S.) 211.

pendant in a manner that conflicted with modes of public land disposition prescribed by Congress and availed of by the plaintiff. The Court, in rejecting that argument, and holding for the defendant, pointed out that the occupancy right in the land in question had been in the Indians from the start and was therefore clearly subject to disposition by Indian treaties.

In upholding the Indian title as a proper subject of treaty-making, the Court characterized aboriginal title in these terms:

"Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held by the Cherokees under their original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man. Unmistakably their title was absolute, subject only to the pre-emption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs." (At p. 244.)

6. Indian Title and Railroad Grants: *Buttz v. Northern Pacific Railroad*.⁵¹

Buttz v. Northern Pacific R.R. is the first of the railroad grant cases in which the principles enunciated in *Johnson v. McIntosh* and *Worcester v. Georgia* were applied to the transcontinental railroads that sought passage across Indian lands. Notwithstanding the vital importance of these railroads for the expanding national economy, and the strong legislative backing which the railroads commanded, Congress when it gave millions of acres of public land to the railroads in aid of construction scrupulously respected Indian possessions, whether or not such possessions had been defined by treaty or act of Congress. The statutory grant in the *Buttz* case⁵² safeguarded Indian rights in these words:

"The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill."

Other railroad grants even went so far as to provide expressly that such extinguishment of Indian title should be effected only by "voluntary cession."⁵³

The interpretation of these grants in the *Buttz* case and suc-

51. (1886) 119 U. S. 55.

52. Act of July 2, 1864, 13 Stat. 365, sec. 2.

53. Act of July 27, 1866, 14 Stat. 292, construed in *United States v. Santa Fe Pacific Ry. Co.*, (1941) 314 U. S. 339, considered *supra* note 1.

ceeding cases adhered to the principle that while a grant of land in Indian possession may convey a legal fee, such a grant does not impair the Indian title, which the grantee must respect until it has been duly terminated by treaty, agreement, or other authorized action of Congress or the Indians. Applying this rule in the *Buttz* case meant that the title originally conveyed to the railroad by the Congressional grant of 1864 and perfected by Indian relinquishment of the land in 1873, for an agreed compensation, prevailed over a settler's preemption title under the act of September 4, 1841, 5 Stat. 453, alleged to have been perfected by actual settlement in 1871. The basis of the Court's decision lay in the determination that "At the time the act of July 2, 1864, was passed the title of the Indian tribes was not extinguished" (at p. 66), that this was still the situation in 1871, and that, "The grant conveyed the fee subject to this right of occupancy" (*ibid.*).

It is to be noted that the Indians' right of occupancy in 1864 had not yet been defined by any treaty. In 1867 a reservation was set aside for the Indians involved, but the Court noted that this did not of itself wipe out aboriginal possessory rights outside of the reservation. The aboriginal Indian title in the area involved in the *Buttz* case never was defined in any treaty or agreement until the agreement of 1873 by which the land was ceded to the United States. The *Buttz* case stands, therefore, as a clear warning that neither settlers nor railroads can ignore aboriginal Indian title.

7. Individual Indian Titles *vs.* The Railroads: *Cramer v. United States*.⁵⁴

The *Cramer* case, which has already been discussed,⁵⁵ is important in the development of the law of Indian title in two respects: (1) it establishes the proposition that individual and tribal possessory rights are entitled to equal respect, and (2) it qualifies the suggestion in the *Buttz* case (at p. 71) that "Indians having only a right of occupancy" do not have such "claims and rights" as suffice to exclude lands entirely from a public grant.⁵⁶ In the *Buttz* case this dictum was entirely justified since the grant act in question provided that the Indian possession should not be disturbed by a grant of naked legal title. But where, as in the *Cramer* case, there was no such express guaranty, the only way to protect

54. (1923) 261 U. S. 219.

55. See *supra* pp. 29-31.

56. This dictum provided the main line of argument for the railroad in the *Cramer* case. See 261 U. S. 219, 220.

the Indian title was to hold that land under Indian title was wholly excluded from the grant. And this the Court did. Taken together, the *Buttz* and *Cramer* cases hold that Indian title survives a railroad grant, either as an encumbrance upon the grant (*Buttz*) or as an exception carved out of it (*Cramer*). In either case the grantee cannot interfere with the Indian title.

8. The Scope of Indian Title: *United States v. Shoshone Tribe*.⁵⁷

Whether original Indian title comprises all elements of value attached to the soil or whether such title extends only to such surface resources as the Indians knew and used was the central question decided in the *Shoshone* case. While the case involved a treaty, the treaty was silent on the question of whether the "lands" which were reserved to the Indians included the timber upon, and the minerals below, the surface. The argument of the case therefore turned primarily on the extent of the Indian tenure prior to the treaty. The Government, represented by Solicitor General (now Mr. Justice) Reed, argued that the Shoshones had a mere right of occupation, which was "limited to those uses incident to the cultivation of the land and the grazing of livestock," and that the Government had an "absolute right to reserve and dispose of the [other] resources as its own."⁵⁸ This view was further developed in the Government's main brief, signed by Solicitor General (now Mr. Justice) Jackson, urging that original Indian title was something *sui generis*, comprising only a "usufructuary right," and that such right "to use and occupy the lands did not include the ownership of the timber and mineral resources thereon."⁵⁹ This view was considered and rejected by the Court, Mr. Justice Reed dissenting.⁶⁰ The Court took the view that original Indian title included every element of value that would accrue to a non-Indian landowner. It concluded that the treaty did not cut down the scope of the title of the Indians, "undisturbed possessors of the soil from time immemorial," and declared:

"For all practical purposes, the tribe owned the land. * * * The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee. * * *

* * * * *

57. (1938) 304 U. S. 111.

58. Brief for United States on petition for certiorari.

59. Brief for United States, pp. 7-24.

60. While Mr. Justice Reed was the sole dissenter from the decision in the *Shoshone* case, he was joined by Justices Burton and Rutledge in a more recent dissent, involving substantially the same contention that Indians are "like paleface squatters on public lands without compensable rights if they are evicted." *United States v. Tillamooks*, (1946) 329 U. S. 40, 58.

"Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title. *Cherokee Nation v. Georgia*, 5 Pet. 1, 48. *Worcester v. Georgia*, *supra*, 580. Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial." (At pp. 116-117).

At the same session of court the Supreme Court applied the identical rule, in the case of the Klamath Indians,⁶¹ to Indian ownership of timber. The *Klamath* and *Shoshone* cases, taken together, overturned prevailing views as to the ownership of timber on Indian reservations. Earlier decisions of the Supreme Court in *United States v. Cook*,⁶² and *Pine River Logging Co. v. United States*,⁶³ to the effect that the Federal Government could replevin logs sold without authority or recover the value thereof, had been widely misconstrued as a denial of Indian rights to timber.⁶⁴ When this misinterpretation was set at rest in the *Shoshone* and *Klamath* cases, Congress ordered that the proceeds of the judgment in the *Pine River* case, which had been deposited to the credit of the Government, should be transferred to the credit of the Indians.⁶⁵ These two decisions delivered a death blow to the argument that aboriginal ownership extends only to products of the soil actually utilized in the stone age culture of the Indian tribes.

9. Indian Title vs. Administrative Officials: *United States as Guardian of Hualpai v. Santa Fe Pacific Railroad Co.*⁶⁶

The main facts and the issues of the *Walapai* case have already been noted.⁶⁷ The significance of the case in the development of the law of Indian title lies not in the recognition that Indian title does not depend upon treaties nor even in the fact that the doctrine of original Indian title was applied to the Mexican cession area—both principles are established in earlier decisions, e.g. in the *Cramer* case. More important is the fact that the aboriginal occupancy of an Indian tribe was here held to have survived a course

61. *United States v. Klamath Indians*, (1938) 304 U. S. 119; same case, (1935) 296 U. S. 244.

62. (1873) 19 Wall. 591.

63. (1902) 186 U. S. 279.

64. See 29 Op. Att'y Gen. 239 (1911). And see F. S. Cohen, *Handbook of Federal Indian Law*, pp. 313-316. The Government's brief in the *Shoshone* case, incorporated by reference in its *Klamath* brief, placed chief reliance upon this interpretation of the *Cook* and *Pine River Logging Co.* cases.

65. Act of June 5, 1938. 52 Stat. 688.

66. (1941) 314 U. S. 339.

67. See *supra* pp. 31-33.

of congressional legislation and administrative action that had proceeded on the assumption that the area in question was unencumbered public land. The decision thus stands as a warning to purchasers of real property from the Federal Government, reminding them that not even the Government can give what it does not possess.

10. Indian Title *vs.* The Federal Government: *United States v. Alcea Band of Tillamooks*.⁶⁸

The last large gap in the doctrine of original Indian title was filled in by the Supreme Court's decision in the *Alcea* case, holding that the Federal Government was bound to pay the Indians when it took from them lands which they held under aboriginal ownership.⁶⁹ While the disagreements that split the Court three ways in its opinion-writing make it dangerous to rely on anything the Court said in this case, the fact stands out that the United States, after taking land, by Congressional act, from Indians who had nothing more than an unrecognized aboriginal title to it, was required, by a five to three vote of the Supreme Court, to pay the Indians the value of the land so taken. Certainly it can make no difference to the Indians in the case whether, as Justice Black thought, they are to be paid because Congress passed a jurisdictional act allowing them to bring suit, or, as the four other justices in the majority thought, and as the Court of Claims thought, because the action of Congress a century ago established a liability which only came before the Court for adjudication in 1947. The question of whether rights depend upon remedies or vice versa is a metaphysical issue on which lawyers have disagreed for at least two thousand years, and it is scarcely likely that unanimity will be reached in the next two thousand years. As long as the Indian gets paid for aboriginal holdings that the Government takes from him, he will not quibble about the reasons assigned for the decision.⁷⁰

68. (1946) 329 U. S. 40, *aff'g* (1945) 103 Ct. Cls. 494, 59 F. Supp. 934.

69. That no such liability arises when land not subject to original Indian title is set aside temporarily for Indian use and then restored to the public domain is the holding of two recent cases. *Sioux Tribe v. United States*, (1942) 316 U. S. 317; *Ute Indians v. United States*, (1947) 330 U. S. 169. The language and circumstances of the Executive orders setting up Indian reservations vary so widely that generalizations from cases interpreting such orders are of little value. See F. S. Cohen, *Handbook of Federal Indian Law*, pp. 299-302.

70. The meaning of the decision, from the standpoint of actual administration, is thus set forth in the statement of Commissioner of Indian Affairs William A. Brophy:

"The Supreme Court has now held that original Indian title—even though not accompanied by notary seals and ribbons—is as good as any white

The difference between Justice Black's formulation of the rule of liability and that of the other four justices of the majority is not likely to affect any actual decisions.⁷¹ The Indian Claims Act of August 13, 1946⁷² establishes a special forum to hear Indian claims and among the claims assigned to this forum for determination are claims based upon a taking of land held under original Indian title.⁷³ The same act also provides for future determination of similar claims by the Court of Claims.⁷⁴ Since all five members of the majority in the *Alcea* case agreed that the combination of (1) an uncompensated taking, and (2) a proper jurisdictional act, jointly, provided a basis for recovery, and since the second condition has been satisfied by general legislation, it follows that, under the *Alcea* decision, if there has been an uncompensated taking, a recovery may now be had. For reasons already noted, the areas within which such recoveries may be had are nowhere near as great as has been commonly supposed, even by some of the Supreme Court justices when they comment upon matters not of record in the case before them.⁷⁵

The *Alcea* case gives the final coup de grace to what has been

man's title. It is good against the United States as well as against third parties. Under recent legislation opening the courts to Indian grievances, the Indians are held entitled to recover the value of any land that has been taken away from them by the Government. This means the end of a long-standing discrimination which made Indian land in the old days a prey to all sorts of land-grab schemes and denied the Indians any redress or compensation. It is the duty of all employees of the Office of Indian Affairs to see that Indian land ownership is respected to the same degree as any other form of land ownership. As the Supreme Court has said, whether a tract of land 'was properly called a reservation . . . or unceded Indian country . . . is a matter of little moment . . . the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then only upon such consideration as should be agreed upon.'"

71. It did affect the decision in *Northwestern Bands of Shoshone Indians v. United States*, (1945) 324 U. S. 335. There a majority of the Court thought that the jurisdictional act did not authorize a suit based on aboriginal title. A four-way split in the Court produced an affirmation of the decision of the Court of Claims below, denying recovery. The limitations of the Shoshone jurisdictional act have now been superseded by the Indian Claims Act, which was passed, very largely, to overcome the injustices which resulted from the Shoshone decision, injustices pointed out by two of the justices (Black and Jackson, JJ.) voting with the majority in that case. The Senate and House Committees which asked the Supreme Court to allow the Indians a rehearing in this case, and were refused, saw to it that the Indian Claims Act allowed such rehearings in all cases heretofore dismissed for jurisdictional reasons. See F. S. Cohen, "Indian Claims," (1945) *Amer. Indian*, vol. 2, No. 3, p. 3. And see K. J. Selander, Section 2 of the Indian Claims Commission Act, (1947) 15 *Geo. Wash. L. Rev.* 388, 422.

72. (1946) 60 Stat. 1049, 25 U. S. C. A. (1946 Supp.) 70.

73. See sec. 2, 60 Stat. 1049, 1050, 25 U. S. C. A. (1946 Supp.) 70a.

74. See sec. 24, 60 Stat. 1049, 1055, 28 U. S. C. A. (1946 Supp.) 259a.

75. See note 13 supra.

called the "menagerie" theory of Indian title,⁷⁶ the theory that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined. The sources of this "menagerie" theory are many and varied and sometimes elegantly pedigreed. There is the feudal doctrine, which has seldom been heard in this country for a century or so except in Indian cases, that ultimate dominion over land rests in the sovereign. There is the echoing of a doctrine that taking land from another nation by the sword creates no justiciable rights—a doctrine that might have been proper enough when the United States was waging war or making treaties with the various Indian tribes, but is hardly relevant to the contemporary scene, when all Indians are citizens and when Congress has provided that these citizens should be fully compensated for confiscated lands that they would own today if the Federal Government had carried out the "fair and honorable dealings" that it first pledged in 1787.

There are other subtler sources of the "menagerie" theory of Indian reservations which are seldom set forth in legal briefs but exert a deep influence on public administration. One of the most insidious of these is the doctrine that the only good Indian is a dead Indian, whence it follows, by frontier logic, that the only good Indian title is one that has been extinguished, through transfer to a white man or a white man's government. And finally there is the more respectable metaphysical doctrine that since government is the source of all rights there are no rights against the Government, from which it may be deduced that Indians who have been deprived of their possessions by governmental action are without redress. All these doctrines, it may be hoped, have been finally consigned to the dust bins of history by the course of decisions of the Supreme Court that cumulates in the *Alcea* case.

That course of decisions now fully justifies the statement made by President Truman some months before the *Alcea* decision was handed down, on the occasion of his signing the Indian Claims Act on August 13, 1946:

"This bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transactions with the Indian tribes we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights.

76. See F. S. Cohen, *Handbook of Federal Indian Law*, p. 288.

Instead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90 per cent of our public domain, paying them approximately 800 million dollars in the process. It would be a miracle if in the course of these dealings—the largest real estate transaction in history—we had not made some mistakes and occasionally failed to live up to the precise terms of our treaties and agreements with some 200 tribes. But we stand ready to submit all such controversies to the judgment of impartial tribunals. We stand ready to correct any mistakes we have made.”