on February 19. 1934[11] This memorandum provided at least part of the basis for those provisions of the Act of June 18, 1934,[12] which put an end to the process of allotment:

> The Indians ate continuing to lose ground; yet Government costs must increase, while the Indians must still continue to lose ground, unless existing law be changed.
>
> Two thirds of the Indians in two thirds of the Indian country for many years have been drifting toward complete impoverishment.
>
> While being stripped of their property, these same Indians cumulatively have been disorganized as groups and pushed to .a lower social level as individuals..
>
> During his time, when Indian wealth has been shrinking and Indian life has been diminishing, the costs of 'Indian administration in the identical areas have been increasing. The complications of bureaucratic manage ment have grown steadily greater.
>
> Ruin for the Indians, and still larger costs to the Government, are insur[ed] by the existing system.
>
> Neither the Indians themselves, nor the Indian Service, can reverse the downhill process, or even materially delay it, unless certain fundamental impracticabilities of law can be changed.
>
> The disastrous condition, peculiar to the Indian situation in the United States, and sharply in contrast with the Indian situations both of Canada and of Mexico, is directly and inevitably the result of existing law—principally, but not exclusively, the allotment law and its amendments and its administrative complications.
>
> The approximately one third of the Indians who as yet are outside the allotment system are not losing their property; and generally they are increasing in industry and are rising. not falling, in the social scale. The costs of Indian administration are markedly lower in these unallotted areas.
>
> * * * * * *
>
> The backbone of Indian law since 1887 has been the allotment act and its amendments and administrative regulations.
>
> The law originally possessed, and still possesses, virtues which can be preserved and made effective. The bill does preserve them. But these virtues, potential rather than realized, have been slight indeed when contrasted with the destructive effects of the law and the system.

HOW ALLOTMENT HAS WORKED AND NOW WORKS

Land allotment, under the general and special allotment acts, has been mandatory. To each Indian-man, woman, and child-living and enrolled at a specified date. a separate parcel of land has been attached. The residual lands. fictitiously called "surplus," have been mandatorily bought from the tribes by the government and thereafter have been disposed of to whites.

The individualized parcels of land have been held under Government trust over longer or shorter periods. Sometimes, where the land was agricultural. the Indian family has lived upon aud has used one or more of the allotments attached to its several members. Where the land was of grazing character. or was timberland, allotment precluded the integrated use of the land by individuals or families. even at the start.

Upon the allottees' death. it has been necessary to partition the land equally among heirs, or to sell it, and in the interim it has been leased.

Most likewise of the land of living allottees has been leased to whites.

STATISTICS OF LOSS OF LAND THROUGH ALLOTMENT

Through sales by the Government of the fictitiously designated "surplus" lands; through sales by allottees after the trust period had ended or had been terminated by administrative act: and through sales by the Government of heirship land. virtually mandatory under the allotment act: Through these three methods. the total of Indian landholdings has been cut from 138,000,000 acres in 1887 to 48.000,000 acres in 1934.

These gross statistics. however. are misleading. for, of the remaining 48,000,000 acres. more than 20,000 acres are contained within areas which for special reasons have been exempted from the allotment law; whereas the land loss is chargeable exclusively against the allotment system.

Furthermore, that part of the allotted lauds which has been lost is the most valuable part. Of the residual lands, taking all Indian-owned lands into account, nearly one half, or nearly 20,000,000 acres, are desert or semidesert lands.

Allotment, commenced at different dates and applied under varying conditions, has divested the Indians of their property at unequal speeds. For about 100,000 Indians the divestment has been absolute. They are totally landless as a result of allotment. On some of the reservations the divestment is as get only partial and in part is only provisional. Many of the heirship lands, awaiting sale to whites under existing law, have not Yet been sold, and the Indian title is not yet extinguished. Under the allotment system it inevitably will be extinguished.

The above statement relates solely to land losses. The facts can be summarized thus:

Through the allotment system, more than 80 percent of the land value belonging to all the Indians in 1887 has been taken away from them; more than 85 percent of the land value of all the allotted Indians has been taken away.

And the allotment system, working down through the partitionment or sale of the land of deceased allottees, mathematically insures and practically requires that the remaining Indian allotted lands shall pass to whites. The allotment act contemplates total landlessness for the Indians of the third generation of each allotted tribe.

THE REMAINING LANDS RENDERED UNUSABLE

A yet more disheartening picture will immediately follow the above statement. For equally important with the outright loss of land is the effect of the allotment system in making such lands as remain in Indian ownership unusable.

There have been presented to the House Indian Committee numerous land maps, showing the condition of Indian-owned lands on allotted reservations. The Indian-owned. lands are parcels belonging (a) to allottees and (*b*) to the heirs of deceased allottees. Both of these classes of Indian-owned laud are checkerboarded with white-owned land already lost to the Indians, and on many reservations the Indian-owned parcels are mere islands within a sea of white-owned property.

Farming, at least at the subsistence level, and commercial farming within irrigated areas. is still possible on those parcels belonging to living allottees. But grazing, upon the grazing land of living allottees, and businesslike or conservative forest operation, upon the allotted forest land of living allottees. are largely, often absolutely, impossible.

On the checkerboarded land maps, the heirship lands each year become a greater proportion of the total of the remaining Indian land. These heirship lands belong to numerous heirs, even up to the number of hundreds.

And one heir possessed equities in numerous allotments, up to the number of hundreds.

The above conditions force some of the Indian allotted land out of any profitable use whatsoever. and they force nearly all of it into the condition of land rented to whites. and rented under conditions disadvantageous to the Indians. The denial of financial credit to Indians is, of course. an added influence.

The Indians are practically compelled to become absentee landlords with petty and fast-dwindling estates, living upon the always diminishing pittances of lease money.

And here there becomes apparent the administrative impossibility created by the allotment system.

ALLOTMENT COSTS THE GOVERNMENT MILLIONS IN BARREN EXPENDITURES THAT CANNOT SAVE THE INDIAN LANDS OR CAPITAL, WHILE EMBITTERING AND RUINING THE INDIANS

The Indian Service is compelled to be a real-estate agent in behalf of the living allottees; and in behalf of the more numerous heirs of deceased allottees. As such

[11] See Hearings, Committee on Ind. Aff. 73d Cong., 2d sess., on H. R. 7902. pp. 15–18.

[12] 48 Stat. 984. 25 U. S. C. 461. et seq.

real-estate agent, selling and renting the hundreds of thousands of parcels of land and, fragmented equities of parcels, and disbursing the rentals (sometimes to more than a hundred heirs of one parcel, and again to an individual heir with an equity in a hundred parcels), the Indian Service is forced to expend millions of dollars a year. The expenditure does not and cannot save the land, or conserve the capital accruing from land sales or from rentals.

The operation gets nowhere at all; under the existing system of law it cannot get anywhere; it creates between the Indians and the Government a relationship barren, embittered, full of contempt and despair; it keeps the Indians' own minds focused upon petty and dwindling equities which inexorably vanish to nothing at all.

For the Indians the situation is necessarily one of frustration, of impotent discontent. They are forced into the status of a landlord class, yet it is impossible for them to control their own estates; and the estates are insufficient to yield a decent living, and the yield diminishes year by year and finally stops altogether.

It is difficult to imagine any other system which with equal effectiveness would pauperize the Indian while impoverishing him, and sicken and kill his soul while pauperizing him, and cast him in so ruined a condition into the final status of a nonward dependent upon the States and counties.

The Indian Bureau's costs must rise, as the allotted lands pass to the heirship class. The multiplication of individual paternalistic actions by the Indian Service must grow as the complications of heirship grow, wtih each year. Such has been the record, and such it will be, unless the Government, in impatience or despair, shall summarily retreat from a hopeless situation, abandoning the victims of its allotment system. The alternative will be to apply a constructi[ve] remedy as proposed by the present bill.

The bill breaks this hopeless impasse.

For a number of years, it has been clearly recognized within the Indian Service that conditions must continue to grow worse, regardless of attempted administrative reforms, unless the allotment situation in its totality be modified.

And for a number of years the directions of practicable modification have become increasingly clear, both within the Indian Service and among observers outside it. The indicated solution has been stated with clarity, and more than once, in debates on the Senate floor and in reports by the Indian Investigation Committee of the Senate. The preceding administration recognized the impasse which had been reached under the allotment system, but did not put forward legislation to break the impasse.

The present bill, in those aspects which are most, truly emergency items, is a bill to correct the allotment system, saving the remaining lands, enabling the Indians to get their lands into usable shape, and providing the machinery and authority for restoring, to those Indians already rendered landless, usable lands, if they will demonstrate their wish to possess and use the restored lands.

E. TERMINATION OF THE ALLOTMENT SYSTEM

The allotment system involved four critical steps:

1. The allotting of tribal lands.
2. The termination of trust periods or periods of restricted alienability, after a fixed term of years.
3. The termination of such restrictions prior to the expiration of the statutory period by administrative action.
4. The alienation of allotted lands prior to the termination of such periods.

The Act of June 18, 1934, stopped the continuance of the allotment system at points 1 and 2 [13] and placed severe limitations on the operation of the system at points 3 and 4.[14]

The operation of the Act of June 18, 1934, upon the statutory fabric of the allotment system at each of these points is analyzed in the following pages.

[13] See Act of June 18, 1934, secs. 1 and 2. 48 Stat. 984, 25 U. S. C. 461-462.

[14] See Act of June 18, 1934, secs. 4 and 5, 48 Stat. 984, 985, 25 U. S. C. 464-465.

SECTION 2. RIGHT TO RECEIVE ALLOTMENT

Section 1 of the Act of June 18, 1934 [15] provides:

> That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, o. otherwise, shall be allotted in severalty to any Indian.

Its obvious purpose is to preserve in communal ownership all tribal lands of Indian reservations. It accomplishes that purpose by the declaration that no such lands shall be allotted. To that extent, the act is incompatible with and, therefore, supplants all prior laws, both general and special, purporting to authorize allotments in severalty in any form on any reservation to which the act applies, and this notwithstanding the fact that the act contains no general repeal provision.[16]

The act extends to and binds all Indians under the jurisdiction Of the Federal Government save those tribes expressly excluded by section 13 and those reservations which. in the exercise of the privilege conferred by section 18, vote against its application.

Since allotments have been discontinued under the mandate of this statute, and under a policy preceding this enactment which applies even to tribes not under the act, a detailed study of the allotment statutes will not be attempted. However, inasmuch as allotments may be made on reservations which have rejected the Wheeler-Howard Act until the surplus lands have been completely disposed of or until prohibited by Congress[17] and individual rights of Indians in real property have vested under the allotment statutes, it may be useful to offer a short summary of the provisions and legal effect of such statutes.

Section 1 of the General Allotment Act of February 8, 1887,[18] later amended by general acts of February 28, 1891,[19] and of June 25, 1910,[20] and now embodied in section 331 of title 25 of the United States Code authorized the President of the United States to allot land [21] in severalty to Indians living on reserva-

[15] 48 Stat. 984, 25 U. S. C. 461.

[16] Where a reservation has by vote come under the act, land may not thereafter be allotted under a prior statute. Op. Sol. I. D., M.27770, May 22. 1935. But where an Indian acquired rights by a proper selection which was approved prior to the passage of the act, it has been ruled that the Secretary may issue a patent, and where lands bad been selected but riot approved before the passage of the act. they could be approved and patented to the allottee, the approval not requiring the exercise of discretion. Op: Sol. I. D. M.28086, July 17, 1935, 55 I. D. 295.

[17] Op. Sol., I. D., M.30256. May 31, 1939. The Act of June 15. 1935. 49 Stat. 378, provided that all laws affecting any Indian reservation which voted to exclude itself from the application of the Indian Reorganization Act shall be deemed to have been continuously effective as to such reservation notwithstanding the passage of that act. *Ibid.* On the power of the Secretary over individual lands.. see Chapter 5, sec. 11.

[18] 24 Stat. 388.

[19] C. 383. sec. 1, 26 Stat. 794.

[20] C. 431, sec. 17, 36 Stat. 855. 859, 25 U. S. C. 331,

[21] Section 335 of title 25 of the Code, derived from the Act of February 14, 1923, c. 76, 42 Stat. 1246, makes the provisions of secs. 331–334, inclusive. and 336 and 341 heretofore discussed (and secs. 348–350, inclusive, and 381 to be discussed subsequently) applicable to "all lands heretofore purchased or which may be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians."

tions, whenever, in his opinion, the reservation or any part thereof might be advantageously utilized for agricultural or grazing purposes. Provision is made for allotments "not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land."[23]

The allotment policy was by no means uniform, certain tribes, for example, being excepted from provisions of the General Allotment Act of 1887.[23]

In addition to the general statute of 1887, Congress passed special acts authorizing the allotment of lands of specific tribes.[24] For those Indians not residing on reservations and, who could otherwise not receive an allotment, Congress provided in section 4 of the General Allotment Act (incorporated in title 25 of the Code as sec. 334) for their receiving allotments upon any surveyed or unsurveyed lands of the United States not otherwise appropriated.

Where under this section an allotment was erroneously made and a person thereafter applied for homestead entry upon such an allotment, the Secretary of the Interior was held to have authority to protect the Indian in his allotment even though erroneously made and to deny the application for homestead entry, since to have allowed the entry would have been to visit a considerable injustice upon the allottee.[25]

Section 336[26] of title 25 of the United States Code provides that where any Indian entitled to an allotment should settle upon lands of the United States not otherwise appropriated he should be entitled to have the same allotted to him in the manner provided for allotments to Indians residing upon reservations, and such allotments were not to exceed 40 acres of irrigable land or 80 acres of nonirrigable agricultural land, or 160 acres of nonirrigable grazing land.

Under section 337 of title 25 of the United States Code,[27] the Secretary of the Interior is permitted in his discretion to make allotments within the national forests to Indians who were living on lands included in a national forest or who had made improvements thereon and were not entitled to an allotment on any existing reservation or whose tribal reservation was not sufficient to give each member an allotment.

As pointed out in Chapter 8, the allotment of lands in severalty did not in any way affect the guardian-ward relationship existing between the national government and the Indian[28] nor did it affect the authority Of the Commissioner of Indian Affairs to remove collectors from the reservation.[29] It has also been held that an allotment system does not deprive the tribe of the right to regulate the domestic affairs of its members.[30]

A. ELIGIBILITY

Insofar as eligibility to receive an allotment depends upon tribal membership the cases and statutes on the subject have been elsewhere discussed.[31]

In litigation dealing with the eligibility of Indians entitled to allotments. it has been held that the fact that a member of a tribe is born after the passage of the General Allotment Act does not disqualify him.[32] It has also been held that an Indian woman, though married to a white man, is head of her family and that her children who maintained their tribal relations were entitled to allotments as members of the tribe.[33] In the case of La *Clair v. United States*[34] the court held that adopted members of the Yakima tribe, who were formerly Puyallup Indians and whose parents had received allotments on the Puyallup Reservation as heads of families, were nevertheless entitled to allotments in the Yakima Reservation.[35] On the other hand, it

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[23] The Act of 1887 provided for allotments of varying amount to various classes of Indians. For example, a head of a family was to receive a quarter of a section, while only one-eighth of a section was to be allotted to a single person over 18 years of age or an orphan under 18. To "each other single person under eighteen Years now living, or who may be born prior to the date of the order of the President," sec. 1 specifies the allotment of one-sixteenth of a section.

[24] Thus sec. 339 of title 25 of U. S. C. which is derived from sec. 8 of the General Allotment Act expressly provided that:

> • • • sections *331* to 334. inclusive, 336. 341. 348 to 350. inclusive, and 381 [of this title] shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in Oklahoma nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by Executive order.

By a proviso annexed to the Act of February 28. 1891. 26 Stat. 796 it was provided that no allotment of lands shall be made or annuities of money paid to any of the Sacs and Foxes of Missouri who are not enrolled as members of said tribe on January 1. 1890.

On the other hand the provisions of secs. 331 to 334, 336, 341, 348, 359, and 381 of title 25 of U. S. C. (Supp.) have by sec. 340. which is derived from the Act of March 2, 1889, 25 Stat. 1013, been extended to

> . . . the Confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians. and the Western Miami tribe of Indians. located in the northeastern part of the former Indian Territory and to their reservation. la the same manner and to the same extent as if said tribes had not been excepted from the provisions of said sections, except and as otherwise hereinafter provided.

[25] See Act of February 25. 1920, c. 87, 41 Stat. 452 for the Flathead Indians and the Act of March 3. 1921. c. 135. 41 Stat. 1355 for the Gros Ventre and Assiniboine Tribes in the Fort Belknap Reservation.

> Broadly speaking, the act of 1889, known as the Nelson act, provided for the cession by "all the different bands or tribes of Chippewa Indians in the State of Minnesota" of all their title and interest in and to their reservations in said State not needed for allotments: for allotments of land in severalty in conformity with the act of February 8. 1887 (24 Stat. 388). and for the sale of the remaining lands. • • •
>
> The act of April 28. 1904 (33 Stat. 539), known as the Morgerson act, providing for allotments to Indians on the White Earth reservation in Minnesota authorized allotment to each Chippewa Indian now legally residing upon" that reservation under treaty or laws of the United States in accordance with the express promise made by the Commissioners appointed under the act of January 14. 1889. (Op. Sol. I. D.. M.15954., January 8. 1927.)
>
> . . . We frequently find acts of Congress directing allotments on particular Indian reservations to be made in accordance with the general allotment laws of the United States. When so made. for all practical purposes. such allotments are to be regarded as coming within the scope of the general allotment act. The chief difference lies in the area received by the allottees. Under the general allotment act, ordinarily, each Indian receives 80 acres of agricultural or 160 acres of grazing land. while under the special acts relating to particular reservations they frequently receive considerably more. See the act of May 30. 1908 (35 Stat. 558), relating to the Fort Peck Reservation and the act of March 1. 1907 (34 Stat. 1035) as amended June 30. 1919 (41 Stat. 16). relating to the Blackfoot reservation. both of which are also in the State of Montana. Both of these acts authorize allotments under the general allotment laws of the United States and on each reservation the allottees received in excess of 320 acres. Patents for such allotments however were issued in accordance with the general allotment act of February 8. 1887. as amended. (Op. Sol. I. D.. M.12498. June 6. 1924.)

[26] *Baldwin v. Keith*. 13 Okla. 624. 75 Pac. 1124 (1904). For a discussion of the Secretary's power over Indian lands, see Chapter 5. sec. 11.

[27] This section was derived from sec. 4 of the Act of February 28. 1891. 26 Stat. 794. 795. as amended by sec. 17 of the Act of June 25, 1910. 36 Stat. 855. 860.

[28] Act of June 25. 1910. sec. 31, 36 Stat. 855. 863.

[29] See sec. *2C.* and *Hollister v. United States, 145* Fed. 773 (C. C. A. 8. 1906).

[30] *Rainbow v. Young. 161* Fed. 835 (C. C. A. 8. 1908).

[31] *Yakima* Joe *v. To-is-lap*. 191 Fed. 516 (C. C. Ore. 1910). And see Chapter 7, sec. 5.

[32] See Chapter 1. sec. 2 : Chapter 5. sec. 13 : Chapter 7. sec. 4.

[33] *United States v. Fairbanks*, 171 Fed. 337. 339 (C. C. A. 8. 1909) aff'd sub nom. *Fairbanks v. United Slates. 223* U. S. *215. 224* (1912).

[34] *Bonifer v. Smith. 166* Fed. 846 (C. C. A. 9, 1909). And *cf. Ladiga v. Roland*. 2 How. 581 (1844). holding that widow living with grandchildren was head of family. entitled to allotment under Creek Treaty of March 24. 1932. 7 Stat. 366. and obtained title thereto by application, although President attempted to award title to another.

[35] 184 Fed. 128 (C. C. E. D. Wash. 1910).

[36] In *Mitchell v. United States,* 22 F. 2d 771 (C. C. A. 9, 1927), it was held that under a regulation requiring that adoptions be approved by the Secretary of the interior and the Indian Commissioner. an adoption without such approval did not entitle the Indian to an allotment.

has been held that a tribal Indian living apart from the tribe and off the reservation is not entitled to an allotment on the reservation.[36] This does not mean, of course, that the Indian had to be: on the reservation the, instant the Allotment Act was passed.[37]

An Indian may not have allotments from two different tribes; [38] nor claim an allotment under his English name and thereafter claim one under an Indian name.[39]

Although the allotment rolls have been deemed conclusive and. final evidence of the right of any Indians of a reservation to an allotment [40] it has been held that they may be changed by the Secretary to correct mistakes.[41]

B. SELECTION OF ALLOTMENT

Section 332 [42] of title 25 of the United States Code deals with the selection of allotments and provides that the Indians are to do. the selecting, the heads of, families selecting for their minor children, and the Indian agent is to make the selection for each orphan. The selections are to be made in such manner as to include the improvements of the Indian making the selection. The Supreme Court has upheld the validity of this clause giving a preferential right to certain lands to Indians who had occupied them and had made improvements thereon, prior to the passage of the Allotment Act affecting the lands of his tribe.[43]

Congress also provided that, if an Indian failed to make his selection within four years after the President authorized an allotment on a particular reservation, the Secretary of the Interior could direct the agent of such tribe or a special agent, if there were no agent, to make the selection The Supreme Court has sustained the power of the Dawes Commission to place members of the Creek Nation on the allotment roll, upon their refusal to select allotments.[44]

The term "select," used with reference to selection of allotments by, Indians, as defined by the Cherokee Allotment Agreement [45] and the Choctaw-Chickasaw Supplemental Agreement,[46] means a formal application for a particular tract or tracts of land in the land office established by the commission for the particular tribe or nation.[47]

It has been held that section 332 contemplates a selection by a living Indian, only. Thus the death of a Chippewa Indian before making, a selection of an allotment under the Nelson Act terminated his right to an allotment.[48] Where a right to the allotment becomes equitably vested in the allottee,[49] the act of the allotting commissioners in thereafter wrongfully allotting the land to another does not operate to cut off the heirs of the person originally entitled to the allotment.[50]

C. APPROVAL OF ALLOTMENT

Section 333 [51] provides that after the filing of the' selection the allotments shall be made by special allotting agents or by the agents or superintendents in charge of the reservations on which the allotments, are directed to be made.[52]

After an allotment has been -approved, the allottee is entitled to have, the, land patented to him,[53] even after the passage of the. Wheeler-Howard Act which provided that "* * * no land * * * shall be allotted * * * to any Indian." [54]

D. CANCELLATION

As might be expected, the wholesale allotment of lands in severalty which characterized Indian administration for many years resulted in numerous instances in injustice to the allottee.[55] this injustice took the form very often of the allotment of a parcel of land which was unsuitable for any purpose to which the allottee could reasonably be expected to put it. To remedy in part this situation, Congress in 1909 [56] provided for the can-

[36] *Lemieux* v. *United States*, 15 F. 2d 518 (C. C. A. 8, 1926). cert. den. 273 U. S. 749. But *cf. Vezina* v. *United States*, *245* Fed. 411 (C. C. A. *8*, 1917). under Act of June 7, 1897, c. 3, 30 Stat. 62, 90, 25 U. S. C. 184.

[37] *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S. 401 (1904). And see *Fairbanks* v. *United States*, *223* U. S. 215, 225 (1912).

[38] *Josephine Valley* et *al.*, 19 L. D. 329 (1894).

[39] *Tiger* v. *Twin State Oil Co.*, *48* F. 2d 509 (C. C. A. 10, 1931).

[40] See Act of March 3. 1921. 41 Stat. 1355 (Fort Belknap Reservation) ; Op. Sol. I. D., M.7599, June 9. 1922. See also Chapter 5, sec. 13.

[41] Op. 'Sol. I. D., M.7599, June 9, 1922. See also Chapter 5, sec. 13.

[42] This section was derived from see. 2 of the General Allotment Act. On selection of allotment for minors and incompetents, see Chapter 8. sec. 8A.

[43] *E. g., Harnage* v. *Martin*, *242* U. S. *386* (1917). See also Smith v. *Bonifer*, 154 Fed. 883 (C. C. Ore. 1907), aff'd sub nom. *Bonifer* v. *Smith*, *166* Fed. 846 (C. C. A. 9, 1909).

[44] United *States* v. *Wildcat*, 244 U. S. 111 (1917). See Chapter 5, secs. *6* and 13.

"Act of March 1, 1901, 31 Stat. 861.

[46] Act of June 30, 1902, 32 Stat. 500.

[47] See *Millet* v. *Bilby*, 110 Okla. 241. 237 Pac. 859 (1925).

[48] *La Roque* v. *United* States. 239 U. S. 62 (1915). See also Chapter 9, sec. *3; Taylor* v. *United States, 230* Fed. 580 (C. C. A. 8, 1916).

[49] See Op. Sol. I. D., M.28086. July 17, 1935. 55 I. D. 295. Where Indians had made selections prior to the passage of the Wheeler-Howard Act and approval was not of a discretionary nature but was lacking because of clerical error, it was held that the Indians were entitled to the approval, and patenting of their selections, even after the passage of, the said act which provided that "* * * no land * * * shall be allotted * * * to any Indian." Act of June 18, 1934, 48 Stat. 984. But *cf. Lemieux* v. United *States*, 15 F. 2d 518 (C. C. A. 8. 1926), cert. , den. 273 U. S. 749, where the approval was of a discretionary nature; *United States ex rel. West* V. *Hitchcock*, *205* U. S. 80 (1907) ; *St. Marie* v. *United States*, *24 F.* Supp. *237* (D. C. S. D. Cal. 1938).

[50] *Bonifer* v. *Smith*, 166 Fed. 846 (C. C. A. 9, 1909) ; *Smith* v. *Bonifer*, 32 Fed. 889 (C. C. Ore. 1904).

[51] 25 U. S. C. 333, derived from Act of February 8, 1887, 24 Stat. 388 and Act of June 25, 1910, 36 Stat. 855, 858.

[52] Sec. 3 of Act of February 8, 1887, 24 Stat. 388. provided only for agents and, special agents fulfilling this duty. but sec. 9 of the 'Act of June-25, 1910, 36 Stat. 855. 858, provided for the inclusion of superintendents as performers of this function.

25 U. S. C. 338, derived from the -4ppropriatlon *Act* of April 4, 1910, sec. 1, 36 Stat. 269. 270, required the Secretary of the Interior to transmit annual reports to Congress of the cost of survey and allotment work on Indian reservations generally. This section was repealed by the Act of May.29. 1928, sec. 64, 45 Stat. 986.

[53] The allottee may bring mandamus to obtain the patent. See *Vachon* v. *Nichols-Chisholm Lumber* Co., 126 Minn. 303, 148 N. W. 288. 290 (1914). But when an allotment has not been approved; approval and issuance of patent cannot be compelled by mandamus. *United States ex rel. West* v. *Hitchcock*, *205* U. S. *80.* (1907) ; *St. Marie* v. *United States*, 24 F. Supp. 237, (D. C. S. D. Calif. 1938). On when mandamus will issue, see Chapter 5, sec. 13B.

[54] Op. Sol. I. D. M.28086, July 17. 1935, 55 I. D. 295.

[55] Section 343 of title 25 of the U. S. Code provides:

> In all cases where it shall appear that a double allotment of land has been wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been made in the description of the land inserted in any patent, said Secretary is authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian, and for which a conditional patent may have been issued. to rectify and correct such mistakes and cancel any patent which may have been thus erroneously and wrongfully issued whenever *in* his opinion the same ought to he canceled for error in the issue thereof, * * *

[56] Act of March 3. 1909. 35 Stat. 781, 784.

From time to time Congress has enacted sundry statutes permitting Indians to surrender the lands allotted to them and select other lands in lieu thereof. See Acts of October 19. 1888, 25 Stat. 611. 612. 25 U. s. c. 350 ; January 26. 1895, 28 Stat. 641. 25 U. S. C. 343 ; April 23. *1904. 33* Stat. 297. 25 U. S. C. 343; March 3. 1909, 35 Stat. 781, 784. 25 U. S. C. 344. Sec. 2 of the Act of 1888, *supra*, which has been incorporated in sec. 350 of 25 U. S. C., reads:

> The Secretary of the Interior is hereby authorized, in his discretion and whenever for good and sufficient reason he shall consider it to be for the best interest of the Indians, in making allotments under the statute aforesaid, to permit any Indian to whom a patent has been issued for land on the reservation to which such Indian belongs, under treaty or existing law, to surrender such patent with formal relinquishment by such Indian to the United States of all his or her right. title. and interest

cellation of an allotment of unsuitable land and the exchange therefor of other land. This act has been incorporated in section 344 of title 25 of the United States Code.[57] Its provisions are:

> If any Indian of a tribe whose surplus lands have been ceded or opened to disposal has received an allotment embracing lands unsuitable for allotment purposes, such allotment may be canceled and other unappropriated, unoccupied, and unreserved land of equal area, within the ceded portions of the reservation upon which such Indian belongs, allotted to him upon the same terms and with the same restrictions as the original allotment, and lands described in any such canceled allotment shall be disposed of as other ceded lands of such reservation. This provision shall not apply to the lands formerly comprising Indian Territory. The Secretary of the Interior is authorized to prescribe rules and regulations to carry this law into effect.

In 1927 Congress also provided for the cancellation of fee patents issued Without the consent of the Indian :[58]

> • • • the Secretary Of the Interior is hereby authorized, in his discretion. to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee. or before the expiration of any extension of such period of trust by the President, where such Patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: *Provided*, That the patentee has not mortgaged or sold any part of the land described in such patent, provided also, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued.

E. SURRENDER

Section 408, title 25, of the United States Code[59] provides:

> In any case where an Indian has an allotment of land, or any right, title, or interest in such' an allotment, the Secretary of the Interior, in his discretion, may permit such Indian to surrender such allotment, or any right, title, or interest therein, by such formal relinquishment as may be prescribed by the Secretary of the Interior. for the benefit of any of his or her children to whom no allotment of land shall have been made; and thereupon the Secretary of the Interior shall cause the estate so relinquished to he allotted to such child or children subject to all conditions which attached to it before such relinquishment.

in the land conveyed thereby, properly indorsed thereon, and to cancel such surrendered patent: *Provided*, That the Indian so surrendering the same shall make a selection. in lieu thereof. of other land and receive patent therefor. nuder the provisions of the act of February eighth, eighteen hundred and eighty-seven.

[57] On the question of the necessity for notice and an opportunity to be heard, see *Fairbanks* v. *United States*, 223 U. S. 215 (1912).

[58] Act of February 26. 1927, c. 215, 44 Stat. 1247, 25 U. S. C. 352a. Partial cancellation was also provided for. Act of February 26, 1927, c. 215, sec. 2, 44 Stat. 1247. as amended February 21, 1931. c. 271.46 Stat. 1205, 25 U. S. C. 352b. For an analysis of the power of the Secretary to cancel a fee patent issued without request from the Indian concerned. see Op. Sol. I. D.. M.28297, August 1, 1939. See Chapter 2, sec. 2E; Chapter 13, sec. 3B.

[59] Act of June 25, 1910. sec. 3, 36 Stat. 855, 856. For regulations regarding reallotment of lands to unallotted Indian children, see 25 C. F. R. 52.1-52.2.

SECTION 3. POSSESSORY RIGHTS IN ALLOTTED LANDS

An allottee ordinarily acquires by virtue of his allotment full possessory right with respect to the improvements and the timber upon his allotment as well as the minerals beneath it. Occasionally, by the term of special allotment acts. the minerals are reserved to the tribe in which event the allottee acquires at best a right to share in the income flowing therefrom.[60] His right of ownership in timber is limited only by the statutory restriction on alienation.[61] These restrictions upon alienation are elsewhere discussed.[62] When the allottee acquires his patent in fee, however. his right of use and enjoyment becomes an absolute right of ownership.

The allottee's right to water is recognized by the General Allotment Act,[63] section 7 of which provides:

> That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and be is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

The Supreme Court in United Stales v. *Powers*[64] declared that under the doctrine of the Winters case[65] waters are reserved for the equal benefit of tribal members and that the Secretary of the Interior is without power affirmatively to authorize unjust and unequal distribution of water. It further declared that when allotments of land were duly made for exclusive use and thereafter conveyed in fee. the right to use some portion of tribal waters essential to cultivation passed to the owner of the allotted land, including both the allottees and those who took from them by conveyance or by purchase of land of deceased allottees at Government sales.

The *Powers* case compels the view that the right to use water is a right appurtenant to the land within the reservation. and that unless excluded it passes to each grantee in subsequent conveyances of allotted land.[66]

In accordance with the doctrine that the United States has exclusive jurisdiction over reservation lands unless it has specified that state statutes shall be controlling, it has been held[67] that an allottee cannot under the state laws relating to the appropriation of water acquire any right whatsoever in waters reserved to the tribe.

[60] See Chapter 15. sec. 14. fn. 286.

[61] See sec. 4 of this chapter.

[62] *Ibid.*

[63] Act of February 8, 1887. 24 Stat. 388. 25 U. S. C. 381. Also see Chapter 12. sec. 7.

[64] 305 U. S. 527. 532–533 (1939)

[65] *Winters* v. *United States. 207* U. S. *564* (1908). For a further discussion of this case in connection with tribal water rights. see Chapter 15. sec. 16.

[66] In *Anderson* v. *Spear-Morgan Livestock Co., 79 P.* 2d 667 (1938). tbe court had occasion to restate the doctrine of the *Powers* case. It said:

> • • • The purpose of this statute is to provide for the distribution of the right to use the water to the individual Indians. United *States* v. *Powers*, • • • - The right to use the water prior to a distribution of it by the Secretary of the Interior may be said to be inchoate in the sense that the precise amount or extent of the right assigned to an individual allottee would be undetermined, but the right is vested in so far as the existence of the right to use the water in the allottee is concerned. This right is appurtenant to the land upon which it is to be used by the allottee. When the allottee became seized of fee simple title. after the removal of the restrictions of the trust patent. then a conveyance of the land. in the absence of a contrary intention, would operate to convey the right to use the water as an appurtenance. *United States* v. *Powers, supra.* (P. 669)

[67] *United States* v. *McIntire*, 101 F. 2d 650 (C. C. A. 9, 1939), rev'g 22 F. Supp. 316 (D. C. D. Mont. 1937).

Likewise, where statutory attempts have been made to relegate water rights of Indians on certain reservations to the jurisdiction of particular states, by requiring that state statutes be complied with in' securing water rights for the- irrigation of Indian land,[68] it has been held [69] that since the statute contained no specific grant of the reserved waters to the state it could not be construed as the intent of Congress to take from' the Indians a vested right and provide in lieu thereof only a means for acquiring an inferior and secondary right.

The water right guaranteed an allottee of Indian land has sometimes been defined in treaty or agreement[70] In *United States* v. *Hibner*,[71] involving such an agreement, it was held that a purchaser from the allottee acquires a water right for' the actual acreage under irrigation at the time title passes from the Indians, and for such additional acreage as can be placed under irrigation within a reasonable time.

On the other hand, a purchaser from an allottee is without right to appropriate to his private use water from a creek most of which comes primarily from a Government irrigation system constructed after he acquired title to the land, which uses the creek bed for a distance as a canal to reach customers below.[72]

[68] Act of June 21, 1906, 34 Stat. 325, 375 (Uintah Project in Utah); Act of March 8, 1905, 33. Stat, 1016 (Shoshone Project in Wyoming).

[69] *United States* v. *Parkins*, 18 F. 2d 642 (D. C. Wyo. 1926).

[70] Act of June 6, 1900, with the Fort Hall Indians, 31 Stat. 672. For a statute guaranteeing a similar right, see Act of May 18, 1916, 39 stat. 123. 130.

[71] 27 F. 2d 909 (D. C. E. D. Idaho 1928).

[72] *United States v. Parkins*, 18 F. 2d 642 (D. C. Wyo. 1926). For a holding that one who purchases land in what was formerly. an Indian reservation from the United States may not appropriate water for the irrigation of his land from an irrigation ditch, which the. United States had constructed for the benefit of Indian allottees, see *United States* v. *Morrison*, 203 Fed: 364 (C. C. Colo. 1901).

SECTION 4. ALIENATION OF ALLOTTED LANDS

Since tribal lands are generally nonalienable without the consent of the Federal Government it was natural that Congress should continue federal control of land alienation when tribal land passed into the hands of individual Indians. The same considerations that lay behind the former restrictions-the desire to protect the Indian against sharp practices leading to Indian landlessness, the desire to safeguard the certainty of titles, and the. urge to continue an important basis of governmental activity-operated in the case of allotted lands. The first of these motives is usually stressed in the opinions. Typical of the cases is the discussion by the Court of Appeals in *Beck* v. *Flournoy Live-Stock & Real-Estate Co.*[73]:

> * * * These limitations upon the power of the Indians to sell or make contracts respecting land that might be set apart to them for their individual use and benefit were imposed to protect. them from the greed and superior intelligence of the white man. Congress well knew that if these wards of the nation were placed in possession of real estate, and were given capacity to sell or lease the same, or to make contracts with white men with reference thereto, they would soon be deprived of their several holdings; and that, instead of adopting the customs and habits of civilized life and becoming self-supporting; they would speedily waste their substance and very likely become paupers. The motive that actuated the lawmaker in depriving the Indians of the power of alienation is so obvious, and the language of the statute in that behalf is so plain, as to leave no room. for doubt that congress intended to put it beyond the power of -white men to secure any interest whatsoever in lands situated within Indian reservations that might be allotted to Indians. This conclusion is fortified by-an amendment to the act of February 8, 1887, which was adopted on February 28, 1891 (26 Stat. 794, c. 383), whereby power was conferred upon the secretary of the interior to prescribe regulations and conditions for the leasing of lands allotted to Indians under the previous act of February 8, 1887, whenever, by reason of "age or other disability," the allottee was not able to occupy or improve the land assigned to him with benefit to himself. It is manifest that the amendment in question, authorizing allotted land to be leased in certain cases, under the direction of the secretary of the interior was unnecessary if power to execute leases of allotted lands had already been conferred by previous enactments or treaty stipulations. The last-mentioned act, therefore is a legislative declaration that congress did not intend by any previous statute to authorize the leasing of any lands that might be assigned to Indians to be held by them in severalty. (P. 34–35.)

[73] 65 Fed. 30 (C. C A. 8, 1894), app. dism. 163 U. 8. 686.

The opinion in *Lykins* v. *McGrath* [74] throws added light upon this basic policy:

> * * * what was the purpose of imposing a restriction upon the Indian's power of conveyance? Title passed to him by the patent, and but for the restriction he would have had the full power of alienation the same as any holder of a fee simple title. The restriction was placed upon his alienation in order that he should not be wronged in any sale he might desire to make; that the consideration should be ample: that he should in fact receive it, and that the conveyance should be subject to no unreasonable conditions or qualifications. It was not to prevent a sale and conveyance, but only to guard against imposition therein. When the Secretary approved the conveyance it was a determination that the purposes for which the restriction was imposed had been fully satisfied; that the consideration was ample; that the Indian grantor had received it. and that there were no unreasonable stipulations attending the transaction. All this being accomplished, justice requires that the conveyance should be upheld, and to that end the doctrine of relation attaches the approval to the conveyance and makes it operative as of the date of the latter.

The broad power of Congress to effectuate this policy and the extent to which the enforcement and relaxation of restraints upon alienation have been entrusted to the Secretary of the Interior have been discussed in Chapter 5.[75]

A. LAND [76]

The policy of restricting alienation finds expression in provisions of allotment acts forbidding alienation of lands during a fixed period of years without the consent of some administrative officer, generally the Secretary of the Interior. The provision contained in section 5 of the General Allotment Act [77] declares:

> * * * And if any conveyance shall be made of the lands set apart and allotted as herein provided. or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *.

[74] 184 U. S. 169. 171–172 (1902).

[75] See secs. 5C and 11.

[76] For regulations relating to sale of allotted lands, exclusive of Five Civilized Tribes lands, see 25 C. F. R. 241.9–241.33.

[77] 24 Stat. 388. 389. 25 U. S. C. 348, amended in other particulars by Act of March 3, 1901, 31 stat. 1058, 1085. Subsequent statutes authorizing alienation of lands with departmental approval are noted in Chapter 5, sec. 11B.

We have elsewhere noted the various forms in which restrictions on alienation are embodied, notably the "trust patent" and the "restricted fee." [78]

Prohibitions against alienation have been broadly interpreted in the light of the policy of Congress to prevent whites from taking advantage of the Indians.[79] This is shown by the interpretation of the term "conveyance" by the Supreme Court of Oklahoma in the case of *Potter* v. *Vernon:* [80]

> Under the general rule that all instruments affecting real estate are included under the word "conveyance" are included the following: A mortgage of an equitable interest (*Sullivan* v. Corn *Exchange Bank*, 154 App. Div. 292. 139 N. Y. S. 97); a leasehold (Lembeck, etc., *Eagle Brewing Co.* v. *Kelly*, 63 N. J. Eq. 401, 496, 51 A. 794); of personal property (*Patterson* v. Jones, 89 Ala. 388, 390, 8 So. 77); an agreement to execute a mortgage (In *re Wight's Mortg. Trust*, L. R. 16 Eq. 41, 46); an assignment for the benefit of creditors (*Prouty* v. *Clark*, 73 Iowa, 55, 56, 34 N. W. 614); an assignment of a chose In action (Wilson v. *Bead&*, 2 Head [Tenn.] 510); the satisfaction of 'a mortgage (*Foss* v. *Dullam*, 111 Minn. 220, 126 N. W. 820); *an* instrument in the *nature of a* trust deed. even without a seal, acknowledgement. or witness (*White* v. *Fitzgerald*. 19 Wis. 480); a release. as an instrument by which tbe title to real estate might be affected in law or equity (*Palmer* v. *Bates*. 22 Minn. 532); a release of a mortgage (*Baker* v. *Thomas*, 61 Hun. 17, 15 N. Y. S. 359); or part 'of land covered by a mortgage (*Merchant* v. *Woods*, 27 Minn. 396, 7 N. W. 826).
>
> It is true that under our statute a mortgage of real estate is to be regarded as a lien only; but the lands in question are Indian lands. with reference to which the federal government has dealt in a peculiar manner, due to peculiar conditions. Under our Oklahoma laws our citizens have the right to transfer without let or hindrance. all or part of their real property. but. with respect to its awards, the Indians, the government has always dealt exclusively with the transfer of their lands. not only placing restrictions upon the lands themselves. but upon those who owned them. In this case the legality of the transfer is to be determined by interpretation of the act of Congress, and the meaning of this art is ascertained by discovering. not what was in the minds of the lawmakers of Oklahoma in passing the several statutes with reference to conveyances and transfers, but what was in the mind of Congress when it passed the Act of May 27. 1908, and its use of the word "conveyances" in said act. We must assume that in an act of such sweeping proportions it was intended by Congress to deal finally and comprehensively with the subject in band. Section 5 of the act uses very general terms:
>
> "That any attempted alienation or incumbrance by deed. mortgage. contract to sell. power of attorney. or other instrument or method of incumbering real estate made before or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes . . . shall be absolutely null and void." 35 Stat. 313.
>
> Section 9 seems to be just as comprehensive in the following words :
>
> "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided.* That no conveyance of any interest of any full-blood Indian heir lo such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee. * . *" 35 Stat. 315.
>
> It appears to us that the words "provided that no conveyance of any Interest of any full-blood Indian heir in such land" could hardly be more comprehensive. We think that the words "conveyance of any Interest" is just as comprehensive and perhaps more so than the word "alienation." and yet a valid mortgage is often the first step In a final alienation Of land and even a foreclosure has reference back to the date of the mortgage and must follow the terms thereof.
>
> To give too limited or restricted a meaning to the word "conveyance" and yet a comprehensive meaning to the word "alienation" in the act, the result would be illogical, for it would require. for the making of a deed by the full-blood Indian heir. an approval of the county court, but for the execution *of* a *mortgage upon* his land, which might easily be effective to transfer his title. no such approval was necessary. This could not have been in the mind of Congress. It is not to be supposed that Congress inadvertently or through oversight failed to take into consideration that the Indian might wish to mortgage his land, for the mortgaging of real estate is almost as old as our assurances of title. so that, in our judgment. they either entirely overlooked this contingency. or they meant the words "conveyance of any interest" should include every written instrument which might affect the title. It has been, and properly so we think, the design of the government as rapidly as they could with safety to permit the Indians *to* deal *with* and have *charge* of their property. not only for the benefit of the community, but for the distinct benefit of the Indians, by casting responsibility upon them. and we Interpret and understand this act of Congress as evidencing that disposition of the government. (P. 614.)

The *courts* have also considered the *remedial nature of* this egislation in construing the extent of its coverage. In holding that homesteads were within the purview of the General Allotment Act, Chief Justice Taft said : [81]

> We find that the Indian Homestead Act of July 4. 1884. and the General Allotment Act of February 8, 1887. with its various amendments. constitute part of a single system evidencing a continuous purpose on the part of the Congress. The statutes ate *in part materia*, and must be so construed. It cannot be supposed that Congress: in any part of this legislation, all of which is directed toward the benefit and protection of the Indians, as such, intended to exclude from the beneficent policy which each Act evidences, an Indian claiming under the homestead act, even though the statute uses the term "allottee." If there were any doubt on the question, the silence of Congress in the face of the long-continued practice of the Department of the Interior in construing statutes which refer only to Indian "allottees," *or Indian* "allotments," as applicable also to Indians claiming under the homestead laws, must be considered as "equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress." *United States* v. *Midwest* Oil Co.. 236 U. S. 459, 481. (Pp. 196–197.)

B. TIMBER

Section 406 of title 25 of the United States Code provides: [82]

> The timber on any Indian allotment held under a trust or other patent containing restrictions on alienations may be sold by the allottee. with the consent of the Secretary of the Interior, and the proceeds thereof shall be paid to

[78] See Chapter 5. sec. 11B. The inability of incompetent Indians to alienate land has been discussed in Chapter 8. sec. 8B(1).

[79] The effect of bankruptcy of *an* allottee is discussed in Chapter 8 sec. 7C.

A deed is not executed until delivered: hence. until the Secretary has removed the restrictions upon alienation of allotted lands effective upon the executing of a deed by an allottee, a deed signed by the allottee and given to an Indian superintendent for transmission to a purchaser does not pass title and is subject to cancellation by the Secretary since the execution of a deed had not been completed by delivery. *United States* v. *Lane*, 258 Fed. 520 (App. D. C. 1919).

An order of the Secretary of the Interior approving an Indian agent's recommendation that restrictions on alienation be removed from an allotment to be effective thirty days from date would become effective on the thirtieth day after its date and the allottee is enabled to mak a valid conveyance on that date. *Lanham* v. *McKeel*, 244 U. S. 582 (1917).

Also see *Taylor* v. Drown. 147 U. S. 640 (1893): *Nixon* v. *Woodcock*, *Conolly*. 163 U. S. 56 (1896).

[80] 129 Okla. 251. 264 Pac. 611 (1928).

[81] *United States* v. *Jackson*. 280 U. S. 183 (1930) : also see *Wiggan* v.

[82] Derived from Act of June 25. 1910. sec. 8. 36 Stat. 855. 857. For regulations regarding timber, see 25 (3. F. R. 61.1–61.29.

the allottee or disposed of for his benefit under regulations to be Prescribed by the Secretary of the Interior.

The rights of an ailottek to sell *timber* on his allotment without administrative approval had been determined by the Supreme Court a few years before the enactment of this provision. The Court in the first case held that the restrictions on aiienation dld not preclude a sale by the allottee of timber of land which was capable of cultivation after the cutting of the timber. The Court said: [84]

> * * * it hardly needs to be said that the ~allotments were intended to be of some use and benefit to the Indians. And, it will be. observed, that on that use there is no restraint whatever. A restraint, however, is deduced from the provision against alienation, the supervision to which, it is asserted, the Indians are subject and the character of their title. It is contended that the right of the Indians is that of. occupation only, and that the. measure of power over the timber on their allotments is expressed in UtrCted *States* v. *Cook*, 19 Wall. 592. We do not regard that case as controlling. The ultimate conclusion of the court was determined by the limited right. which the Indians had in the lands from which the timber there in controversy was cut.
>
> Certain parties of the Oneida Indians ceded to the United States all the lands' set apart to them, except a tract containing one hundred acres. for each individual, or in all about 65,000 acres, which they reserved to themselves, to *be held as other Indian lands are* held. Some of the lands were held in severalty by individuals of the tribe with the consent of the tribe, but the timber sued for was cut by a small number of the tribe from a part of the reservation not occupied in severalty. It was held, citing *Johnson v. McIntosh*, 8 Wheat 574. that the right of the Indians in the land from which the logs were taken was that of occupancy only. Necessarily the timber when cut "became the property of the United States absolutely, discharged of any rights of the Indians therein." It was hence concluded "the cutting was waste, and, in accordance with well-settled principles, the owner of the fee may seize the timber cut, arrest it by replevin, or proceed in trover for its conversion." If such were the title in the case at bar, such would be the conclusions. But such is not the title. We need not, however, exactly define it. It is certainly more than a right of mere occupation. The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple. *Schly* v. *Clark*, 118 U. S. 250. The title is held by the United States, it is true, but it is held "in trust for individuals and their heirs to whom the same were allotted." The considerations, therefore, which determined the decision in *United States* v. *Cook* do not exist The land is not the land of the United States, and the timber when cut did not become the property of the United States. And we cannot extend the restraint upon the alienation of the land to a restraint upon the sale of the timber consistently with a proper and beneficial use of the land by the Indians, a use which can in no way affect any interest of the United States. It was recognized in *United States* v *Clark* that "in theory, at least," that land might be "better and more valuable with the timber off than with it on." Indeed, it may be said that arable land is of no use until the timber is off, and it was of arable land that the treaty contemplated the allotments would be made. We encounter difficulties and baffilling inquiries when we concede a cutting for clearing the land for cultivation, and deny it for other purpose. At what time shall we date the preparation for cultivation and make the right to sell the timber depend? Must the axe immediately precede the plow and do no more than keep out of its way? And if that close relation be not always maintained, may the purpose of an allottee be questioned and referred to some advantage other than the cultivation of the land, and his title or that of his vendee to the timber be denied? Nor does the argument which makes the occupation of the land a test of the title to the timber seem to us more adequate to justify the qualification of the Indians' rights. It is based upon the necessity of superintending the weakness of the Indians and protecting them from imposition. The argument proves too much. If the provision against alienation of the land be extended to timber cut for Purposes other than the cultivation of the land it would extend to timber cut for the purpose of cultivation. What is. there in the latter purpose to protect from, imposition that there is not in the other? Shall we say such evil was contemplated and considered as counterbalanced by benefit? And what was the benefit? The allotments, as we have said, were to be of arable lands useless, may be, certainly improved by being clear. of their timber, and Yet, it is insisted, that this improvement may not be made, though it have the additional- inducement of providing means for the support of the Indians and their families. We are unable to assent to this view. (Pp. 472–474.)

The Supreme Court held in *Starr v. Campbell* [84] that where the allotment is all timber and nonarable land the restriction upon alienation extended to timber. The Court said:

> The restriction upon alienation, however, it is contended, does not extend to the timber. and *United States* v. *Paine Lumber* Co., 206 U. S. 467, is adduced as conclusive of this. We do not think so. There, as said by the Solicitor General, the land granted was arable, and could be of no use until the timber was cut ; here the land granted is all timber land. And that the distinction is important to observe is illustrated by the allegations of the complaint. It is alleged that the value of the land, exclusive of the timber, is no more than $1,000; fifteen thousand dollars' worth of lumber has been cut from the land. The restraint upon alienation would be reduced to small consequence if it be confined to one-sixteenth of the value of the land and fifteen-sixteenths left to the unrestrained or unqualified disposition of the Indian. Such is not the legal effect of the patent. (P. 534.)

C. EXCHANGE OF ALLOTTED LANDS

The Act of October 19, 1888, [85] authorized the Secretary of the Interior in his discretion and when deemed for the best interest of the Indians to permit any Indian to whom a patent was issued for land on a reservation to surrender such patent and authorizes the Secretary to cancel such patent provided that the Indian shall make a lieu selection of other land and receive a patent for it under the General Allotment Act. This provision was interpreted by the Circuit Court of Appeals in *United States v. Getzelman*, as follows: [86]

> The plain language of the statute indicates that it is intended to effect a change in allotments; that is, to acquire other and different land when that is deemed for the best interest of the Indians. And that conclusion finds support in the history of the act. It originated in the

[84] *United States* v. *Paine Lumber Co., 206* U. S. 467 (1907).

[84] 208 U. 5. 527 (1908).

However, an Indian allottee under the General Allotment Act may remove and sell dead timber, standing or fallen from his allotment. The Attorney General said in 19 Op. A. G. 559 (1890):

> The effect of the allotment and declaration of trust are to place the allottee in possession of the land allotted and give him a qualified ownership therein, and the extent to which the allottee is thus restricted as a proprietor remains now to be considered, insofar as necessary to answer the questions submitted.
>
> (1) And first as to timber : In au opinion of Attorney-General Garland dated January 26. 1889, it was held to be waste for an allottee to cut timber standing on his allotment for the direct purpose of selling it, by which I understand him to mean timber that is live and growing. The question before me. however, namely. whether the allottee has the right to sell and remove from his allotment *dead* timber, standing or fallen, is essentially different from that passed upon by my predecessor, and as I have reached the conclusion that appropriating and selling dead timber of any kind is not waste at common law or by the law of Wisconsin, within the limits of which State the timber in question is situated, it is not necessary to reexamine the question whether an allottee is impeachable for waste. (P. 562.)

In this opinion the Attorney General also held that an Indian cannot contract for or permit the erection of mills on. his allotment for the manufacture of lumber or other purposes.

On construction of the word "land" in statutes restricting alienation, see *Holmes* v. United States. 53 F. 2d 960 (C. C. A. 10. 1931).

[85] Sec. 2. 25 Stat. 611, 25 U. S. C. 350.

[86] 89 F. 2d 531 (C. C. A. 10, 1937). cert. den. 302 U. S. 708.

Department of the Interior. The Secretary wrote the President pro tempore of the Senate on June 7. 1888, transmitting a proposed draft of a resolution. The letter recited that four members of the Sisseton and Wahpeton Indians on the Lake Traverse Reservation, in South Dakota, who had obtained allotments under the General Allotment Act, desired to make changes because it had been discovered that in three of these cases the lands allotted were not the lands on which the allottees lived and had made improvements, and in the fourth case the land allotted was not desirable farm land; that steps had been taken to effect relinquishment and new allotments; and that on further investigation it was found that no statutory authority existed for action of that kind. It was further stated that similar cases would likely arise on other reservations; and that for such reason the proposed resolution had been prepared and was transmitted with recommendation that it be passed. The proposed legislation was amended in form from a resolution to an act, and enacted into law. It thus clearly appears that the contemplated object, purpose, and function of the act is to enable an Indian allottee to whom a patent has been issued to make relinquishment and secure other and different land in lieu thereof. It was never intended as a means through which an agreement of the kind outlined in the bill before us could be achieved. The relinquishment of the patent was not for the purpose of enabling John to acquire other and different land more suited. and better adapted to his uses and purposes. It was not intended to enable Mary to relinquish the remaining 80 acres of her original allotment and acquire a new allotment for other and different land in lieu of it. The purpose was to enable John to convey 80 acres of his remaining land, to acquire a new patent for the other 80 acres which he already owned, and to receive the $625 from Cbapman to be used in making improvements on his remaining 80-acre tract; and further to enable Mary to part with the last 80 acres of her original allotment by conveying it to Chapman and at the same time to acquire 80 acres of the land originally allotted to John. A transaction of that kind falls well outside the intended scope. purpose, and function of the act permitting relinquishment and lieu allotments. In the absence of express authority granted by statute, the Secretary has no power to cancel a Patent which has been regularly issued and delivered. See *Ballinger* v. *United States ex rel.* Frost, 216 U. S. 240, 30 S. Ct. 338. 54 L. Ed. 464; United *States* v. *Dowden* (C. C. A.) 220 F. 277. Measured by the doctrine announced in these cases. It is manifest that the Secretary was without power to cancel the patent for the purpose of accomplishing the unauthorized end. (P. 535.)

The restriction on alienation of allotted lands was held not to prohibit an allottee Indian from selling his improvements to the United States and selecting other lands so that the United States could use the lands for irrigation purposes. The Supreme Court in *Henkel* v. United States[87] explained :

> The Circuit Court of Appeals in its decision laid emphasis upon the case of *Williams v. First National. Bank.* 216 U. S. 582, in which this court recognized the right of one Indian to surrender and relinquish to another Indian a preference right to an allotment of a tract of land In that case it was held that one Indian might sell his improvements and holdings to another Indian for allotment, and lay his own on other land which he might find vacant, or which he might, in turn. purchase from another Indian. and the Circuit Court of Appeals held that. this being so. as a matter of course. and for stronger reasons. an Indian might relinquish his rights to the United States. and that restrictions had been placed upon the power of the Indians to alienate their lands or convey their rights of possession only for their protection. and not for the purpose of restricting their right to deal with the United States or to relinquish their rights to the Government. citing *Lykins* v. *McGrath*. 184 U. S. 169, and *Jones* v. *Mcehan*, 175 U. S. 1. Without questioning the correctness of this reasoning, we think the purpose of the United States to acquire any property necessary for the reclamation project embraced such transactions as the Secretary had in this case with the Indians, and the action which he took under the authority conferred by that act wholly justified all that was done in the premises.

The effect of the Wheeler-Howard Act on the exchange of allotted lands has been the subject of many administrative rulings.

On March 22, 1935,[88] the Solicitor of the Department of the Interior discussed as follows these features of the act:

> Section 1 of the act of June 18, 1934 (48 Stat. 984). declares that no land of any Indian reservation created or set apart by treaty or agreement with the Indians, act, of Congress, Executive Order, purchase or otherwise, shall be allotted in severalty to any Indian. It may be argued with some force that an exchange of a tract of tribal land for an individual allotment of equal value does not come within the class of transactions which this section of the act was designed to prevent. In such' case, the tribal land is not depleted. There is no new allotment as such-merely a change of an existing allotment However this may be, the authority to make an exchange of this sort appears to be conferred by section 4 of the act which, so far as material, reads:
>
> > "Except as herein provided, no • • • exchange • * * of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: • * * *Provided* * * * That the Secretary of the. Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of- equal value whenever such exchange. in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations."
>
> The exchanges authorized to be made under the foregoing section do not appear to be confined to lands in individual ownership. The main clause refers to "restricted Indian lands" and the proviso refers to "voluntary exchanges of lands of equal value." The terms so used are broad and when given their natural meaning they embrace both tribal and individually owned lands As I view the section, therefore. it operates to prevent the exchange of a tract of unallotted land for a tract in individual ownership unless the lands are of equal value, the exchange is voluntary and is not inconsistent with the proper consolidation of Indian lands. • * •

In a subsequent memorandum, dated February 3. 1937,[89] the Solicitor further stated:

> Section 4. as I read it, authorizes exchanges of lands of equal value. The parties to the exchange may be two individual Indians, an Indian and a white man, an Indian and an Indian tribe, or a white man and an Indian tribe. The requirement of equality of value is substantially complied with if the difference is so small that both parties are ready to disregard it. It is arguable that an exchange transaction involving a small cash payment to boot falls within the scope of section 4. I would suggest that 5 percent of the value of the land might be regarded as a safe margin within which the maxim, *de minimis non curat lex*, may operate. Where tracts of land are substantially unequal in value, an exchange transaction under section 4 is not authorized. However, where two parties wish to exchange tracts of land and are willing to put improvements on the less valuable tract to make it equal in value to the other tract, no objection can be raised to an exchange. The validity of this proposition is not affected by the question of which party makes the improvements, or whether the improved land goes to an Indian or a white man. In this situation no Indian loses any land, in point of value. The transaction is therefore consistent with the whole purpose of the Reorganization Act. In these cases the report from the field should show that the lands are of equal value and that the exchange is at least compatible with the proper consolidation of Indian lands.

[87] 237 U. S. 43. 51 (1915).

[88] Memo. Sol. I. D., March 22. 1935.

[89] Memo. Sol. I. D.. February 3. 1937.

Section 5 of the act, in my opinion; so far as it authorizes land exchanges has an entirely different purpose from section 4. Under section 5 the two tracts of land may be either equal or unequal in value; but if they are unequal in value it must be the Indians rather than the whites involved in the transaction who emerge from the transaction with an increased land value. Thus, an Indian may not convey $2,000 worth of land to. a white man where the white man transfers to the Secretary for the Indian's use a tract of land worth only $500 and a cash payment to boot of $1,500. On the other hand, an Indian may transfer the lesser tract to a white man and make an additional payment of $1,500 in exchange for a transfer of the more valuable tract to the Secretary for the benefit of the Indian. The difference between the two cases is not. technical or abstruse, In the one case the Indian is selling land; in the other case land is being bought for the Indian's benefit. The former is forbidden and the latter is authorized by the terms of the act. This distinction, based on the major purpose of the act, should eliminate some of the confusion that appears in certain memoranda on this subject in the attached file.

Where exchanges under section 5 affect only Indians it seems to me that. the same principles should be applied. Ordinary commercial transactions in land between Indians are not within the purpose of section 5. It seems to me that a transaction under which an Indian surrenders land does not come within, the true purpose of section 5 unless some special circumstances such as are mentioned in the land circular referred to above • are shown. I would suggest, therefore, that any recommendation for approval of a sale or surrender of Indian land under section 5 should be based upon a finding supported by facts that the result of the transaction will be to bring more land into effective Indian use.

• Indian Office Land Circular No.. 3162. June 30, 1936.

Familiar cases in which such exchanges may advantageously be made are cases involving the exchange of inherited interests, and eases involving the transfer of a more valuable tract of laud by a nonresident Indian in exchange for a less valuable tract and a money payment by a resident Indian able to use the newly acquired land.

Without attempting to analyze every possible transaction, I believe that such cases as the attached will be dealt with more expeditiously in the future if it is borne in mind that section 5 contemplates a land acquisition program looking to general improvement in the land status of the Indians and that section 4 contemplates private transactions which do not interfere with that program.

D. MORTGAGES

Mortgages of restricted lands are also prohibited. The court in *United States v. First Nat. Bank of Yakima, Wash.* said :[90]

> The crops growing upon an Indian allotment are a part of. the land and are held in trust by the government the same as the. allotment itself, at least until the crops are severed from the land. The use and occupancy of these lands by the Indians, together with the crops grown thereon. are a part of the means which the government has employed to carry out its policy of protection, and I am satisfied that a mortgage of any of these means by the Indian, without the consent of the government, is necessarily null and void. If the lien is valid, it carries with it all the incidents of a valid lien. including the right to appoint a receiver to take charge of and garner the crops, if necessary, and the right to send an officer upon the allotment armed. with process to seize and sell the crops without the consent and even over the protest of the government and its agents. That this cannot be done does not, in my opinion, admit of question (P. 332)

E. JUDGMENTS

The Supreme Court in *Mullen* v. *Simmons*,[91] in holding that restricted lands could not be encumbered by judgments entered against an allottee, whether based on tort or contract, said:

> The section referred to is as follows: "Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt or obligation of any character contracted prior to the time at which said land may be alienated under this Act, nor shall said lands be sold except as herein provided." c. 1362, 32 Stat, 641, 642.
>
> The Supreme Court of Oklahoma in deciding that this provision did not apply distinguished between the obligations resulting from an Indian's wrongful conduct and the obligations resulting from his contracts, saying, p. 187, "A judgment in damages for tort is not a 'debt contracted'" within the contemplation of § 15. In other words, the court was of the view that the tort retained its identity, though merged in the judgment. However, we need not enter into the controversy of the cases and the books as to whether a judgment is a contract. Passing such considerations, and regarding the policy. of § 15 and its language, we are unable to concur with the Supreme Court of Oklahoma.
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> This court said, in *Starr* v. *Long Jim*, 227 U. S. 613, 625, that the title to lands allotted to Indians was "retained by the United States for reasons of public policy. and in order to protect the Indians against their own improvidence." It was held, applying the principle, that a warranty deed made by Long Jim at a time when he did not have the power of alienation "was in the very teeth of the policy of the law, and could not operate as a conveyance, either by its primary force or by way of estoppel" after he had received a patent for the land.
>
> The principle was applied again in *Franklin* v. *Lynch*, 233 U. S. 269, and its strict character enforced against the deed of a white woman who acquired title in an Indian right. It is true,- in these cases the act of the Indian was voluntary or contractual, and, it is contended. a different effect can be ascribed to the wrongs done by an Indian and that in reparation or retribution of them the state law may subject his inalienable lands-inalienable by the National law-to alienation. The consequence of the contention repels its acceptance. Torts are of variable degree. In the present case that couuted on reached, perhaps, the degree of a crime, but a tort may be a breach of a mere legal duty, a consequence of negligent conduct. The policy of the law is, as we have said, to protect the Indians against their improvidence, and improvidence may affect all of their acts, those of commission and omission, contracts and torts. And we think § 15 of the act of July 1, 1902, was purposely made broadly protective, broadly preclusive of alienation by any conduct of the Indian, and not only its policy but its language distinguishes it from the statute passed on in *Brun* v. *Mann*, 151 Fed. Rep. 145. Its language is that "lands allotted * * * shall not be *affected* or encumbered by any deed. debt or *obligation* of any *character contracted* prior to the time at which" the lands may be alienated, "nor shall said lands be sold except" as in the act provided. The prohibition then is that the lands shall not be "affected * * * by any obligation of any character," and, as we have seen, an obligation may arise from a tort as well as from a contract, from a breach of duty or the violation of a right. *Exchange Bank v. Ford*, 7 Colorado, 314, 316. If this were not so, a prearranged tort and a judgment confessed would become an easy means of circumventing the policy of the law.

F. CONDEMNATION

Section 357 of title 25 of the United States Code, derived from the Act of March 3, 1901,[92] provides:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or

[90] 282 Fed. 330 (D. C. E. D. Wash., 1922). But see *Miller* v. McClain, 249 U. S. 308. 311 (1919).

[91] 234 U. S. 192, 197–199 (1914).

[92] 31 Stat. 1058. 1084. The preceding provision of this section relating to grants of rights-of-way for telephone and telegraph lines through Indian reservations are set forth under sec. 319 of title 25. Permission to state or local authorities for the opening of public highways through Indian reservations or lands allotted to Indians in severalty was authorized by sec. 4 of this act, 25 U. S. C. 311.

The United States is an indispensable party defendant in a condemnation proceeding brought by a state to acquire a right-of-way over lands which the United States owns and holds in trust for Indian allottees. *Minnesota* v. *United States*, 305 U. S. 382 (1939). For regulations regarding condemnation of allotted lands, see 26 C. F. R. 256.71–256.74.