

MISCELLANY

There are several matters involved in the examination of titles stemming from an allotment to a member of the Five Civilized Tribes which should be considered but which do not readily yield to representation on charts. Those matters follow:

THE STATUTES OF LIMITATION AND THE MARKETABLE TITLE ACT

Prior to allotment, land was owned in common by the members of the Tribes. Statutes of Limitation on actions to recover land were therefore unknown to the Tribal law. In the Act of May 2, 1890, 26 Stat. 81, Congress made certain Arkansas statutes including a statute of limitations on the recovery of land applicable to those other than Indians residing in the Indian Territory. While this may be of historical interest, it is of no concern in the area covered by this work. It is suggested that those who wish to pursue this aspect may do so through Semple, S§ 553-558 and Bryant, "Statutes of Limitation Affecting Indian Land Titles," 46 O.B.A.J. Q 127 (1975).

For our purpose, it is sufficient to say that even after allotment no statute of limitation was applicable to allottees or their heirs as long as the land remained restricted against alienation until the passage of the Act of April 12, 1926, 44 Stat. 239. This proposition is so well accepted, that a search for the base case seems hardly justified. But, nevertheless, a cursory examination suggests that one, if not the base case, is *Goodrum v. Buffalo* 162 F. 817 (8th Cir. 1908), which involved a Quapaw allotment which was subject to the General Allotment Act. Further, *Goodrum v. Buffalo* did not involve the running of a statute of limitations but the doctrine of estoppel by judgment. The closing language of the case, 162 F. at 827 is instructive:

It should be understood, once and for all, that no scheme or device however ingenious or plausible, concocted by any person can avail to divest the Indians of the title to their allotted lands within the period of limitations prescribed by Congress.

As to land which became unrestricted, the causes of action which arose in Indian Territory prior to statehood were controlled by the Arkansas statute and the running of that statute was not interrupted by the laws of the Oklahoma Territory being made applicable, *Joines v. Patterson*, 274 U.S. 544 (1927); *Patterson v. Rousney*, 58 Okla. 185, 159 P.636 (1916), dismissed, 248 U.S. 593 (1918).

But with the passage of the Act of April 12, 1926, 44 Stat. 239, Congress abandoned its policy in relation to protecting restricted Indians against adverse possession.

The second section of that Act provides:

The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or hereafter accruing to any such Indians or their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his or her heirs or grantees, either in his own behalf or by the Government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said State: Provided, That no cause of action which heretofore shall have accrued to any such Indian shall be barred prior to the expiration of a period of two years from and after the approval of this Act, even though the full statutory period of limitation shall already have run or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations.

Under this section it has been held that nothing in the Act revived a cause of action which had been barred by limitations prior to the passage of the Act, *Stewart v. Keyes*, 295 U.S. 403 (1935).

It has been held that the Act of 1926, does not make limitation statutes available as a defense against the Five Civilized Tribes as distinguished from the members thereof nor against the United States when bringing suit on behalf of a tribe, *U.S. v. Russell*, 261 F. Supp. 196 (E.D. Okla. 1966) and cf. *U.S. v. United States F. & G. Co.*, 309 U.S. 506 (1940).

It has also been held that where the State of Oklahoma has not waived its immunity to suit, *U.S. v. Fuston*, 143 F.2d 76 (10th Cir. 1944), that the U.S. is not barred when it sues to recover land for the restricted Indian because the Indian could not have sued the State of Oklahoma in the first instance.

It should be noted that the Act expressly makes the statutes of limitation applicable not only against the Indian but also against the United States as his guardian. This was so held in *Wolfe v. Phillips*, 172 F.2d 481 (10th Cir. 1949) cert. denied, 336 U.S. 968 (1949).

This same case is important in holding that the Act did not adopt the Oklahoma statutes as federal law but rather make the restricted Indians subject to the limitation statutes of Oklahoma, 172 F.2d at 485. The practical consequence of this concept was that the Oklahoma statutes as amended after the passage of the Act of 1926 were applicable as amended to restricted Indians.

This holding raises the possibility that the Marketable Title Act, 16 O.S. 1971 §§ 71-80, adopted after the Act of 1926, might be used to bar the claim of restricted Indians of the Five Civilized Tribes. My own conclusion is that the Marketable Title Act is not a statute of limitations within the meaning of the Act of 1926, and is therefore not applicable to such restricted Indians.

The Marketable Title Act was adopted in 1963. The Title Examination Standards for that Act were adopted in 1964. At that time a caveat to standard 19.1 was adopted. It read:

Caveat: Whether or not the provisions of the Marketable Record Title Act may be relied upon to cure or remedy such imperfections of title as fall within its scope, which imperfections occurred or arose during the time title to the land was in a tribe of Indians or held in trust by the United States for a tribe of Indians or a member or members thereof, or was restricted against alienation by treaty or by act of Congress, is a matter for determination by Congress or by a federal court in a case to which the United States is properly made a party. Until such determination, the Marketable Record Title Act should not be relied upon to cure or remedy such imperfections. See: Section 1, ENABLING ACT, 34 U.S. Stat at Large, pp. 267-278; CONSTITUTION OF OKLAHOMA, Article I, Section 3; OKLAHOMA INDIAN LAND TITLES (Semple), Section 53, page 42.

In December of 1965, the following sentence was added to the caveat:

However, it is possible that the federal courts will consider the Marketable Title Act to be a statute of limitations within the meaning of the Act of April 12, 1926, with respect to the Five Civilized Tribes.

I was on the Subcommittee of the Real Property Committee on Title Standards which initiated the proposal that this sentence be added.

The criticism by members of the bar thus led to this proposal ran like this:

"The Marketable Title Act ought to apply to the Five Civilized Tribes. The present verbage of the caveat is too strong - it invites a court to hold that the Marketable Title Act is not applicable to restricted members of the Five Civilized Tribes." The committee was unwilling to diminish the strength of its recommendation that until Congress or a federal court took additional action that the Marketable Title Act not be relied upon, by one examining a title, as being able to cure a defect relating to Indian Titles. It felt that the odds that a court would hold that the Marketable Title Act was applicable against a restricted Indian were well within improbability. The committee did not wish to lead anyone to believe to the contrary.

But the committee was willing to make it clear that the Bar in adopting the caveat was not taking the position that a court had no choice but to hold that the Marketable Title Act was not a statute of limitations. Notice how carefully the language of the last sentence was selected to say nothing more than and only that:

However, it is possible that the federal courts will consider the Marketable Title Act to be a statute of limita- tions within the meaning of the Act of April 12, 1926, with respect to the Five Civilized Tribes.

Following the subcommittee's concern with the caveat, aside from pointing it out when I was teaching Indian Land Titles, I gave the matter no further attention. Then in the spring of 1976, I learned that some lawyers in some counties east and south of Norman had been passing titles based upon conveyances made by Indians relying on the Market Title Act to cure defects caused by restrictions against alienation.

Some months later I was talking to a Norman, Oklahoma, attorney about the problem. He asked if I knew that there was a letter out of the Muskogee office of the Solicitor of the Department of Interior saying that "the Marketable Record Title Act does apply with the same force and effect to restricted lands and Indians of the Five Civilized Tribes as said act applies to non-Indians." The lawyer later mailed a Xerox copy of the letter to me.

Still later I was preparing a paper to give at a meeting of the Garvin County Bar Association on this subject. At that time the letter in question was six years old. I called the Field Solicitor, Mr. Harold M. Shultz, Jr., to ask if this letter still was a fair representation of his position. He replied that the letter was written without his authorization. After additional conversation I stated a hypothetical case with the following facts:

Suppose that Blackacre had been allotted to a full-blood member of one of the Five Civilized tribes. In 1928, John Brown, a white, conveyed Blackacre to Henry Smith, a white, and Smith recorded the deed. There are no other transactions, except, of course, the certificate of allotment and the patent to the full-blood, on record. No one, neither the full-blood, John Brown, nor Henry Smith have been in possession until six months ago when Henry Smith first made entry. Smith has now brought an action to quiet title in himself.

At this point Mr. Shultz broke in to say, "I would remove to federal court, defend the suit and win. The Indian has not been ousted for fifteen years and the Marketable Title Act does not apply.

As far as I was concerned, this reply destroyed any persuasive effect the letter in question might have had.

But aside from this, I am persuaded that the Marketable Title Act is not a statute of limitation within the meaning of the language of the statutes.

The language of the Act is telling. In the first sentence of the second section of the Act of 1926, there appears this language, "against all rights and causes of action." Again in the proviso there occurs the language "no cause of action." It seems clear that Congress had in mind situations involving the Indian having a cause of action -- situations in which the claimant was in possession of the Indian's land. Does our Marketable Title Act require the claimant to have given the true owner a cause of action? The answer is clearly in the negative.

It is generally agreed that our Marketable Title Act is based on the Model Act which was the product of the scholarship of the late Professor Simes of Michigan. After we adopted the Act in 1963, Professor Simes addressed the Real Property Section of the Oklahoma Bar Association at the annual convention. His address is printed in full in 34 O.B.A.J. 2357 (1963). At 2359 he says:

It should also be noted that the Marketable Title Act is not a statute of limitations. The person whose interest is barred may never have had any cause of action. He did, however, have a right to protect his claim by filing a notice. In a way the Marketable Title Act functions somewhat like a recording act, in that one must record a notice of

claim to preserve the claim. But unlike a recording act, the filing of the notice determines validity, not mere priority."

After the adoption of the Title Standards which implemented the Marketable Title Act, Donald E. Pray of the Tulsa Bar published "Title Standards and Marketable Title Act" in 38 O.B.A.J. 611 (1967). At 617, Pray wrote:

It was stated in the opening paragraphs of this paper that Professor Simes, one of the authors of the Marketable Title Act, is of the opinion that it is not a statute of limitation. It is his opinion, as well as that of certain members of the Oklahoma Bar, that statutes of limitation are distinguishable from Marketable Title Acts in the mechanics by which they operate. An individual is barred by a statute of limitations because he has not brought a suit on his cause of action within the period prescribed. Whereas, on the other hand, one is barred by a Marketable Title Act because he has not filed notice of his claim. The latter involves no cause of action. A statute of limitations affords protection to the person in possession because of his possession alone.

The Act of 1926, applying statute of limitations against restricted Indians speaks of barring causes of action. For example, the clause providing for a grace period recites:

'Provided, that no cause of action which heretofore shall have accrued to any Indian shall be barred prior to the expiration of a period of 2 years from and after approval of this Act.' This certainly sounds like a traditional statute of limitation provision, and not like a marketable title curative act. In a recent seminar in Tulsa on Indian land law, a member of the Solicitor General's Staff appeared and was asked the question concerning the applicability of the 1926 Act to the Marketable Title Act. He replied that in his opinion the Department of Interior would not permit application of the Marketable Title Act under the provisions of the Act of 1926, and that it had a standing practice of resisting this in the other states which had a marketable title act.

Professor Hicks of the University of Tulsa College of Law in 9 Tulsa Law Journal 68 at 80 (1973), concurs in the opinions of Pray and Simes.

Bryant, in "Statutes of Limitations Affecting Indian Land Titles," 46 O.B.A.J. Q 127 (1975), at Q 131 concludes his article by saying:

[T]he effect of the Marketable Record Title Act (16 O.S. 1971 §§ 71 et seq.) has not been determined by the courts, so that it is presently unsafe to rely upon it to cure or remedy defects in the title of Indian lands. As it is hopefully stated in the comments to Title Standard 19.1, it is possible that the federal courts will consider the Act to be a statute of limitation within the meaning of the Act of April 12, 1926. Thus far, the reported cases do not indicate that anyone has had the nerve to push the point.

What about the attitude of the Courts. Except for the fact that all of the cases involving the Five Civilized Tribes and the statutes of limitation emphasize possession and its adversity to the claim of the Indian, it is my opinion that the cases thus far decided are neutral.

To summarize my own reaction, I would say that it is one thing to expect a court to say to a restricted Indian, "You permitted this man to possess your land for fifteen (or five in some cases) years, it is now his. It is a completely different thing to expect a court to say "Thirty years ago

this man recorded a deed to your land given to him by another - now your land is his."

PARTITION

In examining abstracts which involve partition of land belonging fully or partially to restricted Indians of the Five Civilized Tribes two questions arise; first, was the partition itself valid and second, what is the status of the land in the hands of Indians who took in partition.

The first question, the validity of the partition has several aspects not involved in partition where only whites are involved. There is the very fundamental question of whether or not partition involving the land of restricted Indians was possible. There were, in fact, many decrees of partition prior to statehood by the federal courts in Indian Territory and thereafter many partitions by state courts, see *Semple*, S 227. As a practical matter since all allotments were made in severalty, inheritance by co-heirs alone created situations making partition desirable. Further, during the period before 1918, except for the homestead of an allottee of one-half or more Indian blood, only full blooded heirs were restricted. It was held in *Coleman v. Battiest*, 65 Okla. 71, 162 P. 786 (1917), on an appeal from district court, that the district court could not partition land inherited by a full-blood. Partition, it was held was an alienation within the meaning of the Acts of Congress restricting alienation, and that Congress had not provided for partition. In *Griffin v. Culp*, 68 Okla. 310, 174 P. 495 (1918), it was held that the holding in *Coleman* did not apply where the heirs did not include any full bloods and so passed to the heirs free of restriction.

In *Grisso v. U.S.*, 138 F.2d 996 (10th Cir. 1943), there was a collateral attack upon a partition of land inherited by full blood heirs. Therein the court held that a partition was indeed an alienation within the meaning of the Acts of Congress restraining alienation.

In the mean time, Congress passed the Act of June 14, 1918, 40 Stat. 606. Section 2 of that Act provides:

That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisal, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character.

The caption in relation to this section mentions only the district court. However, it was held in *U.S. v. Bond*, 108 F.2d 504 (10th Cir. 1939), that the probate courts had jurisdiction to partition in the process of administration of deceased Indians. In *Haymes v. McDermott*, 125 Okla. 147, 256 P. 909 (1927), the court seems of the opinion that this Act required and permitted state courts to follow the same procedure which the Courts would follow in the case of whites.

The Act in relation to partition first came under the scrutiny of the U.S. Supreme Court in 1944 in *U.S. v. Hellard*, 322 U.S. 363 (1944). That case, apparently to the surprise of many, held, even though the Act was silent on the matter, that the United States was a necessary party to the action. Seemingly, this would have been the case even if additional grounds were not present. The Court, however, did point out that because the lands in question were both tax exempt and restricted that caused the United States to be concerned with the reinvestment of the proceeds of any sale in other lands also tax exempt and restricted under the Act of June 30, 1932, 47 Stat. 474, 25 U.S.C. § 409a. A still further base for United States concern was the preferential right of the Secretary to purchase land for another Indian under S 2 of the Act of June 26, 1936, 49 Stat. 1967, 25 U.S.C.A. § 502.

Semple, 5 231, expresses the opinion that:

...Since the five and fifteen year statutes would be available as a defensive matter on all partition proceedings completed prior to the passage of the Act of April 12, 1926 [44 Stat. 239], it is probably more or less immaterial as to whether or not the United States was brought into any case which arose prior to the passage of the Act of 1926.

It is apparently the position of Semple that the passage of the Act of 1926 served notice on the bar that, in all cases involving restricted Indians, the United States was to be notified of the suit and that compliance with the Act of 1926 would satisfy the requirements of *Hellard*.

In the same place, Semple also voices the opinion that section 3 of the Act of July 2, 1945, 59 Stat. 313, specifically cures the defect in partition suits brought between the Act of 1918 and the Act of 1945 caused by not serving notice upon the United States. Semple further points out that the constitutionality of this section is established in *Frazier v. Goddard*, 156 F.2d 938 (10th Cir. 1946), cert. denied, 329 U.S. 765 (1946).

It should be noted that it is expressly provided that if a full-blood heir is apportioned a part of the land or if he purchases it at appraisalment, the land remains restricted and has the same taxable status as before and see *U.S. v. Hellard*, supra.

There is some division of opinion outside the area of our instant concern as to whether those owners who are made parties are bound where less than all owners are made parties. However, it was held in the *Grisso* case, supra, that all of the owners of land to be partitioned under the Act of 1918 are "indispensable parties" and the absence of any one of the owners makes the proceedings void and not binding on anyone of the owners who were parties. Semple, § 233, reinforces his warning in this regard with the suggestion that the United States Supreme Court in the *Hellard* case, supra, used the term "indispensable party" with the same meaning as used by the Tenth Circuit in the *Grisso* case.

Under the Act of January 27, 1933, 47 Stat. 777, "Where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds by or for restricted Indians" such land was restricted.

As indicated previously, page 246, under this act "restricted Indians means those of one-half

or more blood.

Further, under the Act of August 4, 1947, 61 Stat. 731, heirs and devisees of the half-blood are restricted whether the land is tax-exempt or not. These restrictions are continued under the Act of August 11, 1955, 69 Stat. 666.

The Act bestowing jurisdiction to partition upon the courts of Oklahoma is, literally speaking, limited to partition where the heirs are of the full blood. The question is, "Do the courts of Oklahoma have jurisdiction to partition where there are no full-blood heirs involved?"

I have not located any cases bearing directly on the matter. Semple, §§ 236-237, discusses the problem, more or less. He, Semple, may be saying that *Bond v. Tom*, 25 F. Supp. 157 (N.D. Okla. 1938), affirmed sub. nom. *U.S. v. Bond*, 108 F.2d 504 (10th Cir. 1939), can be construed to support such result.

Semple may be also suggesting that as to partitions prior to July 2, 1945, Section three of that Act has a curative effect.

It should be noted that it was held in *Grisso*, supra, that the record should show that the court was exercising its authority under the Act of 1918 to partition restricted land, otherwise the decree would be ineffective to pass title free of restrictions.

The Act of August 4, 1947, section three gave the State courts of Oklahoma exclusive jurisdiction, inter alia, over all proceedings to administer estates or to probate the wills of deceased Indians of the Five Civilized Tribes. The same section provided that in matters in which the State courts have exclusive jurisdiction that the United States is not a necessary or indispensable party. Nevertheless, the Act requires that the Superintendent of the Five-Civilized Tribes (now the Area Director) be served with written notice of any such action or proceeding.

Where, however, the restricted land is to be sold, the Act of August 4, 1947, in section ten amends the Oklahoma Welfare Act, the Act of June 26, 1936, section two, 49 Stat. 1967, by providing that if the Superintendent of the Five Civilized Tribes (now the Area Director) is given notice of the sale of restricted land at least ten days prior to the sale, the Secretary waives his preferential right to purchase under the Act of 1936 unless the right is exercised within the period of notice.

Semple, § 240, suggests that where the land is to be distributed in kind, that it is not necessary to serve the Superintendent as provided in section three of the Act of April 12, 1926 where he has been notified under the Act of 1947. Semple suggests that until there is a court ruling that the supplemental notice under the Act of 1926 ought to be given.

Apparently if partition is not a part of the administration of an estate, the United States is an indispensable party and service must be had under the Act of 1926.

In *Armstrong v. Maple Leaf Apartments, Ltd*, 622 F.2d 466 (10th Cir. 1980), in what must be

the shoddiest case in Indian land titles in this century, the majority, Seth and Holloway, held that when heirs exchange deeds converting their tenancy in common in the whole severalty in the appropriate fraction, that they hold by purchase the undivided interests conveyed to them. The court was, apparently, also of the opinion that, as to the original fraction, the heir continued to hold by inheritance. The sole authority cited for these propositions was Boyd v. Weer 124 Okla. 91, 253 P. 988 (1927).

In relation to this point, the dissenter, Judge McKay said:

I question our conclusion that two thirds of the appellant's interest in the land had been acquired by purchase, rather than by inheritance. On this point, Oklahoma law is determinative. While Oklahoma case law is not absolutely free from ambiguity, I believe it takes a view inconsistent with that of today's opinion.

Oklahoma cases have clearly held that a partition among cotenents does not amount to a change in title, but merely adjusts the rights of possession. In re Estate of Mullendore, 297 P.2d 1094, 1096 (Okla.1956) (per curiam). It does not transform an inherited estate into one of purchase. In re Moran's Estate, 174 Okla. 507, 51 P.2d 277, 279 (1935) (per curiam). The rule is the same regarding the partition of restricted Indian lands. In re Pryor's Estate, 199 Okla. 17, 181 P.2d 979, 984-85 (1947), cert. denied, 332 U.S. 816, 68 S.Ct.155, 92 L.Ed. 393 (1947)

Whatever ambiguity may be said to exist in this area stems from two decisions of apparently contrary implication. Our analysis in United States v. Hale, 51 F.2d 629 (10th Cir. 1931), is consistent with the above stated rule, but the analysis was criticized as contrary to Oklahoma law in In re Pryor's Estate, 199 Okla. 17, 181 P.2d 979, 984, cert. denied, 332 U.S. 816, 68 S.Ct. 155, 92 L.Ed. 393 (1947).

The case of Boyd v. Weer, 124 Okla. 91, 253 P. 988 (1927) (per curiam), also appears to be in conflict with the inheritance rule. In that case the court regarded an exchange of undivided interests between Indian cotenants as a sale. But the court's analysis was influenced by the fact that the exchange occurred prior to the Act of Congress of June 14, 1918 -- an Act providing for the partition of restricted Indian lands. The court was of the view that such a partition was unavailable prior to the enactment. 253 P. at 990. Boyd is therefore distinguishable from Oklahoma cases following the general rule. More to the point, it is distinguishable from In re Pryor's Estate, a case applying the general rule to a post-1918 partition of Indian lands.

The U.S. Supreme Court denied a writ of certiorari on October 14, 1980, for the Armstrong case, 101 5. Ct. 271 (1980).

LACHE S

In Armstrong v. Maple Leaf Apartments, Ltd., 622 F.2d 466 (10th Cir. 1980) in a "to hell

with the law, get the result we want" opinion, the majority applied the doctrine of laches against a restricted heir to prevent recovery of land conveyed without compliance with the requirements of court approval as set out in the Act of August 4, 1947, 61 Stat 731, (cert. denied, 101 S. Ct. 271 (1980)).

The dissent in the case evaluates the majority view thusly, 622 F.2d at 474:

In addition to dissenting on the acquisition by purchase issue, I wish to express my concerns about engrafting the doctrine of laches onto the Act of August 4, 1947. While I have no doubt about the correctness of our equitable evaluation, I am not certain the statute we are dealing with leaves room for such equitable considerations.

In the Act of August 4, 1947, Congress provided that:

no conveyance, including an oil and gas or mineral lease, of any interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood, when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated . . .

Pub.L. No. 80-336, § 1, 61 Stat. 731 (emphasis added). The words seem to be absolute: "no conveyance . . . shall be valid unless approved in open court." The effect of today's decision is to make just such a conveyance valid.

The majority finds support for its invocation of laches in the Act of April 12, 1926, Pub.L. No. 69-98, 44 Stat. 239. It is true that Congress, in Section 2 of that Act, made Oklahoma limitations statutes applicable to the Civilized Tribes. In an appropriate case, such a statute would be assertable to bar an Indian's claim that an unapproved transfer is invalid. But such a result has been legislated by Congress. Today's rule has been promulgated by this court.

The majority suggests that the same Congressional purpose behind applying limitations statutes to the Civilized Tribes supports invocation of the doctrine of laches in this case. It is true, of course, that both laches and limitations statutes seek to bar stale claims. What the majority does not stress is the difference between the two in terms of which stale claims each is designed to bar. Limitations statutes are focused on the mere passage of time. By contrast, the doctrine of laches focuses on the effect of time's passage. Not much time need pass to justify the doctrine's invocation. What is essential to laches is that the plaintiff's failure to assert his rights has caused prejudice to the defendant and that equity not disfavor the plaintiff. In essence, a balancing of equities is called for. The doctrine of laches thus has conceptual underpinnings quite different from those of a limitations statute. I therefore do not think it correct to suggest that by merely authorizing application of limitations statutes, Congress intended that the doctrine of laches would be invoked as well.¹

1. The majority opinion emphasizes the title stabilizing purpose of the 1947 Act. It seems to me, however, that invocation of the laches doctrine could have a destabilizing effect on title, inviting, as it would, litigation over titles that would be avoided by strict adherence to the requirement that alienation can occur only with court approval. Laches can only be determined in a court battle. Until the battle's outcome is clear, the title will not be.

Even if laches and limitations statutes could be said to have the same conceptual underpinnings, I would be hesitant to agree that this court should adopt what amounts to an amendment of the 1926 Act. Had Congress desired to permit equitable defenses to be raised against Indian assertions of transfer invalidity, it surely could have done so. A Congressional intent to permit such defenses is, at best, rather obliquely suggested in the 1926 Act. Absent such an expression of intent, I do not think we have the authority to fashion today's remedy.

Aside from these more technical considerations, I am troubled by the implications of our decision. It is beyond question that Congress imposed alienation restrictions on Indian lands to protect those Indians who might otherwise lose their property through disadvantageous real estate transactions. E. g., 1 Hearings on H.R.3173 Before the Subcomm. in Indian Affairs of the House Comm. on Public Lands, 80th Cong., 1st Sess. 43 (May 2, 1947) (statement of Rep. Albert), In the face of considerable contrary authority,² we have opened the door to equitable avoidances of these Congressionally imposed protections. In doing so, I fear that we may be frustrating Congressional purposes and endangering Indian lands. While the equities of this particular case are not in favor of the plaintiff,³ it does not require much creativity to imagine a scenario in which the equities are extremely close but where the trial court has made a judgment against an Indian. We might then be barred by the clearly erroneous test from reaching another result. When this occurs, the damage Congress sought to avoid by imposing alienation restrictions will have been done.

Today's opinion upholds a transfer of title that is void under the Act of August 4, 1947. The opinion is troublesome because it transforms the near-absolute protection⁴ of the Act into a protection dependent on the potential effervescence of equitable balancing. Because I question our authority to make this transformation, and because the transformation seems to be inconsistent with the purpose of the alienation restrictions, I respectfully dissent.

2. The majority refers to no judicial authority supportive of its position. In contrast, several cases have expressed hostility to equitable evasions of alienation restrictions. E.g., Hampton v. Ewert, 22 F.2d 81)92 (8th Cir. 1927), cert. denied, 276 U.S. 623, 48 S.Ct. 303, 72 L.Ed. 737 (1928); Haymond v. Scheer, 543 P.2d. 541, 545 (Okla. 1975); Naharkey

v. Sand Springs Home, 177 Okl. 371, 59 P.2d 289, 292-93, cert. denied, 299 U.S. 588, 57 S.Ct. 118, 81 L.Ed. 433 (1936); Scott v. Dawson,¹⁷⁷ Okla. 213, 58 P.2d 538 (1936).; Smith v. Williams, 78 Okl. 297, 190 P. 555 (1920).

Perhaps the most articulate rejection of such equitable exceptions appeared in Smith v. Williams, 78 Okl. 297, 190 P. 555, 557 (1920)

The right on the part of an Indian to alienate his land, and the right on the part of any person to purchase such land and to acquire valid title thereto is peculiarly and strictly a statutory right created by acts of Congress, and which right is not possibly available except through the means which Congress has prescribed, for Congress has expressly said that any attempt to acquire such rights, except through the means prescribed by Congress, shall be absolutely null and void. Therefore, title to restricted Indian land cannot be acquired from the allottee upon equitable grounds.

While Smith involved the consideration of an alienation restriction provision antedating that of the 1947 Act, its rationale remains relevant. The right to alienate Indian lands remains one of Congressional origin.

The majority distinguishes Smith because it was decided prior to the statute of limitations provision of the 1926 Act, suggesting that Oklahoma courts would no longer take this approach. Because I believe Congress has not provided for assertion of equitable defenses in the 1926 Act, I do not believe the Oklahoma courts, any more than this court, have authority to so provide on their own contrary to the statute. In any event, I note that principles similar to those of Smith have recently been upheld in an Oklahoma decision dealing with non-Civilized Tribes. Haymond v. Sheer, 543 P.2d 541, 545 (Okl. 1975). Furthermore, Smith itself has been cited in a post-1926 decision for the proposition that estoppel principles cannot be employed to validate a conveyance otherwise invalid for violation of alienation restrictions. Scott v. Dawson, 177 Okl. 213, 58 P.2d 538, 541-42 (1936).

3. It is not disputed that plaintiff received a fair price for the land, that she had legal counsel in connection with the sale, and that she had some awareness at the time of sale that Indian land transactions can require court approval. In addition, the defendants have invested considerable sums of money in the lands obtained from the plaintiff. There is no question that the return of the lands to the plaintiff would result in great economic losses to defendants. Without minimizing the harshness of the result, I wish to point out that the result is not without parallel in the law. Courts countenance similar occurrences by allowing infants to be relieved from contractual obligations. E. g., Burnand v. Irigoyen, 30 Cal.2d 861, 186 P.2d 417 (1947); Doenges-Long Motors, Inc. v. Gillen, 138 Cob. 31, 328 P.2d 1077 (1958) (en banc)

4. Application of limitations statutes admittedly makes the protection less than absolute.

STATE PROPERTY TAXATION

In relation to lands allotted to members of the Five Civilized Tribes freedom from state ad valorem taxation has been of two sorts. The first is that which was provided for in the Allotment Agreements. The second is that which is the consequence of land being restricted against alienation. As it will be pointed out subsequently, Congress has sought to limit the amount of land which is tax-exempt because it is restricted. In *Choate v. Trapp*, 224 U.S. 665 (1912), (set out beginning at page 80, supra), the Supreme Court held that a tax exemption provided for in an Allotment Agreement was a property right of the allottee which could not be abridged by Congress authorizing the State to apply ad valorem taxes contrary to the Allotment Agreements. Specifically, Congress had provided in the Act of May 27, 1908, 35 Stat. 312, that when lands became unrestricted that they become taxable by the State.

It is therefore necessary to examine the various Allotment Agreements to determine what these tax-exemptions are.

In relation to the Seminoles, the tax-exemptions are to be found in the Act of July 1, 1898, 30 Stat. 567. Therein the homestead of each allottee is said to be "nontaxable... in perpetuity." However it was held in *U.S. v. Bean*, 253 F. 1(8th Cir. 1918), that the exemption was personal to the allottee and was valid only as long as he held the land. The surplus allotment was not given an exemption by the Allotment Agreement.

The Creek Supplemental Agreement, the Act of June 30, 1902, S 16, 32 Stat. 500, provided that homestead should not be taxable for 21 years from the date of the deed. In *English v. Richardson*, 224 U.S. 680 (1912), the court followed *Choate*, supra, in holding that tax-exemption in the Allotment Acts could not be disturbed by Congress. On the other hand, in *Fink v. Com'rs of Muskogee Co.*, 248 U.S. 399 (1919), the court held that when the alienee of the homestead took advantage of the alienability conferred by the Act of 1908, that he also accepted the burden of the statute making land alienable also taxable. The court also suggested that the tax-exemption was personal to the Indian.

There was no provision for the non-taxable status in relation to surplus. Therefore, it was tax-exempt only as a function of its being inalienable, cf. *Davenport v. Doyle*, 57 Okla. 341, 157 P. 110 (1916).

The Cherokee Allotment Agreement, Act of August 7, 1902, 32 Stat. 716, provided in section thirteen that homestead was to be inalienable for the life of the allottee not to exceed twenty-one years from the date of the certificate of allotment. But the same section also provided that it was to be non-taxable while the homestead was held by the allottee. It was held in *Kidd v. Roberts*, 43 Okla. 603, 143 P. 862 (1914), that the non-taxable status applied only to homestead and only as long as held by the allottee. The case further holds that surplus was non-taxable only as long as it was inalienable.

The tax exemption given to the Choctaw-Chickasaw was much more generous. The critical

language, § 29, Act of June 28, 1898, 30 Stat. 495 at 507, is "All lands allotted shall be non-taxable while the title remains in the original allottee but not to exceed twenty-one years from date of the patent..." In *Choate v. Trapp*, supra, it was held that the allottees had a vested right under the treaty to this tax exemption in both homestead and surplus.

There is a peculiarity in relation to Chickasaw freedman. All the other tribes had made their freedmen members of the tribe. Therefore they enjoyed the same treaty tax exemption as the other allottees. The Chickasaws never adopted their freedmen and it was held, therefore, the Chickasaw freedmen had only the freedom from taxation that was a function of inalienability, *Allen v. Trimmer*, 45 Okla. 83, 144 P. 795 (1914). The restriction on alienability of the allotment of freedmen, including homestead, was lifted July 27, 1908 as a result of, § 1, of the Act of May 27, 1908, 35 Stat. 312.

It should be noted that, while Semple, § 479, took the position originally that Cherokee freedmen had no homestead tax exemption, he has since reversed his position, see § 479 in the pocket part.

It has been held that minority by itself is not a federal restriction where the minor, if an adult, would be free of all restrictions, *Bagby v. U.S.*, 53 F.2d 260 (N.D. Okla. 1931). It should be noted that the statute lifting the restrictions provided "mixed blood Indians including minors shall be free of all restrictions."

The tax exemption is not limited to allotted lands. The Secretary has purchased land for Indians with the proceeds of the sale of restricted lands or royalties from restricted land. It had been contended that such lands purchased enjoyed the same tax exemptions as the source of the proceeds used. The United States Supreme Court has held that the Secretary, even if he might restrict those lands against alienation without his consent, had no power to exempt them from state taxation unless he was acting under congressional mandate. This was first held in a case involving an Osage and land purchased for him, *McCurdy v. U.S.*, 246 U.S. 263 (1918), and subsequently in a case involving a Creek Indian, *Shaw v. Gibson-Zahnisen Oil Corp.*, 276 U.S. 575 (1928).

Thereafter Congress passed legislation designed to correct the inequities arising from representations made to the Indians that such land would be tax-exempt. In the Act of June 20, 1936, 49 Stat. 1542, Congress not only provided money to pay the taxes or to redeem or reacquire any land sold for payment of taxes where the Secretary found that such land had been purchased with the understanding of the Indian that the land would be non-taxable. Further, Congress provided that land purchased out of trust or restricted funds and made subject to restriction against alienation or encumbrance except with the Secretary's consent was to be non-taxable until otherwise directed by Congress. Subsequently, that Act was amended by the Act of May 19, 1937, 50 Stat. 188, so that only homesteads purchased out of trust or restricted funds were tax-exempt. The Act also provided for the Indian to designate agricultural or grazing land not in excess of 160 acres or city property not exceeding in cost \$5000 to be designated as homestead.

These two acts were considered in *Board of Commissioners v. Seber*, 318 U.S. 705 (1943).

The Act was held to be constitutional and further it was held that the Acts were not limited to lands purchased for landless Indians. It was also held that the exemptions were available to grantees of the Indian for whom the land was purchased where it was conveyed with the Secretary's permission and subjected to restrictions against alienation except with permission of the Secretary. It was also held that the exemptions would not terminate in 1956.

Under the so called "Oklahoma Welfare Act" section one, Act of June 26, 1936, 49 Stat. 1967, the secretary is authorized to acquire by purchase, or otherwise, agricultural or grazing land for a tribe, band, group or individual Indian. Title to all lands acquired is to be taken in the name of the United States in trust for the tribe, band, group or individual Indian. While the title remains in the United States, the land is freed - of taxation except for the Oklahoma gross production tax. Contrary to the limitation of 160 acres or one piece of city property in the case of land purchased in the Indians name and restricted against alienation under the Act of 1937, there is no limit to tax exemption where the land is held in the name of the United States in trust under the Act of 1936.

It is strange that while Congress was permitting land newly purchased to be tax exempt, Congress was also involved in a program to limit the amount of tax-free land which an Indian might own.

Prior to 1928, both the Oklahoma Court in *Marcy v. Board of Com'rs of Seminole County*, 45 Okla. 1, 144 P. 611 (1914), and a federal court in *U.S. v. Shock*, 187 F. 862 (C.C. E.D. Okia. 1911), had held that as long as land remained restricted against alienation, it was also immune from taxation. In each case the land had been inherited, but remained restricted.

However, under the Act of May 10, 1928, 45 Stat. 495, Congress provided that after April 26, 1931, each Indian would be limited to 160 acres of tax-exempt restricted allotted, inherited, or devised land. Each adult and competent Indian was to select from his restricted land not more than 160 acres. The Indian was to file a certificate with the Superintendent of the Five Civilized Tribes, a certificate designating the land he had selected to remain tax-exempt. Where the Indian failed to file the certificate within two years and where the Indian was a minor or incompetent, the Superintendent was to prepare the certificate. When the certificates were approved by the Secretary, the certificates were to be recorded in the office of the Superintendent and in the county records in the county in which the land was situated.

In *Zweigle v. Webster*, 32 F. Supp. 1015 (E.D. Okla. 1940), it was held that when the Indian failed for two years to file the certificate, then the superintendent was required to make the filing. The statute set no limit on when the Secretary could file and made no provision that the land became taxable on failure of the Secretary to file. The court held, even though no certificate was ever filed, that the United States could prevail upon its intervention, in a quiet title action, asking that the resale tax deed be cancelled and the land declared to be non-taxable. The principle of the case was adopted in *Board of County Commissioners v. U.S.*, 152 F.2d, 540 (10th Cir. 1945), cert. denied, 327 U.S. 805 (1946).

In *U.S. v. Board of Comm'rs*, 62 F. Supp. 671 (E.D. Okia. 1945), it was held that an Indian's allotment which had been certified under the 1928 Act, land purchased for him with restricted funds and certified as a homestead under the Act of 1937, and an interest in land inherited by

him from an ancestor who had certified the land as tax exempt were all tax exempt. This last interest was tax exempt because of the final proviso in the Act of January 27, 1933, 47 Stat. 777.

Footnote five of this case explains that the Acts of 1928, 1933, and 1937, each provide for 160 acres only of nontaxable land under that act.

However, none of the Acts limited the quantity of tax exempt land which could be acquired or held under any other act. The same footnote suggests that the "1936 Act", apparently referring to the Oklahoma Welfare Act, the Act of June 26, 1936, 49 Stat. 1967, is limitless as to land purchased and held in trust by the United States for an Indian and hence was limitless as to tax-free land.

In 1947, Congress acted again to limit further accumulation of land free of ad valorem taxation. Section six of the Act of August 4, 1947, 61 Stat. 731, provides:

(1) Except as hereafter provided, tax-exempt land of any Five Civilized Tribe Indian shall not exceed 160 acres whether acquired by allotment, descent, devise, gift, exchange, partition or by purchase with restricted funds.

(2) All tax-exempt lands owned by a Five Civilized Tribe Indian continue tax free in the hands of the Indian for the restricted period.

(3) But if exemption is claimed under the Acts of 1928 or 1933 the exemption terminates unless a tax exemption certificate is filed of record in the county in which the land is located within two years from August 4, 1947.

(4) Any interest in restricted and tax-exempt lands acquired after the date of the Act by descent, devise, gift, exchange, partition or purchase with restricted funds by an Indian of one half or more Indian blood shall continue tax-exempt during the restricted period.

(5) Tax-exempt land, however acquired by one Indian, shall not exceed 160 acres.

(6) But (5) shall not terminate or abridge any right to tax exemption held by any Indian on the date of the Act.

(7) Nothing in this section is to be construed to affect any tax exemption under Act of June 26, 1936, 49 Stat. 1967, popularly called the Oklahoma Welfare Act.

(8) Superintendent (now the Area Director) is to file with the county treasurer each year in each county in Oklahoma, a statement showing what lands are claimed to be tax-exempt land belonging to Indians of the Five Civilized Tribes. County treasurers must send list of tracts

purposed to be sold for taxes to superintendent (now Area Director) at least 90 days before date of sale.

The above provisions have been subjected to judicial scrutiny in several cases. In *Bridges v. Stick*, 106 F. Supp. 506 (E.D. Okla. 1952), no tax-exemption certificate had been filed. Tax sale had been held and the tax resale deed had been issued in 1940 and the purchaser had gone immediately into possession. The court held title should be quieted in the purchaser because the Indian claimants and the United States were barred by limitations. The court further said that the purpose of Section 6(b) of the Act of 1947, paraphrased in (2) supra terminated the right of the Indian to claim tax exemption. The court thought this was necessary to stabilize those titles sold between the Act of 1928 and the Act of 1947.

In *U.S. v. Newoka Creek W. & S. Con. Dist.*, 222 F. Supp. 225 (E.D. Okla. 1963), it was held that the Act of 1947 did not require new certificates to be filed to preserve the non-taxable status given by the Acts of 1928 and 1933. Certificates filed prior to the Act of 1947 sustained the exemption.

The Act of August 12, 1953, 67 Stat. 558, amended the Act of 1947. Under the amendment the provision that the superintendent shall file a statement each year with the county treasurers of lands regarded as tax-exempt is changed to require the Secretary to file a list of non-taxable lands that have been sold during the preceding year.

Section four of the Act of August 11, 1955, 69 Stat. 666, provides that, with an exemption not here material, "nothing in this Act shall be construed to limit the application of the Act of August 4, 1947 (61 Stat. 731)." In *U.S. v. Daney*, 370 F.2d 791 (10th Cir. 1966), it was held that this provision continued the tax exemptions which had been continued by the Act of 1947.

Section five of the Act of 1955 provides: "Any existing exemption from taxation that constitutes a vested property right shall continue in force and effect until it terminates by virtue of its own limitations." This section undoubtedly refers to those rights which were spelled out in the Allotments Acts as discussed in *Choate v. Trapp supra*.

Powell v. City of Ada, 61 F.2d 283 (10th Cir. 1932), held that land which was restricted could not be subjected to special assessment for improvements. The Indian had platted his homestead and dedicated the streets and alleys with the consent of Secretary. He petitioned for annexation, consented to the improvements and accepted the benefits. The court said that if the Indian could be estopped by his acts, he could remove restrictions by his own acts.

DETERMINATION OF HEIRSHIP

One of the common problems which examiners run across in tracing a title is the missing determination of heirship. Not infrequently an examiner will find transactions vesting the title in, say, John Brown and the next transaction will be a conveyance from persons purporting to be the heirs of John Brown. Or, what is even worse, from a person or persons who are unidentified. It is the first guess, under these circumstances, that John Brown died intestate - and the grantors in the next conveyance are his heirs. In this state of affairs the title is unmarketable. In many eastern states - and some western - this defect would be cured by the recording of affidavits that the grantors in the conveyance were the heirs and all the heirs of John Brown.

The traditions in Oklahoma are such that affidavits such as these are not even entitled to recording.

Until 1918, in relation to Five Civilized Tribes Indian titles there was no machinery for determining conclusively the heirs of an Indian of the Five Civilized Tribes. Bledsoe, in his *Indian Land Laws* (2 ed. 1913) at pages 294-304 writes of the practice before 1918 and speaks without much conviction of the use of such affidavits and the determination of heirship in the county court as part of administration of an estate. Further, in district court there might be a determination of heirship made in the context of trying title but such determination would bind only those who were parties to the suit, see *State v. Huser*, 76 Okla. 130, 184 P.113 (1919).

But in 1918 Congress spoke in section one of the Act of June 14, 1918, 40 Stat. 606, 25 U.S.C.A. § 375.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said State for the determination of heirship in closing up the estates of deceased person, shall be conclusive of said question: Provided, That an appeal may be taken in the manner and to the court provided by law, in cases of appeal in probate matters generally: Provided Further, That where the time limited by the laws of said State for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts, a petition may be filed therein having for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, but this proviso shall not be construed to reopen the question of the determination of an heirship already ascertained by competent legal authority under existing laws:

Provided Further, That said petition shall be verified, and in all cases arising hereunder service by publication may be had on all unknown heirs, the service to be in accordance with the method of serving nonresident defendants in civil suits in the district courts of said State; and if any person so served by publication does not appear and move to be heard within six months from the date of the final order, he shall be equally with parties personally served or voluntarily appearing.

In *State v. Huser*, 76 Okla. at 140-41, 184 P. at 123 appears the following:

The reports of the Senate and House Committees of Congress recommending the passage of the act substantiate this view. The Senate Committee report states:

This Bill is identical with H. R. 10590 as reported by the House Committee on Indian Affairs on March 19, 1918. The legislation is urged by W. P. Z. German, general attorney of the Federal Land Bank of Wichita, Kan., who states that under existing conditions titles based on deeds from the heirs of deceased full-blood Indians offered to the land bank as security for loans have to be rejected as it is impossible to know with certainty who the heirs of a deceased full-blood Indian are, because no court, under existing law, can judicially determine conclusively that question.

There is incorporated in both reports for the information of Congress a brief bearing on the question by Hon. W. F. Semple, now Principal Chief of the Choctaw Nation, who, at the time of making the reports, was a Choctaw Indian attorney and had formerly been one of the probate attorneys for the Five Civilized Tribes and clerk to the Committee on Indian Affairs.

We quote two paragraphs from his brief:

The federal government through the farm-loan banks is loaning millions of dollars to actual farmers throughout the country on first mortgages on farms, and the records will show that in the state of Kansas something over six millions have been loaned to farmers, while in the state of Oklahoma less than half that amount has been loaned. The difference in the amount of money loaned is to be attributed to the fact the title examiner for the federal farm-loan bank declines to approve titles acquired from heirs who are Indians of the full-blood for the reason that there can be no judicial determination of heirship in such cases which will be binding and preclude other Indians from coming into court and asserting an interest in the land.

* * *

The need for legislation of this kind is made necessary not only for the reason that titles are uncertain and the uncertainty has the effect of diminishing the market value of the land, but further, the reason that there is a considerable amount of money in the hands of the superintendent of the Five Civilized Tribes, in the form of per capita payments, which has not been distributed for the reason that there is no means of determining who are the heirs. The department has followed the practice of making these payments on affidavits of Indians that they are the lawful heirs, but this has resulted in injustice being done. In fact it is a very unsatisfactory way of determining the heirs, and unless a commission is sent out with authority to take testimony and hear conflicting claims this policy will result in grave injury being done in distributing the large sums of money now in the hands of the superintendent belonging to the Choctaws and Chickasaws.

The constitutionality of this Act is well established, *Jessie's Heirs*, 259 F. 694, (E.D. Okla. 1919) and *State v. Huser*, supra. Both of these opinions merit study as background for this

important Act.

It should be noted that the final sentence of the section makes the law of Oklahoma applicable to Indians of the Five Civilized Tribes and makes a determination of heirship in closing up the estate of a deceased member conclusive.

Additionally, in the second proviso, the statute provides for a determination of heirship where the time for the institution administration proceeding has run or where for other reasons administration is impossible.

The requirement of the time to initiate administration having elapsed under Oklahoma law without the institution of administration is troublesome.

Semple, § 246, footnote ten, cites "Washington v. Stover, 169 Oki. 143, 36 P.2d 469; Homer v. Lester, 95 Okl. 284, 219 P.392; cert. denied. 264 U.S. 58; 68 L.Ed. 44 5. Ct. 330." as bearing on the problem. The first case does not deal with the question except that the first section of the Act of June 14, 1918 is set out and it contains the language under examination. However, the second case says in the first paragraph of the Court prepared syllabus:

Where the deceased intestate or testator has been dead for a period of three years or more and there is no lawful ground for administration proceedings in the county court, an alleged heir or record claimant desiring to have a determination of heirship and desiring to bring in third persons, who are not heirs but who claim through alleged heirs, must proceed either under the act of Legislature approved April 4, 1919, House Bill 445, in the district or superior court by a suit in ejectment or bill to quiet title, as the circumstances mold the remedy [1919 Okla Sess. Laws, ch. 261].

In the Pacific report of the case this quoted paragraph carries the West key number designation "Descent and Distribution 71(1). In the pocket part under the next subheading, "71(2), Limitations and laches", "Brown v. Wilson, 386 P.2d 152 (Okia. 1963)," is noted and therein "84 O.S. 1961, §257", "is cited. The annotations in West's Oklahoma Statutes Annotated to that section include an updated version of the paragraph set out above from Homer v. Lester.

In the pre-1965 version of this section this language "and the period of three or more years since the death of such intestate or testor has elapsed without their [sic] having been a decree by the county court of the county having jurisdiction to administer upon his estate". In 1965, the period was changed to one year 1965 Okla. Sess. Laws, ch. 27, § 1.

The difficulty that I have is that many hours of search at many various times beginning as long ago as 1954 have led to nothing, other than this section, coming anywhere near to placing a limitation on the time for the institution of administration. There are two aspects of this section which makes it less than the obvious measure as to when the petition to initiate administration may be filed. The first is the time factor. This section was not on the Oklahoma statute books until after the Act of Congress was passed. It was adapted by Laws 1919, c. 261, page 371, § 1. But of even greater importance the section in no way, shape, or form limits the institution of administrative proceedings. Rather it permits a petition to determine heirs after

three years from the death of the deceased even though administration had been started, *Jutensohn v. McGuirt*, 194 Okla. 64, 147 P.2d 777 (1944).

It seems to me that the conclusion must be that at the time the federal determination of heirship statute was adopted that one of the alternative conditions precedent to the applicability of second proviso was impossible of fulfillment - there simply was no limit on when administrative proceeding could have been instituted. Further, there is not as of the time of this writing such limitation on when administration may be started.

The second condition precedent in and to the second proviso, on the other hand, can be fulfilled. If the Indian has no unrestricted property, there can be no administration of his estate by the Oklahoma courts, *Moore v. Jefferson*, 190 Okla. 67, 120 P.2d 983 (1942), and see authority collected in *Micco's Estate*, 59 F.Supp. 434 at 439 (E.D. Okla. 1945), appeal dismissed sub nom. *U.S. v. Merrell*, 157 F.2d 62 (10th Cir. 1946).

These techniques are not available where there are no restricted heirs, *Moore v. Jefferson* 190 Okla. 67, 120 P.2d 983 (1942). But on the other hand, it is not required that all the heirs be restricted, *Washington v. Stover*, 169 Okla. 143, 36 P.2d 469 (1934).

The Act may be used to determine heirs where the allotment was made in the name of heirs. This situation arose where the ancestor had applied for allotment, but then died before the allotment was made or where the application was made by the administrator of a deceased Indian, *Homer v. Lester*, *supra*. Further purchasers from heirs may use the process, *Jackson's Estate*, 117 Oklahoma 151, 245 P. 874 (1926); *Owens v. Kitchens*, 105 Okla. 88, 232 P. 797 (1924). But it has been held that a determination of heirship made pursuant to the Act would not be binding upon one who had purchased from an heir prior to the passage of the Act, *Jessie's Heirs*, *supra* *Homer v. Lester*, *supra*. But in *Owens v. Kitchens*, *supra*, it was held that one who had purchased from an alleged restricted heir after the passage of the Act would be treated as having agreed that his rights could be tried under the Act.

It has been said repeatedly that the courts in operating under this act are not acting strictly judicially but are performing a ministerial or administrative function. The courts point to a similar function being performed by the Secretary of Interior under the General Allotment Act, *Jessie's Heirs*, *supra* *Homer v. Lester*, *supra*. It has also been said repeatedly that the county court was not trying title, but merely finding the fact of heirship. This was in conformity with the lack of jurisdiction of old county courts to try title, *Shade v. Downing*, 333 U.S. 586 (1948); *Micco's Estate*, *supra*.

There is, of course, a group of statutory Oklahoma sections paralleling the Federal Act, 84 O.S. 1971, §§ 251-261. It has been held that in a suit to determine heirship of a member of the Five Civilized Tribes that the Federal Statute controls, *Morrison's Estate*, 187 Okla. 553, 104 P.2d 437 (1940); *Fulsom's Estate*, 141 Okla. 300, 285 P.2d 13 (1930).

As it has been said before, the district courts, both federal and state, have had jurisdiction to determine heirship in the exercise of their general jurisdiction in suits of ejectment, quiet title and

the like. Under this jurisdiction, the district court could entertain a suit in which heirship would be determined even though the county court of the same county had a pending action to determine heirship of the same Indian, *U.S. v. Anglin & Stevenson*, 145 F.2d 622 (10th Cir. 1944). Further, it was a race to judgment to determine which suit would res adjudicata between the parties, *McDougal v. Black Panther Oil & Gas*, 273 F. 113 (8th Cir. 1921).

Until 1947, it was not necessary to serve the Superintendent of the Five Civilized Tribes in order to get a determination in probate court that would bind the United States, *Shade v. Downing*, supra. The theory here was that title was not involved and therefore the United States had no interest. Of course, this was not so in district court case where title was involved. But the Act of August 4, 1947, 61 Stat. 731, seemingly requires that the Superintendent, now the Area Director, be given written notice as provided by the Act. Section 3(b) requires the notice to be given in any action or proceeding in which the Oklahoma courts are given exclusive jurisdiction in all actions to determine heirs under the Act of 1918.

As has been touched upon before, the county courts of Oklahoma have been abolished, it is assumed that the district courts have succeeded to the powers of the county courts, page 253 supra.

The evidence to be used in establishing heirship is amply covered in *Semple*, §§ 265-274. *Semple* mentions as being particularly important the perhaps two thousand determinations made between 1932 and 1947 in a program of the Superintendent of the Five Civilized Tribes. The decrees will be of record in the county of the deceased ancestor's residence. And, of course, census cards, birth affidavits, tribal rolls and proofs of heirship on the basis of which the Secretary has distributed funds. These are to be found in the office of the Area Director in Muskogee.

INVOLUNTARY ALIENATION

As summarized by *Mills*, § 190, the treaties under which the Five Civilized Tribes were allotted, each had provisions protecting restricted lands against the claims of creditors.

But apart from specific provisions, restrictions against voluntary alienation are subject to being circumvented, if restriction is not held to be against involuntary as well. Perhaps one of the best statements of this principle is to be found in *Mullen v. Simmons*, 234 U.S. 192 (1914). In that case the Court pointed out that ". . . a prearranged tort and a judgment confessed would become an easy means of circumventing the policy of the law," 234 U.S. at 199. In *Burney v. Burney*, 61 Okla. 35, 160 P.85 (1916), the Oklahoma Court relied upon *Mullen v. Simmons* to refuse to subject restricted land and even the rents thereof to the satisfaction of a judgment for alimony. This was in spite of the fact that the restricted Indian did have the power to lease the land for periods of five years.

The Act of May 27, 1908, 35 Stat. 312, in section four in the proviso protected allottees

against involuntary alienation of allotments due to claims arising or existing prior to the removal of restrictions.

In *Kolb v. Ball*, 101 Okla. 100, 223 660 (1924), this section insulated an allottee's restricted estate against sale by his administration to satisfy his debts.

In *Merchants' & Planters' National Bank v. Ford*, 93 Okla. 289, 220 P. 833 (1923), the court relied upon this language from section nine of the Act of May 27, 1908, 35 Stat. 312:

Provided that no conveyance of any interest of any full-blood Indian heir shall be valid unless approved by the court having jurisdiction of the settlement of the estate of the said deceased allottee."

The court relied on this language to hold that the heir could not be deprived of his inherited land by forced sale to satisfy a judgment. The court held that the only alienation possible under the statute was a voluntary conveyance with the approval of the appropriate court.

To put it another way, the court held that a restriction on voluntary alienation was also a prohibition against involuntary alienation.

A recent case, also discussed in Notes 8, 37, and 38 to the Gohiston-Rarick Extension, *In re Brown's Estate*, 600 P.2d. 857 (Okla. 1979), seems to be a departure from this line of authority. Therein the court said:

[W]e think the controlling Federal enactment is contained in the Act of August 1947, Ch. 458, § 1, 61 Stat. 731, providing:

- (a)... No conveyance.., of any interest in land acquired before or after . . . (August 4, 1947) by an Indian heir or devisee of one-half or more Indian blood, when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated;
- (b) petition for of conveyance shall be set for hearing . . . The grantor shall be present at said hearing . . . (Emphasis ours)

The quoted portion of the Act of 1947, we interpret as being limited by its own terms to conveyances. Thompson Brown, the testator, has made no conveyance.

The alienation in question in this case was a will in which the restricted heir had directed that the restricted land be sold and the proceeds applied to the satisfaction of a particular debt.

It is difficult to predict what influence this somewhat more than aberrational case may have. It should be noted, as reported above, that it has been said that the case was not appealed because the will was in fact valid having been approved by the appropriate court. It should also be noted that the court was apparently unaware of cases such as the *Merchants' Bank* case which find in a restraint on voluntary alienation a restraint on involuntary alienation as well.

CURATIVE ACTS

There are three important curative acts in relation to the Five Civilized Tribes. The influence of the acts has been reflected in the Gohlston-Rarick Charts to some extent. For the sake of clarity, it seems desirable to again treat the curative acts in another structure.

The major defect touched upon by these acts is irregularities in removal of restrictions on approval of conveyances by the Secretary of Interior. Apparently the matter that was of greatest concern was removals of restriction on the Secretary's own motion without any request therefore by the Indian owner.

Section seven of the Act of March 1, 1901, 31 Stat. 861: at 863 authorized the Secretary to approve alienations by Creek allottees or their heirs. Section sixteen of the Act of June 30, 1902, 32 Stat. 500 at 503, the Creek Supplemental Agreement, contain the same authority for the Secretary.

The Act of March 3, 1903, 32 Stat. 982 at 996, authorizes the Secretary to remove restrictions in connection with the surveying and platting of townsites by private parties where stations were located along the lines of railroads.

After providing for the removal of restrictions on allottees of the Five Civilized Tribes not of Indian blood except for minors and except for homesteads, the Act of April 21, 1904, 33 Stat 189 at 204, provided for the removal of restrictions as to all other allottees except as to minors and as to homestead by the Secretary.

Section twenty-two of the Act of April 26, 1906, 34 Stat. 137 at 145, removed restrictions on the heirs of deceased allottees except that conveyances of full blood heirs were made subject to the approval of the Secretary.

The Act of June 21, 1906, 34 Stat. 325 at 373, seems to relate to the Yankton Sioux, see 34 Stat. at 371. It authorizes the Secretary to remove restrictions allowing "any Indian allottee" to sell for town site purposes any portion of his land allotted to him . .

The first section of the Act of May 27, 1908, 35 Stat. 312, removed restrictions on allottees except as to homesteads of all allottees of one-half or more Indian blood and as to surplus and homestead of all allottees of three-quarter or more including full bloods. These restrictions were subject to removal by the Secretary.

The Act of August 24, 1922, 42 Stat. 831, "confirmed, approved, and declared valid" any conveyance of allotted or inherited Indian lands by any member of the Five Civilized Tribes, or his or her heirs, which may have been hereto approved by the Secretary of Interior or any order heretofore issued by the Secretary of the Interior authorizing the removal of restrictions from lands belonging to such Indians under and in accordance with or purporting to be under and in accordance with the statutes listed above. A proviso denied the curative effect of the Act to any conveyance, order, or action procured by fraud.

Sample, § 377 reports that prior to the adoption of the Act of 1922, there had been wholesale removals of restriction without the application of the Indians involved.

Sample,§ 379,suggests that the Act of 1922 cured titles where there was no formal application for the removal of restrictions.

It is interesting that Congress in the Act of May 10, 1928, 45 Stat. 495, in extending the restrictions which were to expire on April 26, 1931, provided that the Secretary could remove the extended restrictions "upon the application of the Indian owners of the land."

Sample,§§372-378, suggests that the Act of 1947 was passed because of uncertainty as to the validity of removals in which there was no application as specified by the Act of 1928.

The Act of August 4, 1947, 61 Stat. 731, has two sections validating actions by the Secretary. Section seven, 61 Stat, at 734, validates and confirms all removals of restrictions and approval of deeds made prior thereto regardless of whether applications were made for the Secretary's action by the Indian owner. Section nine 61 Stat. at 734, while aimed at the problem of who, the Secretary or the county courts of Oklahoma, had the authority to validate conveyances of heirs or devisees after the Act of January 27, 1933, 47 Stat. 777, validated the approval whether made by a county court or by the Secretary, but only as the sufficiency thereof.

The Act of July 2, 1945, 59 Stat. 313, in its first section seeks to cure a problem created by the so-called Carney-Lacher deeds. These deeds used to convey land bought by the Secretary with restricted funds contained language restricting alienation of such land prior to April 26, 1931. This was the date set by the Act of May 27, 1908, 35 Stat. 312, as the expiration date of the then current restrictions on allottees. The Act of May 10, 1928, 45 Stat. 495, did not specifically extend the restrictions contained in the Carney-Lacher Deeds, but it was held in *U.S. v Williams*, 139 F.2d 83 (10th Cir. 1943), cert. denied, 322 U.S. 727 (1944), that the Act of May 10, 1928 did extend those restrictions. This holding was contrary to a long line of Departmental rulings to the effect that on and after April 26, 1931, no Secretarial approval was needed. Section one of the act of 1945 validated all such conveyance of land held under Carney-Lacher deeds made between April 26, 1931, and the date of the Act. But the act required that thereafter the conveyances of land subject to Carney-Lacher restrictions could be made only with the Secretary's approval

The second section of the Act of 1945, 59 Stat. at 314, was designed to cure defects arising out of *Murray v. Ned*, 135 F.2d 407 (10th Cir. 1943), cert. denied, 320 U.S. 781 (1943). In that case the land in question had been purchased by a full blood with unrestricted funds. On his death the land passed to a full blood heir. It was held that the heir was restricted even though the land had been unrestricted in the hands of the ancestor. The decision is the function of this language: "and no conveyance of any interest in land of any full blood heir shall be valid unless approved" This language is to be found in section eight of the Act of January 27, 1933, 47 Stat. 777.

The second section of the Act of 1945, provides that nothing in the Act of 1933 should be construed to impose restrictions on land acquired by inheritance, devise, or in any other manner

where the land was not restricted against alienation at the time of its acquisition. The section then confirms all conveyances of land which was free of restriction when acquired made after the Act of 1933 and before this Act, the Act of 1945.

It would seem that not only were deeds made prior to the act cured but the section undoes the rule of *Murray v. Ned*, supra, for the future as well.

The third section of the Act of 1945, 59 Stat. at 314, relates to actions in partition. It had been held in *U.S. v. Hellard*, 322 U.S. 363 (1944), that it was necessary to make the United States a party in an action in partition brought under the Act of June 14, 1918, 40 Stat. 606. This section validated partitions made without the United States as a party prior to the Act of 1945 and after the Act of 1918.

The validity of the Act of 1945 was sustained in *Goddard v. Frazier*, 156 F.2d 938 (10th Cir. 1946), cert. denied, 329 U.S. 765 (1946). The validity of the Act of 1947 was sustained in *Brown v. Stufflebean*, 187 F.2d 347 (10th Cir. 1951)