NOTES TO GHOLSTON - RARICK EXTENSION

Introduction:

In the notes, the various acts are cited without the Statutes at Large location. However, this information appears in the heading of the several charts. In addition the full text of the portions of the acts, beginning with the Act of April 26, 1906, pertinent to these charts are set-out following the notes.

The charts refer to the county courts. Of course, these were abolished in 1969. This matter is commented on in Note 34.

Unless otherwise indicated all references are to pages 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.

1. Act of May 27, 1908, effective July 27, 1908, as to Allottees.

> "Section 1. All lands, including homesteads, of said allottees, enrolled as intermarried whites, as freedmen and as mixed-blood Indian having less than half-Indian blood, including minors, shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-fourths Indian blood, shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degree of blood and all allotted lands of enrolled full bloods, and enrolled mixed bloods of three-fourths or more Indian blood, including minors of such degree of blood shall not be subject to alienation, contract to sell, power of attorney or any other encumbrance prior to April 26, 1931, except that the Secretary of the Interior may, wholly or in part, remove the restrictions, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as may be prescribed."

This law has not been changed by any subsequent law affecting conveyances of allottees of the Five Civilized Tribes, except the Act of May 10, 1928, extended the restrictions from April 26, 1931, to April 26, 1956, and the Act of August 11, 1955, extended the restrictions for the lifetime of the allottee. The Act of August 4, 1947, validates and confirms all removals of restrictions theretofore made by the Secretary of the Interior. The Act of August 11, 1955, does make one important change affecting the Secretary's right to remove restrictions upon allottees. Under the provisions of Section 2 of this act, the county court may upon proper petition and hearing reconsider the Secretary's action and if it feels justified, set it aside and issue a contrary

order, subject, however, to the right of the Secretary to appeal. Section 2 also gives the Secretary the authority for the first time to remove restrictions upon heirs and devisees subject nevertheless, to the same possibility his decision will be nullified by a contrary ruling by the county court. See Note 34.

2. The U.S. Supreme Court has held that it was not the intent of the Act of May 27, 1908, to re-impose restrictions on land, "which theretofore had been entirely freed" from restrictions by operation of law, U.S. v. Bartlett, 235 U.S. 72; (1914). See Bronaugh v. Holmes, 102 Okla. 249, 225 p. 512 (1924).

Under this rule, where land in any one of the Five Civilized Tribes could have been alienated on July 26, 1908, free from all restrictions, including minority, such land was in nowise restricted by said Act of 1908. Minors, however, with no other restriction than minority continued restricted if they reached their majority after July 26, 1908, if they were subject to the restrictions of the Act of May 27, 1908. Hopkins v. U.S., 235 F. 95 (8th Cir. 1916)

This rule does not affect the Seminoles as there was no class of exempt lands under the Act of April 26, 1906, that is not exempt under the Act of May 27, 1908.

The rule does apply to a limited extent to surplus allotment of adults of three-fourths and less than full-blood where at the time the Act of May 27, 1908, became effective the following conditions existed:

Cherokee - Where patent had been issued five years.
Choctaw and Chickasaw - One-fourth if patent had been issued one year, one-half if patent had been issued three years, and the entire surplus if patent, on July 27, 1908, had been issued for five years, in each case for appraised value.
Creek - This class free from restrictions.

Theoretically Cherokees of three-fourths or more could be free of restrictions under this provision,but as a practical matter if Mills, S 27, is correct in reporting that no patents were issued for several years after the ratification of the Cherokee Allotment Agreement on August 7, 1902, then no patents could have been issued for five years prior to May 27, 1908.

3. Act of May 27, 1908, effective May 27, 1908, as to Heirs and July 27, 1908, as to Allottees.

"Section 9, That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid, unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided, further, that if any member of the Five Civilized Tribes of one-half or more Indian blood shall die, leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided

in Section 1 hereof, for the use and support of such issue, during their ife or lives, until April 26, 1931; but if no such issue survives, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions. If this be not done, or in the event the issue hereinbefore provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions; Provided, further, that the provisions of Section 23 of the Act of April 26, 1906, as amended by this act are hereby made applicable to all wills executed under this section," See Note 9 for the said Section 23.

All of Section 1 became effective on passage, May 27, 1908, except that part expressly covered by contrary provisions, Sharum v. Anthis, 114 Okla. 642, 243 p. 222 (1926).

Section 9 authorizing the county court to approve deeds of inherited land became effective immediately and not sixty days from approval of act, Seiffert v. Jones, 77 Okla. 204, 186 p. 472 (1919) error dismissed, 257 U.S. 618 (1921).

The chart indicates that the conditions under which allottees or heirs could validly devise are the same. Section 23 of the Act of 1906, remains the basic law even after 1908. That section begins "Every person" thus applying to heirs as well as allottees. Section 8 of the 1908 Act, provides for the amendment of Section 23 by adding "or by the judge of a county court of Oklahoma." Further, the third proviso makes the provisions of Section 23, of the Act of 1906, applicable to "all wills executed under this section."

It is generally agreed that a devise is an "alienation" within Acts of Congress restraining "alienation" of allotments by Indians, Taylor v. Parker, 235 U.s. 42 (1914); Mills sec. 284; Mills Supp. sec. 284-3; Semple sec. 189. It was held, in reliance on this general proposition that a devise by a three-quarter blood allottee of her homestead to her children all of whom were born after March 4, 1906, was invalid, Scott v. Dawson, 177 Okla. 213, 58 P.2d 538 (1936).

Further, an heir (of an allottee of one half or more Indian blood who was survived by a child born since March 4, 1906), even though a white, the wife of the allottee, had no alienable interest during the existence of the special estate, Take v. Miller, 139 Okla. 115, 281 P. 576 (1929). See also other cases set out in third paragraph of Note 3 b.

Mills Supp., sec. 175-a., reports that the proviso was applied where the Allottee died between March 4, 1906 and the effective date of the Act citing, Tuska v. Mills, 108 Okla. 36, 233 P. 470 (1924); and Gage v. Haldin, 122 Okla. 169, 250 P. 82 (1926).

It is obvious that Mills strongly disapproves on constitutional grounds. It should be noted that he had previously predicted that the proviso would not be applied where the allottee had died prior to the effective date of the proviso, Mills sec. 175.

The third proviso of the Act of 1908 applies equally to the wills of allottees and to the wills of their heirs so that a will of a full-blood heir, under S 23, the Act of 1906, must be acknowledged and approved as therein provided if a parent, spouse, or child is disinherited. Mills, sec.sec. 172-178, and Semple, sec.S 61-63, 193-199, deal with a portion of the problem.

3a. Section 9 of the Act of May 27, 1908, contemplates approval of heirs though they be remote takers and not direct heirs, Brown v. Minshall, 83 Okla. 98, 202 P. 1037 (1921).

3b. The rolls were closed after March 4, 1906, so that children born after that date were not entitled to share in the tribal lands. By the Act of May 27, 1908, Congress attempted to make some provision for these children.

The Second Proviso in Section 9, quoted in Note 3 above, created what the U.S. Supreme Court has held to be a "special estate", not a common law life estate but with some of the characteristics of such life estate. The Supreme Court has held that under this language these children and the other heirs took the corpus of the estate of such allottee in such shares as fixed by the applicable laws of inheritance, subject to the rights of these children born after March 4, 1906. The principal or corpus of the estate remains intact to be finally distributed in such shares as the law of inheritance gives, but the owners of this special estate were entitled to the interest or income which may have been obtained upon an investment of royalties produced during the life of such issue. See Parker v. Riley 250 U.S. 66 (1919), Baze v. Scott 106 F.2d 365 (10th Cir. 1939).

In considering whether the homestead land of a member of the Five Civilized Tribes of one-half or more Indian blood is alien able upon his death when there is living issue born since March 4, 1906, the degree of blood of the heirs is unimportant. Unrestricted Indian heirs or heirs of non-Indian blood were powerless to make any conveyance of their interests in the homestead allotment of such an allottee. A white spouse of a deceased allottee under this section had no alienable interest in the lands of the deceased allotte~ during the existence of this special estate, Take v. Miller, 139 Okla. 115, 281 P. 576 (1929). See also Homes v. U.S., 53 F.2d 960 (10th Cir. 1931); U.S. v. Martin, 45 F.2d 836 (E.D. Okla. 1930) Willmott v. U.S., 27 F.2d 277 (8th Cir. 1928) and Semple sec. 186.

Because of the language of the statute, it is safe to assume that the second proviso of Section 9 of the Act of 1908, is applicable only where there is a surviving child of an allottee born after May 4, 1906. It would not apply where an heir or devisee of an allottee died leaving a child of his born after May 6, 1906.

In Quincy v. Texas Co., 185 F.2d 139 (10th Cir. 1950), cert. denied, 340 U.S. 933 (1951), it was held in an opinion by Judge Murrah that the restrictions imposed on the "special estate" by Section 9 of the Act of 1908, 35 Stat. 312, 315, as amended by Act of April 12, 1926, 44 Stat. 239, and Section 2 of Act of May 10, 1928, 45 Stat. 495, terminated on April 26, 1931.

In Biard v. Carlton, 207 Okla. 545, 251 P.2d 485 (1952), the Oklahoma Supreme Court took the same view.

4. Meaning of approval by County Court. The County Court in approving the conveyances of full-blood heirs is acting as a federal agency and its act is administrative and not judicial. Consequently, the findings of the court and its recital of jurisdictional or other facts are not

adjudicated. Such findings are not conclusive and are subject to collateral attack.

The approval of the deed being administrative and not judicial (except where administrative proceedings upon the estate of the allottee were pending at the time in the court which approved the deed), the court is not bound to follow any special procedure. It is not necessary that the approval by the court be embodied in any formal order or journal entry; any writing or order evidencing the approval of the court of the deed is sufficient. The word "approved" endorsed upon the deed satisfies the requirements of the statute. No appeal lies from the action of the county court in approving or disapproving such conveyances. See Mills sec.sec. 183-184 and supporting cases cited.

Where the county court approved a trust of restricted land, the approval did not remove restrictions from the income produced therefrom, Davis v. Jones, 254 F.2d 696 (10th Cir. 1958), cert. denied, 358 U.S. 865 (1958). It is doubtful that Semple's analysis, Semple, sec. 102, 1977 Supp., stating that the Tenth Circuit held the trust to be "void" is sound.

If Semple's note suggests that Nail v. American National Bank of Bristow, 21 F. Supp. 385 (N.D. Okla. 1937), is inconsistent with Davis v. Jones, that suggestion is of doubtful validity. The court holds that the approval of a trust agreement by the Secretary removes restrictions and modifies them "to the extent of permitting the trustee to administer such property in accordance to the trust agreement." It does not hold that the approval removed all restrictions on the allotment or income therefrom.

The Oklahoma case of Pluto Oil Co. v. Miller, 95 Okla. 222, 219 P. 3Q3 (1923), casts no doubts upon the validity of Davis v. Jones. The question involved in that case was whether the specified county court or the Secretary could approve the oil and gas lease of a full-blooded heir under Section 9 of the Act of 1908.

It would seem that Semple has confused the problem of who may approve with the consequences of that approval.

5. The second proviso of Section 9 of the Act of May 27, 1908, which restricted the homestead for the use and support of issue born after March 4, 1906, then provides: "In the event issue herein provided for die before April 26, 1931, the land shall then descend to his heirs.., free from restrictions." There is no similar language where there had never been such issue. For this reason all heirs, including full bloods, are unrestricted where there were such issue but they died before April 26, 1931, Parker v. Riley, 250 U.S. 66 (1919); U.S. v. Lee, 108 F.2d 936 (10th Cir. 1940); Holmes v. U.S., 53 F.2d 960 (10th Cir. 1931); Grisso v. Milsey, 104 Okla. 173, 230 P. 883 (1924), even though, the full blood heirs were restricted where there had never been such issue, see line in chart just above.

6. It was held prior to the passage of the Act of January 27, 1933, that where the lands were unrestricted and alienable in the hands of the ancestor, the heir, though a full-blood, was not restricted as to such lands. Pitman v. Commissioner, 64 F.2d 740 (10th Cir. 1933). In that case a

full-blood Creek woman inherited from her half-blood son his surplus and homestead allotments, and the court reasoned that since the surplus allotment was alienable in the allottee himself, his mother, although a full-blood, in taking as an heir was not restricted as to the surplus allotment. Gholston thought that it was doubtful that this conclusion is correct as to full-blood heirs. Mills, sec. 170, says "It is now definitely settled that all conveyances of their inherited lands by full blood heirs, executed after the passage of the Act were required to be approved by the Secretary of the Interior, or by the County Judge under the Act of May 27, 1908, regardless of whether such lands were restricted or unrestricted before its passage, and that without such approval, the conveyance was void, And the same rule applies to conveyances by full blood heirs of inherited lands, which were allotted after the death of the allottee and were subject to unrestricted sale by the heirs at the time of the passage of the Act." But see Semple, sec.79.

Time has not removed the doubt about which Gholston speaks. My, Rarick's, own conclusion, after more searching in haystacks than I care to admit, is that Gholston's reaction on the chart is correct regardless of his doubts as reflected in his notes. The key sentences in the Pitman case, 64 F.2d 740 (10th Cir. 1933), occur at 742:

> Pitman, Jr., being a half-blood, it follows that section 1, supra, removed all restrictions on that portion of his allotment other than the homestead. On the removal of such restrictions, such lands and the income therefrom became subject to taxation under the provisions of section 4 of such act. Section 9, supra, deals with lands restricted at the time of the allottee's death, and not with lands from which restrictions had been theretofore removed. It did not on the death of Pitman, Jr., reimpose restrictions upon the surplus lands from which re strictions had theretofore been removed.

It should be noted that in this paragraph the court is following the well accepted principle of construction that a proviso modifies that which it immediately follows rather than ranging over the entire piece of legislation.

One is certainly entitled to speculate whether the philosophy of Mr. Justice Van Devanter concerning the reimposition of restrictions in his previous constructions of the Act of 1908 might not have influenced the Tenth Circuit.

In Parker v. Richard, 250 U.S. 235 (1919), Van Devanter had before him the question of whether royalties from oil and gas leases on an allotment were restricted. A full-blood heir had inherited after 1908 from a full-blood allottee. Van Devanter speaks throughout the opinion of section 9's removing restriction on the death of the allottee except where the heir is a full-blood. He never loses sight, nor does he permit the reader to lose sight of the fact that the subject of section 9 is removal of restrictions and the proviso is an exception thereto.

The force of this posture of Van Devanter has even greater impact when the language of Parker v. Richard is read at the same sitting as the language in U.S. v. Bartlett, 235 U.S. 72 (1914), in which he was considering the question of reimposition of restrictions. It should be noted that his discussion is couched in terms of "land being restricted" rather than persons being restricted. In that case, once it was determined that restrictions had been removed from the land in question, the case is decided by the application of language from the Act that "nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the

passage of this act."

Admittedly, this language was not directly applicable to the Pitman case. In the Pitman case, the "ancestor" was a half-blood. He was restricted as to surplus and homestead prior to 1908. The restrictions on his surplus were removed by section 1 of the Act of 1908. He died in 1919, and his mother, his only heir, was a full-blood. The court's refusal to apply the proviso of section 9 while not literally required by the language concerning reimposition of restrictions, was certainly consonant therewith.

When one "Shepardizes" the Pitman case, he is initially impressed with the number of cases wherein Pitman was cited. But of all the citations, only one case involves the question of restrictions on heirs under section 9 of the Act of 1908, Glenn v. Lewis, 105 F.2d 398 (10th Cir. 1939). It is cited in the margin along with numerous others simply in support of the proposition that section 9 removed restrictions on the of an allottee except where the heir who took was a full-death blood. The initial question in the case was the construction of the Act of 1933. It cannot be said that Glenn v. Lewis either supports or questions the soundness of the holding in the Pitman case.

Gholston's caution was prompted by material in Mills, sec. 170. The precise sentence from Mills is:

> It is now definitely settled, however, that all conveyances of their inherited lands by full-blooded heirs, executed after the passage of the Act [that of 1906] were required to be approved by the Secretary of the Interior, or by the County Judge under the Act of May 27, 1908,regardless of whether such lands were restricted before its passage, and that without such approval, the conveyances were void.

If there were any doubt that the section quoted from Mills is intended to equate the results of the Act of 1906, and the Act of 1908, in restricting full-blood heirs, that doubt is completely removed in Mills, sec.sec. 172-173, in which Mills examines section 9 of the Act of 1908. In these sections he concludes that section 22 of the Act of 1906, was amended by section 9 of 1908, in two respects; first, section 9 of the Act of 1908, is broader in that minor heirs are treated equally with adults, and second, the 1906 Act provided for approval by the Secretary whereas section 9 of the 1908 Act permitted approval by the appropriate county court.

It should be noted that in the Mills section from which Gholston quotes, the subject matter is the Act of 1906. Each of the cases cited in Mills' footnotes 13 and 14 deals with the Act of 1906, and its reimposition of restrictions.

Although the Pitman case had been decided before Mills wrote his book, he did not notice that case either in sec. 170 dealing with full-blood heirs under the Act of 1906,or in sec.sec. 172-173, dealing with full-blood heirs under the Act of 1908. Nor does the table of cases indicate that he had cited the case anywhere in his 1924 edition. The 1947 Supplement lists "Pittman [sic] v. Commissioner" in the table of cases (see page 117). However, there is no indication where the case is relied upon and a check of sec.sec. 170 and 172-173 in the Supplement does not reveal any discussion of this case; in fact, only sec. 172 has entries of any sort.

Gholston suggests that his position as indicated by his chart is supported by Semple, sec. 79. I concur. But nevertheless, to remain on the conservative side, the chart indicates only that where section 1 of the Act of 1908, removed restrictions on land in the hands of allottees, that the lands remained unrestricted in the hands of even full-blood heirs. This is strictly within the fact situation in Pitman. It should be observed that this Note appears as authority on the next two of the charts. It is authority then until the Act of 1933, infra.

It should be noted that the proviso of section 9 has been held to be equally applicable to the heir of an heir of an allottee as to the heir of the allottee, Brown v. Minshall, 83 Okla. 98, 202 P. 1037 (1921)

7. Gholston's Note 7 is the following:

"Prior to the passage of the Act of April 12, 1926, all lands acquired by devisees were unrestricted and alienable, except as limited by the language of the second proviso of Section 9 of the Act of May 27, 1908, placing a special restriction on the homestead of an allottee of half or more Indian blood for the benefit of children born after March 4, 1906. However, as stated in Note 5, upon the death of the child or children, born after March 4, 1906, prior to April 26, 1931, the homestead of the allottee is unrestricted in the hands of the other heirs. It follows that this rule would apply to devisees although there are apparently no cases on this point."

Semple, sec. 224, also says that devisees are restricted by the second proviso which was intended to preserve the homestead of allottees of one-half or more Indian blood for their children who had been born too late to participate in the allotment. On the other hand, Semple,sec. 63,states categorically that between the Acts of May 27, 1908,and April 12, 1926, "full-blood devisees were free to convey land so acquired."

I can find no consideration of the problem by Mills.

CAVEAT

As indicated above, Gholston noted the absence of cases dealing with the problem of devisees being subject to the proviso. I admit that I have been troubled by the thought that it may be impossible for there to be a devisee subject to the proviso. It seems to me that what is being said in the portions of the charts dealing with devisees under this proviso is only that there can be no devisee where the proviso is applicable. If this is so then it is somewhat less than academic to ask "Are devisees subject to the proviso?"

On the other hand, if Mills is correct that the proviso can be applicable where the allottee of one-half or more Indian blood dies before the effective date of the Act of 1908, see Note 3, then a devisee under Section 23 of the Act of April 26, 1906 could, nevertheless, be subject to the proviso.

It is this possibility (and this possibility suggests that there may be other possibilities of which I have not thought) plus the deterrent effect of the combined scholarship of Gholston and Semple (who both speak of "devisees being restricted by the proviso"), that has caused me to leave the charts cast in the form consistent with the concept of "devisees subject to the proviso.

End of Caveat

However, land acquired by full-blood devisees unrestricted and alienable prior to the Act of April 12, 1926, became restricted and inalienable in the hands of full-blood devisees after April 12, 1926. Such land sold prior to April 12, 1926, required no approval. See Note 16.

8. Meaning of "disinherited." What constitutes disinheritance under the Act of April 26, 1906, is a question of fact to be ascertained by proof. The controlling factor is the value of the share awarded to the person claiming to be disinherited. A disinheritance under well settled decisions on this point takes place where the devisee receives less in value under the terms of the will than would have passed by the applicable laws of inheritance had the testator died intestate, Kemp v. Turnbull, 198 Okla. 27, 174 P.2d 384 (1946); Porter v. Hansen, 190 Okla. 429, 124 P.2d 391 (1942), holding will not void but only voidable.

In what may well prove to be a case that everyone will wish to forget, In Matter of Estate of Brown, 600 P.2d 857 (Okla. 1979), great doubt was cast upon the meaning of "disinherited" as set out in the first paragraph of this Note. In the Brown case, the testator, a full-blood heir or devisee (the report is ambiguous) provided in his will:

> "(1) I declare that I am at the present time indebted to E,R. of Tishomingo, Oklahoma, in the amount of several thousand dollars which he has advanced to me for expenses during the progress of litigation in the probate of the estate of Nannie Brown, now Johnston, deceased. I direct that in the event that the sums so advanced and which may be advanced hereafter by said E.R., if unpaid in whole or in part at the time of my death, be first paid from my estate and for such purpose I authorize, direct and empower my executor hereinafter named, if necessary, to sell without court order any portion of my estate, including lands otherwise restricted by law against alienation which I may own at the time of my death."

The testator' s wife and children took the residuum. Over their objection, the district court permitted the sale of the allotted land to which the testator had succeeded. On appeal, the court said in affirming, 600 P.2d at 860:

> "It is true that the Act of 1908 provided that the provisions of the 1906 Act, sec. 23, were to be applied to wills; but sec. 23 of the 1906 Act has limited application for its [sic] states in pertinent part that no will of a full-blooded Indian devising real estate shall be valid if it disinherits parent, wife or children. We cannot conclude that the Act of 1926

has application to the devises [sic] by will except as a limitation on disinheritance."

From this, one can only deduce that the court was saying that the direction to sell the allotment and pay the creditor the sum of $18, 238 did not disinherit the spouse and children of the full-blood testator even though spouse and children obviously would take less of the land or its proceeds than they would have taken by inheritance.

Is it possible that the court equates "disinheritance" with "cutting them off without a red cent"?

It is clear that the court is not basing its decision on the land in question being subjected involuntarily to answer for the debts of the deceased. After a flirtation with such a possibility in which the court considers sec. 4 of the Act of May 27, 1908, which protects the lands of allottees against any personal claim or demand, the court hastened to says "Here the question is the right of an Indian heir to dispose of inherited land by will," 600 P.2d at 859. It is submitted that it follows inexorably that the court understood "disinherited" to be far less encompassing than had previous courts.

It has been reported that the Department of Interior decided not to proceed with an appeal of the Brown case because the will had in fact been approved as required by the Act of 1906, as amended by the Act of May 27, 1908, permitting the will of a full-blood to be approved by a judge of a county court of Oklahoma. For further discussion of the Brown case, see Notes 8, 37, and 38.

9. Section 23 of the Act of April 26, 1906, referred to in Note 3 is as follows:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided that no will of a full-blood Indian, devising real estate shall be valid if such will and testament disinherits the parent, spouse or children of such full-blood Indian unless acknowledged before and approved by a judge of the U.S. Court for the Indian Territory, or a United States Commissioner."

The Act of May 27, 1908, Section 8, provides that such will may be approved by the Judge of a county court of Oklahoma.

The acknowledgment and approval that follows has been upheld by the Supreme Court of Oklahoma in Proctor v. Harrison, 34 Okla. 181, 125 P. 479 (1912)

> "Be it remembered, that before me J.B. Smith, a United States Commissioner, in and for the Eastern District of the State of Oklahoma, duly appointed and acting as such, on this 21st day of July, 1908, personally appeared John Doe, to me known to be the identical person who executed the foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth, and he stated and declared to me that said instrument was his last will and testament, and that the same was read over to him, and he fully understood its contents prior to the execution thereof, and said will is now by me approved. In witness whereof, I

have hereunto set my hand and official seal the day and year above written. J.B. Smith, United States Commissioner for the Eastern District of Oklahoma ."

In Davis v. Williford, 271 U.S. 484 (1926), the Supreme Court held the acknowledgment and approval must be endorsed on the will itself, otherwise it is void. However, a later Circuit Court of Appeals case held that even though the acknowledgment and approval was on a separate piece of paper and attached to the will, it was nevertheless valid, Parnacher v. Mount, 207 F.2d 788 (10th Cir. 1953)

An endorsement on a will indicating approval by the U.S. Commissioner, but which by inadvertence failed to show the acknowledgment, was held invalid by the U.S. Supreme Court and parol evidence was inadmissible to supply the lack of a certi ficate of acknowledgment under the Act of 1906, Williford v. Davis, 106 Okla. 208, 232 P. 828 (1925), and Davis v. Williford, supra.

An Oklahoma case, In re Cully's Estate, 276 P.2d 250 (Okla. 1954), held that the will of a full-blood Indian approved as required by law, which disinherited the husband and minor child, could not operate to deprive them of their homestead rights under the State laws. Nor could such disinheritance apply to unrestricted personal property.

In Brown v. Rochester, 527 P.2d 1141 (Okla. Ct. App. 1974), it was held a will following the self-proving procedures which carried a certificate of acknowledgment by the appropriate judge but contained no language indicating the court's approval did not comply with the requirements of the Act of April 26, 1906 in respect to acknowledgment and approval.

10. It may be assumed that the rule expressed in Note 2 continues effective under the Act of April 12, 1926.

11. Section 9 of the Act of April 12, 1926 amends sec. 9 of the Act of 1908 to read:

"The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by Section 1 of this act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator.

Provided further, that if any member of the Five Civilized Tribes of one-half or more Indian blood, shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed, therefrom by the Secretary of the Interior for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from restrictions; if this be not done, or in the event the issue hereinabove provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and

distribution of the State of Oklahoma, free from all restrictions.

Provided, that the word "issue as used in this section shall be construed to mean child or children.

Provided, further, that the provisions of section 23 of the Act of April 26, 1906, as amended by this Act, are hereby made applicable to all wills executed under this section.

And provided further, that all orders of the county court approving such conveyances of such land shall be in open court and shall be conclusive as to the jurisdiction of such court to approve such deed.

Provided, that all conveyances by full-blood Indian heirs heretofore approved by the county courts shall be deemed and held to conclusively establish the jurisdiction of such courts to approve the same except where more than one such conveyance of the same interest in the same land has been made by the same Indian to different grantees and approved by county courts of different counties prior to the passage of this Act, and except that this proviso shall not affect and may be pleaded in any suit brought before the approval of this Act."

11a. This section which amends Section 9 of the Act of May 27, 1908, still leaves the degree of blood of the heir unimportant when considering whether the homestead of a member of the Five Civilized Tribes of one-half or more Indian blood is alienable upon his death when there is a surviving child born since March 4, 1906. See Note 3b. The act of May 10, 1928, provided for the termination of this provision for the benefit of children born after March 4, 1906, as of April 26, 1931.

12. Meaning of approval by County Court.

The Act of April 12, 1926, validates past approvals and says that future approvals are presumed to have been approved in the proper court. However, the Oklahoma Supreme Court held in a case where the record, relating the approval, disclosed on its face that the county court where jurisdiction was invoked was not in fact the court that had jurisdiction of the estate of the deceased allottee, that the deed therein approved was void. It predicated its reasoning upon the principle that where the record affirmatively shows a want of jurisdiction in the court, the judgment is void, Silmon v. Rahhal, 178 Okla. 244, 62 P.2d 501 (1936). In Billy v. Burnett, 137 Okla. 175, 278 P. 635 (1929), the Supreme Court of Oklahoma upheld a deed made prior to the passage of the 1926 Act by full-blood heirs where it was contended that the deed was not approved by the proper county court. To a petition alleging that the deed was not approved by the proper court, the defendant filed demurrer. The trial court sustained the demurrer and the Supreme Court affirmed, basing its conclusions upon the curative Act of April 12, 1926. The law now seems settled that in the absence of fraud and where the record does not show on its face a want of jurisdiction, the approval cannot now be attacked in a collateral proceeding. The record consists of all documents filed in the proceeding and leading up to the final order of ap proval

Meaning of the words "approved in open court."

"While the matter of approving conveyances executed by re stricted heirs or devisees is more or less a ministerial proceeding and not strictly a judicial proceeding, yet the Act of April 12, 1926, provided that all orders of the county court approving conveyances shall be made in open court. The purpose of this amendment was to answer the complaint that some county judges were approving conveyances out on the street, at summer resorts and while out fishing, without giving persons an opportunity to bid. The purpose of the Act of 1906 was to have these proceedings conducted in open court so that the public in general might know the fact that the application for approval was to be heard, and to the end that the land might sell in a competitive market and not simply to the person who happened to get a deed signed by the Indian," Semple sec. 140.

Subsequent acts make no change in the law requiring the approval to be in open court. However, both the Act of January 27, 1933 and August 4, 1947, set out the rules of procedure which accomplish the requirement for approval in open court.

13. The following is from Section 1, Act of April 12, 1926:

"But if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from restrictions; if this be not done, or in the event the issue hereinabove provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions."

This is the same wording as in Section 9 of Act of May 27, 1908, and the same rule as expressed in Note 5 applies.

14. "Provided further, that the provisions of Section 23 of Act of April 26, 1906, as amended by this act, are hereby made applicable to all wills executed under this section," from Section 1, Act of April 12, 1926.

Section 23 of Act of April 26, 1906 reads:

"Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner."

As can be seen, this act neglected to take into account the 1908 amendment permitting the county court to approve wills. See Section 8, Act of May 28, 1908. Until this was corrected by the Act of May 10, 1928, only the U.S. Commissioner or U.S. Judge could approve wills of full-blood Indians.

15. The Secretary of the Interior had on hand, money derived from oil and gas leases upon restricted lands, or from sale of restricted land upon removal of restrictions to purchase other land better suited to the needs of the particular Indian. He realized the necessity of placing restrictions upon the purchased land. The form of deed prepared to carry out these restrictions, known as the Carney-Lacher deeds, contained this restriction:

> "That no lease, deed, mortgage, power of attorney, contract to sell or other instrument affecting the land therein described, or the title thereto, executed during the lifetime of said party, at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification unless made with the consent and approval by the Secretary of the Interior."

The restriction was valid and a conveyance in violation of it was void, Sunderland v. U.S., 266 U.S. 226 (1924); U.S. v. Watashe, 117 F.2d 947 (10th Cir. 1943)

In the case of Ward v. U.S., 139 F.2d 79 (10th Cir. 1943), there was involved the validity of a deed executed by a full-blood heir of a grantee in a Carney-Lacher deed. The conveyance executed prior to the passage of the Act of 1928 was not approved. The court held that under Section 9 of the Act of May 27, 1908, as amended by the Act of April 12, 1926, the conveyance was void unless approved. In substance the court held there was a mere conversion of trust property from the original allotment to the land which was purchased with the proceeds of its sale. The property was converted into funds and the funds were again converted into land.

Mills Supp. sec. 206-h says, "While there are no cases involving this question, upon the death of the grantee (in a Carney-Lacher Deed) prior to passage of the Act of April 12, 1926, the heirs apparently were unrestricted." In the absence of supporting authority, I, Gholston, am reluctant to incorporate this conclusion in the chart.

I, Rarick, concur with Gholston's reluctance as expressed in the paragraph above. I see nothing in the Act of April 12, 1926, which would account for the heirs under a Carney-Lacher deed being restricted after that Act but not before the said Act.

For many years, I have wondered if Mills in the cited section of his Supplement had not really meant to say that devisees, rather than heirs, were unrestricted where the grantee in a Carney-Lacher deed died prior to the Act of 1926. This obviously would be true because, until the Act of 1926, full-blooded devisees were not restricted; see Note 7.

16. It should be recalled that full-blood heirs who took remotely, that is, not from an allottee but from an heir, of an allottee, (directly or remotely) were required by the Act of 1908, to_ have their deeds approved by the appropriate county court, see Note 3a. The language of the amendment to Section 9 of the Act of May 27, 1908, in Section 1 of the Act of April 12, 1926, providing that approval must be had of any conveyance of a full-blood Indian of the Five Civilized Tribes of any in terest in land "acquired by inheritance or devise from an allottee of such land" would seem to no longer require approval of a conveyance by a remote full-blood Indian heir. However, the Circuit Court of Appeals in Grisso v. U.S., 138 F.2d 996 (10th Cir.

1943), held that the quoted clause qualified "devise" and not "inheritance" so that the restriction imposed by the Act of May 27, 1908 as referred to in Note 3a continued to apply, see Mills Supp. sec. 206-d.

Under the 1926 amendment, land is restricted in the hands of a full-blood devisee of an allottee. Chisholm v. House, 106 F.2d 632 (10th Cir. 1947)

16a. The law with reference to full-blood devisees is confused under the January 27, 1933 statute.

See Note 27 for a quotation of Section 1 of said Act. This section was designed to deal with the so-called tax-exempt lands. There are other inherited and devised lands with reference to which no tax exemption certificates were issued pursuant to the provisions of the Act of May 10, 1928. Section 8 of the Act of January 27, 1933, where inherited lands are dealt with and where deeds of full-blood heirs are required to be approved by the County Court, is silent as to devisees. It would seem, therefore, that it was the intention of Congress to eliminate the necessity of approvals where full-blood Indians take by devise in all cases except as to the tax-exempt lands mentioned in Section 1.

Semple, sec. 223, sums up the situation as to devisees as follows:

> "From 1908 to 1926 devisees were not restricted; from 1926 to 1933 devisees were restricted as to all lands, and from 1933 and thereafter devisees may have been restricted only as to lands that came within the scope of Section 1 of the Act of January 27, 1933, that is, tax-exempt lands. From and after the Act of August 4, 1947, all lands of half-bloods or more than half-bloods acquired by inheritance or devise are subject to be approved by the County Court, all distinctions between tax-exempt lands and other lands being eliminated." See Note 32.

Read out of context, Semple might be perceived as saying that from 1926 to 1933 devisees of whatever quantum of blood were restricted as to all lands. This is an incorrect perception. Prior to 1926 no devisees of any quantum of blood were restricted except for the second proviso in Section 9 of the Act of May 27, 1908, providing for children born to allottees of one-half or more Indian blood, born subsequent to March 4, 1906, see Note 7 including the caveat. The Act of April 12, 1926, imposed restrictions on devisees of full-blood only, see Note 11. However, the Act of January 27, 1933, Section 1, imposed restrictions on heirs, devisees, donees or purchasers with restricted funds where the entire interest in any tract of restricted and tax-exempt land which was owned only by restricted Indians. "Restricted Indians" was held to mean Indians of one-half or more Indian blood, see Note 24.

Semple,sec. 223, expresses the view that full-blooded devisees were unrestricted as to non-tax-exempt land. He cites one case in which this was so held, "Buck v. Jennings, No. 673 Civil, U.S. District Court for the Eastern District of Oklahoma [sic]." He cites another holding that full-blood devisees were restricted as to non-tax-exempt land, "Chisholm v. Buck, No. 765 Civil U.S. District Court for the Northern District of Oklahoma [sic].

The chart takes the conservative approach in not suggest ing that full-blood devisees were free of restrictions of non-tax-exempt land after the Act of 1933. This is because of the conflicting decisions in the Northern and Eastern Federal District Courts and the lack of appellate review of the point of law.

17. Section 5, Act of May 10, 1928, states: "That this act shall not be construed to impose restrictions heretofore or hereafter removed by the Secretary of the Interior or by operation of law, **,... "** Note 2 is applicable to show the land entirely freed from restrictions on July 27, 1908.

18. By the Act of May 10, 1928, Section 9 of Act of May 27, 1908, as amended by Section 1 of Act of April 12, 1926, is extended and continued in force for a period of 25 years from and including April 26, 1931, "except the provisions thereof which read as follows:

> 'Provided further, that if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from restrictions; if this be not done, or in the event the issue hereinabove provided for die before April 26, 1931; the lands shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided, that the word "issue" as used in this section, shall be construed to mean child or children: Provided further, that the provisions of Section 23 of the Act of April 26, 1906, as amended by this Act, are hereby made applicable to all wills executed under this section.'

which quoted provisions, be, and the same are, repealed, effective April 26, 1931."

As to heirs and devisees of restricted Indians, only full-blood Indians remained restricted under Section 2 of Act of May 10, 1928.

19. Last proviso in Section 2, Act of May 10, 1928, reads:
"Provided further, that the provisions in Section 23 of the Act of Congress approved April 26, 1906, (Thirty-fourth Statutes at Large, page 137), as amended by the provisions of Section 8 of the Act of Congress approved May 27, 1908, (Thirty-fifth Statutes at Large, page 312), be, and the same are hereby, continued in force and effect until April 26, 1956. The law as stated in Note 9 is re-established effective May 10, 1928."

Act of May 10, 1928, corrected the omission of the provisions of Section 8, in the April 12, 1926 act, Note 18.

20. Under the curative statute of July 2, 1945, no conveyance made by an Indian of the Five

Civilized Tribes on or after April 26, 1931, and prior to July 2, 1945, of land purchased prior to April 26, 1931, for the use and benefit of such Indian with funds derived from the sale of, or income from, restricted allotted lands and conveyed to him by deed containing restrictions on alienation without the consent and approval of the Secretary of the Interior prior to April 26, 1931, shall be invalid because such conveyance was made without the consent of the Secretary of the Interior.

This statute overcame the decision of U.S. v. Williams, 139 F.2d 83 (10th Cir. 1943), in which the Circuit Court of Appeals had held that land purchased with restricted funds continued under restrictions by virtue of the Act of May 10, 1928. See Note 15. All deeds in this category, however, executed after July 2, 1945, require approval of the Secretary of the Interior.

21. The Acts of June 27, 1933, and July 2, 1945, made no changes in the Law of May 27, 1908, as extended by Act of May 10, 1928, with reference to allottees. See Note 1.

22. The Acts of January 27, 1933, and July 2, 1945, made no attempt to re-impose restrictions on allottees whose land had been entirely freed from restrictions by operation of law, see Note 2, or where the Secretary of the Interior had previously removed restrictions.

23. Not until the passage of the Act of January 27, 1933, was there any specific mention of restrictions upon alienation as to purchased land, but in Section 1 of that act purchased land was mentioned along with lands acquired by inheritance, gift and devise, and as interpreted by the government are restricted in this act in the same manner in which allotted lands are restricted.

Semple, sec. 73, says:

> "It is estimated that there are a great many tracts of this type [gifts] as the policy of permitting restricted members of the tribes to make gifts to children or relatives has been approved and followed by the Department over a period of years and there are known to be tracts that have been deeded by a parent to a child for a consideration of $1.00, and it was the purpose of the Department to eliminate any possibility of these lands being unrestricted."

24. Under the Act of June 27, 1933, Indians of less than one-half blood, whites and freedmen who are heirs or devisees, re mained unrestricted. However, in Glennv. Lewis, 105 F.2d 398 (10th Cir. 1939), cert. denied, 308 U.S. 598 (1939), held that this Act did impose restrictions on heirs and devisees of one-half or more Indian blood. It is said, 105 F.2d at 401:

> "Sec. 1 of the Act of January 27, 1933, first deals with funds and other securities under the supervision of the Secretary of the Interior belonging to Indians of the Five Civilized Tribes of one-half or more Indian blood, enrolled or unenrolled. It imposes restrictions on such funds and makes them subject to the jurisdiction of the Secretary of the Interior until April 26, 1956. The first proviso of the section deals with restricted and tax-exempt land

belonging to members of the Five Civilized Tribes acquired by inheritance, devise, or gift, or by purchase with restricted funds by or for restricted In dians, and provides that such lands shall remain restricted and tax exempt while held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law.

The specific question presented is, Who are restricted Indians within the meanings of each proviso?

Under the Act of May 10, 1928, Indians of one-half or more Indian blood were restricted Indians and full-blood Indian heirs were restricted Indians. Under the. Act of April 12, 1926, full blood Indian heirs and devisees were restricted Indians. Hence, if Congress in using the phrase "restricted Indians," had in mind Indians who were subject to restrictions with respect to the incumbrance or conveyance of their lands at the time the act was adopted, the phrase would include Indians of the half-blood.

In that portion of the act which precedes the first proviso, Congress imposed restrictions as to funds and securities under the supervision of the Secretary of the Interior belonging to Indians of half or more Indian blood. The source of such funds was largely lands. If it were necessary to protect the funds, it would seem equally necessary to protect the source of such funds. Hence, it is reasonable to suppose that Congress intended to restrict the lands of half-bloods or more acquired by inheritance or devise.

Furthermore, the first proviso deals with lands acquired by inheritance or devise. Allotted lands acquired through inheritance or devise by full-blood Indians were already restricted by Sec. 9 of the Act of May 27, 1908, as amended by the Act of April 12, 1926, and to the extent of 160 acres when a tax exemption certificate had issued therefor, exempt from taxation by the Act of May 10, 1928, and it was unnecessary to impose restrictions or provide for tax exemption as to full-blood Indian heirs or devisees. This indicates an intention on the part of Congress to deal with an Indian heir or devisee of less than full blood.

Moreover, the subsequent Act of February 11, 1936, 49 Stat. 1135, c. 50, 25 U.S.C.A. sec. 393a, is a legislative construction that the first proviso of the Act of 1933 embraces members of the Five Civilized Tribes of one half or more Indian blood. The Act of 1936 permits "Indians of the Five Civilized Tribes* * * of one-half or more Indian blood, enrolled or unenrolled," to lease their resctricted land for a specified period. Unless the first proviso covers Indians of the half-blood, there could be no unenrolled Indians of the half-blood to whom the Act of 1936 could apply, for unenrolled Indians never received allotments, the special estates created by Sec. 9 of the Act of May 27, 1908, terminated April 26, 1931, and, prior to the Act of 1933, Indian heirs of less than the full-blood, whether enrolled or unenrolled, took inherited land free from restrictions, and needed no statutory permission to lease their lands.

Finally, such has been the administrative construction of the act. See Solicitor's Opinion, 54 Interior Decisions 382, 1934, and 3 Fed. Reg. (1938) pp. 877, 884."

25. The Act of 1933 imposed restrictions on heirs and devisees of one-half or more Indian blood under certain conditions, see note 24. Section 8 of the Act of 1933, reads in part as follows:

"No conveyance of any interest in land of any full-blood Indian heir shall be valid unless

approved in open court after notice, in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma in June, 1914."

The Circuit Court of Appeals in Murray v. Ned, 135 F.2d 407 (10th Cir. 1943), held that the language of the 1933 Act was broad enough to include any full-blood Indian heirs regardless of the fact that the lands were acquired by an Indian ancestor with his own unrestricted funds. The Supreme Court denied certiorari, 320 U.S. 781 (1943).

To ameliorate this situation, Section 2 of the Act of July 2, 1945, stated that all conveyances executed by Indians of the Five Civilized Tribes after January 27, 1933, and before July 2, 1945, of lands or interest in lands, which, at the time of acquisition by them, were free from restrictions, were confirmed and declared to be valid, irrespective of whether such conveyances were or were not approved by the Secretary of the Interior, or by any county court of the State of Oklahoma.

Factual situations other than those specifically involved in Murray v. Ned, might come within the scope of this curative act. Broadly speaking, the Act says that nothing contained in the Act of 1933,shall be construed to impose restrictions on lands free of restrictions at the date of acquision. The curative act not only cures past conveyances, but it declares that such lands are not in the future subject to the Secretary's approval, or to the approval of the county court.

26. Section 8 of the January 27, 1933 Act, provided a means for the approval of conveyance of a full-blood Indian heir. This section provided in part...." andno conveyance of any interest in land of any full-blood Indian heir shall be valid unless approved in open court [county court] after notice in accordance with rules of procedure in probate matters adopted by the Supreme Court of Oklahoma in June of 1914...." Notice this section applies only to full-blood Indian heirs. Full-blood devisees apparently are not affected. See note 16a.

Until the Act of August 4, 1947, considerable confusion surrounded the method by which conveyances of restricted heirs or devisees could be approved. Section 8 of the 1933 Act authorized the county court to approve only conveyances of full-blood Indian heirs. No provisions appear in that act for the approval of conveyances of Indian heirs if of one-half or more blood, but less than full-blood. Until the Act of 1933, only full-blood heirs or devisees were restricted. Also, there was no statutory provision whereby the Secretary of the Interior could remove restrictions on these newly restricted Indians. While this act in referring to such heirs said, "unless the restrictions are removed....in the manner provided by law", no law was provided for such removal.

Confronted with this problem in Kirby v. Parker, 58 F. Supp. 309 (E.D. Okla. 1944), the Federal District Court in considering the conveyance of a seven-eighths blood Indian heir said: "If his interest was restricted under the Act of 1933, it is sufficient to say that his deed was void. It is not necessary to speculate on how he might execute a valid conveyance.

The same difficulty is presented in considering the removal of restrictions by the Secretary of the Interior. By Section 9 of the Act of May 27, 1908, the death of an allottee removed all restrcitions upon the land, except that a conveyance by a full-blood Indian heir should be

approved by the county court. The only authority given by the section to the Secretary of the Interior to remove restrictions upon heirs, was in the case where the allottee of one-half or more Indian blood died, leaving issue surviving, born since March 4, 1906. This part of the section was eliminated in the Act of 1928, effective April 26, 1931.

In summary, an heir or devisee of one-half or more Indian blood, but less than a full-blood could not convey lands he inherited, was devised, or bought or received in gift if they were tax-exempt because there was no statutory provision for approving his deed. However, the Secretary of the Interior in a number of instances approved deeds of Indian heirs or devisees of one-half or more Indian blood but less than full-blood.

The county courts also approved a number of such conveyances. Section 9 of the Act of August 4, 1947, recognizing the confusion, validated and confirmed all conveyances including oil and gas or mineral leases, by Indians of the Five Civilized Tribes in Oklahoma of lands acquired by inheritance or devise, made after the effective date of the Act of January 27, 1933, and prior to August 4, 1947, that were approved either by a County Court in Oklahoma or by the Secretary of the Interior.

Meaning of approval "in open court" under the January 27, 1933 Act.

It would seem that no conveyance that was not approved in open court after notice in accordance with the Rules of Procedure in probate matters adopted by the Supreme Court of Oklahoma in June, 1914, would be valid, In re Ashshalintubbi, 178] 582, 63 P.2d 724 (1937).

27. Section 1 of Act of January 27, 1933, states in part.... "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 lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, butnot longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law.

Provided further, that such restricted and tax-exempt land held by anyone, acquired as herein provided, shall not exceed 160 acres."

Meaning of entire interest - that the Indians or persons inheriting an interest in tax-exempt lands had to be one-half or more Indian blood to be restricted. The lands would not be restricted except as to full-blood if any one of the heirs was of less than one-half blood. Full-bloods would be restricted under Section 8 of the Act of 1933, Welch v. Weems, No. 243 Civil, E.D. Okla., Jan. 18, 1941; Kirby v. Parker, 58 F. Supp. 309 (E.D. Okla. 1944); Brown v. Stufflebean, 187 F.2d 347 (10 Cir. 1951); Gates v. Curry, 301 P.2d 659 (Okla. 1956)

Meaning of restricted and tax-exempt land - Prior to April 26, 1931, all of the restricted lands of the Indians of the Five Civilized Tribes, i.e., the restricted allotments of living allottees and restricted allotments inherited by or devised to full-blood Indians were protected from' state taxation, U.S. v. Rickert, 188 U.S. 432 (1903); U.S. v. Shock, 187 F. 862 (C.C. E.D. Okla.

1911).

By Section 4 of the Act of May 10, 1928, Congress declared that on and after April 26, 1931, all the restricted lands of these Indians, allotted, inherited or devised in excess of 160 acres shall be subject to taxation by the State of Oklahoma in accordance with the laws of that state in all respects as unrestricted and other lands. Selections of tax-exempt acreage within the prescribed limits were to be made from restricted, allotted or inherited or devised lands with the approval of the Secretary of the Interior by each Indian owner or the superintendent for him By January 27, 1933, all selections of tax-exempt acreage had been made and approved.

Under the first proviso of the 1933 act; the lands must be both restricted and tax-exempt to come under the provisions of the section. At the time of passage of the act, January 27, 1933, the only land possessing both these characteristics were those lands which Indians had selected as their tax-exempt acreage under Section 4 of the Act of May 10, 1928. The tax-exempt selections were made from two classes of restricted land.

1. Restricted allotments of living allottees, with respect to which the Secretary of the Interior alone had the power to remove the restrictions.

2. Lands inherited by or devised to full-blood Indians in whose hands the lands were subject to restrictions that no conveyance by them should be valid unless approval by the proper local court.

28. The Act of January 27, 1933 was not retroactive, "Margold Opinion," 54 Interior Decisions 382, 3 Federal Register 877 (1938), also set out at length, Semple Appendix p. 992; Quincy
v. Texas Co., 185 F.2d 139 ClOth Cir. 1950); Moore v. Jefferson, 190 Okla. 67, 120 P.2d 983 (1942). Since there were no restrictions on Indian heirs or devisees of less than full-blood at the time of the allottees death before January 27, 1933, the land passed to these heirs, free from restrictions. The Act of January 27, 1933, did not re-impose restrictions on these heirs.

29. Acts of 1933 and July 2, 1945, made no change in the Act of April 26, 1906, relating to wills. See Darks v. Ickes, 69 F.2d 230 (D.C. 1934). Law of May 10, 1928, remains in effect, under both acts. See Note 19.

30. The Act of August 4, 1947, did not re-impose restrictions on allottees but validated and confirmed all removals of restrictions theretofore made by the Secretary of the Interior. It may be assumed the rule expressed in Note 2 continues effective under the Act of August 4, 1947.

31. The Act of August 4, 1947, did not impose restrictions on Indian heirs or devisees of less than one-half blood, white or freedmen.

32. Sections 1 and 8 of the Act of January 27, 1933, were repealed in their entirety by the Act of August 4, 1947. Indian heirs and devisees in the class and category indicated on the chart, could convey their interest provided their deeds were approved in open court by the county court in Oklahoma, in which the land was situated. Section 1 of the Act of August 4, 1947, sets out in detail the procedure for obtaining that approval.

Under the old statute the court that had jurisdiction was the court that had jurisdiction of the administration of the estate of a deceased allottee, and that gave rise to endless litigation, as it was always an issue of fact as to what court could have jurisdiction where no administration proceedings had ever been instituted.

Also, confusion existed when the court that had jurisdiction of the administration of the estate of a deceased allottee was one without the State of Oklahoma.

In Springer v. Townsend, 336 F.2d 397 (10th Cir. 1964), the court held that a sale under the 1947 Act did not require either a public sale nor competitive bidding. In Armstrong v. Maple Leaf Apartments, 508 F.2d 518 (10th Cir. 1975) it was held that the state probate court could not approve a conveyance of resctricted land over the objection of the Indian owner. On remand, 436 F. Supp. 1125 (N.D. Okla. 1977) it was held that the Act of 1947 was unconstitutional because it had not been included in the U.S. Code and was therefore not notice to the purchasers. For the subsequent history of this case see discussions beginning at 314 and 315

33. Act of August 4, 1947, made no change in the Law of April 26, 1906, relative to wills. See Note 19.

34. The Act of August 11, 1955, extended the period of restrictions against alienation, lease, mortgage or other encumbrance of lands belonging to allottees of the Five Civilized Tribes in Oklahoma of one-half degree or more of Indian blood for the lifetime of such Indians who own such lands subject to restriction on the date of this act, which said restrictions were due to expire on April 26, 1956, under the Act of May 10, 1928.

While the language of the Act does not make it clear that the first section of the Act of 1955 extended restrictions for the life of the owner, on allottees only as opposed to heirs and devisees, it is clear that this is so. The Act of 1955, Section 1, refers to extending the restrictions which were extended to 1956 by the Act of May 10, 1928. The only restrictions expressly extended to that date are the restrictions in the first section of the Act of 1928. Those restrictions refer to allottees only.

Further the legislative history makes it clear that it was restrictions on only allottees that were extended for their lives only.

> "There are two kinds of restrictions against the alienation or encumbrance of lands owned by Indians of the Five Civilized Tribes. One is a restriction against alienation or encumbrance without the approval of the Secretary of the Interior. This restriction applies to the homestead allotments of living allottees of one-half or more Indian blood and to

both homestead and surplus allotments of such allottees of three-fourths or more Indian blood. The death of an allottee removes this restriction on the land." S. Rep. No. 845, 84th Cong., 1st Sess. (1955) reprinted in [1955] U.S. Code Cong. & Ad. News 2970, 2971.

The act permits the Secretary of the Interior to remove restrictions not only on allotted lands and funds but on inherited and devised lands. He may remove the restrictions on application or on his own motion. The test in either case is that in the judgment of the Secretary, the Indian *"has* sufficient ability, knowledge, experience and judgment to enable him, or her, to manage his, or her business affairs, including the administrative use, investment and disposition of any property turned over to such a person and the income or proceeds therefrom, with such reasonable degree of prudence and wisdom as will be apt to prevent him, or her, from losing such property or the benefit thereof."

If the Secretary does not issue the order or disapprove the application within 90 days from the date of application, or if the Secretary on his own motion issues an order of removal of restrictions, tions, the Indian involved may apply to the county court for the county in which the Indian resides for an order setting aside the order of the Secretary or for an order removing the restrictions. Notice is required to be given the Board of County Commissioners, the Welfare Department of the state and county governments, to the local representative of the Commissioner of Indian Affairs, and any other persons the court considers appropriate. The county court after hearing shall issue an order removing restrictions or deny the application for an order to set aside an order of the Secretary issued without application if it determines the Indian able to manage his, or her, own affairs, or deny the application for removal of restriction or set aside an order of the Secretary, if it determines the Indian unable to manage his, or her, own affairs. The court shall furnish the Secretary and the applicant a certified copy of any final order. The final order may be appealed by the applicant, by Secretary, or by the board of County Commissioners in accordance with the probate law of Oklahoma.

Before and after the abolition of the old county courts in 1969, and the transfer of their power to the associate district courts, the question of the jurisdiction to determine heirs under the Act of June 14, 1918 and to approve conveyances under the Act of August 4, 1947 was raised with several members of the Oklahoma delegation to Congress. Obstructionists tactics by personnel of the BIA prevented anything being accomplished toward the resolution of the problem in Congress. Congress alone can legislate in Indian matters.

In Opinion No. 68-381, December 20, 1968, the Attorney General of the Stateof Oklahoma declared that district and associate district courts have authority to act under the above mentioned Acts.

On March 27, 1972, 25 C.F.R. sec. 16.7 (1979) was adopted. Therein, the Secretary under his rule-making power, 37 Federal Register 7082, proclaimed that the powers previously vested in probate and county courts had been vested since January 12, 1969 in the successor courts, including the right of appeal to successor appellate courts.

In Springer v. Townsend, 336 F.2d 397 (10th Cir. 1964), the court held that a sale under the 1947 Act, did not require either a public sale nor competitive bidding.

In Armstrong v. Maple Leaf Apartments, 508 F.2d 518 (10th Cir. 1975) it was held that the state probate court could not approve a conveyance of restricted land over the objection of the Indian owner. On remand, 436 F. Supp. 1125 (N.D. Okla. 1977) it was held that the Act of 1947, was unconstitutional because it had not been included in the U.S. Code and was therefore not notice to the purchasers. For the subsequent history of this case see discussions beginning at 314 and 315

35. The Act of August 11, 1955, did not reimpose restrictions on allottees where restrictions had been removed by operation of law or by the Secretary of the Interior. It may be assumed the rule expressed in Note 2 continues effective under the Act of August 11, 1955.

36. The Act of August 11, 1955, made no change in the status of these persons.

37. Section 4 of the Act of August 11, 1955, provides:

> "Except as provided in section 2 of this Act, nothing in this Act shall be construed to repeal or to limit the application of the Act of August 4, 1947 (61 Stat. 731), the provision of which shall continue in effect until otherwise provided by Congress.
>
> The most important feature of the Act of 1947, was the provision that:
>
> "[N]o 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, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated."

While on the other hand, the first section of the Act of 1955 says "the period of restrictions.., is hereby extended for the lives of the Indians who own such lands subject to such restrictions on the date of this Act", it is clear from the legislative history of the Act that it is only restrictions imposed upon allottees, which under the terms of the Act expire on the death-of the Indian owner. See note 34.

> The Senate Report on the Senate Bill which became the Act of 1955 says:
>
> "The second type of restriction affecting these Indians is a restriction against alienation or encumbrance without the approval of the county court of the county in which the land is located. This restriction applies to heirs and devisees of one-half or more Indian blood, but only to such lands owned by such devisees or heirs that were restricted in the hands of the deceased owner, without regard to whether they were acquired by allotment, inheritance, devise, gift, exchange, partition, or purchase with restricted funds (act of August 4, 1947, 61 Stat. 731). The 1947 act, contains no express provision with respect to the expiration date of the restrictions, and there is a difference of opinion as to whether

the restrictions will expire on April 26, 1956, or continue indefinitely.

> Enactment of 5. 2198 will extend for an indefinite period the restrictions under the 1947 act, and it extends the period of the first kind of restriction [those on allottees] for the lifetime of the Indians who own restricted lands on the date of enactment of the bill", S. Rep. No. 845, 84 Cong., 1st Sess. (1955) reprinted in [1955] Code Cong. & Ad. News 2970, 2971.

Thus it seems that heirs and devisees of one-half or more Indian blood of land which was restricted in the hands of their ancestor or testator are, or will be, restricted whether they owned the land on the effective date of the Act of 1955, or succeeded to it thereafter until the law is changed by Congress.

In Estate of Brown, 600 P.2d 857 (Okla. 1979), discussed in Note 8, the Oklahoma Supreme Court at least assumed that an heir or devisee who took the land in 1977, was bound as to intervivos conveyances under the 1955 Act.

38. Section 3 of the Act of August 11, 1955, continues in force Section 23 of Act of April 26, 1906, as amended by Section 8 of the Act of May 27, 1908, "as long as such properties remain restricted."

The period of restriction under this provision is not discussed in the Senate Report referred to in Notes 34 and 37. Since restrictions on allottees are continued for their lives and the restrictions on heirs and devisees are continued indefinitely, one would be safe only if he assumes that the will of no full-blood is good under the Act of 1955, if the will disinherits a parent, spouse, or child unless the will is approved as provided.

But notice the discussion of In Brown's Estate in Notes 8 and 37.