NOTES

This work is in no sense a text, and a cumbersome annotation would defeat the main purpose -; brevity; therefore only leading and late cases are cited.

Unless otherwise indicated all reference is to page and to the latest edition of such text as is cited. Mills, Oklahoma Indian Land Laws (1924) is cited 'Mills' followed by Section number. The 1947 Supplement to that work is cited 'Mills Supp.' followed by Section number. Semple, Oklahoma Indian Land Titles (1952) is cited 'Semple' followed by Section number. In Semple, the current pocket part should always be checked. Bledsoe, Indian Land Laws (2nd ed. 1913) is cited 'Bledsoe' followed by the Section number. Bennett, The Law of Titles to Indian Lands (1917) is cited 'Bennett' followed by the Section number.

GENERAL PRINCIPLES

All patents issued to Cherokees must be approved by Secretary of Interior. This approval serves as a relinquishment of all residuary interest of the United States.

Cherokee Allotment Agreement, 32 Stat. 716, § 59 (1902).
In re Lands of Five Civilized Tribes, 199 F.811, 819 (E.D. Okla. 1912).
Mills § 22.

The same is so in relation to patents issued to the Creeks.

Original Creek Allotment Agreement, 31 Stat. 861, § 23 (1901).
In re Lands of Five Civilized Tribes, supra.
Mills § 111.

There was a similar provision as to patents issued to the Seminoles.

Original Seminole Allotment Agreement, 30 Stat. 567, 568 (1898).

However, there is no such provision in the allotment acts relating to the Chickasaws and Choctaws. It is said, Mills § 56, that the reversionary interest of the United States was extinguished by a joint patent from these tribes executed by the Principal Chief of the Choctaws and the Governor of the Chickasaws because of § 15 of the Act of March 3, 1893, 27 Stat. 612, which gave the permission of the United States to allotment of not to exceed 160 acres to any one individual, and upon allotment the reversionary interest of the United States shall be relinquished and shall cease. The only difficulty with this explanation is that the Supplemental Choctaw-;Chickasaw Allotment Agreement, 32 Stat. 641 (1902) provided that each member was to receive land equal in value to 320 acres of the average allotable land.

Perhaps the whole problem is solved by the fact that in practice the patents issued to the Choctaws and Chickasaws were approved by or for the Secretary of Interior.

The certificate of allotment, in the absence of restrictions, conveys title sufficient to support a conveyance.

Mullen v. U.S., 224 U.S. 448 (1912).
Ballinger v. U.S. ex rel. Belle Frost, 216 U.S. 240 (1910).
Wallace v. Adams, 143 F.716 (8th Cir. 1906).
Bennett, 53
Mills §§ 21, 60, 110, 147.
Semple 47.

But until allotment is made, lands remain communal and there is no interest in an individual or his heirs (when allotted to the heirs of the deceased) that is alienable.

Mullen v. Pickens, 250 U.S. 590 (1919).
Robinson v. Caldwell, 55 Okla. 701, 155 P. 547 (1916)
Franklin v. Lynch, 233 U.S. 269 (1914).

The court can go behind the patent only for mistake of law or for fraud.

Colbert v. Patterson, 83 Okla. 212, 201 P.256 (1921).
Higgins v. Waters, 60 Okla. 209, 159 P.1129 (1916).

The patent or certificate of allotment must be recorded in the county where the land is situate; the allotment records, certified copies of which may, under section 12, Act of May 27, 1908, 35 Stat. 312, 316, be filed in the county, merely recite the fact that certain land, describing it, has been allotted to a certain Indian, giving roll number, age and sex. Such records are not a sufficient basis of title; where the abstractor certifies to the records of the Dawes Commission at Muskogee filing of patent in county may be waived.

The question of whether the Oklahoma Marketable Record Title Act, 16 0.S., may be relied upon in relation to lands allotted to members of the Five Civilized Tribes is treated infra, page 305. However, it seems relevant to include Oklahoma Title Standard 19.13 at this point:

"Abstracting under the Marketable Record Title Act shall be sufficient when the following is shown in the abstract:

"(a) The patent, grant or other conveyance from the government.

"(b) The following title transactions occurring prior to the first warranty deed in (c) below: easements or interests in the nature of an easement; unreleased leases with indefinite terms such as oil and gas leases; unreleased leases with terms which have not expired; instruments or proceedings pertaining to bankruptcies; use restrictions or area agreements which are part of a plan for subdivision development; any right, title or interest of the United States.

"(c) The first warranty deed most recently recorded more than 40 years prior to the date of abstract certification, together with all conveyances and other title transactions of any character subsequent to said deed; or if there be a mineral severance prior to said warranty deed, then the first warranty deed prior to said mineral severance, together with all conveyances and other title transactions of any character subsequent to said deed.

"(d) Conveyances, title transactions and other instruments recorded prior to the first warranty deed in (c) which are specifically identified in said deed or any subsequent instrument shown in the abstract.

"(e) Any deed imposing restrictions upon alienation without the prior consent of the Secretary of the Interior or a federal agency, for example, a Carney-;Lacher deed.

"(f) Where title stems from a tribe of Indians or from a patent where the United States holds title in trust for an Indian the abstract shall contain all recorded instruments from inception of title other than treaties except (1) where there is an Unallotted Land Deed or where a Patent is to a Freedman or Inter-;Married White member of the Five Civilized Tribes, in which event only the Patent and the material under (b) (c) (d) (e) need be shown: and (2) Where a Patent is from the Osage Nation to an individual and there is of record a conveyance from the allottee and a Certificate of Competency, only the Patent, the conveyance from the allottee, the Certificate of Competency, certificate as to degree of blood of the allottee and the material under (b) (c) (d) (e) need be shown.

"The abstracter shall state on the caption page and in the certificate of an abstract compiled under this standard:

'This abstract is compiled in accordance with Oklahoma Title Standard No. 19.13 under 16 0.S .A., Sections 71-;81.'"

(Authorities, comments, and history of standard omitted.)

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One typewritten version of the notes to the Fitzgerald chart contains the following item:

"A deed made or contracted for before the removal of restrictions is void (Oates v. Freeman, 157 Pac. 74; McKeever v. Carter, 157 Pac. 56; Bennett, 92), but a new deed after removal of restrictions, knowingly executed is valid, though only for a nominal consideration.

"Carter v. Prairie Oil and Gas Co. 160 Pac. 319.
Catron v. Allen, 161 Pac. 829".

A second, and probably earlier version has the same item except for the last two citations,

which are missing. The statements of law in the item are at best incomplete. There is authority for the proposition that where the original deed was given at a time when the controlling statutes expressly provided that a deed given in contravention thereof could not be ratified, for example, the Creek Supplemental Allotment Agreement § 16, 32 Stat. 500 at 503 (1902). A subsequent deed given in ratification thereof is also void.

Nunn v. Hazelrigg, 216 F.330 (8th Cir. 1914).
Oates v. Freeman, 57 Okla. 449, 157 P.74 (1916).
Alfrey v. Colbert, 7 Ind. T.338, 104 S.W. 638 (1907).

A statute provided that "every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void".

§ 16, 34 Stat. 137 at 144 (1906).

Under this Act it was held that deeds contrary to the restriction in existence at the time the deed was given, whether given before this Act or after, were void in the sense that they were not capable of ratification by a deed subsequent to the removal of restrictions where the attempt at ratification was made prior to the passage of 35 Stat. 312 on May 28, 1908.

Hudson v. Johnson, 87 Okla. 128, 209 P.2d 325 (1922).
Johnston v. Burnett, 81 Okla. 294, 198 P.489 (1921).
Williams v. Diesel, 65 Okla. 163, 165 P.187 (1917).
Nixon v. Woodcock, 64 Okla. 86, 166 P.183 (1917).

With the passage of the aforementioned Act of 1908, the Oklahoma Court's reaction to the question of ratification of a previously given void deed took a curious turn.

Thereafter the Oklahoma Supreme Court seemingly favored ratification. This new posture it attributed to § 5 of the said Act. That section provided:

"That any attempted alienation or encumbrance by deed, contract to sell, power of attorney, or other instrument or method of encumbering real estate made in violation of law before or after the approval of this Act shall be absolutely null and void."

A comparison of this language with that set out above from the 1906 Act will show that the 1908 Act is even more strongly worded against ratification than is the 1906 Act; the 1908 Act provided that deeds contrary to its restrictions were "absolutely null and void", whereas the 1906 Act used only the term "void".

The Oklahoma Court first considered the language of the 1908 Act in Ehrig v. Adams, 152 P.594 (1915) which was never reported officially because even after the mandate issued but before the trial court responded to the mandate, the Supreme Court of Oklahoma recalled the mandate and reversed its prior decision.

Ehrig v. Adams, 67 Okla. 157, 169 P.645 (1918).
(Hereinafter referred to as Ehrig II.)

In the first decision, hereinafter referred to as Ehrig I, the opinion was written by Commissioner Devereux and adopted, per curiam, in whole. The Commissioner after setting out the language of the 1908 Act as quoted above said that § 16 of the Creek Supplemental Agreement, 32 Stat. 500, 503 (1902), above, contained comparable language and that the Eighth Circuit, in Nunn v. Hazelrigg, above, had held that under that language a new deed, given without new consideration after the restrictions were removed, could not ratify the former deed.

The Commissioner also cited Carter v. Prairie Oil & Gas, 58 Okla. 365, 160 P.319 (1916), cert. denied and err. dis. 244 U.S. 646 (1916). In that case the Oklahoma Supreme Court held that a deed given at the time the 1906 Act was in force could not ratify a prior deed. In that case there was, at the time of the second deed, payment on notes given at the time of the first deed. The court held that under the Act of 1906 there was not ratification by the second deed. It should be kept well in mind, however, that in Ehrig I the Commissioner indicated clearly that the Act of 1908 was controlling but that the language of the 1908 Act was sufficiently like the Creek Supplemental Agreement and the 1906 Act that cases decided thereunder applied by anology under the 1908 Act. Further, the Court-;prepared syllabus recited that the second deed was void by virtue of the Act of 1908.

As unbelievable as it may be, the Supreme Court in Ehrig II, after holding that the Court held the power to recall its mandate where the case was not yet disposed by the trial court, did so because the prior case had been decided inadvertently under the Act of 1906. The Court then held the Act of 1908 repealed the pertinent section of 1906 and that the Act of 1908 did not contain a provision that deeds given after the removal of restrictions were void.

Thereafter, where the second conveyance was made after 1908 -; whether the first was given before or after 1908, the second deed may ratify the first even though no new consideration was given.

See Campbell v. Daniels 68 Okia. 254, 173 P. 517 (1918) and cases cited therein.

Land not liable for any claim contracted before the removal of restrictions; removal of restrictions does not subject land to forced alienation.

Mullen v. Simmons, 234 U.S. 192 (1914) (tort claim).
Posey v. Abrahams, 165 Okla. 140, 25 P.2d 287 (1933).
Choctaw Lumber Co. v. Coleman, 56 Okla. 377, 156 P.222 (1916).
In re French's Estate, 45 Okla. 819, 147 P.319 (1915).
Bennett 71, 77 and cases cited therein.
Mills §§ 120, 125, 190.
Semple § 374.

A will is an alienation and speaks from the death of the devisor. [Strange as it may seem, both versions of the notes used the word "devisee", rather than the word "devisor".]

Hayes v. Barringer, 168 F.221 (8th Cir. 1909).
Wilson v. Greer, 50 Okla. 387, 151 P.629 (1915).

Taylor v. Parker, 33 Okla. 199, 26 P.573 (1912).
Mills § 284.
Semple § 195.

Leases and mortgages are alienations, pro tanto.

Moore v. Sawyer 167 F.826 (E.D. Okla. 1909).
Chapman v. Siler, 30 Okia. 714, 120 P.608 (1912).

A partition is an alienation and cannot be enforced against a restricted Indian except as authorized by Congress.

U.S. v. Hellard, 322 U.S. 363 (1944).
Coleman v. Battiest, 65 Okla. 71, 162 P.786 (1917).
Mills §§ 281, 336, 360.
Mills Supp. §§ 281, 336b and c. Semple §§ 227-;240.

Restricted land including rents therefrom may not be taken under judgment for alimony even though the allottee had the power to make a lease for not in excess of five years.

Childers v. Childers, 62 Okla. 130, 163 P.948 (1916).
Burney v. Burney, 61 Okla. 35, 160 P.85 (1916).

Where order of Secretary of Interior removing restrictions specifies a date upon which said order is effective, an alienation prior thereto is void.

Deere v. Neumeyer, 54 Okla. 377, 154 P.350 (1916) overruled on another point by
Brown v. Miller, 89 Okla. 287, 215 P.748 (1923).
Rogers v. Noel, 34 Okla. 238, 124 P.976 (1912).
Bennett, 103.
Mills § 204.
Semple § 282.

When in this chart land is shown to be alienable by a minor, it must be understood that the minor must act through a guardian and by order of county court. This statement was true at the time this chart was originally prepared. With the court reform, county courts were abolished and guardianship matters transferred to the district courts.

Truskett v. Closser, 236 U.S. 223 (1915).
Cotton v. McClendon, 128 Okla. 48, 261 P.150 (1927).
Henly v. Davis, 57 Okla. 45, 156 P.337 (1916).

Mills § 210.
Mills Supp. § 210.
Semple § 409.

Minority is a restriction. Prior to Act of 1908, deeds given after majority to ratify a prior deed did not have that result, as prior deeds were incapable of ratification.

Hudson v. Johnson, 87 Okia. 128, 209 P.325 (1922).

A deed given after the Act of 1908, however, even where there was no new consideration by one who had reached his majority did ratify a deed given prior to his majority.

Campbell v. Daniels, 68 Okla. 254, 173 P.517 (1918).
Bennett, 148.
Mills § 215.
Mills Supp. § 215-;13.
See discussion of ratification above.

Oklahoma statutes providing for judicial emancipation of minors, or removal of disability by marriage does not affect minors who are under federal restrictions because of their minorities.

Truskett v. Closser, 236 U.S. 223 (1915).
Bennett, 146.
Mills §§ 216-;217.
Mills Supp. §§ 216-;217.
Semple §§ 419, 425.

Section 3 of the Act of 1908, 35 Stat. 312, provides:

"That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons, to determine questions arising under this act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman."

Prior to this, Section 19 of the Act of 1906, 34 Stat. 137, 144 provided: "for all purposes the quantum of Indian blood possessed by any member of said tribes approved by the Secretary of Interior." Notice that there was no mention of age in the 1906 Act.

It was held that the provisions of the 1908 Act were not retroactive as to validity of transactions completed prior to its adoption.

Rice v. Ruble, 39 Okla. 51, 134 P.49 (1913).
Mills § 303.
Semple § 91.

Notice that in the Act of 1908 "the rolls" are made conclusive evidence of "quantum of blood", whereas "enrollment records" are conclusive as to age. Mills §§ 297-;310,

Mills Supp. §§ 310a-;310b, and Semple §§ 91-;92 develop the significance of this distinction.

Where the actual age is clearly shown by the records, it is conclusive. The age given at the date of enrollment is conclusive that the allottee was at least that old, but where actual birthday is not shown by the records, oral testimony is admissible to establish date within the year.

Gilcrease v. McCullough, 249 U.S. 178 (1919).
McDaniels v. Holland, 230 F.945 (8th Cir. 1916).
Heffner v. Harmon, 60 Okla. 153, 159 P.650 (1916).
Bennett, 224-;234.
Mills § 310.
Mills Supp. §§ 310a and c.
Semple § 92.

The words, "Date of application for enrollment 9/3/99," written in the lower right hand corner of the census card indicate the date of enrollment but if the date alone is given and the phrase, "date of application for enrollment," is omitted the court will not take judicial knowledge that such date is the date of enrollment, but will admit parol evidence.

Gilcrease v. McCullough, 63 Okla. 24, 162 P.178 (1917), aff'd 249 U.S. 178 (1919).

Prior to the Act of 1947, the question of determining quantums of blood of unenrolled Indians was troublesome, Semple § 96. In 61 Stat. 731, § 2 (1947) it is provided:

> "In determining the quantum of Indian blood of any Indian heir or devisee, the final rolls of the Five Civilized Tribes as to such heir or devisee, if enrolled, shall be conclusive of his or her quantum of Indian blood. If unenrolled, his or her degree of Indian blood shall be computed from the nearest enrolled paternal and maternal lineal ancestors of Indian blood on the rolls of the Five Civilized Tribes."

Semple § 96 cites Norris v. Johnson, 205 Okla. 98, 235 P.2d 926 (1951) as holding that (1) evidence that an enrolled ancestor was a half-;blood instead of full as shown by the rolls was inadmissible. Section 97 of Semple takes the position, seemingly correct, that only blood of an ancestor of the Five Civilized Tribes is to be considered. The plain language of the statute so indicates. But Semple's language, § 96, that "This section of the 1947 Act deals with the manner in which the degree of blood of an Indian grantor, whether enrolled or unenrolled may be ascertained" is, standing alone, over-;broad. The language of the section clearly limits its applicability to "Indian heirs or devisees"; allottees are not mentioned. The context of the section seems to indicate that Semple meant to be understood as referring to heirs and devisees alone.