> Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Subsequent legislation concerning rights-of-way through Indian reservations is found in the Act of February 28, 1902[93] and of May 27, 1908.[94] The first-mentioned act authorized any railroad company to condemn a right-of-way through Indian lands. the second provided that no restriction upon alienation should be construed to prevent the exercise of the right of eminent domain in condemning rights-of-way for public purposes over allotted lands.

G. REMOVAL[95] OF RESTRICTIONS[96]

Restrictions on alienation of lands imposed by the allotment acts run with the land and are not personal to the allottee. Hence the removal of such restrictions as to an allotment by the Secretary in accordance with a statute does not operate to remove restrictions as to other tracts in which the Indian may be interested. In reaching this holding the Circuit Court of Appeals in *Johnson* v. United *States* said :[97]

> Appellants rely also on that part of the act of February 8. 1887, as the sixth section thereof is amended by the act of May 8, 1906 (34 Stat. 183 [Comp. St. § 4203]), reading :
>
> > "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 also on subsequent acts (35 Stat. 444; 36 Stat. 855; 37 Stat. 678) which extend the power of the Secretary to determine the heirs of deceased allottees. and provide that, if he is satisfied of their ability to manage their own affairs, he may cause patents in fee simple to be issued to them for their inherited interest. The contention, as we understand it, is that, if the Secretary, acting under these statutes, removes the restriction as to any allotment or an inherited interest therein, such action on his part operates to remove restrictions on other tracts in which the Indian may be interested. But the effect of this contention is to make the restriction against alienation personal to the Indian, whereas the uniform ruling is that it attaches to and runs with the land. In *U. S.* v. *Noble*, *237* U. S. 74, it is said, at page 80, 35 Sup. Ct. 532, 59 L. Ed. 844, that the restriction binds the land for the time stated. See also. *Bowling* v. *U. S.*, 233 U. S. 528 34 Sup. Ct. 659, 58L. Ed. 1080 ; Id., 191 Fed. 19, 111 C. C. A. 561 ; *Goodrum* v. *Buffalo*, *162* Fed. 817. 89 C. C. A. 525. Furthermore, the facts as we obtain them from the record do not show a removal of restrictions, as claimed, in behalf of any Indian other than those that have been heretofore named and whose conveyances we held to be valid under the act of June 21. 1906, as above stated (Pp. 956–957.)

H. RIGHTS OF CONVEYEES OF ALLOTTED LANDS

Contracts involving allotted lands which are not yet freed from restrictions have been held void.[98] Justice Holmes in the case of *Sage* v. *Hampe* [99] explained :

> * * * The purpose of the law still is to protect the Indian interest and a contract that tends to bring to bear improper influence upon the Secretary of the Interior and to induce attempts to mislead him as to what the welfare of the Indian requires are as contrary to the policy of the law as others that have been condemned by the courts. *Kelly* v. *Harper*, 7 Ind. Terr. 541. See *Larson* v. *First National Bank*, 62 Nebraska. 303,308

Courts and administrators have consistently refused to order the restoration of consideration received by an Indian for a conveyance which violates such laws, despite the good faith of the party dealing with the Indian [100] and the bad. faith of the Indian who intended to deceive the purchaser.[101]

In the case of *Bartlett* v. *Okla. Oil Co.*,[102] the District Court stated :

> * * * The disabilities under which these wards of the government are placed as to the alienation of restricted lands is very similar to those attaching to minors with reference to their contracts. and in the latter case it is established that the acts and declarations of a minor during infancy cannot estop him from asserting the invalidity of his debts after he has attained his majority. *Sims* v. *Everhardt*, 102 U. S. 300.26 L. Ed. 87. (P. 391.)

The Supreme Court in the case of *Heckman* v. *United States*,[103] *per* Hughes, J., said :

> It is said that the allottees have received the consideration and should be made parties in order that equitable

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[93] 32 Stat. *43.*

[94] 35 Stat. 312 (Five Civilized Tribes).

[95] The Supreme Court in the case of *United States* v. *Bartlett*, 235 U. S. 72, 80 (1914).. discussed a meaning of the word "removed":

> The real controversy is over the meaning of the word "removed." It is not questioned that it embraces the action of Congress and of the Secretary of the Interior in abrogating or cancelling restrictions in advance of the time fixed for their expiration. but it is insisted that It does not embrace their termination by the lapse of time. In short, the contention is that the word is used in a sense which comprehends only an affirmative act. such as a rescission or revocation while the statutory period was still running. Although having support in some definitions of the word, the contention is. in our opinion. untenable. for other parts of the same act. as also other acts dealing with the same subject. show that the word is employed in this legislation in a broad sense plainly including a termination of the restrictions through the expiration of the prescribed eriod. This is illustrated in §§ 4 and 5 of the act of 1908 and § 19 of the act of April 26. 1906. c. 1876. 34 Stat. 137. 144. and is recognized in *Choate* v. *Trapp*. 224 U. S. 665, 673. where. in dealing with some of these allotments. it was said that "restrictions on alienation were removed by lapse of time."

[96] On the power of the Secretary of the Interior to remove and reimpose restrictions. see Chapter 5. sec. 11. For regulations regarding issuance of patents in fee. see 25 C. F. R. 241.1-241.2.

[97] 283 Fed. 954 (C. C. A 8. 1922). Accord : United *States* v. *Estill*, 62 F. 2d 620 (C. C. *A.* 10, 1932).

[98] Allotted lands are declared not liable for debts contracted prior to the issuance of the final patent in fee therefor. 25 U. S. C. *354.* derived from Act of June 21, 1906, 34 Stat. 325. 327. And see Act of February 8. 1887. sec. 5. 24 Stat. 388, 389, as amended. 25 U. S. C. 348.

[99] 235 U. S. 99, 105 (1914).

[100] *United States* v. Walters, 17 F. 2d 116 (D. C. Minn. 1926). holding that a purchaser of land from an Indian allottee during the trust period is not entitled to return of the purchase money as a condition to the cancellation of the deed at suit of the United States. In *United States v Brown. 8* F. 2d 564 (CC. A. 8. 1925). cert. den. 270 U. S. 644 (1926). the court said that "Whether the disposition of this land was made in good faith or upon commendable considerations cannot be made to affect this decision, which involves a public policy of far-reaching consequences." (P. 568.) Also see *Sage* v. *Hampe*, 235 U. S. 99. 105 (1914). and *Smith* v. *McCullough*, *270* U. S. *456* (1926). rev'g 285 Fed. 698 (C. C. A. 8, 1922). invalidating leases negotiated for a forbidden term.

The Circuit Court of Appeals in *United States* v. *Raiche*, 31 F. 2d 624 (D. C. W. D. Wis. 1928) said :

> The bona fides of the transaction was held to be beside the point in *United States* v. *Brown*, *8* F. (2d) 564 (C. C. A. 8). in which it is said : "The bona fides of these conveyances is unimportant. Whether the disposition of this land was made in good faith or upon commendable considerations cannot be made to affect this decision, which involves a public policy of far-reaching consequences."
>
> Indeed. it seems this must be the correct rule. else the effectiveness of such restrictions would be readily frittered away. * * * (P. 627.)

[101] *United States* v. *Walters*, 17 F. 2d 116 (D. C. Minn. 1926).

[102] 218 Fed. 380 (D. C. E. D. Okla. 1914), aff'd sub nom. *Okla. Oil Co.* v. *Bartlett*, 236 Fed. 488 *(C. C. A. 8.* 1916).

[103] 224 U. S. 413 (1912), mod'g. and aff'g in part *United States* v. *Allen*, 179 Fed. 13 (CC. *A. 8.* 1910).

restoration may be enforced. Where, however, conveyance has been made in violation of the restrictions, it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancelation. Otherwise, if the Indian grantor had squandered the money. he would lose the land which Congress intended he should hold, and the very incompetence and thriftlessness which were the occasion of the measures for his' protection would' render 'them of no avail. The effectiveness of the acts of Congress is not thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid and thus frustrate the policy of the statute. *United States* v. *Trinidad Coal Co.*, 137 U. S. 160, 170, 171. (Pp. 446, 447.)

SECTION 5. LEASING OF ALLb'iTED LANDS

We have elsewhere noted that by virtue of a general statutory prohibition against leasing of tribal lands dating from the Act of May 19, 1796,[104] valid leases of tribal lands can be made only Pursuant .to specific statutes expressly authorizing such leases. Such is not the case with allotted lands. There is no general statutory prohibition against leasing of allotted lands. Limitations, if they exist, are to be found in the treaty or statute prescribing the tenure under which the allotment is to be held.

No attempt will be made in these pages. to analyze the various leasing provisions, of statutes applicable to particular tribes.[105]

The prohibition against leases contained in the General Allotment Act is found in section 5 [106] of' that act, which is embodied in the United States Code as section 348 of title 25, providing:

> * * * And if any conveyance shall be made of the land 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. * * *

This general provision has been modified by a series of statutes authorizing leases, subject to Interior Department control, in a variety of cases. Note has already been taken of the historical process, which began in 1891, of amending this provision contained in the General Allotment Act so as to permit leasing in a growing class of cases. These amendments authorizing the leasing of allotted lands vary in four major respects: (1) The purpose of the lease; (2) the term of the lease; (3) who is to make the lease; and (4) who is to approve the lease.

A brief comment on each of. these points 'is in order.

(1) Leasing of restricted Indian allotments, without regard to the purpose of the lease is authorized by section 4 of the Act of June 25, 1910,[107] which authorizes the Secretary of the Interior to consent to the alienation of allotments "by deed, will, lease, or any other form of conveyance" in cases where, by the terms of special allotment laws or treaties, land is inalienable without the consent of the President.

Other statutes in the field limit the leases which they authorize to those made for specific purposes such as "farming and grazing purposes";[108] "irrigation farming";[109] "farming purposes only";[110] and "mining purposes".[111]

(2) The statutes permitting the Secretary to lease certain heirship lands,[112] to approve leases on lands the alienation of which originally required Presidential consent [113] and authorizing mining leases on allotted lands [114] contain no limitations as to the term of years for which the lease may be made. Other statutes limit the term to 5 [115] or 10 years.[116]

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[104] Sec. 12, 1 Stat. 469, 472. See Chapter 15, sec. 19.

[105] Acts applying to particular tribes include the following:

Allotted lands on the Fort Belknap Reservation, susceptible of irrigation. may be leased for not to exceed ten years for sugar beets "and other crops in rotation" (Act of March 1. 1907, 34 Stat. 1015, 1034).

Allotted lands in the Shoshone Reservation may be leased for maximum terms of twenty years (Act of April 30. 1908, 35 Stat. 70, 97).

Yakima Reservation allottees may lease unimproved allotted lands for agricultural purposes for a period of not more than ten years (Act of March 1, 1899. 30 Stat. 924, 941, and Act of May 31. 1900, 31 Stat. *221. 246).*

The Secretary of the Interior may lease, for a maximum of ten years, the irrigable allotments of any Indian allottees of the former Uintah and Uncompahgre Reservation in Utah when the allottee is unable to cultivate the same or any portion (Act of April 30, 1908. 35 Stat. 70, 95).

Competent Crow allottees may lease their own and their minor children's allotments for five years. Adult incompetent Crows may lease their own and their children's allotments with the approval of the agency superintendent for terms up to five years. Lands of Crow minor orphans may be leased by their superintendent for the same term (Act of May 26. 1926, 44 Stat. 658).

Most of the foregoing acts place the leasing of Indian allotted lands under the superintendent of the reservations. Competent adult Crow Indians may execute farming and grazing leases without restraint of the Indian Service (Act of May 26. 1929, 44 Stat. 658).

Allottees under the Quapaw Agency may tease lands for not to exceed three years for farming or grazing purposes or ten years for mining or business purposes (Act of June 7, 1897. 30 Stat. 62, 72).

On Five Tribes leasing statutes, see Chapter 23. sec. 10. On Osage leasing statutes see ibid., sec. 12D.

[106] Act of February 8, 1887. 24 Stat. 388. 389. amended Act of March 3, 1901, sec. 9. 31 Stat: 1058. 1084.

It has been held that an assignment by an Indian of royalties from a mining lease of restricted lands is void as constituting an assignment of part of his inalienable reversion. *United States v. Moore, 284* Fed. 86 (C. *C. A. 8. 1922).*

[107] 36 *stat.* 855, 856, 25 U. S. C. 403.

Sec. 5 of this act (36 Stat. 855, 857) makes it unlawful and punishable by fine and imprisonment "for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such Indian, or to offer any such contract, deed, mortgage, or other instrument for record in the office of any recorder of deeds."

On administrative power of the Secretary over leasing, see Chapter 5. sec. 11E. When approval is secured, the lease is effective as of the date of execution. *Hallam* v. *Commerce Mining and Royalty Co., 49* F. 2d 103 (C. C. A. 10, 1931), aff'g 32 F. 2d 371 (D. C. N. D. Okla. 1929), cert. den. 284 U. S. 643 (1931). Also *see* Hampton v. *Ewert, 22* F. 2d 81 (C. C. A. 8, 1927), cert. den. *276* U. S. *623* (1928).

[108] Act of March 3, 1921. sec. 1, 41 Stat. 1225. 1232. 25 U. S. C. 393. On general grazing regulations, see 25 C. F. R. 71.1-71.26. On regulations for leasing of certain restricted allotted Indian lands for mining, see 25 C. F. R. 189.1–189.32.

[109] Act of May 18, 1916, sec. 1, 39 Stat. 123, 128. 25 U. S. C. 394.

[110] Act of May 31, 1900, sec. 1, 31 Stat. 221, 229. 25 U. S. C. 395.

[111] Act of March 3, 1909, 35 Stat. 781, 783, 25 U. S. C. 396, amended by Act of May 11, 1938, 52 Stat. 347, 25 U. S. C. 396A–396F.

Leases of Indian mineral lands frequently concern only certain specified minerals. For example, when only oil is named in the lease, it is a wrongful conversion to sell the gas issued from the well, except that such an oil lessee may use gas necessary to facilitate production upon the leased land. such as to run compressors and to repressure his well. *Utilities Production Corp. v. Carter Oil Co., 2* F. Supp. 81 (D. C. N. D. Okla. 1933).

[112] Act of July 8, 1940 (Pub. No. 732, 76th Cong.).

[113] Act of September 21, 1922, sec. 6, 42 Stat. 994. 995, 25 U. S. C. 392.

[114] Act of March 3, 1909, *35* Stat. 781, 783. 25 U. S. C. 396.

[115] Act of June 25, 1910, *sec. 4, 36* Stat. 855. 836, 25 U. S. 403.

[116] Act of May 18, 1916, sec. 1, 39 Stat. 123. 128. 25 U. S. C. 394.

The policy behind this limitation of term has been considered in interpreting other statutes relating to leases of Indian lands. Thus the Circuit Court in *United States* v. *Haddock, 21* F. 2d 165 (C. C. A. 8. 1927) said:

> Whenever Congress has authorized Indian allottees to lease their lands without the approval of the Secretary of the Interior

(3) Most of the statutes Provide specifically that the lease shall be made by the allottee or by the heirs to whom the allotment has descended.[117] Other statutes leave this to inference.[118] A statute authorizing leasing of lands in heirship status allows the local superintendent to execute leases under specified conditions.[119]

It has been administratively ruled that the statutory requirement of execution by the allottee cannot be waived so as to authorize the execution of leases by the superintendent of the reservation.[120]

(4) Several of the statutes specifically require the "approval" or "consent or approval" of the Secretary to a lease of allotted ands.[121]

Other statutes require approval "Of the superintendent or other officer in charge of the reservation where the land is located." [122] Still other statutes leave it to the regulations of the Secretary o determine whether approval shall be by the Secretary, by the Commissioner, or by a local reservation official.[123]

A lease made without the approval required by the statute or by regulations issued Pursuant to such statute is generally considered to be void.[124] There are, however, a number of unsettled

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It has limited the period for which the leases can be made, and in order to protect the Indian allottees it has been held that Congress Intended thereby to authorize the allottees to make leases in possession, and not in future or reversion, and such is the doctrine Of the Noble Case. But as to leases where the approval of the Secretary of the Interior is necessary to give validity thereto the reason for the rule falls. The allottee is protected by the requirement of departmental approval. The lease here was made and approved as provided by law. * * * (P. 167.)

Also see *Bunch* v. *Cole*, 263 U. S. 250 (1923). and *United* States v. *Noble*, *237* U. S. *74* (1915), rev'g 197 Fed. 292 (C. C. A. 8. 1912).

The broad outlines of administrative policy concerning the leasing of allotted lands are shown by many of the regulations. For instance, sec. 171.1 Of *25 C.* F. R. provides "* * * leases should be made for the shortest term for which advantageous contracts can be secured with responsible parties."

[117] Act of March 3. 1921. sec. 1, 41 Stat. 1225, 1232. 25 U. S. C. 393 (farming and grazing leases); Act of March 3, 1909, 35 Stat. 781. 783. 25 U. S. C. *396* (mining leases).

[118] Act of May 18. 1916. sec. 1. 39 Stat, 123. 128. 25 U. S. C. 394 (leases of irrigable allotments); Act of May 31, 1900. sec. 1, 31 Stat. 221. 229, 25 U. S. C. 395 (leases where allottee is incapacitated).

[119] The Act of July 8, 1940. Public, No. 732; 76th Cong.. 3d sess., provides:

> That restricted allotments of deceased Indians may be leased. except for oil and gas mining purposes. by the superintendents of the reservation within which the lands are located (1) when the heirs or devisees of such decedents have not been determined and (2) when the heirs or devisees of the decedents have been determined. and such lands are nor in use by any of the heirs and the heirs have not been able during a three-months' period to agree upon a lease by reason of the number of the heirs. their absence from the reservation. or for other cause. under such rules and regulations as the Secretary of the Interior may prescribe. The proceeds derived from such leases shall be credited to the estates or other accounts of the individuals entitled thereto in accordance with their respective Interests.

[120] "This office has had occasion frequently to point out that the general rule for the leasing of Indian allotments is that the signatures of the Indian owner or owners must be obtained before approval can be given to a lease. In a memorandum dated October 28. 1937. the Solicitor, in dealing with a similar factual situation, held that section 7 of the Leasing Regulations as revised by departmental circular of December 18. 1936. while authorizing a substantial majority of the heirs of allotted land In heirship status to execute a lease thereof dues not auIbOrise an heir or heirs representing only a half interest in the land to do likewise. It was pointed out that the Department was without legal power to approve a lease, where the owner. or the owners of a majority interest. were unable to agree to the lease. except In such special cases as Infancy. mental disability. or pending heirship determinations. These exceptions are not to be broadened Into unlimited administrative discretion. The special circumstances where the Department may act without the consent of the Indian owner, or a majority interest, are thOSe cases where there is no owner, or owners. legally capable of executing a valid lease of the land. They are not every case where Department officials may feel that some of the Indians are acting unwisely or capriciously, or to the detriment of the other Indians Interested in the land.

In the present case. one heir. Jennie Kills First. has signed the lease. The other heir, Benjamin Kills First, refuses. however. to sign it. There is no legal authority, therefore. to take the action proposed in the letter. Neither heir holds such a substantial majority interest in the land as to enable him or her to bind the other. The Indian owners are known and are capable of executing a valid lease. Their motives in signing. or not signing. are not relevant at this point." (Memo. Sol. I. D. June 15. 1938.)

Sec. 7 of the leasing regulations above referred to. embodied in 25 C. F. R. 171 8. declares:

> When the heirs owning a substantial majority in interest are desirous of leasing their inherited trust or restricted lands. the Superintendent is authorized to approve such a lease provided the heirs holding a minority interest in the estate have been notified of the proposed lease and have not objected to such a lease. In case the heirs holding such minority interest have objected to the approval of a lease on such inherited lands. the Superintendent. if in his judgment owners of the majority interest are best served, may approve the lease. and in such case, the share of the rentals that would accrue thereunder to the owners of the minority interest shall be held in escrow by the Superintendent to be paid to such heirs upontheir request or when and if they sign the lease. Such minority owners may, however, be permitted through partition or other arrangement with their coheirs to make use of such part of the land as may be equivalent to their undivided interests in the whole. In which event the rentals otherwise due them and held in escrow shall be refunded to the lessee. Approved leases executed by the heirs holding a majority interest shall be regarded as covering the entire acreage included in the lease and no refund of any portion of the rentals paid thereunder shall be made to the lessee save when by partition or other arrangement, heirs not parties to the lease have been permitted to use a portion of the land included in the lease. * * * (P. 268.)

For a discussion of the lack of power of the Secretary, or the superintendent on his behalf. to change the terms of a lease. see *Holmes v. United States*, 33 F. 2d *688* (C. *C. A 8,* 1929). and *United States* v. *Sandstrom*, *22* F. Supp. 190 (D. C. N. D. Okla. 1938).

[121] Act of September 21. 1922. sec. 6, 42 Stat. 994. 995. 25 U. S. C. 392. And see sec. 1C, *supra.* Also see Chapter 5. sec. 1E. For a discussion of early statutes giving the Secretary power to approve leases, see *Miller* v. *McClain*, 249 U. S. *308 (1919).*

[122] Act *of March* 3, 1921. sec. 1. 41 Stat. 1225. 1232. 25 U. S. C. 393,

[123] Act of May 18, 1916. sec. 1. 39 Stat. 123. 128. 25 U. S. C. 394 (leasing of irrigable land); Act of May 31, 1900, sec. 1. 31 Stat. 221. 229, 25 U. S. C. 395 (leasing where allottee is incapacitated); Act of March 3, 1909. 35 Stat. 781, 783. 25 U. S. C. 396 (mining leases); Act of June 25, 1910, sec. 4, 36 Stat. 855. 856. 25 U. S. C. 403 (leasing of trust allotments generally).

By the Act of May 11, 1938, 52 Stat. 347, 25 U. S. C. 396e, the Secretary of the Interior may delegate his power of approval of mining leases to superintendents or other Indian Service officials. Previously it was held that the superintendent had no power of approval of leases See *Central National Bank of Tulsa, Oklahoma,* v. *United States, 283* Fed. 368 (C. C. A. 8, 1922). By statute, however, the superintendent for the Five Civilized Tribes could previously act for the Secretary in approving leases. See Act of May 27. 1908. sec. 2. 35 Stat. 312. interpreted in *Holmes* v. *United States, 33* F. 2d 688 (C. C. A. 8. 1929). The superintendent for the Osage Tribe also possessed such power pursuant to the Act of June 28, 1906, sec. 7, 34 Stat. 539. 545. interpreted in *United States* v. *Sandstrom*, 22 F. Supp. 190 (D. C. N. D. Okla. 1938).

The regulation which is specifically concerned with business leases provides:

> Whenever it is deemed advisable to lease allotted Indian land for business purposes, the Superintendent should report the facts, object, terms, and conditions of the proposed lease to the Commissioner of Indian Affairs, who, if he deems it proper, may grant authority therefor, and no lease of this nature should be made without such prior approval. (25 C. F. R. 171.10.)

[124] "* * * It thus appears that the leases under which the defendants claim the right to the possession of the lands allotted in severalty are wholly void, having been taken in direct violation of the provisions of the acts of congress under which the allotments in severalty were made; that the occupancy of the lands and the cultivation thereof by the defendants is wholly inconsistent with the purpose for which the lands were originally set apart as a reservation for the Indians. and with the object of the government In providing for allotments in several ty; that such occupancy is held contrary to the rules and regulations of the department of the interior. and is held. not for the benefit. protection, and advancement of the Indians, but for the benefit of the original lessees and their subtenants; that such occupancy Of said lands by the defendants results in antagonizing the authority and control of the government over the Indians, and is clearly detrimental to their best interests, and materially interferes with the rules and regulations of the department charged with the duty Of carrying out the treaty stipulations under which the land forming the reservations was set apart for the benefit and occupancy of the Indians. Having

questions as to the legal position of the parties under such an illegal lease.[125]

Apart from the four matters above considered, as to which different leasing statutes vary, it remains to be said that all the statutes subject the leasing of allotments to regulations prescribed by the Secretary of the Interior. Such regulations require the payment of filing fees [126] and the execution of a bond by the lessee.[127] 'Rents, and, in the case of mineral leases, royalties are ordinarily payable to the superintendent on behalf of the allottee.[128]

Employees of the Office of Indian Affairs may not purchase any lease or have any interest therein, or have any interest in any corporation holding leases on Indian land.[129]

In matters not covered by the statutes or by the regulations authorized thereunder the courts have applied familiar rules of law governing leases. Thus it has been held that a tenant is estopped from denying his landlord's title [130] and that this estoppel continues until the tenant yields title.'" But the landlord's title means the title which the landlord purported to have at the creation of the tenancy, and termination of such title afterwards may be shown.[132]

assumed the duty of securing the use and occupancy of these lands to the Indians, and being charged with the duty of enforcing the provisions of the acts of congress forbidding all alienations of the lands until the expiration Of the period of 25 years after the allotment thereof. the government of the United States, through the executive branch thereof, has the right to invoke the aid of the courts, by mandatory injunction and other proper process, to compel parties wrongfully in possession of the lands held In trust by the United States for the Indians to yield the possession thereof, and to restrain such parties from endeavoring to obtain or retain the possession of these lands in violation of law. • • • • (*United States v. Flournoy Live-Stock & Real-Estate* Co.. 69 Fed. 886, 894' (C. C. Neb. 1895).)

[125] See With respect to the parallel situation under unauthorized leases of tribal land, Chapter 15. sec. 19.

[126] See *25 C. F.* R. 183.7; also. see 189.31 (mining leases). For statutory authority for such fees, see Act of February 14, 1920, 41 Stat. 408. 415. as amended by Act of March 1, 1933. 47 Stat. 1417, 25 U. S. C. 413.

[127] See, *e. g.,* 25 C. F. R. 183.15.

Many statutory requirements are designed to insure the proper payment of rents and royalties..

The Act of May 11. 1938. 52 Stat. 347, 348. 25 U. S. C. 396c, requires lessees of restricted lands for mineral purposes. including oil and gas. to furnish surety bonds for the faithful performance of the terms of the leases.

Lease forms are often prepared by the Department of the Interior. *See* ***Montana Eastern*** *Ltd. V.* ***United States,*** *95* F. 2d 897 (C. C. A. 9, 1938). For a discussion of the power of the United States with respect to violations of leases on restricted lands, see Chapter 19, sec. 2A(1).

[128] 25 C. F. R. 189.12, 189.14. Circumstances under which allottees are permitted to make their own leases are defined in current regulations in these terms:

> Any adult allottees deemed by the Superintendent to have the requisite knowledge, experience, and business capacity may be permitted to negotiate their own leases and collect the rentals therefor. All such leases, however, must be approved by the Superintendent. This privilege should be granted in writing, and with some liberality, and be subject to revocation at any time the allotte proves himself unworthy of it by wasteful expenditure of the money. Indians of this class may also be permitted to negotiate leases on the land of their minor children, but not to collect the rentals, which shall be paid to the Superintendent for deposit to the minors' credit as individual Indian money. Such leases must be approved by the Superintendent. (25 C. F. R. 171.4.)

[129] Act of June 30, 1834, 4 Stat. 735. 738; 25 U. S. C. 68. See Chapter 2, sec. 3B, fn. 335.

[130] *Eagle-Picher Lead Co. v.* ***Fullerton,*** *28* F. 2d *472* (C. C. A. 8. 1928).

[131] *Sittel* v. ***Wright,*** 122 Fed. 434 (C. C. A 8. 1903).

[132] ***Eagle-Picher Lead*** *Co.* v. ***Fullerton,*** *supra.*

SECTION 6. DESCENT AND DISTRIBUTION OF ALLOTTED LANDS [133]

No feature of the allotment system has provoked more criticism than the "heirship problem" and it is against the background of this problem that existing law must be reviewed.

> It is doubtful if the serious nature of this problem was appreciated at the time the allotment acts were passed. Because of this feature of the allotment system the land of the Indians is rapidly passing into the hands of the whites, and a generation of landless, almost penniless. unadjusted Indians is coming on. What happens is this: The Indian to whom the land was allotted dies leaving several heirs. Actual division of the land among them is impracticable. The estate is either leased or sold to whites and the proceeds are divided among the heirs and are used for living expenses. So long as one member of the family of heirs has land the family is not landless os homeless, but as time goes on the last of the original allottees will die and the public will have the landless. unadjusted Indians on its hands.[134]

The problem of the landless younger generations on those reservations which were earliest allotted was the chief problem leading to the termination of the allotment system.[135] In place of alienable titles, the tendency today is to grant, out of tribal lands, "assignments" of land which are to be used by the "assignee" and which revert to the tribe for reassignment when no longer so used. This development has occurred on reservatiocls which still retain sufficient areas of unallotted land. As for the other areas, any development along these lines depends upon (*a*) federal acquisition of land for the tribe, under section 5 of the Wheeler-Howard Act [136] or restoration of ceded lands, under section 3; [137] or (b) the acquisition of land by a tribe. through exchange of allotments for assignments, or through land purchase or through other legal means.[138]

Meanwhile, on the allotted reservations, the complexities of the "heirship" problem increase in geometric progression.

> The problem of land is still the greatest unsolved problem of Indian administration. The condition of allotted lands in heirship status grows more complicated each year. Commissioner Collier supplied the House Appropriations Committee a year ago with examples showing probate and administrative expenditures upon heirship lands totaling costs seventy times the value of the land; and under existing law these costs are destined to increase indefinitely. Responsibility lies with Congress and the administration to work out a practical solution to this problem, either in terms of corporate ownership of lands, or through some modification of the existing inheritance system. (P. 34.)[139]

The chief reasons for this complexity appear to be : (1) The Indian allottee does not ordinarily have ready cash or credit facilities for the settlement of estates where physical partition is not practicable.[140]

(2) The Indian allottee frequently does not consider land in a commercial aspect, and in many cases he could not get as much cash income from the land as a non-Indian, and therefore cannot outbid non-Indian purchasers of heirship lands.[141]

[133] Questions of administrative power in this field are dealt with in Chapter 5. sec. 11C. Questions of jurisdiction are considered in Chapter 19. sec. 5.

[134] Meriam, The Problem of Indian Administration (1928). p. 40.

[135] See sec. 1D, *supra.*

[136] See Chapter 15, sec. 8.

[137] See Chapter 15, sec. 7.

[138] See Chapter 15, sec. 8.

[139] Abeita et al., The New Day for the Indians (1938).

[140] See quotation from Meriam, *supra.*

[141] See sec. 1C, *supra.*

(3) It may be that Indian family relations are more complicated than the family relations of non-Indians in rural areas, although there do not appear to be any authoritative figures on this point.

(4) The Indian population, on most allotted reservations, is without channels by which members of families too large for the family homestead and too poor to increase it move off to other rural or urban areas. The application to the allotted Indians of state inheritance laws adapted to a more fluid population and economy has therefore had striking and largely unforeseen results.

(5) Under existing law the cost of administration is borne by the Federal Government rather than by the individual Indians concerned in the estate. There is thus no economic incentive on the part of the Indians concerned to simplify the status of heirship lands.

A. INTESTACY

In the absence of statute, heirs to an allotment are determined in accordance with tribal custom.[142]

The General Allotment Act, like several special allotment acts, modifies this rule and substitutes state law as a standard for the determination of heirs. The most important consequence of this shift has been the multiplication of the number of heirs and the subdivision of interests in "dead allotments."

This result is achieved by section 5 of the General Allotment Act.[143] which prescribes that the patent issued to each allottee under the General Allotment Act shall

> * * * declare 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 * * *.

Where an Indian to whom an allotment of land has been 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 the Secretary of the Interior may. under rules prescribed by him and upon notice and hearing. determine the heirs; his decision is final and conclusive.[144] The statute [145] granting him this right further provides:

(1) If the Secretary finds the heirs competent to manage their own affairs he may issue a patent in fee to them for the allotment

(2) If he finds partition to be to the advantage of the heirs. he may, on petition of the competent heirs, issue patents in fee to them for their shares.

(3) If he finds one or more of them incompetent, he may cause the land to be sold, under certain rules of sale.

(4) The shares of the proceeds of the sale due the competent Indians are to be paid to them.

(5) The shares due the incompetent ones are to be held in trust for their use during the trust period.

(6) The purchaser of the land receives a patent in fee.

The foregoing provision, though phrased to apply to trust allotments, has been held by the Supreme Court to be applicable to restricted allotments in fee as well.[146]

The power of Congress to enact this statute and the power of the Secretary thereunder have been elsewhere treated.[147]

The Act of June 18, 1934, has not affected the mode of intestate lescent of allotted lands.

Certain of the regulations pertaining to the determination of heirs define the manner in which the Secretary determines heirs.[148] Eight examiners of inheritance are appointed, one for each probate district in the Indian country.[149] It is made the duty of the superintendent in charge of any allotted reservation, as soon as he is informed of the death of an allottee or an Indian possessed of trust property within the jurisdiction, to cause to be prepared an inventory showing in detail the estate of the decedent and also a certificate of appraisement thereof and statement as to reimbursabie claims.[150]

Notice of hearing is provided for by the requirement that the examiner of inheritance shall post, for 20 days in five or more conspicuous places on the reservation or in the vicinity of the place of hearing, notices of the time and place at which he will take testimony to determine the legal heirs of the deceased Indian, calling upon all persons interested to attend the hearing.[151] Copies of the notice are usually served personally on all persons who the superintendent believes are probable heirs or creditors of the deceased.[152] A further requirement is made of the examiner that he inspect carefully the allotment. census, and annuity rolls, and any other records on file at the agency, and obtain all other information which may enable him to make a prima facie list of the heirs of such deceased Indian.[153]

Minors in interest must be represented at the hearings by a natural guardian or by a guardian ad litem appointed by the examiner.[154]

Parties interested in any probate case before an examiner of inheritance may appear by attorney.[155] Attorneys appearing before the examiner of inheritance, the Indian Office, or the Department of the Interior, must have a power of attorney from their respective clients and must be licensed attorneys. admitted to practice.[156] Written arguments or briefs may be presented.[157]

All claimants are required to be summoned to appear and testify at the hearings. There must be present at least two disinterested witnesses, who are acquainted with and have direct knowledge of the family history of the decedent.[158] In case the decedent is a minor, unmarried and without issue, and the heirs are members of the immediate families of the decedent, the ex-

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[142] See Chapter 7. sec. 6 ; Chapter 10. sec. 10.

[143] Act of February 8. 1887. 24 Stat. 388. 389. amended Act March 3, 1901. sec. 9.31 stat. 1058, 1085. 25 U. S. c. 348.

[144] In *Chase* v. *United* States. 272 Fed. 684 (C. C. A. 8. 1921). the COUPt held that the determination by the Secretary of the Interior that a certain person was the heir of a deceased Omaha allottee who as such had a life estate in the allotment under the Nebraska laws was COoCiusive. The same principle was followed In Lone v. *United States ex rel.* MZckodiet, 241 U. S. 201 (1916), wherein it was further held that even after determining the heirs the Secretary may reopen his decision at any time during the trust period.

[145] Act of June 25, 1910. sec. 1. 36 Stat. 855 ; Act of March 3. 1928 45 Stat. 161; Act of April 30, 1934, 48 Stat. 647 ; 25 U. S. C. 372.

[146] *United States* v. *Bowling*, 256 U. S. 484 (1921).

[147] See Chapter 5, secs. 5C, 11C.

[148] The procedure in Indian probate cases is discussed in Monograph No. 20, Attorney General's Committee on Administrative Procedure (1940).

[149] 25 C. F. R. 81.1, 81.2, 81.3.

[150] 25 C. F. R. 81.5. The superintendent also notifies the examiner for the district and the Probate Division of the Office of Indian Affairs of the demise of an Indian with restricted property. When an Indian of any allotted reservation dies leaving only personal property or cash of a value less than $250, the superintendeut of the reservation where the property is found is authorized to assemble the apparent heirs and hold an informal hearing, with a view to the proper distribution thereof. In the disposition of such funds, the superintendent Is authorized to pay funeral charges and expenses of last illness and any just claims for necessaries furnished decedent. 25 C. F. R. 81 23 (1940).

[151] 25 C. F. R. 81.6. Also see 81.10–81.11.

[152] The rules also permit service by mail. 25 C. F. R 81.8.

[153] 25 C. F. R. 81.7.

[154] 25 C. F. R. 81.12.

[155] 25 C. F. R. 81.15. Attorneys appear very rarely.

[156] 25 C. F. R. 81.17.

[157] 25 C. F. R. 81.18.

[158] 25 C. F. R. 81.19–81.21.

aminer may, in his discretion, dispense with the- presence of disinterested witnesses, provided the testimony of the interested witnesses is corroborated by the records of the Department.[160]

When, subsequent to the determination of heirs by the Department, property is found which' is not included in the examiner's report, this fact must be brought to the attention of the Commissioner, together with an appraisal thereof. The superintendent will then be instructed to include this property in the original findings with instructions as to any additional fee to be charged. However, where newly discovered property takes a different line of descent from that shown by the original findings, a redetermination relative thereto must be ordered and had.[160]

The Solicitor for the Department of the Interior, discussing the authority of the Secretary of the Interior relative to claims against estates of deceased Indians, declared : [161]

> The Secretary of the Interior is authorized to probate Indian estates under the Acts of June 25, 1910 (36 Stat. 855), and February 14, I913 (37 Stat. 678). No specific authority is indicated in these acts relative to the allowance or disallowance of claims against the estate. As an incident to the power granted, however, ever since the passage of the acts mentioned, the, Secretary of the Interior has passed on claims based on indebtedness incurred. by the decedent during his lifetime, and on expense of last illness and funeral charges. While the allotted lands of the Indian are not subject to the liens of indebtedness: incurred while the title is held in trust for the Indian (Section 354, Title 25, U. S. Code), the right of the Secretary administratively to allow and settle indebtedness against the Indian decedent has never been seriously questioned.
>
> The priority accorded claims of the United States by virtue of 31 U. S. C. 191, does not apply to the estates of deceased Indians. No administrator or executor is appointed in these Indian estates, and claims against them: are not such liens as may be enforced through the sale of the restricted lands involved. Allowed claims are paid from the accruals to the land or from such cash as may, be available at the time of death of the decedent.
>
> Priority is however given to claims of the United States against estates of deceased Indians, administratively. There are some qualifications which are covered by Departmental Regulations.
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> * • * * •
>
> Except when the expenditures above mentioned [medical and funeral] affect the order of priority this Department allows claims administratively as follows:
>
> 1. The probate fee (25 U. S. C. 377; 25 C. F. R. *81.40).*
> 2. Funeral bills and expense of last illness in reasonable amount (25 C. F. R. 221.9 and 81.46).
> 3. Claims of the United States.
> 4. General creditors (25 C. F. R. 81.44, 81.46).

Any aggrieved person claiming an interest in the trust or restricted property of an Indian, who has received notice of the hearing to determine heirs or consideration of a will, or who was present at the hearing, may file a motion for rehearing within 60 days from the date of notice on him of the determination of heirs or action on a will, or within such shorter period of time as the Secretary of the Interior may determine to be appropriate in any particular case. A motion so filed operates as a supersedeas until otherwise directed by the Secretary of the Interior.

A n y such motion must state concisely and specifically the grounds upon which the motion for rehearing is based and be accompanied by brief and argument in support thereof.

If proper grounds are not shown, the rehearing will be denied. If upon examination grounds sufficient for' rehearing are shown, a rehearing will be granted and the moving party will be notified that he will be allowed 15 days from the receipt of notice within which to serve a copy of this motion, together with all argument in support thereof, on the opposite party or parties, who will be allowed 30 days thereafter in which) to file and serve answer, brief, and argument. Thereafter, the case will be again considered and appropriate action taken, which may consist either in adhering to the former decision or modifying or vacating same, or the making of any further or other order deemed warranted.[162]

No case will be reopened at the petition of any person who received notice of the hearing or who was present at such hearing, and received notice of the final decision, except as provided in § 81.34. Any other aggrieved person, claiming an interest in the estate, may apply for reopening of the case by petition, in writing, addressed to the Secretary of the Interior, to be submitted through the Commissioner of Indian Affairs. All such petitions must set forth fully the alleged grounds for reopening, and when such petitions are based on alleged errors of fact are to be accompanied by affidavits or other supporting evidence. On receipt of such petition, the Commissioner of Indian Affairs, if he deems it essential, will give the previously determined heirs an opportunity to present such showing in the matter as they may care to offer. Thereafter the petition together with the record in the case will be submitted to the Secretary of the Interior with such recommendation in the premises as the Commissioner of Indian Affairs may deem appropriate. Aside from filing the papers specifically referred to, no further proceedings by the respective parties are required prior to a determination by the Secretary of the question whether a reopening will be granted or not.

Petitions for reopening will not be considered when 10 years or longer have elapsed since the heirs were previously determined nor in those cases in which the estate of the decedent or any considerable part thereof has been disposed of under the previous finding of heirs. Claims for expenses, attorneys' fees, etc., in connection with petitions for reopening will not be considered or recognized prior to a determination of the question whether or not a reopening is to be had, and neither the estate of the decendent nor the determined heirs thereto will be subject to any expense incurred prior to allowance by the Secretary of a reopening of the case.[163]

B. TESTAMENTARY DISPOSITION

Statutory provision has been made for the disposal by will of allotments held under trust.[164] This provision, as it appears in

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[160] 25 C. F. R. 81.20. According to the Court of Appeals of the District of Columbia in *Nimrod* v. *Jandron,* 24 F. 2d 613 (App. D. C. 1928) :

> The duty of the examiner is clearly defined under the regulations, which require a complete investigation of the mental capacity of the testator at the time of the making of the will. and of the influences to which she may have been subjected at the time. as well as the ascertainment of the legal heirs to her estate. He was required likewise to give a full and complete bearing to all parties interested.' * * * (P. 616.)

The report of the examiner of inheritance, which contains a proposed order for the determination of heirs, is reviewed by the Probate Division of the Office of Indian Affairs and the Office of the Solicitor, and is then submitted to the Secretary of the Interior for approval. While the Probate Division is nominally a branch of the Office of Indian Affairs. it is also subject to the supervision of the Solicitor by virtue of a departmental order which placed all attorneys under the administrative jurisdiction of the Solicitor. Personnel Order No. 3396 of June 30. 1934. supplementing Order No. 639. issued June 9. 1933.

[160] 25 C. F. R 81.22.

[161] Letter Sol. . D. to Sol. of Dept. of Agr., June 20, 1940.

[162] 25 C. F. R. 81.34.

[163] 25 C. F. R. 81.35.

[164] Acts of June 25, 1910, 36 Stat. *855.* 856, and February 14, 1913, 37 Stat. 678. 25 U. S. C. 373.

the United States Code,[165] permits the disposal by will of interests in allotments (as well as other property) held under trust by anyone having such an interest who is at least 21 years old. The will is to be executed in accordance with regulations prescribed by the Secretary of the Interior and each will must be approved by him. If after an Indian's decease the will is disapproved, the allotment descends according to the law of the state wherein it is located.[166]

Approval of a will and death of the testator do not automatically terminate the trust. The Secretary may cause the lands to be sold and the proceeds to be held for the legatees or devisees and used for their benefit.

In the case of *Blanset* v. *Cardin*,[167] the Supreme Court was of the opinion that this provision was exclusive and that state statutes regarding devises of property have no effect upon allotments held in trust. Thus it held that the death of an allottee who had made a will did not terminate the restrictions[168] and subject the land to the Oklahoma law of wills, under which a wife could not devise more than two-thirds of her property away from her husband.

The power of the Secretary in connection with the approval or disapproval of wills is broad enough to enable him to determine whether he has mistakenly approved a will and whether the hearing before the examiner has been conducted in accordance with statute and regulations even after more than a year has elapsed since the death of the allottee.[169]

The authority of the Secretary of the Interior is limited to approval or disapproval of an Indian will, and he is without authority to change the provisions of the will by making a different provision than that provided by the testator.[170]

But after the will has been approved. the parties interested in the estate may agree upon a different disposition of property, subject, of course, to the approval of the Secretary of the Interior.

Certain of the federal regulations pertaining to the approval of wills illuminate the meaning of the statutory provisions above quoted. It is provided[171] that the will of any Indian who may make such an instrument shall be filed with the superintendent and that the officials of the Indian Office shall aid and assist the Indian as far as possible in the drawing of the instrument so that it will clearly and unequivocally express his wishes and intentions. Statements preferably under oath by the person drawing the will and the witnesses thereto that the testator was mentally competent and that there was no evidence of fraud, duress, or undue influence in connection therewith should be attached to the Instrument. Where such evidence exists, a detailed statement should accompany the will setting forth the nature and extent thereof.

Other important regulations as they appear in title 25 of the Code of Federal Regulations are noted in the following summary :

> Section 81.53 requires the examiner, Superintendent, or other officer to make a specific recommendation as to whether the will of a deceased Indian should be approved by the Secretary, based upon a full inquiry into his mental competency; "the circumstances attending the execution of the will; the influences which induced its execution." In the event that the distribution is contrary to the laws of the State in which the testator resides, the examiner is required to seek the best available evidence as to the reasons for such action, including the affidavit of the testator, if living. He must also investigate the competency of all devisees and legatees to manage their affairs and note if any beneficiary is a person not of Indian blood.
>
> Section 81.54 provides that "No will executed in conformity with the Act of February 14. 1913 (37 Stat. 678; 25 U. S. C. 373), shall be valid or have any force or effect so far as it relates to property under the control of the United States, unless and until it shall have been approved by the Secretary of the Interior, who may approve or disapprore the will after a due and proper hearing to determine the heirs to the estate of the testator or testatrix shall hare been held. required notice of such hearing first having been given to all persons interested, including the presumptive legal heirs, so far as they may be ascertained, and at which hearing the circumstances attendant upon the execution of said will shall have been fully shown by proper aud credible testimony, and after the legal heir or heirs have had ample opportunity to object to the will and its approval. * * *"
>
> Section 81.55 provides that no action on wills will he taken until after the death of the testator, except that during the life of the testator the Office of Indian Affairs shall pass on the form of the will.
>
> Section 81.56 provides that in the absence of a contest, the examiner may secure affidavits of attesting witnesses to the will, in lieu of their personal appearante at the hearing.

Under section 4 of the Act of June 18. 1934,[172] an Indian's real property and shares in a tribal corporation may be devised only to his heirs, to members of the tribe having jurisdiction over the property, or to the tribe itself. In a recent opinion. the Solicitor of the Department of the Interior was called upon to construe this section, His opinion throws considerable light upon the limitation placed by that act upon a testator: [173]

> My opinion has been requested upon the proper construction of section 4 of the Wheeler-Howard Act (48

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[165] "Any persona of the age of twenty-one years having any right. title. or interest in any allotment held under trust or other patent containlug 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. nod 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, *hoaever*, That no will so executed shall be valid or have any force or effect unless and until it shall bave 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 he 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 and the preceding section shall not apply to the Five Civilized Tribes or the Osage Indians." (25 u. S. c. 373.)

[166] See subsection A. *supra*. Also see Chapter 7, sec. 6.

[167] 256 U. s. 319 (1921).

[168] Where, on the other hand, an Indian died testate prior to the enactment of June 25. 1910. 36 Stat. 855, his will made under an authnrlstng statute which was silent as to its effect upon the removal by will of restrictions made upon approval by the President serves to remove such restrictions. Op. Sol. I. D., M.27700. *August* 3. 1934. See *La* Motte v. *United States*, *254* U. *S. 570 (1921)*.

[169] *Nimrod* v. *Jandron*, 24 F. 2d 613 (App. D. C. 1928).

[170] In the *case* of *In Ite Wah shah-she-Me-tsa-he's Estate*, 111 Okla. *177*, 239 Pac. 177 (1925). the Supreme Court of Oklahoma. speaking with reference to the probating of a will of au Osage Indian which Had been approved by the Secretary of the Interior as provided by law. said:

> If the will is void for any reason the husband would tak under the provisions of section 11301. C. S. 1921, but so long as the will stands the disposition of the property made by its terms must also stand. as the court cannot make a new will nor direct a different division of the property from that made by the testatrix with the approval of the Secretary of the Interior. (P. 179.)

[171] 25 C. F. R. 81.50.

[172] 48 Stat. 984, 985, 25 U. S. C. 464. See 25 C. F. R. 81.58.

[173] Op. Sol. I. D., M.27776, August 17, 1934 ; 54 I. D. 584.

Stat. 984. 985) in so far as this section limits the class of persons to whom an Indian may devise restricted lands The relevant language of this section declares:

> Except as herein provided, no. sale. devise, gift, exchange. or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe, or corporation organized hereunder, shall be made or approved: *Provided, however*, That such lands or interests may, with the approval of the Secretary of the Interior. be sold. devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such Lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable. in which said lands are located or in which the subject matter of the corporation is located. to any member: of such tribe or of such corporation or any heirs of such member: . . *

The question of what persons other than members of the testator's tribe may lawfully be designated as devisees of his restricted property, where such property is subject to the terms of the Wheeler-Howard Act, is raised by the ambiguity of the last two words in the passage above quoted, namely. "such member." If "such member" refers to the testator himself. then the class of nonmembers entitled to receive restricted Indian property will be limited to those who through marriage, descent or adoption have acquired a relationship to the testator sufficient to constitute them heirs at law.

If the words "such member" be construed to mean any *member to whom the property in question might be devised*, then. apparently. nonmember heirs of other Indians than the testator might be made devisees of the testator's restricted property.

in the third place, the phrase "such member" might be construed to refer lo a *member who is a devisee under the will in question.*

* * * *

The circumstances under which the phrase "or any heirs of such member" was inserted in the Wheeler-Howard Bill indicate the proper meaning to be attached lo that phrase. Early drafts of the legislation (e. g. H. R 7902. Title III, See. 5, April House Committee Print; S. 2755. Sec. 4, May Senate Committee Print), both in the House and in the Senate, limited the privilege of inheriting restricted property to the members of the testator's tribe. in accordance with the fundamental purpose of the legislation to conserve Indian lands in Indian ownership and to prevent the further checker-boarding of Indian lands through the acquisition of parcels of such lands by persons not subject to the authority of the Indian tribe or reservation. To this limitation the objection was urged that in some cases the heirs of a deceased Indian would not be members of the tribe or corporation to which the deceased had adhered, and that it would be unfair to deny such natural heirs the tight to participate in a devise of property. The House Committee on Indian Affairs, therefore, added to the clause first considered the phrase "or any heirs of such member." (H. R. 7902. Sec. 4, as reported to the House.) Independently. the Senate Committee on Indian Affairs added to the draft under its consideration a parallel phrase more restricted in scope, "or the Indian heirs of such member." (S. 2755. Sec. 4. Committee Print No. 2; S. 3645, Sec. 4. as reported to the Senate.) It seems clear that the purpose of these legislative after-thoughts was not to alter fundamentally the intent and scope of the original restriction but rather to provide for the exigencies of a special case that had not been distinctly considered, namely. the case of an Indian testor desiring to divide his estate by will among those who would. in the absence of a will, have been entitled to share in the estate, namely. his own heirs.

That the Chairman of the House Committee on Indian Affairs so construed the phrase here in question is indicated by his explanatory statement to the House of Representatives:

> Section 4 stops a dangerous leak through which the restricted allotted lands still in Indian ownership pass therefrom. Upon the death of an allottee the number of heirs frequently makes partition of the land impractical, and it must be sold at partition sale, when it generally passes, into the hands of whites. This section endeavors to restrict such sales to Indian buyers or to Indian tribes or organizations. It however *permits* the devise of restricted lands to the heirs, whether Indian or not. (Cong. Rec. June 15, 1934. p. 12051.)

It requires no strained construction of language to interpret the phrase "or any heirs of such member" in accordance with this intent and purpose. The phraseology of section 4 suffers from the looseness of syntax incident to the agglutinative process of amendment. Grammatical rules, such as that requiring a definite antecedent for the word "such", are not always religiously observed in the closing days of a Congressional session. In the phrase "heirs of such member" the reference of the word "such" is supplied not by any clear grammatical antecedent but by the fact that the "member" ~~chiefly considered~~ throughout the section, though never expressly named, is the testator. This is not the only instance in the Statute where the word "such" cannot be construed by simple application of the rules of grammar. (See the initial words of Sec. 17.)

To conclude, legal usage requires that the phrase "heirs of such member" must refer to the heirs of one who is deceased. *Memo est haeres viventis.* The only deceased person considered in the section is the testator. Evidence of the intent of Congress indicates that it is the testator's heirs that are being considered. I am of the opinion that the phrase "heirs of such member" should properly be construed to mean "heirs of the testator."

C. PARTITION AND SALE OF INHERITED ALLOTMENTS

In 1935, the National Resources Board published a study entitled "Indian Land Tenure, Economic Status, and Population Trends." its authors had studied, among others, the problems resulting from the partition and sale of inherited allotments. Their comments on this subject are particularly enlightening:

> In 1902 pressure for legislation which would authorize the sale of heirship allotments could no longer be resisted. The passage of the act of May 27, 1902 (32 Stat. 245, 275)[24] opened the sluiceway for a wholesale dissipation of the Indian landed estate.[25] A few years later (1906) it was complemented by another law which permitted the Secretary of the Interior to sell original allotments. as well.

[24] The act of 1902 was later modified to provide a more orderly method of determining heirs, principally by the act of May 8, 1906 (34 Stat. 182), and the act of June 25, 1910 (36 Stat. 855, 859).

[25] Although such sale was provided for as early as 1902, no statutory provision for the determination of heirs by the Secretary of the Interior was made until 1910 (Act of June 25, 1910, 36 Stat 855). As a result, purchasers of allotted Indian lands from heirs of the allottee prior to 1910 found difficulty in obtaining loans upon such property because of the contention of the loan companies that there had not been formal determination of the heirs of the deceased allottees by a court or official clothed with authority to make such determination and that in the absence of such proceedings the title was defective. A letter from the Secretary of the Interior to the Chairman of the Federal Home Loan Bank Board, presents a rather exhaustive review of authority on the validity of sale under the foregoing statutory provisions:

> It has come to the attention of this Department that owners of lands whose titles are founded upon deeds executed by the heirs of deceased Indian allottees and approved by the Secretary of the Interior prior to the enactment of the act of June 25, 1910 (36 Stat. 855), conferring jurisdiction upon the Secretary of the Interior to determine the heirs of such deceased Indians, are experiencing difficulty in obtaining loans from the Federal land banks and other governmental lending agencies.
>
> The principal trouble appears to be that the abstracts of title furnished by the applicants for loans fail to show that there has been a formal determination of the heirs of the deceased Indian allottees by a court or official clothed with authority to make such determination, and in the absence of such proceedings, the position has been taken that the title is defective. We believe that the position so taken is based upon a misconception of the legal effect of the deeds from these Indian heirs.
>
> The deeds under consideration were executed and approved in accordance with regulations prescribed by the Secretary of

Upon the death of an allottee there were four possible methods of disposing of the estate:

(1) The Secretary of the Interior could issue fee patents to the heirs as a group or otherwise remove the restrictions.

(2) The estate could be physically partitioned among the heirs and either trust or fee Patents issued to them individually.[175]

(3) The estate could be retained by the superintendent and leased for the benefit of the heirs.

(4) The estate could be sold under Government supervision and the proceeds distributed among the heirs.

Partition of estates is a common procedure when the number of heirs is small; but small families are not the rule among Indians, and the very tardy process of probate in the Office of Indian Affairs causes long periods of time, often running into years, to elapse before the heirs are determined. In the meantime, new heirs may have been born, and the heirs of the original allottee may have died.

The leasing of heirship allotments is a more frequent procedure, with consequences to be noted later. But it is more important to note here that under the act of 1902 a single "competent" heir could demand the sale of the whole allotment. Even though an administration may frown upon the sale of the heirship lands, it is actually powerless to prevent it. It perpetually faces the dilemma of either permitting the land to be sold, or exerting its influence to retain the land in the ownership of the heirs and to lease it. So long as the allotment is held intact, it is subject to progressive subdivision by the death of heirs and the resulting fragmentation of the equities.

If the estate is put up for sale, Indians rarely have the cash to buy it and the allotment almost invariably passes to white ownership. A strong pressure to sell comes from the Indian heirs themselves because of their lack of experience with the white man's property system. Contrary to the hopeful idealism of the proponents of the allotment system, the Indians have not acquired the white man's respect for "land in severalty." Unrestricted, individual ownership, as contrasted with their own communal ownership, tempts Indians to look on land as an asset to be disposed of for cash to meet everyday wants rather than to work it for an income.[29]

[29] Dr. John R. Swanton of the Bureau of American Ethnology recently wrote: "Our own attempts to substitute land for a living fails to attain its object because there is no insistence that land shall be used to furnish a living with the addition of labor instead of belug sold outright."

The result of this legislation was exactly what would be expected—a rapid dissipation of capital assets From 1903. when the first sales were made. to 1934. sales of heirship land totaled 1,426,061 acres. most of which was spent as income. Desperately in need of the steady income which the application of labor to these lands would have provided, Indians were nevertheless permitted to divest themselves of the one asset which they needed most to insure their own survival. (Pp. 15–17.)

* * * * *

With the stoppage of further allotment virtually assured under the Wheeler-Howard Act.[26] all the land now in the possession of original allottees will pass into the heirship stage in the next generation. Sales of Iand to other than Indian tribes or corporations were also prohibited.[27] It is, therefore, a definite certainty that the area of heirship lands will steadily increase in the immediate future; and inasmuch as the Wheeler-Howard Act left untouched the present system of heirship, except to restrict inheritance to members of a tribe or their descendants (thus preventing acquisition by whites). the problem of what to do with these lands becomes of paramount importance. At present the heirship lands are 12

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the Interior under authority of section 7 of the act of May 27. 1902 (32 Stat. 245–275) and the act of March 1. 1907 34 Stat. 1015–1018). The pertinent provisions of these acts read:

Sec 7. Act of 1902

"That 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 subect 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.* * * *" [Italics supplied.]

Act of 1907

"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 ail 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 disoosing of his land or interest, tinder 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 some as if fee simple patent had been issued to the allottee.*" [italics supplied.]

In considering the foregoing statutory provisions. it is well to point out that the courts were without jurisdiction to determine the heirs of deceased Indian allottees (*McKay v. Kalyton*, 204 U. S. 458). and that, other than the Secretary of the Interior. there existed no tribunal with jurisdiction to make such determination. Before any conveyance could be made of the lands of deceased allottees. it was. of course. essential that the heirs be first determined, and the acts of 1902 and 1907, reasonably construed. appear to confer upon the Secretary of the Interior. by necessary implication, the authority to determine the facts of heirship. Neither act makes provision for formal notice and hearing for the determination of heirs. but regulations were approved and promulgated by the Secretary of the interior providing that when a deed or other instrument conveying inherited lands was submitted to him for approval, it should be accompanied by the following data concerning the heirs of the deceased allottee:

"By a certificate signed by two members of a business committee. if there be such, or by at least two recognized chiefs. or by two or more reliable members of the tribe. setting forth that the allottee to whom he land was originally allotted is dead, giving as nearly as possible the date of death. Such certi fiate shall also show the names and ages of the heirs. adults and minors, of such deceased allottee. but the Department reserves the right to require, if in its judgment it shall be considered necessary. such further and additional evidence relative to heirship as may be deemed proper. If the persons who certify to the death of the allottee are. from their own knowledge. unable to certify as to who are the heirs (with their names and ages) of such deceased allottee, an additional certificate made by persons of one of the three classes herein specified. showing who are the heirs and giving their names and ages (adults and minors), must be furnished."

It has been the uniform practice and policy of this Depnrtment to regard the aoproval by the Secretary of the Interior of a deed based upon proof of heirship furnished in accordance with the above regulations as having the effect of finally determining the heirs and conveying the full title. particularly In view of the legislative declaration in the acts of 1902 and 1907 that, such an approved deed shall convey full title to the ptrrcbasor the same as if a final fee simple patent had been issued to the allottee or purchaser. While the authorities are not in entire harmony. the better view supports the departmental position.

The remainder of the letter above quoted analyzes the cases supPorting (*Brown v. Boston Steele. et al., 23* Kans. 672 (1880) : *Egan v. McDonald*, 153 N. W. 915 (1915) : *Hellen v. Morgan*, 283 Fed. 433 (D. C E D Wash. 1922) ; Davidson *v. Roberson*, *92* Okla. 161. 218 Pac. 878 (1923)) and opposing the foregoing conclusion. (Even cases which deny binding force to secretarial determination of helm under the cirtumstnnces considered indicate that secretarial approval conveys a prima facie tifle good until someone else shows a better title. See *Highrock v. Gavin*, 179 N. W. 12 (1920) ; *Tripp v. Sieler*, 161 N. W. 337 (1917) ; Horn v. *Ne-Gon-Ah-E-Quaince*, 192 N. W. 363 (1923).)

[175] The Act of May 18. 1916. 39 Stat. 123. 127. 25 U. S. C. 378 provides:

* * * 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 far 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.

For regulations regarding applications for partitions of inherited allotments, see 25 C. F. R. 241.8; regarding sale of heirship lands, see 25 C. F. R. 241.9–241.12.

percent of all Indian lands and 35 percent of the allotted lands.

[26] Sec. 1 prohibits further allotment, but by sec. 18 the whole act may be rejected by a negative vote of a majority of eligible voters of a band or tribe.

[27] Sec. 4.

These heirship tracts are potentially one of the most important of the Indian resources. (p. 15.)

The Present Federal policy and objectives relating to Indian land have recently been stated in a Handbook of Indian Land Policy and Manual Of Procedures prepared by the Office of Indian Affairs.[176]

By exchange of allotments for assignments the problem of the sale and partition of inherited lands is finding a solution and the federal Indian land policy is being carried forward. Section 5 of the Act of June 18, 1934,[177] has provided for the acquisition of land by the Secretary of the Interior for an Indian tribe, through purchase,, gift, exchange, or assignment, or through relinquishment of land by individual Indians; It has been held that. the purpose of "providing land for Indians" is served by an exchange transaction whereby an individual Indian transfers allotted land to the tribe in exchange for an assignment of occupancy rights in the same or in another tract, since the tribe hrough this transaction acquires a definite interest in the land ver and above the transferor's retained occupancy right.[178] By means of this exchange provision the tribe may acquire Indian llotments or heirship lands and may designate various parcels f tribal land which are not needed for any tribal enterprise as vailable for exchange. Where a tribe has funds in its tribal reasury or in the United States Treasury, it may decide to use a ortion of such funds to buy up lands from Indians who have oldings in the area under consideration. Where the land is in eirship status, if the tribe and all the heirs are unable to agree mong themselves on the terms of purchase, the Secretary of he Interior may prescribe the method of sale and valuation.

There is no reason why a tribe may not purchase allotted lands n heirship status where such lands are offered for sale by the ecretary of the Interior. The mechanics of such a transaction re set forth in a memorandum of the Solicitor of the Depart: ent of the Interior [179] in the following words :

> It will be noted that section 372 of United States Code, title 25, requires that upon completion of the payment of the purchase price a patent in fee shall issue to the purchaser. Does this requirement make impossible sales to individual Indians, to Indian tribes, or to the Secretary of the Interior in trust for such tribes or individuals?
>
> So far as direct sales to Indian tribes are concerned, there is nothing to prevent the issuance of a patent in fee to an Indian tribe. The issuance of patents to an Indian tribe is provided for by the following statutes: Act of January 12, 1891 (26 Stat. 762), providing for patents to Mission Bands; treaty with Cherokees, December 29, 1835 (7 Stat. 478) granting land to Cherokee Nation.
>
> After issuance of such patent, however, an organized tribe might, under section 5 of the act of June 18, 1934, surrender legal title to the land, if it so chose. to the United States, retaining equitable ownership of the land. A tribe not within the provisions of that act could not surrender such legal title.
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> * * * * *
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> The necessity for issuance of a fee patent which arises when heirship land is sold by the Secretary of the Interior, does not arise where the conveyance of land is made by all the interested heirs. Such conveyance, made on a restricted deed form, conveys only the same interest as is held by the heirs.
>
> The question of issuing fee patents to Indian purchasers of land does not arise on reservations subject to the act of June 18, 1934, since on such reservations direct sales to individual Indians are prohibited. A related question. however, arises with respect to sales of land to the United States in trust for a tribe or individual Indian under. the provisions of section 5 of the said act, which authorizes the Secretary of the Interior,
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> > "to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians."
>
> The statute in question specifically provides, with respect to the tenure of lands so acquired:
>
> > "Title to any lands or rights acquired pursuant to this act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

[176] The primary object of Indian land policy is to save and to provide for the Indian people adequate land, in such a tenure and in accordance with such proper usage that they may subsist on it permanently by their own labor.

Indian land policy shall have for its purpose the organization and consolidation of Indian lands into proper units. considering the use to he made of the land. the type of labor and capital investment to be applied thereon, and the technical capacities and habits of co-operation of the Indians concerned.

Indian land policy definitely looks toward the substitution of Indian use for non-Indian use of Indian lands.

Implicit in all of the above is the responsibility of affording the Indians the necessary credit and technical training to make possible the best economic use of their lands.

Indian land tenure policy shall be searchingly adapted to various solutions not only as to whole tribes. but also as to natural communities within any particular tribe, and where the facts so indicate, to individual cases.

Indian land policy should take into account and should seek to contribute to the solution of the land policy problems of the Government as a whole.

In the protection and enlargement of an adequate land base, due consideration must be given to the preservation of those Indian cultural. social, and economic values and Institutions which have in the past sustained, and are now sustaining. their economic and spiritual integrity and which may hold important possibilities for the future.

Indian land policy shall seek the most rapid possible reduction Of uneconomic and nonproductive administrative expenditures, particularly in connection with the management of heirship lands.

In view of the limited amount of funds available for the enlargement of the Indian land base, preference in the application of these funds shall be given to those reservations showing a readiness to cooperate in order to secure the advantages, and to those showing a critical shortage of resources: and within these reservations, preference shall be given to those communities definitely Indian in character.

In the process of simplifying the ownership pattern on Indian reservations, tribal funds, IRA land-acquisition appropriations, or other applicable funds may he used (In default of other and preferable methods) for the consolidation of Indian-owned lands whenever such use supplies an essential element in improving the economy of the tribe, and reducing costs of administration.

The acquisition of land for Indians shall be for Indian use and upon adequate evidence that it will be used by Indians. In all cases where it is practicable. the acquisition should be carried out in response to the request of the Indians and upon evidence furnished by *them* of their determination to use the land.

Funds accruing to tribes from the past or present disposal of capital assets shall be used to the largest feasible extent for the creation of new productive resources. (Handbook. *supra,* Pt. III (1938). pp. 1-3.)

[177] 48 Stat. 984, 25 U. S. C. 465.

[178] Memo Sol. I. D., April 4, 1935.

[179] Memo Sol. I. D., August 14, 1937.

In the light of these provisions it may be asked whether the requirement of section 372 that a fee patent issued to the purchaser of heirship lands remains in force, on reservations subject to the act of June 18. 1934. If it is in force then either the Secretary of the interior must issue a fee patent to the United States, or, if this is impossible, he must refrain from acquiring heirship land under the provisions of section 372. If the latter view Is taken one of the principal objects of section 5 of the act of June 18, 1934. would he defeated. If the former view is taken a legal absurdity is presented. In the face of this dilemma it appears to be a reasonable view that the requirement of section 372 that a patent in fee be issued to the purchaser, is inapplicable where the United States is itself the out-chaser. and that in this case section 5 of the act of June 18. 1934, supersedes and amends the relevant provisions of section 372. This view is in accord with the familiar rule that a limiting statute does not run against the sovereign.

It Is my opinion, therefore, that the Secretary of the Interior, on reservations subject to the act of June 18. 1934. may acquire heirship land on behalf of individual Indians or Indian tribes, on the same terms as a private individual might acquire such lands under section 372, and that title to such lauds is to be held by the United States in trust for the Indian or Indian tribe for which the land is purchased.

In accordance with the foregoing analysis you are advised that existing departmental regulations and orders affecting the sale of heirship lands may be amended to provide for the following transactions, under existing law:

1. On all reservations heirship lands may be sold by the Secretary of the Interior to an Indian tribe. Such sale may be made with or without the consent of the interested heirs. It is necessary that reasonable compensation be paid by the tribe for the land thus sold Such reasonable compensation may be based upon the actual income-producing prospects and record of the land. due consideration being given to the expenses of leasing created by [the] heirship status insofar as these expenses would be deducted from the sums paid to the lessors. Except for the requirement that 10 percent of the purchase price be paid in advance, the terms of payment are within the discretion of the Secretary of the Interior.

2. On reservations within the act of June 18, 1934, sales of heirship land may be made to the United States in trust for the tribe or for individual Indians. With respect to the terms and manner of sale and the basis of valuation the comments noted in the preceding paragraph appear equally applicable.

3. On reservations not within the act of June 18, 1934, heirship lands may be sold directly to individual Indians or to an Indian cooperative or tribe. It is within the discretion of the Secretary of the Interior to make such sales with or without the consent of the heirs. without calling for bids or after bids have been called for. Patents in fee must issue to the purchaser upon final completion of payments for the land. unless all the heirs join in making a conveyance of the trust title. If bids are called for it would be proper to limit the bidders either to Indians or to Indians of a particular tribe or to Indians interested in the particular estate or to any other reasonably defined class of Indians, provided that in any case a fair price, in the light of all circumstances, is obtained for the land that is sold. With respect to the terms and manner of sale. and the basis of valuation the comments noted in the first paragraph of this summary appear equally applicable.