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- The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation *Donald Shelby Chisum* 633

A proper jurisdictional balance between state and federal court systems has long been a goal of federal statutes granting jurisdiction over patent matters to the federal courts. Prompted by the recent decision of the United States Court of Appeals for the Ninth Circuit in *Koratron Co. v. Deering Milliken, Inc.*, Professor Chisum considers the general problem of the jurisdiction of federal and state courts over cases concerning questions of federal law and then focuses on the specific problem of jurisdiction over cases involving federal patent law. The article begins with a discussion of the history of statutes granting patent jurisdiction to federal courts and concludes with an evaluation of the present division of jurisdiction in patent matters between state and federal courts.

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TOO LITTLE LAND, TOO MANY HEIRS— THE INDIAN HEIRSHIP LAND PROBLEM

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INTRODUCTION

The poverty of the American Indian is magnified by the vagaries of long-established federal land policies controlling reservation ter-

B. Restrictions on Disposition of Indian Allotments

By present law, sale of allotments requires the unanimous consent of the owners, some of whom may be minors, recalcitrant, *non compos mentis*, or unavailable.²² Frictions arise because Indians cannot understand how land in which they have an equity can pass intestate to persons not immediately related to them or only related by marriage, and this misunderstanding compounds the difficulty in management of their land.²³ At best, heirs will not act without time-consuming consultations with other heirs.²⁴ Some of the owners holding minor interests will not reply to inquiries, while others, realizing that their signature is needed to achieve unanimity, will demand a bonus before they sign.²⁵ Trouble can develop even after tentative agreement has been reached.²⁶

22. 25 U.S.C. § 379 (1964) reads as follows:

The adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interest shall be sold only by a guardian duly appointed by the proper court upon the order of such court . . . but all conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser. . . .

25 U.S.C. § 404 (1964) reads, in part:

The lands, or any part thereof, allotted to any Indian, or any inherited interest therein, which can be sold under existing law by authority of the Secretary of the Interior, except the lands in Oklahoma and the States of Minnesota and South Dakota, may be sold on the petition of the allottee, or his heirs, on such terms and conditions and under such regulations as the Secretary of the Interior may prescribe. . . .

25 U.S.C. § 483 (1964) reads, in part:

The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians. . . .

23. One Colville Indian complained:

My sister's allotment was 80 acres. She died and my dad, a white man, was willed the land. He died and all his children fell heir. His share was 13440/20160. We had that probated in court—four children share is 960/20160, and cousins one share 270/20160, one share 305/20160, five shares 128/20160, one share 320/20160, one share 140/20160, seven shares 35/20160 and these last seven are no relation only that this man was once a brother-in-law and they are the ones that won't sign so that we can have a hundred percent signers.

HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 86th CONG., 2d Sess., INDIAN HEIRSHIP LAND STUDY Pt. 1, at 463 (Comm. Print 1960) [hereinafter cited as 1960 LAND STUDY].

24. 1960 LAND SURVEY, *supra* note 9, at 897.

25. For example, on the Warm Springs Reservation of Oregon, 7 of the 8 heirs to an allotment wanted to sell their land to the tribe but the one heir who withheld her signature wanted a larger share than the one-ninth she was entitled to. In a second case, involving a total of 21 heirs, one heir demanded that the best land be partitioned to him, to which the rest could not agree. 1960 LAND SURVEY, *supra* note 9, at 908. See also *Id.* at 988; S. LAIDLAW, FEDERAL INDIAN POLICY AND THE FORT HALL INDIANS 51 (1960); 1960 LAND STUDY, *supra* note 23, at 19.

26. One Colville Indian reported:

About 3 years ago we asked the heirs if we could buy their shares in the heirship

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Nor is partition of the allotments feasible in most cases, since farmers cannot make economical use of a farm as small as 80 acres.²⁷ The cost of partition is prohibitive unless the land is valuable and all the owners solvent—a combination of circumstances seldom found on an Indian reservation.²⁸

Allotted land can seldom be sold, even when the owners unanimously agree. In order to reduce sales to non-Indians—sales which erode the land base of the reservation—the present policy of the Secretary of Interior is to withhold his required permission for sales unless the sale is in the best interests of the selling Indians and the land is sold either to other Indians or to the tribe.²⁹ Unfortunately, few tribes or individual Indians are wealthy enough to buy land. Relatively rich tribes like the Yakimas of Washington, who have land-acquisition programs, have far more applications for purchase than they are able to satisfy.³⁰

we now live on. All were agreeable and signed papers to that effect, so we went ahead and built a modern 7-room home and proceeded to build up the land which was in a very rundown condition. Now that the land is producing and fenced, one of the heirs has changed her mind and retracted her name which according to the present law and regulations she was able to do. Now as we own the biggest share in these allotments and the rest of the heirs are anxious to sell, we don't think it's fair she can hold up the sale and purchase of this land. She holds about 10 acres out of 160 acres.

1960 LAND SURVEY, *supra* note 9, at 466.

27. 1963 Hearings, *supra* note 4, at 429; 1960 LAND SURVEY, *supra* note 9, at 897. See note 14, *supra*.

28. For instance, when the Tulalip Indians of Washington partitioned some of their fractionated allotments in 1957, the court and attorney costs varied from \$500 to \$1000 for each allotment. 1960 LAND SURVEY, *supra* note 9, at xiv.

29. Statement of Mr. Richard Neely, Asst. Regional Solicitor, the Dept. of the Interior, Portland, Oregon, Office, to the Indian Legal Problems Seminar, University of Washington, Nov. 12, 1969. See also 25 C.F.R. § 121.11 (1970) which reads as follows:

Petitions for the sale of trust or restricted land shall be filed on approved forms with the Superintendent or other officer in charge of the Indian Agency or other local facility having administrative jurisdiction over the land. Sales will be authorized only if, after careful examination of the circumstances in each case, a sale appears to be clearly justified in the light of the long-range best interests of the owner(s). Written notice of the approval of petitions for sale of land shall be given to the tribe, occupying the reservation where the land is located, a sufficient time in advance of public advertising to reasonably enable the tribal authorities to consider the possibility of tribal interest in the land being sold. Such notice need not be given where a tribe has, by appropriate resolution, expressed a lack of interest in acquiring land on the reservation.

30. See 1963 Hearings, *supra* note 4, at 428. In a statement to the Indian Legal Problems Seminar, at the University of Washington, Chairman Robert Jim of the Yakima Tribal Council said on Dec. 3, 1969:

The Yakima tribe gives first priority to buying land owned by Indians on the reservation who have received governmental permission to sell, and which thus might be sold to non-Indians and go out of Indian control. Second priority is accorded the purchase of land interests inherited by members of the Colville Indian tribe on the Yakima reservation. The Colvilles are considering the termination of

Loan funds needed to create a market among other Indians for heirship interests or to generate purchasing power at a tribal level are also sorely lacking. The Bureau of Indian Affairs administers a small revolving loan fund which is available to tribal Indians or to those of one-quarter or more Indian blood, and to Indian organizations, but the funds available for land acquisition are insufficient.³¹

While the BIA encourages Indians to borrow from commercial sources, that policy has not been a success. Indians have been reluctant to approach banks, and the credit business has assumed that adequate financing was available to Indians through governmental agencies. Indians can offer little security for a loan. Often without permanent work, they have been unable to establish a credit rating

their reservation and such termination might affect restrictions on lands owned by the Colvilles in other reservations. Third priority must go to purchase of key tracts which contain easements to other reservation lands or which have needed water rights. Only after all land with higher priorities has been purchased can the Yakimas consider buying fractionated land merely to relieve the economic needs of its owners.

The Yakimas at present have \$1 million set aside to buy land, but heirs owning land appraised at \$3.7 million are waiting anxiously for their land to be purchased. The tribal income has many demands upon it, and unless loan funds are available to the tribe above the amount needed for more pressing needs, the amounts allocated to land purchase must be apportioned.

The Makah tribe of Washington strives to purchase interests in Makah Reservation land which have been inherited by non-Indians or Canadian Indians. The Makahs had purchased 28 percent of all reservation allotments by 1960, but had not been able to allocate more funds to buy other Makah interests which owners wished to sell. 1960 LAND SURVEY, *supra* note 9, at 916.

31. From 1934 until 1952, 77 percent of all loans from this fund were under \$1000 and were largely for emergency subsistence. In 1965 applications for Bureau loans exceeded the available funds by \$42 million. W. BROPHY & S. ABERLE, *THE INDIAN: AMERICA'S UNFINISHED BUSINESS* 109 (1966).

25 U.S.C. § 470 (1964) reads:

There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of \$20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established.

25 U.S.C. § 479 (1964) reads in part:

The term "Indian" . . . shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. . . .

25 U.S.C. § 482 (1962):

The Secretary of the Interior, or his designated representative, is authorized, under such regulations as the Secretary may prescribe, to make loans from the revolving fund . . . to tribes, bands, groups, and individual Indians, not otherwise eligible

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or to acquire collateral,³² although legislation passed in 1956 enabled restricted Indian land to be mortgaged.³³

Unless the loan funds are readily available to the tribe or individual Indians, the theoretical right to buy heirship land is meaningless, and even if funds were available, the requirement of unanimous consent of the owners for sale remains an imposing obstacle. As a result, one-half of the heirship land was being leased to non-Indians in 1960.³⁴

Present regulations allow the Secretary of the Interior to act in the interest of persons *non compos mentis*, orphaned minors, and undetermined heirs when a satisfactory lease is proposed to the Bureau of Indian Affairs or when a majority of the other interests negotiated a satisfactory lease.³⁵ The Secretary may also grant a lease on behalf of those heirs or devisees who are not able to agree upon a satisfactory lease during a three-month period after a lease becomes available.³⁶

for loans . . . *Provided*, That no portion of these funds shall be loaned to Indians of less than one-quarter Indian blood.

32. W. BROPHY & S. ABERLE, *THE INDIAN: AMERICA'S UNFINISHED BUSINESS* 109-11 (1966). The Indian revolving loan default record from 1934 to 1965 was only 5% S. REP. No. 523, 90th Cong., 1st Sess. 10 (1967). Indians are not even able to qualify for F.H.A. mortgages in Washington. Telephone interview with Mrs. Lee Piper, Director of Indian and Alaskan Native Services, April 1970.

33. 25 U.S.C. § 483a (1964) reads in part:

The individual Indian owners of any land which either is held by the United States in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to approval by the Secretary of the Interior, to execute a mortgage or deed or trust to such land. Such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the State or Territory in which the land is located. For the purpose of any foreclosure or sale proceeding the Indian owners shall be regarded as vested with an unrestricted fee simple title to the land, the United States shall not be a necessary party to the proceeding, and any conveyance of the land pursuant to the proceeding shall divest the United States of title to the land. . . .

However, the power to mortgage land on the reservation is the power to terminate that part of the reservation, if for some reason the mortgage cannot be satisfied. "It's the main proposal in the bill," said Vine Deloria, Jr., referring to the Indian Omnibus Bill of 1967, "ostensibly it would be so we could raise capital, but many tribes think it's just another scheme to get their land." S. STEINER, *THE NEW INDIANS* 171 (1969).

34. See 1960 LAND SURVEY, *supra* note 9, at 985; COHEN, *supra* note 1, at 229; 1963 *Hearings, supra* note 4, at 417, 424, 480; 1961 *Hearings, supra* note 11, at 101.

35. 25 C.F.R. § 131.2 (1970).

36. 25 U.S.C. § 380 (1964) reads:

Restricted allotments of deceased Indians may be leased, except for oil and gas mining purposes, by the superintendents of the reservation within which the lands are located (1) when the heirs or devisees of such decedents have not been determined and (2) when the heirs or devisees of the decedents have been determined, and such lands are not in use by any of the heirs and the heirs have not been able during a three-months' period to agree upon a lease by reason of the number of the heirs, their absence from the reservation, or for other cause, under such rules and regulations as the Secretary of the Interior may prescribe. . . .

majority agreement may be unworkable inasmuch as many owners have infinitesimal shares and live away from the reservation.

Among non-Indians, it is customary to allow partition on the request of one owner of an undivided interest.⁹⁶ Justification for requiring agreement by a substantial fraction of the land interests lies in an analogy to principles of trust law. In addition, there must be some consultation and harmony among persons who will continue to live within a small community.⁹⁷

An Indian heirship bill introduced by Senator Henry Jackson⁹⁸ seems to be an intelligent compromise. The bill provides that the owners of not less than a 50 percent interest in restricted land may partition or sell where ten or fewer persons own undivided interests, whereas the owners of 25 percent interests may partition or sell where eleven or more own undivided interests.

D. Incorporation

A medium for exchange of fractional allotments is also presently possible through use of the 1934 Indian Reorganization Act provision enabling tribes to incorporate.⁹⁹ Many plans of incorporation are possible, depending upon the wishes and resources of the group. Upon agreement of the tribe, fractional land interests may be exchanged for shares in the corporation, the whole group can work as a unit to make the land productive, and acquired income can be distributed as dividends to stockholders. Such a plan might be particularly effective where stock is grazed or timber cut on Indian land. Another possibility is allocating a block of land according to the number of shares possessed by a tribesmember.¹⁰⁰ Alternatively, the tribe might use tribal savings as a revolving fund to buy fractional interests and replace the fund by money earned by leasing the land. Though a share in a corporation might seem an incomprehensible abstraction to some Indians, a deed to an undivided and often infinitesimal land share must seem no less abstract. A possible advantage is a return to the model of com-

96. See 2 H. TIFFANY, REAL PROPERTY § 475 (1939).

97. See 1961 Hearings, *supra* note 11 at 64, 70-71; 1960 LAND STUDY, *supra* note 23, at 451; 1960 LAND SURVEY, *supra* note 9, at 919.

98. S. 522, 91st Cong., 1st Sess. § 2(a) (1969).

99. 25 U.S.C. § 464 (1964); 25 C.F.R. §§ 52, 53 (1970).

100. See 1966 Hearings, *supra* note 4, at 6, 20; 1961 Hearings, *supra* note 11, at 116; 1960 LAND SURVEY, *supra* note 9, at 901, 917, 923.

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munal ownership and to a right of occupancy by use and tribal agreement.¹⁰¹

One of the most successful examples of incorporation is the Tribal Land Enterprises formed by the Rosebud Sioux of South Dakota in 1943.¹⁰² Fractional owners exchange their interests for Enterprise stock certificates of equivalent value on which they receive dividends. Accumulated certificates may be transferred for an allocation of an integrated block of land. The tribe hopes to purchase outstanding certificates as money becomes available, thereby compensating the original owners and returning the allotted land to tribal ownership.¹⁰³

The principal problems the Rosebud Sioux have experienced are the cost of clearing title to the heirship tract by obtaining transfers to the corporation from all the fractional owners, and lack of funds to purchase certificates. In 1959 the tribe had only been able to buy 35 percent of the fractional interests. In order to consolidate blocks of land, the tribe buys all the interests in fewer blocks of estates rather than buying partial interests in many estates. In 1968 the corporation was leasing most of its land to whites in order to recover its investment quickly and buy more land.¹⁰⁴ Similar attempts by various other tribes have been less successful.¹⁰⁵

A statute granting Indian tribes the power of eminent domain¹⁰⁶

101. For instance, among the Hopi, land allotments from clan lands are made by the senior women of the clan. Enough unoccupied lands at the edges of the community exist to facilitate shifts in case members of the clan need more or less land. Possession is affirmed by the use of the land and descent is by custom, in the lineage of the female line. See Shepardson & Hammond, *Navajo Inheritance Patterns: Random or Regular?* 5 ETHNOLOGY at 87-96 (1966); Beaglehole, *Ownership and Inheritance in an American Indian Tribe*, 20 IOWA L. REV. 304, 311-16 (1934). See *Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 302 (1893), *aff'd*, 155 U.S. 196 (1894) (Every member of the community is the owner of the communal property. He does not take as an heir and if he dies his right of property does not descend. He has nothing which he can convey, yet he has a right in the land as perfect as that of any other person, a right which his children after him will enjoy to the same extent).

102. Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1852-53 (1968). See also 1960 LAND SURVEY, *supra* note 9, at 901.

103. 81 HARV. L. REV. at 1853.

104. *Id.*

105. At Pine Ridge Reservation in South Dakota the Oglala Sioux rejected an allocation program for their land because they were not ready to exchange title to the land for a use right. At Standing Rock the Sioux tribal council voted to buy heirship land whenever the tribe was able to do so, but the program has been halted by lack of funds. See 1960 LAND SURVEY, *supra* note 9, at 901.

106. See 3 J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 9.1[1] (3d ed. rev. 1970) (The condemnor obtains title good against the world, extinguishing pre-existing interests.); 2 *Id.* § 5.1[5] (The land itself is taken, not the rights of persons. All previous estates are extinguished, giving a new title.); 2 *Id.* § 5.2[2] (Condemnation

over heirship lands would provide a useful tool for a tribal corporation to acquire land and clear title inexpensively. The power of condemnation, accompanied by funds to compensate for the taking at a fair appraised price and provision for consent or petition by a majority of the land interests, would provide simplicity and economy in dealing with land that is usually worth very little. So long as the individual owner is protected, the tribe ought to be able to remove the burden of fractionation from the land by the simplest method.

Though the option of incorporation is useful to some well-led, well-integrated tribes, it cannot solve the heirship problem unless funds are made available for land purchase. Allocation of land by a corporation, unless done with scrupulous impartiality, would often be more divisive than helpful to a reservation, since many reservations are composed of many tribes forced together for the convenience of the white treaty-maker.¹⁰⁷ Besides rivalry among tribes, divisions exist along religious and family lines.¹⁰⁸ Unless a tribe has had traditional and satisfactory experience of communal land ownership, joint ownership and allocation of land to individuals may be a difficult leap backwards. Ancient tribal patterns are often shattered by generations of acculturation to individual land ownership.

E. Sale to Tribe with Revolving Loan Funds

The most promising solutions to the heirship problem assume that Congress will vote a substantial increase to the revolving loan fund presently available to the tribes, with which they could purchase fractionated interests. With an appropriate loan fund, owners' consent, representation of interests which cannot represent themselves, fair compensation, and low cost administration, the worst aspects of the fractionated land problem could be solved with equity to the owners, tribe and taxpayer.

can proceed even when the title is in dispute or owners cannot be ascertained. If doubt as to ownership exists, the condemnor can pay a lump sum into court and the claimants may litigate among themselves the question of ownership or apportionment.)

107. The Yakima Reservation of Washington, for example, is actually an amalgamation of 14 tribes. See Treaty with the Yakima, 1855, reproduced in C. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 698 (1904).

108. Statement of Chairman Leo Alexander, Treaty Indians of the Columbia, Inc., to the Indian Legal Problems Seminar, University of Washington, Nov. 19, 1969. See 1960 LAND SURVEY, *supra* note 9, at 923.

1. The Revolving Loan Fund

Senator Jackson's bill¹⁰⁹ suggests increasing the appropriation for a revolving loan fund, presently \$20 million, to \$55 million. The loan fund would be available for any purpose which would promote the economic development of an organized tribe or of individual Indians of one-quarter or more Indian blood who are not members of a tribe. Jackson's bill provides that loans shall be made only when in the judgment of the Secretary of the Interior there is a reasonable prospect of repayment, the applicants are without sufficient funds, and they are unable to obtain financing from other sources on reasonable terms. Though these provisions are subject to variable interpretation and possible abuse, the provisions preserve the limited loan funds for cases of greatest need. The requirement that a tribe must use its own funds if available should not be construed to mean that a tribe must be penniless before it has access to the revolving fund, and this point should be made explicit.

Title to property purchased with revolving loan funds would be pledged or mortgaged to the lender as security for the unpaid indebtedness, unless the Secretary determines that the payment of the loan is otherwise reasonably assured.¹¹⁰ Foreclosure of mortgaged land obviously presents a problem of loss of reservation land base, whoever the lender may be. If the federal government forecloses, however, the land is less apt to move irrevocably out of Indian hands. A new proposal¹¹¹ has been made to allow the Secretary of the Interior to guarantee up to 90 percent of a loan made to an Indian tribe to a limit of \$1 million and to an individual Indian to a limit of \$60,000. The guaranteed loans would be conditioned on reasonable assurance of repayment and unavailability of other financing. This device would be a useful supplement to a revolving loan fund. Private lending institutions will continue to be wary of making loans to Indians until they have had an opportunity to prove themselves good risks.

2. Owner's Consent

In 1961 John Carver, Assistant Secretary of the Interior, proposed that whenever the Secretary determined that any trust lands located

109. S. 522, 91st Cong., 1st Sess. §§ 1(a), (b) (1969). See note 98 and accompanying text, *supra*.

110. S. 522, 91st Cong., 1st Sess. §§ 1(c), (d) (1969).

111. S. 523, 91st Cong., 1st Sess. § 2, 3 (1969).