NOTES TO ACCOMPANY

OSAGE TABLE OF ALIENABILITY

1. The Act of June 28, 1906, sec. 2, Fourth, 34 Stat. 541 provides:

> After each member has selected his or her second selection of one hundred and sixty acres of land as herein provided, he or she shall be permitted to make a third selection of one hundred and sixty acres of land in the manner herein provided for the first and second selections: Provided, That all selections herein provided for shall conform to the existing public surveys in tracts of not less than forty acres, or a legal subdivision of a less amount, designated a 'lot'. Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and non-taxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided.

Section 2, Seventh of the same Act, 34 Stat. 542 provides:

> That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him be reason of this Act, except his homestead, which shall remain inalienable and non-taxable for a period of twenty five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: Provided, That upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: Provided, That the surplus lands shall be non-taxable for the period of three years from the approval of this Act, except where the certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress: And provided further, That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided: <u>And provided further</u>, That the oil, gas, coal and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress.

Where the allottee secures a certificate of competency, his surplus becomes alienable immediately, his homestead, twenty five years thereafter or upon his earlier death, Aaron v. U.S., 204 F. 943 (8th Cir. 1913).

Mills, sec.399, 401, 403.
Semple, sec. 653.

It would seem that the ability to alienate included the ability to devise not only surplus but homestead, LaMotte v. U.s., 256 F. 5, 11 (8th Cir. 1919) aff'd as modified on other matters, 254 U.S. 570 (1921).

Mills, sec. 409.
Semple, sec. 704.

Section 7 of the Act of April 18, 1912, 37 Stat. 88 provides:

> That the lands allotted to members of the Osage tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs: Provided, however, That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid under order of the county court of Osage County, State of Oklahoma: Provided further, That nothing herein shall be construed so as to exempt any such property from liability for taxes.

It could be suggested that this statute ought not to appear until the third critical period in the chart, but out of an abundance of precaution it is included here.

It is inserted here because it is the first legislation expressly protecting Osage allotments against involuntary alienation. Nevertheless, it was held by the Oklahoma Supreme Court in Neilson v. Alberty, 36 Okla. 490, 129 P. 847 (1913) that the Osage allotments were restricted against involuntary alienation from the time of allotment. The case further held that the issuance of a certificate of competence permitted voluntary alienation but not involuntary. In Roe v. Burt, 66 Okla. 19, 168 P. 405 (1917) it was held that Section 7 of the Act of 1912 did not operate retroactively. Clearly then the allottee's allotment was not available to satisfy judgment debt until after the Act of 1912.

2. While the Act of 1906, supra Note 1, does not expressly make the Osage allotments inalienable in the hands of the heir, where neither the allottee or heir has procured certificates of competency, the land passes to the heir subject to the restrictions imposed by Act of 1906, Aaron v. U.S., 204 F. 943, (8th Cir. 1913). The court pointed to a policy that restraints on alienation run with the land.

But where the allottee has been issued a certificate of competency then not only the surplus but also the homestead becomes alienable by the heir on the death of the allottee, Aaron v. U.S., supra, at 947.

In LaiMotte v. U.S., 254 U.S. 570., at 580, (192)) the court says: "There is no provision in the Act of 1906 or that of 1912 which reimposes restrictions after they have been removed, or which subjects to restrictions all land, however acquired, which a member without a certificate of competency may own. See McCurdy v. U.S., 246 U.S. 263."

It should be noted that contrary to the law in relation to the Five Civilized Tribes, where the Osage allottee died prior to allotment, the allotments were restricted in the hands of the allottee's heirs who did not have certificates of competence, Kenny v. Miles, 250 U.S. 58 (1919).

The comment upon alienation by will by the allottee in Note 1 above seems equally valid in respect to an heir or devisee of an allottee when the allottee was competent to alienate inter vivos.

It would seem, although it apparently has not been specifically so held, that a devisee of land, where the allottee had a certificate of competency, would take the land free from restriction. A devisee under a will under the Act of 1912, see Note 7 below, was held to take land unrestricted. Further, language in LaNotte v. U.S. and McCurdy v. U.S., supra, in this Note is to the effect that restrictions once removed are not reimposed unless some statute specifically requires that construction and that nothing in the Acts of 1906 or 1912 **50** requires would seemingly settle the matter.

From a speculative posture, it might be wondered whether or not an heir of an allottee could be issued a certificate of competency under the Act of 1906. To answer that question, it is necessary to divide the question into three parts so that the first part relates to heirs who were also allottees under the Act of 1906, the second part relates to heirs who were not allottees because born after the cut-off date of July 1, 1907, and the third part relates to heirs not of Osage blood.

As to the first part, the courts have decided - perhaps assumed but at least without detailed discussion, that an allottee who had a certificate of competency could alienate land inherited from an Osage ancestor as well as his own allotment. See the holding of court in first paragraph of the opinion in U.S. v. LaNotte, 67 F.2d 788 (10th Cir. 1933) in relation to the conveyance of John Claremore to H. G. Burt of land allotted to the mother of Claremore, the spouse of Che-she-hun-pak and inherited from her by Claremore.

Also see a prior case, LaMotte v. U.S., 254 U.S. 570, (1921). In that case in the last paragraph beginning on page 580, the Court says:

> "Through purchases . . . from heirs who have certi ficates of competency . . . the defendants have come lawfully to own . . . interests in particular lands."

The heirs described in the paragraph above would, of necessity, have been allottees as well as heirs inasmuch as the date of the case is 1922. Only persons born prior to July 1, 1907, could

have reached twenty-one and been eligible for a certifi cate by the date of the case. Osages born prior to July 1, 1907, were allotted.

An allottee with a certificate could alienate surplus. It is not difficult to see why an heir with a certificate could alienate inherited surplus. On the other hand, an allottee with a certificate could alienate homestead only after twenty five years. But his heir without a certificate could alienate immediately, so perhaps it is not stretching anything to permit an heir with a certificate to alienate his ancestor's homestead immediately. Any problem in this matter was solved by the Act of April 18, 1912, see Note 5 below, which provided "When the heirs of such deceased allottees have certificates of competency . . . the restrictions on alienation are hereby removed."

Based on this authority, it seems clear that alienation of inherited land by allottees who had certificates of competence was valid.

As to the second part of the question, the part in relation to heirs who were unalloted Osages, the question of their having a certificate of competence prior to 1912 could not have arisen. Since non-allottees were born subsequent to July 1, 1907, none of them could have reached twenty-one before 1912. The Act of 1912, see Note 5 below, provided that Osages born after July 1, 1907, were not restricted as to land which they inherited. Under the Act of 1929, see Note 17 below, when restrictions were placed upon unallotted heirs, the same act provided for the issuance of certificates of competence to them, see proviso in Section 5 of Act of 1929 in Note 17, below.

As to the third group, heirs not of Osage blood, it is clear that white heirs were never restricted, Levindale Lead and Zinc Mining Co. v. Coleman, 241 U.S. 432 (1916) and LaNotte v. U.S., 254 U.S. 570 (1921). In both cases, the Court links the terms "white men" and "not members of the tribe" so that it is difficult to determine which factor, "white man" or "not a member of the tribe", is critical. Suppose an Osage were married to a full-blood of another tribe who proved to be the Osage's heir. Mills, sec. 400, is seemingly of the opinion that non-Osage but Indian heirs would also not be restricted. He further says the same would be applicable to Osage unallotted heirs. As to the latter, it should be noted that under the Act of 1912, which provided that "When the heirs of such deceased allottees . . . are not members of the tribe, the restrictions on alienation are hereby removed," it was held that an unallotted Osage born after July 1, 1907, was "not a member of the tribe", U.S. v. LaMotte, 67 F.2d 788, (10th Cir. 1933), and was unrestricted.

It is significant, however, that the Supreme Court of the United States after "weasling" around as to using the provisions of the Act of 1912 to construe the Act of 1906, said:

> "We confine ourseif to the single point presented. Our conclusion is that the Act of 1906 placed no restrictions upon the land, or undivided interests in land, of which white men who were not members of the tribe became owners."

Levindale, supra.

I have not been able to locate any litigation involving a non-Osage Indian heir under the Act of 1906 and seemingly neither did Mills nor has Semple or his successors on the pocket parts.

However, one should note Drummond v. U.S., 131 F.2d 568, a case decided under the Kaw

Allotment Act, July 1, 1902, 32 Stat. 636. Section 11 of that Act permitted adult heirs of deceased Kaw Indians "to sell and convey lands inherited from such decedent . . . all conveyances made under the provision to be subject to approval of the Secretary of Interior." The Court noted the Levindale case, supra, holding that Osage lands passing to white heirs were not restricted and distinguished that case saying that the policy of protecting Indians served no purpose when lands passed to white persons. The Court pointed to the lack of anything in the act limiting restrictions to heirs who were Kaws. It noted that the provision of Section 11 of the Kaw Allotment Act were not expressly limited to heirs who were members of the Kaw Tribe and held that the Kaw allotment remained restricted in the hands of an Otoe heir.

Would inherited allotments be available to satisfy claims of creditors? In Note 1, supra, it was said that creditors could not reach the allotments of allottees even when the allottee had a certificate of competence until after the Act of 1912. Heirs were subject to the same restrictions as allottees. Therefore, it would seem that an heir's inherited land would not be available before the same time.

The situation would seemingly be different in relation to devisees. Prior to the Act of 1912, see Note 7, there was no provision for those otherwise restricted to make wills. But those who had certificates could, Mills, sec. 409 and Semple, sec. 704, both relying on LaMotte v. U.S., 256 F. 5 (8th Cir. 1919) mod. and as mod. aff'd, 254 U.S. 570 (1921). Devisees were unrestricted, Semple sec. 707 relying on LaNotte v. U.S., supra, until the Act of 1925 as to devisees who were allotted Osage Indians, see Note 11. At that time restrictions were reimposed on certain of the allotted devisees, see Note 11. Under the Act of 1929, unallotted devisees were made subject to the same restrictions as allotted devisees, see Note 19. Therefore, after that time, devised lands restricted against voluntary alienation would be restricted against_involuntary.

3. The Act of March 3, 1909, 35 Stat. 778, provides:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he hereby is, authorized and empowered, upon application, to sell, under such rules and regulations as he may prescribe, part or all of the surplus lands of any member of the Kaw or Kansas and Osage tribe of Indians in Oklahoma: Provided, That the sales of the Osage lands shall be subject to the reserved rights of the tribe in oil, gas and other minerals.

In U.S. v. Aaron, 183 F. 347, at 351, (C.C. W.D. Okla. 1910) the Court in dicta said that the Secretary was authorized to sell surplus lands "of any member" of the tribe and that included lands "of deceased allottees".

Mills, sec. 396.
Semple, sec. 651.

Where the Secretary sold land under this statute, taking a note secured by a mortgage and the mortgage note was paid by deeding the land back to the Indian, which deed provided that land should remain restricted under provision of Act of 1906, Note 1, supra, the restrictions were valid, Drummond v. U.s., 34 F.2d 755 (8th. Cir. 1929).

Further, under this Act when the Secretary approved a sale by one co-tenant to another and inserted restrictions in the deed, the restrictions were valid, Drummond v. U.S., supra.

4. Section 2 of the Act of April 18, 1912, 37 Stat. 86, provides:

> That the Secretary of the Interior be, and he hereby is, authorized, where the same would be to the best interests of Osage allottees, and the same is submitted to the Osage council for recommendation and approved by it, to permit the exchange of surplus allotments, or any portions thereof, of Osage allottees under such rules and regulations as he may prescribe and upon such terms as he shall approve. The Secretary shall have authority to do any and all things necessary to make these exchanges effective.

5. Section 6 of the Act of April 18, 1912, 37 Stat. 87-88, provides:

> That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: Provided, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior. Where some heirs are minors, the said court shall appoint a guardian ad litem for said minors in the matter of said partition, and partition of said land shall be valid when approved by the court and the Secretary of the Interior. When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed. If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them without the intervention of an administrator. The shares due minor heirs, including such minor Indian heirs as may not be tribal members and those Indian heirs not having certificates of competency, shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees.

The language of the third sentence of this section, i.e., "When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed" received considerable judicial attention in U.S. v. LaNotte, 67 F.2d 788 (10th Cir. 1933). The case holds that heirs of allottees born after July 1, 1907, are within the language "not members of the tribe". The court says "The act [of 1912] clearly removed the restrictions upon children born after July 1, 1907. Such restrictions could be reimposed only by statute. Neither the Act of 1906 [sic] nor that of 1912 reimposed them, although the land again became the property of a restricted Indian. Lamotte v. United States, 254 U.S. 570, 41 S.Ct. 204, 65 L.Ed. 410."

It is suggested that the discussion of sec. 7 of the Act of 1912 in Notes 1 and 2 ought to be considered in relation to the subjection of land to the claims of creditors.

6. Section 6 of the Act of April 18, 1912, 37 Stat. 87-88, is set out in Note 5, supra.

In Kenny v. Miles, 250 U.S. 58 (1919), it was held that partition among those claiming as an allottee's heirs, who were both Osage, not approved by Secretary was absolutely void and a determination of heirship made therein was equally void.

But where partition is approved and the Secretary places restrictions on land set out to an Osage heir, the restrictions are valid, U.S. v. Hale, 51 F.2d 629 (10th Cir. 1931). Land partitioned to a white heir becomes unrestricted, Semple, sec. 680, relying on Levindale and Kenny, supra.

Notice that those who take in a partition decree take by purchase rather than inheritance, U.S. v. Hale, supra. It was held in U.S. v. Howard, 8 F. Supp. 617, (D.C., N.D. Okla., 1934), that where allottees had inherited other allotted land which was partitioned with the approval of the Secretary who imposed no restrictions upon the property set aside to the heirs that they were then unrestricted. But the case also holds that the Act of 1925, see Note 10, below, reimposed restrictions upon these allottee heirs.

7. Section 8, Act of April 18, 1912, 37 Stat. 88, provides:

> That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will in accordance with the laws of the State of Oklahoma: Provided, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior.

Until the passage of this Act, there was no statutory provision for the devise of restricted land, Mills, sec. 409; Semple, sec. 705. On the other hand, where restrictions had been lifted as a result of the issuance of a certificate of competence, the allottee, heir, or devisee could validly dispose of property by will without approval of Secretary, LaNotte v. U.S., 254 U.S. 570 (1920), and see Mills, sec. 409, and Semple sec. 704.

Under the Act of 1912, "adult" meant twenty-one for males and females, regardless of state law because the Act of 1906, sec. 2, 34 Stat. 541, defines minor as those under twenty-one, Opinion, Solicitor, Dept. of Int. D. 47112, April 16, 1920; Cohen, Handbook of Federal Indian Law, 454; Semple, sec. 705.

From the passage of the Act of 1912 until Act of February 27, 1925, see Notes 10 and 11 below, the devisees under a will approved by the Secretary under the Act of 1912 were unrestricted, LaMotte v. U.S., 254 U.S. 570 (1921), see language on pages 483-84 infra

In Gilliland v. Strikeaxe, 366 P.2d 419 (Okla. 1961), it was held that a will made but not approved as required by statute could not revoke a prior will which disposed of restricted property and had been approved by the Secretary. This was so even though the subsequent will

contained a revocation clause. The court said: We hold that under the provisions of said Act an unapproved will disposing only of restricted property is void and ineffective of any purpose, including the revocation of a prior valid will.

The words "in accordance with the laws of the State of Oklahoma" require that the will must comply with Oklahoma law in addition to approval by the Secretary, In re Revard's Estate, 178 Okla. 524, 63 P.2d 973 (1936).

It is suggested that the discussion of Section 7 of the Act of 1912 in Notes 1 and 2, supra, ought to be considered in relation to the land in the hands of devisees being subject to the claims of creditors.

It should be noted that Section 3 of the Act of April 18, 1912, 37 Stat. 86-87, put probate matters into the county courts of Oklahoma. The last proviso of Section 3 says: That no land shall be sold or alienated under the provisions of this section without the approval of the Secretary of the Interior.

8. The Act of May 25, 1918, 40 Stat. 561, at 579, provides:

> That the allottees of the Osage Nation may change the present designation of homesteads to an equal area of their unencumbered surplus lands, upon application to, and under such rules and regulations as the Secretary of the Interior may prescribe: Provided, That each tract after the change and designation shall take the status of the other as it existed prior to the change in designation as to alienation, taxation, or otherwise, and that any order of change of designation shall be recorded in the proper office of Osage County: Provided further, That the Secretary of the Interior be, and he is hereby, authorized where the same would be for the best interests of Osage Allottees, to permit the sale of surplus and homestead allotments, wholly or in part, of Osage allottees under such rules and regulations as he may prescribe and upon such terms as he shall approve.

It should be noted that this material applies only to lands of allottees literally. I have found nothing to indicate that it has been expanded by construction to heirs or devisees. No doubt this is so because, with some exception, the distinction between homestead and surplus is largely meaningless when the land has passed into the hands of heirs and devisees. Further in light of the construction placed on the Act of 1921, see Note 9 below, construing "Allottee" not to include heirs; it is unlikely that a broader construction will ever occur.

9. The Act of March 3, 1921, sec. 3, 41 Stat. 1249, reads:

> That all members of the Osage Tribe of Indians are hereby declared to be citizens of the United States, but this shall not affect their interest in tribal property or the control of the United States over such property as is now or may hereafter be provided by law, and all restrictions against alienation of their allotment selections, both surplus and homestead, of all adult Osage Indians of less than one-half Indian blood, are hereby

> removed, and the Secretary of the Interior shall, within four months after the passage of this Act, determine what members of said tribe are of less than one-half Indian blood, and their ages, and his determination thereof shall be final and conclusive. The homestead allotments of the members of the Osage Tribe shall not be subject to taxation if held by the original allottee prior to April 8, 1931.

In Osage Motor Co. v. U.S., 33 F.2d 21 (8th Cir. 1929), cert. den'd 280 U.S. 577 (1929), the court citing this statute and the Act of February 27, 1925, sec. 6, 43 Stat. 1011, see Note 12 below, held that a mortgage given by a 9/64 adult Osage on his "unrestricted allotted land to secure a debt" was void. The Indian did not have a certificate of competency and the Secretary had not approved the contract for debt. The mortgagee argued that the Act of 1921, sec. 3, amounted to a blanket certificate of competency for all less than half-blood Osages. The court, at 33 F.2d 22, said:

> We do not so construe the language. It removes only restrictions_against alienation of their allotted selections, etc.; that is, it is confined to a specific object, and is not an attempt to remove all restrictions of whatever nature of kind.

I find this case baffling to a degree. It seems that in this case the court is saying that restrictions against an outright conveyance were lifted by the Act of 1921 but restrictions against giving a mortgage were not. This seems to fly in the face of the old saw that "the greater (the conveyance of all interest in the land) includes the lesser (the giving of a mortgage)." However, that old saw is not of universal applicability; the power of a trustee to sell is with a great deal of regularity held not to include the power to mortgage. The thought behind the trust rule is that it is one thing for a trustee to sell (at the full market value, it is assumed) but another for him to risk the loss of the whole property for less than the market value at the time the mortgage is given.

This, the Osage Motor case, was cited subsequently in U.S. v. Johnson, 29 F. Supp. 300, (D.C., N.D. Okia. 1939), in which the court ruled that an outright conveyance of inherited land was invalid because the Act of 1921 removed restrictions against alienation of allotments by allottees only.

It seems very doubtful that the Osage Motor case would have been decided the same way if the mortgage had been executed between the effective dates of the Acts of 1921 and 1925, Smith v. American Nat. Bank of Pawhuska, 181 Okla. 195, 72 P.2d 808 (1937).

In other words, I would suggest that the Act of 1921 did lift all restrictions from adult allottees of less than half-blood but that the Act of 1925 reimposed restrictions as to morgages gages because it "outlawed" debts not approved by the Secretary.

In the critical period, March 3, 1921 to February 27, 1925, and thereafter, in the division labelled "By Will Where Otherwise Restricted" there appears the line item "Unconditionally by allottees". This entry is subject to the criticism that allottees of less than one-half blood were totally unrestricted by virtue of the Act of 1921 and this total lifting of restrictions included the lifting of restrictions on alienation by will of less than half-blood allottees, making such an entry unnecessary and repetitious. But this entry is nevertheless included as about the only way available to emphasize the negative implication that it is only the allottee's allotment and not his

inheritance which he may devise unconditionally.

Because the chart contains only affirmative propositions - that is propositions as to valid alienations - the only way to emphasize a negative matter is by the negative implication of an affirmative statement.

10. The Act of February 27, 1925, sec. 3, 43 Stat. 1010, provides:

> Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as herein before set forth shall not be subject to the lien of any debt, claim, or judgment except taxes, or be subject to alienation, without the approval of the Secretary of the Interior.

The first problem of construing this statute is the question of whether it applies to unallotted Osages. The language is "members of the tribe." Under the Act of 1912, it was held that unallotted Osages were not members of the tribe, Note 5 supra.

But whether unallotted Osages taking by devise or inheritance are restricted under sec. 3 of the Act of 1925 has not been determined judicially. In dicta the question is discussed in relation to Agnes King in U.S. v. Johnson, 29 F. Supp. 300 at 302 (N.D. Okla. 1939). Agnes was a full blood, unallotted Osage, without a certificate of competency. Her ancestor, Perry King, died March 5, 1925, id. at 301. The court says: "Agnes King inherited her interest in land prior to the enactment of the Act of 1929, and under the law then in effect [Section 3, Act of 1925] such interest passed to her free from restriction.

Further in U.S. v. Howard, 8 F. Supp. 617 (N.D. Okla. 1934) District Judge Kennamer speaks repeatedly of the intent of Congress to reimpose restrictions upon "incompetent allottees." In one place the court coupled "incompetent allottees" with the language "without respect to the manner in which such lands were acquired."

The Howard case is criticized in Donelson v. Oldfield, 488 P.2d 1269 at 1271 (Okla. 1971) in regard to the language beginning "without respect". But that does not go to the question of whether the Act reimposes restrictions on unallotted Osages taking as heirs.

In light of the above, there seems no basis for believing that this Act reimposed restrictions on unallotted Osages taking as heirs.

The next question, then, is what allotted heirs were restricted under Section 3 of the Act of 1925. In U.S. v. Johnson, supra, the court held that the language of the Section "of one-half or more Indian blood or who do not have certificates" could not be read to impose restrictions only on one-half or more Indian blood and who also do not have a certificate. The result is that only those allotted heirs who were less than half-blood and had a certificate were left unrestricted. It should be remembered that to be born after July 1, 1907 is to be "unallotted", and to be

"unallotted" is to be not "a member of the Osage Tribe,' see notes 2 and 5. supra.

11. Section 3 of the Act of 1925, as indicated in Note 10 above, reimposed restrictions upon land devised to and inherited by allottees. "[M]embers of the tribe" is the language of the statute. For the reasons set out above in Note 10 in relation to non-allottee heirs, I do not believe that the Act of 1925 reimposed restrictions on non-allottee devisees. As to allotted devisees who were of half or more Indian blood or who had no certificate of competency (see last paragraph of Note 10, supra, as to the significance of "or") and who took under a will approved by the Secretary - an obvious reference to sec. 8 of the Act of 1912 - restrictions were reimposed.

The first obvious inquiry is, "Suppose that a will containing a devise of unrestricted land made to such an allottee was in fact approved by the Secretary."

In Cox v. Smith, 171 Okla. 567, 43 P.2d 439 (1935) and Donelson v. Oldfield, 488 P.2d 1269 (Okla. 1971), the testator had purchased the lands in question with his own personal unrestricted funds. He devised the land in a will approved by the Secretary. It was contended that the devisees were restricted by force of sec. 3 of the Act of 1925. The court held that the land was unrestricted in the hands of the testator. This involved the holding that the land was not within the last sentence of Section 3. Section 3 applied only to land purchased by the Secretary with restricted funds in the Secretary's possession as per Section 1 of the same Act.

The court further held that as to the land in question, the approval of the will by the Secretary was unnecessary and therefore did not alter the status of the land; it remained unrestriced in the hands of the devisee.

By extrapolation, we can list those wills which were valid without the approval of the Secretary before the Act of 1925. Those wills would be (1) wills of testator-allottees with a certificate of competency; (2) wills of testator-heirs born after July 1, 1907; (3) wills of testator-heirs who had a certificate; and (4) wills of heirs or devisees who had taken immediately or remotely by inheritance, devise, or both from a devisee under a will described in (1), (2), or (3).

Those who take under wills described in (1) through (4) would not be restricted by virtue of Section 3 of the Act of 1925 because they would not have taken under a will required to be approved by the Secretary.

The line items marked (1), (2), (3) and (4) in the segment of the chart labeled "By Allotted Devisee" are the functions of the items bearing corresponding designations within this Note.

Since the reimposition was as to allotted devisees who were one- half or more Osage blood or who did not have a certificate of competency, an allotted devisee of less than one-half Indian blood who had a certificate remained unrestricted under Note 2 above.

Again, it might be well to mention that Section 7 of the Act of 1912, 37 Stat. 88, also continued to protect against sub jecting allotments and inherited land against the claims of creditors including claims under mortgages given to secure debts, U.S. v. Drummond,3[2]4 U.S. 316 (1945),

which involved a mortgage given in 1937.

12. The Act of February 27, 1925, sec. 6, 43 Stat. 1011 provides:

> Sec. 6. No contract for debt hereafter made with a member of the Osage Tribe of Indians not having a certificate of competency, shall have any validity, unless approved by the Secretary of the Interior. In addition to the payment of funds heretofore authorized, the Secretary of the Interior is hereby authorized in his discretion to pay, out of the funds of a member of the Osage Tribe not having a certificate of competency, any indebtedness heretofore or hereafter incurred by such member by reason of his unlawful acts of carelessness or negligence.

As indicated in Note 9, above, the provisions of Section 6 of the Act of 1925 rendered invalid contracts for debt made by allotted Osages not having a certificate of competency and not approved by the Secretary and, hence, mortgages given to secure such debts. It does not seem, however, to reimpose this restriction other than on less than half-blood allottees in respect to their allotments. In all other combinations of factors where this section creates a restriction, the Indian would already be restricted by other statutory provisions.

13. It should be noted that Section 3 of the Act of 1925 reimposed restrictions on some allottees as to their inherited and devised land. This Note is added to call attention to the fact that a will is undoubtedly a conveyance within the meaning of Section 3. Therefore, a will of an allottee disposing of land inherited or devised would be subject to those rules set forth in the sections labelled "By Heirs" and "By Devisees".

14. As pointed out in Note 13, supra, a will is undoubtedly a conveyance within Section 3 of the Act of 1925, which reimposes restrictions on allottees as to their devised and inherited lands. Section 8 of the Act of April 18, 1912, see Note 8, supra, required approval of wills by the Secretary before or after the death of testator. The restrictions reimposed by Section 3 of the Act of 1925, see Notes 10-13 above, require approval by the Secretary. I express no opinion whether approval after the death of the testator would satisfy the requirements of Section 3 of the Act of 1925 where they are applicable. However, Congress, in adopting sec. 3 of the Act of 1925, may be presumed to have had the terms of the approval under the Act of 1912, sec. 8, in mind inasmuch as that is the only provision for the approval of wills prior to the Act of 1925. The Act of 1925 refers to wills approved by the Secretary. I deem it unlikely that in sec. 3, Act of 1925, Congress would have meant to preclude approval after death without expressly excluding it.

15. The last sentence of sec. 3 of the Act of 1925, 43 Stat. 1010, and see Note 10, above, provides:

> "Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim or judgment except taxes, or be subject to alienation, without the approval of the Secretary of the

Interior."

The "purchase as hereinbefore set forth" refers to, inter alia, land bought by the Secretary from restricted funds in his hands. See Act of February 27, 1925, sec. 1, 43 Stat. 1008, particularly at 1009. See Cox v. Smith, 171 Okla. 567, 43 P.2d 439 (1935) and Donelson v. Oldfield, 488 P.2d 1269 (Okla. 1971) distinguishing between lands purchased by Secretary and lands purchased by the Indian from unrestricted funds.

The statute puts land other than allotted to the Osage, to the Osage heir's ancestor, or to Osage devisee' s testator under restrictions. The land may have been previously in a white and totally unrestricted as an allotment.

Land so purchased for an Osage is conveyed to the Indian by a deed containing restrictions on its face. The Interior Department has taken the position that the certificate of competency, when issued, removes these deed restrictions, Semple sec. 663 relying on Report of Under Secretary Oscar Chapman, dated July 3, 1947.

16. The Act of June 28, 1906, sec. 2, Fourth, 34 Stat. 541, see Note 1, supra, provided that surplus was to be inalienable for twenty five years. Had this provision been permitted to stand, the restrictions on surplus would have run out in 1931. Congress, by Section 1 of the Act of March 2, 1929, 45 Stat. 1479, provided:

> The lands, moneys, and other properties now or hereafter held in trust or under the supervision of the United States for the Osage Tribe of Indians, the members thereof, or their heirs and assigns, shall continue subject to such trust and supervision until January 1, 1959, unless otherwise provided by Act of Congress.

U.S. v. Sands, 94 F.2d 156 (l0th Cir. 1936) holds that the above language continues only those restrictions which were in effect at the time the Act was passed. However, Section 5 of the same Act extended the existing restrictions on allotted Indians to unallotted heirs, see Note 17 below.

17. Section 5 of the Act of March 2, 1929, 45 Stat. 1478 provides:

> The restrictions concerning lands and funds of allotted Osage Indians, as provided in this Act and all prior Acts now in force, shall apply to unallotted Osage Indians born since July 1, 1907, or after the passage of this Act, and to their heirs of Osage Indian blood, except that the provisions of Section 6 of the Act of Congress approved February 27, 1925, with reference to the validity of contracts for debt, shall not apply to any allotted or unallotted Osage Indian of less than one-half degree Indian blood: Provided, That the Osage lands and funds and any other property which has heretofore or which may hereafter be held in trust or under supervision of the United States for such Osage Indians of less than one-half degree Indian blood not having a certificate of competency shall not be subject to forced sale to satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency: Provided further, That the Secretary of the Interior is hereby authorized in his discretion to grant a certificate of competency to any unallotted Osage Indian when in the judgment of the said Secretary such member

is fully competent and capable of transacting his or her own affairs.

The Section extends or reimposes restrictions applicable to allotted Osages to unallotted Osages, that is Osage Indians born after July 1, 1907, and their heirs of Osage blood. For this reason some line items appearing above in relation to unallotted Osage Indians will not appear in the portion of the chart applicable after the passage of the Act of 1929. Likewise, unless indicated to the contrary, line items previously applicable only to allotted Osage Indians, as they appear above, are equally applicable to unallotted Osages as they appear in the post-Act of 1929 portion of the chart.

The Act removes the protection (given by Section 6 of the Act of 1925, see Note 12, supra) against non-Secretary approved contracts for debt from the allotted Osage Indians of less than one-half Indian blood. Evenhandedly, it withholds that protection from the unallotted of the same degree. But, at the same time, it refused access to the restricted property including land of allotted or unallotted Osage Indians of less than one-half Indian blood who do not have certificates of competency.

The net result is that after this Act, only allotted or unallotted Osages of less than one-half degree may make valid contracts without the Secretary's approval. And involuntary alienation is available as to restricted property of only the less than half-bloods with certificates of competency. Lake v. Slayden, 185 Okla. 288, 91 P.2d 678 (1939) cited by Semple sec. 664 makes it clear that under this Act, while an allotted Osage of less than half Osage blood could voluntarily alienate his allotment and freely contract, that, nevertheless, if he had no certificate of competency, his alloted land was not subject to involuntary alienation to satisfy his debts.

In this Section of the Act of 1929, provision was made for the Secretary to issue certificates of competency to unallotted Osage Indians found to be competent. It should be noted that, at least since the Act of 1912, see Note 5, supra, unallotted Osage Indians had not been restricted at all.

18. It may appear to be anomalous to take the position (in the line in the chart above that line in which this Note's signal appears) that a less than one-half blood allottee may make a will as to his allotment without the Secretary's approval and yet take the position in this line that an unallotted heir of less than one-half degree may not make an effective will of his inherited land without that approval. It should be noted, however, that the restrictions as to allotted Osages lifted by the Act of 1921 applied to their allotments only, see Note 9 above. The allotted Osage Indians without certificates of competency were restricted by the Act of 1925, sec. 3, see Note 10 above, as to land devised to them under certain conditions and as to land inherited by them. Section 5 of the Act of 1929 imposes those same restrictions on land inherited by non-allotted Indians or devised to them.

As to parentheses around "after" in the chart, see note 14, above.

19. As to allotted devisees, see Note 14, supra. This two-step reference is necessary to avoid overcrowding on the charts. In regard to the status of unallotted devisees, Section 5 of the Act of 1929, see Note 17, supra, imposes restrictions of the same kind which were on the allotted

devisees after Section 3 of the Act of 1925, Note 10, as that situation was changed by Section 5 of the Act of 1929, Note 17, supra.

Special attention must be given to a change in line (2) from the same line as it was in the 1925-1929 period. During that earlier period, a testator-devisee born after July 1, 1907, was one of the sources from which an allottee might derive a title by devise which did not need approval by the Secretary, see Note 11. However, after the Act of 1929, unallotted testator-devisees devisees are restricted where they took the title under restrictions and had no certificate of competency. Therefore, after the Act of 1929, the testator-devisee would have had to die before the Act of 1929 in order for his will to be a source of a devise which did not have to be approved by the Secretary.

Since this is the only situation dependent upon the unrestricted status of an unallotted testator, no other changes need to be made in the "Devisee" portion of the chart. But notice that the change is applicable in the case of either an allotted or unallotted devisee because the two classes of devisees are equated by Section 5 of the Act of 1929, supra Note 17.

20. A portion of sec. 3 of the Act of June 24, 1938, 52 Stat. 1035 provides:

> "The lands, moneys, and other properties now or hereafter held in trust or under the supervision of the United States for the Osage Tribe of Indians, the members thereof, or their heirs and assigns, shall continue subject to such trusts and supervision until January 1, 1984, unless otherwise provided by Act of Congress.

21. The Act of August 4, 1947, 61 Stat. 747, provides:

> That the provisions of Section 6 of the act approved February 27, 1925 (43 Stat. 1008), as amended by Section 5 of the act approved March 2, 1929 (45 Stat. 1478), which made invalid contracts of debt entered into by certain members of the Osage tribe of Indians, shall not apply to any debt contracted pursuant to Title III of the Servicemen's Readjustment Act of 1944 by any member of such tribe, who by reason of his service in the armed forces of the United States during World War II, is eligible for benefits of such Title III; and any other member of the Osage tribe on attaining the age of 21 may contract a valid debt without approval of the Secretary of the Interior; Provided, that the Osage lands and funds and any other property which has heretofore or which may hereafter be held in trust or under supervision of the United States for such Osage Indians not having a certificate of competency shall not be subject to lien, levy, attachment or forced sale to satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency.

While this validates contracts made by World War II veterans and all contracts made by Osages who have reached 21, without approval of the Secretary as required by the Act of 1925, Note 12 above, such debts may not be satisfied out of the veteran's of adult Osage's land if he did not have a certificate of competency at the time of contracting the debt. The proviso would seem to make the possession of a certificate of competency the sole measure of the availability of Osage lands in satisfaction of creditors' claims.

Since this is the last entry in these notes dealing with involuntary alienation, perhaps it would be useful at this point to summarize the development of the availability of Osage land to answer for the debts of its owners.

A. Until the Act of 1912, land in the hands of allottees could not be reached to satisfy the claims of creditors.

Even where the allottee had a certificate of competency, his homestead was completely inalienable and only his surplus was subject to voluntary, but not involuntary, alienation, Note 1, supra.

B. During the same period, it was the rule that heirs took subject to the same restrictions as their ancestors. For that reason, only an heir whose ancestor had a certificate of competency, or who had one himself, could alienate his inherited land - and only voluntarily Note 2, supra.

C. In relation to devisees, their devised land was probably available to claims of creditors, Note 2, supra.

D. Section 7 of the Act of 1912 removed restrictions where the allottee had a certificate of competency but the issuance did not work retroactively to make land subject to debts contracted before the certificate was issued, Note 2, supra.

E. Section 7 of the Act of 1912 places a similar restriction on an inherited allotment. It is not available until it is set over to the heir. But there is first the requirement that the heir or his ancestor have a certificate of competency; otherwise, the inheritance will not be available even after it is turned over, Notes 1 and 2 above.

F. The Act of 1912 made that land which was voluntarily alienable by allottee, heir, or devisees also subject to claims of creditors.

G. The Act of 1912 also added another class of heirs, those born after July 1, 1907, the unallotted whose land would be freely alienable through guardians initially, since the oldest of them would be a little under five. Conceivably, their inherited lands might, through guardians, be available for some claims of creditors - for necessities, for example.

H. The Act of March 3, 1921, removed "all restrictions on less than half-blood allottees as to both homestead and surplus. Seemingly, "all restrictions" included those against involuntary alienation, see Note 9, supra.

I. In 1925 debts made by allottees, including less than half-bloods, not having a certificate of competency and not approved by the Secretary, including mortgages, were declared to be invalid, see Note 12, supra.

J. Land purchased for Osages from restricted funds by the Secretary under the Act of 1925

were restricted against voluntary and involuntary alienation, see Note 15, supra.

K. The Act of 1929, allowed less than half-bloods, whether allotted or not, to make contracts, but the same Act provided against involuntary alienation of the lands of such less than half-blood Osages who did not have a certificate of competency to satisfy those debts, see Note 17, supra.

L. As said above in this Note, at least after the Act of 1947, "the bottom line" as to the question of involuntary alienability of Osage land to answer for debt is the possession of a certificate of competence.

M. It is not intended that mortgages, where approved by the Secretary, and their foreclosure be considered as involuntary alienation, see Note 23 below.

22. The Act of February 5, 1948, 62 Stat. 18, carried the proviso:

> That all restrictions against alienation of the property of every kind and character except headright shares or interests in the Osage tribal mineral estate, of members of the Osage Tribe who now have, or may hereafter receive a certificate of competency are hereby removed.

Language (referring to those who would become twenty-one) in earlier parts of the Act makes it clear that as used here "member" included the unallotted.

In 1948 all the allotted would be at least 40.

Because this Act was repealed by the Act of October 21, 1978, sec. 3(a), 92 Stat. 1660, this_special one-line entry going in and out of the chart is used.

23. Act of March 29, 1956, 70 Stat. 62, 25 U.S.C. sec. 483a:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the individual Indian owners of any land which either is held by the United States in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to approval by the Secretary of the Interior, to execute a mortgage or deed of trust to such land. Such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the State or Territory in which the land is located. For the purpose of any foreclosure or sale proceeding the Indian owners shall be regarded as vested with an unrestricted fee simple title to the land, the United States shall not be a necessary party to the proceeding, and any conveyance of the land pursuant to the proceeding shall divest the United States of title to the land. All mortgages and deeds of trust to such land heretofore approved by the Secretary of the Interior are ratified and confirmed.

This Act permits any Indian owner, including Osages, since not expressly excluded, to mortgage their land with the Secretary's approval. The Montana court held that this Act did not bestow jurisdiction upon state courts in mortgage foreclosures Crow Tribe v. Deernose, 158 Mont. 25, 487 P.2d 1133 (1971).

24. The Act of October 21, 1978, sec. 2(c), 92 Stat. 1661 reads in part:

> [S]ection 3 . . . of the Act of February 27, 1925 (45 Stat. 1008, 1010) [is] hereby amended by strikingout the phrase . . . "of one-half or more Indian blood [or]" .

This amendment causes Section 3 of the said Act to read:

> Lands devised to members of the Osage Tribe who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shallbe inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim, or judgment except taxes, or be subject to alienation, without the approval of the Secretary of the Interior.

The amendment eliminates the problem created by the clumsy drafting in Section 3 of the Act of 1925, see Note 10, supra. Under that Act, only allotted heirs and some allotted devisees of less than half-blood were unrestricted, and then only if they had certificates of competency. Under this amendment, it is clear as to allotted heirs and devisees that if they have certificates of competency they may alienate without restriction. If they have not a certificate, they must get the approval of the Secretary. No distinction is made between half or more blood and less than half.

As to the unallotted heirs and devisees, there is more of a problem. In 1929, see Note 17, Congress provided that unallotted Osages, who were previously unrestricted, were to be restricted equally with allotted Osage Indians. As to unallotted Osage Indians, they can hold as far as we are concerned only as heirs, devisees, or purchasers with restrictions in their deeds. Congress did not distinguish between the allotted and the unallotted as to land purchased by the Secretary with restricted funds, see Note 15, supra.

The question is, are the unallotted heirs and devisees under this amendment to be treated equally with allotted heirs and devisees, as those allotted heirs and devisees are now restricted? ted? Or are the unallotted heirs and devisees to remain equal to what the allotted heirs and devisees were before the amendment set out above in this Note?

If Congress intended both allotted and unallotted to remain under the same restrictions after this amendment, it chose a most unfortunate way of accomplishing it. The section which was amended speaks only of members of the Osage Tribe. Nothing is better settled than that this means allottees and excludes unallotted Osages, see Note 5, supra.

The amendment under examination does not then alter the status of unallotted heirs and devisees.

The second inquiry must be, is there anything in the 1929 legislation, which made restrictions on

the allotted and unallotted equal, which could be used to show an intent to preserve that equality from then on? Unfortunately, the answer is strongly negative. That which is imposed on the unallotted by that Act is "The restrictions concerning lands and funds of allotted Osage Indians as provided in this Act and all prior Acts now in force", Section 5 of the Act of March 2, 1929, 45 Stat. 1478, see Note 17, supra.

To remain on the safe side, the title examiner, because there is no clear applicability of the 1978 amendment to the unallotted, must, until the courts or Congress speak again, continue to apply to the unallotted the more stringent restrictions applicable to all heirs and devisees before the amendment, see Notes 10 and 17, supra. The net difference this conservative position dictates is that the unallotted heir 'or unallotted devisee of one-half or more Indian blood who has a certificate of competence will, nevertheless, be required to have secretarial approval of his conveyances.

25. Section 5(a) of the Act of October 21, 1978, 92 Stat. 1661:

> Section 8 of the Act of April 18, 1912 (37 Stat. 86, 88), is hereby amended to read as follows: "Any person of Osage Indian blood, eighteen years of age or older,may dispose of his Osage headright or mineral interest and the remainder of his estate (real, person [sic], and mixed, including trust funds) from which restrictions against alienation have not been removed by will executed in accordance with the laws of the State of Oklahoma: Provided, That the will of any Osage Indian shall not be admitted to probate or have any validity unless approved after the death of the testator by the Secretary of the Interior. The Secretary shall conduct a hearing as to the validity of such will at the Osage Indian Agency in Pawhuska, Oklahoma. Notice of such hearing shall be given by publication at least ten days before the hearing in a newspaper of general circulation in Osage County, Oklahoma, and by mailing notice of such hearing to the last known address of all known heirs, legatees, and devisees. The cost of publication shall be borne by the estate. The rules of evidence of the State of Oklahoma shall govern the admissibility of evidence at such hearing. All evidence relative to the validity of the will of an Osage Indian shall be submitted to the Secretary within one hundred and twenty days after the date of the petition for approval of such will is filed with the Secretary, unless for good cause shown the Secretary extends the time: Provided, That such time shall not be extended beyond six months from the date of the first hearing. For purposes of determining the validity of any will, the Secretary is hereby granted the same subpena power as is vested in the courts. All costs of obtaining witnesses and evidence before the Secretary shall be borne by the party producing such witnesses or evidence, subject to such costs being taxed to the estate in the event that the District Court of the State of Oklahoma having jurisdiction should determine such costs beneficial to the whole estate. Notwithstanding any appeal from the decision of the Secretary, approval of such will by the Secretary shall entitle it to be admitted to probate without further evidence as to its validity or, upon disapproval thereof, the heirs may immediately petition for letters of administration in the district court. No appeal from the order of the Secretary approving or disapproving any will shall stay the issuance of letters testamentary or of administration: Provided, That such letters shall not confer power to sell any restricted assets by virtue of any provision in such will, pay or satisfy legacies, or distribute property of the decedent to the heirs or beneficiaries

> until the final determination of the appeal, but all other action taken by the district court pending said appeal shall be valid and binding. No court except a Federal court shall have jurisdiction to hear a contest of a probate of a will that has been approved by the Secretary. Such appeals shall be on the record made before the Secretary and his decisions shall be binding and shall not be reversed unless the same is against the clear weight of the evidence or erroneous in law.

One important change made by this Section is that the age for making wills is dropped to 18.

This section does not seem to alter in any way the ability of an allotted Osage of less than one-half blood to devise his allotment without Secretarial approval. It is immaterial that this privilege is granted only those twenty-one or over. It applies to allottees only and by definition they were all born prior to July 1, 1907 and would be well beyond twenty-one.

A second change is that wills may be approved by the Secretary only <u>after</u> the death of the testator and after a formal hearing.

An appeal may be taken from the finding of the Secretary. If the Secretary has approved, but an appeal is taken, the letters issued cannot contain powers of sale of any restricted assets to pay or satisfy legacies or to distribute property until the appeal is finally determined.

Section 5(b) of the same Act is the current provision for probate matters. It is set out:

> Section 3 of the Act of April 18, 1912 (37 Stat. 86), is hereby amended to read as follows: "That the property of deceased and of orphan minor, insane, or other incompetent Osage Indians, such incompetency being determined by the laws of the State of Oklahoma which are hereby extended for such purpose to all Osage Indians, shall, in probate matters, be subject to the District Court of Oklahoma having jurisdiction. A copy of all papers filed in the district court shall be served on the Superintendent of the Osage Agency at the time of filing, and said Superintendent is authorized, whenever the protection of the interest of the Osage Indian requires, to appear in the district court. The Superintendent of the Osage Agency or the Secretary of the Interior, whenever he deems the same necessary, may investigate the conduct of executors, administrators, guardians, or other persons having charge of the estate of any minor, incompetent, or deceased Osage Indian. Whenever he shall be of the opinion that the estate is in any manner being dissipated, wasted, or permitted to deteriorate in value by reason of the negligence, carelessness, or incompetency of the executor, administrator, guardian, or other person in charge of the estate, the Superintendent of the Osage Agency or the Secretary is authorized, and it shall be his duty, to report said matter to the district court, take the necessary steps to have such case fully investigated, and prosecute any remedy, either civil or criminal, as the exigencies of the case may require. The costs and expenses of any civil proceedings shall be a charge upon the estate of the Osage Indian or upon the executor, administrator, guardian, or other person in charge of the estate of the Osage Indian and his surety, as the district court shall determine. Every bond of the executor, administrator, guardian, or other person in charge of the estate of any Osage Indian shall be subject to the provisions of this section and shall contain therein a reference hereto: <u>Provided</u>, That no guardian shall be appointed for a minor whose parents are living unless

the estate of said minor is being wasted or misused by such parents: Provided further, That no land shall be sold or alienated under the provisions of this section without approval of the Secretary.

Notice the final proviso requiring approval of sales of land "under this section" by the Secretary. Because of the quoted language, it would seem that any sale mentioned in Section 5a above would be subject to this proviso also.

26. Section 6 of the Act of October 21, 1978, 92 Stat. 1662, set out below, brings Osage estate planning almost into the twentieth century. Eighteen-year-olds and above are permitted, subject to the approval of the Secretary, to create inter vivos trusts of restricted property. Those with a certificate of competency may designate a banking or trust institution as trustee. The disposition of headrights is made subject to the restrictions of Section 7 of the Act, which contains 120 words in its first sentence.

Sec. 6. (a) With the approval of the Secretary of the Interior, any person of Osage Indian blood, eighteen years of age or older, may establish an inter vivos trust covering his headright or mineral interest except as provided in section 8 hereof; surplus funds; invested surplus funds; segregated trust funds; and allotted or inherited land, naming the Secretary of the Interior as trustee. An Osage Indian having a certificate of competency may designate a banking or trust institution as trustee. Said trust shall be revocable and shall make provision for the payment of funeral expenses, expenses of last illness, debts, and an allowance to members of the family dependent on the settlor.

(b) Property placed in trust as provided by this section shall be subject to the same restrictions against alienation that presently apply to lands and property of members of the Osage Tribe, and the execution of such instrument shall not in any way affect the tax-exempt status of said property.

27. Section 9 of the Act of October 21, 1978, 92 Stat. 1664, provides that where the restricted assets of a deceased Osage do not exceed $10,000, the Secretary may determine "heirs and legatees" if no court of competent jurisdiction has undertaken probate and a request is made by one or more heirs or legatees.

Probate of the restricted estate has always been handled by the Secretary among the General Allotment Indians. The probate courts of Oklahoma handle the whole estate of the Five Civilized Tribes, except for restricted funds.

Under such regulations as the Secretary of the Interior may prescribe, the heirs and legatees of any deceased owner of an Osage headright or mineral interest, real estate on which restrictions against alienation have not been removed, and funds on deposit at the Osage Agency may be determined by the Secretary if such aggregate interests do not exceed $10,000: Provided, That no court of competent jurisdiction has undertaken the probate of the deceased's estate and a request for such administrative determination has been made to the Secretary by one or more of the heirs or legatees.

28. The Act of October 21, 1978, sec. 2b, 92 Stat. 1660, provides:

> The second paragraph of section 3 of the Act of June 24, 1938 (52 Stat. 1034, 1035), as amended, is amended by striking the phrase "unless otherwise provided by Act of Congress" and inserting, in lieu thereof, the phrase "and thereafter until otherwise provided by Congress"

Thereafter, the Act of June 24, 1938, reads:

> The lands, money, and other properties now or hereafter held in trust or under the supervision of the United States for the Osage Tribe of Indians, the members thereof, or their heirs and assigns, shall continue subject to such trusts and supervision until January 1, 1984, and thereafter until otherwise provided by Congress.