CHAPTER 13

TAXATION

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The use of the phrase "Indians not taxed" in the provisions of the Federal Constitution relating to representation in Congress [1] has given color to the popular belief that tribal Indians are exempt from taxes. Whatever the situation may have been when this phrase was first used, it is a fact today that Indians pay a great variety of taxes, federal, state, and tribal. It is, however, a fact that peculiarities of property ownership and special jurisdictional factors affecting Indian reservations result in certain tax exemptions not generally applicable to non-Indians. These exemptions involve a series of difficult legal and political problems.[2]

Limitations upon the power to tax, which has been called an attribute of sovereignty,[3] give rise to certain immunities. Such limitation may be expressed in federal, state, and tribal constitutions [4] or laws [5] or they may be imposed by contract.[6]

[1] Art. I. sec. 2; amendment XIV. sec. 2. For an analysis of the legislative and administrative history of this phrase. leading to the conclusion that there is no longer any class of "Indians not taxed." see Op. Sol. I. D., M.31039, November 7, 1940. And see 87 Cong. Rec. 79 (January 8. 1941) for census report following this opinion.

[2] See Sen. Rept. 168, 75th Cong., 3d sess. (May 6. 1938); Sen. Rept. 1365, 72d Cong., 2d sess.; Hearings, Sen. Comm. on Ind. Aff., on S. Res. 282, 72d Cong., 1st sess. The proposal has been made for many years that the Federal Government pay to counties and states in which tax-exempt Indian lands are located sums in lieu of taxes to pay for educational and other services. See Twenty-first Report of the Board of Indian Commissioners (1889). This principle has been occasionally embodied in special legislation. Act of July 1, 1892. sec. 2. 27 Stat. 62. 63 (Colville). And see Chapter 12, sec. 2A.

[3] See *McCulloch v. Maryland*, 4 Wheat. 316. 428-429 (1819); 1 Cooley, Taxation (4th ed. 1924) c. 1, sec. 1, p. 61.

[4] See secs. 1C and 8, *infra*.

[5] Act of June 18, 1934, sec. 5. 48 Stat. 984, 985, 25 U. S. C. 465; Act of June 20, 1936, 49 Stat. 1542.

[6] 1 Cooley, Taxation (4th ed. 1924) c. 2. sec. 58. p. 151.

SECTION 1. SOURCES OF LIMITATIONS ON TAXING POWER OF THE STATES

To the extent that Indians and Indian property within an Indian reservation are not subject to state laws, they are not subject to state tax laws.[7]

We have seen, elsewhere, that state laws, are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply.[8] It follows that Indians and Indian property on an Indian reservation are not subject to state taxation except by virtue of express authority conferred upon the state by act of Congress. Conversely Indian property outside of an Indian reservation is subject to state taxation unless congressional authority for a claim Of tax exemption can be found.[9] This jurisdictional immunity from state taxation is sometimes buttressed by:

(*a*) The judicial doctrine that states may not tax a federal instrumentality, operating upon the assumption that various incidents of Indian property are federal instrumentalities;

(*b*) Express prohibition in enabling acts and other federal statutes against taxation of Indians and Indian property;

(*c*) Explicit waiver in state constitutions of the right to tax Indians or Indian property;

(*d*) Express prohibition in state statutes against taxation of Indians or Indian property.

It is not clear whether any of these added reasons need be advanced to justify the immunity of Indian property on an Indian reservation from state property taxes. Since, however, they often figure largely in the reasoning used by the courts in attaining a particular result, they will hereinafter be discussed in some detail.

A. "INSTRUMENTALITY" DOCTRINE

Perhaps the most frequent reason stressed by the courts for the exemption of Indian property from state taxation is the federal instrumentality doctrine. The doctrine in its application to Indians and Indian property is founded upon the premise that the power and duty of governing and protecting tribal Indians is

[7] See *Surplus Trading* Co. v. Cook. 281 U. S. 647. 651 (1930).

[8] See Chapter 6.

[9] Act of June 18, 1934, sec. 5. 48 Stat. 984. 985, 25 U. S. C. 465; Act of June 20. 1936, 49 Stat. 1542.

primarily a federal function,[10] and that a state cannot impose a tax which will substantially impede or burden the functioning of the Federal Government.[11]

The doctrine is limited in its application to the property or functions of those Indians, who are in some degree under federal control or supervision. Thus, it has afforded immunity to the property and functions of tribal Indians whether allotted or unallotted.[12]

Something of the nature of the doctrine as well as its scope may be found in the illuminating opinion of the Circuit Court of Appeals' in the case of *United States v. Thurston County* [13] where the proceeds of the sale of restricted Indian lands were held exempt from state taxation:

> • • • . The experience of more than a century has demonstrated the fact that the unrestrained greed, rapacity, cunning, and perfidy of members of the superior race in their dealings with the Indians unavoidably drive them to poverty, despair, and war. To protect them from want and despair, and the superior race from the inevitable attacks which these evils produce, to lead them to abandon their nomadic habits and to learn the arts of civilized life, the government of the United States has long exercised the power granted to it by the Constitution (article 1, § 8; subd. 3) to reserve and hold in trust for them large tracts of land and large sums of money. derived from the release of their rights of occupancy of the lands of the continent, to manage and control their property, to furnish them with agricultural implements, houses, barns, and other permanent improvements upon their lands, domestic animals, means of subsistence, and small amounts of money, and to provide them with physicians, farmers, schools and teachers. The Indian reservations, the funds derived from the release of the Indian right of occupancy, the lands alloted to individual Indians, but still held in trust by the nation for their benefit, the improvements upon these lands, the agricultural implements, the domestic animals and other property of. like character furnished to them by the nation to enable and induce them to cultivate the soil and to establish and maintain permanent homes and families, are the means by which the nation pursues its wise policy of protection and instruction and exercises its lawful powers of, government
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> * * * Every instrumentality lawfully employed by the United States to execute its constitutional laws and to exercise Its lawful governmental authority is necessarily exempt from state taxation and- interference. *McCullough v. Maryland,* 6 Wheat. 316, 4 L. Ed. 479 ; *Van Brocklin v. State of Tennessee,* 117 U. S. *151,* 155, 6 Sup. Ct. *670, 29* L. *Ed. 845; Wisconsin Central Railroad Co. v. Price County,* 133 U. s. 496, 504, 10 sup. ct. 341, 33 L. Ed. 687. It is for this reason that the Supreme Court decided that lands held by Indian allottees under Act Feb. 8, 1887. 24 Stat. 389, c. 119, § 5, within 25 years after their allotment, houses and other permanent improvements thereon. and the cattle, horses, and other property of like character which had been issued to the allottees by the United States and which they were using upon their allotments, were exempt from state taxation, and declared that "no authority exists for the state to tax lands which are held in trust by the United States for the purpose of carrying out its policy in reference to these Indians." *U. S.* v. *Rickert,* 188 U. S. 432, 441, 23 Sup. Ct. 478, 482, 47 L. Ed. 532.
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> * * The proceeds of the sales of these lands have been lawfully substituted for the lands themselves by the trustee. The substitutes partake of the nature of the originals, and stand charged with the same trust. The lands and their Proceeds; so long as they are held or controlled by the United States and the term of the trust has not expired, are alike instrumentalities employed by it in the lawful exercise of its powers of government to protect, support, and instruct the Indians, for whose benefit the complainant holds them, and they are not subject to taxation by any state or county. (Pp. 289–290, 292.)

B. FEDERAL STATUTES

Congressional power to exempt land from state taxation [14] is limited only by the requirement that the property or function in question be reasonably considered incident to a federal function. So large is the discretion permitted the legislature by the courts [15] in this connection that no case has been found in which the court refused to sustain Congress' power to exempt.

When a tax immunity is offered to individual Indians by federal statute or treaty, by way of inducement to a voluntary transaction, the courts have held that the immunity becomes contractual in the sense that the individual Indians acquire a vested right to the exemption which is protected against Congress itself by the Fifth Amendment.[16]

Other federal statutes limiting the power of the states to tax are the enabling and organic acts authorizing the formation of state and territorial governments,[17] expressly exempting Indians and Indian property from the application of state laws.

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[10] see Chapter 5.

[11] *United States* v. *Rickert,* 188 U. S. 432 (1903) ; United *States* v. *Pearson. 231* Fed. 270 (D. C. S. D. 1916) ; *Dewey County, S. D.* v. *United States,* 26 F. 2d 434 (C. C. A. 8, 1928). cert. den. 278 U. S. 649 (1928) ; *United States* v. *Thurston County,* 143 Fed. 287 (C. C. A. 8, 1906) ; United *States* v. *Wright,* 53 F. 2d 300 (C. C. A. 4. 1931). cert. den. 285 U. S. 530; *Morrow* v. *United States,* 243 Fed. 854 (C. C. A. 8, 1917).

"*New York Indians, 5.* Wall, ,761 (1866).

[13] 143 Fed. 287 (C. C. A. 8, 1906).

[14] Act of June 18, 1934. . sac. 5, 48 stat. 984, 25 U.S. c. 465. provides:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire * * * any interest in lands, * * * within or without existing reservations, * * * for the purpose of providing land for Indians.
>
> Title to any lands * * * shall be taken in the name of the United States * * * and such lands or rights shall be exempt from State and local taxation.

See also Act of June 20, 1936. 49 Stat. 1542. upheld in *United States* v. *Board of Comm'rs,* 26 F. Supp. 270 (D. C. N. D. Okla. 1939).

[15] *Cf. United States* v. *Board of County Commissioners of Osage County, Okla.,* 193 Fed. 485 (C. C. W. D. Okla. 1911), aff'd 216 Fed. 883 (C. C. A. 8, 1914), app. dism. 244 U. S. 663 (1917).

[16] The leading case is *Choate* v. *Trapp,* 224 U. S. 665 (1912), holding that the Act of May 27, 1908, 35 Stat. 312, was invalid insofar as it attempted to remove the tax exemption accruing to Choctaw and Chickasaw allottees under the Atoka Agreement and Curtfs Act of June 28. 1898, 30 Stat. 495. The rationale of this decision has been followed in many eases. See for example, *Carpenter* v. *Shaw,* 280 U. S. 363 (1930) ; *Ward* v. *Love County,* 253 U. S. 17 (1920) ; *Board of Com'rs* v. *United States,* 110 F. 2d 929 (C. C. A. 10, 1938), cert. granted 306 U. S. 629, mod. 60 Sup. Ct. 285 ; *Board of Com'rs* of *Caddo County, Okla.* v. *United States,* 87 F. 2d 55 (C. C. A. 10, 1936) ; *Glacier County, Mont.* v. *United States,* 99 F. 2d 733 (C. C. A. *9, 1938)* ; *Morrow v. United States,* 243 Fed. 854 (C. C. A. 8, 1917).

The doctrine is not without limitations. The immunity can only vest in an Indian and does not accrue to a purchaser from him. *Fink* v. *County Commissioners,* 248 U. S. 399 (1919). This conclusion is sometimes based upon the ground that tax immunity has been contractually relinquished by the Indian in consideration for a removal of restrictions. *Sweet* v. *Shock,* 245 U. S. 192 (1917). This immunity.. finally. extends only for the time prescribed in the defining statute. *United States* v. *Spaeth.* 24 F. Supp. 465 (D. C. Minn. 1938).

[17] *United States* v. *Pearson,* 231 Fed. 270 (D. C. S. D. 1916) (Enabling Act for North Dakota, South Dakota, Montana, and Wyoming, Act of February 22, 1889, 25 Stat. 676, 677) ; *Wau-Pe-Man-Qua* v. *Aldrich, 28* Fed. 489 (C. C. Ind. 1886) (Northwest Ordinance, July 13, 1787, U. S. C. (1934 ed.) p. xxiii) ; *United States v. Yakima County, 274* Fed. 115 (D. C. E. D. Wash. 1921) (Enabling Act for Washington, Act of February 22. 1889. 25 Stat. 677) ; see *United States v. Ferry County,* Wash., 24 F. Supp. 399 (D. C. E. D. Wash. 1938) (Enabling' Act for Washington, Act of February 22, 1889, 25 Stat. 676, 677), Fink v. *County Com'rs,* 248 U. S. 399, 401 (1919) ; *United States v. Board of Com'rs of McIntosh County,* 271 Fed. 747 (D. C. E. D. Okla. 1921), aff'd 284 Fed. 103 (C. C. A. 8. 1922), app. dism. 263 U. S. 689 (1924), 263 U. S. 691 (1924) ; *United States* v. *Board of Com'rs,* 26 F. Supp. 270. 275 (D. C. N. D. Okla. 1939) (Enabling Act for Oklahoma, Act of June 16, 1906. 34 Stat. 207) ; *Truscott* v. *Hurlbut Land & Cattle Co.*. 73 Fed. 60 (C. C. A. 9. 1896) (Enabling Act for Montana, Act of February 22, 1889, 25 Stat. 676, 677). app. dism. sub nom. *Hurlbut Land & Cattle Co.* v. *Truscott,* 165 u. s. 719 (1897).

Thus Indian immunity from taxation has been predicated[18] upon clauses providing that nothing in the enabling act shall impair the rights of persons or property pertaining to the Indians, or that Indian lands shall remain subject to the absolute jurisdiction of Congress.[19]

C. STATE CONSTITUTIONS

Most of these enabling act provisions have been written into state constitutions, thus adding additional reason for limitation upon the power of the state.[30]

D. STATE STATUTES

A state may also limit its own power to tax the property of an Indian tribe by entering into an agreement with the tribe guaranteeing exemption of its lands from taxation, which guarantee is protected against violation by the obligation of contracts clause of the Federal Constitution.[31] This source of immunity, however, is of little importance today because states, seldom make agreements with Indian tribes.

The agreement may sometimes take the form of. a statutory enactment.[32]

[18] *The Kansas Indians*, 5 Wall. 737, 756 (1866); *United States* v. *Yakima* County, 274 Fed.115 (D. C. E. D. Wash. 1321); *United States* v. *Pearson*. 231 Fed. 270 (D. *C.* S. D. 1916); see *United States* v. *Stahl*, 27 *Fed.* Case *'No. 16373* (C. *C* Kans. 1868); see *United States* v. *Board of Com'rs of McIntosh County*, 271 Fed. 747. (D. C. E. D. Okla., 1921). aff'd 284 Fed. 103 (C. C. *A.* 8, 1322). app. dism., 263 U. S. 689 (1924), 263 U. S. 691 (1924).

[19] See for example Arizona: Act of June 20, 1910, 36 Stat. 557; Colorado: Act of February 28, 1861, 12 Stat. 172; Dakota Territory: Act of March 2. 1861. 12 Stat. 239; Idaho Territory: Act of March 3. 1863. 12 Stat. 808. 809; Kansas; *Act* of January 29. 1861, 12 Stat. 126. 127; Montana Territory: Act of May 26, 1864. 13 Stat. 85, 86; New Mexico: Act of June 29. 1910. 36 Stat. 557; Oklahoma: Act of May 2, 1890, 26 Stat. 81. 82; Act of June 16, 1906, 84 Stat. 267. 270; Utah: Act of July 16. 1894. 28 Stat. 107; Wyoming Territory: Act of July 25. 1868. 15 Stat. 178.

[30] Oklahoma Const., Art. 1, sec. 3; South Dakota Const. Art. XXII. sec. 2. See *United States v. Rickert*, 188 U. S. 432 (1903); *United States* v. *Yakima County*, 274 Fed. 115 (D. C. E. D. Wash. 1921).

[31] United States Const., Art. 1, sec. 10, cl. 1. *New Jersey* v. *Wilson*, 7 Cranch 164 (1812). Cf. fn. 35, *infra*.

[32] *New Jersey* v. *Wilson*, 7 Cranch 164 (1812); and see *Wau-Pe-Man-Qua* v. *Aldrich*, 28 Fed. 489 (C. C. Ind. 1886).

SECTION 2. STATE TAXATION OF TRIBAL LANDS

Lands which are occupied by a tribe or tribes of Indians have always been regarded as not within the jurisdiction of the state for purposes of state property taxation. The principal reason for this immunity has been the fact that the tribes have been regarded as distinct political communities exercising many Of the attributes of a sovereign body.[33] A landmark in this field is the case of *The* Kansas *Indians*.[34] In holding that the tribal lands (as well as lands held by individual members thereof) were not subject to state' tax laws, the court said:

> * * * If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a "people distinct from other." capable of making treaties. separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority. If they have outlived many things they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress. It may be, that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, "but until they are clothed with the rights and bound to all the duties of citizens," they enjoy the privilege of total immunity from State taxation. There can be no question of State sovereignty in the case. as Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them. their lands, property, or other rights. which it would hare been competent to make if Kansas had not been admitted into the Union.* * * While the general government has a superintending care over their interests. and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians cannot affect their situation. which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress. and their property is withdrawn from the operation of State laws. (Pp. 755–757.)

When the State of New York attempted to levy taxes upon the lands occupied by various tribes of Indians, contending that though the lands might be sold for nonpayment of the taxes the right of occupancy of the tribe would continue unchallenged, its attempt was frustrated by the Supreme Court [35] in the following words:

> It will be seen on looking into the general laws of the State imposing taxes for town and county charges. as well as into the special acts of 1840 and 1841, that the taxes are imposed upon the lands in these reservations. and it is the lands which are sold in default of payment. They are dealt with by the town and county authorities in the same way in making this assessment, and in levying the same, as other real property in these subdivisions of the State. We must say, regarding these reservations as wholly exempt from State taxation, and which, as we understand the opinion of the learned judge below, is not denied, the exercise of this authority over them is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations.
>
> The tax titles purporting to convey these lands to the purchaser, even with the qualification suggested that the right of occupation is not to be affected, may well embarrass the occupants and be used by unworthy persons to the disturbance of the tribe. All agree that the Indian right of occupancy creates an indefeasible title to the reservations that may extend from generation to generation, and will cease only by the dissolution of the tribe. or their consent to sell to the party possessed of the right of pre emption. He is the only party that is authorized to deal with the tribe in respect to their property. and this with the consent of the government. Any other party is an intruder. and may be proceeded against under the twelfth section of the act of 30th June, 1834.* (P. 771.)
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> * 4 Stat at Large. 730.

On the Other hand. though a state may not tax the lands which the tribe occupies. it was early held that the state might tax cattle of non-Indians grazing upon tribal land under a lease from the Indians.[36] "But it is obvious," said the court, 'that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the Lands or privileges of the Indians."

[33] See Chapter 14.

[34] 5 Wall. 737 (1866). Where. however. the tribe has ceased to exist as such within the state. lands owned by Indians formerly members of the tribe are subject to state taxation unless forbidden by some other federal law. *Pennock* v. *Commissioners, 103* U. S. 44 (1880).

[35] *The New York Indians*, 5 Wall. 761 (1866).

[36] *Thomas* v. *Gay*, 169 U. S. 264 (1898).

Until recently, the federal instrumentality doctrine was employed to exempt from state taxation the. income of non-Indian lessees of tribal or restricted Indian lands. However. in sustaining a federal tax on the income accruing to a lessee under a lease of state lands the Supreme Court in *Helvering v. Producers Corp.*[27] expressly overruled the leading case of *Gillespie v. Oklahoma,*[28] which held that a state tax on income derived by a lessee from leases of Creek or Osage restricted lands was invalid. because it hampered. the United States in making the best terms possible for its Indian wards.[29]

The Gillespie case seems to have rested on the premise that a lessee of lands from which a Government derives income for its governmental functions becomes thereby an instrumentality of that Government.

The Supreme Court, in 1938, was more concerned with the immunity. from state and federal taxation which its decision 6 years earlier in the *Gillespie* case had granted to large private incomes than with any question of Interference with federal power in Indian affairs.

As said by the court, in the *Helvering* case :

> * * * immunity' from non-discriminatory taxation sought by a private. person for. his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government Regard -must be had to substance and direct effects. And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses. there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote * * . (303 U. S. 386-387.)

And even if the lessee were in fact an agency of the Government. "no constitutional implications prohibit a State tax upon the property of an agent of the Government merely because it is the property of such an agent" [30]

[27] 303 U. S. 376 (1938).

[28] 257 U. 8. 501 (1922). 'Bat see dissenting opinion In *Helvering v Producers Corp., 303* U. S. *376, 387* (1933).

[29] In Its original form the tax immunity of governmental lessees seemed a relatively innocuous doctrine designed to protect the income of the Indian wards of the nation. See Note, 51 Harv. L. Rev. 707. 712. fn. 36 (1938). Bat from exemption of the gross income of the lessee of Indian lands.. the cases progressed through exemption of net receipts to serious impairment of the taring powers of Oklahoma. *Choctaw, Okla. & G. R. R. v. Harrison, 235* U. S. 292 (1914) (gross income tar: rent paid directly to Federal Government) : *Indian Territory Illuminating* Oil Co. v. *Oklahoma,* 240 U. S. 522 (1916) (leaseholds of Indian land exempt from general property tax) ; *Howard v. Gipsy Oil Co., 247* U. S. 503 (1918) (gross production tax in lieu of property taxes) : *Gillespie v Oklahoma,* 257 U. S. 501 (1922) (net Income tax: Interstate commerce analogy rejected) : *Jaybird Mining* Co. v. *Weir,* 271 U. S. 609 (1926) (non-discriminatory property tax on ore at mine before sale). But *cf. Indian Territory Illuminating Oil Co. v. Board. 288* U. S. *325 (1933)* (oil taxable before sale. where royalty already paid to Indians).

[30] *Railroad Co. v. Peniston, 18 Wall. 5. 33 (1873). Cf. Clallum County v. United States, 263* U. S. *341* (1923). See also discussion of federal income tax, *infra,* sec. 7B.

It is to be noted, however, that in the cases overruled the taxes were levied on private individuals or corporations organized for profit and which were only incidentally performing a federal function. A distinction may be drawn between these cases, and cases involving a corporation organized solely to carry out governmental objectives, such as the tribal corporations organized under the Indian Reorganization Act of June 18, 1934,[31] and it is probable that an attempt by a state to impose income or other types of taxes on such business organizations would still be held a direct burden on a federal instrumentality.[32]

There seems little doubt in view of the foregoing that the validity, if not the scope, of the instrumentality doctrine, in so far as it relates to Indians, their property and their affairs, remains unchanged. For just as the right to tax the lessee of state lands does not include the right to tax the state itself, so the right to tax the lessee of Indian lands does not imply a right to tax the Indians or their property.

When the lands pass from the tribe to non-Indians they become, ordinarily, subject to state taxation. Thus a railroad purchasing a right-of-way through a reservation must pay taxes on that right-of-way as though the lands were entirely withdrawn from the reservation,[33] and the fact that property owned by a railroad is subject to a right of reverter in an Indian tribe does not preclude the state from taxing such property while owned by the railroad.[34]

On the other hand a state may contract with a tribe that designated lands be tax exempt In such a case it has been held that the exemption runs with the lands even into the hands of a non-Indian purchaser.[35] Nevertheless, as pointed out by the Court. the state could, as a condition to permitting the sale of the lands, require that the right to exemption be waived, in which event the lands in the hands of the purchaser would be subject to state property taxes.

In the exercise of its plenary power over the Indian tribes, Congress may expressly subject a privilege or a property right of the tribe to state taxation. Thus the Act of May 29, 1924,[36] provided that—

> * * * the production of oil and gas and other minerals on [unallotted Indian reservation land, other than land of the Five Civilized Tribes and the Osage reservation,] may be taxed by the State in which said lands are located * * * the same as production on unrestricted lands. * * *. *Provided, however,* That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

[31] 48 Stat. 984.

[32] See *Clallum County v. United States,* 263 U. S. 341 (1923).

[33] *Utah and Northern Railway v. Fisher,* 116 U. S. 28 (1885) ; *Maricopa and Phoenix Railroad v. Arizona,* 156 U. 8. 347 (1895).

[34] *Choctaw, O. & G. R. R. v. Mackey,* 256 U. S. 531 (1921).

[35] *New Jersey v. Wilson,* 7 Cranch 164 (1812), *Cf. Fink v. County Commissioners,* 248 U. S. 399 (1919) ; *Sweet v. Schock,* 245 U. S. 192 (1917).

[36] 43 Stat. 244.

SECTION 3. STATE TAXATION OF INDIVIDUAL INDIAN LANDS

A. TREATY ALLOTMENTS

The earliest individual Indian land holdings with which the cases are concerned are those resulting from treaty. The early case of The *Kansas Indians* involved. among others. the question of whether tribal lands conveyed, pursuant to treaty, to tribal members in severalty were exempt from state taxation. As we have seen [37] the Court was of the opinion that since "There is no evidence * * . to show that the Indians with separate estates have not the same rights in the tribe as those whose estates are held in common," and since "as long as the United States recognizes their [the tribes'] national character they are under the protection of treaties and the laws Of Congress, and their property is withdrawn from the operation of State laws," the individual Indian holdings, as those of the tribe, are exempt from state taxation.

Similarly, lands allotted pursuant to treaty to a chief of the

[37] 5 Wall. 737. 756, 757 (1866). See Fn. 24 *supra.*

Miamies and restricted as to alienation remain tax exempt even in the hands of the heirs of the allottee, provided that tribal relations are maintained.[38]

With the growth of the practice of allotting tribal lands in severalty the question of their exemption from state taxation became of increasing importance. We find the courts holding uniformly that restricted lands within an Indian reservation remain exempt from taxation. The extent, however, of their immunity from taxation is dependent in each case upon the statute under which the allotment is made. Conversely, land held by individual Indians outside an Indian reservation is exempt only to the extent that it is declared exempt by statute or state constitution or is recognized by the court as a federal instrumentality.[39]

B. THE GENERAL ALLOTMENT ACT

The division of tribal lands in severalty to individual Indians was largely accomplished by the General Allotment Act of 1887.[40] This act did not apply to all the Indians, several tribes including the Five Civilized Tribes inhabiting the Indian Territory, which has since become a part of Oklahoma, being omitted.[41] However, it covered all Indian tribes except those explicitly named, and provided for the allotment to individual Indians of tracts of land for their own use. Under it the President was authorized to allot to individual Indians plots of land, and the Secretary of the Interior to issue patents

> * * * in the name of the allottees, which patents shall be of the legal effect, and 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, * * * 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.[42] * * * (P. 389.)

Buttressing their holding with the argument that the "trust" is the means whereby the Federal Government exercises control over the Indian ward in order to fulfill the duty of care and protection which it owes him, the courts have uniformly declared the subject of that trust a federal instrumentality and hence not subject to state taxation. As said by the Supreme Court [43] in quoting a statement of the Attorney General:

> It was therefore well said by the Attorney General of the United States, in an opinion delivered in 1888, "that the allotment lands provided for in the Act of 1887 are exempt from state or territorial taxation upon the ground above stated, * * * namely, that the lands covered by the act are held by the United States for the period of twenty-five years in trust for the Indians, such trust being an agency for the exercise of a Federal power, and therefore outside the province of state or territorial authority. 19 Op. Atty. Gen. 161,169. (P. 439.)

The courts have also argued that the lands allotted under this act are not subject to state taxation, on the theory that if the lands were taxable, they could be incumbered, and any incumbrance would prevent the United States from fulfilling its trust obligation.[44]

Similarly, lands allotted under authority of acts incorporating the General Allotment Act by reference are not taxable.[45] In *Morrow* v. *United States*[46] the court said that the exemption arose from the legal trusteeship obligating the United States to convey free of encumbrance, rather than from any concept of "governmental wardship over a dependent and inferior people." (P. 859.)

The futility of exempting the lands and not the improvements thereon was recognized in *United States* v. *Rickert*[47] wherein the court said:

> Looking at the object to be accomplished by allotting Indian lands in severalty, it is evident that Congress expected that the lands so allotted would be improved and cultivated by the allottee. But that object would be defeated if the improvements could be assessed and sold for taxes. The improvements to which the question refers were of a permanent kind. While the title to the land remained in the United States, the permanent improvements could no more be sold for local taxes than could the land to which they belonged. Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements.
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> * * * * * * *
>
> The fact remains that the improvements here in question are essentially a part of the lands, and their use by the Indians is necessary to effectuate the policy of the United States. (P. 442.)

It is clear, of course, that an allotment made under the General Allotment Act[48] remained exempt from taxation so long as the land was held in trust by the United States.[49] The allottee was thus assured that his lands would be tax exempt for at least 25 years and perhaps longer. However, in 1906[50] Congress empowered the Secretary of the Interior, before the expiration of the 25-year trust period, to issue a patent in fee "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs * * *." The duration of the exemption came thus to be determined according to the federal Indian policy in vogue at any particular time.[51] Yet, the importance to the Indian of his tax immunity can hardly be underestimated. The consequences of the vesting of a fee patent have been expressed in Meriam, The Problem of Indian Administration as follows:

> * * * The statistics of Indian property previously given in this chapter demonstrate the fact, so obvious to persons who visit the Indian country, that the value of the Indian lands is relatively high as compared with the

[38] *Wau-Pe-Man-Qua* v. *Aldrich*, 28 Fed. 489 (C. C. Ind. 1886). *Cf. Lowry* v. *Weaver*, 15 Fed. Cas. No. 8584 (C. C. Ind. 1846).

[39] *Pennock* v. *Commissioners*, 103 U. S. 44 (1880).

[40] Act of February 8, 1887, 24 Stat. 388. See Chapter 4, sec. 11, and Chapter 11.

[41] The act, by its terms, did not apply to territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Osages, Miamies, Peorias, Sacs, and Foxes, in the Indian Territory, nor to any reservations occupied by the Seneca Nation in New York, nor to a certain strip of land in Nebraska, adjoining the Sioux Nation on the south. For a discussion of state taxation of the lands of the Five Civilized Tribes and the Osages see Chapter 23.

[42] The trust period was extended from time to time by various Executive orders, and indefinitely by the Act of June 18, 1934, 48 Stat. 984.

[43] *United States* v. *Rickert*, 188 U. S. 432 (1903).

[44] *Morrow* v. *United States*, 243 Fed. 834 (C. C. A. 8. 1917); *Board of Com'rs.* v. *United States*, 100 F. 2d 929 (C. C. A. 10. 1938), mod. 60 Sup. Ct. 285 (1939); *Glacier County, Mont.* v. *United States*, 99 F. 2d 733 (C. C. A. 9. 1938); *United States* v. *Benewah County, Idaho*, 290 Fed. 628 (C. C. A. 9, 1923); *United States* v. *Chehalis* County, 217 Fed. 281 (D. C. W. D. Wash. 1914); *United States* v. *Ferry County, Washington*, 24 F. Supp. 399 (D. C. E. D. Wash., 1938); *see United States v. Nez Perce County, Idaho*, 95 F. 2d 232 (C. C. A. 9. 1938), rehearing den. 95 F. 2d 238 (C. C. A. 9. 1938).

[45] *E. g.*, Nelson Act of January 14, 1889, 25 Stat. 642, 643, sec. 3, applied to Minnesota Chippewas in *Morrow* v. *United States*, 243 Fed. 854 (C. C. A. 8. 1917); *cf., United States* v. *Spaeth*, 24 F. Supp. 465 (D. C. Minn. 1938); Act of June 6, 1900, 31 Stat. 672, 678, sec. 5 (Comanches, Kiowas, and Apaches) discussed in *United States* v. *Board Of Com'rs (Comanche County)*, 6 F. Supp. 401 (D. C. W. D. Okla. 1934); Act of March 3, 1893, 27 Stat. 557, applying to the Kickapoos in Indian Territory. *Cf United States* v. *Matthewson*, 32 F. 2d 745 (C. C. A. 8, 1929).

[46] 243 Fed. 854 (C. C. A. 8, 1917).

[47] 188 U. S. 432 (1903).

[48] Act of February 8, 1887, 24 Stat. 388.

[49] *United States* v. *Rickert*, 188 U. S. 432 (1903).

[50] Act of May 8, 1906, 34 Stat. 182.

[51] For a discussion of such policy and its effects, see Chapters 2 and 11.

> Indians' income from the use of that land. The general property tax, although based on the value of land, must be paid from incomeunless it is to result in the forfeiture of the land itself. Bad as is the general property tax from many points of view, it is peculiarly bad when, applied to Indians suddenly removed from the status of a tax exempt incompetent and subjected to the full weight of state and local taxation. So far as the Indians are concerned, the tax violates the accepted canon of taxation that a tax shall be related to the capacity to pay. The levying of these taxes, has without doubt been an important factor in causing the loss of Indian lands by so large a proportion of those Indians who. have been declared competent.
>
> The policies involved in making individual allotments and issuing fee patents brought into the economic problems of the Indian Service the difficult subject of taxation. Under the allotment act the incompetent Indian holding a trust patent is generally exempt from taxation. On the day he is declared competent and is given his fee patent, he straightway becomes subject to the full burden of state and local taxation. The more common form of taxation is the general property tax, the basis of which is the value of the property owned . and the burden of which falls heavily on land, because it cannot slip out from under in the way other forms of property frequently do.
>
> Many wise, conservative Indians, with a keen power to observe the experience of others, have no desire to progress to the point where they will be declared competent and be obliged to pay taxes. They know that the taxes will consume a large proportion of their total income and that taxes are inescapable. To them to achieve the status of competency means in all probability the ultimate loss of their lands. From their point of view the reward for success is the imposition of an annual fine. (P. 477.)

A policy of "great liberalism" inaugurated in 1917 led to wholesale patenting in fee whether the allottee desired the patent or not. Fairly typical is the following description by the Court of Appeals for the Tenth Circuit :[52]

> * * * Briefly, the record discloses that in the year 1918 patents covering the lands involved were issued to the United States in trust for twenty-seven Indians to whom the lands had been allotted in sereralty. Within two years thereafter; fee patents were issued to these Indians. It is stipulated that the fee title was granted to the Indians without any application on their part and without their consent. Apparently there was some opposition among the Indians to the policy of the Department and some had said that they would not receipt for the fee patents. There is a letter in the record written under date of April 24, 1918 from the office of the Commissioner of Indian Affairs to the special superintendent in charge at the reservation, instructing the latter to inform the Indians that the Secretary of the Interior "has the right to issue these patents, and if they refuse to accept them, you are directed to have the patents recorded and after recording same, to send them to the patentees by registered mail and retain the receipt cards, for the files in your office." (P. 734.)

The year 1921 saw a reversal of policy in the issuing of patents and recent years have witnessed the cancellation of such patents[53] and a variety of suits by the Federal Government seeking to recover taxes paid. the state by the allottee, to enjoin further taxation and to strike allotments from the tax rolls.[54] In all these cases the Government was successful on a rationale perhaps best expressed in *United States v. Nez Perce County, Idaho*,[55] as follows:

> * * * The Allotment Act, as well as the trust patent, by plain implication granted the Indian immunity from taxation during the trust period or any extension of it, and he had the right finally to receive his lands "free of all charge or incumbrance whatsoever." The authorities are uniform to the effect that this right of exemption is a vested right, as much a part of the grant as the land itself, and the Indian may not be deprived of it by the unwanted issuance to him of a fee patent prior to the end of the trust period. *Choate v. Trapp*, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941; *Ward v. Love County*, 253 U. S. 17, 40 S. Ct. 419, 64 L. Ed. 751; *United States v. Benewah County*, 9 Cir., 290 F. 628; *Morrow v. United States*, 8 Cir., 243 F. 854; *Board of Com'rs of Caddo County v. United States*, 10 Cir., 87 F. 2d 55; *United States v. Dewey County*, D. C., 14 F. 2d 784; *United States v. Comanche County*, D. C., 6 F. Supp. 401; *United States v. Chehalis County*, D. C., 217 F. 281. Treaties with the Indians and acts of Congress relative to their rights in property reserved to them have always been liberally construed by the courts. The dependent condition of these wards of the Government makes it imperative that doubtful provisions in treaties and statutes be resolved in their favor. This court in *United States v. Benewah County, supra*, as early as 1923 declared that the Act of May 8, 1906, should be held to mean that the action of the Secretary of the Interior authorized by it can be had only on the application of the allottee or with his consent. The Act of February 26, 1927, was little more than a statutory recognition of the principle there announced. The fee patent in the present instance was issued during the trust period, or at least during an extension of that period. It follows from what has been said that, if it was issued to Carter without his application or consent, his land remained immune from taxation during the whole of the time from 1921 to 1932, and the lien of the county should be held void. (Pp. 235-236.)

Therefore, it would appear that the allottee under the General Allotment Act obtains a vested right to tax exemption which cannot be taken from him without his consent.[56] Should he, on the other hand, apply for the issuance of a fee patent and be accorded one pursuant to law, there seems no reason to believe that his lands would not thereby become subject to state taxation.[57]

C. HOMESTEAD ALLOTMENTS

Lands acquired by individual Indians under the general homestead laws are exempt from taxation for specified periods following the date of issuance of the patent. Section 15 of the Homestead Act of March 3, 1875.[58] extended to Indians born in the United States who were. heads of families or over 21 years of age and who have abandoned or shall abandon tribal relations, the benefits of the General Homestead Act of 1862.[59] The 1875 Act defined a tax exemption for a 5-year period by providing that the title to the lands acquired under it

> * * * shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment.

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[52] *Glacier County*, Mont. *v. United States*, 99 F. 2d 733 (C. C. A. 9, 1938).

[53] Authority for such cancellation is accorded by the Act of February 26. 1927. 44 Stat. 1247. which provides:

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

See also Act of February 21. 1931, 46 Stat. 1205.

[54] *United States v. Benewah County, 290* Fed. *628* (C. C. A. 9. 1923); *United States v. Board of Com'rs*, 6 F. Supp. 401 (D. C. W. D. Okla. 1934); *United States v. Ferry County, Washington, 24* F. Supp. 399 (D. C. E. D. Wash. 1938).

[55] 95 F. 2d 232 (C. C. A. 9, 1938).

[56] *United States v. Ferry County, Washington, 24* F. Supp. 399 (D. C. E. D. Wash., 1938). For an account of legislation designed to deal with this situation. see Chapter 5, sec. 11B.

[57] *Ibid.* Accord: 50 L. D. 691 (1924).

[58] 18 Stat. 402, 420.

[59] Act of May 20, 1862, 12 Stat. 392. allowing citizens over 21 or heads of families to enter a quarter section of public lands. This act was thought not to include Indians because they were not considered citizens. *United States v. Joyce, 240* Fed. 610 (C. C. A. 8, 1917).

> decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor.[60] * * *

This act was supplemented by the Act of July 4, 1884,[61] which applied the homestead laws to Indians generally who had located on public lands rather than to a specified class.[62] and contained a 25-year [63] trust period provision almost identical to that contained in the General Allotment Act.[64] The same principles applied to the General Allotment Act allotments would seem, therefore, applicable to lands acquired under the 1884 Act.[65]

D. LAND PURCHASED WITH RESTRICTED FUNDS

In 1928 the Meriam report on "The Problem of Indian Administration" was published. Its authors had had occasion to study the then perplexing problem of the taxability of lands purchased with restricted funds and their comments concerning it are particularly enlightening:

> * * * A perplexing problem confronting the Indian Office today is the taxation by the stat& of the lands purchased for the Indians with their restricted funds which are under the supervision of the Office. The voltime of such purchases is large because the allotments originally made to the Indians are often not suitable for homes. These original allotments must be sold and new property purchased if the Indians are to be started on the road to better social and economic conditions. In order to preserve these new lands for the use and benefit of the Indian owner. it has been the uniform rule to impose upon them the restrictions which existed upon the funds with which they were obtained. Some states are claiming and exercising the power to tax such lands. Since the Indian owner, on account of his lack of ready funds or his insufficient sense of public responsibility, either cannot or will not pay taxes, the result is that the lands purchased for his permanent home are speedily slipping from him and he himself is becoming a homeless public charge. This unfortunate situation is rendered more acute because the terms of the deeds prohibit alienation by voluntary act, and thus 'the Indian *owner* is not able either to mortgage or sell his lands to secure for himself the interest that he may have in the land over and above the delinquent taxes.
>
> The United States Supreme Court [66] held at an early date that the allotted lands of the Indians. the title to which was held in trust by the United States, were not taxable by the states. The policy of allotting land to the Indians and holding the title to it in abeyance until such time as they could be trusted with its full and free control had been adopted by the national government as a means for more fully civilizing the Indians and bringing them to the position where they could assume the full responsibility of citizenship. The lands were therefore the Instrumentalities of the United States, and as such. by virtue of longstanding principles of constitutional law, not taxable by the several states. To this unquestioned decision may be added the ruling that, in the event of the sale of the allotted lands by governmental consent, the proceeds, being simply the medium for which the lands were exchanged, were likewise held in trust by the government and not taxable.[67] The Supreme Court has also sustained the power of the Secretary of the Interior, in whom is vested the discretion to permit the conveyance of Indian lands, to allow such conveyance on the sole condition that the proceeds be invested in lands subject to his control in the matter of sale.[68]

[60] See *United States* v. *Hemmer.* 241 U. S. 379 (1916).

[61] 23 Stat 76. 98.

The 1875 Act was also supplemented by the Act of January 18. 1881. 21 Stat. 315. making funds available to the Winnebagoes of *Wisconsin* so they could avail themselves of the benefits of it. That act expressly provided that titles acquired by the Winnebagoes should be nontaxable for 20 years from date of issuance of the patent.

[62] For discussions comparing the two acts. see *United States* v. Hemmer. 241 U. S. 379. 384-385 (1916) : United *States* v. *Corporation of the* President Etc.. 101 F. 2d 156 (C. C. A. 10. 1939).

[63] This trust period was extended to 1945 by Executive orders issued under authority of Act of June 21. 1906. 34 Stat. 325. 326. and indefinitely under the Act of June 18. 1934. 48 Stat. 984.

[64] see sec. 3B. *supra.*

[65] See discussion of General Allotment Act. *supra*, sec. 3B. Also see *United States* v. *Jackson*, 280 U. S. 183 (1930).

[66] *United States* v. *Rickert*, 188 U. S. 432, (1903).

[67] *National Bank of Commerce* v. *Anderson*, 147 Fed. 87 (C. C. A. 9th Cir. 1906) ; *United States* v. *Thurston County*, 143 Fed. 287 (C. C. A. 8th Cir. 1906).

[68] *United States* v. *Sunderland*, 266 U. S. 226 (1924). See also *United States* v. *Brown*, 8 Fed. 2nd 564 (C. C. A. 8th Cir. 1925), holding that the Secretary of the Interior may purchase lands for the Indians with money arising from the lease of restricted lands, and restrict the title of the lands purchased.

In spite of the intimation from these cases and from the express decisions of two district courts of the Northwest[69] more favorable to the Indians, the exemption from state taxes of restricted lands purchased for them by the government with their restricted funds is in a precarious situation. In a case which was taken to the United States Supreme Court [70] it was held that lands purchased with trust funds for an Osage Indian, and made inalienable without the consent of the Secretary of the Interior, were yet taxable. This decision, however, did not involve necessarily the declaration of a general principle, since the ruling was occasioned by the fact that the special act [71] under which these particular funds were released to the allottee gave to the Secretary no authority to control said funds after such release. In this case, moreover, it was not shown that the money released from the, trust was invested directly in the property purchased. The thought of the court is perhaps shown in its closing remark, "Congress did not confer upon the Secretary of the Interior authority * * * to give to property purchased with released funds immunity from state taxation." By a series of recent decisions [72] the Circuit Court of Appeals for the Eighth Circuit, although omitting some dicta favorable to the Indian position, has uniformly sustained state taxation of lands purchased for the Indians with their restricted funds and made subject to alienation only with the consent of the Secretary of the Interior, and has declared itself committed to the proposition that such lands are taxable.[73] One of these cases was affirmed by the United States Supreme Court [74] in a *per curiam* decision on the somewhat doubtful authority of the McCurdy case *supra.*[75]

[69] *United States* v. *Nez Perce County, 267 Fed. 495* (D. C. Idaho. 1917) ; *United States* v. *Yakima County*, 274 Fed. 115 (D. C. E. D. Wash. 1921).

[70] *United States* v. *McCurdy*, 246 U. S. 263 (1918).

[71] Section 5 of the act of April 18. 1912.

[72] *United States* v. *Gray*, 284 Fed. 103 (1922) ; *United States* v. *Ransom*, 284 Fed. 108 (1922) ; *United States* v. *Brown*, 8 Fed. 2nd 584 (1925), dictum ; *United States* v. *Mummert*, 15 Fed. 2nd 926 (1926).

[73] *United States* v. *Ransom*, 263 U. S. 691 11924).

[74] *United States* v. *McCurdy, 246* U. S. 263 (1918).

[75] The declaration by the Circuit Court of Appeals[49] that the national government has no authority to withdraw from state taxation lands formerly subject thereto is certainly not tenable. Congress has the power to relieve from the burden of state taxes a governmental instrumentality, whether a post office or a home for the government's Indian wards, and it matters not that the prior status of the property may have been such that the state could freely tax it.

[49] *United States* v. *Brown*, 8 F. 2d 584 (1925). dictum.

[66] On the other hand, some courts have held that where land is purchased for an Indian with restricted funds from another Indian who held tax exempt, it is tax exempt in the hands of the new purchaser, the reason given being that the lands and funds involved were at all times used by the United States in the discharge of its obligation to its Indian wards. *McGeehan* v. *Ashland County*, 192 Wis. 177, 212 N. W. 83 (1927) ; *United States* v. *G. Meriwether* (D. C. E. D. Okla. June 14, 1934). Justice file No. 90-2-11-431 ; *Marble* v. *King* (D. C. N. D. Okla. August 27, 1934) Justice File No. 90-2-5-36; *United States* v. *Stone* D. C. W. D. Okla. September 29, 1934), Justice File No. 90-2-11-322.