INDIAN LAND CESSIONS IN THE UNITED STATES

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INTRODUCTION

By CYRUS THOMAS

RIGHT TO THE SOIL DEPENDENT ON DISCOVERY

Among the various problems forced on European nations by the discovery of America was that of determining their respective rights in regard to the territory of the newly discovered continent. The fact that the country was inhabited by and in possession of a native population does not appear to have been taken into consideration in the solution of this problem.

Each of the great nations of Europe was eager to appropriate to itself so much of the new continent as it could acquire. Its extent afforded an ample field for the ambition and enterprise of all, and the character, low culture-status, and religious beliefs of the aborigines afforded an apology for considering them a people over whom the superior genius of Europe might rightfully claim an ascendency. The sovereigns of the Old World therefore found no difficulty in convincing themselves that they made ample compensation to the natives by bestowing on them the benefits of civilization and Christianity in exchange for control over them and their country. However, as they were all in pursuit of the same object, it became necessary, in order to avoid conflicting settlements and consequent war with one another, to establish a principle which all would acknowledge as the law by which the right, as between themselves, to the acquisition of territory on this continent, should be determined. This principle was, that discovery of lands gave title therein to the government by whose subjects or by whose authority such discovery was made, against all other European or civilized governments, which title might be consummated by possession. This is clearly shown, not only by the express declarations officially made in behalf of the different powers, but also by the wording of the various grants and charters allowed by them. However, the

opinion of the United States Supreme Court[1] is so full and decisive on this point that a summary of the statements therein contained will dispense with the necessity of furnishing proof of the acknowledgment of this principle from the history of the discovery and settlement of the continent.

Although Spain obtained immense territory in the western continent, she did not rest her title solely on the grant of the Pope. On the contrary, her discussions with France, Great Britain, and the United States respecting boundaries all go to show very clearly that she based her claims on the rights given by discovery.

France also founded her title to the territories she claimed in America on discovery. Her claim to Louisiana, comprehending the immense territory watered by the Mississippi and its tributaries, and her claims in Canada as well, were based expressly on discovery. In the treaties made with Spain and Great Britain by the United States this title was recognized by the latter. The claims by the states of Holland to American territory were based on the same title, and the contest with them by the English was not because of a dispute of this principle, but because the latter claimed prior discovery. All the transfers of American territory from one European nation to another were based on the title by discovery; nor did any one of the European powers give more complete or more unequivocal assent to this principle than England. In 1496 her monarch commissioned the Cabots to discover countries "then unknown to all Christian people," with authority to take possession of them in the name of the King of England. To the discovery made by these navigators have the English traced the title to their possessions in North America.

In all these claims and contests between the civilized nations of Europe, the Indian title to the soil is nowhere allowed to intervene, it being conceded that the nation making the discovery had the sole right of acquiring the soil from the natives and of establishing settlements on it. This was understood to be a right with which no other European government could interfere; it was a right which each government asserted for itself and to which all others assented. Those relations which were to exist between the discoverers and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

Nevertheless, it must not be understood that the Indians' rights were wholly disregarded by the powers in planting colonies in the territories taken possession of by them.

Continuing, the court remarks—

> In the establishment of these relations, 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 [or rather so much as was necessary for their use], and to use it according to their own discretion; but their rights to

[1] Johnson and Graham's lessee *v.* McIntosh, 8 Wheaton, p. 543 et seq.

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.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

In these statements the court, of course, speaks only from the legal point of view or theory, for it is well known that in their practical dealings with the natives the nations of Europe, and the United States also, often failed to carry out this theory. It is also doubtful whether it can truly be said that France fully recognized the Indian title, even theoretically, to the extent indicated.

The right to take possession regardless of the occupancy of the natives was not only claimed by all the nations making discoveries, but the same principle continued to be recognized. This is shown by the following instances adduced by the court, to which many others might be added:

The charter granted to Sir Humphrey Gilbert, in 1578, authorizes him to discover and take possession of such remote, heathen and barbarous lands as were not actually possessed by any Christian prince or people. This charter was afterwards renewed to Sir Walter Raleigh in nearly the same terms.

By the charter of 1606, under which the first permanent English settlement on this continent was made, James I. granted to Sir Thomas Gates and others, those territories in America lying on the sea-coast between the thirty-fourth and forty-fifth degrees of north latitude, and which either belonged to that monarch, or were not then possessed by any other Christian prince or people. The grantees were divided into two companies at their own request. The first, or southern colony, was directed to settle between the thirty-fourth and forty-first degrees of north latitude; and the second, or northern colony, between the thirty-eighth and forty-fifth degrees.

In 1609, after some expensive and not very successful attempts at settlement had been made, a new and more enlarged charter was given by the Crown to the first colony, in which the King granted to the "Treasurer and Company of Adventurers of the city of London for the first colony in Virginia," in absolute property, the lands extending along the sea-coast 400 miles, and into the land throughout from sea to sea. This charter, which is a part of the special verdict in this cause, was annulled, so far as respected the rights of the company, by the judgment of the Court of King's Bench on a writ of *quo warranto;* but the whole effect allowed to this judgment was to revest in the crown the powers of government, and the title to the land within its limits.

At the solicitation of those who held under the grant to the second or northern colony, a new and more enlarged charter was granted to the Duke of Lenox and others, in 1620, who were denominated the Plymouth Company, conveying to them in absolute property all the lands between the fortieth and forty-eighth degrees of north latitude.

Under this patent, New England has been in a great measure settled. The company conveyed to Henry Rosewell and others, in 1627, that territory which is now Massachusetts; and in 1628, a charter of incorporation, comprehending the powers of government, was granted to the purchasers.

Great part of New England was granted by this company, which at length divided their remaining lands among themselves; and, in 1635, surrendered their charter to the crown. A patent was granted to Gorges for Maine, which was allotted to him in the division of property.

All the grants made by the Plymouth Company, so far as we can learn, have been respected. In pursuance of the same principle, the King, in 1664, granted to the Duke of York the country of New England as far south as the Delaware bay. His Royal Highness transferred New Jersey to Lord Berkeley and Sir George Carteret.

In 1663, the Crown granted to Lord Clarendon and others, the country lying between the thirty-sixth degree of north latitude and the river St Mathes; and, in 1666, the proprietors obtained from the crown a new charter, granting to them that province in the King's dominions in North America which lies from thirty-sixth degrees thirty minutes north latitude to the twenty-ninth degree, and from the Atlantic Ocean to the South sea.

Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the Crown, or was vested in the colonial government, the king claimed and exercised the right of granting lands and of dismembering the government at his will. The grants made out of the two original colonies, after the resumption of their charters by the crown, are examples of this. The governments of New England, New York, New Jersey, Pennsylvania, Maryland, and a part of Carolina, were thus created. In all of them, the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants. In some instances, the soil was conveyed by the crown unaccompanied by the powers of government, as in the case of the northern neck of Virginia. It has never been objected to this, or to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

These various patents can not be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only, would never contain words expressly granting the land, the soil and the waters. Some of them purport to convey the soil alone; and in those cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed; and, in some instances, even after the powers of government were revested in the crown, the title of the proprietors to the soil was respected.

Charles II. was extremely anxious to acquire the property of Maine, but the grantees sold it to Massachusetts, and he did not venture to contest the right of that colony to the soil. The Carolinas were originally proprietary governments. In 1721 a revolution was effected by the people, who shook off their obedience to the proprietors, and declared their dependence immediately on the crown. The king, however, purchased the title of those who were disposed to sell. One of them, Lord Carteret, surrendered his interest in the government, but retained his title to the soil. That title was respected till the revolution, when it was forfeited by the laws of war.

Further proofs of the extent to which this principle has been recognized, will be found in the history of the wars, negotiations and treaties which the different nations, claiming territory in America, have carried on and held with each other. . . .

Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?

By the treaty which concluded the war of our Revolution, Great Britain relin-

quished all claim, not only to the government, but to the "propriety and territorial rights of the United States," whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these states. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted, that either the United States, or the several states, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it.

That this rule has been adopted also by the United States is asserted by the Supreme Court in the same opinion:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.

The power now possessed by the Government of the United States to grant lands resided, while we were colonies, in the crown or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands can not exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognized the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror can not deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the courts of this country to question the validity of this title or, to sustain one which is incompatible with it.

Although we do not mean to engage in the defense of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable,

humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections, and united by force to strangers.

When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he can not neglect them without injury to his fame and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighborhood and exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parceled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and can not be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly can not be rejected by courts of justice. . . .

It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right. The object of the crown was to settle the sea-coast of America; and when a portion of it was settled, without violating the rights of others, by persons professing their loyalty, and soliciting the royal sanction of an act, the consequences of which were ascertained to be beneficial, it would have been as unwise as ungracious to expel them from their habitations

because they had obtained the Indian title otherwise than through the agency of government. The very grant of a charter is an assertion of the title of the crown, and its words convey the same idea. The country granted is said to be "our island called Rhode Island;" and the charter contains an actual grant of the soil, as well as of the powers of government.

The decision in this case is of course conclusive in regard to the nature of the Indian title to lands as held by our Government. Nevertheless, a brief reference to the history of the subject preceding the date of decision (1823) will be appropriate here before alluding to the policy adopted in regard to the extinguishment of this title.

As early as September 22, 1783, while yet operating under the Articles of Confederation, the following "proclamation" was ordered by Congress.[1]

Whereas by the 9th of the Articles of Confederation, it is among other things declared, that "the United States in Congress assembled have the sole and exclusive right and power of regulating the trade, and managing all affairs with the Indians not members of any of the States, provided that the legislative right of any State, within its own limits, be not infringed or violated." And whereas it is essential to the welfare of the United States, as well as necessary for the maintenance of harmony and friendship with the Indians, not members of any of the States, that all cause of quarrel or complaint between them and the United States or any of them, should be removed and prevented; therefore, the United States in Congress assembled, have thought proper to issue their proclamation, and they do hereby prohibit and forbid all persons from making settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular State, and from purchasing or receiving any gift or cession of such lands or claims without the express authority and direction of the United States in Congress assembled.

It is, moreover, declared that every such purchase or settlement, gift or cession, not having the authority aforesaid, is null and void, and that no right or title will accrue in consequence of any such purchase, gift, or settlement.

By the eighth section of the act of Congress of March 1, 1793, entitled "An act to regulate trade and intercourse with the Indian tribes," the same principle was enacted into law, as follows:

And be it further enacted, That no purchase or grant of lands, or of any title or claim thereto, from any Indians, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution. And it shall be a misdemeanor in any person, not employed under the authority of the United States in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held or claimed: *Provided, nevertheless,* That it shall be lawful for the agent or agents of any State, who may be present at any treaty held with the Indians, under the authority of the United States, in the presence, and with the approbation of, the Commissioner or Commissioners of the United States appointed to hold the same, to propose to, and adjust with, the Indians, the compensation to be made for their claims to lands within such State, which shall be extinguished by the treaty.[2]

[1] Old Journals, vol. IV (1783), p. 275, as copied in "Laws, etc., respecting the Public Lands," Washington, Gales & Seaton, 1828; pp. 338–339.

[2] Op. cit., pp. 414–415.

This is repeated in section 12 of the act of May 19, 1796, entitled "An act to regulate trade and intercourse with the Indian Tribes, and to preserve peace on the frontier;" also in section 12 of the act of March 30, 1802. By section 15 of the act of March 26, 1804, "erecting Louisiana into two Territories, and providing for the temporary government thereof," it is ordered that—

The President of the United States is hereby authorized to stipulate with any Indian tribes owning lands on the East side of the Mississippi, and residing thereon, for an exchange of lands the property of the United States, on the West side of the Mississippi, in case the said tribe shall remove and settle thereon; but, in such stipulation, the said tribes shall acknowledge themselves to be under the protection of the United States, and shall agree that they will not hold any treaty with any foreign Power, individual State, or with the individuals of any State or Power; and that they will not sell or dispose of the said lands, or any part thereof, to any sovereign Power, except the United States, nor to the subjects or citizens of any other sovereign Power, nor to the citizens of the United States. And in order to maintain peace and tranquillity with the Indian tribes who reside within the limits of Louisiana, as ceded by France to the United States, the act of Congress, passed on the thirtieth day of March, one thousand eight hundred and two, entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," is hereby extended to the Territories erected and established by this act; and the sum of fifteen thousand dollars, of any money in the Treasury, not otherwise appropriated by law, is hereby appropriated, to enable the President of the United States to effect the object expressed in this section.[1]

As this law was not to take effect until October 1, 1804, it was provided that until this date the act passed October 31, 1803, entitled "An act to enable the President of the United States to take possession of the territories ceded by France to the United States . . . and for the temporary government thereof," was to remain in force. All rights of the Indians within the limits of Louisiana which existed under the French control remained, therefore, under United States authority until October, 1804.

To complete the chain we note the fact that, by article 6 of the treaty of April 30, 1803, by which France ceded Louisiana to the United States, the latter promised "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."

These acts and treaties indicate, and in fact form, steps in the policy of the United States in its dealings with the Indians in reference to their lands, and will be noticed in this connection hereafter. The object at present in referring to them is only to show the theory of the Government in regard to the Indian title.

It is clear, therefore, that although the United States has always conceded to the Indians the usufruct or right of occupancy to such lands as they were in possession of, yet they have always held the theory of the European powers, and claimed that the absolute right to the soil was in the Government.

[1] Op. cit., p. 509.

However, as will be seen when allusion is made to the policy of the nations in their dealings with the Indians, there was some difference in regard to the extent of their right or title. This was limited by some of the governments to the territory occupied, while by others, as the United States, it was usual to allow it to extend to the territory claimed, where the boundaries between the different tribes were understood and agreed on. It would seem, in fact, that the United States proceeded on the theory that *all* the land was held by natives. A single instance occurs to the writer at present where land was taken possession of as waste or without an owner. This is mentioned by Mr Royce in his remarks under schedule number 432.

The right of occupancy in the Indians, until voluntarily relinquished or extinguished by justifiable conquest, being conceded, it became necessary on the part of the Government to adopt some policy to extinguish their right to such territory as was not necessary for their actual use.

As a natural corollary of this theory arose the question, With whom shall the Government treat? The Indians having no general government or regular political organization, but consisting of numerous independent tribes in a state of savagery, the usual policy of civilized nations in a case of conquest could not be adopted. As their claims were those of tribes or communities, and not individuals in severalty, it followed as a matter of necessity that the only policy which the Government could adopt was to recognize them as quasi and dependent, distinct political communities, or nations, or half sovereign states, and treat them as such.

It has been said that the method of regarding them as distinct peoples or nations and treating with them as such is a "legal fiction." Nevertheless, if we study carefully all the circumstances which surround the case, and the pressing necessities of the Republic in its early days, we are likely to be convinced that it was not the part of wisdom then to hamper the struggles for national life with theoretic lines or legal technicalities, which stood in the way of practical progress. Humanity is an element which should attend every step of governmental as well as of individual progress, but political theories must be broadened, restricted, or varied in accordance with new and imperative necessities which arise.

It is doubtless true that the recognition of the Indian tribes as distinct nationalities, with which the Government could enter into solemn treaties, was a legal fiction which should be superseded by a more correct policy when possible. But necessity often makes laws, and in this instance forced the Government to what was, in its early days, probably the best possible policy in this respect, consistent with humanity, which it could have adopted.

A doubt has also been expressed as to whether the United States or any European power could, with perfect honesty and integrity, purchase

lands of the natives under their care and protection. Bozman,[1] who expresses this doubt, bases it on the following considerations:

First, it is not a clear proposition that savages can, for any consideration, enter into a contract obligatory upon them. They stand by the laws of nations, when trafficking with the civilized part of mankind, in the situation of infants, incapable of entering into contracts, especially for the sale of their country. Should this be denied, it may then be asserted that no monarch of a nation (that is, no sachem, chief, or headmen, or assemblage of sachems, etc.) has a power to transfer by sale the country, that is, the soil of the nation, over which they rule.

That the Indians of the United States have been and are still considered wards of the Government must be conceded. It also must be admitted that, as a general rule of law, wards can not divest themselves of their title to land except through the decree of court or some properly authorized power. But in the case of the Indians the Government is both guardian and court, and as there is no higher authority to which application can be made, its decision must be final, otherwise no transfer of title would be possible, however advantageous it might be to the wards.

Bozman's theory seems to overlook the fact that Indians, except perhaps in a few isolated cases, never claimed individual or exclusive personal titles in fee to given and designated portions of the soil. What, therefore, is held in common may, it would seem, by the joint action of those interested, be transferred or alienated.

However, it is not our object at present to theorize as to what should or might have been done, but to state what was done in this respect, and thus to show on what policy the various territorial cessions and reservations mentioned in the present work are based.

The correct theory on this subject appears to be so clearly set forth by John Quincy Adams in his oration at the anniversary of the Sons of the Pilgrims, December 22, 1802, that his words are quoted, as follows:

There are moralists who have questioned the right of Europeans to intrude upon the possessions of the aborigines in any case and under any limitations whatsoever. But have they maturely considered the whole subject? The Indian right of possession itself stands, with regard to the greatest part of the country, upon a questionable foundation. Their cultivated fields, their constructed habitations, a space of ample sufficiency for their subsistence, and whatever they had annexed to themselves by personal labor, was undoubtedly by the laws of nature theirs. But what is the right of a huntsman to the forest of a thousand miles over which he has accidentally ranged in quest of prey? Shall the liberal bounties of Providence to the race of man be monopolized by one of ten thousand for whom they were created? Shall the exuberant bosom of the common mother, amply adequate to the nourishment of millions, be claimed exclusively by a few hundreds of her offspring? Shall the lordly savage not only disdain the virtues and enjoyments of civilization himself, but shall he control the civilization of a world? Shall he forbid the wilderness to blossom like the rose? Shall he forbid the oaks of the forest to fall before the ax of industry and rise again transformed into the habitations of ease and elegance? Shall he doom an immense region of the globe to perpetual desolation, and to hear

[1] History of Maryland, p. 569.

the howlings of the tiger and the wolf silence forever the voice of human gladness? Shall the fields and the valleys which a beneficent God has framed to teem with the life of innumerable multitudes be condemned to everlasting barrenness? Shall the mighty rivers, poured out by the hands of nature as channels of communication between numerous nations, roll their waters in sullen silence and eternal solitude to the deep? Have hundreds of commodious harbors, a thousand leagues of coast, and a boundless ocean been spread in the front of this land, and shall every purpose of utility to which they could apply be prohibited by the tenant of the woods? No, generous philanthropists! Heaven has not been thus inconsistent in the works of its hands. Heaven has not thus placed at irreconcilable strife its moral laws with its physical creation.[1]

In order to show the correctness of the views expressed by Adams in the above quotation, and the absurdity of admitting the Indians' claim to the absolute right of the soil of the whole country, some comparisons are here introduced. These are simple comparisons between the Indian population and the extent of territory claimed by them.

Perhaps the best estimate of the Indian population of the United States (exclusive of Alaska), at different periods up to 1876, are those given by Honorable John Eaton.[2] His summary is as follows:

1820. Report of Morse on Indian Affairs	471,036
1825. Report of Secretary of War	129,366
1829. Report of Secretary of War	312,930
1834. Report of Secretary of War	312,610
1836. Report of Superintendent of Indian Affairs	253,464
1837. Report of Superintendent of Indian Affairs	302,498
1850. Report of H. R. Schoolcraft	388,229
1853. Report of United States Census, 1850	400,764
1855. Report of Indian Office	314,622
1857. Report of H. R. Schoolcraft	379,264
1860. Report of Indian Office	254,300
1865. Report of Indian Office	294,574
1870. Report of United States Census	313,712
1870. Report of Indian Office	313,371
1875. Report of Indian Office	305,068
1876. Report of Indian Office	291,882

Examining these estimates at the different dates, we see that the average, in round numbers, is 315,000. Now, assuming this to be a correct estimate, and allowing five persons to a family, this would give 63,000 as the whole number of Indian families in the United States. Assuming the area of the United States, exclusive of Alaska, to be 3,025,000 square miles, this would give to each Indian family a manor of 48 square miles, or 30,720 acres. Now, supposing, for further illustration, that the families were distributed uniformly over the whole territory, the state of Rhode Island, which now supports a population of 345,506 persons, or 69,101 families (allowing five persons to a family), would be apportioned among 26 Indian families; the state of Delaware would be allotted to but 43, and the whole state of New York, which

[1] Report of the Commissioner of Indian Affairs for 1867, p. 143.
[2] Ibid., for 1877.

now supports more than a million families, would be assigned to 1,025 lordly savages.

It is apparent, therefore, that the requirements of the human race and the march of civilization could not permit such an apportionment of the soil of the American continent as this, even were the estimates trebled. It is true that practically no such equal distribution of the lands as that mentioned would be possible. Moreover, it is also true that some portions are unsuitable for the ordinary purposes of life; but the supposition given will be understood as an illustration of the theory of the Indian claim, and is correct in principle. That a population whose territorial needs would be amply supplied by the area embraced in the single state of Illinois should, on the score of being the first occupants of the country, be allowed the exclusive use of the whole territory of the United States is inconsistent with any true theory of natural rights. Moreover, it is not required by humanity, religion, nor any principle of human rights. This must be conceded. But what is the necessary consequence of such concession?

There were few, if any, areas in the United States which the Indians did not claim. If this claim could not be admitted in its entirety as a just and valid one; if it could not be admitted as a just bar to any settlements by other peoples; if civilization could not consent to such a claim, where should the restriction begin? How should it be accomplished? Who should fix the metes and bounds and who decide the proper apportionment? This brings us back precisely to the point which the European settlers on the continent were forced to meet, and where the governments to which they pertained were forced to act, whether they did so in accordance with a settled theory and policy or not.

FOREIGN POLICY TOWARD THE INDIANS

In the preceding section attention is called to the principle maintained by the United States and by other civilized governments in regard to the rights of the Indians to the soil. As theory and practice are not necessarily identical and are sometimes quite variant from each other, reference will now be made to the policy and methods adopted in putting into practical operation this theory. However, to cover the range of acquisitions from the Indians of land within the bounds of the United States, it will be necessary to refer not only to the policy of the Government since the adoption of its constitution, but also to that of the colonies and of the other powers from which territory has been obtained by the United States.

It will perhaps be best to begin with the policy of the powers from which territory has been obtained by the United States since the adoption of the constitution. By so doing the policy adopted by the colonies can be connected with that of the United States without being interrupted by reference to that of other governments.

THE SPANISH POLICY

Although the cruelty of the Spaniards in their treatment of the Indians during the conquest of Mexico and Central America is proverbial, yet an examination of the laws of Spain and ordinances of the King show that these acts were not only not warranted thereby, but in direct conflict therewith. So early as 1529, in the commission constituting Cortes captain-general of New Spain, he was directed to give his principal care to the conversion of the Indians; that he should see that no Indians be given to the Spaniards to serve them; that they paid such tribute to His Majesty as they might easily afford, and that there should be a good correspondence maintained between the Spaniards and the Indians and no wrong offered to the latter either in their goods, families, or persons. Bishop Don Sebastian Ramirez, who was acting governor under Cortes subsequent to his commission, earnestly endeavored, be it said to his honor, to put into practice these humane orders. We are informed by Antonio de Herrera[1] that he not only abrogated the enslavement of any Indians whatsoever, but also took care that none of them should be made to carry burdens about the country, "looking upon it as a labor fit only for beasts." He was no less exact in the execution of all the ordinances sent by the Council of Spain for the ease, improvement, and conversion of the natives. "By that means," adds the old historian, "the Country was much improv'd and all Things carried on with Equity, to the general Satisfaction of all good Men."

The laws enacted for the government of the "Kingdoms of the Indies" were still more pointed in the same direction, and fully recognized the rights of the Indians to their landed possessions. However, as will become apparent from an examination of these, no claim by the natives to unoccupied lands or uninhabited territory appears to have been recognized. Such territory was designated "waste lands," and formed part of the royal domain. As evidence of this the following brief extracts from the *Recopilacion de las Leyes de los Reynos de las Indias* are presented:[2]

> We decree and command, that the laws and good customs anciently in force in the Indies, for their good government and police, and the usages and customs observed and retained from the introduction of Christianity among them, which are not repugnant to our sacred religion, or to the laws contained in this book, and to those which have been framed anew, be observed and fulfilled; and it having become expedient to do so, we hereby approve and confirm them, reserving to ourselves the power of adding thereto whatever we shall think fit and will appear to us necessary for the service of God our Lord, and our own, and for the protection of, and Christian police among, the natives of those Provinces, without prejudice to established usages among them, or to their good and wholesome customs and statutes.—*Lib. II, tit. 1, law 4, vol. I, p. 218.*
>
> It being our wish that the Indians be protected and well treated, and that they be

[1] Historia General, dec. III, bk. 7, chap. 3 (Stevens' translation).

[2] From Laws, U. S. Treaties, etc., Respecting Public Lands, vol. II, 1836.

not molested nor injured in their person or property; We command that in all cases, and on all occasions, when it shall be proposed to institute an inquiry, whether any injury is to accrue to any person in consequence of any grant of land, whether for tillage, pasture, or other purposes, the Viceroys, Presidents, and Judges shall cause summonses to be directed to all persons whom it may really concern, and to the Attorneys of our Royal Audiences, wherever Indians may be interested, in order that all and every person may take such measures as may be expedient to protect his rights against all injuries which might result therefrom.—*Lib. II, tit. 18, law 36, vol. I, p. 412.*

Whereas some grazing farms, owned by Spaniards for the use of their cattle, have been productive of injury to the Indians, by being located upon their lands, or very near their fields and settlements, whereby said cattle eat and destroy their produce and do them other damage: We command that the Judges who shall examine the lands, make it their duty to visit such farms, without previous request to do so, and ascertain whether any injury accrues therefrom to the Indians or their property; and, if so, that, after due notice to the parties interested, they forthwith, and by summary or legal process, according as they may think most fit, remove them to some other place without damage or prejudice to any third person.—*Lib. II, tit. 31, law 13, vol. I, p. 484.*

Should the natives attempt to oppose the settlement [of a colony], they shall be given to understand that the intention in forming it, is to teach them to know God and His holy law, by which they are to be saved; to preserve friendship with them, and teach them to live in a civilized state, and not to do them any harm or take from them their settlements. They shall be convinced of this by mild means, through the interference of religion and priests, and of other persons appointed by the Governor, by means of interpreters, and by endeavoring by all possible good means, that the settlement may be made in peace and with their consent; and if, notwithstanding, they do withhold their consent, the settlers, after having notified them pursuant to Law 9, Tit. 4, Lib. 3, shall proceed to make their settlement without taking any thing that may belong to the Indians, and without doing them any greater damage than shall be necessary for the protection of the settlers and to remove obstacles to the settlement.—*Lib. IV, tit. 7, law 23, vol. II, p. 24.*

We command that the farms and lands which may be granted to Spaniards, be so granted without prejudice to the Indians; and that such as may have been granted to their prejudice and injury be restored to whoever they of right shall belong.—*Lib. IV, tit. 12, law 9, vol. II, p. 41.*

In order to avoid the inconveniences and damages resulting from the sale or gift to Spaniards of *caballerias* or *peonias*, and other tracts of land, to the prejudice of the Indians, upon the suspicious testimony of witnesses, we order and command, that all sales or gifts shall be made before the Attorneys of our Royal Audiencias, to be summoned for that purpose, who shall be bound to examine, with due care and diligence, the character and depositions of witnesses; and the Presidents and Audiences, where they shall administer the government, shall give or grant such lands by the advice of the Board of Treasury, where it shall appear that they belong to us, at auction, to the highest bidder, as other estates of ours, and always with an eye to the benefit of the Indians. And where the grant or sale shall be made by the Viceroys, it is our will that none of the officers above mentioned shall interfere. Upon the letters which shall be granted to the parties interested, they shall sue out confirmations within the usual time prescribed in cases of grants of Indians [*encomiendas de Indios*].—*Lib. IV, tit. 12, law 16, vol. II, p. 43.*

In order more effectually to favor the Indians, and to prevent their receiving any injury, we command that no composition shall be admitted of lands which Spaniards shall have acquired from Indians, in violation of our royal letters and ordinances, and which shall be held upon illegal titles: it being our will that the Attorneys-Protectors should proceed according to right and justice, as required by letters and

ordinances, in procuring such illegal contracts to be annulled. And we command the Viceroys, Presidents, and Audiences to grant them their assistance for its entire execution.—*Lib. IV, tit. 12, law 17, vol. II, p. 43.*

We command that the sale, grant, and composition of lands be executed with such attention, that the Indians shall be left in possession of the full amount of lands belonging to them, either singly or in communities, together with their rivers and waters; and the lands which they shall have drained or otherwise improved, whereby they may, by their own industry, have rendered them fertile, are reserved in the first place, and can in no case be sold or aliened. And the Judges who shall have been sent thither, shall specify what Indians they may have found on the land, and what lands they shall have left in possession of each of the elders of tribes, caciques, governors, or communities.—*Lib. IV. tit. 12, law 17 [18], vol. II, p. 44.*

No one shall be admitted to make composition of lands who shall not have been in possession thereof for the term of ten years, although he should state that he is in possession at the time; for such circumstance by itself is not sufficient; and communities of Indians shall be admitted to make such compositions in preference to other private individuals, giving them all facilities for that purpose.—*Lib. IV, tit. 12, law 19, vol. II, p.* 44.

Whereas the Indians would sooner and more willingly be reduced into settlements, if they were allowed to retain the lands and improvements which they may possess in the districts from which they shall remove; we command that no alteration be made therein, and that the same be left to them to be owned as before, in order that they may continue to cultivate them and to dispose of their produce.—*Lib. VI, tit. 3, law 9, vol. II, p. 209.*

According to the royal ordinance given at San Lorenzo el Real, October 15, 1754, it was decreed that, "The Judges and Officers, to whom jurisdiction for the sale and composition of the royal lands [*realengos*] may be sub-delegated, shall proceed with mildness, gentleness, and moderation, with verbal and not judicial proceedings, in the case of those lands which the Indians shall have possessed, and of others when required, especially for their labor, tillage, and tending of cattle."

It appears, however, that the Spanish government never accepted the idea that the Indians had a possessory right to the whole territory, but only to so much as they actually occupied, or that was necessary for their use. This policy toward the natives seems to be indicated by the following extract:

Whereas we have fully inherited the dominion of the Indies; and whereas the waste lands and soil which were not granted by the Kings, our predecessors, or by ourselves, in our name, belong to our patrimony and royal crown, it is expedient that all the land which is held without just and true titles be restored, as belonging to us, in order that we may retain, before all things all the lands which may appear to us and to our Viceroys, Audiences, and Governors, to be necessary for public squares, liberties, [*exidos,*] reservations, [*propios,*] pastures, and commons, to be granted to the villages and councils already settled, with due regard as well to their present condition as to their future state, and to the increase they may receive, and after distributing among the Indians whatever they may justly want to cultivate, sow, and raise cattle, confirming to them what they now hold, and granting what they may want besides—all the remaining land may be reserved to us, clear of any incumbrance, for the purpose of being given as rewards, or disposed of according to our pleasure.—*Lib. IV, tit. 12, law 14, vol. II, p. 42.*

The same idea appears to be embraced in law 18, lib. 4, tit. 12, given above; also in the following sections in the "Regulations of intendant Morales regarding grants of land:"

24. As it is impossible, considering all the local circumstances of these provinces, that all the vacant lands belonging to the domain should be sold at auction, as it is ordained by the law 15th, title 12th, book 4th of the collection of the laws of these Kingdoms, the sale shall be made according as it shall be demanded, with the intervention of the King's Attorney for the Board of Finances, for the price they shall be taxed, to those who wish to purchase; understanding, if the purchasers have not ready money to pay, it shall be lawful for them to purchase the said lands at redeemable quit-rent, during which they shall pay the five per cent. yearly.

31. Indians who possess lands within the limits of the Government shall not, in any manner, be disturbed; on the contrary, they shall be protected and supported; and to this, the Commandants, Syndics, and Surveyors, ought to pay the greatest attention, to conduct themselves in consequence.

32. The granting or sale of any lands shall not be proceeded in without formal information having been previously received that they are vacant; and, to avoid injurious mistakes, we premise that, beside the signature of the Commandant or Syndic of the District, this information ought to be joined by that of the Surveyor, and of two of the neighbors, well understanding. If, notwithstanding this necessary precaution, it shall be found that the land has another owner besides the claimant, and that there is sufficient reason to restore it to him, the Commandant, or Syndic, Surveyor, and the neighbors, who have signed the information, shall indemnify him for the losses he has suffered.[1]

In 1776 one Maurice Conway, who had made a purchase on New Orleans island from the Houma Indians, which purchase had been approved, asked of the Spanish authorities an additional grant by which he might obtain some timber land adjoining thereto. This was granted by Onzaga with the following restrictions: "Provided it be vacant, and that no injury is thereby done to any of the adjoining inhabitants; to which effect he shall establish his boundaries and limits; and of the whole proceedings he shall make a process verbal, of which he shall make a return to us, signed by himself and the parties, in order to issue the complete title, in due form, to the claimant."

In carrying out the orders to mark off this grant the Houma chief was taken upon the ground in order that he might see that the lands of his tribe were not encroached on.

It does not appear that the Spanish government at any time adopted the policy of purchasing the Indian title, though clearly and distinctly recognizing it, to the lands they occupied. It, however, seems to have been a rule that the Indians should be compensated for their village sites and lands in actual use which were taken from them. This, however, was done usually by granting them other lands. Grantees were usually the purchasers of the Indian title where it was deemed necessary that this should be extinguished.

The foregoing laws and ordinances applying generally to the Spanish possessions known as "New Spain" were, of course, equally applicable to Louisiana and Florida and other portions of territory acquired

[1] Laws Relating to Public Lands, 1828, pp. 984-985.

by the United States, directly or indirectly, from Spain. However, as West Florida was a dependency of Louisiana, which most of the time had its own government, and East Florida was attached to the intendency of Cuba, there were some differences in the local administration of the laws and in the customs adopted in dealing with the Indians.

Some two or three commissions were authorized by Congress to examine into and decide in regard to land claims in Florida derived from Spanish grants. Little or nothing can be derived from their reports in regard to the method of extinguishing the Indians' claim. Two members of the first commission were so clearly personally interested in several of these grants that the third member (Alexander Hamilton) felt himself compelled to resign and to protest against the conclusions reached. The only fact brought out by them bearing on the question before us is that grants were, during the closing years of Spanish rule, made in a most reckless manner and apparently with little or no attention to the rights of the Indians, the designation "vacant lands" being considered a sufficient ground for making a grant. The official surveyor in many cases did not even run around the boundary of a grant, nor pretend to ascertain whether it was on Indian territory. This, however, was not in accordance with the law and royal policy, as appears from the statement of Juan José de Estrada, governor pro tempore of Florida (July 29, 1811).[1] Writing to the Marques de Someruelos, in regard to a request of one Don Cristoval Gios for a large grant along the southwest coast of Florida for planting a colony, he remarks:

> But the greatest objection to the project of Don Cristoval Gios [who proposed planting a colony] remaines to be examined, and it is, that the lands he asks the cession of are not public; they are the property of the Indians, who look with much interest to any usurpation of them, however small it may be. The preservation of their lands is one of the bases of our friendship with them; and in all the harangues pronounced by the Governors of this Province, they have been always promised the same treatment and privileges they had under the British Government. That Government ruled the land as a sovereign, but left the Indians the property of the soil, except those places which they had acquired from the aborigines by purchase, or by a solemn treaty made with the Chiefs. The Anglo-Americans follow this same rule with the Indians who are under their dominion, and it is certain that the same rule has been religiously observed in the two Floridas, no white man being permitted to purchase land from the Indians without the intervention of the Government to prevent frauds, and prohibiting strictly that any person should establish himself in the territory known as theirs.

He further adds:

> In virtue of this, I am of opinion that, unless Don Cristoval Gios obliges himself to purchase from the Indians the lands he pretends to, and that said purchase is made with the knowledge and in the presence of this Government, and interpreters appointed by it, his project is rather directed to compromise the tranquility of this province, and, therefore, that perpetual silence on the subject should be imposed upon him.

[1] Laws etc., Relating to Public Lands, vol. II (1836), appendix, pp. 233-234.

It would appear from this that when the law was complied with, those desiring lands which were in possession of the Indians were required to purchase them from the tribe. This was to be done in the presence of the surveyor or some one authorized to act for the governor of the province, and it was required that there should be an interpreter approved by the governor. It was also requisite that the deed of purchase should be approved. Whether official permission to make the purchase was necessary does not appear. That the governor, or one exercising authority in the name of the King, had the power to refuse approval of such purchase is certain, although this seems to have been doubted by some of the commissioners appointed by the United States to examine into the Spanish claims.

The custom in Louisiana was substantially that described by Estrada in the above-quoted letter.

According to the report of the commissioners on the "Opelousas claims," the Spanish functionaries seem to have made a distinction between Indians who had partaken of the rite of baptism and other Indians. The former appear to have been considered capable of holding and enjoying lands in as full and complete a manner as any other subjects of the Crown of Spain. Sales by these Indians were generally for small tracts, such as an Indian and his family might be supposed capable of cultivating, and being passed before the proper Spanish officer and filed for record, were considered valid by the usages of the Spanish government without ratification being necessary. But purchases from other Indians, as those from a tribe or chief, were not complete until they had been ratified by the governor of the province, the Indian sale transferring the Indian title and the ratification by the governor being a relinquishment of the right of the Crown.

The testimony of Mr Charles L. Trudeau, many years surveyor-general of the province of Louisiana under the Spanish government, in regard to the custom in this respect, which appears to have been relied on by the commissioners, is as follows:

The deponent knows of no ordinances or regulations under any Governor of Louisiana, except O'Reilly, by which the Indians, inhabiting lands in the province, were limited in their possessions to one league square about their villages, but this regulation has not been adhered to by any of his successors. The deponent knows that the custom was, that when a tribe of Indians settled a village by the consent of the Government, that the chief fixed the boundaries, and where there were one or more neighboring villages, the respective chiefs of those villages agreed upon and fixed the boundaries between themselves, and when any tribe sold out its village, the commandant uniformly made the conveyance according to the limits pointed out by the chief. The lands claimed by the Indians around their villages, were always considered as their own, and they were always protected in the unmolested enjoyment of it by the Government against all the world, and has always passed from one generation to another so long as it was possessed by them as their own property. The Indians always sell their land with the consent of the Government, and if, after selling their village and the lands around it, they should, by the permission of the Government establish themselves elsewhere, they might again sell, having first obtained the permission of the Government, and so on, as often as such permission was obtained, and

no instance is known where such permission has ever been refused or withheld. These sales were passed before the Commandant of the District, and were always good and valid, without any order from the Commandant.[1]

It appears that Governor O'Reilly ordained that no grant for land in Opelousas, Attacapas, or Natchitoches could exceed one league square. It seems that this ordinance was to have a retroactive effect. Hence, purchases which had been made from Indians were reduced to this amount, but the surplusage, instead of reverting to the Indians, became a part of the royal domain.

Finally, we quote the following from the commissioners' report, as bearing on the point now under discussion:

If it should be asked, what evidence exists of the law of prescription operating to the extinction of the Indian title to lands in Louisiana, it might be replied, that the evidence is to be found in the various acts of the Spanish Government, in relation to the Indians, evincing that the Government recognized no title in them, independently of that derived from the crown, a mere right of occupancy at the will of the Government; else why was the sanction of the Government necessary to all sales passed by Indians, which may be clearly established by a recurrence to written documents, and the testimony of Messrs. Trudeau, De Blanc, and Laypard? and why was it not necessary to have such sanction of the sales made by other subjects of the Spanish Government? The force and effect of prescription, in abolishing the Indian title to lands in Louisiana, is further established by the Indians permitting themselves to be removed from place to place by Governmental authority. By their condescending, in some cases, to ask permission of the Government to sell their lands, and, when that permission was not solicited, assenting to the insertion of a clause in the deeds of sale, expressly admitting that their sales could be of no validity without the ratification of the Government.[2]

THE FRENCH POLICY

A somewhat thorough examination of the documents and histories relating to French dominion in Canada and Louisiana fails to reveal any settled or regularly defined policy in regard to the extinguishment of the Indian title to land. Nevertheless, it is fair to assume that there was some policy in their proceedings in this respect, but it does not appear to have been set forth by legal enactments or clearly made known by ordinances. It seems, in truth, to have been a question kept in the background in their dealings with Indians, and brought to the front only in their contests with other powers in regard to territory. It would seem, although not clearly announced as a theory or policy, that it was assumed, when a nation or tribe agreed to come under French dominion, that this agreement carried with it the title to their lands.

In the letters patent given by Louis XV to the "Western Company" in August 1717, the following rights and privileges are granted:[3]

SEC. V. With a view to give the said Western Company the means of forming a firm establishment, and enable her to execute all the speculations she may undertake, we have given, granted, and conceded, do give, grant, and concede to her, by

[1] Laws, U. S. Treaties, etc., respecting Public Lands, vol. II (1836), app., p. 222*.
[2] Ibid., p. 224*.
[3] B. F. French, Historical Collections of Louisiana, pt. 3, 1851, pp. 50, 51.

these present letters and forever, all the lands, coasts, ports, havens, and islands which compose our province of Louisiana, in the same way and extent as we have granted them to M. Crozat by our letters patent of 14th September 1712, to enjoy the same in full property, seigniory, and jurisdiction, keeping to ourselves no other rights or duties than the fealty and liege homage the said company shall be bound to pay us and to the kings our successors at every new reign, with a golden crown of the weight of thirty marks.

SEC. VI. The said company shall be free, in the said granted lands, to negotiate and make alliance in our name with all the nations of the land, except those which are dependent on the other powers of Europe; she may agree with them on such conditions as she may think fit, to settle among them, and trade freely with them, and in case they insult her she may declare war against them, attack them or defend herself by means of arms, and negotiate with them for peace or for a truce.

By section 8 authority is given to the company "to sell and give away the lands granted to her for whatever quit or ground rent she may think fit, and even to grant them in freehold, without jurisdiction or seigniory."

In section 53 it is declared:

Whereas in the settlement of the lands granted to the said company by these present letters we have chiefly in view the glory of God by procuring the salvation of the Indian savage and negro inhabitants whom we wish to be instructed in the true religion, the said company shall be bound to build churches at her expense in the places of her settlements, as likewise to maintain there as many approved clergymen as may be necessary.

Substantially the same privileges, powers, and requirements were provided for in the grant made ninety years before (April, 1627), through Cardinal Richelieu's influence, to the Company of One Hundred Associates, while France was struggling, through the leadership of Champlain, to obtain a permanent settlement on the St Lawrence.[1]

Although these are the strongest passages having any bearing on the point indicated which have been found in the early grants, it must be admitted that reference to the Indian title is only to be inferred. The policy both in Louisiana and Canada seems to have been to take possession, at first, of those points at which they desired to make settlements by peaceable measures if possible, though without any pretense of purchase, thus obtaining a foothold. Either preceding or following such settlement, a treaty was made with the tribe, obtaining their consent to come under the dominion of the King of France and acknowledging him as the only rightful ruler over themselves and their territory.

As an illustration of this statement, attention is called to the following paragraph:[2]

What is more authentic in this matter is the entry into possession of all those Countries made by Mr. Talon, Intendant of New France, who in 1671, sent Sieur de St. Lusson, his Subdelegate, into the country of the Stauas, who invited the Deputies of all the tribes within a circumference of more than a hundred leagues to meet

[1] J. G. Shea, Charlevoix's Hist. New France, vol. II, p. 39.

[2] Denonville, Memoir on the French Limits in North America, New York Colonial Documents, vol. IX, p. 383.

at S^{t}. Mary of the Sault. On the 4th of June, of the same year, fourteen tribes by their ambassadors repaired thither, and in their presence and that of a number of Frenchmen, Sieur de S^{t}. Lusson erected there a post to which he affixed the King's arms, and declared to all those people that he had convoked them in order to receive them into the King's protection, and in his name to take possession of all their lands, so that henceforth ours and theirs should be but one; which all those tribes very readily accepted. The commission of said Subdelegate contained these very words, viz^{t} That he was sent to take possession of the countries lying between the East and West, from Montreal to the South Sea, as much and as far as was in his power. This entry into possession was made with all those formalities, as is to be seen in the Relation of 1671, and more expressly in the record of the entry into possession, drawn up by the said Subdelegate.

Although this is used by Denonville in this place as an evidence of the title of France as against that of England, yet it shows the French custom of taking possession of new countries. Although not differing materially from the method adopted in similar cases by other governments, yet it would seem from their dealings with the Indians that the French considered this ceremony, where the Indians were persuaded to join in it, as absolutely passing to the Crown their possessory right.

The commission to Marquis de Tracy (November 19, 1663), bestowing on him the government of Canada, contains the following passage,[1] which indicates reliance on the power of arms rather than in peaceful measures:

These and other considerations Us moving, We have constituted, ordained and established, and by these Presents signed by our hands, do constitute, ordain and establish the said Sieur de Prouville Tracy Our Lieutenant General in the entire extent of territory under Our obedience situate in South and North America, the continent and islands, rivers, ports, harbors and coasts discovered and to be discovered by Our subjects, for, and in the absence of, said Count D'Estrades, Viceroy, to have command over all the Governors, Lieutenant Generals by Us established, in all the said Islands, Continent of Canada, Acadie, Newfoundland, the Antilles etc. likewise, over all the Officers and Sovereign Councils established in all the said Islands and over the French Vessels which will sail to the said Country, whether of War to Us belonging, or of Merchants, to tender a new oath of fidelity as well to the Governors and Sovereign Councils as to the three orders of the said Islands; enjoining said Governors, Officers and Sovereign Councils and others to recognize the said Sieur de Prouville Tracy and to obey him in all that he shall order them; to assemble the commonalty when necessary; cause them to take up arms; to take cognizance of, settle and arrange all differences which have arisen or may arise in the said Country, either between Seigniors and their Superiors, or between private inhabitants; to besiege and capture places and castles according to the necessity of the case; to cause pieces of artillery to be dispatched and discharged against them; to establish garrisons where the importance of the place shall demand them; to conclude peace or truces according to circumstances either with other Nations of Europe established in said Country, or with the barbarians; to invade either the continent or the Islands for the purpose of seizing New Countries or establishing New Colonies, and for this purpose to give battle and make use of other means he shall deem proper for such undertaking; to command the people of said Country as well as all our other Subjects, Ecclesiastics, Nobles, Military and others of what condition soever there residing; to cause our boundaries and our name to be extended as far as he can, with full power to establish our authority there, to subdue, subject and

[1] New York Colonial Documents, vol. IX, p. 18.

exact obedience from all the people of said Countries, inviting them by all the most lenient means possible to the knowledge of God, and the light of the Faith and of the Catholic Apostolic and Roman Religion, and to establish its exercise to the exclusion of all others; to defend the said Countries with all his power; to maintain and preserve the said people in peace, repose and tranquility, and to command both on sea and land; to order and cause to be executed all that he, or those he will appoint, shall judge fit and proper to be done, to extend and preserve said places under Our authority and obedience.

It will be seen from this that the King's reliance in accomplishing the end he had in view was on force rather than on fair dealing with the natives. Nowhere in this commission or in any of the grants is there any direct recognition of the Indians' possessory title, or an expressed desire that they be secured in possession of the lands they occupy, or that are necessary for their use. It is well known to all who are familiar with the history of French dominion in Louisiana and Canada, that resort was often made to the policy of secretly fomenting quarrels between Indian tribes, and thus, by wars between themselves, so weaken them as to render it less difficult to bring them under control.

That no idea of purchasing or pretending to purchase the possessory right of the natives had been entertained by the French up to 1686, is evident from a passage in the letter of M. de Denonville to M. de Seignelay, May 8, 1686,[1] where he states: "The mode observed by the English with the Iroquois, when desirous to form an establishment in their neighborhood, has been, to make them presents for the purchase of the fee and property of the land they would occupy. What I consider most certain is, that whether we do so, or have war or peace with them, they will not suffer, except most unwillingly, the construction of a fort at Niagara." That the war policy was the course adopted is a matter of history.

How, then, are we to account for the fact that the relations of the French with the Indians under their control were, as a general rule, more intimate and satisfactory to both parties than those of other nations? Parkman has remarked that "The power of the priest established, that of the temporal ruler was secure. . . . Spanish civilization crushed the Indian; English civilization scorned and neglected him; French civilization embraced and cherished him." Although this can not be accepted as strictly correct in every respect, yet it is true that intimate, friendly relations existed between the French and their Indian subjects, which did not exist between the Spanish or English and the native population. However, this can not be attributed to the legal enactments or defined policy of the French, but rather to their practical methods.

Instead of holding the natives at arm's length and treating them only as distinct and inferior people and quasi independent nations, the French policy was to make them one with their own people, at least in Canada. This is expressly declared in the following extracts:

[1] New York Colonial Documents, vol. IX, p. 289.

Colbert, writing to Talon, April 6, 1666, says:

In order to strengthen the Colony in the manner you propose, by bringing the isolated settlements into parishes, it appears to me, without waiting to depend on the new colonists who may be sent from France, nothing would contribute more to it than to endeavor to civilize the Algonquins, the Hurons and other Indians who have embraced Christianity, and to induce them to come and settle in common with the French, to live with them and raise their children according to our manners and customs.[1]

In his reply, some seven months later, M. Talon informs Colbert that he has endeavored to put his suggestions into practical operation under police regulations.

In another letter, dated April 6, 1667, Colbert writes to Talon[2] as follows:

Recommendation to mould the Indians, settled near us, after our manners and language.

I confess that I agreed with you that very little regard has been paid, up to the present time, in New France, to the police and civilization of the Algonquins and Hurons (who were a long time ago subjected to the King's domination,) through our neglect to detach them from their savage customs and to oblige them to adopt ours, especially to become acquainted with our language. On the contrary, to carry on some traffic with them, our French have been necessitated to attract those people, especially such as have embraced Christianity, to the vicinity of our settlements, if possible to mingle there with them, in order that through course of time, having only but one law and one master, they might likewise constitute only one people and one race.

That this was the policy favored by the King is expressly stated by Du Chesneau in his letter to M. de Seignelay, November 10, 1679. "I communicated," he says, "to the Religious communities, both male and female, and even to private persons, the King's and your intentions regarding the Frenchification of the Indians. They all promised me to use their best efforts to execute them, and I hope to let you have some news thereof next year. I shall begin by setting the example, and will take some young Indians to have them instructed."[3]

In another letter to the same person, dated November 13, 1681, he says: "Amidst all the plans presented to me to attract the Indians among us and to accustom them to our manners, that from which most success may be anticipated, without fearing the inconveniences common to all the others, is to establish Villages of those people in our midst."[4]

That the same policy was in vogue as late as 1704 is shown by the fact that at this time the Abnaki were taken under French protection and placed, as the records say, "In the center of the colony."

THE ENGLISH POLICY

In attempting to determine from history and the records the British policy in dealing with the Indians in regard to their possessory rights,

[1] New York Colonial Documents, vol. IX, p. 43.
[2] Ibid., p. 59.
[3] Ibid., p. 136.
[4] Ibid., p. 150.

the investigator is somewhat surprised to find (except so far as they relate to the Dominion of Canada and near the close of the government rule over the colonies) the data are not only meager but mostly of a negative character. It must be understood, however, that this statement refers to the policy of the English government as distinct from the methods and policy of the different colonies, which will later be noticed.

The result of this investigation, so far as it relates to the possessions formerly held by Great Britain within the present limits of the United States, would seem to justify Parkman's statement that "English civilization scorned and neglected the Indian," at least so far as it relates to his possessory right. It is a significant fact that the Indian was entirely overlooked and ignored in most, if not all, of the original grants of territory to companies and colonists. Most of these grants and charters are as completely void of allusion to the native population as though the grantors believed the lands to be absolutely waste and uninhabited.

For example, the letters patent of James I to Sir Thomas Gage and others for "two several colonies," dated April 10, 1606, although granting away two vast areas of territory greater than England, inhabited by thousands of Indians, a fact of which the King had knowledge both officially and unofficially, do not contain therein the slightest allusion to them.

Was this a mere oversight? More than a hundred years had elapsed since the Cabots had visited the coast; Raleigh's attempted colonization twenty years before was well known, and the history of the discovery and conquest of Mexico had been proclaimed to all the civilized world. Still the omission might be considered a mere oversight but for the fact that his second charter (May 23, 1609), to "The Treasurer and Company of Adventurers and Planters of the City of London for the Colony of Virginia," and that of March 12, 1611–12, are equally silent on this important subject. It may be said, and no doubt truly, that the Crown merely granted away its title in the lands, its public domain, leaving the grantees to deal with the inhabitants as they might find most advantageous. Nevertheless this view will not afford an adequate excuse for the total disregard of the native occupants. The grants were to subjects, and the rights of sovereignty were retained.

The so-called "Great Patent of New England," granted "absolutely" to the "said council called the council established at Plymouth, etc.," the "aforesaid part of America, lying and being in breadth from forty degrees of northerly latitude from the equinoctial line, to forty-eight degrees of said northerly latitude inclusively, and in length of and within all the breadth aforesaid throughout the main land from sea to sea, together also with all the firm land, soils, grounds, havens, ports, rivers, waters, fishings, mines, and minerals," yet there is not the

slightest intimation that any portion of this territory was occupied by natives. There is, however, a proviso that the grant is not to include any lands "actually possessed or inhabited by any other Christian prince or state," but the Indians are wholly ignored.

That the Indians were not wholly forgotten when the charter of Charles I, granting Maryland to Lord Baltimore, was penned, is evident from some two or three statements therein. But none of these, nor anything contained in the charter, has any reference to the rights of these natives, or show any solicitude for their welfare or proper treatment. The first of these is a mere recognition of the fact that the territory is partly occupied by them: "A certain region, hereinafter described, in a country hitherto uncultivated, in the parts of America, and partly occupied by savages having no knowledge of the Divine Being." The next is that mentioning as the payment required "two Indian arrows of those parts to be delivered at the said castle of Windsor, every year on Tuesday in Easter week." The third is a mere mention of "savages" as among the enemies the colonists may have to encounter. The fourth and last allusion to the natives is in the twelfth section, which authorizes Lord Baltimore to collect troops and wage war on the "barbarians" and other enemies who may make incursion into the settlements, and "to pursue them even beyond the limits of their province," and "if God shall grant it, to vanquish and captivate them; and the captives to put to death, or according to their discretion, to save." The only allusion to the natives in William Penn's charter is the same as the latter in substance and almost the same in words.

Other charters might be cited to the same effect, but those mentioned will suffice to show that as a rule the English sovereigns wholly ignored the Indians' rights in granting charters for lands in North America; that they gave no expression therein of a solicitude for the civilization or welfare of the natives. Although the problem of dealing with these native occupants was thus shifted on the grantees and colonists, yet there were occasions where the government was forced to meet the question and take some action. Actual contact with the difficulty, of course, made it necessary to develop some policy or adopt some rule of action. This led to the recognition of the Indians' right of occupancy and the obligation on the government to extinguish this right by purchase or other proper means consistent with national honor.

Soon after Charles II ascended the throne he sent (1664) commissioners to America to examine into the condition of the colonies and to determine all complaints and appeals which might be brought before them. Their purpose was thwarted largely by the opposition of Massachusetts, and, although deciding on some claims based on purchases from Indians, no policy in this respect was developed.

As treaties, etc, concerning lands, which may be considered as made directly with the English government and not with the colonies, the following may be mentioned as the most important.

A "Deed from the Five Nations to the King, of their Beaver Hunting Ground," made at Albany, New York, July 19, 1701. This, which is somewhat peculiar, is as follows:[1]

To all Christian & Indian people in this parte of the world and in Europe over the great salt waters, to whom the presents shall come—Wee the Sachims Chief men, Captns and representatives of the Five nations or Cantons of Indians called the Maquase Oneydes Onnandages and Sinnekes living in the Government of New Yorke in America, to the north west of Albany on this side the Lake Cadarachqui sendeth greeting—Bee it known unto you that our ancestors to our certain knowledge have had, time out of mind a fierce and bloody warr with seaven nations of Indians called the Aragaritkas[2] whose Chief cômand was called successively Chohahise—The land is scituate lyeing and being northwest and by west from Albany beginning on the south west[3] side of Cadarachqui lake and includes all that waste Tract of Land lyeing between the great lake off Ottowawa[4] and the lake called by the natives Sahiquage and by the Christians the lake of Swege[5] and runns till it butts upon the Twichtwichs and is bounded on the right hand by a place called Quadoge[6] conteigning in length about eight hundred miles and in bredth four hundred miles including the country where the bevers the deers, Elks and such beasts keep and the place called Tieugsachrondio, alias Fort de Tret or Wawyachtenok and so runs round the lake of Swege till you come to place called Oniadarondaquat which is about twenty miles from the Sinnekes Castles which said seaven nations our predecessors did four score years agoe totally conquer and subdue and drove them out of that country and had peaceable and quiet possession of the same to hunt beavers (which was the motive caused us to war for the same) for three score years it being the only chief place for hunting in this parte of the world that ever wee heard of and after that wee had been sixty years sole masters and owners of the said land enjoying peaceable hunting without any internegation, a remnant of one of the seaven nations called Tionondade whom wee had expelled and drove away came and settled there twenty years agoe disturbed our beaver hunting against which nation wee have warred ever since and would have subdued them long ere now had not they been assisted and succoured by the French of Canada, and whereas the Governour of Canada aforesaid hath lately sent a considerable force to a place called Tjeughsaghronde the principall passe that commands said land to build a Forte there without our leave and consent, by which means they will possess themselves of that excellent country where there is not only a very good soile but great plenty of all maner of wild beasts in such quantities that there is no maner of trouble in killing of them and also will be sole masters of the Boar[7] hunting whereby wee shall be deprived of our livelyhood and subsistance and brought to perpetual bondage and slavery, and wee having subjected ourselves and lands on this side of Cadarachqui lake wholy to the Crown of England wee the said Sachims chief men Captns and representatives of the Five nations after mature deliberation out of a deep sence of the many Royall favours extended to us by the present great Monarch of England King William the third, and in consideration also that wee have lived peaceably and quietly with the people of albany our fellow subjects above eighty years when wee first made a firm league and covenant chain with these Christians that first came to settle Albany on this river which covenant chain hath been yearly renewed and kept bright and clear by all the Governours successively and many neighbouring Govern-

[1] New York Colonial Documents, vol. IV, p. 908.

[2] Hurons.

[3] Northwest. See next page, line 12.

[4] Lake Huron.

[5] Lake Erie.

[6] At the head of Lake Michigan. *Mitchell's Map of North America*, 1755. Now, Chicago, according to *Map of the British Dominions in North America*, 1763, prefixed to *Charlevoix's Voyages*, 8°, Dublin, 1766.

[7] *Sic.* Query—Beaver?

m^ts of English and nations of Indians have since upon their request been admitted into the same. Wee say upon these and many other good motives us hereunto moveing have freely and voluntary surrendered delivered up and for ever quit claimed, and by these presents doe for us our heires and successors absolutely surrender, deliver up and for ever quit claime unto our great Lord and Master the King of England called by us Corachkoo and by the Christians William the third and to his heires and successors Kings and Queens of England for ever all the right title and interest and all the claime and demand whatsoever which wee the said five nations of Indians called the Maquase, Oneydes, Onnondages, Cayouges and Sinnekes now have or which wee ever had or that our heirs or successors at any time hereafter may or ought to have of, in or to all that vast Tract of land or Colony called Canagariarchio beginning on the northwest side of Cadarachqui lake and includes all that vast tract of land lyeing between the great lake of Ottawawa and the lake called by the natives Cahiquage and by the Christians the lake of Swege and runns till it butts upon the Twichtwichs and is bounded on the westward by the Twichtwichs by a place called Quadoge conteining in length about eight hundred miles and in breath four hundred miles including the Country where Beavers and all sorts of wild game keeps and the place called Tjeughsaghrondie alias Fort de tret or Wawyachtenock and so runns round the lake of Swege till you come to a place called Oniadarundaquat which is about twenty miles from the Sinnekes castles including likewise the great falls Oakinagaro, all which [was] formerly posest by seaven nations of Indians called the Aragaritka whom by a fair warr wee subdued and drove from thence four score years agoe bringing many of them captives to our country and soe became to be the true owners of the same by conquest which said land is scituate lyeing and being as is above expressed with the whole soyle the lakes the rivers and all things pertaining to the said tract of land or colony with power to erect Forts and castles there, soe that wee the said Five nations nor our heires nor any other person or persons for us by any ways or meanes hereafter have claime challenge and demand of in or to the premises or any parte thereof alwayes provided and it is hereby expected that wee are to have free hunting for us and the heires and descendants from us the Five nations for ever and that free of all disturbances expecting to be protected therein by the Crown of England but from all the action right title interest and demand of in or to the premises or every of them shall and will be uterly excluded and debarred for ever by these presents and wee the said Sachims of the Five Nations of Indians called the Maquase, Oneydes, Onnandages, Cayouges and Sinnekes and our heires the said tract of land or Colony, lakes and rivers and premises and every part and parcell thereof with their and every of their appurtenances unto our souveraigne Lord the King William the third & his heires and successors Kings of England to his and their proper use and uses against us our heires and all and every other person lawfully claiming by from or under us the said Five nations shall and will warrant and forever defend by these presents—In Witness whereof wee the Sachims of the Five nations above mentioned in behalf of ourselves and the Five nations have signed and sealed this present Instrument and delivered the same as an Act and deed to the Hon^ble John Nanfan Esq^r Lieu^t Gov^r to our Great King in this province whom wee call Corlaer in the presence of all the Magistrates officers and other inhabitants of Albany praying our Brother Corlaer to send it over to Carachkoo our dread souveraigne Lord and that he would be graciously pleased to accept of the same Actum in Albany in the middle of the high street this nineteenth day of July in the thirteenth year of His Maj^ty^s reign Annoque Domini 1701.

This was confirmed twenty-five years later by a substantial renewal of the deed, but limited in extent and made in the form of a trust. the granting clause being as follows:[1]

We . . . Do hereby Ratify Confirm Submit and Grant and by these Presents do (for our Selves our heirs and Successors and in behalf of the whole nations of

[1] New York Colonial Documents, vol. v, p. 800.

Sinnekes Cayouges & onnondages) Ratify Confirme Submit and Grant unto Our Most Sovereign Lord George by the grace of God King of Great Brittain France and Ireland Defender of the Faith & his heirs and Successors for Ever. all the Said Land and Beaver hunting to be Protected & Defended by his Said Majesty his heirs & Successors to and for the use of us our heirs & Successors and the said Three nations. And we Do allso of our own Accord free and Voluntary will Give Render Submit and Grant and by these presents do for our Selves our heirs & Successors Give Render Submit and Grant unto Our Said Sovereign Lord King George his heirs and Successors for Ever all that Land Lying and being Sixty miles distance taken Directly from the water into the Country Beginning from a Creek Call'd Canahogue on the Lake Osweego, all along the said lake and all along the narrow passage from the said Lake to the Falls of Oniagara Called Cahaquaraghe and all along the River of Oniagara and all along the Lake Cadarackquis to the Creek Called Sodoms belonging to the Senekes and from Sodoms to the hill Called Tegerhunkserode Belonging to the Cayouges, and from Tegerhunckseroda to the Creek Called Cayhunghage Belonging to the Onnondages all the Said Land being of the Breadth of Sixty English miles as aforesaid all the way from the aforesaid Lakes or Rivers Directly into the Country and thereby Including all the Castles of the aforesaid Three nations with all the Rivers Creeks and Lakes within the Said Limits to be protected & Defended by his said Majesty his heirs and Successors for Ever To and for Our USE our heirs & Sucessors and the Said Three Nations In Testimony whereof We have hereunto sett our Marks and Affixed our Seales in the city of Albany this fourteenth Day of September in The thirteenth year of his Majestys Reign Annoq[e] Domini 1726

Although these concessions were made by the Indians solely for the purpose of placing themselves under the sovereignty and protection of the English government, attempts were afterward made to construe them as an absolute transfer of the Indian title, and grants were made by the authorities for tracts in said territory. This claim, however, was abandoned, although it does not appear that the individual grants were surrendered, notwithstanding this course was urged by Sir William Johnson. This, as might have been foreseen, resulted in serious trouble.

It appears by a report of the Lords of Trade, read before the Council at the Court of Saint James, November 23, 1761, and approved, the King being present, that the government had at last been aroused to the necessity of paying regard to the Indians' rights, as shown by the following quotation therefrom:[1]

That it is as unnecessary as it would be tedious to enter into a Detail of all the Causes of Complaint which, our Indian Allies had against us at the commencement of the troubles in America, and which not only induced them thô reluctantly to take up the Hatchet against us and desolate the Settlement on the Frontiers but encouraged our enemies to pursue those Measures which have involved us in a dangerous and critical war, it will be sufficient for the present purpose to observe that the primary cause of that discontent which produced these fatal Effects was the Cruelty and Injustice with which they had been treated with respect to their hunting grounds, in open violation of those solemn compacts by which they had yielded to us the Dominion, but not the property of those Lands. It was happy for us that we were early awakened to a proper sense of the Injustice and bad Policy of such a Conduct towards the Indians, and no sooner were those measures pursued which

[1] Colonial documents, number five, vol. VII, p. 473.

indicated a Disposition to do them all possible justice upon this head of Complaint than those hostilities which had produced such horrid scenes of devastation ceased, and the Six Nations and their Dependents became at once from the most inveterate Enemies our fast and faithfull Friends.

That their steady and intrepid Conduct upon the Expedition under General Amherst for the Reduction of Canada is a striking example of this truth, and they now, trusting to our good Faith, impatiently wait for that event which by putting an End to the War shall not only ascertain the British Empire in America but enable Your Majesty to renew those Compacts by which their property in their Lands shall be ascertained and such a system of Reformation introduced with respect to our Interests and Commerce with them as shall at the same time that it redresses their Complaints and establishes their Rights give equal Security and Stability to the rights and Interests of all Your Majesty's American Subjects.

That under these Circumstances and in this scituation the granting Lands hitherto unsettled and establishing Colonies upon the Frontiers before the claims of the Indians are ascertained appears to be a measure of the most dangerous tendency, and is more particularly so in the present case, as these settlements now proposed to be made, especially those upon the Mohawk River are in that part of the Country of the Possession of which the Indians are the most jealous having at different times expressed in the strongest terms their Resolution to oppose all settlements thereon as a manifest violation of their Rights.

This condition of affairs was no doubt due largely to the lack of any settled and well-defined policy on the part of the government in its dealings with the Indians in regard to their lands. This subject, as hitherto stated, seems to have been relegated, at least to a large extent, to the colonists or grantees of the royal charters; and although complaints from the Indians, or from others in their behalf, were frequently made directly to governmental authorities, it does not appear that the latter were aroused thereby to the necessity of adopting some policy on this subject. It was not until the war with France and the expedition against Canada that the government felt compelled to deal directly with this subject.

We find the Lords of Trade, in 1756, inquiring through Mr Pownalls of Governor Hardy what should be the proper and general system for the management of Indian affairs.

The reply of this official was to the effect that, with respect to the Six Nations, the governor of the province should have the chief direction of their affairs and that no steps should be taken with them without consulting him, as he had always directed the transactions with them; but he suggested that "some proper person under this direction should have the management and conduct of Indian affairs." He recommended for this purpose Sir William Johnson, who had previously been commissioned for the same purpose by General Braddock.

This suggestion was adopted, though Sir William Johnson refused to accept a new commission, preferring to act under that received from General Braddock, which was broader in its scope, and referred to tribes other than the Six Nations. This was permitted.

On December 2, 1761, the Lords of Trade submitted to the King a draft of instructions to the governors of the colonies, which were

approved by him. As these indicate a reform in the system which had prevailed, they are given here:

Draft of an Instruction for the Governors of Nova Scotia, New Hampshire, New York, Virginia, North Carolina, South Carolina, and Georgia forbidding them to Grant Lands or make Settlements which may interfere with the Indians bordering on those Colonies.

Whereas the peace and security of Our Colonies and Plantations upon the Continent of North America does greatly depend upon the Amity and Alliance of the several Nations or Tribes of Indians bordering upon the said Colonies and upon a just and faithfull Observance of those Treaties and Compacts which have been heretofore solemnly entered into with the said Indians by Our Royall Predecessors Kings & Queens of this Realm. And whereas notwithstanding the repeated Instructions which have been from time to time given by Our Royal Grandfather to the Governors of Our several Colonies upon this head the said Indians have made and do still continue to make great complaints that Settlements have been made and possession taken of Lands, the property of which they have by Treaties reserved to themselves by persons claiming the said lands under pretence of deeds of Sale and Conveyance illegally fraudulently and surreptitiously obtained of the said Indians; And Whereas it has likewise been represented unto Us that some of Our Governors or other Chief Officers of Our said Colonies regardless of the Duty they owe to Us and of the Welfare and Security of our Colonies have countenanced such unjust claims and pretensions by passing Grants of the Lands so pretended to have been purchased of the Indians We therefor taking this matter into Our Royal Consideration, as also the fatal Effects which would attend a discontent amongst the Indians in the present situation of affairs, and being determined upon all occasions to support and protect the said Indians in their just Rights and Possessions and to keep inviolable the Treaties and Compacts which have been entered into with them, Do hereby strictly enjoyn & command that neither yourself nor any Lieutenant Governor, President of the Council or Commander in Chief of Our said Colony/province of do upon any pretence whatever upon pain of Our highest Displeasure and of being forthwith removed from your or his office, pass any Grant or Grants to any persons whatever of any lands within or adjacent to the Territories possessed or occupied by the said Indians or the Property Possession of which has at any time been reserved to or claimed by them. And it is Our further Will and Pleasure that you do publish a proclamation in Our Name strictly enjoining and requiring all persons whatever who may either wilfully or inadvertently have seated themselves on any Lands so reserved to or claimed by the said Indians without any lawfull Authority for so doing forthwith to remove therefrom And in case you shall find upon strict enquiry to be made for that purpose that any person or persons do claim to hold or possess any lands within Our said Province/Colony upon pretence of purchases made of the said Indians without a proper licence first had and obtained either from Us or any of Our Royal Predecessors or any person acting under Our or their Authority you are forthwith to cause a prosecution to be carried on against such person or persons who shall have made such fraudulent purchases to the end that the land may be recovered by due Course of Law And whereas the wholsome Laws that have at different times been passed in several of Our said Colonies and the instructions which have been given by Our Royal Predecessors for restraining persons from purchasing lands of the Indians without a Licence for that purpose and for regulating the proceedings upon such purchases have not been duly observed, It is therefore Our express Will and Pleasure that when any application shall be made to you for licence to purchase lands of the Indians you do forbear to grant such licence untill you shall have first transmitted to Us by Our Commissioners for Trade and Plantations the particulars of such applications as well as in respect to the situation as the extent of the lands so proposed to be purchased and shall have

received Our further directions therein; And it is Our further Will and Pleasure that you do forthwith cause this Our Instruction to you to be made Publick not only within all parts of your said Province/Colony inhabited by Our Subjects, but also amongst the several Tribes of Indians living within the same to the end that Our Royal Will and Pleasure in the Premises may be known and that the Indians may be apprized of Our determin'd Resolution to support them in their just Rights, and inviolably to observe Our Engagements with them.[1]

It was not surprising that the condition complained of should have resulted from a wavering and undefined policy and double-headed system. First, a total ignoring of the Indians' rights, turning over the problem to the colonies; then appointing an agent of Indian affairs on behalf of the government, yet subject in most respects to the control of the colonial governors, who might, and did in more than one case, grant away tracts of the very lands reserved by this agent to the natives. Such a system, or rather lack of system. was likely to result in confusion and trouble.

Two agents were appointed, one for the northern district—that is to say, for certain of the northern colonies and the territory not embraced in the colonial limits—and another for the southern district.

Lord Egremont, writing on May 5, 1763, to the Lords of Trade in regard to questions relating to North America, remarks, among other things, as follows:

> The second question which relates to the security of North America, seems to include two objects to be provided for; The first is the security of the whole against any European Power; The next is the preservation of the internal peace & tranquility of the Country against any Indian disturbances. Of these two objects the latter appears to call more immediately for such Regulations and Precautions as your Lordships shall think proper to suggest &ca.
>
> Thô in order to succeed effectually in this point it may become necessary to erect some Forts in the Indian Country with their consent, yet his Majesty's Justice and Moderation inclines him to adopt the more eligible Method of conciliating the minds of the Indians by the mildness of His Government, by protecting their persons and property, & securing to them all the possessions rights and Privileges they have hitherto enjoyed & are entitled to most cautiously guarded against any Invasion or Occupation of their hunting Lands, the possession of which is to be acquired by fair purchase only, and it has been thought so highly expedient to give the earliest and most convincing proofs of his Majesty's gracious and friendly Intentions on this head, that I have already received and transmitted the King's commands to this purpose to the Governors of Virginia, the two Carolinas & Georgia, & to the Agent for Indian Affairs in the Southern Department, as your Lordships will see fully in the inclosed copy of my circular letter to them on this subject.[2]

In August of the same year the Lords of Trade informed Sir William Johnson that they had "proposed to His Majesty that a proclamation should be issued declaratory of His Majesty's final determination to permit no grants of lands nor any settlement to be made within certain fixed bounds under pretence of purchase, or any pretext whatever, leaving all the territory within these bounds free for the hunting grounds of the Indian Nations, and for the free trade of all his subjects."

[1] New York Colonial Documents, vol. VII, pp. 478-479.

[2] Ibid., pp. 520-521.

That the management of Indian affairs was at last taken out of the hands of at least the governor of New York appears from a letter of Lieutenant-Governor Colden to the Earl of Halifax, December 8, 1763.

As the territories of Quebec, East Florida, and West Florida had, by virtue of the treaty with France, February 10, 1763, come under the control of Great Britain, a proclamation for their government was issued October 7, 1763. The following clauses relating to the policy to be pursued with the Indians in these colonies, and some other sections mentioned, are inserted here:[1]

And whereas, it is just and reasonable, and essential to our interest and the security of our colonies, that the several nations or tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to, or purchased by us, are reserved to them, or any of them, as their hunting grounds; we do, therefore, with the advice of our privy council, declare it to be our royal will and pleasure, that no Governor or commander in chief, in any of our colonies of Quebec, East Florida, or West Florida, do presume, upon any pretence whatever, to grant warrants of survey, or pass any patents for lands beyond the bounds of their respective governments, as described in their commissions; as, also, that no Governor or commander in chief of our other colonies or plantations in America, do presume for the present, and until our further pleasure be known, to grant warrants of survey, or pass patents for any lands beyond the heads or sources of any of the rivers which fall into the Atlantic ocean from the West or Northwest; or upon any lands whatever, which, not having been ceded to, or purchased by, us, as aforesaid, are reserved to the said Indians or any of them.

And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty, protection, and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new Governments, or within the limits of the territory granted to the Hudson's Bay Company; as also all the lands and territories lying to the Westward of the sources of the rivers which fall into the sea from the West and Northwest as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.

And we do further strictly enjoin and require all persons whatever, who have either wilfully or inadvertently seated themselves upon any lands within the countries above described, or upon any other lands, which, not having been ceded to, or purchased by, us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.

And whereas great frauds and abuses have been committed in the purchasing lands of the Indians, to the great prejudice of our interests, and to the great dissatisfaction of the said Indians; in order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent, we do, with the advice of our privy council, strictly enjoin and require that no private person do presume to make any purchase from the said Indians, of any lands reserved to the said Indians, within those parts of our colonies where we have thought proper to allow settlement; but that, if, at any time, any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only for us, in our name, at some public meeting or assembly of the said Indians, to be held for that purpose, by the Governor or commander-in-chief of our colony, respectively, within which they shall lie: and in case they shall lie within the limits of any proprietaries,

[1] Laws, etc, relating to Public Lands (1828), pp. 86-88.

conformable to such directions and instructions as we or they shall think proper to give for that purpose.

Although primarily relating to the colonies of Quebec, East Florida, and West Florida, it is evident from the distinct statements therein that it was intended, as regards the points referred to in the quotation, to be of general application. The policy set forth in this proclamation is just and honorable, and appears to have been followed, as a general rule, by Great Britain in its subsequent dealings with the Indians, which, after 1776, were limited to its northern possessions.

In April, 1764, Sir William Johnson, as "Sole agent and superintendent of Indian affairs for the Northern parts of North America," concluded articles of peace with the Seneca Indians in which they ceded to the King the following lands:

From the Fort of Niagara, extending easterly along Lake Ontario, about four miles, comprehending the Petit Marais, or landing place, and running from thence southerly, about fourteen miles to the Creek above the Fort Schlosser or Little Niagara, and down the same to the River, or Strait and across the same, at the great Cataract; thence Northerly to the Banks of Lake Ontario, at a Creek or small Lake about two miles west of the Fort, thence easterly along the Banks of the Lake Ontario, and across the River or Strait to Niagara, comprehending the whole carrying place, with the Lands on both sides the Strait, and containing a Tract of ab^{t} fourteen miles in length and four in breadth.[1]

As the articles make no mention of payment it is presumed the grant was made by the Seneca to purchase peace with the English.

Most of the foregoing facts relate, it is true, to the lands and Indians of New York, and might very properly be considered in referring to the policy of that colony; however, as they give some insight into the English policy in the latter days of British rule over the colonies, they are presented here. It must be admitted, however, as before stated, that they indicate an ill-defined system resulting apparently from a neglect to take the subject into consideration at the outset. Had some provision for the proper treatment of the Indians in regard to their possessory rights been made in the original charters, and the lords proprietary and governors of the colonies been required to observe these provisions, much of the trouble with the natives experienced by the government and the colonies would, in all probability, have been avoided.

It is unnecessary to allude to the transactions of the English authorities in the southern colonies, as these, so far as they relate to purchases and grants of lands by the Indians, will be referred to under the respective colonies. However, there are two or three treaties in regard to lands in the south, outside of the colonies, which should be mentioned, as the boundaries fixed therein are referred to in one or two of the treaties in the accompanying schedule.

The first of these is "a treaty between Great Britain and the Chickasaw and Choctaw Indians," made at Mobile, March 26, 1765. Article 5 is as follows:

And to prevent all disputes on account of encroachments, or supposed encroachments, committed by the English inhabitants of this or any other of His Majesty's

[1] New York Colonial Documents, vol. VII, p. 621.

Provinces, on the lands or hunting grounds reserved and claimed by the Chickasaw and Choctaw Indians, and that no mistakes, doubts, or disputes, may, for the future, arise thereupon, in consideration of the great marks of friendship, benevolence, and clemency, extended to us, the said Chickasaw and Choctaw Indians, by His Majesty King George the Third, we, the chiefs and head warriors, distinguished by great and small medals, and gorgets, and bearing His Majesty's commissions as Chiefs and leaders of our respective nations, by virtue and in pursuance of the full right and power which we now have and are possessed of, have agreed, and we do hereby agree, that, for the future, the boundary be settled by a line extended from Gross Point, in the island of Mount Louis, by the course of the western coast of Mobile Bay, to the mouth of the Eastern branch of Tombecbee river, and north by the course of the said river, to the confluence of Alebamont and Tombecbee rivers, and afterwards along the western bank of Alebamont river to the mouth of Chickasaw river, and from the confluence of Chickasaw and Alebamont rivers, a straight line to the confluence of Bance and Tombecbee rivers; from thence, by a line along the western bank of Bance river, till its confluence with the Tallotkpe river; from thence, by a straight line, to Tombecbee river, opposite to Alchalickpe; and from Alchalickpe, by a straight line, to the most northerly part of Buckatanne river, and down the course of Buckatanne river to its confluence to the river Pascagoula, and down by the course of the river Pascagoula, within twelve leagues of the sea coast; and thence, by a due west line, as far as the Choctaw nation have a right to grant.

And the said chiefs, for themselves and their nations, give and confirm the property of all the lands contained between the above described lines and the sea to His Majesty the King of Great Britain, and his successors, reserving to themselves full right and property in all the lands to the northward of said lines now possessed by them; and none of His Majesty's white subjects shall be permitted to settle on Tombechee river to the northward of the rivulet called Centebonck.[1]

The second is "a treaty between Great Britain and the Upper and Lower Creek Indians," signed at Pensacola, Florida, May 28, 1765. Article 5 is as follows:

And to prevent all disputes on account of encroachments, or supposed encroachments, committed by the English inhabitants of this or any other of his Majesty's provinces, on the lands or hunting grounds reserved and claimed by the Upper and Lower Creek nations of Indians, and that no mistakes, doubts, or disputes, may, for the future, arise thereupon, in consideration of the great marks of friendship, benevolence, and clemency, extended to us, the said Indians of the Upper and Lower Creek nations, by His Majesty King George the Third, we, the said chiefs and head warriors, leaders of our respective nations, by virtue and in pursuance of the full rights and power we have and are possessed of, have agreed, and we do hereby agree, that, for the future, the boundary be at the dividing paths going to the nation and Mobile, where is a creek; that it shall run along the side of that creek until its confluence with the river which falls into the bay; then to run around the bay and take in all the plantations which formerly belonged to the Yanmasee Indians; that no notice is to be taken of such cattle or horses as shall pass the line; that, from the said dividing paths towards the west, the boundary is to run along the path leading to Mobile, to the creek, called Cassaba; and from thence, still in a straight line, to another creek or great branch, within forty miles of the ferry, and so to go up to the head of that creek; and from thence turn round towards the river so as to include all the old French settlements at Tassa; the eastern line to be determined by the flowing of the sea in the bays, as was settled at Augusta. And we do hereby grant and confirm unto His Majesty, his heirs, and successors, all the lands contained between the said lines and the sea coast.[2]

[1] Laws, U. S., etc, respecting Public Lands, vol. II, 1836, app., p. 275.* [2] Ibid., p. 276.*

The third is a treaty between the same parties as the last, made at Picolata, Florida, November 18, 1765. The fifth article is as follows:

Tc prevent all disputes on account of encroachments, or supposed encroachments, made by the English inhabitants of his Majesty's said province, on the lands or hunting grounds reserved and claimed by the Upper and Lower nations of Creek Indians, and that no doubts, mistakes, or disputes, may, for the future, arise; in consideration of the great marks of friendship, benevolence, and clemency, generosity, and protection, extended to us, the said Indians of the Upper and Lower Creek nations, by His Majesty King George the Third, we, the chiefs, head warriors, and leaders, of our respective nations, by virtue and in pursuance of the full rights and power which we now have, and are possessed of, have agreed, and we do hereby agree, that, for the future, the boundary line of His Majesty's said province of East Florida shall be, all the sea coast as far as the tide flows, in the manner settled with the English by the Great Tomachiches, with all the country to the eastward of St. John's river, forming nearly an island from its source to its entrance into the sea, and to the westward of St. John's river by a line drawn from the entrance of the creek Ocklawagh into said river above the great lake, and near to Spalding's upper trading storehouse, to the forks of Black creek at Colville's plantation; and from thence to that part of St. Mary's river which shall be intersected by the continuation of the line to the entrance of Turkey creek into the river Altamaha. That no notice is to be taken of such horses or cattle as shall pass the line. And we do hereby accordingly grant and confirm unto His Majesty, his heirs and successors, all the said lands within the said lines.[1]

But little need be said in regard to the English policy in the Canadian provinces from their acquisition in 1762. The system outlined in the proclamation of October 7, 1763, appears to have been followed from that time up to the present day, and it may truly be said that, as a general rule, it has been one of justice and humanity creditable to the Canadian authorities. Mr Joseph Howe, in retiring from his position as superintendent of Indian affairs in 1872, makes the following statement: "Up to the present time the results are encouraging, and although I regret that the state of my health will soon compel me to relinquish the oversight of the work, I trust it will not be neglected by those who may come after me, and who ought never to forget that the crowning glory of Canadian policy in all times past, and under all administrations, has been the treatment of the Indians." Though this statement is perhaps too broad, yet the course pursued under English control, with some exceptions relative to the seaboard provinces, has been an honorable one.

One precaution which the commissioners adopted and have generally followed was to require the assembled Indians to name the chiefs, or persons of their tribes, who were authorized by them to make the treaty and sign the grant. This fact and the names of the persons so selected were inserted in the deed or grant.

[1] Laws, U. S., etc, respecting Public Lands, vol. II, 1836, app., p. 276*.