PART IV

LANDS ALLOTTED AMONG

THE OSAGE INDIANS

BY

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INTRODUCTION AND KEY TO TABLES OF ALIENABILITY

OF LANDS ALLOTTED AMONG THE OSAGE INDIANS

There are several features in the Osage allotments under the Act of June 28, 1906, 34 Stat. 539, that are unique to them. In the first place, all of the land in the reservation was allotted. There were three rounds in each of which each allottee selected 160 acres. Following that, the remaining land was divided by a commission among the allottees. There was no land except that in townsites, see Act of March 3, 1905, 33 Stat. 1048, available for sale except from an allottee. One of the first three selections had to be designated as homestead. The certificate of allotment and deed carried that designation. The Act of 1918, see Note 8, permitted changing designations so that homestead became surplus, and vice versa.

A second feature was the severance of the mineral estate, which was reserved to the Tribe. The mineral estate has been managed by the tribal council with the supervision of government officials. The income thereof makes up the famous "Osage headrights." There was one headright for each of the original allottees.

As in no other scheme of restrictions, the terms "allotted" and "unallotted" became an important distinction. In other schemes, heirs were heirs and devisees were devisees. In the Osage scheme, at some periods in time, there are allotted and unallotted heirs, or allotted and unallotted devisees, and other classes. Those who were allotted were, of course, those who received allotments. The allotment act provided for allotment to those on the approved rolls as of January 1, 1906, to children born of those on the roll by that date but themselves not on the roll as of January 1, 1906, and all children born to those on the roll between January 1, 1906 and July 1, 1907. No Osage born thereafter received an allotment. They would take as heirs, devisees, or perhaps as purchasers with restricted funds under the Act of February 27, 1925, 43 Stat. 1008. Such Osages born too late to receive an allotment are referred to as "unallotted." At times, the term appears as the first part of a hyphenated term, such as "unallotted-heir."

In many pieces of legislation, "members of the Osage tribe" is construed to mean only those Osage who were allotted, see, e.g., Note 5 below. But context sometimes requires the construction which would include the unallotted as well, as in the Act of 1948, discussed below herein.

Although they were subject to having their land managed through guardianships, for most of the time the unallotted remained unrestricted until the Act of March 2, 1929, 45 Stat. 1478, when the same restrictions on the allotted were imposed on them.

Guardianship should be herein noted. It was applicable to both allotted and unallotted minors. The second section of the Allotment Act, supra, defined minors as those under twenty-one. The selection of land for minors was to be made by parents. Those who did not have parents had their selections made by the Osage Indian Agent, subject to approval of the Secretary.

The earliest provisions concerning the land of minors occurs in Section 7 of the Allotment Act, supra, and provides that parents of minors may lease their land for farming and grazing use

and have control of the proceeds until the minor reaches majority. These leases were subject to approval of the Secretary of the Interior.

The first act providing for guardianship as well as general probate matters is found in Section 3 of the Act of April 18, 1912, 37 Stat. 86-87, set out below:

> That the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma, but a copy of all papers filed in the county court shall be served on the superintendent of the Osage Agency at the time of filing, and said superintendent is authorized, whenever the interest of the allottee require, to appear in the county court for the protection of the interests of the allottee. 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, and guardians or other persons having in charge the estate of any deceased allottee or of minors or persons incompetent under the laws of Oklahoma, and whenever he shall be or opinion that the estate is in any manner being dissipated or wasted or is being permitted to deteriorate in value by reason of the negligence, carelessness, or incompetency of the guardian or other person in charge of the estate, the superintendent of the Osage Agency or the Secretary of the Interior or his representative shall have power, and it shall be his duty, to report said matter to the county court and take the necessary steps to have such case fully investigated, and also to prosecute any remedy, either civil or criminal, as the exigencies of the case and the preservation and protection of the interests of the allottee or his estate may require, the costs and expenses of the civil proceedings to be a charge upon the estate of the allottee or upon the executor, administrator, guardian, or other person in charge of the estate of the allottee and his surety, as the county court shall determine. Every bond of the executor, administrator, guardian, or other person in charge of the estate of any Osage allottee shall be subject to the provisions of this section and shall contain therein a reference hereto: Provided, 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 the approval of the Secretary of the Interior.

The Act of February 27, 1925, 43 Stat. 1008, has numerous provisions as to guardians and their handling of funds paid to them. The one provision of significance to title examination occurs 43 Stat. 1009:

> No guardian shall be appointed except on the written application or approval of the Secretary of the Interior for the estate of a member of the Osage Tribe of Indians who does not have a certificate of competency or who is one-half or more Indian blood.

The Act of October 21, 1978, Section 5(b), 92 Stat. 1660, overhauls the provisions of the Act of 1912 in relation to probate matters. It is set out in Note 25 below.

The certificate of competency is a very important feature in the scheme of Osage allotments. It was first provided for in the Osage Allotment Act. For its procedure, standards for issuance

and consequence, see Note 1, below. Superficially, it permitted alienation of surplus but left homestead restricted initially for twenty-five years or for the life of the allottee, see Note 1, below. But the certificate, in the hands of an heir, freed all inherited land, see Note 2, below.

The Act of 1925 provided that the Secretary could, after hearing, revoke a certificate if he found the Indian was squandering his estate. The Secretary's action was not reviewable by the courts. The revocation was held not to void transactions taking place prior to the revocation. U.S. v. Sands, 94 F.2d 156 (10th Cir. 1938).

The Act of March 2, 1929, imposed restrictions on the unallotted Osages but at the same time authorized the Secretary to issue certificates of competency to the unallotted, see Note 17. Section 3 of the same Act required the Secretary to issue certificates to all allotted Osage having less than one-half Osage blood within ten years of the Act, 45 Stat. 1478.

This was followed by the Act of February 5, 1948, 62 Stat. 18, which required the Secretary to "issue a certificate of competency to each member of the Osage Tribe of less than one-half Indian blood heretofore or hereafter attaining the age of twenty-one years." While "member of the Osage tribe," as indicated herein above, is frequently construed to include only allotted Osage, such construction is here impossible. No allotted Osage could reach twenty-one after the passage of the Act. They were all born prior to July 1, 1907.

The Act of 1948 was repealed by Section 3(a) of the Act of October 21, 1978, 92 Stat. 1660, and Section 3(b), 92 Stat. 1660-1661, thereof provides:

> Any Osage Indian having received a certificate of competency under paragraph 7 of section 2 of the Act of June 28, 1906 (34 Stat. 539, 542); section 3 of the Act of March 2, 1929 (45 Stat. 1478, 1480); or the Act of February 5, 1948 (62 Stat. 18), may make application to the Secretary of the Interior to revoke such certificate and the Secretary shall revoke such certificate: Provided, That revocation of any certificate shall not affect the legality of any transactions heretofore made by reason of the issuance of any such certificate. Restrictions against alienation of lands heretofore removed are not reimposed.

It was held in U.S. v. Mashunkashey, 72 F.2d 847 (10th Cir. 1934), the court may set aside a certificate of competency tency where fraud has been practiced (in this case by a third person) in procuring the issuance of the certificate.

One of the features of Indian allotments has been freedom from ad valorem taxation. That was a particular problem in the case of Osage allotments, because there were relatively no unallotted lands to be sold to whites and thereby to become taxable.

In the Allotment Act, it was provided that all surplus should become taxable in three years, that is, beginning with the year 1910. In case of the death of the allottee or the issuance of a certificate of competency, surplus became taxable immediately, even though the three-year period had not run, Seventh par., sec. 2, Act of June 21, 1906, 34 Stat. 325.

Homestead, on the other hand, was made non-taxable until otherwise provided by Congress, Fourth par., sec. 2, 34 Stat. 325.

In the Act of March 3, 1921, sec. 3, 41 Stat. 1249, Congress removed the restrictions on homestead and surplus as to all adult allotted (see Note 9, infra) Osages of less than one-half blood but at the same time provided their homestead allotments should not be taxable before April 28, 1931, if held by the original allottee.

The status of the homestead in the hands of an heir is treated in U.S. v. Board of Com'rs of Osage County, 193 F. 485 (C.C. W.D. Okia. 1911). In that case, Judge Cotteral laid it down, id. at 488:

> When no certificates of competency issue, the homesteads, whether held by the allottees or their heirs, remain an instrumentality employed by the national government, pursuant to the constitutional power it possesses to deal with the Indians for their protection and welfare. [Citations omitted.] The question presented for decision in respect to homesteads is whether they are exempt where the allottees die without receiving certificates of competence. In the opinion of this court they are exempt, and will so remain until Congress shall remove the exemption.

The Act of March 2, 1929, sec. 1, 45 Stat. 1479 provided:

> Homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation while the title remains in the original allottee of one-half or more of Osage Indian blood and in his unallotted heirs or devisees of one-half or more of Osage Indian blood until January 1, 1959: Provided, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at anytime exceed one hundred and sixty acres.

The Act of June 24, 1938, sec. 3, 52 Stat. 1034, 1036 provides in part:

> Homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation while the title remains in the original allottee of one-half or more of Osage Indian blood and in his unallotted heirs or devisees of one-half or more of Osage Indian blood until January 1, 1984: Provided, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.

The Act of October 21, 1978, sec. 2(c), 92 Stat. 1660, provides:

> The fourth paragraph of section 3 of the Act of June 24, 1938 (52 Stat. 1034, 1036) is amended by striking the phrase "January 1, 1984" and inserting, in lieu thereof, the phrase "January 1, 1984 and thereafter until otherwise provided by Congress".

The Act of October 21, 1978, sec. 3(c), 92 Stat. 1660, 1661, reads in part:

> [S]ection . . 3 of the Act of June 24. 1938 (52 Stat. 1034) [is] hereby amended by striking wherever they occur, the phrase . . . "of one-half or more Osage Indian blood" . . .

Thus amended, the pertinent language of the Act of 1938 now reads:

> Homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation while the title remains in the original allottee and in his unallotted heirs or devisees until January 1, 1984, and thereafter until otherwise provided by Congress: Provided, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.

The Allotment Act provided that the intestacy laws of the Territory of Oklahoma or of the state into which it might afterwards be incorporated should apply, Act of June 28, 1906, sec. 6, 34 Stat. 539, 545.

The Act of April 18, 1912, sec. 8, 37 Stat. 86, 88, in providing for the making of wills did not restrict the pattern of distribution thereunder other than providing that the wills should be in accordance with the laws of the State of Oklahoma.

But as every loyal Jimmy Stewart fan knows, the wealth of the Osages led to rackets involving the passage of wealth upon the death of an Osage Indian, In the Acts of May 10, 1926, 44 Stat. 453, 475, and May 29, 1928, 45 Stat. 883, 899, appropriations are made to aid in the prosecutions of the Osage murder cases.

The Act of February 27, 1925, sec. 5, 43 Stat. 1008, 1011 provided:

> No person convicted of having taken, or convicted of causing or procuring another to take, the life of an Osage Indian shall inherit from or receive any interest in the estate of the decedent, regardless of where the crime was committed and the conviction obtained.

Section 7 of the same Act, 43 Stat. 1011, said:

> Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe: Provided, That this section shall not apply to spouses under existing marriages.

Beginning with the Act of February 27, 1925, sec. 7, 43 Stat. 1008, 1011, Congress began limiting to who might take by intestate and testate succession. In the Act of 1925, supra, inheritance of any restricted property from Osages of one-half or more Osage blood was limited to those of Indian blood and the spouses of existing marriages. Under this Act, adopted white children were excluded, In re Martin's Estate, 183 Okla. 177, 80 P.2d 561 (1938).

The Act of February 27, 1925, sec. 7, supra, was amended by the Act of September 1, 1950, 64 StatT572. It provided:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that Section 7 of the Act of February 27, 1925 (43 Stat. 1008, 1011) which imposes an inheritance restriction with relation to lands and funds of the Osage Indians, is amended by striking out the portion of said section, after the comma following the word "provided," and inserting in lieu thereof the following:
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> "That (except in cases where a person claiming as such heir is a party to a judicial

proceeding pending on the date of the enactment of this proviso in which the claimant has filed a formal pleading alleging Indian blood) no claim of heirship ship shall be recognized unless the claimant shall establish that he is a citizen of the United States and is enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior, or has a lineal ancestor so enrolled; provided further, that this section shall not apply to spouses under marriages existing on February 27, 1925."

It is said that this was adopted to put an end to the practice of using Mexican Indians to comply with the prior Act.

The Act of October 21, 1978, sec. 5(b) (7), 92 Stat. 1660, 1662, provides:

Section 7 of the Act of February 27, 1925 (43 Stat. 1008, 1011), as amended, is hereby further amended to read as follows: "Hereafter none but heirs of Indian blood and children legally adopted by a court of compe tent jurisdiction and parents, Indian or non-Indian, shall inherit from Osage Indians any right, title, or interest to any restricted land, moneys, or Osage headright or mineral interest.

The Act further protects the disposition, testate, intestate or inter vivos, of headrights in a very complicated scheme preventing any interest but life estates to go to those not of Osage Indian blood, except adopted children and their lineal descendants , who are then restricted as though they were of Osage blood. Reversion back to the Tribe in some instances is provided for. Sale of headrights by those of non-Indian blood is subjected to the right of the Tribe to purchase at the highest legitimate offer made to the owner thereof.

Because restricted land is not involved in this morass, no further explanation is deemed necessary.

The main divisions of the chart are, like those in relation to the Five Civilized Tribes, critical time periods - periods of time in which the law as to alienability was the same. Toward the end of the chart, there is a departure from this pattern to avoid repetition, of which there is, even so, an overabundance.

In the broadest of the columns, statements are made concerning alienability by persons who occupy a stated status, such as "Allottee", "Heir", "Unallotted Devisee" etc. Some of the divisions relate to a particular type of alienation, such as "By Will", "Partition", etc. In that same column, conditions are stated, such as "Unconditionally", "With approval by Secretary", and the like. Those conditions are, of course, a part of the statement of the alienability.

The last five columns on the right convey information concerning authority or further limitations not reflected on the chart, or information which completes the statement. The first of the five columns, (1), is of the first sort. It directs the user to an appended note containing authority and discussion of the statement. In some cases, the column bears two numbers, as 1/5, which indicates that both Notes 1 and 5 must be consulted, and frequently there is cross-referencing within a Note itself.

Symbols in column (2) indicate the status of the alienor; that is, "A" for adult, which means twenty-one or over; "M" for minor, meaning under twenty-one, with the understanding that the minor must act through a guardian; and "All", including both adults and minors. Congress has recently permitted eighteen-year-olds to make wills and inter vivos trusts. In these cases, "18" will appear in the first column. It should be noted that where the alienability depends upon the alienor having a certificate of competency, the symbol is always "A", because certificates are issued to adults only.

In the third column, the symbols are "5", for surplus, "H", for homestead, or "All", for both. In the final two columns, the critical quantum of Indian blood is indicated. If "X" appears in column (4), it means the statement is true of an alienor who is one-half or more of Osage blood. If the "X" appears in column (5), it indicates the statement is true of those of less than one-half blood. Where the "X" appears in both columns (4) and (5), the statement is true of those of all degrees of blood.

Reference in the notes to "Mills" indicates a citation to Mills, Oklahoma Indian Land Laws (1924), and "Semple" refers to Semple, Oklahoma Indian Land Titles (1952). In the latter, the current pocket part should always be consulted.

For some reason, Mills did not update his Osage materials in his 1947 Supplement to his work.