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INDIAN LAND LAW—SOME FUNDAMENTAL CONCEPTS FOR THE TITLE EXAMINER

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INTRODUCTION

All land titles in Oklahoma stem from treaties with Indian tribes and acts of Congress vitalizing treaty provisions.[1]

No fledgling title examiner can embrace this premise without some degree of awe—even amazement. But the initial historical interest which may be aroused often rapidly fades; customarily it is replaced by despair, confusion, or worse. For the title examiner of Oklahoma real property, no single body of law presents so much mystery, complexity or difficulty as that small segment of real estate and property law innocently called Indian Land Law. Contrary to the consensus that Indian Land Law presents a complex impregnable maze similar to future interests, today's title examiner can in many instances readily cope with and dispose of substantially all problems concerning the subject. For those issues which remain tangled, we should be able to recognize and deal with almost all of them with confidence and perhaps

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1. W. SEMPLE, OKLAHOMA INDIAN LAND TITLES v (1952).

even agility.[2] To support this contention we shall review the historical background of the allotment of tribal lands in severalty to the citizens of the Indian nations, discuss the scheme of restrictions upon alienation of the allotments and their gradual removal, and conclude with a few suggestions for legislative improvements.

I. HISTORICAL BACKGROUND

For the purpose of title examination in Oklahoma, there are basically three kinds of Indians—(1) citizens of the Five Civilized Tribes, (2) the Osage Nation and (3) the so-called "wild tribes," comprising the remaining tribes in the state. The Five Civilized Tribes and Osage Nation inhabited what was known as Indian Territory, and the remaining tribes, such as the Cheyenne, Commanche, Ponca and Shawnee, resided primarily in Oklahoma Territory. This arbitrary classification is due to allotment and regulation of the tribal lands by three distinct sets of federal statutes.

Five Civilized Tribes

The removal of the Five Civilized Tribes to Indian Territory, an ignoble but consistent chapter in the relationship between the United States government and these tribes, has been depicted in many chronicles describing the "trail of tears." For our study, it is sufficient to note that, between 1830 and 1845, the Choctaw, Creek (Muskogee), Cherokee, Chicksaw and Seminole Nations signed separate treaties with the government providing for removal from their ancestral lands in the southeastern part of the country to designated areas in Indian Territory. Patents were issued from the United States to each of the five Indian nations covering the land granted to them. From that time, each tribe held legal title to, and owned the beneficial interest in, the entire tribal domain. No citizen of the tribe owned any severable interest in the tribal lands. These treaties contained commitments from the government that it would not create a state out of the new tribal domains without the consent of the Indian nation and that it would protect the Indians from attack by whites.

Unfortunately, the Civil War created factions within the Five Civilized Tribes just as in other border areas. After much divisiveness, the tribal leaders cast their lot with the South, and each tribe entered

2. Title examiners are not unlike diagnosticians. The most important and often most difficult task is to recognize the danger—the cure is often routine.

into a treaty with the Confederacy in 1861. This action prompted Congress in 1862 to authorize the President to declare all treaties with the Five Civilized Tribes dissolved. The ill-fated alliance with the Confederacy resulted in far reaching adverse consequences for the Indian Nations.

By the early 1890's the majority of the population in Indian Territory was white, much intermarriage had occurred, and many towns had been established. Responding to pressure from whites and some mixed bloods, Congress established the Dawes Commission in 1893, charging it with the task of persuading the tribal leaders to consent to the dissolution of the tribal governments and the allotment of the tribal lands among the citizens of the tribes. The ultimate goal was, of course, the creation of a new state. For the next several years, extensive negotiations were held, laws were passed creating the necessary procedures and the desires of Congress were realized. In brief, Congress passed the following legislation:

1893	Established the Dawes Commission.
1896	Directed the Commission to take a census of each tribe and prepare tribal rolls.
1897	Provided that all persons in Indian Territory would be subject to general jurisdiction of federal courts beginning January 1, 1898.
1898	Enacted the Curtis Bill,[3] which provided for enrollment of all citizens of the Five Civilized Tribes, established the laws of Arkansas in Indian Territory, established a comprehensive plan for dissolution of tribal governments and the allotment of tribal lands in severalty among the citizens of each tribe, recognized existing cities and towns, and provided for the procedure to sell town lots.

Between 1898 and 1902, the United States and each of the Five Civilized Tribes entered into treaties, and Congress enacted legislation establishing a detailed procedure and the substantive criteria for enrollment, selection of lands by tribal members and allotment of lands. As title examiners, we can envisage the complexities involved in the dissolution of the tribal governments and the allotment of the tribal domains in severalty simply as conveyances from each Indian Nation to its individual tribal members. These conveyances were in the form

3. Named after Charles Curtis, a Kaw Indian and Congressman from Kansas. This bill was passed because the Dawes Commission was unsuccessful in reaching agreement with the tribal leaders.

of allotment deeds, signed by the tribal chief, approved by the Secretary of the Interior, and recorded in the office of the Dawes Commission.[4] The allotment deed is the legal equivalent of a patent, so for practical purposes, the inception of title in the individual Indian citizen begins with this second patent.

Osage Nation

The history of the Osage Nation in Oklahoma is much less complicated. Essentially, the Osages signed a treaty with the United States in 1867 removing them from lands in Kansas to their new tribal domain in Indian Territory—which now comprises Osage County. These lands were purchased by the government from the Cherokee Nation and the resettlement occurred in 1872. Title was held by the Osage Nation pursuant to a conveyance from the Cherokee Nation, and remained under tribal ownership until 1906. In that year Congress established the procedure for allotment in severalty of the surface interest in the tribal lands. The tribe retained common ownership of the oil, gas and other minerals. Ultimately an allotment deed or patent was issued by the Osage Nation to each duly enrolled citizen of that tribe.

The "Wild Tribes"

The General Allotment Act of 1887 was enacted to break up the Indian reservations in Oklahoma and in some other areas, to divide equally the tribal lands among the members, and to sell the surplus land. The Act applied to all Indian tribes in Oklahoma except the Five Civilized Tribes and the Osage Nation.[5] The government issued a trust patent to each member. The document retained legal title in the United States, but vested the equitable title and the right to use the land in the allottee.

And now the fun begins.

II. RESTRICTIONS ON ALIENATION BY ALLOTTEES

When it became clear that the tribal domains would be dissolved and the lands allotted to the tribal members, the leaders of the Indian Nations insisted that the United States government take the full re-

4. The Dawes Commission concluded its work in 1905. It was succeeded by what is now known as the BIA—Bureau of Indian Affairs—a branch of the Department of the Interior. Its offices are in Muskogee.

5. The tribes covered by the General Allotment Act are listed in W. SEMPLE, *supra* note 1, at § 730.

sponsibility for placing and maintaining the allottee in possession of his allotment and for protecting him from losing his land through inexperience. Without such assurances, the tribal leaders feared that unscrupulous whites and Indians would induce many allottees to sell their allotments for inadequate consideration, leaving them without any means of support. From this sound premise developed a complex scheme of restrictions on the Indian allottee's power to alienate his allotment. These restrictions appeared initially in the separate treaties with each of the Five Civilized Tribes and later were replaced by acts of Congress applicable to all of the tribes. Since most title problems arise in dealing with the lands of the Five Civilized Tribes, we shall emphasize the restrictions applicable to those tribes.

Perhaps we should begin with a definition. W. F. Semple, in his authoritative treatise, *Oklahoma Indian Land Titles,* asserts that "the words 'restrictions upon alienation,' broadly speaking, mean those restraints placed by acts of Congress on the power of allottees, and heirs or devises, to alienate their allotted, inherited or devised lands or lands acquired by gift or purchase[d] with restricted funds."[6] In essence then, allottees were selectively prohibited from transferring any interest in their allotments or in land which they inherited. These restrictions were not applicable uniformly, but varied according to several factors. Generally, these factors were, and still are:

(a) *Degree of Indian Blood.* Consistent with the purpose of protection for the Indian from his forced inexperience, Congress concluded that, as a general rule, the more Indian blood an allottee possessed, the more protection he needed. Thus, the most comprehensive restraints were placed on alienation by full bloods and the least on citizens of no Indian blood.[7] The title examiner can determine the allottee's degree of Indian blood by reading the excerpt from the Dawes Commission Enrollment Records, known as the Tribal Rolls, which should appear in each abstract, or by consulting the published Final Rolls of the Five Civilized Tribes.

(b) *Homestead or surplus.* Each allotment was divided into two parts—homestead and surplus—and was conveyed to the allottee in separate deeds. The portion designated homestead (which has nothing to do with Oklahoma homestead laws) was that part of the allot-

6. W. SEMPLE, *supra* note 1, at § 52.

7. Each of the tribes had many citizens of non-Indian blood. In addition to some whites, former slaves of the tribes had been accorded full citizenship in the treaties signed after the Civil War. The Negro members were separately enrolled as Freedmen.

ment deemed adequate to support the allottee; the remainder of his allotment was considered as surplus. As you would expect, the right to alienate the homestead portion was more limited than the freedom to convey the surplus. The average size of the allotment and the division between homestead and surplus varied between tribes, but the homestead portion was not less than one-fourth of the entire allotment.[8] The title examiner will have no difficulty in determining whether an allotment is homestead or surplus, because the allotment deed clearly indicates its character.

(c) *Allotted or inherited land.* Each member of the tribe, adult and minor alike, who was duly enrolled before the cutoff date of March 4, 1907 received an allotment. As members died, their allotments would descend to their heirs. The heirs would now own, in addition to their allotment, an undivided interest in other lands. Because the inherited land was not considered necessary for support of the allottee, fewer restrictions were imposed on the right to alienate such lands than on the original allotment.

(d) *Age of allottee.* Naturally, proscriptions on the right to transfer the lands of minors would be greater than on adults.

The first task of the title examiner is to determine the relevant factors concerning the Indian allottee and the type of allotment. For example, a profile constituting the most restrictive situation would be a minor full blood who has received a homestead allotment. Because the quantum of restraints on alienation varied from time to time as Congress modified treaties and enacted new laws, the examiner must next pay attention to the date of the conveyance under scrutiny in order to determine the nature of the restrictions in effect at that time.

Before delving into the precise nature and extent of the restrictions, it is necessary to understand the broad scope given by the courts to the word "alienation." In its simplest terms, alienation encompasses *every* type of transfer of *any* interest in the land, voluntary or involuntary, except the passage of the allotment on death to heirs. Thus a

8. The average size of the allotments of the Five Civilized Tribes and Osage Nation were:

Tribe	Homestead	Surplus	Total Acres
Seminole	40	80	120
Creek	40	120	160
Cherokee	40	70	110
Choctaw	160	160	320
Chickasaw	160	160	320
Osage	160	480	640

sale of any interest, a mortgage, an oil and gas lease, the grant of easement, a gift or a transfer by will each constitute a type of alienation. Further, it is important to understand that every conveyance or alienation by a restricted Indian is absolutely *void*—not voidable or something less arbitrary—but just as if the transfer had never been attempted. Nor does it matter how many times the restricted Indian tried to convey to the same or different grantees—all are nullities and the title examiner may ignore them when there is a valid conveyance in the chain of title.

The Scope of the Restrictions against Alienation

Many experts in Indian Land Law have devised comprehensive charts, diagrams and other visual aids to enable the title examiner to pinpoint the restrictions existing for the members of each tribe and for each type of allotment at any given time. With all of the factors which must be considered, and with the necessity to interleaf all of the statutes, such aids often become more confusing than the texts. Usually, it is more practical to start, not with the original treaties and work forward through each of the statutes, but rather to begin in the middle chronologically, since this is the time when Congress finally organized the law applicable to the Five Civilized Tribes. Using this approach, the first year to remember is 1908.

Prior to the Act of May 27, 1908,[9] restrictions on alienation affecting the allotments and inherited land of citizens of the Five Civilized Tribes were contained in the separate treaties ending the tribal domains and in two principal statutes.[10] The 1908 Act was the first comprehensive legislation dealing with restraints on alienation, establishing a uniform scheme of restrictions for the Five Civilized Tribes. It supplanted prior treaties and statutes and set forth the basic law for title examiners. Since most conveyances have occurred after the effective date of that Act, in many instances the title examiner need not look at the law prior to that date.

The purpose of the 1908 Act was to remove all restrictions on citizens of non-Indian blood and Indian citizens of less than half-blood.[11] This was accomplished by the straightforward legislative pronouncement that "All lands, including homesteads, of said allottees

9. Act of May 27, 1908, ch. 199, 35 Stat. 312.
10. Act of April 21, 1904, ch. 1402, 33 Stat. 189; Act of April 26, 1906, ch. 1876, 34 Stat. 137.
11. W. SEMPLE, *supra* note 1, at p. 747.

[members of Five Civilized Tribes] enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions."[12] The Act retained restrictions on other citizens, in the following manner:

Homestead allotments	—	½ or more blood
Surplus allotments	—	¾ or more blood

Thus, as to allotted lands, no restraint on alienation applied to non-Indian citizens, to Indians of less than ½ blood, nor to the surplus allotments of Indians of less than ¾ blood.

The 1908 Act provided that "the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land."[13] Thus, restrictions were also removed from inherited lands. A special requirement was created for approval of conveyances of inherited land by full-blood heirs by the appropriate county court,[14] and a special lifetime restriction was imposed on alienation of the homestead of a deceased allottee of ½ or more Indian blood who died with surviving issue born since March 4, 1906. Restrictions under the 1908 Act originally lasted until 1931, but have been extended from time to time by Congress and Executive Orders, the last extension being for the life of the Indian.

The 1908 Act has been amended many times, but the basic scheme has remained intact. Some of the more important amendments, which of course affect only those conveyances made after the legislation, include:

Act of April 12, 1926[15]	Added requirement that conveyances from full-blood devisees, as well as heirs, must be approved by the county court. Made Oklahoma statutes of limitations applicable to all restricted Indians, their heirs and grantees.
Act of January 27, 1933[16]	Established restrictions on alienation by half-blood heirs in certain circumstances.

12. Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312.
13. Act of May 27, 1908, ch. 199, § 9, 35 Stat. 315.
14. The procedure for approval appears in OKLA. STAT. tit. 58, §§ 901-05 (1971).
15. Act of April 12, 1926, ch. 115, 44 Stat. 239. This statute also made Oklahoma statutes of limitations applicable to all restricted Indians of the Five Civilized Tribes.
16. Act of Jan. 27, 1933, ch. 23, 47 Stat. 777.

Act of August 4, 1947[17]	Repealed the substance of the 1933 Act, removed all restrictions on death of the allottee, and required court approval of conveyances by heirs and devisees of half or more Indian blood. The procedure for obtaining the approval is set forth in detail in the Act.

The title examiner should not have too much trouble determining whether or not a post-1908 Act conveyance is valid. Earlier transfers tend to cause more trouble because of the variance between the tribes. The best source to determine the status of restrictions under the treaties and the pre-1908 Act statutes is *Oklahoma Indian Land Laws*, by Lawrence Mills.[18] In dealing with each tribe separately, the author gives periodic status reports, delineating the scheme of restrictions before and after the important legislative enactments.

Restrictions Applicable to the Osage Nation and the So-Called "Wild Tribes"

Under the Osage Allotment Act of June 28, 1906,[19] the homestead allotment was restricted until otherwise provided by Congress. This restriction applied to heirs and devisees since it was deemed to run with the land. The surplus allotment was restricted for 25 years. No provision was made for alienation of inherited land until 1909, when Congress authorized the Secretary of Interior to sell inherited lands upon application by the heir.

The General Allotment Act of 1887[20] affected reservations of tribes in Oklahoma (except the Five Civilized Tribes and Osage Nation) and other states. Under that Act, instead of a conveyance or patent from the tribe, "so-called trust patents were issued to the individual allottee, thereby evidencing the fact of his right to the use and occupancy, with final title in fee to be issued at the end of the trust period."[21] Under this system, the United States held the allotment in

17. Act of Aug. 4, 1947, ch. 458, 61 Stat. 731.
18. L. MILLS, OKLAHOMA INDIAN LAND LAWS (1924).
19. Act of June 28, 1906, ch. 3572, 34 Stat. 539. There was no antecedent treaty between the Osage Nation and the United States Government dealing with division of the tribal lands and restraints on alienation. The Act also reserved to the Osage Nation all mineral rights.
20. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.
21. W. SEMPLE, *supra* note 1, at § 723.

trust for the use and benefit of the allottee for a period of 25 years from the issuance of the trust patent. No restrictive plan was needed because title was retained in the government and no allottee had any interest which could be alienated. The trust period has been extended by Congress and Executive Orders through the present.

Unallotted Lands

After the tribal domains had been divided up among the citizens, there remained a substantial amount of excess land unnecessary for individual allotment. This surplus acreage was principally in the Choctaw and Chickasaw Nations, totaling more than 800,000 acres in each tribe. Large unallotted tracts remained in the Osage Nation and in the lands held by the "wild tribes." Congress authorized the sale of these lands by the Department of Interior, with the funds retained for the tribes. Title to lands purchased from the tribes begins with a patent from the Indian Nation, approved by the Secretary of Interior. The patent conveyed fee simple title to the purchaser, free of any restrictions upon alienation. This was true even if the purchaser were a full-blood Indian whose allotment might be restricted, unless he purchased the land with restricted funds. Thus, except in the instance of purchase with restricted funds, no Indian land law problems arise with unallotted land deeds.

III. Removal of Restrictions— The Title Examiner's Blessing

Inexperienced title examiners are often taught to browse through the abstract before beginning a microscopic examination. One reason for this suggestion is that monumental problems concerning restricted Indians which appear at the beginning of the abstract may well disappear if a later entry discloses that the restrictions have been removed. Congress recognized after several years that the general plan for the protection of certain Indians against their own inexperience might be inappropriate under certain circumstances. From time to time methods were prescribed by which the restraints on alienation on certain types of Indian citizen could be removed. Once restrictions are removed, Indian land law problems cease.

Almost from the beginning, Congress determined that, as to allotted lands, non-Indians and Indian citizens of less than half-blood should be considered capable of managing their own affairs. Thus, in

the 1908 Act, no restrictions were imposed on such persons as to the alienation of their allotments.[22] As to inherited lands, there was no presumption of competency, but Congress generally felt that heirs, although they might sell their inherited lands, would still own their own allotments which were adequate to support them. Removal of restrictions on inherited lands under the 1908 Act was effective as to all degrees of blood. As noted previously, Congress established a protection against the sale for inadequate consideration by full blood heirs by requiring approval of the conveyance by the county court.

Even prior to the 1908 Act, Congress had authorized the Secretary of the Interior to remove restrictions in limited situations. The 1904 Act authorized the Secretary to remove restrictions on adult surplus allotments. That authority was withdrawn by the 1906 Act as to full bloods. The 1908 Act continued the power of the Secretary to remove restrictions on allotted land, but no limitation was placed on his discretion because of age, degree of blood or type of allotment. The procedure for removal of restrictions was left up to the Secretary, but this matter does not concern the title examiner except for the rule that the order removing restrictions is not effective for thirty days. This order contains the name and other identification of the allottee, a description of the land from which the restrictions are removed, and a notation concerning the thirty-day waiting period. Conveyances during the thirty-day period are void. The Secretary has never had authority under the 1908 Act to remove restrictions with respect to inherited or devised land.

Wholesale removal of restrictions of adult Osage allottees of less than half blood, both as to homestead and surplus, occurred under the Act of March 3, 1921.[23] Prior thereto, under the Act of 1909,[24] the Secretary was granted authority to issue a Certificate of Competency to an adult citizen covering his surplus allotment. The issuance of this Certificate lifted all restraints on voluntary alienation by the allottee. Prior to 1925, no restrictions existed as to land acquired by devise.[25]

Under the General Allotment Act, the Secretary has had the power, since May 8, 1906, to issue a final patent and thus remove all restrictions.[26] Adult heirs of a deceased allottee who died before the

22. See discussion p. 327 *supra.*
23. Act of March 3, 1921, ch. 120, 41 Stat. 1249.
24. Act of March 3, 1909, ch. 256, 35 Stat. 778.
25. W. SEMPLE, *supra* note 1, at § 653.
26. Act of May 8, 1906, ch. 2348, 34 Stat. 182, *amending* Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.

issuance of the final patent could sell their inherited interest upon approval by the Secretary.

IV. MISCELLANEOUS SKELETONS— THE TITLE EXAMINER'S PLAGUE

Other than determining whether a conveyance from an Indian allottee or heir is valid, the title examiner must be aware of several other requirements to insure a merchantable title. The first has to do with litigation, primarily quiet title and heirship determination actions, involving restricted Indians of the Five Civilized Tribes.

In 1926 Congress enacted a statute[27] which provides, among other things, that when a party to a lawsuit includes in the litigation a restricted citizen of the Five Civilized Tribes, his restricted heirs, or his grantees, and when the lawsuit has as its subject matter a claim to an interest in lands allotted to a citizen of the Five Civilized Tribes, the party "may" serve a written notice of the pendency of the action on the Superintendent[28] for the Five Civilized Tribes. This notice must be served by the United States Marshall for the Eastern District of Oklahoma. Upon receipt of the notice, the government may, within twenty days, appear in the case on behalf of the Indian. The Superintendent also has the authority to remove an action pending in a state court to the federal court. The 1926 Act was amended in 1947[29] to provide that the government could not remove a pending action to the federal court except on the recommendation of the Secretary of Interior.

The 1947 Act made judgments of state courts binding on the United States if notice of the pendency of the action was duly given by the party filing the first pleading in the case. Customarily, upon being served with a Notice of Pendency of Action, to which must be attached a copy of the pleadings, the Area Director will file an Election Not to Remove when his staff is satisfied as to the accuracy of the allegations in the Petition. The filing of this document ends the participation of the government in the case. Title attorneys almost uniformly take the position that failure to comply with this procedure renders the title unmerchantable, because the interests of the United States have not been eliminated.[30]

27. Act of April 10, 1926, ch. 115, 44 Stat. 239.
28. The Superintendent is now called the Area Director.
29. Act of Aug. 4, 1947, ch. 458, 61 Stat. 731.
30. W. SEMPLE, *supra* note 1, at § 244.

It is not uncommon for a title examiner to encounter heirship problems involving restricted Indians. These problems arise generally in two ways. (1) When the original allottee died after selecting his allotment, but prior to the issuance of the patent from the tribe, the allotment deed shows as the grantee "the heirs of A." Often, the abstract next contains conveyances from persons purporting to be the heirs of the allottee. These deeds may or may not be accompanied by one or more affidavits setting forth the date of death and purported heirs of the allottee. The most commonly used form of affidavit appearing in the abstracts is the so-called Departmental Proof of Death and Heirship, utilized by the Bureau of Indian Affairs at Muskogee.[31] (2) A similar situation arises when the allottee died after receiving the allotment patent, but before conveying his land.

Prior to 1918, Congress had not established a procedure, either administrative or judicial, to determine the heirs of an allottee of the Five Civilized Tribes. Although recognizing the legal inadequacy (and often unreliability) of affidavits, title examiners had no other alternative by which to establish heirship. There are now four legally sufficient methods which can be used for that purpose.[32] The most common procedure followed today is the combination quiet title-heirship determination proceeding in the state district courts. Only the normal precautions must be taken in examining the proceedings, other than the notice to the Area Director.

V. CURATIVE STATUTES AND RESTRICTED INDIANS

The most effective solutions to murky and arcane title defects of the past are the curative statutes passed by the Oklahoma legislature during the past fifteen years. While prior piecemeal legislation covered fragments, it was not until the Simplification of Land Titles Act in 1961[33] and the Marketable Record Title statute in 1963[34] that a comprehensive plan was adopted to eliminate ancient inactive defects and possible claims which would otherwise render a title unmerchantable. Logically, the ten- and thirty-year time frames encompassed by these statutes would cover most of the invalid conveyances, unreliable heirship determinations, and other problems involving restricted Indians,

31. If the abstract does not contain information concerning heirship, copies of the appropriate documents can be obtained, for a nominal charge, from the BIA at Muskogee.

32. W. SEMPLE, *supra* note 1, at § 243.

33. OKLA. STAT. tit. 16, §§ 61-6 (1971).

34. OKLA. STAT. tit. 16, §§ 71-81 (1971).

drastically reducing the magnitude of Indian Land Law problems. Unfortunately, this is not the case.

The United States Constitution gives Congress exclusive jurisdiction over regulating commerce with the Indian Tribes.[35] This provision prohibits state legislatures from enacting statutes affecting Indians, except as may be specifically authorized by Congress. Such authority has been granted to the Oklahoma legislature in many instances, so that Oklahoma statutes of limitation are applicable to restricted Indians, probate courts act as a governmental agency to conduct hearings on conveyances by heirs, and state district courts have general jurisdiction over Indian citizens. But Congress has not enacted legislation making Oklahoma curative statutes applicable to restricted Indians, and until such time as Congress deems it advisable, relics of Indian problems of the past will continue to befuddle title examiners.[36]

VI. Recent Developments or Red Man's Revenge in Eastern Oklahoma

We have stressed in this article the concepts that (a) the protective treaties and laws which created the restraints on alienation were designed to offset the inexperience of many Indian citizens and (b) conveyances by restricted Indians are absolutely void. Frequently early titles include a succession of invalid deeds from the allottee to one purchaser after another. The result of these transactions was, of course, to leave the allottee still owning the land. We can only speculate as to the motives of these grantors and grantees. But there is nothing like a present-day bombshell to remind the title examiner of the potency of Indian Land Law and the need for continued care in reviewing transactions involving restricted Indians. Two such recent occurrences should adequately illustrate the point.

About six years ago, adventuresome salesmen for a shell home construction company migrated west from Arkansas, with the sole avowed purpose of upgrading the housing standards in Adair, Cherokee, Sequoyah and perhaps other counties in eastern Oklahoma. Unfortunately, none of these gentlemen was either versed in or curious about Indian Land Law. Several contracts were made with Indians calling for the construction of shell homes on their restricted inherited lands. As is customary in that business, each contract provided for the

35. U.S. Const. art. I, § 8.

36. A member of the Real Property Committee of the Oklahoma Bar Association contemplates proposing appropriate legislation to members of the Oklahoma congressional delegation during 1975.

construction of a shell home in return for the issuance of a promissory note and a mortgage on the site. Some of the Indians elected not to pay the installments due on the notes,[37] which resulted in the commencement of suits on the notes and to foreclose the mortgages. We can perhaps imagine the plaintiff's feeling of despair when counsel for the Indian mortgagor suggested that not only was the mortgage invalid but, since the improvements had become part of the real estate, the construction company was not entitled to remove the shell home. While the results in the cases varied as to whether the improvements could be removed, the trial court decisions were unanimous that the mortgages were invalid. None of the cases was appealed.[38]

On February 22, 1974 a Complaint was filed in the United States District Court for the Northern District of Oklahoma, Case No. 74-C-119, styled *Nellie Atkins Armstrong v. Maple Leaf Apartments, Ltd. et al.* The plaintiff alleged that she is a ½ blood Creek Indian who had inherited lands from her full-blood father which were restricted against alienation under the 1908 and 1947 Acts. She asserted that she is entitled to recover possession of and quiet the title to a tract of land which she previously conveyed to a predecessor in title of the defendants. From the pleadings and briefs filed in the case, it appears that (a) plaintiff conveyed the land in 1965, receiving approximately $110,000 as consideration, (b) the conveyance was not approved by the county court as required by the 1947 Act, and (c) substantial improvements have been erected on the premises, consisting of an apartment complex and shopping center valued at approximately $2,000,000. The defendants, while conceding that the 1965 conveyance was void without approval, counter-attacked by causing a Petition for Approval of the deed to be filed on March 4, 1974 in the District Court of Tulsa County, Case No. P-74-284. Plaintiff sought in the federal court case to enjoin the continuation of the proceeding in the state court.[39] Many important issues were raised by the parties in the two proceedings, including:

37. The principal reasons for declining to pay related to the alleged misrepresentations of the construction company.

38. The litigation presented several periphal questions, including liability on the promissory notes and whether certain types of shell homes could be removed. In some instances, the construction company did not bother to file suit, merely taking the loss. Information concerning these events was graciously supplied by Mr. Jack E. Rider, an attorney in Stilwell, Oklahoma.

39. In performing its duties under the 1947 Act, the probate court acts in an administrative capacity as an agency of the federal government. Thus, the proceeding is not in the strict sense judicial. Issues concerning the proper tribunal to hear an appeal have been raised.

1. Does the federal court have authority to enjoin a congressionally authorized state court proceeding to approve a deed by an Indian heir, absent irreparable harm?
2. Is the plaintiff's consent, either as the moving party or by affirmative action in open court, necessary to a valid approval of the deed?
3. If the state court approves the deed, will that approval relate back to 1965, the date of the deed?

Judge Barrow denied the plaintiff's request for a preliminary injunction to stop the state court proceeding. He concluded that the federal statute,[40] which limits the authority of federal courts to enjoin state court actions, did not apply because of the administrative role of the state court in the approval proceeding. The basis for the denial was not lack of authority, but rather that the traditional factors which support injunctive relief were not present. Plaintiff appealed the ruling to the United States Court of Appeals for the Tenth Circuit. By agreement, the state court proceeding remained dormant during the appeal.

After hearing oral argument during October, the court of appeals rendered its decision on December 12, 1974.[41] Judge Doyle, speaking for the majority, gave his initial consideration to

> [W]hether the pertinent statute [the 1947 Act] allows the Oklahoma court to approve a conveyance of restricted land without consent of and indeed over the protest of the Indian grantor of such land.[42]

In concluding that, under the federal statute, the consent of the Indian grantor is essential to the state court's approval, the court of appeals held that an injunction should have been granted to stop the proceedings in the probate court. Rejecting the defendants' argument that the state court has primary jurisdiction to determine the propriety of its own proceedings, the court of appeals held that, since the probate court acts under the 1947 Act as a federal administrative tribunal, "it is for the federal court to decide whether the statute allows the proceedings to be held over the objections of the Indian grantor."[43] Having found that consent of the Indian grantor is necessary and that no legal impediment exists to the granting of an injunction, the appellate court concluded that the denial of the preliminary injunction by the trial court

40. 28 U.S.C. § 2283.
41. Armstrong v. Maple Leaf Apartments, Ltd., Case No. 74-1286, — F.2d — (10th Cir. 1974).
42. Armstrong at —.
43. Armstrong at —.

was improper and reversed its judgment.[44]

In ordering that the preliminary injunction issue, the appellate court seems to have decided that the plaintiff must prevail in her ejectment and quiet title suit. The only issue apparently left for determination by the trial court is a balancing of the equities between the plaintiff, who was paid $110,000 for undeveloped land nine years ago, and the defendants who, in good faith reliance on an admittedly invalid deed, have expended considerable money for improvements on the property. The court of appeals, quite aware of the inequity to the defendants, suggested that the trial court "in connection with its ejection suit on its merits [can] adjust the equities between the parties."[45]

Lurking in the background is a provision in the 1947 Act which may cause considerable concern to the defendants in this case or in future litigation. The statute provides that, when the state court determines that it would be in the best interest of the Indian, at the hearing on approval "competitive bidding may be had and a conveyance may be confirmed in the name of the person offering the highest bid therefor. . . ."[46] In discharging its duty to determine the adequacy of the consideration, must the court use present value or the value at the time of the conveyance as the most relevant evidence? Under the circumstances, would it be an abuse of discretion for the court not to hold competitive bidding?[47]

VII. Conclusion—Suggestions for the Future

Congress has enacted no significant legislation since 1955 concerning Oklahoma Indian Land Law. While restricted Indians have no vested right in their restricted status, Congress does not seem disposed to end the existing protections even though more than seventy years have elapsed since the original treaties inaugurated Indian Land Law in Oklahoma. Yet, short of wholesale removal of restrictions or the issuance of final patents, it would appear that Congress could render a meaningful service to attorneys, land owners—present and pros-

44. In his dissent, Judge Lewis maintained that the plaintiff's remedy seemed to be adequate in the state court, and thus no basis for a preliminary injunction appeared. He seems to have overlooked the fact that, by issuing a warrant to compel Mrs. Armstrong to be present in court, the probate judge had already construed the federal statute adversely to her and contrary to the ruling of the majority.

45. Armstrong at —.

46. Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731.

47. Helpful information and suggestions concerning this lawsuit were provided by Mr. Jay Baker, counsel for the plaintiff, and Mr. Royce H. Savage, counsel for one of the defendants.

pective—and restricted Indians, without in any manner curtailing the legitimate rights and needs of today's Indian citizens.

The first constructive action which should be considered by Congress is to rid land titles of defects which are moss-covered, barred by the statutes of limitations and unnecessarily expensive to cure. The most direct approach would be to bar claims which might arise from these ancient defects by making the Simplification of Land Titles Act, the Marketable Record Title Act and other Oklahoma curative statutes applicable to restricted Indians. The effect of such legislation would be merely to treat such defects in the same manner as non-Indian relics. An initial one-year redemption period could be provided during which otherwise barred interests would be protected by an active claimant or the government. No longer would the heirship of an allottee who died in 1922 have to be judicially determined when those purporting to be his heirs validly conveyed their interests more than thirty years ago. No longer would hundreds of dollars have to be spent by a landowner because a conveyance by a full blood heir in 1930 was never approved by the county court. Even a conveyance by a restricted Indian, otherwise void, would not constitute a defect if more than thirty years had elapsed since the deed and the other requirements of the curative statute were satisfied. What is being suggested is neither revolutionary nor a departure from the compelling governmental interest to protect Indians from inexperience in dealing with their allotments. Rather it would be a recognition that no protection to anyone is really afforded by continuing the present law as it relates to ancient transactions. Only unnecessary expense and delay result.

Second, Congress should consider the validation of all conveyances by restricted Indians which are more than fifteen years old, unless an appropriate notice asserting an adverse claim is filed in the county records by the grantor or the Area Director. This period, the same as the Oklahoma statute of limitations for adverse possession, should be completely adequate to protect restricted Indians against an improvident transfer of their lands.

Finally, it is perhaps time for Congress to review the entire scheme of restraints on alienation, at least in preparation for the seventieth anniversary of the 1908 Act. Undoubtedly there are still valid reasons to continue restrictions and protections for some Indian citizens and for some transactions. Nonetheless, certain areas merit re-evaluation in light of the 1970's. Possible revisions might include:

1. Removal of all restraints on alienation, except as to the homestead allotments of citizens of ¾ths or more Indian blood.

2. Elimination of the need for approval of conveyances by ½ or more blood heirs, established under the 1947 Act, limiting the requirement to full blood heirs as provided in the 1908 Act.

3. Simplification of the procedures for obtaining approval of conveyances by full blood heirs by permitting administrative action subject to appeal to the probate court by the heir.

No economic or other hardship on restricted Indian citizens should result from such proposals if enacted. By bringing Indian Land Law into the modern era, Congress would both recognize that most restricted Indian landowners of today need not be patronized by governmental protections designed for the turn of the century and that title examiners should no longer be required, at considerable expense to their clients, to struggle with the archaic scheme of the Dawes Commission and its successors.

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