With respect to the leasing of individual lands, the regulations of the Interior Department make no provisions with respect to the mechanics thereof, except as to acknowledgment and witnessing of leases, and recording when necessary to secure crop liens under the state law. The practices vary at the different reservations. At Yuma the procedure seems to be informal. A person desiring to lease an Indian allotment secures from the farmer or other government employee, the names of those Indians who might be willing to lease their land, or else he finds these Indians by his own efforts. A lease is then made by the superintendent, the Indian, and the lessee. There is no compiled record of these leases. The documents themselves are contained in the individual files of the Indian lessors, and to make any study of them to ascertain the consideration for the lease of Indian land as compared to the lease of white land, or to compare the consideration paid by the different lessees of the Indian lands, requires a search of all these individual folders, or else a search through the individual money ledgers of the different Indians. Under such a system it is apparent that discrimination and even bribery may exist without opportunity of discovery. At the other reservations, notably at the Flathead and Osage Reservations, a complete record is kept and an appraisal by the government farmer is required and kept on file, while at Flathead an application is required of the lessee.

Adequate regulations for the making of leases and the recordation thereof should be made to guard against favoritism and undue influence. While the paper work should be kept to a minimum, informality and secretiveness furnish opportunity for favoritism and dishonest practices. The following suggestions are made:

1. That there be an inquiry of the superintendents at the reservations where a considerable amount of leasing is conducted for the purpose of discovering the methods there employed and their operation in actual practice.

2. Pending such study the tentative proposal is made that the greater publicity through the posting in the agency office of the lists of lands available for lease be attained. This list should, of course, give the name of the Indian, the allotment number, and the description of the land by the government survey. It should also contain the minimum appraisal for lease purposes fixed by the government. It is probably not necessary or advisable to have public

bidding or advertisement for the leasing of Indian lands for agricultural purposes, for the term is short, the monetary consideration involved small, and the need of prompt action often pressing. However, it is suggested that after the list of lands available for leasing has been posted, it be allowed to remain for a short time, say one week or ten days, before final acceptance of offers for leases is made. This would enable different parties to have an opportunity of making bids for the lease. After a bid had been made and accepted, the name of the lessee should be added to the above posted information, together with the consideration paid. All this information should remain a part of the records of the Indian Office open to inspection. A written appraisal signed by the government farmer should also be required in order to fix responsibility. Even though the Indian be technically incompetent a copy of the lease should be given to him, to train him to some extent in business matters and give him a start in the proper care of private property.

As pointed out in other portions of the staff report, Indian property can be used as a valuable means of educating the Indian to economic competency. Too often at present the government officers, in order to avoid the trouble and time spent in making the Indians cognizant of the methods and policies pursued in the management of their property, accept the undesirable alternative of keeping them in the dark concerning their own property. Such a practice furnishes a breeding ground for suspicions and indictments, which, though usually unfounded, are due in no small measure to the government's own short-sighted policy.

Administration of the Estates of Deceased Indians. By enactment of Congress the Secretary of the Interior has been charged with the duty of determining the heirs to the restricted estates of deceased Indians, and with the responsibility of probating such wills as may have been executed by the deceased owners of such estates. The intent of Congress was clearly that the rights of intestate succession should be determined by the laws of the several states, with the qualification that the offspring of Indians cohabiting together as man and wife according to the Indian custom should be considered legitimate for purposes of determining descent. The right of the Indian to dispose of his property by will is subject,

however, to the " regulations to be prescribed by the Secretary of the Interior," and no will is valid until it has received his approval.[39]

To accomplish the tasks thus assigned to the Secretary of the Interior, a probate division has been organized in the Indian Office, consisting of field and office employees. Eleven inheritance examiners, duly admitted attorneys, working in particular sections of the Indian country secure the evidence in the field, which they submit to the Department for final action. By detailed regulations requiring posted and personal notice, and by openly conducted hearings, an attempt is made to guard against the possibility of careless, arbitrary, or corrupt action.

The execution and probate of wills are treated rather sparingly by the regulations. Certain directory provisions in regard to the execution of wills, including the presence of attesting witnesses, do not appear to be essential where the will is filed after the death of the testator or was made under circumstances rendering impractical a strict compliance with the regulations. The examiner is expected to inquire into the mental competency of the testator and the influence which occasioned the execution of the will, and to submit the document with his recommendations of approval or disapproval, as the case may be.

When the report of the examiners, whether involving intestate or testate succession, reaches the Indian Office, it is reviewed by a staff of workers and submitted to the Commissioner, who in turn submits the entire record to the Secretary for his final action. By statute no appeal lies from the Secretary's decision.

This system of administrative settlement of estates is believed in its main elements to be sound, and it should be retained for some time to come. In view of the peculiar nature of the problem the task is probably better performed than it would be if committed to

[39] See Title 25 of the Code of Laws of the United States, Sections 348, 371-73. In the case of the Five Civilized Tribes and of the Osages the administration of Indian estates is by the probate courts of Oklahoma. Any Indian of the Five Tribes may make a will free from departmental control, while in the case of the Osages the will must be valid under the laws of Oklahoma and also be approved by the Secretary. The administration of the estates of Osage Indians was deemed so unsatisfactory that by act of February 27, 1925, Congress gave to the Interior Department final authority over the distribution of the restricted estates of deceased Osages, though leaving the nominal conduct of the estate with the local court.

the state courts, the doctrines and methods of which are designed to fit the needs of an entirely different class of people. The difficulties inherent in the task, and the failure of the personnel to attain the ideals set before it call, however, for certain changes necessary to protect the interests of the ignorant and simple people with whom the government is dealing.

Examination of the records of the Indian Office for the last year discloses considerable laxity in the proof of service of notices. If forms of certificates or affidavits were furnished setting forth the time, place, and manner of service, with the detail which is usually required in state and federal court proceedings, and the examiners were required in all cases to execute duly the certificates, the added guaranty that the excellent provisions of the regulations in this respect were fulfilled would be well worth the added effort.

Undoubtedly an inherent difficulty lies in the conduct of hearings. Although notice is posted for a hearing at a definite time and place, seldom will the necessary parties and witnesses be present at the time set. The Indians are frequently scattered over thinly settled regions with poor means of communication and, if no immediate pecuniary reward is in sight, they often fail to appear for the hearing. Under these circumstances, the usual practice is to take the testimony of those who are present, and then to continue the case to an indefinite date until the missing testimony can be procured. The ideal of a single hearing, in which all parties interested may appear and partake, seems impossible of attainment if the work is to proceed. The practice of some examiners of taking the *ex parte* affidavits of government officers instead of examining them in form at the regular hearing, should not be followed except where the parties are absent and their testimony procurable in no other way. Particular pains should be taken to observe Section 19 of the regulations, giving to interested parties an opportunity to examine depositions and to submit questions of their own if they so desire. The examiner must take pains to explain fully to the Indian claimants the status of the case and the nature of the testimony required for its determination. To assure as nearly as possible a compliance in these respects, the certificate of the examiner should state in detail his adherence thereto. Some examiners, but not all, follow the requirement that the certificate of the examiner indicates the time and places where the testimony

was taken and those present at the hearing. The tentative suggestion is here made, that, when a record is complete and the examiner has determined on the recommendations to be made, notice should be posted stating that a final report will be made in the estate and that parties interested will be given an opportunity to examine it and to state their views in the matter.

Considerable improvement can be made in the actual conduct of the hearings. The fact that those interested in the proceedings often do not speak or read English and are usually reluctant in the presence of government officers and contesting claimants to assert to the full extent the rights of which they may be possessed, makes it imperative that those in charge of the work be unusually careful in protecting the interests of all parties concerned. Many examiners have a tendency to lead the witness excessively, and although the niceties of court procedure should not be expected or required, in too many instances the answer of the witness is but a reflection of the preconceived ideas of the interrogator, clearly indicated by the question he propounds. Since the disposition of the case is entirely dependent on the record made by the examiner it is of extreme importance that he be careful to procure from the witnesses before him the testimony bearing on the vital issues of the case. In many instances the examiner's questions reveal an insufficient knowledge of the concepts of testamentary capacity, or fraud, and of undue influence, and, hence, the answers lack relevance and clarity.

Several important matters are not covered by the regulations, such as the necessity for the presence of attesting witnesses, the effect of the omission in the will of provision for children, and the death of a devisee before the testator, and it is left uncertain whether the state law is or is not applicable. This omission sometimes leads to erratic and arbitrary recommendations from the examiners. In two instances, one of the failure of a bequest because of the impossibility of performance of conditions, and the other of the death of a devisee before the testator, the examiner recommended the complete disallowance of the will for the apparent reason that he had no other solution to offer. Fortunately these strange proposals were not followed by the Washington Office.

The statutes of Congress, and the regulations of the Interior Department make no provision for the payment of claims against

the estates of decedents, but the practice of receiving and allowing claims is nevertheless uniformly practiced. The surviving spouse or the next of kin is asked if the indebtedness was in fact incurred, and if the payment of the claim is desired. Affirmative answers occasion a decree of payment. Although a tendency is apparent to disallow debts improvidently and unwisely incurred and to look with suspicion on the claims of relatives and near friends on account of personal services, no legal rule has been set up to guide departmental action in these matters. The practice of allowing claims against decedents' estates is probably a proper one, although during the life of the decedent his property would not be subject to execution for debt. In many instances, had not death intervened, the Indian debtor would have paid the claim. The government should not be in the position of enabling the heirs of legatees to prosper because death prevented an honest debtor from meeting his obligations. The regulations, however, should furnish as specific a guide as possible for the action of the Department in allowing or disallowing claims. All claims should be itemized and verified by affidavit. Although it should not be ruled that debts for necessaries only will be allowed, the debts must not be so excessive or unwise that the creditor in allowing them to accrue is inferentially guilty of fraud or overreaching. The common law principle which denies recovery for voluntary services furnishes a safe guide for the consideration of most cases of personal services rendered the decedent.

In the Washington headquarters the examiner's report normally passes through the hands of six persons, the reviewing clerk, the head of the probate division, the law clerk of the Indian Office, the Commissioner or Assistant Commissioner of Indian Affairs, one of the attorneys in the Solicitor's Office particularly charged with the duty of reviewing Indian matters and the Assistant Secretary of the Interior. The initial detailed examination is made in the Indian Office by the reviewing clerk under the immediate direction of the head of the probate division. Subsequent reviews in the Indian Office itself are administrative and are not ordinarily detailed except in large or controverted cases. Under the present administration of the Department all cases regardless of their size are then reexamined in detail from the complete record by one of

the attorneys in the Office of the Solicitor of the Interior Department specially concerned with Indian affairs. In many cases this review results in concurrence with the recommendations made by the attorneys in the Indian Office but in a considerable number of cases these attorneys raise new questions or disagree with the recommendations of the Indian Office. When issues are thus raised, memoranda or briefs are exchanged and if agreement is not reached among the examining officers, the case with all the papers is referred to the Assistant Secretary of the Interior for settlement. In large or controverted cases both the Commissioner of Indian Affairs and the Assistant Secretary of the Interior devote considerable time to the study of the case. When the attorneys in charge of the initial examination in the Indian Office and in the Solicitor's Office are in complete agreement, the review by the Assistant Secretary is generally administrative rather than detailed, although the subject of Indian wills particularly interests the present Assistant Secretary and leads him in many instances to make more than the ordinary administrative review.

Question should be raised as to the advisability of having the inheritance examiner prepare in the field for signature the recommendations of the Commissioner of Indian Affairs and the final decision of the Secretary of the Interior. The inheritance examiner should, of course, submit his opinion in each case, but it is believed the final decision could be determined better by the office force which has greater opportunity for careful survey of the testimony and for reference to statutes, decisions, and treaties. Not only would the tendency to accept the prepared opinion of the examiner instead of preparing a new one be overcome, but the work which is now such tedious drudgery would afford more opportunity for originality and initiative.

More comprehensive and detailed regulations are needed to cover the various questions which arise concerning the validity and interpretation of wills. The Department takes the position that the Indian should be allowed to make his own will and to determine for himself, unrestrained by the supposedly superior wisdom of the government, the manner in which his property should be distributed after his death. The practice seems to accord with this liberal viewpoint, though some examiners of inheritance have not yet fully comprehended the principle adopted by the Department;

and the superintendents, who in some instances pass on all questions regarding wills, are likely to exercise a discretionary rather than a juristic control over the making of wills by Indians.

The argument might be advanced that the Secretary should exercise the power of disapproving such wills as fail to provide for deserving spouses and children, or which make large gifts to those apparently with little claim to such attention. Such a practice would result in the Department instead of the Indian testator making the will, and would encourage an arbitrariness which might be based upon favoritism or prejudice. Such dangers offset the possible benefits which might arise from the exercise on the part of the Secretary of greater discretionary powers. The purpose of giving to the Indians the same right to make their wills as their white brethren enjoy cannot be effected, however, unless there be provided, either by regulations of the Department or by adoption of state law, rules and principles to guide the administration in its task of approving or disapproving of Indian wills. Not only will such a step secure to the individual Indians equality and impartiality of treatment, but it will not leave important questions of policy to be determined by the personal views of the particular Secretary or Assistant Secretary of the Interior who happens at the time to be in charge of Indian affairs.

As far as the execution of the will is concerned the state laws in their strictness should not be made applicable. Ignorance of the technicalities of the state law on the part of the Indian testator and also of many governmental employees who assist in preparing wills, would cause many a will to fail which, in fact, would clearly express the testator's wishes. It should be sufficient if it appears by reliable testimony that the testator executed the document by subscribing his signature, mark, or thumb print thereto with the intent that it serve as his last will. It is not meant, however, to abandon the practice of employing attesting witnesses when the will is executed under government supervision, or to neglect securing their testimony whenever such witnesses have signed the document. The legal principles governing testamentary capacity, fraud, and undue influence as developed by the common law should be adopted, and as the inheritance examiner seldom has access to adequate law libraries, the regulations of the Department should contain definitions and discussions of these concepts. For the final decision of

the case in Washington, recourse can be had to the various legal authorities, but in the meantime the examiner should not be left uninstructed as to the nature of the problem before him.

If the will is validly executed by a person of testamentary capacity, free from fraud and undue influence, the best results will be obtained by applying the state law thereto. This will take care of those perennial problems arising from the disinheritance of husbands and wives and from the omission in wills of any provision for issue of the testator, matters uniformly covered by state statute or decision. Also rules will thus be provided to govern the situation where the devisee dies before the testator, and the effect of the divorce or marriage of the testator upon a previously executed will. Regulations should not be actually drawn up and promulgated, however, until a careful survey has first been made of the laws of the several states wherein the Indians are located. In some of them adjustments will have to be made in order to make the statutes applicable to the administration of estates by the Department, particularly in the allowance of homestead rights and maintenance for the widow during the administration of the estate. Such an application of the state law will, it is believed, be found more desirable than a uniform code covering the probate of Indian wills. It will carry out the policy of acquainting the Indians with the system of law under which they will come when finally released from government supervision, and it will bring the practice in the matter of wills into accordance with that already existing in intestate succession.

Reference has been made to the fact that the decision of the Secretary of the Interior in matters relating to descent and distribution of the estates of deceased Indians is final. If the changes above recommended are made, it is believed inadvisable to alter this to allow a resort to the courts for a hearing anew of the entire case. The inheritance examiners are lawyers; and attorneys are permitted to, and do, appear before them. Within the Indian Office and the Interior Department at Washington, the indications are that the controverted cases, particularly where the parties are represented by attorneys, are carefully and conscientiously considered. Because the rules applicable to the administration of Indian estates must differ considerably from the laws of the several states, a reference of the entire matter, particularly to the state courts, might

cause confusion and misunderstanding. If, however, the United States courts were given jurisdiction to correct errors of law, erroneous decisions of fact unsupported by any evidence, and abuses of discretion so grave as to be indicative of fraud, as is the case with respect to many other federal administrative agencies, no serious interference with the administration of the law would result but rather an even greater care on the part of the government to be judicial and impartial. The Indian then could feel that he, like other citizens, was subject to a "government of laws and not of men."

Taxation of Lands Purchased for the Indians with their Restricted Funds. A perplexing problem confronting the Indian Office today is the taxation by the states of the lands purchased for the Indians with their restricted funds which are under the supervision of the Office. The volume 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[40] 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 con-

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

trol 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 long standing 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.[41] 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.[42]

In spite of the intimation from these cases and from the express decisions of two district courts of the Northwest [43] 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 [44] 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 [45] 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

[41] 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).

[42] 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.

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

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

[45] Section 5 of the act of April 18, 1912.

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 [46] the Circuit Court of Appeals for the Eighth Circuit, although emitting 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. One of these cases was affirmed by the United States Supreme Court [47] in a *per curiam* decision on the somewhat doubtful authority of the McCurdy case *supra*.[48]

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.

If, as has been inferred, there be doubt as to the intention of Congress to give immunity from state taxation, it is recommended that legislation be secured expressly conferring the exemption. The states will not suffer from such a practice, for in return for the lost taxes on the purchased lands will be the subjection to the state taxing power of the relinquished lands, or of the funds used in making the new purchase.

Pending litigation should, of course, be pressed to a final conclusion with all possible speed in order that the existing uncertainty be ended. Should it transpire that these Indian lands are taxable, then the national government must fairly consider the nature of the duty to the ward of the guardian who has employed the ward's tax-exempt funds to purchase property on the express

[46] 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).

[47] United States v. Ransom 263 U. S. 691 (1924).

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

[49] United States v. Brown, 8 Fed. 2nd 584 (1925), dictum.

or implied misrepresentation that the newly-acquired property is likewise exempt. Several Indians have complained to the survey staff that they are being taxed despite the formal assurance of Indian Service employees that the land purchased for them would be exempt from taxation.

The Five Civilized Tribes. The general effect of the laws of Congress relating to the Five Civilized Tribes of Oklahoma has been to relieve them, to an unusual extent, from the supervision of the national government, and to subject them to the authority of the State of Oklahoma. This deviation from the usual mode of dealing with the government's wards, has up to comparatively recent years resulted in a flagrant example of the white man's brutal and unscrupulous domination over a weaker race. The conditions existing brought about a protest from the friends of the Indians, both in Oklahoma and elsewhere, and a committee of Congress held hearings in the state and made its report. As a result of this investigation conditions seem to be improving. County judges have been elected who regard it as their duty to preserve the property of the uneducated and improvident Indians who come before their courts, rather than expedite the transfer of such property from Indian to white ownership, as too often has been the case in the past. In one case where judge, guardians, and attorneys were engaged in the outrageous looting of an Indian estate, local opinion forced their indictment and brought about the appointment of reputable citizens as receivers for the estate. In spite of this gratifying improvement, some white citizens still remain from whose machinations the Indian is not sufficiently protected. Here, as in many other communities, the ignorant, poor, and untrained are often misled, cheated, and robbed by their cleverer and more unscrupulous neighbors. As long as this condition prevails Congress should not view it with equanimity. It is the duty of both the national and state governments to prevent the spoliation of the weaker class of the community by the stronger and to remedy the conditions that make this possible.

Probate Attorneys. For the purpose of protecting the Indians of the Five Civilized Tribes in their legal affairs, Congress, by act of May 27, 1908, provided for certain so-called probate attorneys to watch over the administration of the estates of Indian minors

and to assist the Indians in the various legal matters relating to their restricted property. Although the staff of nine attorneys now employed has undoubtedly exercised effective influence in preventing many cases of spoliation, the service falls short of what should be accomplished. In spite of the many assertions of fraud and overreaching, interviews with six of the nine attorneys revealed scarcely an instance of appeal to the courts for redress. The lack of adequate supervision and leadership, the absence of any funds for the payment of court costs, the absorption in administrative details, the necessity for the constant reference to higher authority before taking decisive action, and the restriction of the scope of the work to matters relating to the restricted property of the Indians deprive the probate attorneys of a large part of their possible effectiveness. To remedy these deficiencies a system of legal aid should be provided, which might be of real benefit to the Indians of the Five Civilized Tribes; the government should not, however, be expected to handle all litigation for the Indians of these tribes, because many of them can afford, and will prefer, to select their own legal representatives. If the recommendations hereafter made for the purpose of safeguarding Indian interests by closer government supervision are followed, it is probable that several attorneys retained on a part-time basis under the supervision of one competent man stationed at the office of the Superintendent of the Five Civilized Tribes, could accomplish the work which the eight probate attorneys are now expected to do.

Sale of Inherited Lands. As part of a comprehensive plan for the removal of restrictions from Indian lands of the Five Civilized Tribes, Congress by the act of May 27, 1908, provided that any member of the Five Civilized Tribes could convey, with some minor exceptions in the case of homesteads, any lands inherited by him, subject to the sole approval of the county court. The Oklahoma Supreme Court [50] decided that in exercising this function the county courts act as federal administrative agents and not under state law. This decision has meant that the safeguards thrown about the procedure by the Oklahoma statutes are inoperative, that the presence of the Indian grantor is not a pre-requisite to the approval of a conveyance, and that the discretion of the judge is

[50] Malone v. Wamsley, 195 Pac. 485 (1921).

absolute, from which no appeal lies.[51] It is the duty of the probate attorneys to advise the court concerning the approval of Indian deeds, and they often render valuable aid in this respect. Often, however, their services are ineffective, either because they are not notified of the proceedings, or are unable to be present to secure appraisals of the land, or because their recommendations are ignored by the court. At best they are in the position of interlopers. The transaction has already been agreed upon, the purchaser desires his lands, and the Indian grantor desires, usually very eagerly, his money. The state is also not adverse to having the land placed on the tax rolls. The county judges almost universally pay no attention to the social or economic desirability of the sale of the Indian land. Although the conveyance of the land may leave the Indian homeless and the proceeds of the sale be squandered, such considerations do not weigh with the court. Several judges, in fact, have declared that their duty is accomplished if it appears that the Indian knows the land which he is selling and the consideration he is to receive. Under such circumstances it is not strange that sales for grossly inadequate considerations are not uncommon. Since the court usually makes no extended inquiry as to the heirs of the decedent, pretended heirs may file for record deeds bearing court approval, which merely cloud the title so that heirs having a real interest in the land are forced to pay well to clear their title.

It has been stated on reliable authority[52] that it was expected that the Indian owners would not long retain their inherited lands after the restrictions had been removed; but that the lands which they themselves had received as allotments would be sufficient to provide them a home and support. This second hypothesis is becoming less and less true, since with the passing years the number of Indians who have received allotments in their own names is becoming fewer and fewer. If the heirs were competent to handle their property the existing situation might be left undisturbed, but the evidence is overwhelming that such is not the case and that the Indians of the Five Tribes are still the easy victims of the greedy and unscrupulous. The national government owes a duty to preserve to these Indians their patrimony. This cannot be accomplished unless the act of May 27, 1908, be so amended that the death of an allottee shall no longer have the effect of removing the restrictions from the lands descending to his heirs, unless they are persons of the lesser degrees of Indian blood from whose allotted lands the restrictions have already been removed.

[51] Malone v. Wamsley, 195 Pac. 485 (1921); Carey v. Bewley, 224 Pac. 990 (1924); Lasiter v. Ferguson, 192 Pac. 197 (1920); Snell v. Canard, 218 Pac. 813 (1923); Haddock v. Johnson, 194 Pac. 1077 (1920).

[52] Mills, Oklahoma Indian land law (2d.), pp. 168-71.

Partitioning of Inherited Lands. By making the restricted lands of the Indians of the Five Civilized Tribes subject to partition proceedings in the state courts of Oklahoma[53] another way has been opened for the Indian to lose title to his lands. In the case of the death of an allottee leaving several heirs, and the transfer by one of the heirs of his interest, the purchaser can have the land partitioned by the District Court of Oklahoma. If the court finds that the land cannot be equitably partitioned, it may be sold and the proceeds divided among the respective owners. Any owner may buy the land at the price set by the commissioners of the court, but, as the Indian owner seldom has the funds with which to purchase, the almost uniform result is that the land passes from his hands. In several instances discovered by the attorneys of the office of the Superintendent of the Five Civilized Tribes it would appear that sales have been made when it was inconceivable that a partition in kind could not easily have been made.

If the restrictions on inherited land be continued as above suggested, much of the damage occasioned by this act will be removed. If it be necessary to separate the interests of the Indian heirs, a sale under the direction of the Indian Office according to existing regulations is more likely to secure a fair price for the land than is the sheriff's sale in the state partition proceedings. If the latter method of partition is retained, steps should be taken at once to provide that in all cases where the restricted interests of Indians are affected the proper probate attorney be notified, and that he have full rights as an attorney of the court to represent the Indian interests in the litigation.

Leases. The provision of the 1908 act[54] whereby any Indian of the Five Civilized Tribes may make a surface lease of his homestead lands for a period not to exceed one year and of his surplus

[53] Act of June 14, 1918.

[54] Act of May 27, 1908, Section 2. 35 Stat. L., 312.

lands for a period not to exceed five years, has undoubtedly led to great abuses. The misrepresentations to the unlettered Indians of the terms of the instruments they are signing and the grossly inadequate rentals paid, demand immediate changes in the existing situations. Another unfortunate result of the present situation is that at times the Indians will frustrate unwittingly desired sales of their lands by leasing them without the knowledge of the government, after the latter has placed them on the market for sale at the Indian owner's request. Although a complete assumption by the government of the leasing of Indian lands—negotiation, execution, and collection—would perhaps secure the greatest return to the owners, this would undoubtedly cause many delays, require a great increase in the present field force, and be a step backward in the task of training the Indian for economic competency. The more feasible proposition is that the Indian be allowed to negotiate leases of his land as formerly, but that the executed document be invalid without the approval of a duly authorized representative of the Indian Service. Also, no receipt for rent should be binding unless witnessed by an employee of the government. If leases for not more than one year were subject to the approval of the several field clerks, and only the longer term leases submitted to the Muskogee office, there would be no appreciable delay in the handling of leases, and great savings would be secured for the Indians.

Probate of Estates of Minors and Incompetents. On account of several notorious cases the administration of the estates of minors and incompetents by the probate courts of Oklahoma has received much unfavorable attention. There is reason to believe that, as in other phases of the relation of the State of Oklahoma to the Indians of the Five Tribes, a changed public sentiment is gradually bringing about improved conditions. Although the nominal administration of the estates of minor and incompetent Indians is in the state courts, it should be noted that where restricted lands or funds are involved, the ultimate authority over this property rests with the Indian Office. A considerable portion of the work of the probate attorneys has been the approval of the requests of guardians for the expenditures of funds within the control of the Department. Although the probate attorneys should pass on such questions as the allowance of guardian and attorney fees, and

should see that the estates of this nature are administered according to the statutes of Oklahoma and the regulations of the Indian Office, there is no reason why the approval of ordinary expenditures for food, clothing, and other routine expenses should require the service of a man with legal training. It is work which could be done better and more cheaply by a social worker or even by a high grade clerk.

If the ward has no property in respect to which the government has retained its trust title, then the estate is beyond federal jurisdiction, and no method is apparent by which the property thus once relinquished can be brought again under the national ægis. Although several probate attorneys have rendered good service even in such cases, there is considerable question whether under the law their duties extend to these estates. It is recommended that, either by instructions from the Indian Office or by statute if necessary, the probate attorneys be directed to render service in all cases where the Indian wards, because of ignorance or lack of funds, are unable to secure proper legal advice, or where there is an appearance of fraud.

In many cases where no probate proceedings have been taken in the state court, the Superintendent of the Five Civilized Tribes is required to determine the distribution of restricted funds among the heirs. At present the evidence is secured by means of *ex parte* affidavits, a practice believed dangerous and reprehensible. The general provisions of law relating to the probate of Indian estates do not apply to the Five Civilized Tribes; but in cases where no proceedings have been had in the state courts of Oklahoma, and action by the Office of Indian Affairs is necessary, it is urged that the determination of heirs be made in accordance with the regulations of the Indian Office applicable to Indians elsewhere. The probate attorneys would be well suited to perform the duties of the inheritance examiners.

Continuation of Restrictions. The most important question affecting the Indians of the Five Civilized Tribes is the continuation of the restrictions upon their lands, which will expire April 25, 1931. Although on many phases of the subject opinion differs widely, practically everyone agrees that if the restrictions are not extended the Indians will speedily be deprived of their lands, in

most instances for ridiculously inadequate considerations. Like most Indians elsewhere, the Indians of the Five Civilized Tribes have but little sense of values and will make almost any sacrifice of property for ready money. Congress should not be deluded into believing that anything else will result. In spite of the concurrence of opinion on this point, suggestions as to the proper course to be pursued are diverse. Although all but the most heartless agree that as to the older and the physically and mentally incapacitated the restrictions must be continued, many believe that the only salvation for the able bodied Indian, who is not too old to make a start in life, is to release him and his property from government supervision, and to let him run the risks of success or ruin in common with his fellow men. It is, however, the recommendation of the survey staff that the soundest and most humane solution is to extend the restrictions on all lands for a further period of ten or twenty years, and to include therein the inherited lands as above suggested. The existing law and regulations are ample to release the lands in the individual cases where this course is best, and such a method is infinitely more efficient and exact than the so-called competency commissions employed in times past. The theory of the government has been that the Indian should be retained under government supervision and control until such time as he is rendered competent through education and by example to care for and preserve his patrimony. This time has not yet arrived with the greater part of the restricted Indians of the Five Civilized Tribes. The United States will be unfaithful to its trust if it surrenders to these people their lands and funds at a time when the only possible result will be a carnival of dissipation, fraud, and oppression.

The Pueblos Lands Board. Too great speed must not be expected in the settlement of the Pueblo land claims. The problems of settling thousands of conflicting claims in twenty different pueblos under a statute uncertain and vague in meaning, cannot be accomplished in a moment. Each separate claim is in effect a separate suit. Records must be searched, deeds translated, witnesses interviewed, and sometimes extensive surveys made before an understanding of the separate claims can be gained. Steps are now being taken for the appeal of a case to the Supreme Court for a determination of some of the controverted questions of law arising in the interpretation and application of the Pueblo Land Act, a settlement of which will facilitate the work of the board. If all three members of the board had the health, time, and ability to do the persistent, grinding work that is now being done by one member in going directly to the Indian communities, there to interview the Indians, the claimants, and their witnesses, and to gather the evidence necessary for a proper determination of the conflicting claims, the whole matter could be concluded without delay and the disturbing controversies arising out of these claims made a matter of history. A consideration of this possibility is earnestly recommended.

Indian Tribal Claims Against the Government. The benevolent desire of the United States government to educate and civilize the Indian cannot be realized with a tribe which has any considerable unsatisfied bona fide claim against the government. The expectation of large awards making all members of the tribe wealthy, the disturbing influence of outside agitators seeking personal emoluments, and the conviction in the Indian mind that justice is being denied, renders extremely difficult any coöperation between the government and its Indian wards. Besides these practical considerations, the simple canons of justice and morality demand that no Indian tribe should be denied an opportunity to present for adjustment before an appropriate tribunal the rights which the tribe claims under recognized principles of law and government.

Since an Indian tribe is not a recognized legal entity, and since, under the general laws, the statute of limitations is a bar to practically all tribal claims, no Indian tribe can commence a suit against the United States in the Court of Claims, without first securing from Congress an act conferring on the Court of Claims special jurisdiction over the case. The necessity for such congressional action introduces political considerations into what should be solely a judicial question. Much depends upon the standing in Congress of the sponsors of the bill, upon the composition of the Committee on Indian Affairs, and upon the attitude of the administration. The present practice is for the Committee on Indian Affairs of the House or the Senate, as the case may be, to refer the bill to the Secretary of the Interior for report. Bills which hold possibilities

of heavy payments from the treasury must also be submitted to the Bureau of the Budget, where they may receive an adverse report because in conflict with "the financial program of the President." Jurisdictional bills for the California Indians have within the space of six years twice received favorable and twice unfavorable reports from the Secretary of the Interior. The result is that before a jurisdictional act is finally secured many years frequently must be consumed in agitation, propaganda, and lobbying. The expense of attorneys, representatives, and witnesses, and the disappointing delays, postponements, and defeats are burdens on Indian claimants, the imposition of which may well be questioned. A practice which requires a claimant to prove his case twice, once before Congress and once before the court, should not be accepted as inevitable without great effort to discover a substitute less burdensome and unjust.

As the jurisdictional act is the sole source of the jurisdiction of the Court of Claims' authority, the entire litigation depends upon the wording of the act. Certain features are indeed common to all the acts: authority to sue, disregard of the statutes of limitation, a time limit for filing suit, advancement of the case on the docket, access by claimant to all pertinent government records, right of the government to plead set-offs and counter-claims, determination of attorney fees, and right of appeal to the Supreme Court. The principal difficulty is to determine the wording of the act which fixed the scope of the claims cognizable by the court. The court is at times limited to a single specific claim under a single specific treaty;[55] in other cases its jurisdiction may include the wide range of "amounts, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for misappropriations of any funds or lands of said tribes or bands thereof, or for failure of the United States to pay any money or other property due."[56] The court invariably confines itself to claims of an equitable or legal nature[57] and is loath to consider the jurisdictional

[55] See act of March 3, 1909, 35 Stat. L., 788; act of March 1, 1907, 34 Stat. L., 1055.

[56] Act of June 3, 1920, 41 Stat. L., 738, in re the claim of the Sioux Indians.

[57] Sisseton and Wahpeton Bands of Sioux v. United States, 53 Ct. Cls. 302 (1923).

act as creating a liability against the government.[58] Although in the interpretation of treaties due regard is given to the inequality in power and understanding of the respective parties negotiating the agreement,[59] the Indians' rights are measured by the words of the treaty or statute, and, unless clearly permitted by the words of the jurisdictional act, the court will not consider mere moral obligations, arising out of circumstances preceding or accompanying the negotiation of the treaty.[60] It is difficult to see why a particular group of Indians who have been treated with injustice by the government should have deductions made for gratuities already given them, when other Indians who have suffered no wrongs are permitted to keep their gratuities in full. Such, however, is frequently the case. The matter, however, is often left to the discretion and conscience of the court according to the facts in individual cases.

Within recent years the number of jurisdictional acts has greatly increased. Twenty tribes now have cases pending before the Court of Claims, and several more have secured the necessary legislation, but as yet have not commenced suit. Nevertheless, a number of Indian groups still remain for whom no relief has been afforded. Although much may be said in favor of a general jurisdictional act, there is some danger that such an act would burden the court and the Department of Justice with too many ill-advised and unsubstantial suits, thus retarding action on more meritorious matters. It is recommended, therefore, that the Secretary of the Interior delegate to a special staff, expert in law and Indian affairs and not affiliated either with the government or with attorneys prosecuting Indian cases, the authority to investigate the remaining tribal claims, and to report to him its recommendations in regard thereto, together with suggestions as to the proper jurisdictional bills to be drafted in the instances where suit seems proper. Such information would be invaluable to Congress in enabling it speedily and efficiently to dispose of this problem recurring in each session.

[58] Mille Lac Band of Chippewas v. United States, 46 Ct. Cls. 424 (1911); Mdewakanton and Wahpakoota Bands of Sioux v. United States, 57 Ct. Cls. 357 (1922).

[59] Ottawa and Chippewa Indians of Michigan v. United States, 42 Ct. Cls. 240 (1907).

[60] Creek Nation v. United States, Ct. Cls. March 7, 1927. Sisseton and Wahpeton Bands of Sioux v. United States, 58 Ct. Cls. 302 (1923); Otoe and Missouria Tribes v. United States, 52 Ct. Cls. 424 (1917).

Not only is the permission of the government necessary before an Indian tribe may commence suit against the government, but also no contract that the tribe may make with an attorney to represent it either in the court or before Congress has any validity unless it is approved by the Secretary of the Interior.[61] The position of the government as at once the Indian suitor's guardian and the adverse party to the suit is an anomalous one, but one that must be assumed, if the Indians are to be protected against certain unscrupulous and designing attorneys. The prosecution of Indian tribal claims from the introduction of the jurisdictional bill in Congress to the final payment of the judgment is an extremely specialized proceeding. Ability to secure favorable action from Congress, knowledge of Indian history, familiarity with the records of the Interior Department and of the General Accounting Office, and experience in practice before the Court of Claims are qualifications possessed by but few. The result has been that the bulk of Indian litigation is handled by a comparatively small group of attorneys in Washington, who either hold original powers of attorney from their Indian clients, or else have an interest in the suit by way of assignment.

The task of the government in approving the contracts of Indian tribal attorneys is made more arduous by the difficulty of getting united action owing to the existence of factions among the Indians, and Indian politics which lead one group to insist on the selection of this attorney, and another group to insist on the selection of the other, present a delicate situation which has to be handled with extreme care in order to avoid disastrous results. The Department must avoid the Scylla and Charybdis of incompetent representation of the Indians, and undue dictation in the choice of legal representatives. To lay down any rules to govern the selection of tribal attorneys seems impossible. At times the Indians without governmental direction will be able to select competent help. At other times the submission by the Commissioner of Indian Affairs of a list of suitable attorneys from which the tribe may make a selection seems the best procedure; but to adopt this as a settled policy would in many instances be an arbitrary method of doing business and might give basis to the charge that a monopoly in Indian tribal business was being created.

[61] Code of Laws of the United States, Title 25, Secs. 81, 84.

Although the terms of the attorneys' contracts naturally vary with the individual case, certain general provisions are common. In the conduct of the case the attorneys are made subject to the supervision and direction of the Commissioner of Indian Affairs and the Secretary of the Interior, and they can make no compromise or other settlement of the case without the Secretary's approval. The contract may also be terminated by the Department for cause and upon due notice. Although naturally some objection has been raised to this unusual power, no evidence has been found that in actual practice the attorneys have been hindered in the conduct of the litigation.

A much more common complaint is directed to the provisions as to fees. The recovery of a fee is contingent on the success of the suit and is to be determined by the Court of Claims, but is not to exceed 10 per cent of the amount of recovery with a usual maximum of $25,000. The attorneys must also advance the costs of the suit, which are considerable on account of the printing of the pleadings and briefs, the long trips between Washington and the Indian country, and the necessity for voluminous depositions in many cases. As these advancements must be borne by the attorneys in case the suit is unsuccessful, tribal litigation naturally fails to attract the more successful attorneys who are in a position to choose or refuse the cases offered them. Where there are tribal funds, the expedient of reimbursing the attorneys, after departmental approval, for expenses incurred has much to commend it; and where no such funds exist, it is suggested that a congressional appropriation to cover expenses should be made. The $25,000 limit on the fee should be raised in some cases, for the difficulty of preparing the cases is great, and several years of effort are required before the matter is finally settled. This course is particularly desirable in view of the fact that the allowance of the fee in any case may be made subject to the control of the Court of Claims. In the recent Chippewa cases a yearly stipend is paid from the tribal fund, instead of the customary contingent fee. It is too early to judge how satisfactory this device will be.

The procedure of the Court of Claims is in many ways ideal for the handling of Indian cases. Within the time limit set by the jurisdictional act the attorney for the plaintiff must open the case by filing the petition with the court. In many instances reminders

have been sent from the Indian Office in confidential correspondence to attorneys that the time for filing suit has almost run, but in only one suit has the attorney failed to present the petition within the time fixed. Within forty days after the filing of the petition the government must file its demurrer, plea, or answer. Ordinarily the Attorney General submits within a week a general traverse. Considering the fact that the government is as ignorant as is the attorney for the plaintiff of the exact status of the defendant's case, it is doubtful whether a more specific answer should be required.

Evidence in tribal cases against the government consists entirely of transcripts from the public records furnished by the various governmental departments, and of such oral testimony in the form of depositions as the parties wish to submit. As the testimony of aged Indians who were conversant with the circumstances surrounding transactions occurring many years ago is often extremely important in Indian cases, these cases should be determined as speedily as possible while the witnesses are still available. On motion of the plaintiff the court by virtue of Section 164 of the Judicial Code may request from the various departments and bureaus of the government transcripts of relevant documents and book entries in the case. Such motions are denied, however, when it appears that the defendant has already informally requested similar evidence for its own use.

The great delays in the cases are often due to the time consumed in preparation of the material by the various governmental bureaus, particularly in the General Accounting Office. One is inclined to consider this delay with charity, however, when the immense task of gathering and compiling the requested information is considered. Single reports from the General Accounting Office often comprise many volumes, the preparation of which requires an extended search through vouchers, warrants, receipts, and ledgers of long periods of past decades. In September, 1926, a division of the General Accounting Office comprising eighty-two employees was organized for the sole purpose of compiling data for Indian cases. Even with this large force it is estimated that in some cases it will take several years to gather the necessary information. Whether the methods of this division could be improved upon and whether a larger force would be able to handle the records without interference and confusion, are questions which can be determined only by those expert in matters of accounting.

In the Indian Office, however, particularly in cases involving the Five Civilized Tribes, it is desirable that employees be detailed to furnish the material called for by the court and the Department of Justice, and that these be uninterrupted in their task by the necessity of performing other routine duties of the Indian Office. On account of the recent increase in the number of Indian tribal cases the Department of Justice should furnish more assistance to the attorney in charge of these cases in order that these cases may be promptly and thoroughly prepared.

As far as the pending cases at least are concerned, the only thing to do is to press them to a conclusion as rapidly as is consistent with proper consideration. Claims for which no method of settlement has as yet been provided should be considered by an expert group as above recommended, and where the determination of controverted questions of fact and law is necessary, submission to the Court of Claims with opportunity for appeal to the United States Supreme Court seems the best procedure. The Court of Claims is much less likely to be influenced by political considerations than are committees of Congress and executive commissions. It is doubtful, moreover, if the establishment of any other body would result in any considerable saving to the Indians or to the government in time and money, for in any event the evidence in the case would have to be prepared and the Indians represented by attorneys. The present delay is due not to the failure of the court to act promptly when a case is finally prepared and submitted to it, but to the inherent difficulties in gathering, digesting, and presenting the facts in these ancient, extensive, and involved controversies. The Indians, too, like other citizens, will be satisfied with nothing less than the opportunity of presenting before the regular courts of justice provided for the settlement of such controversies, the important cases which have such a close relation to their present and future welfare.