NOTES TO ACCOMPANY TABLE OF ALIENABILITY

AMONG GENERAL ALLOTMENT INDIANS

1. Provisions of the General Allotment Act, February 8, 1887, 24 Stat. 388:

> sec. 5 That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declared that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, that the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, that the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents theref or have been executed and delivered, except as herein otherwise provided; and the laws of the state of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: . . .

This is incorporated in 25 U.S.C. sec. 348.

> Mills, sec. 341-351.
> Mills Supp., sec. 345, 359.
> Semple, sec. 723-725.

The extensions of the trust or restricted status of allotments under the General Allotment Act are listed in an appendix to Ch. I, 25 C.F.R. Currently, in 1980 volume, this list begins on page 671.

2. 25 U.S.C. sec. 379:

> The adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction

upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject to taxation under the laws of the State or Territory where the same is situate: Provided, That the sale herein provided for shall not apply to the homestead during the life of the father, mother or minority of any child or children. May 27, 1902, C. 888, sec. 7, 32 Stat. 245.

Mills, sec. 355-360
Semple, sec. 786, 788

While the chart reflects the division of the statute of the allotment into "Homestead" and "Surplus" similar to that in the Five Civilized Tribes, Mills, sec. 355 says that "there is no designation of homestead or surplus allotment under the General Allotment Act, nor it is believed, is the term homestead used with reference to any lands held under the trust patents.

It has been held that all that is required in relation to the sale of a minor's interest is that court having jurisdiction (under state law?) appoint the guardian and that the court order the sale of the minors interest, and that the Secretary approve the conveyance. White v. Sallee, 86 Okla 260, 208 P.214 (1922).

It has been held that the approval of the Secretary of a conveyance extinguishes the federal government's s title, vests title in the vendee, and confers jurisdiction solely in state courts, but if the vendor was not the true heir, the vendee holds in trust for the true heir.

Tripp v. Steler, 38 S.D. 321, 161 N.W. 337 (1917).
Highrock v. Gavin, 43 S.D. 315, 179 N.W. 12 (1920).
Horn v. Negonahequaince, 155 Minn 77, 192 N.W. 363 (1923).

Prior to the Act of June 25, 1910, there was no requirement that heirship should be determined before the sale and approval of the Secretary of Interior and such adjudication was not necessary to a marketable title. Egan v. McDonald, 246 U.S. 277 (1918).

Prior to the Act of August 15, 1894, 28 Stat. 286, there were no general provisions for the determination of heirs under the General Allotment Act. That act conferred jurisdiction upon the federal courts to entertain suits by Indians claiming a right to an allotment. This Act as it was amended by the Act of February 6, 1901, 31 Stat. 760, was used to determine heirship. Hallowell v. Commons, 239 U.S. 506 (1916), and see Mills, sec. 366.

The Act of May 8, 1906, 34 Stat. 182, amended the General Allotment Act in providing that as to allotments made thereafter if an Indian died before the end of the trust period that his allotment should be cancelled, the Secretary should ascertain the legal heirs and issue a fee patented to them in their names. The Act was made inapplicable to Indian Territory.

The Act of Jui~ie 25, 1910, sec. 1, 36 Stat. 855, conferred power upon the Secretary of Interior to determine, upon notice and hearing, the heirs of any intestate allottee dying before the expiration of the trust period. The Secretary's determination was made final and conclusive. Attocknie v. Udall, 390 F.2d 636, (10th Cir. 1968) cert. den. 393 U.S. 833 (1968); Heffleman v. Udall, 378 F.2d 109 (10th Cir. 1967), cert. den., 389 U.S. 926 (1967); Johnson v. Kieppe, 596

F.2d 950 (10th Cir. 1979); Crawford v. Andrus, 472 F. Supp. 853 (D. Mont. l979).
This statutory material is now incorporated in 25 U.S.C. sec. 372, see Note 5 below.

Mills, sec. 364-367.
Mills Supp., sec. 367, 369.
Semple, sec. 776-785.

As to the terms of and the proceeds of sales of land belonging to heirs of allottee, see statutory materials, including history of legislation, in Notes 3 and 5 below.

3. While the General Allotment Act made the law of Kansas concerning descent and partition applicable to allotments in Indian Territory (and the same law of the state or territory where other allotted lands were situated), it was held that because a partition by sale was an alienation that Congress had not intended to authorize a partition by sale but only a partition in kind when heirs could not agree to hold in common. U.S. v. Bellm, 182 F. 161 (E.D.Okla. 1910).

The Act of June 25, 1910, 36 Stat. 855, authorized the Secretary of Interior to determine heirs, and upon making requisite finding to partition land among the heirs of the deceased. The pertinent portions of the Act follow:

> Be it enacted by the Senate and House of Representa tives of the United States of America in Congress assembled, That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent he may, in his discretion, cause such lands to be sold: Provided, That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them theref or. All sales of lands allotted to Indians authorized by this or any other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe, and he shall require a deposit of ten per centum of the purchase price at the time of the sale. Should the purchaser fail to comply with the terms of sale prescribed by the Secretary of the Interior, the amount so paid shall be forfeited; in case the balance of the purchase 'price is to be paid in deferred payments, a further amount, not exceeding fifteen per centum of the purchase price may be so forfeited for failure to comply with the terms of the sale. All forfeitures shall inure to the benefit of the heirs. Upon payment of the purchase price in full, the Secretary of the Interior shall cause to be issued to the purchaser patent in fee for such land: Provided, That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent, as their respective interests shall appear: . .

The last proviso of Section 2 of this Act provides that Sections 1 and 2 of the Act shall not apply to the State of Oklahoma.

This material is now incorporated in 25 U.S.C. sec. 372, see Note 5 below.

Mills, sec. 360, suggests that the partition here provided for is to be upon petition of the heirs whereas the Act of May 18, 1916, authorized partition without petition of heirs.

It seems to me that if any distinctions are to be drawn between the Act of 1910 and that of 1916, one distinction is that the provisions of the 1910 Act are set in the context of a "probate" proceeding, that is a part of the process described for the administration of the estate of a deceased. On the other hand, the 1916 Act seems more broadly applicable and could be used by the Secretary if subsequent to the closing of a deceased's estate, it became desirable to partition among the heirs.

This is not to say, however, that either act contains language clearly limiting the applicability to the situations above described. The Act of 1916 is incorporated into 25 U.S.C. sec. 378, set out below in Note 5.

But of greater importance, it seems to me that the 1910 Act provides for partition by sale or in kind, whereas the 1916 Act provides expressly for partition in kind only.

This portion of the Act of 1916 is now 25 U.S.C. sec. 378, and is set out in Note 5 below.

4. The Act of February 14, 1913, amended the last proviso in Section 2 of June 25, 1910. This proviso had made Sections 1 and 2 of the 1910 Act inapplicable to the State of Oklahoma, The said 1913 amendment limited the inapplicability to the Five Civilized Tribes and the Osage Indians. Thus did Section 1 of the Act of 1910 providing for the determination of heirs and partition become applicable to the General Allotment Indians in Oklahoma.

5. Since 1916, the law concerning partition is in the following two sections of 25 U.S.C.:

> sec. 372. Ascertainment of heirs of deceased allottees; settlement of estates; sale of lands; deposit of Indian moneys
>
> When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold:

Provided, That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them theref or. All sales of lands allotted to Indians authorized by this or any other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe, and he shall require a deposit of 10 per centum of the purchase price at the time of the sale. Should the purchaser fail to comply with the terms of sale prescribed by the Secretary of the Interior, the amount so paid shall be forfeited; in case the balance of the purchase price is to be paid on such deferred payments, all payments made, together with all interest paid on such deferred installments, shall be so forfeited for failure to comply with the terms of the sale. All forfeitures shall inure to the benefit of the allottee or his heirs. Upon payment of the purchase price in full, the Secretary of the Interior shall cause to be issued to the purchaser patent in fee for such land: Provided, That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent as their respective interests shall appear: Provided further, That the Secretary of the Interior is authorized, in his discretion, to issue a certificate of competency, upon application theref or, to any Indian, or in case of his death to his heirs, to whom a patent in fee containing restrictions on alienation has been or may hereafter be issued, and such certificate shall have the effect of removing the restrictions on alienation contained in such patent: Provided further, That any United States Indian agent, superintendent, or other disbursing agent of the Indian Service may deposit Indian moneys, individual or tribal, coming into his hands as custodian, in such bank or banks as he may select: Provided, That the bank or banks so selected by him shall first execute to the said disbursing agent a bond, with approved surety, in such amount as will properly safeguard the funds to be deposited. Such bonds shall be subject to the approval of the Secretary of the Interior. June 25, 1910, c. 431, sec. 1, 36 Stat. 855; Mar. 3, 1928, c. 122, 45 Stat. 161; Apr. 30, 1934, c. 169, 48 Stat. 647.

Historical Note

1934 Amendment. Act Apr. 30, 1934 substituted ", all payments made, together with all interest paid on such deferred installments, shall be so forfeited" for "a further amount, not exceeding 15 per centum of the purchase price together with all interest paid on such deferred installments may be so forfeited", inserted "allottee or his" in the sentence "All forfeitures shall inure" and deleted from the last "Provided further" clause the term "hereafter."

1928 Amendment. Act Mar. 3, 1928 inserted in the introductory clause "or may hereafter be made," following "has been made", "together with all interest paid on such deferred installments" following "purchase price", "or may hereafter be" following

"restrictions on alienation has been", and "hereafter" in the last "Provided further" clause, and substituted "by this or any other Act" for "by any Act."

Indian Agents. There have been no Indian agents since 1908. See note under section 64 of this title.

sec. 378. Partition of allotment among heirs; patents

If the Secretary of the Interior shall find that any inherited trust allotment or allotments are capable of partition to the advantage of the heirs, he may cause such lands to be partitioned among them, regardless of their competency, patents in fee to be issued to the competent heirs for their shares and trust patents to be issued to the incompetent heirs for the lands respectively or jointly set apart to them, the trust period to terminate in accordance with the terms of the original patent or order of extension of the trust period set out in said patent. May 18, 1916, c. 125 sec. 1, 39 Stat. 123.

In Chemah v. Fodder, 259 F. Supp. 910 (W.D. Okla. 1966)it was held that a suit to partition among heirs of deceased allottee must be dismissed because the United States was an indispensable party but had not consented to be sued.

6. See the third proviso in 25 U.S.C. 372, in Note 5, above. Prior to 1913, the section including this proviso was inapplicable to the State of Oklahoma. In 1913, the inapplicability was limited to the Five Civilized Tribes and the Osage, see Note 4 above.

This proviso thus became applicable to the Kaw Indians because their allotment agreement provided for patents containing restrictions against alienation rather than trust patents, Act of July 1, 1902, 32 Stat. 636, sec. 2. See Mills, sec. 382-387. By the Act of March 4, 1923, 42 Stat. 1561, the restrictions on Kaw surplus were continued until March 3, 1948. The Act of May 27, 1924, extended the restrictions on Kaw homesteads until December 31, 1947. Simes, on page 520, footnote 1, says that the Department has ruled that all Kaw restrictions have expired.

7. The Act of June 25, 1910, sec. 2, 36 Stat. 855, 856 reads:

That any Indian of the age of twenty-one years, or over, to whom an allotment of land has been or may hereafter be made, shall have the right, prior to the expiration of the trust period and before the issue of a fee simple patent, to dispose of such allotment by will, in accordance with rules and regulations to be prescribed by the Secretary of the Interior:
Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Commissioner of Indian Affairs and the Secretary of the Interior:
Provided further, That sections one and two of this Act shall not apply to the State of Oklahoma.

8. After 1913, the law concerning wills of allotments under the General Allotment Act is that

contained in 25 U.S.C. sec. 373 which follows:

> Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: Provided further, That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit; Provided also, That this section and section 372 of this title shall not apply to the Five Civilized Tribes or the Osage Indians. June 25, 1910, c. 431, sec. 2, 36 Stat. 855; Feb. 14, 1913, c. 55, 37 Stat. 678.

As to the applicability to Kaw Indians, see U.S. v. Drummond, 42 F. Supp. 958 (W.D.Okla. 1941) and on appeal 131 F.2d 568 (10th Cir. 1942).

The Supreme Court has taken a very narrow view of the authority of the Secretary to disapprove of the testamentary scheme of the will, Tooahnippah v. Hickel, 397 U.S. 598 (1970).

9. 25 U.S.C. sec. 404 provides:

> The lands, or any part thereof, allotted to any Indian, or any inherited interest therein, which can be sold under existing law by authority of the Secretary of the Interior, except the lands in Oklahoma and the States of Minnesota and South Dakota, may be sold on the petition of the allottee, or his heirs, on such terms and conditions and under such regulations as the Secretary of the Interior may prescribe; and the lands of a minor, or of a person deemed incompetent by the Secretary of the Interior to petition for himself, may be sold in the same manner, on the petition of the natural guardian in the case of infants, and in the case of Indians deemed incompetent as aforesaid, and of orphans without a natural guardian, on petition of a person designated for the purpose by the Secretary of the Interior. When any Indian who has received an allotment of land dies before the expiration of the trust period, the Secretary of the Interior shall ascertain the legal heirs of

such Indian, and if satisfied of their ability to manage their own affairs shall cause to be issued in their names a patent in fee simple for said lands; but if he finds them incapable of managing their own affairs, the land may be sold as hereinbefore provided: Provided, That the proceeds derived from all sales hereunder shall be used, during the trust period, for the benefit of the allottee, or heir, so disposing of his interest, under the supervision of the Commissioner of Indian Affairs: And provided further, That upon the approval of any sale hereunder by the Secretary of the Interior, he shall cause a patent in fee to issue in the name of the purchaser for the lands so sold: And provided further, That nothing in this section shall apply to the States of Minnesota and South Dakota. May 29, 1908, c. 216, sec. 1, 35 Stat. 444.

HISTORICAL NOTEM

Codification. Previous provisions, similar to some extent to those of this section, for patents to heirs of deceased allottees or sale of the lands allotted to them, were contained in Act May 8, 1906, c. 2348, 34 Stat. 183, which amended section 6 of the General Allotment Act, Act Feb. 8, 1887, c. 119, set forth as section 394 of this title. The provisions were as follows:

"Hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian, The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final."

Yakima Indian Reservation, Washington. Special provisions for sale of interests of Indian minors in lands of the Yakima Indian reservation, in the State of Washington, whether by direct allotment or by inheritance. were made by Act Mar. 27, 1908, c. 107, 35 Stat. 49.

Transfer of Functions. All functions of all officers of the Department of the Interior and all functionsof all agencies and employees of the Department were, with two exceptions, transferred to the Secretary of the Interior, with power vested in him to authorize their performance or the performance of any of his functions by any of those officers, agencies, and employees, by 1950 Reorg. Plan No. 3, sec. 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in note under section 481 of Title 5, Executive Departments and Government Officers and Employees.

10. 25 U.S.C. sec. 405 provides:

> 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 inherited interest on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or interest, under the supervision of the Commissioner of Indian Affairs; and any conveyance made hereunder and approved by the Secretary of the Interior shall convey full title to the land or interest so sold, the same as if fee-simple patent had been issued to the allottee. Mar. 1, 1907, c. 2285, 34 Stat. 1015.

HISTORICAL NOTE

> Transfer of Functions. All functions of all officers of the Department of the Interior and all functions of all agencies and employees of the Department were, with two exceptions, transferred to the Secretary of the Interior, with power vested in him to authorize their performance or the performance of any of his functions by any of those officers, agencies, and employees, by 1950 Reorg. Plan No. 3, sec. 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in note under section 481 of Title 5, Executive Departments and Government Officers and Employees.

In U.S. v. Nez Perce County, 267 F. 495 (D.Ida. 1917) it was said that "noncompetent Indian" means any Indian who lacks full power to alienate his property.

In Bacher v. Patencio, 232 F. Supp. 939 (S.D.Cal. 1964), aff'd 368 F.2d 1010 (9th Cir. 1966) the majority stating simply that they agreed with the reasoning of the court below, the contract entered into by the Indian and his conservator and the vendees called for the issuance of a fee patent to the Indian. The Area Director approved the sale but refused to issue the fee patent on the request of the Indian not to issue it. The vendees were asking for specific performance of the contract. The court said, 232 F. Supp at 943:

> From the complainant's allegations it seems clear that either an expressed or implied term and condition of the Area Director's approval of the arrangement to sell Patencio land was that Patencio himself remain willing to receive the fee patent up to the time of its actual issuance and delivery to him.

The court discusses the requirement of "continuing application" for the issuance of the fee patent. The court finds a parallel between this and a series of cases decided in applying 25 U.S.C. sec. 349, a section discussed below in Note 11. Those cases hold that where the Indian has been issued a fee patent without application or consent of the Indian, it is invalid and cancellable.

Compare Armstrong v. Maple Leaf Apartments, 508 F.2d 518, (10th Cir. 1975), aff'd, 436 F.

Supp. 1125 (N.D. Okla. 1977), aff'd on rehearing, 622 F.2d 466 (10th Cir. 1980., cert. denied, 101 5. Ct. 271 (1980). See discussions beginning at 314 and 315. But also compare cases discussed in Note 11 below, particularly Chatterton v. Lukin, 116 Mont. 419, 154 P.2d 798, cert den'd, 325 U.S. 880 (1945) involving a collateral attack on a fee patent issued but, while recorded, never delivered.

11. 25 U.S.C. sec. 349 provides:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying such Indian within its jurisdiction the equal protection of the law: Provided, That the Secretary of the Interior may, in his discretion, and he is 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:
> Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States:
> And provided further, That the provisions of sections 331-334, 339, 341, 342, 349 and 381 of this title shall not extend to any Indians in the Indian Territory. Feb. 8, 1887, c. 119, sec. 6, 24 Stat. 390; May 8, 1906, c. 2348, 34 Stat. 182.

HISTORICAL NOTE

> Codification. Act May 8, 1906 substituted "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee" for "Upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made" and added the three provisos.
>
> Provisions of Act May 8, 1906, for patents to heirs of deceased allottee or sale of the lands allotted to him, were superseded by provisions relating to the same subject contained in Act May 29, 1908, c. 216, 35 Stat. 444 and classified to section 404 of this title.

It should be noted that, as indicated by the historical note, the proviso authorizing Secretary of Interior to issue a fee patent did not come into the law until the Act of May 8, 1906.

Upon the issuance of the patent in fee simple, the duties of United States as trustee terminates.

The Indian in respect to his allotment becomes subject to the law of the state. And even though the issuance of the fee patent would have been voidable because procured by fraud, the action to set the fee patent aside is barred by the Montana Statutes of Limitation, Dillion v. Antler Land Co., 507 F.2d 940 (9th Cir. 1974) cert. den'd, 421 U.S. 992 (1975).

When the fee patent has issued the Indian can sue or be sued concerning his allotment in state courts, Bonds v. Sherburne Mercantile Co., 169 F.2d 433 (9th Cir. 1948), cert. den'd 335 U.S. 899 (1948).

Prior to issuance of fee patent the state courts have no jurisdiction concerning title to allotments, McKay v. Kalyton, 204 U.S. 458 (1907).

The issuance of a fee patent to an Indian without application did not relieve U.S. government from performing trust imposed by the trust patent. Nor did the issuance of the fee patent under the circumstances subject the allotment to Minnesota state taxes, Mahnomen County v. U.S., 131 F.2d 936 (8th Cir. 1942) rev'd on other grounds 319 U.S. 474 (1942). See also Board of Com'rs of Jackson County v. U.S., 100 F.2d 929 (10th Cir. 1939) modified on other grounds, 308 U.S. 343 (1951).

But where allottee' s application for fee patent resulted in issue thereof no collateral attack is permitted thereon. The patent will be set aside only on a direct proceeding for that purpose, Chatterton v. Lukin, 116 Mont. 419, 154 P.2d 798 (1945), cert. denied, 325 U.S. 880 (1945).

Where fee patent was issued, the fact that patentee subsequently alienated a portion of the land while not itself establishing consent is some evidence thereof, U.S. v. Frisbee, 165 F. Supp. 883 (D. Mont. 1958).

In Dickson v. Luck Land Co., 242 U.S. 371 (1917), the fee patent had issued, the allottee before he reached his majority under Minnesota law conveyed to A. After he reached his majority under state law he conveyed to B. The Court held that both parties claimed under the fee patent but that its issuance determined the allottee' s age for purpose of sustaining his right to the title free of restrictions but was not conclusive of his age under state law which became applicable upon issuance of fee patent. In the case, B prevailed because the deed to B was a disaffirmance of the conveyance to A made while the allottee was a minor under state law.

In the absence of expressed statutory authority, Secretary has no power to cancel fee patent which has been regularly issued, U.S. v. Getzelman, 89 F.2d 531 (10th Cir. 1937), cert. den'd 302 U.S. 708 (1937).

12. 25 U.S.C. sec. 408 provides:

> In any case where an Indian has an allotment of land, or any right, title, or interest in such an allotment, the Secretary of the Interior, in his discretion, may permit such Indian to surrender such allotment, or any right, title, or interest therein, by such formal relinquishment as may be prescribed by the Secretary of the Interior, for the benefit of any of his or her children to whom no allotment of land shall have been made; and

thereupon the Secretary of the Interior shall cause the estate so relinquished to be allotted to such child or children subject to all conditions which attached to it before such relinquishment. June 25, 1910, c. 431 sec. 3, 36 Stat. 856.

13. 25 U.S.C. sec.483a provides:

The individual Indian owners of any land which either is held by the United States in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to approval by the Secretary of the Interior, to execute a mortgage or deed of trust to such land. Such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the State or Territory in which the land is located. For the purpose of any foreclosure or sale proceeding the Indian owners shall be regarded as vested with an unrestricted fee simple title to the land, the United States shall not be a necessary party to the proceeding, and any conveyance of the land pursuant to the proceeding shall divest the United States of title to the land. All mortgages and deeds of trust to such land heretofore approved by the Secretary of the Interior are ratified and confirmed. Mar. 29, 1956, c. 107, 70 Stat. 62.

The following is extracted from the Senate report on the bill incorporated in the above section of the U.S. Code, see 1956 U.S. Code Cong. & Ad. News 2304:

H.R. 4802 would authorize an Indian owner of trust or restricted property to mortgage such property, subject to approval by the Secretary of the Interior, so that a valid mortgage thereon could be issued and the property pledged as security for loans. Its enactment would encourage individual Indian landholders to utilize commercial credit to the maximum extent possible, under proper supervision.

While existing law authorizes the Secretary of the Interior to approve mortgages and deeds of trust on Indian trust or restricted lands, some title companies in the Northwest and North Central States have refused to make loans to Indians because they feel present provisions of law do not grant clear and unquestionable authority for such borrowing by Indians and for encumbering the trust lands and related property interests with foreclosurable first mortgages. The Department of the Interior, therefore, has requested the enactment of H.R. 4802 to permit competent individual Indians to use their real-estate resources for obtaining capital necessary to develop an economic unit. .

The executive communication from the Secretary of the Interior requesting introduction and enactment of this legislation follows:

Department of the Interior
Office of the Secretary
Washington, D.C., March 1, 1955

Hon. Richard M. Nixon,
President of the Senate, Washington 25, D.C.

My Dear Mr. President: Enclosed is a draft of a proposed bill to authorize the execution of mortgages and deeds of trust on individual Indian trust or restricted land. . .

The Department believes that the Secretary presently has the authority to approve mortgages and deeds of trust to trust or restricted lands of individual Indians, and that such approval has the effect of removing restrictions on the lands to the extent of permitting a foreclosure or sale pursuant to the terms of the mortgage or deed of trust in accordance with the laws of the State or Territory in which the lands are located. Trust and restricted individual Indian lands may be sold with the approval of the Secretary, and it has long been the position of the Department that the power to approve sales and conveyances of restricted Indian lands includes the lesser power to approve mortgages on the lands. This position of the Department is reflected in 25 C.F.R. 241.52, which provides for the execution and approval of mortgages and deeds of trust in the following language:

"Approval of mortgages and deeds of trust. - The Commissioner of Indian Affairs or his authorized representative may approve mortgages or deeds of trust on any individually owned trust or restricted land whenever such lands under any law or treaty may be sold with the approval of the Secretary of the Interior or his duly authorized representative. The approval of such mortgage or deed of trust terminates the trust or restricted status of the land only with respect to such mortgage or deed of trust and only for the purpose of permitting foreclosure or sale pursuant to the terms of the mortgage or deed of trust in accordance with the laws of the State or Territory in which the land is situated."

In some States Indians have experienced little difficulty in obtaining loans from commercial sources on the basis of mortgages or deeds of trust executed and approved in accordance with the regulation quoted above. In other States, however, Indian applications for loans have been disapproved because the title insurance companies have refused to insure the lien of the mortgages. The title insurance companies that have taken this position have expressed a doubt about the authority of the Secretary under present law to consent to the encumbrance of the Indian trust land, and a belief that under some State laws the United States would be a necessary party defendant in a foreclosure action because it is the holder of the legal title to the trust allotted land.

It is the policy of the Department to encourage Indians to utilize commercial-credit sources to the maximum extent possible, and in order to do so the Indians need to be able to mortgage their trust land under proper secretarial supervision. Consequently, the objections raised by some of the title insurance companies should be met by legislation that removes any question about the validity and enforceability of such mortgages.

The Bureau of the Budget has advised that there is no objection to the submission of this proposed bill to Congress.

Sincerely yours,

ORME LEWIS

The caution of the lenders refusing to accept mortgages on Indian land seems well advised as a matter of foresight. The position of the Department that the power to approve sale included the lesser power to approve mortgages is not persuasive among those learned in trust law, wherein it is generally held that a power to sell does not include the power to mortgage. The rationalization therefor is that it is one thing for the trustee to sell for full consideration but another for him to risk the loss of the entire asset on a mortgage for less than full value.

In Crow Tribe v. Deernose, 158 Mont. 25, 487 P.2d 1133 (1971) it was held that this statute did not in and of itself confer jurisdiction over foreclosures authorized therein upon state courts.

14. 25 U.S.C. sec. 483 provides:

> The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians under the provisions of sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title, or sections 501-5 10 of this title. May 14, 1948, c. 293, 62 Stat. 236.

This section has not been used extensively because of the interpretation used by the Department requiring all Indian owners of a parcel to apply. In Sampson v. Andrus, 483 F. Supp. 240 (D. S.D. 1980), the court held that the interpretation was too narrow and issued mandamus requiring the Secretary to exercise his discretion in the matter where one of two owners had applied for what the court considered to be partition: