If, as has been inferred, there be doubt as to the intention of Congress to give immunity from state taxation, it is recommended that legislation be secured expressly conferring the exemption. The states will not suffer from such a practice, for in return for the lost taxes on the purchased lands will be the subjection to the state taxing power of the relinquished lands, or of the funds used in making the new purchase.

Pending litigation should, of course, be pressed to a final conclusion with all possible speed in order that the existing uncertainty be ended. Should it transpire that these Indian lands are taxable, then the national government must fairly consider the nature of the duty to the ward of the guardian who has employed the ward's tax-exempt funds to purchase property on the express or implied misrepresentation that the newly-acquired property is likewise exempt. Several Indians have complained to the survey staff that they are, being taxed despite the formal assurance of Indian Service employees that the land purchased for them would be exempt from taxation.[67] (Pp.. 795–798.)

In the case of *Shaw* v. *Gibson-Zahniser Oil Corp.*,[68] lands outside a reservation purchased with restricted Indian funds and subject to a restraint against alienation were held subject to state property taxation. The court, however, recognized the fact that:

There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to, that taxation unless Congress speaks. (P. 581.)

Thereafter by the Act of June 20, 1936,[69] Congress expressly exempted such lands from, state taxation. In order that its purpose and meaning may be more fully understood, both section 1 and section 2 of the 1936 Act. are quoted in full:

That there is hereby authorized to be appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of $25,000, to be expended under such rules and regulations as. the Secretary of the Interior may prescribe, for payment of taxes, including penalties and Interest, assessed against individually owned Indian land the title to which is held subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of an Indian, where the Secretary finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be nontaxable, and for redemption or reacquisition of any such land heretofore or hereafter sold for nonpayment of taxes.

SEC. 2. All lands. the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress.

The 1937 amendment[70] to section 2 of the above act reads as follows:

All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: *Provided*, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior: *And provided further*, That the Indian owner Or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town, or city property, not exceeding in cost $5,000, to be designated as a homestead.

The 1936 Act was passed to establish the tax-exemption of the lands purchased with restricted funds under the guidance and direction of the Interior Department as tax-exempt lands. After the passage of the act it was found that section 2 had application to such a large quantity of lands that a bill was introduced in Congress for its repeal. This bill was, however, amended on the recommendation of the Senate Committee on Indian Affairs to provide for restricting the tax exemption to homesteads purchased with trust or restricted funds rather than for repealing the tax exemption entirely, and the bill was passed in this amended form. The report of the Senate Committee in which this recommendation was made contains the following pertinent statement of the purpose of the 1936 Act and the 1937 amendment:

The said act of June 20, 1936 (49 Stat. L. 1542) was designed to bring relief and reimbursement to Indians who by failure to pay taxes have lost or now are in danger of *losing lands* purchased for *them* under supervision, advice, and guidance of the Federal Government, which losses were not the 'fault of the Indians. but were purchased with the understanding and belief on their part and induced by representations of the Government that the lands be nontaxable after purchase. It was intended that *such lands would be redeemed out of the* fund of $25,000 authorized to be appropriated under the provisions of said act of June 20, 1936 (49 Stat. L. 1542).

Since the passage of said act of June 20, 1936 (49 Stat. L. 1542), it was found the provisions of section 2 thereof would apply to lands and other property purchased by restricted Indian funds, which would exempt from taxation vast quantities of property, such as business buildings, farm lands which are not homesteads, etc.

The Commissioner of Indian Affairs appeared before the committee and suggested the amendment herein proposed, which proposed amendment was adopted and herein recommended by your committee. (Senate Report No. 332. 75th Cong., 1st sess.)

In *United States* v. *Board of Com'rs.*,[71] the court, in construing these statutes, held that Congress had the power to define federal instrumentalities, and that the 1936 Act clearly applied to prevent taxation for 1936[72] of real estate, used far both residence and business purposes which was purchased with restricted funds of Osage Indians. The court said that the act applied to Indians in general, and was not made inapplicable to the Osages by reason of prior acts referring specifically to Osage homesteads.

In an unreported case, the same court applied these statutes to prevent taxation of homesteads purchased with trust funds held on deposit by the United States for Pawnee Indians in lieu of allotment.[73]

The further extent of the operation of these statutes is not known at the present time, but they express the clear intent of Congress to continue homesteads of Indians tax exempt, whether the homestead was purchased for the Indian or allotted to him.[74]

[67] The legislation referred to was finally enacted in 1936. Act of June 20. 1936. 49 Stat. 1542. Cf.. Act of June 30, 1932. 47 Stat. 474.

[68] 276 U. S. 575 (1928).

[69] 49 Stat. 1542. Upheld in *United States* v. *Board of Comm'rs*, 26 F. Supp. 270 (D. C. N. D. Okla. 1939).

[70] Act of May 19, 1937. 50 stat. 188.

[71] 26 F. Supp. 270 (D. C. N. D. Okla. 1939) (Osage County). The court followed the view expressed in 56 I. D. 48 (1937) as to the applicability of the 1936 act to the Osages.

[72] The court held that the act was in force at the date of levy which was the critical date.

[73] *United States* v. *Board of County Com'rs. of* Pawnee *County, Okla.* (D. C. N. D. Okla., January 19, 1939). Justice File No. 90–2–11–610.

[74] For a discussion of questions of tax exemption *not* yet passed upon by the courts, see Op. Sol. I. D., M.29867 (1939). And *cf.* letter of Attorney General dated October 6, 1939, declining to pass upon cases therein discussed.

SECTION 4. STATE TAXATION OF PERSONAL PROPERTY

Wherever personal property is acquired by or for tribal Indians for use on Indian reservation lands in connection with or in furtherance of the policy adopted by the Government in encouraging the Indians to cultivate the soil and to establish permanent homes and families, or otherwise aid in their economic rehabilitattoo, such property may not be taxed by the state.[75] The immunity exists whether the property be purchased with moneys held in trust by the United States for the Indians or with moneys accruing to the Indians from other federal sources. The reason behind this doctrine of immunity is that the state has no power, by taxation or otherwise, to retard, impede, burden, or control the operations or instrumentalities employed by the Federal Government in carrying into execution the powers lawfully vested in it.

In *United States v. Thurston County*[76] the Circuit Court of Appeals for the Eighth Circuit ruled that the proceeds of the sales of allotted lands held in trust by the United States were exempt from state taxation for the reason that the proceeds like the lands from which they were derived constituted an instrumentality lawfully employed by the Government in the exercise of its powers to protect, support and instruct the Indians. The court said, among other things:

> The allotted lands were held in trust by the United States for the benefit of those to whom they were assigned, and their heirs, under the acts of August 7, 1882, and February 8, 1887. The proceeds of the sales of these lands have been lawfully substituted for the lands themselves by the trustee The substitutes partake of the nature of the originals and stand charged with the same trust. The lands and their proceeds, so long as they are held or controlled by the United States and the term of the trust has not expired, are alike instrumentalities employed by it in the lawful exercise of its powers of government to protect, support, and instruct the Indians, for whose benefit the complainant holds them, and they are not subject to taxation by any state or county. (P. 292.)

The doctrine of the foregoing case was approved in *United States v. Pearson*,[77] a case involving issue property, that is, property issued to the Indians by the Federal Government. Immunity from state taxation was there extended to personal property which could be traced and identified as issue property, the increase of issue property, property purchased with the proceeds of the sale of issue property, property purchased with the proceeds of the sale of the increase of issue property, property for which similar issue property has been exchanged for similar use, the increase of property received in such exchange, the increase of issue property exchanged for similar property for similar use, and property purchased with money given to the Indians by the United States.

To the same general effect is *United States v. Dewey County*[78] and *United States v. Rickert*.[79] In the case last cited the court held that personal property consisting of horses, cattle, and other property issued by the United States to the Indians and used by them on their allotments was not subject to assessment and taxation by the state.

For the same reason that property purchased by Indians with restricted funds and property issued to the Indians by the Government are Government instrumentalities, property purchased by the Indians pursuant to a specific plan for economic rehabilitation approved by the Government and carried out under Government supervision should likewise be recognized as a Government instrumentality. As said by the Solicitor of the Interior Department:[80]

> The purchase of property by the Indians themselves in accordance with an economic plan worked out with the Government is supplanting, as a method of assuring the possession by Indians of productive property, the old method of the Government's issuing such property to the Indians. From a legal viewpoint the purpose and concern of the Government are identical whether the plow or the cattle are bought by the Indian with Individual Indian Moneys, the expenditure of which has been approved by the Superintendent, or bought by the Indians with revolving loan funds or judgment fund money, pursuant to a plan of rehabilitation approved by the Superintendent, or bought by the Superintendent with gratuity funds and issued to the Indians. The reasoning of the courts applies equally to these procedures, except that in the cases above cited the Government had an ownership interest as the title to the property was found to be in the United States. The form of title, while indicative of the interest of the Government, is not, in my opinion, the determining factor. The important factor is the acquisition and use of the property in execution of a government plan for the Indians.

There are apparently no cases determining the right of the state to tax personal property of an Indian on a reservation which is not used pursuant to some federal plan. Apparently no state has attempted to collect such a tax. The doctrine that Indians on a reservation are not subject to state law in the absence of congressional authority[81] would indicate that any such tax would be invalid.

On the other hand, personalty issued to an Indian by the Federal Government and used by him outside the reservation is taxable by the state.[82]

Personalty owned by non-Indians but held on an Indian reservation is subject to state taxation.[83] This is true even though the personalty belongs to a Catholic mission situated do an Indian reservation and devoting both the personalty and the proceeds therefrom to the welfare of the Indians. In so deciding the Supreme Court declared:[84]

> Taking the complaint as it is, it shows on its face that the Indians have neither any legal nor equitable title to the property, neither have they any legal or equitable right to its beneficial use, and it also appears from the complaint that the property is owned unconditionally and absolutely by the plaintiff. The plaintiff, as the owner of these cattle, may, at any time, abandon its present manner of using them and may devote them, or any income arising from their ownership, to any other purpose it may choose, and the Indians would have no legal right of complaint. The plaintiff might refuse to spend another dollar upon the Indians upon these reservations, and refuse to further maintain or aid them in any way whatever, and no right of the Indians would be thereby violated, nor could they call upon the courts to enforce the application of the plaintiff's property, or the income thereof, to the same purposes the plaintiff had theretofore applied them. There is noth-

[75] This immunity extends to the personalty of a half-blood Itldian adopted Into a tribe, United *States v. Heyfron*, 138 Fed. 964 (C. C. hfont. 1905), and in fact to the personalty of any recognized member of an Indian tribe. *United States v. Higgins*, 103 Fed. 348 (C. C. Mont. 1900). But cf. *United States v. Higgins*, 110 Fed. 609 (C. C. Mont. 1901).

[76] 143 Fed. 287 (C. C. A. 8. 1906).

[77] 231 Fed. 270 (D C. S Dak 1916)

[78] 14 F. 2d 784 (D. C. S. Dak. 1926), aff'd. sub nom. *Dewey* County v. *United States*, 26 F. 2d 434 (C. C. A. 8. 1928), cert. den. 278 U. S. 649.

[79] 188 U. S. 432 (1903). And see *McKnight v. United States*, 130 Fed. 659 (C. C. A. 9. 1904).

[80] Op. Sol. I. D. M 30449. May 8, 1940.

[81] See Chapter 6

[82] *United States v. Porter*, 22 F 2d 365 (C C A 9. 1927).

[83] *Thomas v. Gay*, 169 U S. 264 (1898); *Wagoner v. Evans*, 170 U. S. 588 (1898); *Catholic Missions v. Missoula County*, 200 U. S. 118 (1906); *Truscott v. Hurlbut Land & Cattle* Co 73 Fed 60 (C. C. A. 9. 1896), app. dism. sub nom *Hurlbut Land & Cattle* Co v. *Truscott*, 165 U. S. 719 (1897).

[84] *Catholic Missions v. Missoula County*, 200 U. S. 118 (1906).

ing in *Mormon Church* v. United *States*, 136 U. S. 1, which in the remotest degree applies to this case. This court has heretofore determined that the Indians' interest in this kind of property, situated on their reservations, was not sufficient to exempt such property, when owned by private individuals, from taxation. *Thomas v. Gay*, 169 U. S. 264; *Wagoner* v. *Evans*, 170 U. S. 588. In the first of above-cited cases the right to graze over the reservation was leased by the Indians to the owners of the cattle, and it was alleged that if the cattle were taxed the value of the lands would be reduced, because the owners of the cattle would not pay as much for the right to graze as they would if their cattle were not subjected to taxation, and that therefore the tax was, in effect and substance, upon the land. This court held that the tax put upon the cattle of the lessees was too remote and indirect to be deemed a tax upon the lands or privileges of the Indians, citing *Erie Railroad* v. *Pennsylvania*, 158 U. S. 431, and other cases, as authority for the decision. This is reaffirmed in the second case above cited. In this case the Indians have not even given a lease, and the owners are not obliged to pay anything for the privilege of grazing, and may, as we have said, devote the property, or the income thereof, to purposes wholly foreign to the Indians themselves. However meritorious the conduct of the owners of the cattle may be, in devoting the income or any portion of the principal of their property to the charitable work of improving and educating the Indians (and we cordially admit the merit of such conduct), we cannot see that there is, on that account, the least claim for exemption from taxation because of any Federal provision, constitutional or otherwise. (Pp. 128–129.)

SECTION 5. STATE SALES TAXES

The question of the extent to which Indians and persons trading with Indians are subject to state sales taxes has been treated in a recent opinion of the Solicitor of the Interior Department.[85] Though the questions treated arose under Arizona statutes, the problem they present is a general one and the Arizona statutes involved are not dissimilar in substance from the sales tax laws of other states. For this reason the following copious quotations from the opinion serve to illuminate the entire subject:

> There are two Arizona statutes particularly involved, each of which is illustrative of a type of sales tax law. The Excise Revenue Act *of* 1935, Chapter 77, Laws Regular Session 1935, as amended by Chapter 2, Laws of First Special Session 1937, places an annual privilege tax on the business of selling at retail measured by the gross proceeds or the gross income from the business. Provision is made by the law fur the use of tokens -by-purchasers to reimburse the dealers for the tax applicable to any sale. The other statute in -question, Chapter 78, Laws Regular Session 1935, as amended in 1936, 1937, and 1939, places a tax on certain designated luxuries to be paid by stamps to be affixed to the articles by the dealers. Both statutes contain, as a method of enforcement, the requirement that all dealers shall take out State licenses. Both statutes provide for an exemption from the tax of businesses and transactions not subject to tax under the United States Constitution, and provide for refund to the dealer of the tax paid by him when proof is made that the transactions and articles taxed were not subject to tax under the law. In both statutes the tax is, on its face a tax to be paid by dealers, whether wholesalers or retailers, and to be enforced against them, although both acts contemplate that the amount of the tax shall be added to the price paid by, the consumer.
>
> 1. *Application of State taxes to persons trading with Indians.*
>
> The question of the application of these taxes to persons trading with Indians is subject to different answers depending upon the location of the trade and upon whether the traders or the persons dealt with are Indians. The regulation of trade with Indian tribes is one of the powers expressly delegated to Congress by section 8 of Article I of the United States Constitution. Congress has exercised this power in statutes restricting trade with the Indians and giving exclusive authority to the Commissioner of Indian Affairs to regulate such trade and the prices at which goods shall be sold to the Indians. (Sections 261 through 266, Title 25 of the United States Code.) These statutes, by their terms or by judicial construction, are limited in their application to Indian reservations. *United States* v. *Taylor*, 44 F. (2d) 537 (C. C. A. 9th. 1930), cert. den. 283 U. S. 820; Rider v. *La Clair*, 77 Wash. *488*, 138 Pac. *3; United States v. Certain Property*, 25 Pac. 517 (Ariz. 1871). Congress has not exercised its power to regulate trade with the Indians in so far as trade off the reservation is concerned except in the case of traffic in liquor.
>
> (a) Where Congress has exercised its authority it is axiomatic that the field is closed to State action. *Sperry Oil and Gas Co. v. Chisholm*, 264 U. S. 488. Therefore, persons selling to or buying from Indians on Indian reservations are not subject to State laws which regulate *or* tax such transactions. However, it should be emphasized that it is trade with the Indians which is removed from State interference and not the trader himself, if the trader is a white person and is dealing with other white persons, even though such transactions occur on a reservation.
>
> The Supreme Court has repeatedly permitted the taxation by the State of the property of white persons located on Indian reservations on the theory that such taxation did not interfere with the exercise of Federal authority within the reservation. *Thomas* v. *Gay*, 169 U. S. 264; *Wagoner* v. *Evans*, 170 U. S. *588: Catholic Missions* v. *Missoula County*, 200 U. S. 118. This principle has been carried by the State courts to the extent of permitting State taxation of the property of Indian traders, including their stock in trade. *Moore* v. *Beason*, 7 Wyo. 292, 51 Pac. 875; *Costier* v. *McMillan*, 22 Mont. 484, 56 Pac. 965; *Noble* v. *Amoretti*, 71 Pac. 879 (Wyo. 1903). In the review of the relationship between the Federal Government and the State government on an Indian reservation, in *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, the Supreme Court stated that the jurisdiction of the State over the reservation is full and complete save as to the Indians and their property.
>
> In view of this jurisdiction of the State I held in my memorandum to the Commissioner of Indian Affairs of February 4, 1938, that white traders in their dealings with non-Indians must comply with the State laws, including those imposing sales taxes. I believe this ruling was correct. Traders on Indian reservations who are non-Indians are, in my opinion, required to take out licenses under the Arizona laws in question to carry on trade with non-Indians on the reservation, and must account to the State authorities for sales taxes on so much of their business as is done with non-Indians.[86] They are not required to account to the State authorities for their transactions with Indians on the reservations, but are, if they do deal with the Indians, required to conform with the licensing provisions in the Federal statutes regulating trade with Indians. Traders who are themselves Indians are not subject to the State laws whether they deal with Indians or non-Indians.
>
> (b) Where traders are not located on Indian reservations they are, in my opinion, responsible for the State taxes and subject to license whether or not they are Indians and whether or not they deal with Indians. Since

[85] Op. Sol. L D., M.30449, May 8, 1940.

[86] The position of the Solicitor in this connection has been substantiated by the recent case of *Neah Bay Fish Co.* v. *Krummet*, 101 P. 2d 600 (Wash. 1940). The court there held that the State of Washington may levy a sales tax upon a company conducting business solely within the Indian reservation under a license from the Commissioner of Indian Affairs and the tribe, for sales made to persons other than Indians.

Congress has not attempted to regulate such trade and since such trade has been carried on subject to State laws for a long number of years, there is no ground for exemption of such trade in the absence of congressional authority, except in the special types of Indian purchases discussed in part 2 (b) of this opinion.

2. *Application of State taxes to sales to Indians.*

This subject falls into two parts—sales to, Indians on the reservation and sales to Indians off the reservation.

(a) The preceding part of this opinion. demonstrates that sales to Indians on the reservation are not subject to State taxation and Indian purchasers are not required to pay the additional cost which is' added to the price of the article to cover the tax. Such additions to the price of articles by State action are clearly interferences with the authority of the Commissioner of Indian Affairs to regulate the prices at which goods shall he sold to the Indians.

(b) The preceding part of this opinion likewise demonstrates that when Indians purchase goods off the reservation they are not exempt from sales taxes on the ground of State. interference with Federal regulation of Indian trade. However, certain purchases by Indians may be exempt on the ground that these purchases are instrumentalities of the Federal Government used to improve the economic conditions of its wards., Where this is the case, the purchase may be considered not subject to State taxation under the principle that the State, through the use of its taxing power, cannot hinder or interfere with an instrumentality of the Federal Government.

After noting the fact that personal property purchased by Indians with restricted funds and property issued to the Indians by the Government are Government instrumentalities. and that property purchased by the Indians pursuant to a specific plan for economic rehabilitation approved by the Government and carried oat under Government supervision should likewise be recognized as a Government instrumentality. the opinion continues with a review of the authorities on the question of whether a state tax upon the acquisition of such property places an unconstitutional burden upon a federal instrumentality and concludes :

> The Supreme Court has held that the application of a State tax on the selling of gasoline to sales of gasoline to the United States is-unconstitutional as placing a direct burden on the Federal Government- *Panhandle Oil* Co. *v. Mississippi*, 277 U. S. 218; *Graves v. Texas Co.*, 298 U. S 393. However. in *James* v. *Draw Contracting Co.*, 302 U. S. 313, the Supreme Court said that the *Panhandle* and *Graves* cases had been distinguished and should be limited to their particular facts. In the James case a State tax on the gross proceeds of a contractor on Government work was held constitutional as having only an indirect effect on the Federal Government. That case is representative of the recent Supreme Court cases tending to restrict the tax immunity of agencies of Government where the burden on the Government was not clear and direct. *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376; *Helvering* v. *Gerhardt*, 304 U. S. 405.
>
> * * * *
>
> Although the law on the question is in a state of flux, the proper holding at the present time is, in my opinion, that where purchases are made either by the Indians themselves or by Government agents in carrying out a specific economic program for the Indians approved and supervised by the Federal Government, or where such purchases are made with restricted funds, the purchases are not subject to-the State sales taxes even though they are made off the reservation.

SUMMARY

1. Persons trading with the Indians on Indian reservations are not subject to the Arizona sales tax laws. However, where such traders are non-Indians, they are subject to the sales tax laws on so much of their business as is carried on with other non-Indians. Traders off an Indian reservation are subject to the State sales tax laws whether or not they are Indians or dealing with Indians..

2. Purchases made by Indians on Indian reservations are not subject to the Arizona sales taxes nor are purchases made by Indians or Government agents off the reservation where they are made with restricted funds or in carrying out a specific program for. the economic rehabllitation of the Indians approved and supervised by the Federal Government.

In another recent opinion of the Solicitor of the Interior Department[87] the application of certain state taxes to sales of tobacco and gasoline to the Menominee Indian Mills was considered. The state taxes in question were : (1) the State excise tax on the sales of gasoline, levied under chapter 78 of the Wisconsin Statutes of 1937; and (2) the State occupational tax on the sale of tobacco products, levied under chapters 443 and 518 of the Laws of Wisconsin, 1939.

After a searching analysis of the problems presented, the Solicitor made a twofold finding, to wit:

1. State gasoline sales taxes (a) do not apply to sales of gasoline to the Menominee Indian Mills for use in the operation of the mills, but (*b*) do apply to sales *of* gasoline to the mills for resale through the commissary of the mills to employees and the general public. This latter ruling was occasioned by the fact that title IV of the Internal Revenue Act of 1932 and the regulations issued thereunder exempted from the operation of the tax only gasoline sold "for the exclusive use of the United States."

2. The state tax on the selling of tobacco products does not apply to the selling of such products by the commissary of the Menominee Indian Mills to employees and the general public.

[87] Op. Sol. I. D., M.30544, May 31, 1940.

SECTION 6. STATE INHERITANCE TAXES

There appears to be meager authority on the question of the liability of an Indian's estate to the payment of state inheritance taxes. The only case to reach the Supreme Court involved allotted lands of a restricted full-blood Quapaw Indian which had been declared inalienable for a period of 25 years by the Act of March 2, 1895.[88] By the Act of June 25, 1910,[89] the Secretary of the Interior was directed to determine the heirs of deceased allottees according to state statutes of descent. According to the state statute the land herein involved descended to two full-blood Quapaws. The state auditor of Oklahoma attempted to subject the lands to the state inheritance tax. Upon appeal the Supreme Court declared :[90]

> Apparently appellant supposed that the lands passed to the heirs by virtue of the laws of the State and were subject to the inheritance taxes which she laid. He accordingly demanded the payment of appellees and threatened enforcement by summary process and sale of the lands. The court below held that the State had no right to demand the taxes and restrained appellant from attempting to collect them.
>
> The duty of the Secretary of the Interior to determine the heirs according to the State law of descent is not questioned. Congress provided that the lands should de-

[88] 28 Stat. 876; [89] 36 Stat. 855

[90] *Childers* v. *Beaver*, 270 U. S. 555 (1926).

scend and directed how the heirs should be ascertained. It adopted the provisions of the Oklahoma statute as an expression of its own will-the laws of Missouri or Kansas, or any other State, might have been accepted. The lands really passed under a law of the United States, and nut by 'Oklahoma's permission.

It must be accepted as established that during the trust or restricted period Congress has power to control lands within a State which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people; and the means or instrumentalities utilized therein cannot be subjected to taxation by the State without assent of the federal government. (P. 559.)

SECTION 7. FEDERAL TAXATION

A. SOURCES OF LIMITATIONS

While the tax which was declared invalid in Choate *v. Trapp* [91] was payable to the State of Oklahoma, the question to which the Supreme Court addressed its primary attention in that case was the validity of the congressional enactment which purportedly subjected the land to state taxation. In holding that Congress had no *power* to subject the land to taxation after agreeing, in exchange for a valuable consideration, that the land should be tax-exempt, the Supreme Court enunciated and went far to support a rule which would lay limits upon federal taxation as well as upon state taxation. Thus if, in circumstances similar to those exemplified in *Choate v. Trapp,* the Federal Government, pursuant to an agreement with an Indian tribe, issues a trust patent promising clear title to the patentee after a fixed period, it seems probable that any attempt, for example, to impose a federal inheritance tax upon such land would be held violative of the Fifth- Amendment.

Nevertheless, in the only Supreme Court case in which the constitutionality of a federal tax violating an agreement with an Indian tribe was considered, the case of *The Cherokee Tobacco,* [92] the Supreme Court held that the violation of a treaty provision by an act of Congress presented a purely political question which the courts were powerless to remedy. This doctrine would, of course, preclude the relief which the Supreme Court gave in *Choate v. Trapp.*

It seems clear, then, that the holding in *Choate v. Trapp* is inconsistent with the doctrine of *The Cherokee Tobacco.* and that the holding in that case is incompatible with the doctrine of *Choate v. Trapp.* The opinion in the later case does not attempt to distinguish the earlier case-does not even mention the earlier case. It is easy to make verbal distinctions, to say that *The Cherokee Case* involved a question of the plenary power of Congress over tribal affairs and that Choate *v. Trapp* involved individual property rights. But one might as easily say that plenary power of Congress over tribal affairs was involved in *Choate v. Trapp,* since all the legislation in that case dealt with tribes, and that the individual rights of the Indian Elias Boudinot in *The Cherokee Tobacco,* which in fact Congress felt called upon to recognize and compensate 4 years after the Supreme Court decision,[93] were even more individual than the rights of the 8,000 plaintiff members of the Choctaw and Chickasaw tribes in *Choate v. Trapp.* To say that property rights existed in one ease and not in the other is to describe the result rather than to explain it or to aid in predicting future decisions.[94]

Whether the *Choate* case overruled the case of *The Cherokee Tobacco, sub silentio,* or whether the doctrine of the earlier case is to prevail outside the narrow fact situation presented in the *Choate* case, the future will determine. Some support is given to the former hypothesis by the consideration that the decision of the Supreme Court in *Choate* v. *Trapp* was unanimous, while that in *The Cherokee Tobacco* was a four-to-two decision with three members of the court not hearing argument.[95]

In recent years Congress has occasionally made certain that no claim to permanent tax exemption would arise, by specifying that designated Indian property should be "nontaxable until otherwise directed by Congress." [96]

B. FEDERAL INCOME TAXES

In considering federal taxation of Indian income, one finds the courts concerned not, as in the case of the state, with the question of whether the state may tax, but with the question of whether the Federal Government has intended to tax. Whether it has done so in a particular case depends on the construction accorded the taxing statute by the courts. The rule of construction most recently announced [97] is that the federal income tax law, applying as it does to the income of "every individual" and to income derived "from any source whatever," includes within its application Indians and their income unless they are by agreement or statute exempted.

It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom.[98] Accordingly, rents, royalties, and other income of Quapaw,[99] Otoe,[100] Otoe and Missouri,[101] and Ponca [102] Indians have been held tax-exempt. Likewise, the income derived by individual Indians as their share in the oil or mineral deposits in tribal lands has been held tax-exempt.[103]

---

[91] 224 U. S. 665 (1912).

[92] 11 Wall. 616 (1870).

[93] Act of May 14. 1874 ; c. 173. 18 Stat. 549.

[94] Cf. F. S. Cohen. Transcendental Nonsense and the Functional Approach (1935) 35 Col. L. Rev. 809, 813-820.

[95] "The case of the Cherokee Tobacco Tax, 11 Wall. 616, cannot be treated as authority against the conclusion we have reached. The decision only disposed of that case, as three of the judges of the court did not sit in it and two dissented from the judgment pronounced by the other four." *United* States v. *Forty-Three Gallons of Whiskey,* 108 u. s. 491, 497-498 (1883).

[96] Act of June 20, 1936. sec. 2. 49 Stat. 1542, amended May 19, 1937. 50 Stat. 188, 25 U. S. C. 412a. No such limitation is found in various other statutes. *e. g.,* Act of June 18, 1934, sec. 5, 48 Stat. 984, 985. 25 U. S. C. 465.

[97] *Superintendent* v. *Commissioner of Internal Revenue,* 295 U. S. 418 (1935).

[98] *United States* v. *Homeratha,* 40 F. 2d 305 (D. C. W. D. Okla. 1930). app. dism. 49 F. 2d 1086 ; *Blackbird* v. *Commissioner of Internal Revenue,* 38 F. 2d 976 (C. C. A. 10, 1930) ; *Pitman* v. *Commissioner,* 64 F. 2d 740 (C. C. A. 10, 1933).

[99] T. D. 3754, c. B. IV–2, p. 37 ; G. C. M. 2056, c. B. VI–a, p. 65.

The following abbreviations, referring to Treasury Department rulings, are used in this and succeeding footnotes :

G. C. M.—General Counsel Memo.
C. B.—Cumulative Bulletin, Treasury Department.
B. T. A.—Board of Tax Appeals.
A. F. T. R.—American Federal Tax Reports.
S. M.—Solicitor's Memo.
T. D.—Treasury Decisions.

[100] G. C. M. 2715. C. B. VII–1, p. 56, revoked, however, in G. C. M. 6020. C. B. VIII-1. p. 63.

[101] *United States* v. *Homeratha,* 40 F. 2d 305 (D. C. W. D. Okla. 1930).

[102] S. M. 5632, C. B. V–1. p. 193.

[103] *Blackbird* v. *Commissioner of Internal Revenue,* 38 F. 2d 976 (C. C. A. 10. 1930).

Conversely, income which is derived from unrestricted lands has been held taxable,[104] and the Circuit Court of Appeals has held that upon the death of a restricted Creek allottee. his surplus allotment having been freed of restrictions by the Act of May 27. 1908,[105] the Income therefrom was taxable in the bands of .a noncompetent heir although income from the homestead which remained restricted was nontaxable.[106] It has been, held, too, by the United States Supreme Court[107] that where an Indian holds a certificate of competency the income paid to him as royalties from oil and gas leases is taxable. And the income of a Hopi Indian derived from his commercial business in trading with other Indians and from the sale of cattle given him by the Government is taxable.[108]

Though income derived directly from restricted allotted lands is exempt from federal income taxation, so-called reinvestment income is subject to such taxation.[109] The case of *Superintendent, Five* Civilized *Tribes* v. *Commissioner*,[110] involved the taxability of the income of a noncompetent Indian derived from the reinvestment of income from restricted allotted lands. The court there said that the taxation of the income from trust property of its Indian wards by the Federal Government, under federal revenue acts general in scope, is not so inconsistent with the relationship between the Government and its Indian wards that exemption is a necessary implication, and held that reinvestment income is clearly taxable under the federal revenue laws.[111]

It has been held that the income of a non-Indian lessee derived from a lease of restricted Indian lands is subject to the federal income tax.[112]

The courts in considering an Indian claim for refund of taxes erroneously paid, have looked upon an unrestricted Indian claimant as upon any other taxpayer. Thus au unrestricted Indian member of the Choctaw Tribe of Indians is not entitled to a refund of taxes erroneously paid upon income from tax-exempt lands where no claim for refund was filed until after the running of the statute of limitations.[113] But there is no limitation on refunds to restricted Indians if (1) a tax was assessed against their nontaxable income, and (2) such tax was paid by an Indian superintendent, or other such officer of the United States, out of funds in his possession belonging eventually to his ward.[114]

Provision has been made by public resolution [115] for the allowance of claims for refund of taxes erroneously or illegally collected from a duly enrolled member of an Indian tribe who received in pursuance of a tribal treaty or agreement with the United States an allotment of land which by the terms of said treaty or agreement was exempted from taxation, notwithstanding his failure to file a claim for refund within the time prescribed by law. A recent statute,[116] similar in nature to the foregoing resolution, has expressly stated that it is not the policy of the Government to invoke or plead the statute of limitations in order to escape its obligation to Its Indian wards.

C. OTHER FEDERALTAXES

By section 617 of title 4 of the Revenue Act of 1932.[117] an excise tax was levied on sales of gasoline. In considering the application of this tax to sales of gasoline to the Menominee Indian Mills, the Solicitor of the Interior Department in a recent opinion [118] made the following finding, to wit:

1. Federal gasoline sales taxes (*a*) do not apply to sales of gasoline to the Menominee Indian Mills for use in the operation of the mills, but (*b*) do apply to sales of gasoline to the mills for resale through the commissary of the mills to employees and the general public. This latter ruling was occasioned by the fact that title 4 of the Internal Revenue Act of 1932 and the regulations issued thereunder exempted from the operation of the tax only gasoline sold "for the exclusive use of the United States."

From an early date Congress has expressly provided that no duty shall be levied or collected from Indians on the importation of peltries brought by them into the territories of the United States [119] and the desire to encourage native Indian handicraft has been clearly evidenced by the express exemption from the operation of the Revenue Act of 1932 [120] of "any article of native Indian handicraft manufactured or produced by Indians on Indian reservations, or in Indian schools. or by Indians under the jurisdiction of the United States Government in Alaska."

[104] Esther Rentle, 21 B. T. A. 1230. involving a full-blood Creek Indian; G. C. M. 2008. C. B. VII-1. p. 209. involving a half-blood, incompetent Creek Indian; G. C. M. 8066. C. B. IX–2. p. 316.

[105] 35 Stat. 312. Of. *Bayby* v. *United States*, 60 Fed. 80 (C. C. A. 10, 1932).

[106] *Pitman* v. *Commissioner*, 64 F. 2d 740 (C. C. A. 10. 1933). *Cf. Commr.* v. *Owens*, 78 F. 2d 768 (C. C. A. 10. 1935).

[107] *Choteau* v. *Burnet*, 283 U. S. 691 (1931).

[108] S. M. 4527. C. B. IV–2, p. 29.

[109] Katie *Snell et al.* v. *Commissioner*, 10 B. T. A. 1081, and G. C. M. 9621. C. B. December 1931. chap. 111.

[110] 295 U. S. 418 (1935), affg. 75 F. 2d 183 (C. C. A. 10. 1935).

[111] For a discussion and construction of this case see the rulings of the Board of Tax Appeals, as contained to Prentis Hall, Federal Tax Service. pars. 8335, 8336.

[112] *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232 (1927). To the same effect, S. R. 8498. C. B. June 1926. p. 183; *Cortez Oil Co.* v. United *States*, 64 C. Cls. 390 (1928). T. D. 4146. C. B. June 1928. p. 282; 6 A. F. T. R. 7130 (cart. den. May 28. 1928): *The Terrell Co.*, 9 B. T. A. 1131 (involving a lessee of Indian lands expressly exempted from taxation); *Western* American *Oil* Co.. 10 B. T. A. 17: *Ernest L. Henton*, 10 B. T. A. 21; *Thomas Coal Co.*, 10 B. T. A. 639; *McAlester-Edwards Coal Co.*, 10 B. T. A 1368; *Philadelphia Quartz Co.*, 13 B. T. A. 1146 (nonacquiescence, C. B. December 1929. p. 69).

[113] G. C. M. 762, C. B. June 1927, p. 123. To the same effect: *United States* v. *Richards*, 27 F. 2d. 284 (C. C. A. 8. 1928), cert. den. 278 U. S. 530; *Landman* v. *Alexander*, 26 F. Supp. 752 (D. C. Okla. 1939), sec. 5.207 of P. H. Fed. Tax Service for 1939. app. dism.. 105 F. 2d 1018 (C. C. A. 10). sec. 5.627 of P. H. Fed. Tax Service for 1939.

[114] S. M. 5632, C. B. June 1926, p. 193.

[115] Public Resolution No. 74. 71st Cong. (S. J. Res. 163). approved May 19. 1930.

[116] Act of February 14. 1933. 47 Stat. 807.

[117] 26 U. S. C. 1481, *et* seq.; chap. 29 of the Internal Revenue code. approved February 10. 1939, 53 Stat. 409.

[118] Op. Sol. I. D., M.30544, May 31. 1940. See sec. 5, *supra*.

[119] Act of March 2, 1799. 4 Stat. 627; Act of October 1, 1890. 26 Stat. 567; Act of August 27. 1894. 28 Stat. 509.

[120] Act of June 6. 1932. sec. 624, 47 Stat. 169.

SECTION 8. TRIBAL TAXATION

As distinct political communities. the Indian tribes possess some of the attributes of sovereignty. among which is the power to legislate regarding their internal relations.[121] This power. with certain exceptions. includes the power to levy local taxes on all property within tribal limits, belonging to members of the tribe.[122] Though the scope of the power as applied to nonmembers is not clear, it extends at least to property of nonmembers used in connection with Indian property as well as to privileges enjoyed by nonmembers in trading with the Indians.[123] The power to tax nonmembers is derived in the cases from the authority, founded on original sovereignty and guaranteed in some instances by treaties, to remove property of nonmembers from

[121] See Chapter 7.

[122] 55 I. D. 14, 46 (1934).

[123] See *Morris* v. *Hitchcock*, 21 App. D. C. 565. 593 (1903). aff'd 194 U. S. 384 (1904).

the territorial limits of the tribe. Since the tribal government has the power to exclude, it can extract a fee from nonmembers as a condition precedent to granting permission to remain or to operate. within the tribal domain.[124] Since, however, the exclusive power to regulate trade with the. Indians is vested in the Commissioner of Indian Affairs,[125] it would seem that, in the absence of specific federal authorization, the tribe -has no power to tax licensed traders.[126]

Limitations on the taxing power of the state governments arising from the federal instrumentality doctrine logically also apply to the tribal governments.[127]

It would 'seem that the tribal taxing power is not subject to limitations imposed upon state or federal legislation by the Federal Constitution.[128] In the only Supreme Court case on the point the court remarked in approving such a tax that the act of the tribal legislature was not arbitrary and did not violate the Federal Constitution.[129]

Under section 16 of the Act of June 18, 1934,[130] tribal constitutions containing provisions authorizing taxation of members and nonmembers have been adopted by many tribes and approved by the Secretary of the Interior. Since there is no express grant of taxing power in the act, such power must be traced to tribal sovereignty, the power to exclude, or some federal statute or treaty. Several types of limitations are imposed on the tribal taxing power by the constitutions.

Some of the constitutions provide that taxes may be levied upon members of the tribe without review by the Secretary of the Interior, but that taxes upon nonmembers shall be subject to such review,[131] and another group provides for general review of all taxing ordinances by the Secretary.[132] Still another group provides that an assessment upon members of the tribe shall not be effective unless the eligible voters of the tribe approve.[133]

Under some of the constitutions only a per capita tax on eligible voters can be levied.[134] One constitution providing for assessments to obtain funds for carrying out any project for. the benefit of the community as a whole allows any district not directly benefited by the project to exempt itself from the assessment by a majority vote.[135]

---

[124] *Morris* v. *Hitchcock*, 194 U. S. 384 (1904) (Chickasaw); *Buster* v. *Wright*, 135 Fed. 947 (C. C. A. 8. 1905) (Creek), app. dism. 203 U. S. 599; *Maxey* v. *Wright*, 3 Ind. T. 243, 54 S. W. 807 (1900), aff'd 105 Fed. 1003 (C. C. A. 8. 1900); 23 Op. A. G. 214 (1900) (Five Civilized Tribes); 18 Op. A. G. 34 (1884); 17 Op. A. G. 134 (1881) (Choctaw and Chickasaw); *cf. Crabtree* v. *Madden*, 54 Fed. 426 (C. C. A.. 8, 1893). This rationale is more like the exercise of a police power than tax power.

[125] 25 U. S. C. 261. derived from Act of August 15. 1876, see. 5, 19 Stat. 176, 200; and 75 U. S. C. 262. derived from Acts of March 3, 1901, sec 1, 31 Stat 1058, 1066: March 3, 1903, sec. 10. 82 Stat. 982, 1009.

[126] 1 Op. A. G. 645 (1824) (Cherokee); 55 I. D. 14. 48 (1934).

[127] For example, it has been administratively determined that the tribe may not tax employees of the Federal Government See Memo. Sol. I. D.. February 17. 1939.

[128] See Chapter 7. sec. 2. Cf. *Talton* v. *Mayes*, 163 U. S. 376 (1896); Worcester v. *Georgia*, 6 Pet. 515, 559 (1832); Memo. Sol. I. D., February 17. 1939.

[129] See *Morris* v. *Hitchcock*, 194 U. S. 384. 393 (1904).

[130] 48 Stat. 984, 987, 25 U. S. C. 476.

[131] Constitution, Hannahville Indian Community, Art. V, sec. 1 (3); Constitution, Keweenaw Bay Indian Community, Art. VI, sec. 1 (i).

[132] Constitution, Oneida Tribe of Indians of Wisconsin, Art. IV, sec. 1 (f); Constitution, Kalispel Indian Community, Wash., Art. IV, sec. 1 (f); Constitution, Fort McDermitt Paiute and Shoshone Tribe, Art. VI, sec. 1 (f); Constitution, Flandreau Santee Sioux Tribe. Art. IV, sec. 1 (f).

[133] Constitution, Omaha Tribe of Nebraska, Act. IV, sec. 1 (h); Constitution, Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin, Act. VI. see. 1 (i); Constitution, Lower Sioux Indian Community in Minnesota, Art. V. see. 1 (h); Constitution, Hydaburg Cooperative Association, Alaska. Act. 4, sec. 1 (d).

[134] Constitution, Colorado River Indian Tribe, Act. VI. sec. 1 (g); Constitution. Cheyenne River Sioux Tribe, Act. IV. see. 1 (i); Constitution, Three Affiliated Tribes. Fort Berthold Reservation, Act VI, see. 5 (b).

[135] Constitution; Fort Belknap Indian Community, Art. V, see. 1 (g).