CREEK LAW

NOTE SIXTEEN

CREEK AGREEMENT, MARCH 1, 1901 - ALIENATION BY ALLOTTEES RATIFIED AND EFFECTIVE MAY 25, 1901, 31 STAT. 861, 863

> "Section 7. Lands allotted to citizens hereunder shall not in any manner whatsoever at any time be incumbered, taken or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.
>
> "Each citizen shall select from his allotment forty acres of land as a homestead, which shall be not taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed conditioned as above. * * *

The Supplemental Creek Treaty of June 30, 1902, 32 Stat. 500, 503, Section 16, reaffirms the above propositions of law in practically the same language, its only effect being the extension of the time to five years from the date of the Supplemental Agreement.

The Supplemental Agreement was ratified by proclamation of the President, August 8, 1902.

After August 8, 1907, the surplus land of said adult Creeks, except full-bloods, could be sold free from any restrictions and without the approval of the Secretary of the Interior. See discussion of §19 of the Act of April 26, 1906 in Note Five, supra page 132 at 134.

Where an allottee died between the adoption of the Original and Supplemental Agreements, it was held that the restriction as to surplus was to be measured from the date of the Supplemental Agreement.

Skelton v. Dill, 30 Okla. 278, 119 P.267 (1911) aff'd 235 U.S. 206 (1914).

ALIENATION BY MINOR ALLOTTEES

Section 4 of Original Creek Agreement, March 1, 1901, 31 Stat. 863, provided:

"Allotment for any minor * * * may not be sold during his minority."

This was not repealed by the Creek Supplemental Agreement, June 30, 1902, 32 Stat. 500. Minors, whether Indians or freedmen, are restricted both as to homestead and surplus.

U.S. v. Shock, 187 F. 862 (G.C. E.D. Okia. 1911)

Where a minor took by conveyance from his mother, an unrestricted Creek, he was not restricted because he took as a purchaser from his grantor.

Barlow v. Soldofsky, 84 Okla. 153, 202 P.1009 (1921).

NOTE SEVENTEEN

HOMESTEAD ALIENATION BY CREEK HEIRS

Creek Supplemental Agreement, 32 Stat. 500, 503 (1902), Section 16 provided:

> "The homestead of each citizen shall remain after death of the allottee for the use and support of the children born to him after May 25, 1901, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land embraced in his homestead shall descend to his heirs, free from such limitations * * * ."

Where there are no surviving children born since May 25, 1901, the homestead when selected by the allottees, in the absence of a will, descends to heirs free from restriction.

Mills, Section 134, doubts that the homestead passes to the heirs free of restrictions as was the case of the Choctaw-Chickasaws in Mullen v. U.S., supra. He argues that "free from such limitations" is not "free of restrictions". He argues that under Section 7 of the Creek Original and Section 16 of the Creek Supplemental Agreements that in the hands of heirs it would be restricted for five years under the respective acts.

But there is support for the proposition as stated.

U.S. v. Cook, 225 F.756 (8th Cir. 1915).
In re Land of Five Civilized Tribes, supra.
Oats v. Freeman, 57 Okla. 449, 157 P.74 (1916).

Indeed, in Nixon v. Good, 87 Okla. 19, 208 P.803 (1922), and Nixon v. Harter, 87 Okla. 21, 208 P.804 (1922), the holding in the cases has been said to be a rule of property.

It was held in Woodward v. DeGraffenried, 238 U.S. 284 (1915), that where a member of the tribe had been allotted under the Curtis Act, June 28, 1898, 30 Stat. 495, prior to the Original Creek Agreement that the allottee took only "the exclusive use and occupancy of the premises" and, therefore, had not received his allotment. When these allotments were confirmed by

subsequent Acts, the "heirs" who took were not restricted on the authority of Skelton v. Dill, supra, which had held that when an allotment was made to heirs on behalf of a deceased member the heirs took without restrictions.

Deming Inv. Co. v. Bruner Oil Co., 35 Okla. 395, 130 P.1157 (1913)
Mills § 132.

NOTE EIGHTEEN

Creek Original Agreement, 31 Stat. 861, 870, Section 28:

" * * * and if such citizen has died since that time, or may hereafter die before receiving his allotment * * * , the lands * * * shall descend to his heirs according to the law of descent of the Creek Nation, and be allotted and distributed to them accordingly."

Under this section the Creek lands, both surplus and homestead, when allotted after the death of the ancestral allottee, descended to the heirs free.

Tiger v. Western Inv. Co., supra.
Harris v. Bell, 254 U.S. 103 (1920) (land allotted to heirs of an after-born who died prior to allotment).
Skelton v. Dill, supra.
Mullen V. U.S., supra.
Rentie v. McCoy, supra.
In re Lands of Five Civilized Tribes, supra.

NOTE NINETEEN

HOMESTEAD - ALIENATION BY WILL UNDER CREEK AGREEMENT

See pertinent language from Section 16, 32 Stat. 500, 503 in Note Seventeen, supra.

The Creek Nation is the only nation in which land was subject to will prior to April 26, 1906. A Creek citizen who died before the Original Creek Agreement could not dispose of his land by will.

Coachman v. Sims, 36 Okla. 536, 129 P.845 (1913).

In Grayson v. Thompson, 77 Okla. 77, 186 P.236 (1920), it was argued that the language created only a life estate in the allottee with a contingent remainder in the children. This argument no doubt was inspired by Mills, Section 137. However, it was held that he took a fee with a restriction on alienation and a limitation of the descent thereof. When subsequent legislation removed those restrictions, the allottee could convey good title fee simple to the property in question.

Fitzpatrick was aware of uneasiness among his contempo raries concerning the validity of the section permitting a devise of the homestead. He said:

"It is true that the court in Wilson v. Greer, 50 Okia. 387, 151 P.629 (1915) said:

'The restriction was not on his power to make the will but applied only to his right to pass the title to this particular piece of land by will. That he had no right to do so prior to April 26, 1906, is settled.'

Citing: 'Hayes v. Barringer, 168 Fed. 221, and Sec. 60, Bledsoe, 2nd Ed.'"

The Barringer case was a Chickasaw case and not in point, and the section of Bledsoe cited holds the contrary view; furthermore, this inadvertent expression of the court was obiter as in the case under consideration the will was made before the Creek Agreement took effect and the devisee died after the Act of 1906 took effect, the court holding, and properly so, that the will was ambulatory and spoke from the death of the devisee.

This unfortunate expression in the Wilson-Greer case has been entirely overlooked by the court in more recent decisions holding the contrary view, and establishing beyond question the rule that such will is valid.

In Oakes v. Freeman, supra, it is said:

" * * * the homestead goes to the heirs free from all restrictions provided the allottee dies without children born since May 25, 1901, and does not dispose of it by will."

In Rentie v. McCoy, supra, it was held:

"But if he has no such issue, then he may dispose of his homestead by will free from such limitations."

In In re Lands of Five Civilized Tribes, supra, we find this language:

"In either event it is provided that in the absence of children born after May 25, 1901, the allottee may dispose of his homestead by will, and if it be not done it shall descend to his heirs, in either case free from 'the limitations herein imposed.

In In re Brown's Estate, 22 Okla. 216, 97 P.613 (1908), it is said:

"As in this case there were no children born to devisee after May 25, 1901, there was no reason why she should not dispose of the land embraced in the homestead by will."

It should be noted that the provision for Creek children born after May 25, 1901 was eliminated by the provisions of the Act of April 26, 1906, § 23. However, the Act of May 27, 1908, § 9, see Note 9, adopted a similar provision for the issue of any member of the Five Civilized Tribes of one half or more Indian blood where the issue was born since March 4, 1906.

The conditions of alienation under Acts of 1904, 1906 and 1908 discussed in Notes Three through Nine, apply with equal force to the Creeks.