

Michigan State University College of Law

INDIGENOUS LAW & POLICY CENTER

WORKING PAPER

Indian Claims and the Real
Origins of Certain Equitable
Defenses

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This working paper covers three areas of law concerning the equitable defenses of laches, acquiescence, and impossibility. The first is a detailed history of the origins of the defenses. The second is a review of the application of the defense in modern American courts. The third is a review of the application of the defense in Indian claims cases. The intent of this memorandum is to give a detailed and accurate account of these equitable defenses to be used to counter the expected State argument for the defenses to be applied in Indian land treaty claims cases.

I. Historic Origins of the Equitable Defenses

A. Laches

i. Laches and Sovereign Immunity in England

B. Acquiescence

C. Impossibility

II. Review of Equitable Defenses in U.S. Courts

A. Laches

i. Laches and Sovereign Immunity in the United States

B. Acquiescence

C. Impossibility

III. Application of Defenses in Indian claims cases

A. Laches

B. Acquiescence

i. Congressional Acquiescence

C. Impossibility

I. The Historic Origins of the Equitable Defenses

A. Laches

Laches is an equitable defense, developed by early English courts. Equity courts were courts of “conscience,” bound only by what the chancellor thought was “substantial justice.” W. S. Holdsworth, *A History of English Law*, Vol. 5, Methuen & Co., 337 (1937 2d Ed.). Holdsworth reflected that this type of court led to certain problems, for example,

[i]t is equally clear, that, in the absence of any fixed principles to guide the chancellor as to what course was in the circumstances equitable, the question whether in any given case relief should be granted, depended upon the view which the chancellor took of the facts of the case.

Id., 336.

To counter this capriciousness, English courts began to develop various equitable remedies and standards, reflected in the growing common law. For example, laches was developed to prevent a party from delaying in bringing his claims. (“But it was quite clear that equity was not prepared to assist those who slept upon their rights.” *Id.*, 329) Not only were statutes of limitations limited to actions at law, but they were a relatively new legal development in the 1600’s. *Id.* Laches applied to actions in equity, and by the seventeenth century the notion of laches, or delay, had been a part of English common law for 300 years.

The equitable doctrine of laches has been traced back to the year 1311 by Antoni Vaquer, *Verwirkung Versus Laches: A Tale of Two Legal Transplants*, 21 Tul. Euro. Civ. LF 53, 55 (2006). In that case, a property inheritance dispute, land devised by a brother to his sister and her husband, was further devised by the husband to a third party. In the case where the wife, via her second husband, tried to recover the land, the court held that “the statute does not help her at all, for this writ is at the common law.” *Gascelyn v. Rivere*, 4 Edward II (1311), Year Books Series v. 9 (1925), 50, 52. The court further noted

"[t]hat is not wonderful, for he could have recovered if he had used his action in the lifetime of his father; so that the laches and his own negligence will turn to his disadvantage. But in this case it is absolutely necessary that the wife await the death of her husband. Therefore a great hardship would ensue if she were barred . . ."

Id. at 54.

This early application demonstrates the doctrine’s flexibility. Were the claimant to have been a man, he would have been barred by laches. However, since the claimant was a woman (through her second husband), she could not bring the claim until the death of her

first husband. Therefore, it would be inequitable to bar her claim based on the passage of time.

The word “laches,” itself stems from the French word, “la lachesse,” of similar pronunciation, for “negligence” or “delay.” *Id.* While later courts did not always use the term “laches,” it is clear that a delay in taking action would result in an adverse result for the plaintiff.

Upon the hearing of the matter it appeareth, that the lands in question have been in the defendants and their possession, by whom they claime by the space of eighty years; Therefore ordered and decreed the defendants to be dismissed.

Blackwell v. Simpson, Choyce Cases, 163 (1582-1583).

The Plaintiff seeks to have a Conveyance for his Father’s Estate set aside, which was made twenty Years since, when he was eighty Years old and *non compos mentis*. This Court was of Opinion and declared, that after twenty Years and two Purchasors, it was not proper for this Court to examine a *non compos mentis*, and did dismiss the Bill.

Winchcomb v. Hall, 1 Ch. Rep. 39 (1629-30).

A further examination of historical authorities has revealed that laches was most often applied by English courts in cases involving property interests. *See*, W. S. Holdsworth, *A History of English Law*, Vol. 5, Methuen & Co., 329 (1937 2d Ed.). Such cases might have involved actions on bonds, liabilities to pay rent, legacies, and the validity of conveyances. *Id.* In the 1613 case of *Byden v. Loveden*, it was determined that a defendant should prevail on equitable grounds where he had enjoyed possession of an estate for twenty-five years, despite the fact that he did so without livery or seisin. *Id.*

Further refinements were made to the doctrine of laches, moving from simple delay in time to a two part test. As noted in *Developments in the Law, Statute of Limitations*, 63 Harv. L. Rev. 1177 (1950),

the doctrine of laches is more flexible than statutory limitations in that it is not controlled solely by the passage of time. Traditionally there is no laches unless the plaintiff knew, or reasonably should have known, of the existence of the cause of action, and unless the delay was prejudicial to the defendant.

Therefore, in addition to a delay in time, the plaintiff must be aware of his claim and not bring it, and the defendant must also show that the delay was in fact prejudicial. As stated in *Penny v. Allen*,

Mere lapse of time does not bar in equity any more than at law: it is an ingredient which, with other circumstances, may lead the Court to draw inferences unfavourable to the claim of a party who has let twenty or nearly twenty years elapse without asserting his right. It may in such a case be supposed, that, if he had proceeded earlier, the facts might have been more clearly shewn, but there is nothing here to lead to such a supposition.

7 De G M & M. 409 (1857)

In an early definition from *Lindsay Petroleum v. Hurd*, (1874) LR 5 Privy Council 221, at 239-40, Sir Barnes Peacock stated:

Now the doctrine of laches in Courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy was afterwards to be asserted.

It is important to note, however, that the rationale for a defendant to plead the doctrine of laches was at its strongest where the plaintiff's action caused the loss. "A fortiori the plaintiff could not succeed in getting relief if the loss had occurred through his own misconduct." W. S. Holdsworth, *A History of English Law*, Vol. 5, Methuen & Co., 329 (1937 2d Ed.); See also Hon. Sir Robert Megarry, *Snell's Principles of Equity*, Sweet & Maxwell Ltd., 35 (1973 27th Ed.) ("Delay will accordingly be fatal to a claim for equitable relief if it is evidence of an agreement by the plaintiff to abandon or release his right....").

i. Laches and Sovereign Immunity in England

At English common law, parties could not avail themselves of the defense of laches against the Crown, as immunity from such a defense was considered an inherent attribute of sovereignty. See *The Attorney General v. Norstedt*, 146 E.R. 203, 205 (1716) ("In the case of the Crown, there can be no laches as a reason for precluding its claim at any distance of time, as no delay can defeat its rights.").

B. Acquiescence

An early case demonstrates the confusion between acquiescence and laches. In the case of *Smith v. Clay*, Lord Camden stated that "[a] court of equity...has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time" 3 Bro. C.C. 646 (1767). In this case, the party did not acquiescence to an

action, but rather did not bring his claim in a timely manner. The party was aware of his claim, but did nothing to remedy it, which is a laches defense.

Acquiescence, however, is a lack of action at the time of the wrong. Another English case describes it as when

. . . a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence.

Duke of Leeds v. Earl of Amherst, 2 Ph 117, 123 (1846)

A later case claims acquiescence

does not accurately express any known legal defence [sic]; but if used at all, it must have attached to it a very different signification according to whether the acquiescence alleged occurs while the act acquiesced in is in progress or only after it has been completed. If a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, who might otherwise have abstained from it, to believe he assents to its being committed, he cannot afterwards be heard to complain of the act.

De Bussche v. Alt, All ER Rep 1247 (1878)

The court also states that

[m]ere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the lame of laches it may afford a ground for refusing relief under some particular circumstances;

Further,

even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and, therefore, not binding.

Id. (emphasis added).

The court distinguishes in this case between “mere submission” and acquiescence, the latter requiring an action or inaction which knowingly gives the impression the act is sanctioned by the injured party.

C. Impossibility

Blackstone briefly mentions impossibility when discussing the requirements of tenancy by the curtesy. 2 *Blackstone Commentaries* 127. It is “impossible to have” a tenancy by the curtesy without fulfilling four requirements. Blackstone goes on to say “*Impotentia excusat legem* or powerlessness excuses (or dispenses with) law,” *Id.* Black’s Law Dictionary interprets the maxim as “The impossibility of doing what is required by the law excuses nonperformance or nonenforcement.”

Impossibility was used almost entirely in the field of contracts, and was not considered an equitable defense. Neither *Snell’s Principles of Equity*, nor Pomeroy’s *Equity Jurisprudence* mentions impossibility as a defense. *Snell’s* only mentions impossibility in regards to carrying out the terms of a trust, related to the *cy-pres* doctrine. Hon. Sir Robert Megarry, *Snell’s Principles of Equity*, Sweet & Maxwell Ltd., 162 (27th Ed. 1973). The confusion likely stems from the fact that impossibility is an excuse to performance of a contract, and can be used to preserve an equitable result in a breach of contract.

Some early English cases allowed impossibility as an excuse for performance.

They did so, for example, when the performance was illegal [Abbott of Westminster v. Clerke, 73 Eng. Rep. 59, 63 (K.B. 1536)], or the party obligated to perform had died [Hyde v. Dean of Winsor, 78 Eng. Rep. 798 (K.B. 1597)], or the object bailed had been destroyed by an “act of God,” [Williams v. Hide, Palm. 548 (1624) or a plague suspended construction work [H.Rolle, Abridgment 540, Cond. (G) 10 (London, 1668)].

James Gordley, *Impossibility and Changed and Unforeseen Circumstances*, 53 Am. J. Comp. L. 513, 521 (Summer, 2004).

However, the leading English case on impossibility was *Taylor v. Caldwell*, 122 Eng. Rep. 309 (K.B. 1863), where a musical hall was destroyed by fire before the owner could rent out the musical hall for four contracted performances. *Id.*, 312. The judge in this case held

In none of these [bailment or chattel] cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance. We think, therefore, that the Music Hall

having ceased to exist, without fault of either party, both parties are excused . . .”

Id., 314-351.

This case is considered to be the first use of impossibility as an excuse to perform a contract.

II. A modern review of the application of the defenses in U.S. Courts

A. Laches

Though the United States did not have separate equity courts, equitable claims could still be brought, and equitable defenses were allowed by the courts. From an early cases in U.S. Courts, however, judges had “hopeless confusion in nomenclature,” 4 John Norton Pomeroy, *Pomeroy’s Equity Jurisprudence* §1440 at 3410 (4th ed. 1919), often substituting laches for acquiescence or vice versa. However, by 1902, the U.S. Supreme Court claimed

The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to find relief.

O’Brien v. Wheelock, 184 U.S. 450 (1902)

In the United States, laches was initially used as a defense in cases involving property interests, such as real property and bank notes. *See e.g., French’s Executrix v. Bank of Columbia*, 8 U.S. 141 (1807); and *Prevost v. Gratz*, 19 U.S. 481 (1821). While length of time often worked against the claimant, if the injury were concealed by active fraud on the part of the defendant, the courts were less likely to bar the claim under laches.

In *Prevost*, the Plaintiff, successors in interest to the beneficiary of a secret trust, contended that the trustee, to whom the Defendants were successors in interest, had breached fiduciary duties through the fraudulent disposition of lands 40 years prior to the claim. *Id.* In response to the claim of laches by the Defendants, the Court stated:

It is certainly true, that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time, during which the fraud has been successfully concealed and practised, is rather an aggravation of the offence, and calls more loudly upon a Court of equity to grant ample and decisive relief.

Id. at 497-98.

Another public policy advanced by laches was the preservation of necessary evidence. In *Prevost*, the availability of evidence appeared central to the Court's consideration of laches in the case. *See Id.* at 498 ("But length of time obscures all human evidence."). The Court eventually found in favor of the Defendants; however, its finding was based upon a review of the evidence, rather than upon laches. It could reasonably be contended, then, that *Prevost* permits a rebuttal against an assertion of laches based upon fraud, but establishes a high evidentiary requirement on the part of the plaintiff.

The existence, or lack, of evidence continued to be a main element in the U.S. application of laches, for example

Where important evidence in behalf of the defendant has been lost during the delay of the complainant, he will generally be barred from relief. The loss may result from death or incapacity of some of the witnesses. Again, the delay may be so long that under the circumstances many of the important facts have become obscured.

4 *Pomeroy's Equity Jurisprudence*, §1443 at 3425.

However, Pomeroy was concerned that the theoretical basis for the defense of laches was being overturned by U.S. Supreme Court decisions. He stated the Supreme Court was more willing to use laches to dismiss a claim if the property in question went up significantly in value.

The courts profess to find in the plaintiff's delay under such circumstances an element of injury to the defendant consisting, apparently, in the latter's uncertainty whether suit will or will not be brought; and base the doctrine of laches not on the unfairness of the plaintiff's conduct, *but rather on motives of public policy against the disturbance of possessory titles, however acquired.*

Id., §1444 at 3428 (emphasis added).

Pomeroy goes on to criticize this use of laches as public policy favoring those who are able to increase the value of their ill-gotten property over those who have actual rights to the property.

It practically amounts to saying, that if the defendant's wrong has turned out to be an enormously profitable one to him, that affords a reason, either alone or in connection with other reasons, why he should be protected in the enjoyment of his profit by a court of equity; and the greater the profit, the stronger the protection . . . The motives of public policy and the repose of society by which this favoritism shown to the defense of laches has been justified

seem rather appropriate for the consideration of a legislature than of a court, and hardly warrant the court's overruling a legislative policy already expressed in statutes of limitation.

Id., §1444 at 3431 n.73.

Laches is an affirmative defense, and must be brought by the defendant to the action. The burden of proof is on the defendant, who must demonstrate the plaintiff's knowledge of the claim, the plaintiff sat on the claim, and that the delay was damaging to the defendant. *Costello v. United States*, 365 U.S. 265 (1961). In addition, if there is a statute of limitations, or the statute has been expressly extended, the defendant faces an even higher burden in bringing laches before the time under the statute has tolled.

When a suit is brought within the time fixed by analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches.

Kelley v. Boettcher, 85 F. 55, 62 (8th Cir., 1898).

Costello v. United States, 365 U.S. 265 (1961) is one of the most influential modern cases in delineating the current doctrine of laches. The case involved an individual who was naturalized as a United States citizen in 1925, but who subsequently had his citizenship revoked in 1959 due to willful misrepresentation on his original citizenship application. *Id.* at 266. The defendant asserted the defense of laches, which prompted the Court to respond: "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *Id.* at 282.

Costello, then, makes clear that laches is an affirmative defense, which places the burden on the defendant to prove that the plaintiff has satisfied the elements. The *Costello* test is now the applicable test for the assertion of laches. See e.g., *Fuji Machine Manufacturing Co. v. Hover-Davis, Inc.*, 60 F.Supp.2d 111, 115 (W.D.N.Y. 1999) (stating that the defendant "must prove" unreasonable delay and prejudice to the defendant as a result thereof); and *Conopco v. Campbell Soup Co.*, 95 F.3d 187, 191 (2nd Cir. 1996) ("...the burden remains on the defendant to prove the defense.").

i. Laches and Sovereign Immunity in the United States

This concept was carried over to the United States and adopted by the Supreme Court. *United States v. Kirkpatrick*, 22 U.S. 720, 735 (1824) ("The general principle is, that laches is not imputable to the Government."). The Court did add in *Kirkpatrick*, however, that "this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy." *Id.*

In a later case, though, the Supreme Court noted that the roots of the government's immunity from laches are found in its sovereign authority. See *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 132 (1938) (“...that the sovereign is exempt from the consequence of its laches...appears to be a vestigial survival of the prerogative of the Crown.”). The Court in *Guaranty Trust* later added that this immunity is “equally applicable to all governments,” *Id.* (citing *United States v. Hoar*, 26 F.Cas. 329 (C.C. Mass. 1821)), including “domestic ‘sovereign’” governments. 304 U.S. at 133 (emphasis added).

Sovereign immunity from laches primarily exists where the government is enforcing its own rights, such as the collection of public debt. See e.g., *Dox v. United States Postmaster General*, 26 U.S. 318, 325 (1828); and *United States v. Thompson*, 98 U.S. 486 (1878).

The connection between sovereignty and immunity from laches can also be seen in *Inhabitants of Topsham v. Blondell*, 82 Me. 152 (1889), where the Court held that municipal governments are not immune from statutes of limitation because they lack inherent sovereignty.

In this manner, then, the doctrine of immunity from laches is considered a very close relative to the doctrine of sovereign immunity:

Nullum tempus originally derived from the same common law principals that drove sovereign immunity. The crown could not be negligent, and therefore could not suffer from any negligent delay, just as it could not suffer for negligently causing its citizens injury. Thus the ‘great public policy of preserving the public rights, revenues, and property from injury and loss, [sic] by the negligence of public officers’ justifies immunity to statutes of limitations, just as it had justified sovereign immunity. Another policy justification of sovereign immunity, the impracticality of suing the sovereign in a judicial system created by the sovereign, is also shared by statutes of limitations when used to constrain the very government which created them.

Joseph Mack, *Nullum Tempus: Governmental Immunity to Statutes of Limitation, Laches, and Statutes of Repose*, 73 Def. Couns. J. 180, 185 (April 2006).

Much like the doctrine of sovereign immunity, laches, and its law counterpart, statutes of limitations, are only applied to the sovereign where expressly made to do so. *Hoar*, 26 F.Cas. at 330. Finally, the relationship between the two doctrines is so close that it has been understood by some jurisdictions as to imply the abrogation of immunity from laches where immunity from suit has been successfully abrogated. 73 Def. Couns. J. at 187.

The modern Supreme Court has also remained true to the maxim that laches will not be imputed against the sovereign. In *Illinois v. Kentucky*, 500 U.S. 380 (1991), the Supreme

Court was called upon to determine the boundary between the State of Illinois and the Commonwealth of Kentucky. There, the Court stated “the laches defense is generally inapplicable against a state.” *Id.* at 388. It later added that while it disfavors untimely assertion of rights in interstate boundary disputes, that the proper defenses are prescription and acquiescence. *Id.*

In a prior case, the Supreme Court was called upon to determine whether the State of Mississippi conveyed valid title to submerged lands where a private entity had record title to those lands. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). Mississippi claimed its title by virtue of gaining statehood in 1817, whereas Phillips Petroleum asserted that their century-long record ownership of the land in question resulted in settled expectations in the continued enjoyment of the land. *Id.* at 481-82. The Court held:

The fact that petitioners have long been the record title holders, or long paid taxes on these lands does not change the outcome here. How such facts would transfer ownership of these lands from the State to petitioners is a question of state law. Here, the Mississippi Supreme Court held that under Mississippi law, the State’s ownership of these lands *could not be lost via adverse possession, laches, or any other equitable doctrine.*

Id. at 484 (emphasis added). The Court went on to affirm the judgment of the Mississippi Supreme Court, that the State of Mississippi acquired fee title to the lands in question by virtue of gaining statehood.

And finally, with regard to sovereign immunity from laches, Justice O’Connor’s dissenting opinion in *Block v. North Dakota*, 461 U.S. 273 (1983), has frequently been cited to support the enduring proposition that sovereign governments are immune from the defense of laches. There, she stated:

The common law has long accepted the principle ‘*nullum tempus occurrit regi*’ – neither laches nor statutes of limitations will bar the sovereign. [citations omitted] As this Court has observed, ‘So complete has been its acceptance that the implied immunity of the domestic ‘sovereign,’ state or national, has been universally deemed to be an exception to local statutes of limitation where the government, state or national, is not expressly excluded.’ [citations omitted] In this country, courts adopted the rule, not on the theory that an ‘impeccable’ sovereign could not be guilty of laches, but because of the public polices served by the doctrine. The public interest in preserving public rights and property from injury and loss attributable to the negligence of public officers and agents, through whom the public must act, justified a special rule for the sovereign.

Id. at 294.

B. Acquiescence

U.S. Courts also adopted the equitable defense of acquiescence, though often confused it with laches, as noted above. Laches is delay of bringing a claim, while acquiescence, often used in property cases, is active acceptance of an action. As Pomeroy states

[t]he acquiescence must be the knowledge of the wrongful acts themselves and of their injurious consequences; it must be voluntary, not the result of accident, nor of causes rendering it a physical, legal, or moral necessity, and it must last for an unreasonable length of time, so that it will be inequitable even to the wrong-doer to enforce the peculiar remedies of equity against him.

2 *Pomeroy's Equity Jurisprudence*, §817 at 1677.

Acquiescence was often used in adverse possession cases or prescriptive easements. It also applies when seeking “purely equitable relief against fraud.” In addition, Pomeroy notes, “[i]f one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent.” *Id.* §818 at 1680.

A more recent approach to the doctrine of acquiescence has been found in boundary disputes among the states. One of the oldest, *Indiana v. Kentucky*, 136 U.S. 479 (1890), focused on the fact that Indiana waited 70 years after becoming a state before bringing a claim against Kentucky for the Green River island. The Court stated

On the day [Indiana] became a state, her right to Green River island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of complaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty, both as to soil and jurisdiction, over the land. On that day, and for many years afterwards, . . . there were, perhaps, scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two states now hinge; and yet she waited for over 70 years before asserting any claim whatever to the island, and during all those years *she never exercised, or attempted to exercise, a single right of sovereignty or ownership over its soil*. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenues. This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the state of Kentucky, such omission to take any steps to assert her present claim by the state of Indiana, can only be regarded as a recognition of the right of Kentucky too

plain to be overcome except by the clearest and most unquestioned proof. It is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.

Id., 510 (emphasis added).

In 1926, Michigan brought a suit in equity to determine “the boundary between the states of Michigan and Wisconsin from the mouth of the Montreal river at Lake Superior to the ship channel entrance from Lake Michigan into Green Bay.” *Michigan v. Wisconsin*, 270 U.S. 295, 298 (1926). The Court held that the “decree . . . will be for Wisconsin,” citing the acquiescence language used in *Indiana v. Kentucky*, 136 U.S. 479 (1890).

The same issues arose years later in *Ohio v. Kentucky*, 410 U.S. 641 (1973), but led to the same holding. In this case, Ohio sued Kentucky to “establish a boundary line between the states where they were separated by the Ohio River, and to declare that each of the states had equal and concurrent jurisdiction over the Ohio River” *Id.* The Court stated, “for [Ohio’s] long acquiescence in the location of its southern border at the northern edge of the Ohio River, and its persistent failure to assert a claim to the northern half of the river, convince us that it may not arise the middle-of-the-river issue at this very late date.” *Id.*, at 674. The Court relied on *Indiana v. Kentucky*, and also *Michigan v. Wisconsin*, and explained, “not, in the light of the longstanding and unequivocal claims of Kentucky over the river, and Ohio’s failure to oppose those claims, may Ohio credibly suggest that it has not acquiesced.” *Id.* at 651.

Again, acquiescence, as with laches, seems to be used to protect the current landholders, regardless of how the land was acquired. These cases focus less on the merits of the claims than on the length of time it took the states to bring the claims. However, it is noted by Pomeroy, that the “material facts” of a potential claim must be “unknown” to the party “claiming the benefit of the estoppel, not only at the time of the conduct . . . but also at the time when that conduct is acted upon by him.” 2 *Pomeroy’s Equity Jurisprudence*, §810 at 1662. While extensive research into the clean hands defense is beyond the scope of this memo, it is well settled that “he who seeks equity must do equity, and He who comes into equity must come with clean hands.” *Id.*, §816 at 1676.

C. Impossibility

Impossibility was also adopted in the United States but primarily as a contracts claims defense. Prior to the advent of the Uniform Commercial Code, courts generally recognized three classes of cases in which performance was excused:

- (1) when performance is made illegal by legislative act or by judicial, executive, or administrative order;

- (2) death or illness of the promisor, where his particular performance was bargained for; and
- (3) non-existence or injury of a specific thing or person necessary for performance, or the material deterioration of such specific thing

Current Decisions, Contracts-Impossibility-Inaccessibility of Usual and Customary Route, 8 Wm. & Mary L. Rev. 679, 681 (1966-1967).

There is no common law defense of impracticability separate from the contracts defense of impossibility. The doctrine of impracticability stems from the Uniform Commercial Code, which states

Delay in delivery or non-delivery . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made . . .

UCC, §2-615

It should be noted that in addition to contracts claims, impossibility has also been legal defense against a criminal charge of a crime. In this context, there is both factual impossibility and legal impossibility. Rollin M. Perkins and Ronald N. Boyce, *Criminal Law*, 627 (Foundation Press, 3rd Ed. 1982). While factual impossibility is not a defense to a crime, legal impossibility is:

Legal impossibility refers to those situations in which the intended acts, even if successfully carried out, would not amount to a crime. Thus, attempt is not unlawful where success is not a crime, and this is true even though the defendant believes his scheme to be criminal.

United States v. Frazier, 560 F.2d 884, 888 (8th Cir. 1977)

However, impossibility was not an ancient equitable defense used in either England or the United States. The recent Supreme Court's use of the "doctrine" of impossibility in *Sherrill* can be traced back only to *Yankton Sioux Tribe v. United States*, 272 U.S. 351 (1926), discussed below.

III. Application of the Defenses in Indian claims cases

A. Laches

The majority in the Second Circuit's *Cayuga* decision held that laches was applicable to the United States because it was not asserting its own public rights, but rather the rights of a third party – the Cayuga Nation. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 279 (2nd Cir. 2005) (stating that laches may be applicable where the United States is seeking

to enforce private rights, including those of tribes with whom it shares a trust relationship).

In a prior case, however, the United States Supreme Court held exactly the opposite. *Board of Commissioners of Jackson County, Kansas v. United States*, 308 U.S. 343 (1939). There, the Court stated,

...state notions of laches and state statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise...[t]his is so because the immunity of the sovereign from these defenses is historic.

Id. at 351.

In *Jackson County*, the United States was seeking the recovery of taxes, plus interest, on behalf of a tribal member who had her trust land patent improperly cancelled in favor of a fee simple land patent. *Id.* at 348.

In *Ewert v. Bluejacket*, 259 U.S. 129 (1922), the Court was called upon to apply the doctrine of laches where an individual purchased Indian land in violation of a federal statute restricting alienation. In *Bluejacket*, a special assistant to the United States Attorney General purchased land from a tribal member in violation of a law prohibiting the purchase of Indian lands by a “person employed in Indian affairs.” *Id.* at 135. The heirs of Bluejacket, the tribal landowner, brought a suit 7 years following the conveyance to recover rent and royalties derived from the land. *Id.* at 133. The Court found in favor of Bluejacket’s heirs, stating:

[The] equitable doctrine of laches, developed and designed to protect goodfaith transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them, *cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions.*

Id. at 138 (emphasis added).

More recently, the Ninth Circuit Court of Appeals has determined that the doctrine of laches is unavailable to defendants seeking to defeat tribal treaty rights. *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998); and *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000).

In *United States v. Washington*, the Federal Government and several tribes brought an action against the State of Washington to determine the extent of tribal shellfish rights under the Stevens Treaties. 157 F.3d at 638. The treaties at the heart of the litigation were entered into more than 115 years before any action was brought by the tribe to determine the extent of their rights under those agreements. *See Id.* at 640. The State,

along with private intervenors, asserted the defense of laches, arguing that “this is an extraordinary case...call[ing] for new law.” *Id.* at 649.

The Court rejected this argument, stating, “[a]lthough the equities do weigh heavily in favor of the [interveners’] argument – *the Tribes waited 135 years to assert their shellfishing rights* – the law does not support their claim.” *Id.* (emphasis added). The Court reiterated the rule “that ‘laches or estoppel is not available to defeat Indian treaty rights.’” *Id.* (citing *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983)). The central holding of the decision was based upon the trial court’s use of equitable doctrines, such as laches, to interpret the Stevens Treaties. The Ninth Circuit held that equitable considerations cannot be used to interpret Indian treaties, but “[a]t best, they [may be used] as a tool to calculate damages.” *Id.* at 650.

Shortly after the decision in *United States v. Washington*, the Ninth Circuit reiterated its holding by stating “the doctrine of laches cannot defeat Indian rights recognized in a treaty.” *Metcalf*, 214 F.3d at 1146. In *Metcalf*, the Court rebuked an attempt to invoke laches where the Makah Nation had declined to exercise its treaty rights to hunt whales for more than 70 years. *Id.*

Finally, the Supreme Court implied, in *United States v. Mottaz*, 476 U.S. 834 (1986), that where Congress wishes to bar stale tribal claims, it must do so through express action. *Mottaz* involved the federal sale of several Indian allotments in 1954, with litigation contesting those sales instituted nearly 30 years later, in 1981. *Id.* at 836; 838. The Court held that the plaintiff’s action was time-barred by the statute of limitations contained within the Quiet Title Act. *Id.* at 851. In so holding, the court stated:

Federal law rightly provides Indians with a range of special protections. But even for Indian plaintiffs, ‘[a] waiver of sovereign immunity cannot be lightly implied but must be unequivocally expressed.’ [citations omitted] Congress has consented to a suit challenging the Federal Government’s title to real property only if the action is brought within the 12-year period set by the Quiet Title Act. *The limitations provision of the Quiet Title Act reflects a clear congressional judgment that the national public interest requires barring stale challenges to the United States’ claim to real property, whatever the merits of those challenges.*

Id. (emphasis added). *Mottaz* could thus be fairly read to evince the relationship between sovereign immunity and immunity from laches, as applied to the United States. Additionally, it may also be read to imply that where Congress wishes to limit stale claims by Indian tribes, it has the ability to do so through the exercise of its plenary authority in the realm of Indian affairs.

B. Acquiescence

Acquiescence has been used rarely in Indian land claims prior to the *Sherrill* case. The earliest case, *Kinney v. Clark*, 43 U.S. 76 (1844), was a land claim dispute between two

private individuals. If Clark's claim was made while the land was still considered Cherokee land, then it was invalid. The Court found that the land was considered Chickasaw land, by treaty boundaries, and the acquiescence of the Cherokee Tribe to the boundary. While this was not a boundary dispute between the Cherokees and Chickasaws, Cherokee tribe is treated much the same way as the Court treated the states in later boundary disputes noted above. The Court states:

And as to the Cherokees, acquiescence [of the boundary] from 1785-1819, when the United States acquired the Chickasaw title, it ought to conclude them, unless their superior title was plainly and conclusively proved; and the delay in not asserting it accounted for in a satisfactory manner.

Id., 124-25.

Acquiescence was also used by the Court in *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941). The Court determined that a request by the Walapai Tribe in 1881 for a reservation and the grant of one by executive order in 1883

amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation. They were in substance acquiescing in the penetration of white settlers on condition that permanent provision was made for them too. In view of this historical setting, it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved . . . Hence, acquiescence in that arrangement must be deemed to have been a relinquishment of tribal rights in lands outside the reservation and notoriously claimed by others.

Id., 357-8.

This language was primarily dicta, as the claim was to the right of the Santa Fe Pacific Railroad to use land that was Walapai land in 1872. The Court ordered a survey of reservation land to determine if land was encumbered by "Indian title," and found that the railroad did not have proper title if the land was Walapai tribal land. *Id.*, 347.

In 1976, the Ninth Circuit Court of Appeals held that the defense of acquiescence would not overcome the lack of a valid right-of-way by a railroad company over the Walker River Paiute Tribe reservation. *United States v. Southern Pac. Transportation Co.*, 543 F.2d 676 (1976). Though the railroad had been operating over the reservation for over 90 years, the court stated that

it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owner, we conclude that an even older policy of Indian law compels this result. Southern Pacific does not have and has never had a valid right-of-way across lands within the original 1874 executive order boundaries of the Walker River Reservation

...

Id., 699.

i. Congressional Acquiescence

The court in *United States v. Southern Pac. Transportation Co.* also discussed congressional acquiescence, where Congress's inaction in the face of actions by the courts or executive branch amounts to approval of their actions. For example, the court observed that the President had the authority to create executive order reservations under Congress's "long-continued acquiescence in the exercise of that [Executive] power." 543 F.2d 676, 686.

Though not an Indian land claim case, congressional acquiescence of public land issues is further explained in *United States v. Midwest Oil Co.*,

it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress 'may deal with such lands precisely as an ordinary individual may deal with farming property. It may sell or withhold them from sale.' [citations omitted] Like any other owner it may provide when, how, and to whom its land can be sold. It can permit it to be withdrawn from sale. Like any other owner, it can waive its strict rights, as it did when the valuable privilege of grazing cattle on this public land was held to be based upon an 'implied license growing out of the custom of nearly a hundred years.' [citation omitted] So, too, in the early days, the 'government, by its silent acquiescence, assented to the general occupation of the public lands for mining.' [citation omitted] If private persons could acquire a privilege in public land by virtue of an implied congressional consent, then, for a much stronger reason, an implied grant of power to preserve the public interest would arise out of like *congressional acquiescence*.

The Executive, as agent, was in charge of the public domain; by a multitude of orders extending over a long period of time, and affecting vast bodies of land, in many states and territories, he withdrew large areas in the public interest. *These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved.* Its acquiescence all the more readily operated as an implied grant of power in view of the fact that its exercise was not only useful to the public, but did not interfere with any vested right of the citizen.

236 U.S. 459, 474-5 (1915) (emphasis added).

C. Impossibility

The type of impossibility described in the *Sherrill* case only exists in the context of one Indian land claim. It originated in *Yankton Sioux v. United States*, 272 U.S. 351 (1926). To further complicate matters, the Court in *Yankton Sioux* primarily discussed contractual impossibility, examined above. The treaty discussed expanded the jurisdiction over the Supreme Court, in that any question of ownership over a tract of land was to be forwarded by the Secretary of the Interior to the Supreme Court. *Id.*, 355. The Attorney General determined that “compliance with [the treaty] was impracticable” because “referring the matter to [the Supreme Court] was beyond the constitutional power of Congress.” *Id.*, 356. The Court held that

The general rule undoubtedly is that, where there is a legal impossibility of performance appearing on the face of the promise there is no contract in respect of it. But here the undertaking of the government is in the alternative—that either the question of the title of the Indians shall be referred to this court for determination, or, in default of that being done, title in fee shall vest in the Indians. Granted the impossibility of the first alternative, the government nevertheless, took the risk, and must, in accordance with its definite undertaking to that effect, suffer the stipulated consequence, in virtue of the principle that, *where promises are in the alternative, the fact that one of them is at the time, or subsequently becomes, impossible of performance does not, at least without more, relieve the promisor from performing the other.*

Id., 358 (emphasis added).

This is a common interpretation of contract law, and lower courts have cited *Yankton Sioux* for this principle. For example,

[t]here hence were alternative methods of performance; and it is well settled that when a contract provides for one of two alternatives, impossibility of performance of one alternative does not excuse the promisor from performing the other. *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 47 S.Ct. 142, 71 L.Ed. 294; 6 Williston on Contracts, Rev.Ed.1938, § 1961.

Crowley v. Commodity Exchange, 141 F.2d 182 (2nd Cir. 1944).

And,

What is the consequence of failure because of impossibility of one of two alternative performance provisions in a contract? The cases hold that where a contract requires a promisor to do a certain thing or to do something else the impossibility of one mode of performance "does not discharge him from his obligation to render the alternative performance which has not become impossible. See the following cases: *Yankton Sioux Tribe v United States* (1926) 272 US 351, 71 L ed 294, 47 S Ct 142;

Crowley v Commodity Exch., Inc. (1944, CA2 NY) 141 F2d 182; Glidden Co. v. Hellenic Lines, Ltd. (1960, CA2 NY) 275 F2d 253; Edward G. Acker, Inc. v Rittenberg (1926) 255 Mass 599, 152 NE 87.

Ashland Oil & Refining Co. v. Cities Service Gas Co., 462 F.2d 204, 211-12 (10th Cir. 1972)

The court in *Ashland Oil* goes on to state in a footnote that *Yankton Sioux* is “one of the best examples of the application of this doctrine” *Id.*, 212 n.5. While these cases are older, other courts, as recent as 2005 continue to cite *Yankton Sioux* for the premise that the impossibility of one promise does not negate performance on another. *See also*, *United States v. Moore American Graphics, Inc.*, 1989 WL 81799, 4 (N.D. Ill 1989); *In re Bicoastal Corp.*, 600 A.2d 343, 351 (Del. 1991); *International Association of Machinists and Aerospace Workers v. Northwest*, 2005 WL 1594327, 5 (New York Supreme Court, NY County 2005).

However, the Supreme Court in the *Sherrill* case did not cite *Yankton Sioux* for this well accepted doctrine of impossibility. Instead, the Court cited the following quote

It is impossible, however, to rescind the cession and restore the Indians to their former rights, because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers, and nothing remains but to sanction a great injustice or enforce the alternative agreement of the United States in respect of the ownership of the Indians.

Yankton Sioux, at 357.

The Court does not cite the holding in *Yankton Sioux*, which is

[t]hat the United States has taken and holds possession of the entire quarry tract of 648 acres is not in dispute; and since the Indians are owners of it in fee, they are entitled to just compensation as for a taking under the power of eminent domain.

Id., 359.

Instead the Court, from the use of the word “impossible” in a discussion about land claims, created the “impossibility” doctrine, which has no basis in the common law, or in equity. The current Court simply stated that “the unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences similar to those that led this Court in *Yankton Sioux* to initiate the impossibility doctrine.” *Sherrill*, 544 U.S. 197, 219. It appears clear that the impossibility doctrine the Court in *Yankton Sioux* used was an accepted use of contract impossibility, and not the creation of a doctrine out of the natural use of the word “impossibility”.

Instead, this new “impossibility” doctrine simply refers to the current Court’s public policy determination that disrupting the title of current landowners is worse than following an agreement with an Indian tribe. Clearly its use in *Sherrill* is disturbing because assuming there is an “impossibility” doctrine invented by the Supreme Court, which holds current land title should not be disrupted, it would only apply when the tribe is looking to recover the actual land. It cannot apply to land purchased in fee by a Tribe, as the Tribe has become the current title holder.

However, the Supreme Court may have given an indication of this possibility in a footnote in 1986. In *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, the Court stated

Although the complaint asks in part that the Tribe “be restored to immediate possession” of virtually the entire 144,000 acres, App. 25, the available remedies, even if the Tribe prevailed, well might be limited by equitable considerations. See *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357, 47 S.Ct. 142, 143, 71 L.Ed. 294 (1926).

Id., n.5.

Of course, the only time the Court in *Yankton Sioux* specifically mentions equity (“would be most inequitable and utterly indefensible upon any moral ground” 272 U.S. at 357), occurs when the Court is discussing the Government’s attempt to claim the entire treaty void because of the impossibility of performance.