TENURE OF LAND AMONG THE INDIANS

By GEORGE BIRD GRINNELL

The civilized man and the savage man are utterly unlike in mental attitude. Their ways of looking at many material and most abstract things and their methods of reasoning are wholly different. This is so true that in many cases it is difficult for either to comprehend the other's point of view, even after it has been elaborately explained. In such cases even the white man must use new modes of thought, and must set aside for a time all that he has been taught; he must abandon his axioms and must put himself again in the position of a child who has to learn things from the foundation, with the added difficulty that the grown man must unlearn all that life's experience has taught him.

Thus there is nothing in an Indian's traditions or experience that enables him even to imagine the ownership of land by persons, although he regards personal property much as we do. His food, arms, and clothing, his horses and other livestock, are his to do what he pleases with: to sell, to give away, even to destroy. He may have rights in less tangible things. He may have the sole right in his tribe to carry some ceremonial object, to sing some sacred song, to tell some particular story. This is a property right that is respected by others and one that he may usually divest himself of by giving it away or by selling it. A man who belongs to a certain society, on leaving the society may sell his place in it to another, but such sale must be confirmed by the members of this society. These views and practices are closely analogous to those of civilized man.

But with regard to the ownership of the soil the case is quite different. Many savages, but especially our own Indians, are ab-
solutely unacquainted with the ideas held by the whites of property in land. They cannot conceive of the individual ownership of land; they think of their land as held by the tribe for those who shall come after them, who in turn may occupy it.

At the time of the discovery of America so much of the land now belonging to our nation as was occupied or controlled by anybody was, of course, in the possession of the aboriginal inhabitants. There was no individual ownership of land, but there was tribal ownership. In some cases a tribe occupied certain lands to the exclusion of all others. In other cases various tribes, friendly or allied, occupied or controlled certain territory from which they expelled other people who ventured on it. Again large tracts might be claimed—even though not permanently occupied or controlled—by half a dozen tribes and might serve as hunting grounds for them, where at any time hostile tribes might be encountered and where war might be a part of every hunt. In earlier times the lands bordering the Ohio river in Ohio, Indiana, and Kentucky, and later those along the Yellowstone and the Missouri, in the country of the Beaverhead, and about the Three Forks of the Missouri, constituted in this way debatable ground.

Often when the white man came the Indians received him in friendly fashion and gave him permission to camp in their territory and to put up permanent buildings. A little later, individuals or groups of individuals, who might be chiefs or principal men of tribes, sub-tribes, or villages, for a consideration gave the white men permission to occupy certain lands of greater or less area. Such transactions, we may assume, were sometimes believed by the whites to be absolute purchases of the land, while by the Indian we may feel sure they were always regarded merely as permits to use the land for a term and on conditions.

No Indian could understand the need or sense of expressing some of those conditions. Some of them the white man would have misunderstood if they had been expressed. The white man knew more than one way of having an individual and exclusive interest in the land. He was familiar with the idea of leases for years or for life; he was familiar with the estate in fee. His mind was imbued with the idea of exclusive tenancies running for years or
lives, and of exclusive individual ownerships, running from generation to generation. But the Indian's savage mind knew no such thing as absolute ownership of land by individuals. According to his view neither the tribe nor any member of it has in any piece of land rights other than the right to occupy and use it, the individual for life in common with his fellows, the tribe forever, to the exclusion of unfriendly peoples. In the past the old people occupied this land, hunted over it, gathered fruits from it, or cultivated it; and as they passed away the same operations were performed by one generation after another; and after those now occupying it shall have passed from life, their children and their children's children for all succeeding generations shall have in it the same rights that the people of the past have had and those of the present possess, but no others. This land cannot be sold by the individual or the tribe. The individuals now living on it may sometimes barter away their personal rights in it, but they cannot alienate the land, because the sole ownership of it is not in them. The tribe are tenants and in a sense trustees; and individuals can part only with the rights which they possess as members of the tribe, subject to the rights and duties of the tribe. The primitive Indian, when dealing with his friends, was usually an honest person. He would never think of selling anything to which he did not believe he had a good title. His horses, his blankets, his arms, his food, he might sell, or lose at gambling, but his land he could not sell and would not think of selling any more than he would think of selling the rivers or the springs. The rights in the land of those unborn were as clear as his own, as clear as those of his ancestors. These rights could not be alienated.\footnote{The almost universal reverence of the Indians for the earth is interesting in connection with their feeling about the ownership of land. The earth is regarded as sacred, often it is called the "mother" and it appears to rank second among the gods. A sacrifice of food is held up first to the sky and then is deposited on the earth, and perhaps rubbed into the soil. The first smoke is directed to the sky, the second to the earth, and then those to the four directions in order. Other sacrifices are commonly held up first to the sky, and then are held toward the earth. Before beginning to perform any sacred office, the priest or doctor holds his hands first toward the sky and then rubs them on the ground. "It is by the earth," they say, "that we live. Without it we could not exist. It nourishes and supports us. From it grow the fruits that we eat, and the grass that sustains the animals whose flesh we live on; from it comes forth, and over its surface run, the waters which we drink. We walk on it, and unless it is firm and steadfast we cannot live."}
Until within comparatively recent times, all land sales and all treaties have been made by the Indians on the theory that they were passing over to the white people certain rights of occupancy — were lending them the use of the land. These rights in a general way were to live on the land, to pass over it, to cultivate it, to use its waters, the animals that lived on it, the birds that flew over it, and the fish in the streams; yet the Indians looked forward to a time at the end of the loan when the land should be returned to them, when nature would heal the scars made by the white man, when the animals and the birds would re-establish themselves and the fish would increase in the rivers.

Until within a few years when I explained the manner in which the Indians looked at this matter, I think it had never been brought to the public notice, and even today the number of those who understand it is small. Nevertheless, I believe that anyone who investigates the subject among the North American Indians will find the feeling exactly as I report it, and it is quite possible that this view of the land may be the one generally held by primitive races. In books on African travel some evidence is to be found that the natives of the west coast hold just this view of the land they occupy and their rights in it. Rev. J. Leighton Wilson, who acquired his information on the subject during the early years of the last century, speaks of the feelings of the Kru men about their land in language that is quite unmistakable. He says:  

The Kru people have no idea of the appropriation of land by individuals except for temporary purposes. It is regarded as common property, and any man may use as much of it as he chooses, but he cannot sell any. The only exclusive right which any one has is that of occupancy. If a man reclaims a piece of land from its primitive woods it is considered his and his descendants as long as they chose to use it, but it cannot be transferred like other property. The people, by common consent, may sell any portion of it to a stranger, for the purpose of erecting a trading factory, for a garden, or a farm; but in their minds this transaction, even when subjected to the formality of a written contract, amounts to little more than a general consent to the stranger living among them and enjoying all the rights of citizenship; and with the expectation that the land will revert to themselves, as a matter of course, should he die or leave their country. In some cases, where they have transferred a por-

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tion or the whole of their territory to a foreign jurisdiction, it is not probable that they have a correct apprehension of the nature of the transaction, whatever pains may have been taken to make them understand; and they do not comprehend it fully until the contract is carried into execution, in connection with their own observation and experience.

The matter has been touched on also by Mary Kingsley in her *West African Studies* (p. 436) in the following language:

You will often hear of the vast stretches of country in Africa unowned, and open to all who choose to cultivate or possess them. Well, those stretches of unowned land are not in West Africa. I do not pretend to know other parts of the continent. In West Africa there is not an acre of land that does not belong to some one who is a trustee for it, for a set of people who themselves are only life tenants, the real owner being the tribe in its past, present and future state away into Eternity at both ends. But as West African land is a thing that I should not feel, even if I had the money, anxious to acquire as a freehold, and as you can get under native law a safe possession of mining and cultivation rights from the representatives living of the tribe they belong to, I do not think that any interference is urgently needed with a system fundamentally just.

It is but a few years since the Blackfeet Indians, whose reservation in northern Montana now reaches from Birch creek to Canada, appealed to me to know when they were to receive back the land which they had lent to the white people nearly forty years before. Prior to 1865, after gold had been discovered in Montana and people began to settle there, the Blackfeet were pushed north of the Marias river, and ever since, though with a constantly diminishing area of reservation, they have remained in the same general region. The land they still believe to be theirs is now worth vast sums, for it comprises some of the most valuable agricultural and mining territory in the state of Montana.

I have heard of Indians complaining of mining operations carried on in territory which they had passed over to the whites, their grievance being that when they thus lent the land they understood that only its surface was to be used, and that while the whites had the right to plow the soil and turn it over for cultivation, their rights of excavation did not go beyond this. They had no right to bore into the ground and to carry away the minerals.

The elder Indians often speak of the wrongs that their race
has suffered, especially with respect to their land, regarding which they have deep feeling—a feeling which we can hardly comprehend. Thus in the view of the Indians our treatment of them contains an element of outrage and extortion far beyond the worst that sympathetic friends of the Indians allege. We have not only taken from the Indian everything that is his own; we have not only plowed up the bones of his fathers and desecrated the places that he holds sacred; we have uprooted the tribe itself and have taken away from it the lands which it held as a trust for posterity, and which the tribe itself had no right to give to any man. That he has been expelled from the land which was too sacred to become even his own, is a bitter hardship, but it seems to him worst of all that the unborn children of his race have been robbed of their tribal birthright. On all the broad footstool of God there will be no spot where the Indians will have the rights that have belonged to their tribes from time immemorial. They will be entitled to the use of no foot of land except that which they may be able to earn in the white man’s way—by their wits or by the sweat of their brow. Perhaps it is time and perhaps it is best that the Indians should fade away as we see them fading to-day.

Such is the feeling held by these Stone-age people, a feeling with which we may sympathize, though powerless to relieve their sadness. We may regret the crushing out of the race before the march of civilization as we regret the extinction of other natural things, but we must recognize it as nothing more than the operation of the inexorable natural law that the weaker must perish while the fitter shall survive.

Our notions of land ownership have developed through thousands of years. It seems to us now quite reasonable and expedient that one man should fence out others from his farm and that another should monopolize a lake and another a water power; but a primitive Indian can no more understand such private monopolies than the average American can understand how there could be a private monopoly of air or light.

The Indian’s notions of land tenure, so distinctly primitive, could not find acceptance in our day and our civilization. It became evident long ago that the time would come when the communal hold-
ing of great tracts of land by Indian tribes must cease. But the American people scrupled to wrest from the Indian every foot of land that he possessed and give it over to the white man; and so, nearly twenty years ago, a law was passed providing that, as time went on, the Indians of the several tribes should have allotted to them small individual holdings of land, while the remainder of the tribal tract should be opened to settlement and sold under various restrictions, the money to be applied to uses of the Indians.

Where allotments had been made in carrying out this law, whites rushed in and bought the surplus land which they improved themselves or sold to others for improvement. Soon the allotments were all gone, and yet there seemed as many people as ever clamoring for land, and before long these white people began to try to lease from the Indians the allotments on which the latter had located, and succeeded in persuading the Government to assent to such procedure. Influential and enterprising speculators can usually induce their senators or representatives or delegates in Congress to go to the agent or the commissioner, or to the Secretary of the Interior, and persuade him that it will be for the advantage of the Indians to lease their allotments; it will mean money in the Indians’ pockets; they will receive a rental greater than the value of any crops they can probably raise. An argument of this sort may very well appeal to an honest man, if he does not know that money is less important to the Indian than to be taught by slow degrees the lessons of civilized life. The Indian must learn first how to live on a piece of land, and then, last of all, he may learn how to live without land.

When the allotment law was passed and made applicable to all Indians it was supposed by many good people that the difficult problems of the race at last had been solved. In the passage of this law it was not considered—because the people interested in it had but little knowledge of the subject dealt with—that the conditions governing each tribe differed from those governing every other tribe and that therefore it is impossible to frame a single law that shall be so elastic that it will fit all conditions.

In many cases allotment has proved the greatest misfortune that could come to the Indians, and, as carried out at present (and the
same is true of the past), it is often an absolute bar to their progress. Having been permitted to lease their lands, and receiving their rents at regular intervals, they live from day to day in lodges in the old fashion, not working, not learning any lessons of thrift, but instead constantly sinking a little lower in helplessness and inefficiency. If they were obliged to live on their allotted lands and were instructed in the proper method of using them, the case would be different.

The whole trend of legislation is toward getting away the Indians’ lands from them for white men. This is natural enough, but to carry the process through with speed, to terminate it in ten, twenty, or thirty years, seems cruel.

Moreover, a general law which provides for the allotment of a fixed area to the individual without regard to local conditions is unjust, unwise, and wasteful. The soil of the several Indian reservations varies from the most fertile to the most barren. The climate ranges from arid to moist; irrigation is needed here, drainage there. In some places not even the white man can make a living, toil he ever so hard. Sometimes two or more settlements of the country have taken place; a succession of dry years and crop failures have driven out the first people who took up and worked the land for awhile and then abandoned it; while a second group of settlers, perhaps more frugal and hardworking than the first, but at all events assisted by a succession of favorable seasons, are now making a living of some sort.

In 1890 when traveling through North Dakota near the Missouri river I found the farms largely abandoned. There had been a succession of crop failures, and the people seemed to have reached at last a point where they wanted nothing so much as to get away from the country. I saw deserted houses with cook stoves still standing in them, and farms with farm machinery abandoned in the field. It was as if the people had been stricken by a panic. The population of Bismarck, the capital of the state, had dwindled to 200 or 300 people, who were clustered in the middle of the town, within a fringe of attractive and more or less costly frame cottages, which had been abandoned by the fleeing population.

Some years later another wave of emigration reached this country and the land has again been occupied — this time by Russian peas-
ants, whose industry is untiring and whose frugality is astonishing. Helped for the last few years by favorable seasons and by their practice of selling everything raised on the farm for which a market can be found, and of consuming themselves the produce which is unsalable, they have succeeded in making both ends meet and are even doing well. But it would be folly to imagine that in that country the savage man who belongs there could earn a living by agriculture, even if he had been taught to plow, to sow, to reap, and to sell. What is true of some of the Missouri river agencies is further true of some of those to the Southwest, where without water nothing will grow out of the ground, while with water almost anything can be raised.

There are a number of reservations where owing to dryness, altitude, or soil conditions, farming is impossible, and where the people must support themselves as herdsmen if they are to live by their own exertions. It is a quite well established fact that no family can support itself on a herd of cattle which numbers fewer than 150 or 200. Of these 200 only a small proportion — roughly 10 percent annually — will be beef cattle, which can be sold. In the arid West from 20 to 40 acres of land are needed to support a horned animal for a year. The Bureau of Animal Industry, which I have consulted, seems to have nothing definite on this point, but the opinion of the cattlemen in the west, i.e., the Dakotas and Montana, is as given. Assuming that 30 acres are required to support a cow throughout the year, 640 acres will support about 21 cows. If a man and his wife and five children in this dry country should receive an allotment of 640 acres each, they would then have pasturage for only 150 head of cattle. On the other hand, it may be fair to assume that some portion of such a tract could be watered so that it would produce a crop of hay and thus support a larger number of animals.

In a country which is cold, or dry, or which for any reason cannot be cultivated, in any allotments that are made the Indians should receive 640 acres to the individual. To give to a family in such a country no more land, or only twice as much as is given to Indians in a farming country, such for example as the Indian Territory, is to give them something that is useless to them except to be
leased as a part of the pasture of some cattleman who controls a large tract.

The Flathead reservation, which is now soon to be opened, is a farming country. It has many streams, there is considerable precipitation, there is a mild climate together with a soil on which crops can be grown. On the Blackfoot reservation, to the eastward across the mountains, there is little water, snows and frosts occur every month of the year, potatoes do not yield a crop more than once in five years, oats seldom ripen, yet it is a splendid country for fattening cattle. It is not a good country for breeding cattle except in small herds, where the animals can be looked after at certain seasons of the year.

Again, down in the country of the Northern Cheyenne, the Tongue River Indian reservation, there is little or no water; the Rosebud river and its tributary streams on the west of the reservation commonly go dry in June or July and there is no opportunity for irrigation. Tongue river, which forms the western boundary of the reservation, might irrigate some land if money were available to make a ditch, but cattle must be the support of these Northern Cheyenne.

On the other hand, on the Crow reservation, 60 or 70 miles to the westward, there are irrigation ditches which water the broad bottoms of the Big Horn and the Little Big Horn, and here after a while the Indians could be made to raise crops. I can conceive that the Crows might get along with 160 acres apiece, properly chosen along these ditches. The Northern Cheyenne, on the other hand, should have 640 acres, or at least 320 acres, to the individual.

The tide of Congressional sentiment is now setting strongly in favor of the policy of opening Indian reservations by allotting the lands, no matter how ill-prepared for such allotment the Indians may be. It may be futile to attempt to stem this tide, but it should be possible to have laws passed authorizing the Secretary of the Interior, in the case of certain reservations which are nonagricultural, whether from barrenness of soil, lack of water, or elevation, to allot to each Indian living on such reservations a section or at least half a section of land. This action seems to be essential if the Indians of such reservations are to continue to occupy portions of them and
to earn their living in the only way they can earn it there—by pastoral pursuits—in other words if they are to continue to be a settled people and not wanderers and beggars like the Cree of northern Montana. The President, the Secretary of the Interior, and the Commissioner of Indian Affairs are deeply interested in the Indians, and most anxious to do everything in their power to protect them. If the matter is properly presented to these representatives of the executive power, I believe that they will agree that the action above suggested is just and wise. It should be possible to persuade Congress of the justice of such a course, and all who care for right and fair dealing should unite in urging such action on Congress.

The patents issued for future allotments should be inalienable for life, or better still for one hundred years. The Indian should be obliged to keep his land; it will be something to anchor him, and after him his descendants, to the soil. In a generation or two such an anchor may mean the permanent prosperity of the remnant of the race.

I make no complaint here about the policy or justice of driving Indians by force from lands which we need. I seek only to point out that in many places, by an unwise application of the allotment law, a grave wrong is being done under the guise of a benevolent policy. It has been said hundreds of times that Indians, like children, have been incapable of guarding wisely their own interests in making treaties and in other bargains; but what I dwell on is the fact, which no person of experience with Indians can deny, that a bargain with a tribe to sell its land to others, so that others could hold it forever and distribute it among private persons, is a transaction which no Indian mind could comprehend; consequently in the case of every land cession the Indian has been made to seem to agree to something which the mind of the primitive Indian could by no means grasp.

346 Broadway,
New York City.
DIGEST

I.
The North American Indian had no conception of private or exclusive individual ownership of land; but only of perpetual use and occupancy of land, by the tribe as tenants in common. They had no conception that land was merchantable, but an individual could sell, or dispose of, or a tribe could seal, whatever user it had, but could not sell the user of other bands or tribes, or the right of user in future generations of the tribe.

pp. 1-5.

II.
When a nation acquires new country by cession or conquest, there is a change only of public or political law, but not of private or municipal law; and the same as to property, the new sovereign or state taking territory from another by cession or conquest, works no change in the law of private property rights, but those who have rights in or to land, or other property, remain in the same relation to those rights as they did before the cession or conquest.

pp. 6-9.

III.
The United States recognizes in the American Indian a right to perpetual occupancy, user and possession, by tribes, as tenants in common, the fee remaining in the United States as successor to the original European discoverers, and the user of the Indians can be sold by them only to the United States. This does not prevent the United States from deeding the fee to Indians, or selling the fee, leaving them the use.

pp. 9-10. (Lands originally held by Spain or Mexico excepted in Louisiana Purchase.)
TENURE OF LAND AMONG THE NORTH AMERICAN INDIANS.


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Indians are absolutely unacquainted with ideas held by white people of property in land, and cannot conceive of individual ownership of land. They think of their land as held by tribe, for those who shall come after them, who, in turn may occupy it.

At time of discovery of America, so much of the land as was occupied or controlled by anybody, was in the possession of the Indians. Again large tracts might be claimed by tribes, though not permanently occupied or controlled by them. There was no individual ownership, but tribal ownership. In some cases various tribes, friendly to each other, had joint occupancy of certain land, to the exclusion of other tribes. When Indians received white men into their country they gave them permission to occupy or use land for a term and under conditions. Sometimes the whites thought they were buying this land from the Indian, but the Indian had no such idea of the transaction, in all likelihood.

"But the Indian's Savage mind knew no such thing as absolute ownership of land by individuals. According to his view neither the tribe nor any member of it has any piece or land rights other than the right to occupy and use it, the individual for life in
common with his fellows, the tribe forever, to the exclusion of unfriendly peoples. In the past the old people occupied this land, hunted over it, gathered fruits from it, or cultivated it; and as they passed away the same operations were performed by one generation after another; and after those now occupying it shall have passed from life, their children and their children's children for all succeeding generations shall have in it the same rights that the people of the past have had, and those of the present possess, but no others. This land cannot be sold by the individual or the tribe. The individuals now living on it may sometimes barter away their personal rights in it, but they cannot alienate the land, because the sole ownership of it is not in them. The tribe are tenants, and in a sense trustees; and individuals can part only with the rights which they possess as members of the tribe, subject to the rights and duties of the tribe." "Until within comparatively recent times, all land sales and all treaties have been made by the Indians on the theory that they were passing over to the white people certain rights of occupancy—were lending them the use of the land. These rights in general were to live on the land, to pass over it, to cultivate it, to use its waters, the animals that lived on it, the birds that flew over it, and the fish in the streams; yet the Indians looked forward to a time at the end of the loan when the land should be returned to them, when nature would heal the scars made by the white man, when the animals and the birds would reestablish themselves and the fish would increase in the rivers." The Kius, and other African tribes entertain the same ideas of land tenure.

Indians have been heard to complain of mining operations of whites in territory which had passed from them to white men. The Indians complain that when they lent the land they understood that only the surface was to be used, and rights of the whites to excavate the soil extended only to turning it over with a plow. They complain that whites had no right to bore into the ground and take out minerals.
The Ghost Dance Religion, by James Mooney.

pp. 720-721. 721, statement by Smohalla to Major Mac Murray; in part, as follows: "Those who cut up the lands or sign papers for lands will be defrauded of their rights and will be punished by God's anger. Moses (an Indian Chief) was bad. God did not love him. He sold his people's houses and the graves of their dead. It is a bad word that comes from Washington. It is not a good law that would take my people away from me to make them sin against the laws of God. You ask me to plow the ground? Shall I take a knife and tear my mother's bosom? Then when I die she will not take me to her bosom to rest. You ask me to dig for stone! Shall I dig under her skin for her bones? Then when I die I cannot enter her body to be born again. You ask me to cut grass and make hay and sell it, and be rich like white men! But how dare I cut off my mother's hair? It is a bad law, and my people cannot obey it. I want my people to stay with me here. All the dead will come to life again. Their spirits will come to their bodies again. We must wait here in the homes of our fathers and be ready to meet them again in the bosom of our mother." (MacMurray M.S.)

The idea that the earth is the mother of all created things lies at the base, not only of the Smohalla religion, but of the theology of the Indian tribes generally, and primitive races all over the world. This explains Tecumtha's reply to Harrison: "The sun is my father and the earth is my mother. On her bosom I will rest." In the Indian mind the corn, fruits, and edible roots are the gifts which the earth-mother gives freely to her children.

Lakes and ponds are her eyes, hill are her breasts, and streams are the milk flowing from her breasts. Earthquakes and underground noises are signs of her displeasure at the wrong doing of her children. Especially are the malarial fevers, which often
follow extensive disturbance of the surface by excavation or otherwise, held to be direct punishment for the crime of lacerating her bosom. Kanakuk, of the Kickapoos, to General Clark (695) "Some of the chiefs said the land belonged to us, the Kickapoos; but that is not what the Great Spirit told me - the land belongs to him. The Great Spirit told me that no people owned the lands - that all was his, and not to forget to tell the white people that when we went into council."

Bulletin 30, Bureau of American Ethnology, Handbook of American Indians North of Mexico. Vol I. pp. 756-757. By Alice C. Fletcher, contribution on "Land tenure. The Indian conceived of the earth as mother, and as mother she provided food for her children. The words in the various languages which refer to the land as 'mother' were used only in sacred or religious sense. In the primitive and religious sense land was not regarded as property; it was like the air, it was something necessary to the life of the race, and therefore not to be appropriated by any individual or group of individuals to the permanent exclusion of all others. Other words referring to the earth as 'soil' to be used and cultivated by man, mark a change in the manner of living and the growth of the idea of a secular relation to the earth. Instead of depending on the spontaneous products of the land the Indian began to sow seeds and care for the plants. In order to do this he had to remain on the soil he cultivated. This occupancy gradually established a claim or right to possess the tract from which a tribe or individual derived food. This occupancy was the only land tenure recognized by the Indian; he never himself reached the conception of land as merchantable, this view being forced on his acceptance through his relations with the white race. Tecumseh claimed that the Northwest Territory, occupied by allied tribes, belonged to the tribes in common, hence a sale of land to the whites by one tribes did not convey title unless confirmed
by other tribes. Furthermore, among most of the Algonquin tribes, at least, according to Dr. William Jones, if land were ceded to the whites, the cession could not be regarded as absolute, i.e., the whites could only hold to a certain depth in the earth such as was needful for sustenance. Each tribe had its village sites and contiguous hunting or fishing grounds, they could claim them against all intruders. This claim often had to be maintained by battling with tribes less favorably situated. The struggle over the right to hunting grounds was the cause of most Indian wars. In some tribes garden spots were claimed by clans, each family working on its own particular patch. In other tribes the favorable localities were preempted by individuals regardless of clan relations. As long as apperson planted a certain tract the claim was not disputed, but if its cultivation were neglected anyone who chose might take it. Among the Zuni, according to Cushing, if a man, either before or after marriage, takes up a field of unappropriated land, it belongs strictly to him, but is spoken of as the property of his clan, or on his death it may be cultivated by any member of that clan, though preferably by near relatives, but not by his wife or children, who must be of another clan. Moreover, a man cultivating land at one Zuni farming settlement of the tribe cannot give even of his own fields to a tribesman belonging to another farming village unless that person should be a member of his clan; nor can a man living at one village take up land at another without the consent of the body politic of the latter settlement; and no one, whatever his rank, can grant land to any member of another tribe without consent of the Corn and certain other Clans." Cites Authorities: Adair, Hist. Am. Indians, 282, 1775; Bandelier in Archaeol. Inst. Papers, III, 201-272, 1890; Cushing in Millstone, IX, 55, 1884; Dawson, Queen Charlotte Islands, 117, 1878; Fletcher, Indian Education and Civilization, 1888; Grimmell, Am. Anthropol., IX, No. 1, 1907; Jenks, 19th Rep. B.A.E., 1900; Powell, 7th Rep. B.A.E., 39-41, 1891; Royce, Indian Land Cessions, 18 Rep. B.A.E., Part 2, 1889; Willoughby, Am. Anthropol. VIII, No. 1, 1906.
Sec. 95. "All the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the Government of the United States. Congress recognized this principle by using the words 'laws of the territory now in force therein.' No laws could then have been in force but those enacted by the Spanish Government." **Marshall, C.J., American Insurance Co. v. Canter, 1 Pet. 542.**

In cases of conquest, among civilized countries, having established laws of property, the rule is that laws, usages, and municipal regulations in force at the time of the conquest remain in force until changed by the new sovereign. **United States v. Power's Heirs, 11 Howard, 570.**

An adjudication as to title to certain lands in Louisiana, made by a Spanish tribunal in that territory after its cession to the United States, but before actual possession had been surrendered, the territory being de facto in the possession of Spain and subject to Spanish laws, was held valid as the adjudication of a competent tribunal having jurisdiction over the case. **Keene v. McDonough, 8 Peters, 308.**

By the law of nations the rights and property of the inhabitants are protected, even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty, with or without any stipulation to such effect; and the laws, whether in writing or evidenced by the usage and customs of the conquered or ceded country, continue in force till altered by the new sovereign. **Strother v. Lucas, 12 Peters, 410.**

Spanish laws prevailing in Louisiana before its
cession, and effecting titles to lands there, must be judicially noticed by the court. Their existence is not matter of fact to be tried by a jury. United States v. Turner, 11 Howard, 663; United States v. Chaves, 159 U.S. 452.

The general principle that when political jurisdiction and legislative power over a territory are transferred from one sovereign to another, the municipal laws of the territory continue in force until abrogated by the new sovereign, is applicable as to territory owned by the United States, the exclusive jurisdiction of which is ceded to them by a State in a manner not provided for by the Constitution, to so much thereof as is not used by the United States for its forts, buildings, and other needful purposes. The court said "It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. Per Field, J. Chicago and Pac. Railway Co. v. McGlinn, 114 U.S. 542.


Sec. 99. ***415. *In the treaty by which Louisiana was acquired, the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract. The term 'property', as applied to lands, comprehends every species of title inchoate nor complete. It is supposed to embrace those rights which lie in contract; those which are executory; as well as those
which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away. "Marshall, C.J., United States v. Soulard, (1830), 4 Pet. 511.

This rule does not extend, however, to mere inchoate rights which are of imperfect obligation and effect only the conscience of the new sovereign. Dent v. Emmeger, 14 Wall. 308.

416. "It is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usgae of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed. Marshall, C.J., United States v. Percheman (1833), 7 Pet. 51.

419. "It is no doubt the received doctrine that, in cases of ceded or conquered territory, the rights of private property in lands are respected. Grants made by former government, being rightful when made, are not usually disturbed.... It is true that the property rights of the people, in those cases, were protected by stipulations in the treaties of cession, as is usual in such treaties; but the court took broader ground, and held, as a general principle of international law, that a mere cession of territory only operates upon the sovereignty and jurisdiction, including the right to the public domain, and not upon private property of individuals which had been segregated from the public domain before the cession. This principle is asserted in the cases of United States v. Arredondo, 6 Pet. 691; United States v. Percheman, 7 Pet. 51, 86-89; Delassus v. United States, 9 Pet. 117; Strother v. Lucas, 12 Pet. 410;

Indian Title:
III Kappler, Indian Laws and Treaties, 728-729.
Nature of title (a) In general - Indian tribes hold their rights to the soil by virtue of aboriginal occupancy and possession. Holden v. Joy, 21 L. Ed. 523; Worcester v. Georgia, 8 L. Ed. 483;

To sustain the title, their use and occupancy must have been actual, not merely desultory or constructive. Choctaw Nation v. U.S. 45 L. Ed. 291.

Their title is a perpetual right of possession and occupancy, the fee remaining in the United States or in the State where the land is situated. Spaulding v. Chandler, 40 L. Ed. 469; Buttz v. N.P.R.R.Co. 50 L. Ed. 330; U.S. v. Kagama, 30 L. Ed. 228; U.S. v. Cook, 22 L. Ed. 210; Doe v. Wilson, 16 L. Ed. 584; U.S. v. Rogers, 11 L. Ed. 1105; Mitchel v. U.S. 9 L. Ed. 283; Worcester v. Georgia, 8 L. Ed. 483; Cherokee v. Georgia 8 L. Ed 25; Johnson v. McIntosh, 5 L. Ed. 681; Fletcher v. Peck, 3 L. Ed. 162.


(b) Reservations and grants to tribes. Where tribal lands have been assigned lands and reservations as places of domicile, they have no vested rights therein, but simply a right to occupy at the will of the Government. Lone Wolf v. Hitchcock, 47 L. Ed. 299.

Ward v. Race Horse

Where they hold by grant, their title does not depend upon aboriginal possession, but its nature and extent are measured by the terms of the grant. U.S. v. Old Settlers, 37 L. Ed. 509 (Cherokee title in fee); U.S. v. De La Paz Valdez de Conway, 44 L. Ed. 72; U.S. v.
Blackfeather. 39 L. Ed. 186; Cherokee Nation v. Journeycake. 39 L. Ed. 120; Delaware Indians v. Cherokee Nation. 48 L. Ed. 646.

(c) Land grants conflicting with Indian title. — The United States, or a State holding the fee, may, before a cession by the Indians, convey an unencumbered title in the fee simple or a title subject to their right of possession. Latimer v. Poteet, 10 L. Ed. 328; Butt v. N. P. R. R. Co. 30 L. Ed. 330; Beecher v. Wetherby, 24 L. Ed. 440; Marsh v. Brooks, 14 L. Ed. 522; Clark v. Smith, 10 L. Ed. 123; Danforth v. Wear, 6 L. Ed. 189.

but such intention is not to be presumed, and Indian lands are not affected by an act giving the right of preemption. Thredgill v. Pintard, 13 L. Ed 977.

or a grant in general terms. Atlantic etc. R. R. Co. v. Mingus, 41 L. Ed. 770; U. S. v. Missouri etc. R. R. Co. 23 L. Ed. 645; U. S. v. Leavenworth etc. R.R. Co. 23 L. Ed. 634.

The foregoing applies, with restrictions, to the 13 Original States. These recognized aboriginal possessory right in the Indians, but many of them prior to ratification of the Constitution acquired title from, or made grants to the tribes within their borders. Also many of these States had purchased such possessory title from the tribes, or made grants to them, when yet Colonies of Great Britain. Spain never recognized possessory right of Indians to the lands occupied by them. So in lands acquired by the United States by the Florida cession, the Treaty of Guadalupe Hidalgo and the Gadsden Purchase, aboriginal right of occupancy and possession is not recognized, and unless the tribes within these territories can show title under Spanish grant, or Mexican grant, prior to cession, or title from the United States, by act of Congress, or Reservation by Executive Order, the have no rights to the land that the Courts will recognize. The only apparent exception to this rule is the Southern Ute case. But in this case it was held that the United States were bound to pay for lands for which they had agreed by Treaty to pay the Utes, regardless of the fact that Utes never owned the land. 75 CC. 440, 46-225 (No appeal to Sup. Court).
By John G. Carter:

The Doctrine of Indian Right to Occupancy and Possession of Land,

IV Kappler Indian Laws and Treaties, page 1166-1176.

A copy of the above is in the Library of Georgetown Law School.
May 23rd, 1928.

Mr. John G. Carter,
c/o Abram R. Serven,
1422 F Street,
Washington, D.C.

Dear Mr. Carter:

I acknowledge your favor of May 21st, asking for a copy or reference to an article written by me about twenty years ago on tenure of land among the Indians.

I have found a reprint of this story and take pleasure in enclosing it with my compliments.

Yours truly,

[Signature]

Geo. Bird Grinnell