(b) Purchase of Indian products.—The Act of April 30, 1908,144 provides that Indian labor shall be employed as far as practicable and that purchases of the products of Indian industry may be made in the open market. In the discretion of the Secretary of the Interior. By subsequent amendments,145 the portion of this provision regarding purchases was made applicable only to those purchases and contracts for supplies and services, except personal services, for the Indian Field Service, which exceed in amount $100 each.146

The Act of May 11, 1880,147 authorizes the Secretary to purchase for use in the Indian Service articles manufactured at Indian manual and training schools.

(c) Military service.—The skill and bravery of Indians were utilized in fighting foreign foes148 and other Indians.149 Article

III of the Treaty of September 17, 1783,150 provided that the Delawares151 "...engage to join the troops of the United States aforesaid, with such a number of their best and most expert warriors as they can spare...". The Act of March 5, 1792,152 provided for the employment of Indians to protect the frontiers of the nation. Some of the tribes agreed to furnish such warriors as the "president of the United States, or any officer having his authority therefor, may require," in prosecuting the War of 1812 against Great Britain.153 A decade before the Civil War the Army contained a company of Shawnee and Delaware mounted volunteers.154 Three full regiments of Indians were enlisted in the Union Army.155 With the coming of peace, the President was authorized to employ in the territories and Indian country a maximum of 1,000 Indian scouts, to be paid like cavalry soldiers.156 The Act of August 1, 1894,157 permitted the enlistment of noncitizen Indians in the Army in times of peace.158 Over 12,000 Indians served in the World War.159 There are Indian scouts in the regular army of the United States.

(4) Youth.—The Act of June 7, 1897,160 requires the Commissioner of Indian Affairs to "employ Indian girls as assistant

With the Delawares, 7 Stat. 13. The Treaty of December 2, 1804, with the Oneida, Tuscorora, and Stockbridge Indians, 7 Stat. 74, cites in its preamble the faithful assistance of a body of the Oneida, Tuscorora, and Stockbridge Indians who, because of their services during the Revolution, were driven from their homes, their houses and property destroyed. Arts. 1 and 6 of this treaty provided that $5,000 shall be distributed for individual losses and services in return for relinquishment of further claims. The Act of July 29, 1845, 5 Stat. 265, provided for the granting of a pension for widows of "Indian spies, who shall have served in the Continental line."


Treaty of July 22, 1814, with the Wyandots and others, Art 2; 7 Stat. 118. Also see Treaty of September 29, 1817, with the Wyandots and others, Art 12, 7 Stat 181. 18 Indians,-

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matrons and Indian boys as farmers and industrial teachers in all Indian schools when it is practicable to do so."

Sections 1 and 9 of the Act of June 28, 1887, which establishes a permanent Civilian Conservation Corps, provide that

a. 50 Stat. 319; 320. The original law, Act of March 31, 1933, c. 17, 48 Stat. 22, did not contain such a provision.

SECTION 5. ELIGIBILITY OF STATE ASSISTANCE

Some state administrators are unaware that Indians maintaining tribal relations or living on reservations are citizens, and mistakenly assume that they are supported by the Federal Government, and deny them relief. This discrimination in state aid has made more acute the economic distress of many Indians who are poor and live below any, reasonable standard of health and decency.

It has been administratively held, that Indians are entitled to share in the aids and services provided by state laws, subsidized by federal grants-in-aid, under the Social Security Act, or direct or work-relief statutes.

For a discussion of their right to federal assistance, see Chapter 12, sec. 5; on right to ration, clothing, etc., under treaties, see Chapter 15, sec. 23. For a discussion of rations, see Schneekelber, The Office of Indian Affairs, Its History, Activities, and Organization (1927), Pp. 65-70; for a discussion of the commodities, see, pp. 205-209.

Often treaties provided that the United States would give an Indian tribe provisions and clothing. See Chapter 3, sec. 3C(3). This was generally a partial consideration for the cession of land by the Indians and a sometimes a recognition of a moral obligation as guardian. Sometimes Congress provided "food and clothing in lieu of annuities. For an example of a statute providing subsistence to Indians, see Act of April 29, 1902, 32 Stat. 177 (Cherokee and Chickasaw). On regulations regarding the operations of the Indian Division of the Civilian Conservation Corps see C. F. D. 181-182.

161.0. This, I. M. Feb. 8686, February 12, 1937, p. 5.

162. See Chapter 12.

163. Annual Report of Secretary of Interior (1938), p. 237. The income of the typical Indian family is low and the earned income extremely low.: Meriam, Problem of Indian Administration (1928), p. 4: for a discussion of the general economic condition of the Indian see, pp. 5-6, and p. 430-454; on health conditions, pp. 380-385; also see Schneekelber, op. cit., pp. 227-238.


See Chapter 12.

165. Act of May 22, 1938, 48 Stat. 95; Resolution of April 8, 1938, 49 Stat. 115; Letters of Act of July 17, 1933, and November 1, 1934, of the

camps may be established for a maximum of 10,000 Indian enrollees who need not be unemployed or in need of employment, and who may be exempted from the requirement that part of the wages shall be paid to dependents.

166. Sec. 7, 50 Stat. 319. On regulations regarding operations of Indian Division of C. C. C. see 28 C. F. R. 18.1-18.29.

167. Ray A. Brown, the Indian Problem & the Law (1930), 39 Yale L. J. 307. In Fels in Patric, 145 U. S. 317, 332 (1892), the court said that there was no doubt that before he became a citizen the Indian was capable of maintaining himself in the state he was in, which were open to all persons irrespective of race or color, and that upon becoming a citizen he could also sue in the federal courts. Also see Yick Wo v. Hopkins, 118 U. S. 356, 367 (1886), and holding that aliens bad access to the courts for the protection of their person and property and a redress of their wrongs.


169. Cansfield contended that the common law did not prevail, on the reservations and that since Indian tribes were distinct political entities. Indians could not be able to enforce in state courts rights acquired under Indian laws or customs. Legal Position of the Indian (1881), 15 Am. L. Rev. 21, 32, 33.

170. Suits by and against tribes are elsewhere analyzed. See Chapter 14, sec. 6. Cf. Johnson v. Long Island Railroad Company, 162 N. Y. 462, 56 N. E. 992 (1900). Plaintiff, a member of the Montauk Tribe, brought an action of ejectment on behalf of himself and any members of the tribe who would come in. The court held (two judges dissenting) that Indian tribes are Words of the state and are only possessed of such rights to litigate in courts or justice as are conferred upon them by statutes.


171. Pound, Nationals without a Nation (1922), 22 Col. L. Rev. 97, 101, 102.

SECTION 6. RIGHT TO SUE

Even before attaining citizenship, Indians had the capacity to sue and be sued in state and federal courts. Although some writers have sought to deny the right of reservation Indians to sue, this view is rejected by the weight of authority "169


on the ground that Indians are not extraterritorial but only subject to special rules or substantive law. An Indian has the same right as anyone else to be represented by counsel of his own selection, who may not be subordinated to counsel appointed by the court.171

As a practical matter, the Indians have frequently been at a decided disadvantage in safeguarding their legal rights. The courts were often at such a distance that the Indians could not avail themselves of their right to sue. Their ignorance of the language, customs, usages, rules of law, and forms of procedure of the white man, the disparities of race, the animosities caused by hostilities, frequently deprived them of a fair trial by jury.172 They were sometimes barred by state statutes from serving on juries and deemed incompetent as witnesses.173

The Committee on Indian Affairs of the House of Representatives, in a report on the trade and intercourse Act of 1834, said:

Complaints have been made by Indians that they are dispossessed of their property and it is with some reason understood that they are in some of the States excluded by law. Those laws, however, do not bind the courts or tribunals of the United States. The committee have made no provision on the subject, believing that none is necessary. The law of procedure, if properly applied, to remove every ground of complaint. (P. 13.)

Even at the present time, many Indians, particularly the older people, do not know any language but their native Indian tongue, and lack familiarity with most of the customs and ideas of the white people. Most of the Indians live far from the county seats and cities where courts meet and legal business is transacted.179 Prejudice, lack of education, of money, and of a sufficient number of lawyers of their race who have their confidence also hamper them in securing adequate legal advice and enforcing their rights. Prof. Ray A. Brown, an eminent authority on Indian Law, has written:180

The majority of these people are not able either in understanding or financial ability, to take advantage of the courts of justice...

In order to minimize the foregoing disadvantages a number of statutes have been enacted, establishing a separate administrative procedure to safeguard the rights of the Indians. One of the most important laws of this nature is the Act of June 26, 1910,181 which vests in the Secretary of the Interior conclusive power to 'assert the heirs of deceased allottee.

During the era of the westward expansion of railroads, statutes authorizing the construction and operation of railways through the Indian Territory usually provided that, in case of the failure of the railroad to make amicable settlements with the Indian occupants of the lands, a commission of three disinterested referees should be appointed as appraisers, the chairman by the President, one by the 'chief of the nation to which the occupant belongs, and the other by the railway.182

In the absence of statute, Indian litigants are subject to the same defenses as other people. Except with respect to restricted property,183 they may lose their rights because of laches, and the running of the statute of limitations.184 They are also subject to the restrictions against suing sovereigns without their consent.

179 Ibid., pp. 713-714.
180 Ibid., p. 776.
181 Ibid., pp. 480-429.
182 Ibid., p. 776.
183 The Indian Problem and the Law, 39 Yale L.J. 307, 331 (1930).
186 For an example of such a provision, see Act of September 26, 1890.
187 20 Stat. 485, 486. The Act of May 21, 1926, 46 Stat. 777, repealed Sec. 156, U. S. C. derived from Sec. 2, of the Act of June 14, 1862, 12 Stat. 427, which empowered the superintendent or agent to ascertain the damages caused by a tribal Indian trespassing upon the allotments of an Indian; to deduct from the annuities due to the trespassing Indian the amount so ascertained, and with the approval of the Secretary, to pay it to the party injured.
188 See Chapter 11; Chapter 19; sec. 5.
189 Felix V. Patrick, 143 U. S. 317, 331 (1892), discussing the act of 1892. Sec. 36 Fed. 457, discussing the statute of limitations. Also see Lemieux v. United States, 15 pet. 518 (C. C. A. 8, 1926), cert. den. 273 U. S. 749; 14 Col. L. Rev. 587-589 (1914). Also see Act of May 31, 1902, sec. 1. 32 Stat. 284, 25 U. S. C. 347 which provides for the application of the state statute of limitations in certain suits involving lands patented in severalty under treaties. While a deed of an Indian who received patent prohibiting alienation of property without the approval of the Secretary of Interior is void and the statute of limitations does not run against him and his heirs so long as the condition of incompetency remains, when by treaty subsequent to the issuance of the deed all restrictions were removed and the Indian became a citizen, the Statute of Limitations began to run against him and his heirs.
The right to sue is not conferred upon an individual member by a statute granting to a tribe the right to sue to recover tribal property. In the absence of congressional legislation bestowing upon individual Indians the right to litigate in the federal courts matters affecting tribal property, the courts will not assume jurisdiction.

SECTION 7. RIGHT TO CONTRACT

Indians may make contracts in the same way as any other people, "except where prohibited by statutes which primarily regulate contracts affecting trust property." Indians are incapable of making any valid contracts for disposing of property held in trust by the United States until approved by the Secretary of the Interior, 

The most important limitation on the alienability of land is found in the Allotment Act of February 8, 1887, which prevents an Indian allottee from making a binding contract in respect to land which the United States holds for him as trustee. The Act of May 21, 1872, imposing restrictions on the contractual rights of noncitizen Indians, which has lost most of its importance because of the passage of the Citizenship Act, voids any contract with a noncitizen Indian (or an Indian tribe) for services concerning his lands or claims against the United States, unless it is executed in accordance with prescribed formalities and approved by the Secretary of the Interior.

An important statute restricting the contractual power of Indians with respect to certain types of property is the Act of June 30, 1913, which provides:

A contract made with any Indian, where such contract relates to the tribal funds or property in the hands of the United States, shall be valid, nor shall any payment for services rendered in relation thereto be made unless the consent of the United States has previously been given.

A. POWER OF ATTORNEY

Though an Indian may grant a power of attorney to another, and such grants of power have been extensively used in the award of grazing permits in allotted lands, such a power will not 'ordinarily be implied. If there is any doubt about the method of exercising the power, it will be resolved in favor of the grantee.

The government examines closely the circumstances surrounding the issuance and exercise of a power of attorney in order to prevent the misuse of agency authority.

801. permitting their members and resident freedmen to sell their farm or manufactured products and to ship and drive them to market without restraint.
to safeguard the interests of the Indian." Subterfuges whereby such powers are used to take away control of restricted lands are held invalid because "the restraints upon alienation and incumbrance were intended by Congress to instill into the Indians habits of thrift and industry and a sense of independence, and to protect them in the meantime from improvident contracts." 16

B. COOPERATIVES AND BUSINESS ORGANIZATIONS

In some types of work, Indians, like other people, cannot compete with large aggregations of capital which dominate an increasing number of types of business, unless many of them combine their resources and energies. Indian cooperatives have been chartered by the Secretary of the Interior, by organized tribes, and by states. 17

Many recent statutes encourage the formation of cooperatives, including the Wheeler-Howard Act, 18 the Act of May 1, 1906, supplying its main provisions to Alaska, the Oklahoma Welfare Act, 19 and the Alaskan Reindeer Act. 20 Other legislation permitting loans to cooperatives is discussed under other headings.

Thus encouraged, the Federal Government, Indians have established many different kinds of cooperatives. Several statutes and tribal ordinances are designed to encourage Indian cooperatives in a particular tribe. 21

The hearings report the growth of monopoly in general and in specific industries. See also Berle and Means, The Modern Corporation and Private Property (1932), pp. 18-46.

In Oklahoma the Secretary may issue charters of incorporation to Indian cooperatives: in other states they generally operate as unincorporated associations. J. E. Curry, Principles of Cooperation, 4 Indians at Work, No. 11 (1911), p. 6. For regulations on cooperatives see 25 C. F. R. 21.1-26.26

Sec. 10 (25 U. S. C. 470) and 17 (25 U. S. C. 477) J une 18, 1934, 18 Stat. 984. The regulations governing the administration of the revolving credit fund make special provision for loans by incorporated tribes to Indian cooperatives. For example, see 25 C. F. R. 24.1-22.27 relating to cooperatives in Oklahoma.

49 Stat. 1250.


Act of September 1, 1937, sec. 10, 50 Stat. 500, authorizing transfer of federal loans to cooperative associations or other organizations.

See Chapter 12, sec. 6A.

Of these enterprises were discussed by J ohn Collier, Commission- er of Indian Affairs, in a radio address on December 4, 1939, entitled "American Indians of the Indian Nation" and in the Annual Report of the Secretary of the Interior (1939), pp. 90-31, and (1938), pp. 251-552.

The most important development in the Indian livestock field perhaps has been the marked increase in Indian initiative and marketing of large cooperative livestock associations, are making controlled grazing, round-ups, sales, and other improvement of the grade. In some cases, organized livestock associations have increased from a comparative small number in 1933 to 52 in 1938, and to 131 in 1938. (Annual Report of the Secretary of Interior (1939), Pt. X, pp. 90-31, and (1938), pp. 251-552.

Also see Indian Land Tenure, Economic Status, and Population Trends, Pt. X of the Supplementary Report of the Land Planning Committee to the National Resources Board (1935), pp. 24-25, 56.


The Constitution of the Blackfeet Tribe contains provisions typical of many tribal constitutions. Article VII, section 3, gives preference in the leasing of tribal land to members and associations of members, such as oil producers' cooperatives. Section 11 of Article VI authorizes the Tribal Business Council to regulate and license all business or professional activities upon the reservation, subject to the approval of the Secretary of the Interior. 18

Indian business organizations have been aided by some important laws relating to both Indians and non-Indians, such as the Taylor Grazing Act, 22 which provides for the granting of privileges to stockholders, including groups, associations, or corporations, authorized to conduct business under the laws of the state in which the grazing district is located. An Indian or group of Indians is capable of applying for grazing privileges under this act without the intervention of agency officials. 23

C. RIGHTS OF CREDITORS

In the absence of statutory authorization, a third person may not discharge the duty of the Government and then recover the expenses incurred in performing such governmental duty. 24

Governmental liability for the debts of Indians arises solely from acts of Congress or treaties with the tribes. Treaties often provided payments for substantial debts. 25

The treaty provisions were, often worded in justification for the payments of claims. The Indians were "anxious" to pay the claims, 26 or the payments were made at the "request" of the Indians, and the money was acknowledged by them to be due or to be a just claim. 27 The good deed of the creditor or a friend of the tribe would be gloriously described. 23

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16 United States v. Sands, 94 F. 26 168 (C. C. A. 10, 1938). Individual Indian owners frequently empower superintendents to issue leases or permits for them. Also see Chapter 11, sec. 5.


18 Chairman of the Temporary National Economic Committee, alluded to one of the many causes for the trend toward concentration of economic power.

19 It is a common experience that the large aggregations of capital have a secure money at a very much lower rate and for longer periods and for more lenient conditions than the small business corporation may, and that in itself is an inherent difficulty which tends to magnify the one and reduce the other. Hearings before the Temporary National Economic Committee, Pt. V, p. 1608 (1938).

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Often the United States would agree to pay creditors\(^\text{228}\) of the Indians for some consideration or partial consideration, such as the cession of land,\(^\text{229}\) reduction or omission of annuities,\(^\text{230}\) or relinquishment of claims against the United States,\(^\text{231}\) or described services and goods.\(^\text{228}\)

The names of the creditors were often enumerated in an attached schedule\(^\text{228}\) or separate schedule,\(^\text{228}\) but sometimes they were listed in the body of the treaty\(^\text{228}\).

Other provisions included an acknowledgment of special services and a provision for their payment. One, for example, provided that money should be paid to a designated captain to repay him for expenditures in defending Chickasaw towns against the invasion of the Creeks.\(^\text{232}\)

Sometimes claims already brought against the Indians were acknowledged as due and the United States agreed to make payments for them.\(^\text{233}\) Occasional provisions include a prohibition against the payments of debts of individuals'\(^\text{234}\) or payments for depredations;\(^\text{235}\) a requirement that the superintendent shall defend Chickasaw towns in defending Chickasaw towns against the invasion of the Creeks.\(^\text{236}\)

The limitation of the rights of creditors is in accordance with the well established policy of the Federal Government to protect Indians from their own improvidence.\(^\text{237}\)

\(^{228}\) For early opinions on method of determining amount of claims against Indians, see 5 Op. A. G. 284 (1851) and 672 (1852), Treaty of October 27, 1822 with the Potowatomi, Art. 4, 7 Stat. 309, 401.

\(^{229}\) Treaty of August 30, 1831, (articles of agreement and convention), with Otooway Indians, Arts. 2 and 6, 7 Stat. 360, 360-361; Treaty of October 27, 1832; with the Potowatomi, Art 4, 7 Stat. 399, 401; Act of February 21, 1833, Art. 4, 12 Stat. 658, 659 (Winnebago).

\(^{230}\) Treaty of May 13, 1833 (Articles of Agreement), with the Quapaw Indians, Art. 4, 7 Stat. 424, 425-426.


\(^{232}\) Treaty of July 22, 1839, with the Chickasaw Nation, Art 2, 7 Stat. 89, 90; Treaty of February 11, 1828, with the Eel River, or Thornport party of 'Miami Indians, Art 3, 7 Stat 309, 310; Treaty of March 24, 1832, with the Creek Tribe, Art. 9, 7 Stat. 366, 367.

\(^{233}\) Treaty of October 11, 1842, with the Sac and Fox Indians, Art. 2, 7 Stat. 306.

\(^{234}\) Treaty of October 18, 1826, with the Potawatomi, Art. 5, 7 Stat. 295, 296, 297.


\(^{236}\) Treaty of October 18, 1819, with the Chickasaw, Art 2, 7 Stat 192, 193. Also see Treaty of July 23, 1865, with the Chickasaw Nation, Art. 2, 7 Stat 89, 90.


\(^{238}\) Treaty of October 17, 1855, with the Blackfoot, Art. 15, 11 Stat 657, 660.

\(^{239}\) Treaty of November 1, 1837, with the Winnebago Nation, Art 4, 7 Stat. 544.

\(^{240}\) Treaty of October 26, 1832, with the Shawnee and Delawares, Art. 3, 7 Stat 397, 398.

\(^{241}\) Act of June 1, 1872. Act 4, 17 Stat 213, 214 (Miami).

\(^{242}\) Knopf, Legal Status of American Indian & His Property (1922), 7 Ind. L. B. 232, 245. On creditor's rights against restricted money and estates of allottees. see Chapter 11, sec. 6, and 25 C. F. R. 81, 23, 81, 46. 81, 48, 221,221.39.

A number of restrictive statutes hamper creditors from executing on their judgments.\(^\text{230}\) An important general provision of this type is contained in the Appropriation Act of June 22, 1906,\(^\text{231}\) which amended the General Allotment Act\(^\text{232}\) by adding the following:

No lands acquired under the provisions of this Act shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent, in fee therefor.

The same principle is also applicable to restricted money.\(^\text{233}\)

The United States cannot restrain the enforcement, in a state court, of claims against property of Indian allottees for which they had received patents in fee,\(^\text{234}\) but it can restrain a state receiver from disposing of the proceeds of a lease of restricted lands,\(^\text{235}\) and of a growing crop on allotted lands.\(^\text{236}\)

In holding that a mortgage by an allottee of growing crops is void, the District Court said:\(^\text{237}\)

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)

Though an Indian may be a bankrupt, land allotted to him does not pass to a trustee in bankruptcy.\(^\text{239}\) This decision is based on the fact that it is not the policy of the Bankruptcy Act to interfere with congressional statutes relating to the disposition and control of property which is set apart for the benefit of the bankrupt, and that a man presumably deals with an Indian with full knowledge of his disability, and does not give credit on his allotments, or his other restricted property.

\(^{230}\) Act of May 2, 1809, 26 Stat. 81, 84 (Indian Territory), discussed in Cresswell v. Young, 4 Ind. T. 36 (1901). mod. 4 Ind. T. 148 (1902). Also see In re Graydon, 3 Ind. T. 497 (1901), concerning foreclosure of mortgages.

\(^{231}\) See Chapter 5, sec. 5B and D.


\(^{233}\) United States v. Inaba, 201 Fed. 446 (D. C. E. D. Wash. 1923) On the right of the United States to sue on behalf of Indians, see Chapter 19, sec. 2A (1).

\(^{234}\) See United States v. First Nat. Bank, 282 Fed. 330 (D. C. E. D. Wash. 1922). On the rights of conveyees of allotted lands, see Chapter 11, sec. 4F.

\(^{235}\) In re Foor, a decision holding invalid a mortgage executed by a tribal member of his interest in the tribal lands, see United States v. Boyle, 205 Fed. 163 (C. C. A. 2. 1920).

\(^{236}\) In re Russo, 96 Fed. 603 (D. C. Ore. 1899). See Chapter 11, sec. 4A. State laws relating to assignments for the benefit of creditors were extended to the Indian debtor by the Act of May 4, 1900, 26 Stat. 81 (Indian Territory), discussed in Robinson & Co. v. Belt, 187 U. S. 41 (1902). affg 100 Fed. 718 (C. C. A. 8, 1900).

\(^{237}\) In re Russo, 96 Fed. 600 (D. C. Ore. 1899).
The word "incompetency" has varied applications in many branches of law. Thus a person may be incompetent to serve on a jury, or evidence may be inadmissible as incompetent. Perhaps the most common meaning of the term is lack of capacity to enter into legally binding contracts.

In addition to its ordinary legal meaning, the term "incompetency," as used in Indian law, has several special or restricted meanings, relating to particular types of transactions, such as land alienation.

A. GENERAL LACK OF LEGAL CAPACITY

Terms and statutes contain numerous illustrations of the ordinary use of the term "incompetency," and various provisions to safeguard the interests of Indians who are deemed unfit to manage their own affairs. They empower guardians or other persons authorized by the Department of the Interior, parents or guardians, heads of families, chiefs, collectors of customs, and agents, superintendents or other bonded officers of the Indian Service, to select allotments, homestead entries, receive payments due, appraise property in condemnation proceedings, or perform other functions for minors or persons non compos mentis.

Special provisions were often made for minor orphan children, such as making the chiefs responsible for the school attendance of orphan children between 7 and 18 who had no guardians. Congress has conferred on parents certain rights with respect to the property of minor children. The administrative practice of the Department of the Interior requires that a minor be represented in some cases, such as the relinquishment or inheritance of Indian trust lands.

B. RESTRICTED MEANINGS

(1) Inability to alienate land. Perhaps the most frequent special use of the term "incompetency" is to describe the status of an Indian incapable of alienating some or all of his real property. Such an Indian may be competent in the ordinary legal sense. An outstanding example is Charles Curtis, who, though he became Senator and Vice-President of the United States, remained all his life an incompetent Indian incapable of disposing of his trust property by deed or devise, without securing the approval of the Secretary of the Interior. This striking example indicates that a determination of general competency is not always sufficient to cause the Secretary to issue a certificate of competency permitting the Indian to dispose of his restricted property. In determining whether to remove restrictions, the Secretary must decide, not only the "competency" of the Indian, but also whether such removal would be for the best interest of the Indian.

See Act of March 3, 1884; Act of April 10, 1889; Act of June 28, 1891; Act of March 3, 1893; 15 L. D. 318, 331, 611; 34 L. D. 422 (1910); 38 L. D. 427 (1910).

For a further discussion, see Chapter 3, art. 8, sec. 5 and 6 of the Indian Code (1913); 43 L. D. 146 (1908), 53 L. D. 422 (1910), and 43 L. D. 113 (1914).

The rights of heirs upon death of allottee before expiration of trust period and before issuance of fee simple patent without having made will are discussed in 40 L. D. 120 (1911). Also see 38 L. D. 422 (1910); 38 L. D. 427 (1910).

Allotments to minors were sometimes not selected until their majority or marriage. Treaty of June 19, 1858, with the Sioux, art. 1, sec. 1031: Treaty of June 19, 1858, with the Sioux, art. 1, 12 Stat. 1037.

Treaty of May 10, 1854, with the Shawnees, art. 2, 10 Stat. 1005; providing that the selections for incompetent and minor Indians shall be made as near as practical to their friends by some disinterested and responsible person appointed by the council and approved by the United States agent. Also see Treaty of January 31, 1855, with the Wyandottes, 10 Stat. 1150: Treaty of May 10, 1855, with the Chippewas, Art. 1, 11 Stat. 633; Act of June 28, 1858, 30 Stat. 395, 518 (Indian Territory); Act of April 11, 1862, 22 Stat. 42 (Crow); Act of August 7, 1882, 25 Stat. 341, 342 (Omaha Tribe). The Act of March 3, 1893, 25 Stat. 301. 1015 (Peorias and Miamis).

Sec. 2A: "Incompetency." "Incompetency" is used herein to mean a person to whom a certificate has been issued authorizing alienation of all the lands comprising his allotment, except as hereinafter provided.

Williams v. Johnson, 239 U. S. 414, 418, 419 (1915). While the Secretary may permit the sale of trust lands, he may retain control.

The right of aliens upon death of allottee before expiration of trust period and before issuance of fee simple patent without having made will are discussed in 40 L. D. 120 (1911). Also see 38 L. D. 422 (1910); 38 L. D. 427 (1910).

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See Act of June 28, 1906, sec. 7, 34 Stat. 539, 545 (Osage), which confers on parents of minor members of the tribe the control and use of such lands, together with its proceeds, until the minors reach majority.

See Act of March 3, 1884; Act of April 10, 1889; Act of June 28, 1891; Act of March 3, 1893; 15 L. D. 318, 331, 611; 34 L. D. 422 (1910); 38 L. D. 427 (1910).

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An Indian, may be declared competent to alienate his land, and then, having become landless, may inherit property in a restricted estate and thus become incompetent again. 20

An administrative holding analyzes the material difference between the removal of restrictions against alienation and the issuance of a certificate of competency: 21

* * * At times, and under given circumstances, restrictions against alienation, as applied to lands allotted to the Indians, favor largely of covenants running with the land. Competency, of course, is a personal attribute or relation. These two, competency and the power to alienate certain lands are not synonymous or even coexistent factors in all cases. Frequently they go hand in hand, but not necessarily always so. Congress itself, at times, has lifted restrictions against alienation, in mass., without special regard to the competency of the individual Indian land owners. With respect to the Osages, as previously shown, under the act of 1866, the issuance of a certificate of competency did not remove the restrictions against alienation of the homestead and under other legislation dealing with these people, the Secretary of the Interior is empowered to lift the restrictions against alienation on part or all of their allotted lands including the homestead. In the hands of incompetent members of the tribe, act of March 3, 1906, (36 Stat. 778): act of May 25, 1918 (40 Stat. 561-579). This but again emphasizes the fact that removal of restrictions against alienation is not synonymous with competency, or the right to a certificate of that character. (Pp. 8-9). 22

(a) Statutes.—The following provision of the Act of May 8, 1906, 23 illustrates this use of the term:

* * * Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter, all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: 24

The Circuit of Appeals, 25 in construing this provision, said that the Indian "shall have at least sufficient ability, knowledge, experience, and judgment to, enable him to conduct the negotiations for the sale of his land and to 'care for, manage, invest, and dispose of its proceeds, with such a reasonable degree of prudence and wisdom as will be likely to prevent him from losing the benefit of his property or its proceeds."

over the investment of the proceeds. Sunderland v. United States, 206 U. S. 226 (1924), a § 287 Fed. 468. (C. C. A. 8, 1923). Also see Chapter 5, sec. 11.


This case held that the Secretary may not determine such competency by an arbitrary test, such as the Indian's awareness of the effect of his deeding restricted property, saying: "* * * a person might know he was making a deed to his property, and have thereby delivered the deed be could not regain his property, and yet be utterly incapable of managing his affairs, the sale of his property, or the care or disposition of the proceeds: * * *" (P. 770). Also see Miller v. United States. 57 F. 2d 967 (C. C. A. 10, 1932).

The same court, in another case, 26 said:

* * * The chief purpose and main object of the restriction upon alienation is not to prevent the incompetent Indian from selling his land for a price too low, but to prevent him from selling it at all, to the end that he shall be prevented from losing, giving away, or squandering its proceeds and thus be left dependent upon the government or upon charity for his support. * * *

(P. 778).

Another important act, illustrating a somewhat similar concept of incompetency is the Act of March 1, 1907, 27 which provides:

That any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law, or treaty, or who may have an interest in any allotment by inheritance, may sell or convey all or any part of such allotment or such interest on such terms and conditions as the Secretary of the Interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or his heir disposing of his land, or interest, under the supervision of the Commissioner of Indian Affairs.

A federal district court 28 in construing this provision at first construing the term "noncompefent", as equivalet to "incompetent", and as implying the ordinary legal meaning of incompetency "legal incapacity, due to nonage, imbecility, or insanity." Upon reconsideration the court thought such restriction of its meaning was too narrow. It also discussed the provisions of section 1 of the Act of June 25, 1910, 29 which authorizes the Secretary of the Interior:

* * * * * 34 1910, 25 U. S. C. 349. For regulations regarding this statute see 25 C. F. R. 241.1-241.2.

The court concluded:

* * * * * 35 United States v. Debell. 227 Fed. 775 (C. C. A. 8, 1915).

* * * while as applied to Indians the terms "competency" and "noncompetency" or "incompetent" are used in their ordinary legal sense, there is a presumption conclusive upon the courts, that until the restriction against alienation is removed in the manner prescribed by law, either through the lapse of time or the positive action of the Secretary of the Interior, the allottee continues to be an "incompetent" Indian, at least in so far as concerns the land to which the restriction relates. (Pp. 497-498.)

Under the 1910 act the determination of competency and the issuance of a patent in fee simple were both conditions precedent to the removal of restrictions on alienation and the issuance of a patent in fee simple by the Secretary is not mandatory upon his being satisfied that a trust allottee is competent and capable of managing his own affairs. 36


The MEANINGS OF “WARDSHIP”

Statutory and administrative distinctions in the determination of competency to ‘alienate freely often hinges on the quantum of the Indian blood of the allottee.\(^a\)

\(^b\) Treaties—Many treaties contain special provisions providing for the separation of competent and incompetent Indians.\(^b\)


SEC. 9. THE MEANINGS OF “WARDSHIP”

The relationship of guardian and ward, at common law, is a relation under which, typically, the guardian (a) has custody of the ward’s person and can decide where the ward is to reside, (b) is required to educate and maintain the ward, out of the ward’s estate, (c) is authorized to manage the ward’s funds and property, for the benefit of the ward, (d) is precluded from profiting at the expense of the ward’s estate, or acquiring any interest therein, (e) is responsible to the courts and to the ward, at such time as the ward may become sui juris, for an accounting with respect to the conduct of the guardianship.\(^285\)

It is clear that this relationship does not exist between the United States and the Indians, although there are important similarities and suggestive parallels between the two relationships. The relationship of the United States to the Indian tribes and their members is analyzed in many other sections and chapters of this work, and it would be futile to treat under the heading of “wardship” the many aspects of that relation which are analyzed elsewhere under more precise topical headings. Rather we shall attempt in the present section to clarify and separate the various questions that have frequently been asked or confused under the term “wardship.”

The term “ward” has been applied to Indians in many different senses and the failure to distinguish among these different senses is responsible for a considerable amount of confusion. Today a careful draftsman of statutes will not use the term “ward Indian” or, if he uses the term at all, will expressly define it for the purposes of the statute. The fact remains, however, that the term “ward Indian” has been used in several statutes.\(^288\)

\(^a\) Schouler, Marriage, Divorce, Separation, and Domestic Relations (6th ed., 1921), p. 1V.
Thus in its original and most precise significations the term "ward" was applied (a) to tribes rather than to individuals, (b) as a suggestive analogy rather than as an exact description, and (c) to distinguish an Indian tribe from a foreign state. It should be noted that the basis, upon which the Supreme Court applied the concept of wardship was the acceptance of that status, in effect, by the Indian tribes themselves: "They look to our government for protection . . . ." For many years, after the decision in Cherokee Nation v. Georgia, the Indian tribes continued to emphasize, in their treaties, with the United States, their dependence upon the protection of the Federal Government.

A. WARDS AS DOMESTIC DEPENDENT NATIONS

Like so many other concepts in Indian law, the idea of "wardship" appears to have been first utilized by Chief Justice Marshall. In fairness to the great Chief Justice, however, it must be said that he used the term with more respect for its accepted legal significance than some of his successors have shown. He did not apply the term "ward" to individual Indians; he applied it to Indian tribes. He did not say that Indian tribes were wards of the Government but only that the relation to the United States of the Indian tribes within its territorial limits "resembles that of a ward to his guardian." The Chief Justice hastened to explain this sentence by offering a bill of particulars (pp. 37-18):

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great-father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by alias an invasion of our territory and an act of hostility.

The court went on to say (p. 18):

These considerations go far to support the opinion, that the framers of our constitution had not the Indian tribes in view; when they opened the courts of the Union to controversies between a state or the citizens thereof and foreign states.

The question in the case was whether the Supreme Court had jurisdiction to entertain a suit by the Cherokee Nation against the State of Georgia under that provision of the Constitution (Art. I, sec. 2) which provides for the extension of the federal judicial power "to controversies * * * between a State * * * and foreign States * * *" To that question the following answer was given:

The Court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion, that an Indian tribe or nation within the United States is not a foreign state, in the sense of the constitution, and cannot maintain an action in the courts of the United States. (P. 20.)

Thus it is seen that the Supreme Court has not applied the concept of wardship to Indian tribes as a matter of course, but has considered the applicability of the concept in each case on its merits.

B. WARDS AS TRIBES SUBJECT TO CONGRESSIONAL POWER

By a natural extension of the term "wardship" came to be commonly used to connote the submission of Indian tribes to congressional legislation. The power of Congress to legislate in matters affecting the Indian tribes was expressly recognized by the tribes themselves in many early treaties. Thus, quite apart from the specific power given by the Constitution to Congress to regulate commerce with the Indian tribes, there came to be recognized, as an outgrowth of the federal treaty-making power and the power of Congress to legislate for the effectuation of treaties, a broad and vague defined constitutional power over Indian affairs.

By virtue of this power, congressional legislation that would have been unconstitutional if applied to non-Indians was held to be constitutional when limited in its application to Indians: In this sense, "wardship" was still a concept applicable primarily to the Indian tribe, rather than to the individual members thereof, since it was the tribe as such that entered into treaties. As with the original meaning of the term "wardship," the justification of the result reached, in this case the extension of congressional Power, was found in a course of action to which the Indian tribes themselves had expressly consented.

The effective meaning of the term "wardship," in the sense of special subjection to congressional Power, is to be found entirely in the realm of constitutional law. The extent of this constitutional power is a matter dealt with in other chapters. For the present it is enough to note that this power is utilized in two general ways: (1) as a justification for congressional legislation in matters ordinarily within the exclusive control of the States, and (2) as a justification for federal legislation which would be considered "confiscatory" if applied to non-Indians.

In upholding the power of Congress to confer jurisdiction upon the federal courts over certain crimes committed on Indian reservations within a state, the Supreme Court of the United States said:

* * * These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights; They owe allegiance to the States, and receive from them no protection. Because of their local ill feeling, the people of the States where they are found are often their deadliest enemies. From their