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Indians - Original Indian Title - Ascertainment of Heirs of Deceased Allottees

John D. Butterwick

COMMENT

INDIANS — ORIGINAL INDIAN TITLE — ASCERTAINMENT OF HEIRS OF DECEASED ALLOTTEES. A considerable portion of the lands in the State of North Dakota has, at one time or another, been held by an Indian, either through a treaty between the United States and the tribe of which the Indian is a member, or under a patent issued by the United States Government. In some instances, Indians acquired such lands merely by virtue of exercising a right of occupancy.[1] Such possessory rights, though not recognized by any statute or other formal governmental action at the time, were protected by the settled policy of the Government towards the Indians, which is to induce the Indians to forsake their nomadic habits, attach themselves to a particular locality and there cultivate the soil.[2]

The Supreme Court of the United States, in recognizing and protecting, as it has, the original Indian title, has served notice, by analogy, that it will be equally diligent in the protection of Indian claims to real property that arise out of land grants made to such Indians under the General Allotment Act of 1887.[3] It thus becomes a matter of some importance to interpret the congressional enactments dealing with Indian allotments and the permissible means of transfer under those enactments. Against this standard, when ascertained, title examiners of the state must measure the propriety of the chain of title to lands, originally granted to Indians, which are currently being purchased and sold. If the allotment to the Indian and his subsequent disposition of it are not in accord with the terms of the statutes, it would seem that they are void, the present title to the lands would not be marketable and the title checker would have to advise his client so that remedial measures might be undertaken.

Four Congressional Acts, which bear upon the problem, comprise the statutory history, in its principal aspects, of

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[1] United States v. Cramer, 261 U.S. 219, 43 S .Ct. 342, 67 L. Ed. 622 (1922). Problem arose where United States granted land to Central Pacific Railway Company upon which three Indians had resided in open possession for forty-five years.

[2] Ibid.

[3] Cohen, Original Indian Title, 32 Minn. L. Rev. 28 (1947). The author shows that until the original Indian title has been procured by the Federal Government through purchase or treaty, it cannot make a valid grant of such lands to a state or railway or other grantee. Such lands are included in those excluded from the statutory grants in the clause, "reserved . . . or otherwise disposed of."

Indian allotments. They are (1) The General Allotment Act of February 8, 1887, c. 119;[4] (2) The Act of August 15, 1894, c. 290, sec. 1;[5] (3) The Act of February 6, 1901, c. 217;[6] and (4) The Act of June 25, 1910, c. 431, sec. 1.[7] Other statutes make minor amendments or make provisions for particular tribes, and are not material to our problem in relation to North Dakota.

The first of these statutes, The General Allotment Act of 1887,[8] is the original means set up by Congress for making allotments to Indians, and covers the amount of lands to be included in each allotment, the classes of Indians who might receive them, and, in its fifth section, contains the directions as to how the allotments are to be made and what shall be their legal effect. Judicial construction of this act, appearing in Bond v. United States,[9] indicates the nature of the grant made, and the powers over the allotted lands reserved by the United States. It was there said:

"By this act, the United States retained title to and control over the allotted lands during the trust period, without any right in the allottee to do more than occupy and cultivate them under a paper or writing showing that at a particular time in the future, unless it is extended by the President, he would be entitled to a regular patent conveying the fee. The property did not cease, by the allotment, to be the property of the United States nor subject to its control, nor did the allottee cease to be a ward of the government. The title still remained in the government, and the allottee remained in a condition of pupilage and dependency. The determination of all disputes con-

[4] 24 Stat. 389 (1887), 25 U.S.C., sec. 348 (1940).

[5] 28 Stat. 305 (1894), 25 U.S.C., sec. 345, 402 (1940).

[6] 31 Stat. 760 (1901), 25 U.S.C., sec. 345, 346 (1940).

[7] 36 Stat. 855 (1910), 25 U.S.C., sec. 151, 372 (1940).

[8] See note 4. "Section 5—That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and 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, 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 encumbrance whatsoever; *Provided*, That the President of the United States may, in any case, in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void; *Provided*, That the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided."

[9] 181 Fed. 613 (1910), cited with approval by the United States Supreme Court in Hallowell v. Commons, 239 U.S. 509, 36 S. Ct. 204, 60 L. Ed. 411 (1916).

cerning the allotment, its occupancy and possession and the general control of the Indian, remained with the Secretary of the Interior." [10]

And in McKay v. Kalyton,[11] Justice White, speaking for the court, said:

"This being settled, it follows that, prior to the act of Congress of 1894 [which was the first to amend the General Allotment Act of 1887] controversies necessarily involving a determination of the title, and, incidentally, of the right to the possession, of Indian allotments, while the same were held in trust by the United States, were not primarily cognizable by any court, either state or federal."

The second legislative enactment of Congress bearing on the subject appeared as the Act of August 15, 1894.[12] As pointed out by the Supreme Court in the *McKay Case*,[13] this act, which delegated to the courts of the United States the power to determine questions of title to and possession of Indian allotments cannot be construed as having conferred upon the state courts the authority to pass upon federal questions over which, prior to the act, no court had any authority. Apparently, the congressional intent was merely to vest a concurrent jurisdiction in the Federal District Courts and in the Secretary of the Interior to try these disputes.

The third act of Congress that deals with the problem is the Act of February 6, 1901,[14] which makes no important changes insofar as the problem of the note is concerned.

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[10] To same effect, United States v. Rickert, 188 U.S. 432, 23 S. Ct. 478, 47 L. Ed. 532 (1902); and Hy-Yu-Tse-Mil-Kin v. Smith, 194 U.S. 408, 24 S. Ct. 676, 48 L. Ed. 1043 (1903).

[11] 204 U.S. 458, 27 S. Ct. 346, 51 L. Ed. 566 (1906).

[12] See note 5. "That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto, in the proper circuit court of the United States. And said circuit courts are hereby given jurisdiction to try and determine any action, cuit or proceeding arising within their jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty. And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior as if such allotment had been allowed and approved by him . . ."

[13] Same as note 11.

[14] See note 6 and note 12. The section here is verbatim with that in note 12, save that there is a parenthetical addition to the jurisdictional grant directing that in such suits the parties thereto shall be claimant as plaintiff and the United States as party defendant.

Fourth in the line [15] of the acts of Congress to be taken up is the Act of June 25, 1910.[16] The first section thereof repeals the Acts of 1894 and 1901, hereinbefore mentioned, insofar as they might be construed to confer jurisdiction on federal courts to determine heirship of deceased Indian allottees, and restored to the Secretary of the Interior the power taken from him, in that regard, by the said acts.[17] And inasmuch as the section contained no saving clause, the authority of the courts under the repealed acts immeditely ceased insofar as pending causes were concerned.[18]

From the study of the above statutes and the judicial construction of each, it can be concluded that Congress has, at all stages of the existence of Indian allotments, laid down specific rules regarding the disposition of allotments when the Indian allottee dies. If these rules are not followed, e.g., in the determination of the heirs of the deceased allottee, it would seem that no title would pass to such improperly named heirs. The obvious result is that there will then be a defect in the chain of title which might render the land in question un-

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[15] Fourth in point of time, but dealing with a somewhat different aspect of the problem, is the Act of May 27, 1902, c. 888, sec. 7 (32 Stat. 275), which provides that the adult heirs of a deceased Indian who had an allotment under a trust or restricted patent could sell and convey the same, minor heirs' interests to be disposed of by guardian appointed by proper court on order of such court, subject to approval by the Secretary of the Interior; when so approved, the conveyance to vest full title in the purchaser, "the same as if a final patent without restriction upon the alienation had been issued to the allottee." The Supreme of South Dakota, in Daugherty v. McFarland, 40 S.D. 1, 166 N.W. 143 (1918), in construing this section in the light of the Act of 1894, as amended by the Act of 1901 (see notes 5 and 6), held that the county probate court had no jurisdiction to distribute the lands of Indian allottees held under trust patents and to partition such lands, as the "proper court" referred to in the Act of 1902 was presumably the appropriate federal circuit court authorized under the Act of 1894.

[16] See note 7. "When any Indian to whom an allotment of land has been made or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee-simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent . . ." (other provisions if heirs found incompetent).

[17] Bond v. United States, 181 Fed. 613 (1910); Hallowell v. Commons, 239 U.S. 506, 36 S. Ct. 202, 60 L. Ed. 409 (1916), in which latter case the Supreme Court of the United States also affirmed the power of Congress to pass the act taking away the jurisdiction that for a time had been conferred upon the courts of the United States. No alteration of substantive rights is involved but simply a change in the tribunal hearing the case.

[18] See note 17.

saleable, or at least, constitute a cloud upon the title to such lands.

It will be observed that there are three general types of patents that can issue to the allotteee, viz., a trust patent, a patent in fee, and a patent in fee with a restriction on alienation.[19]

By the provisions of the General Allotment Act of 1887[20] it is apparent that once a patent in fee has issued, the United States relinquishes all control over the lands comprising the allotment and the same are thereafter subject only to the laws of the state or territory which is the situs of the lands. In the event that either of the other two types of patent are issued, the Supreme Court has stated in United States v. Bowling[21] that the Federal Government retains a sufficient interest in the lands allotted to permit Congress to legislate with respect to the procedure for the determination of the heirs of deceased Indian allottees.

In the *Bowling Case*, Justice Van Devanter, speaking for the court, after identifying trust and restricted allotments, said:

"As respects both classes of allotments—one as much as the other—the United States possesses a supervisory control over the land, and may take appropriate measures to make sure that it inures to the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restriction. As an incident to this power, Congress may authorize and require the Secretary of the Interior to determine the legal heirs of a deceased allottee, and may make that determination final and conclusive."

With regard to the finality and the conclusiveness of the Secretary of the Interior's decision, it has frequently been held that his jurisdiction is exclusive (since the passage of the Act of 1910[22]) to determine the heirs of a deceased Indian allottee; and that such decision is neither subject to collateral attack nor reviewable by the courts, in the absence of pleading

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[19] The first two types of patents are authorized by the General Allotment Act of 1887. For an example of congressional legislation authorizing the third type of patent, see 41 Stat. 17; or United States v. Bowling, 256 U.S. 484, 41 S. Ct. 561, 65 L. Ed. 1054 (1920).

[20] See note 8.

[21] 256 U.S. 484, 41 S. Ct. 561, 65 L. Ed. 1054 (1920).

[22] See note 7.

and proof of fraud, error of law or gross mistake of fact.[23]

Until adminstrative control of the Secretary of the Interior over allotments and trust property of Indians has ceased, then, courts are without power to interfere with performance by the Secretary of his administrative functions with respect thereto.[24] And in Gray v. McKnight,[25] the Supreme Court of Oklahoma said that country courts, under their probate jurisdiction, except in cases involving Indian allotments, where Congress has not relinquished its supervisory control or delegated such authority to such courts.[26]

From such judicial statements the conclusion may be drawn that no state court has at any time had the power to involve itself in matters relating to lands within their territorial jurisdictions that have been allotted to Indians until a patent in fee has issued to the Indian, or his heirs, and the United States Government thereby relinquished its control over the lands. At the same time it is apparent that a federal court could entertain such an action relating to trust allotments or to restricted allotments only during the period between 1894 and 1910 when they were empowered to do so by act of Congress. A determination of heirship made at any other time must necessarily have come from the Secretary of the Interior to be valid.[27]

JOHN D. BUTTERWICK
Third Year Law Student
University of North Dakota.

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[23] Mickadiet v. Payne, 50 App. D.C. 115, 269 Fed. 194; af'd. in 258 U.S. 609, 42 S. Ct. 381, 66 L. Ed. 788 (1921). Dixon v. Cox (C.C.A. 8), 268 Fed. 285 (1920); Chase v. United States, (C.C.A. 8) 272 Fed. 684 (1921). It should be pointed out here, also, that the Secretary of the Interior has the power to re-open any decision he has made relating to the determination of heirs of deceased Indian allottees, where the United States has retained administrative control over such allotted lands. Lane v. United States, ex. rel. Mickadiet, 241 U.S. 201, 36 S. Ct. 599, 60 L. Ed. 956 (1916); Dixon v. Cox, 268 Fed. 285 (1920), app. dismissed 258 U.S. 634, 42 S. Ct. 383, 66 L. Ed. 803 (1922).

[24] Hanson v. Hoffman, (C.C.A. 10) 113 F. (2) 780 (1940).

[25] 75 Okla. 268, 183 Pac. 489 (1919).

[26] One other matter might profitably be discussed—where adult heirs of any deceased Indian, having an allotment under a patent with restriction on alienation, convey the same, as authorized by Act of Congress of May 27, 1902, (see note 15) and secure the approval of the Secretary of the Interior of the deed making such conveyance, the jurisdiction of the federal government over the land conveyed terminated, and the land subsequently came within the exclusive jurisdiction of the state courts. Egan v. McDonald, 36 S.D. 92, 153 N.W. 915 (1915).

[27] For the regulations promulgated by the Secretary of the Interior for the determination of heirs and approval of wills, see 25 Code Fed. Regs., sec. 81.1-81.52 (1938). Rules have been prescribed relating to notice, hearing, presentation of claims, etc., much akin to a state probate code.