CHAPTER 9

INDIVIDUAL RIGHTS IN TRIBAL PROPERTY

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SECTION 1. THE NATURE OF INDIVIDUAL RIGHTS IN TRIBAL PROPERTY [1]

The nature of the individual Indian's interest in tribal property presents one of the most difficult problems in the law of Indian property. It is clearly established that where legal or equitable title to real or personal property is vested in the tribe it is not vested in the individual members thereof, and yet these individual members are not entirely without legal or equitable rights in such property. The right of the individual Indian is, in effect, a right of participation similar in some respects to the rights of a stockholder in the property of a corporation;

In analyzing this right of participation, we shall be concerned, in the present chapter, with six questions:

(1) How does the right of participation in tribal property resemble, or differ from, other forms of property right?

(2) How far is this right of participation limited by the character and extent of the tribal property?

(3) Who is entitled to participate in tribal property?

(4) Under what circumstances, if any, is the individual's right of participation transferable?

(5) What rights of *user* may the individual participant exercise while property remains in tribal status?

(6) What rights does the individual enjoy, in the *distribution* of tribal property?

We must recognize that just as the nature of rights of participation in corporate property, varies among corporations and among various classes of security holders within a single corporation, so the rights of individual Indians in tribal property exhibit a wide range of variation, and depend, in the last analysis, upon the governmental acts and contractual agreements of the Federal Government, the tribe, and the individual Indian himself.

Answers to our questions are to be found primarily in a series of statutes and treaties, nearly all of which deal with particular tribes. The judicial and administrative decisions in this field are, in nearly every case, dependent upon such particular acts and treaties.

Here, even more than in most fields of law, general principles, no matter how confidently announced by the highest authorities, must be pared down to the facts with which they deal before we are entitled to rely upon them.

With this cautionary introduction we turn to our first question: How does the right of participation in tribal property resemble, or differ from, other forms of property right?

The right of participation in tribal property must be distinguished, in the first place, from tenancy in common. This distinction is particularly important because a good deal of the discussion of tribal property in the decided cases invokes such terms as "ownership in common," which is occasionally used to mean "tenancy in common." The distinction between tribal ownership and tenancy in common may be clearly seen if we consider the fractional interest of an Indian in an allotment in heirship status where there are so many heirs that every member of the tribe has a fractional interest, and then consider the interest which the same Indian would have in the same land if the land belonged to the tribe. In the first case, the individual Indian is a tenant in common. He may, under certain circumstances, obtain a partition of the estate. His consent is, generally, necessary to authorize the leasing of the land. His interest in the land is transferable, devisable, and inheritable. In the second case, his interest is legally more indirect, although economically it may be more valuable. He cannot, generally, secure partition of the tribal estate. He can act only as a voter in the leasing of tribal land. His interest in the tribal property is personal and cannot be transferred or, inherited, but his heirs, if they are members of the tribe, will participate in the tribal property in their own right.

Observing that the Cherokee lands were held in communal ownership, the Supreme Court, speaking in the case of *The Cherokee Trust Funds* [2] remarks:

> * * * that does not mean that each member had such an interest, as a tenant in common, that he could claim a *pro rata* proportion of the proceeds of sales made of any part of them. (P. 308.)

In the absence of legislation to the contrary, the individual Indian has no right as against the tribe to any specific part of the tribal property.[3] It is often said that the individual has only

[1] On the nature of tribal property see Chapter 15. On individual property see Chapters 10 and 11.

[2] 117 U. S. 288 (1886).

[3] *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127 (1904); *United States* v. *Chase*, 245 U. S. 89 (1917). See *McDougal* v. *McKay*, 237 U. S. 372 (1915); *Shulthis* v. *McDougal*, 170 Fed. 529 (C. C. A. 8, 1909), app. dism. 225 U. S. 561 (1912).

a "prospective right" [4] to future income from tribal property in which he has no present interest.[5] Other terms used to picture this right are "an inchoate interest,"[6] and a "float."[7] These terms aptly characterize the intangible right of the Indian to share in tribal property. Until the property loses its tribal character and becomes individualized, his right can be no more than this, except insofar as federal law, tribal law, or tribal custom may give him' a more definite right of occupancy. in a particular. tract. In the case of tribal funds, he has, ordinarily, no vested right in them until they have been paid over to him or have been set over to his credit, perhaps subject to certain restrictions.[8] In the case of lands, he has no vested right unless the land or some designated interest therein has been set aside for him either severally or as tenant. in common.[9]

The statement has often been made that the tribe holds its property in trust for its members.[10] This statement may be compared with the assertion frequently made that corporate property is held in trust for the stockholders, though, strictly speaking, no technical trust relationship exists in either case.

In speaking of the title to the lands of the Creek Nation, the court in *Shulthis v. McDougal*,[11] declared.:

> The tribal 'lands belonged to the tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as the public lands of the United States are held by the nation. They constituted the home or seat of the tribe. Every member, by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property. It was granted to the tribe by the federal government not only as the home of the tribe, but as a home for each of the members.[12]

Indian lands were generally. looked upon as a permanent home for the Indians. "Considered as such, * * * it was not unnatural or unequal that. the vast body of lands not thus specifically and personally appropriated should he treated as the common property of, the Nation * * *." [13]

That tribal property should be held in common for the benefit of the members of the Indian community as a whole was, according to the Supreme Court in the case of *Woodward* v. *de Graffenried*, the principle upon which conveyances of land to the Five Civilized Tribes were made.[14] Treaties often provided that the land conveyed to the tribe was to be held in common.[15]

Likewise certain statutes specify that tribal lands are to be held or occupied in common.[16]

Indian tribal laws and customs led governments dealing with Indian-lands to adopt the theory that tribal property was held for the common benefit of all.[17] The constitution of the Cherokee Nation, both as originally adopted in 1839 and as amended in 1866, declared in section 2, article 1, that the lands of the Cherokee Nation were to remain the common property of the tribe.[18]

In the case of *United States* v. *Charles*,[19] the court, in referring to the lands occupied by the Tonawanda Band of Seneca Indians, stated, "The reservation lands are held in common by the tribe, although individual members of the tribe may be in possession of a particular tract; and such possession is recognized by the tribe." (P. 348.) Many tribal constitutions, adopted under the Wheeler-Howard Act,[20] provide that all lands hitherto unallotted shall be held' in the future as tribal property.[21]

Although tribal property is vested in the tribe as an entity, rather than in the individual members thereof, each member of the tribe may have an interest in the property.

The nature of the individual member's right in tribal property is discussed in *Seufert Bros. Co. v. United States*.[22] The court quotes the words of an Indian witness who compared a river in which there was a common right to fish to a "great table where all the Indians time to partake." '(P. 197.)

In the case of *Mason* v. *Sams*, the Treaty of 1855 between the United States and the Quinaielts [23] is discussed. By the terms of article two of the treaty, a tract of land was to be "reserved for the use and occupation of the tribes * * * and set apart for their exclusive use." The court construed the treaty to give the Indians an exclusive right of fishing in the waters on these lands; the right to fish being enjoyed by all members, even though the treaty was made with the tribe.[24]

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[4] Op. Sol. I. D., M.8370. August 15. 1922.

[5] *Taylor* v. *Tayrien*, 51 F. 2d 884 (C. C. A. 10. 1931). cert. den. 284 U. S. 672 (1931). This case involved individual rights in Osage tribal minerals. For a discussion of special laws governing Osage tribe see Chapter 23. sec. 12.

[6] *Taylor* v. *Tayrien*, 51 F. 2d 884 (C. C. A. 10, 1931). cert. den. 284 U. s. 672 (1931).

[7] *McKee* v. *Henry*, 201 Fed. 74 (C. C. A. 8. 1912); *Woodbury v. United States*, 170 Fed. 302 (C. C. A. 8. 1909). The cases involved rights of an enrollee before allotments bad been made. In an opinion involving back annuity payments. the Solicitor of the Department of the Interior wrote : "The members of a tribe have an inherent interest in the tribal lands and funds but until segregated by allotment or payment in severalty they remain the common property of the tribe." Op. Sol. I. D., D. 42071. December 29. 1921.

[8] Funds due Osage as share in royalties and proceeds from sale of land not his until actually paid to him or placed to his credit—Op. Sol. I. D.. M 8370. August 15. 1922. See Chapter 23. sec. 12B. So long as a judgment In favor of a tribe is not prorated among individual members. no present or former member has a vested right—Letter of Commissioner of Indian Affairs to Indian Agents, October 9. 1937.

[9] *Gritts* v. *Fisher*, *224* U. S. 640 (1912) ; *St. Marie* v. *United States*. 24 F. Supp. 237 (D. C. S. D. Cal. 1938). aff'd — F. 2d — (C. C. A. 10, 1940) : 56 I. D. 102 (1937): *McKee* v. *Henry*, 201 Fed. 74 (C. C. A. 8. 1912).

[10] *Ligon* v. *Johnston*, 164 Fed. 670 (C. C. A. 8. 1908). app. dism. 223 U. S 741: Cherokee *Nation* v. *Hitchcock*, 187 U. S. 294 (1902).

[11] 170 Fed. 529. 533 (C. C. A. 8. 1909). aff'd 225 U. S. 561 (1912).

[12] Also see W. 0. Whitney *Lumber & Grain* Co. v. *Crabtree*, 166 Fed. 738 (C. C. A. 8. 1908). Title to Creek lands were In nation ; occupants had no more than possessory rights.

[13] *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 215 (1894).

[14] 238 U S. 284 (1915). *Accord: Heckman v. United States, 224* U. S. 413 (1912), modify'g and aff'g sub nom. *United States* v. Allen, 179 Fed. 13 (C. C. A. 8. 1910). See *Shulthis* v. *McDougal*, 170 Fed. 529 (C. C. A. 8. 1909). app. dism. 225 U. S. 561 (1912).

[15] See, for example: Treaty of December 29. 1832. with the United Nation of the Senecas and Shawnee Indians, 7 Stat. 411: Treaty of May 30. 1854. with the United Tribes of Kaskaskia and Peoria. Plankeshaw, and Wea Indians, 10 Stat. 1082; Treaty of June 22. 1855. with Choctaws and Chickasaws, 11 Stat 611; Treaty of August 6. 1846. with Cherokee. 9 Stat. 871. discussed in *The Cherokee* Trust *Funds*, 117 U. S. 288 (1886). and *United States* v. *Cherokee Nation*, *202* U. S. 101 (1906).

[16] See. for example, Joint Resolution, June 19, 1902, 32 Stat. 744 (Walker River, Uintah, and White River Utes). Various allotment statutes reserve from allotment lands to be held "in common," specifying occasionally for the reservation of gracing or timber lands. lands containing springs. etc. See, for example: Act of March 3. 1885. 23 Stat. 340 (Umatilla Reservation) ; Act of March 2. 1889, 25 Stat. 1013 United Peorias and Miamies) ; Act of June 3. 1926. 44 Stat. 690 (Northern Cheyenne Indian Reservation). See, also. Chapter 15.

[17] *See Mitchel v. United States, 9* Pet. 711. 746 (1835).

[18] Cited and discussed in *Cherokee Intermarriage Cases*, 203 U. S. 76 (1906). and in *The Cherokee Trust Funds*. 117 U. S. 288 (1886).

[19] 23 F. Supp. 346. 348 (D. C. W. D. N. Y. 1938).

[20] Act of June 18. 1934, 48 Star. 984, 25 U. S. C. 461, et *seq.*

[21] *E g.*, Art. 8. sec. 2. of the Constitution and Bylaws for the Shoshone-Bannock Tribes of the Fort Hall Reservation. Idaho, approved Apr l 30. 1936.

[22] 249 U. S. 194 (1919). aff'g *sub* nom. *United Staten ex rel. Williams* v *Seufert Bros.* Co.. 233 Fed. 579 (D. C. Ore. 1916).

[23] 12 stat. 971.

[24] 5 F 2d 255 (D. C. W. D. Wash. 1925). Accord : *Halbert* v. *United States*. 283 U. s. 753 (1931), rev'g sub nom. *United States* v. *Halbert*, 38 F. 2d 795 (C. C. A. 9, 1930).

Where certain lands have been reserved for the use and occupation of a tribe, members of the tribe are entitled to use bodies of navigable water within the reservation.[25]

In all these cases, the individual enjoys a right of user derived from the legal or equitable property right of the tribe in which he is a member.[26]

[25] Op. Sol. I. D.. M.24358, May 14, 1928. *Cf. United States* v. *Powers*, 305 U. S. 527 (1939). aff'g 94 F. 2d 783 (C. C A. 9, 1938), and modify'g 16 F. Supp. 155 (D. C Mont. 1936), holding that under the Treaty of. Map 7, 1868, with the Crow Indians, 15 Stat. 649. the waters within the reservation were reserved for the equal benefit of tribal members and when allotments of these lands were made, the right to use the waters passed to the allottees. See also *Skeem* v. *United States*, 273 Fed. 93 (C. C. A. 9. 1921). holding that the members of the Shoshone Tribe who occupied tribal lands under Art. 6 *of* the Fort Bridger Treaty, July 3, 1868, 15 Stat. 673, and who were awarded allotments of these lands under Art 8 of the agreement ratified by Act of June 6, 1900, 31 Stat. 672. were entitled to the water rights.

[26] See sec. 5, *infra*.

SECTION 2. DEPENDENCY OF INDIVIDUAL RIGHTS UPON EXTENT OF TRIBAL PROPERTY.

The individual Indian claiming a share in tribal assets is subject to the general rule that he can obtain no greater interest than that possessed by the tribe in whose assets he participates.[27] The use that an individual Indian may make of tribal lands is limited by the nature of the estate in the land held by the tribe. Thus in the case of United *States v. Chase*,[28] the court held that where the Omaha tribe held only a right of occupancy in certain lands, with the fee remaining in the United States, the tribe could not convey more than its right of occupancy to a member without the consent of the United States.

Viewed in this fashion, an allotment system or any act or treaty which extinguishes tribal title decreases to that extent the quantity of tribal property in which the individual may share.[29]

In the case of *The Cherokee bust Funds*,[30] the court said,

> Their [Cherokee Nation] treaties of cession must, therefore, be held not only to convey (he common property of the Nation, but to divest the interest therein of each of its members. (P. 308.)

The individual's rights in tribal property are affected by any set-offs or claims against the tribe, because the amount of his share that he would otherwise be entitled to is decreased.

[27] "The right of the individual member in tribal land is derived from and is no greater than the right of the tribe itself." If the tribe cannot make a lease without the approval of the Department of the Interior, neither can the individual. Memo. Sol. I. D.. October 21. 1938.

[28] 245 U. S. 89 (1817). rev'g 222 Fed. 593 (C. C. A. 8, 1915).

[29] For examples of this fact situation see : *Moore* v. *Carter Oil Co.*, 43 F. 2d 322 (C. C. A. 10. 1930). cert. den. 282 U. S. 903 ; *United States* v. *Ft. Smith & W. R. Co.*, 195 Fed. 211 (C. C. A. 8. 1912) ; *Choate* v. *Trapp*, *224* U. S. 665 (1912) ; *The Kansas Indians*, 5 Wall. 737 (1866).

[30] 117 U. S. 288 (1886).

SECTION 3. ELIGIBILITY TO SHARE IN TRIBAL PROPERTY

Originally the only requisite to share in tribal property was membership.[31] Abandonment. or loss of membership forfeited the right to share." Acquisition of membership ordinarily carried with it the right to share in tribal property.[32] The question of what constitutes tribal membership is discussed elsewhere.[34]

Under the rule that membership was necessary to share in tribal property, the right to participate In the distribution could not pass to the member's heirs, nor could it be assigned by the member.[35] The children of a member could not inherit their parent's right to share. Their only right to share in the distribution of tribal property came from being members themselves. However, had their parent's right to participate in the distribution of tribal assets attached itself to certain property in which he had a vested right, his children might inherit this property.[36] But as soon as the member's right had vested, the property was no longer tribal property. It had become individualized ; it was individual property and not tribal property that was being passed on by descent.[37]

Although originally the right to participate in tribal property was coextensive with tribal membership, this rule has been modified by various congressional enactments. On the one hand, the

[31] *Halbert* v. *United States*, 283 U. S. 753 (1931). rev'g sub nom. *United States* v. *Halbert*, 38 F. 2d 795 (C. C. A. 9, 1930) ; *Tiger* v. *Fewell*, 22 F. 2d 786 (C. C. A; 8. 1827) ; *La Roqui* v. *United States*, *239* U. S. 62 (1915). aff'g 198 Fed. 645 (C. C. A. 8. 1912) ; *Sizemore* v. *Brady*, 235 U.-S. 441 (1914); *Gritts* v. *Fisher*, *224* U. *8.* 640 (1912) ; *Oakes* v. United *States*, 172 -Fed. 305 (C. C. A. 8, 1909) ; *Fleming* v. *McCurtain*, 215 U. S. 56 (1909) ; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294 (1902). ; Op. Sol. I. D., M.15954, January 8. 1927. For regulations governing pro-rata shares of tribal funds, see 25 C. F. R. 233.1 233.7: for regulations governing annuity and other per capita payments, see 25 C. F. R. 224.1-224.5.

[32] See Memo. Sol. I. D.. March 19, 1938 (Cheyenne River Sioux). In the case of The *Cherokee' Trust Funds*, 117 U. S. 288 (1886). in which the Court denied the right of those who had remained East and abandoned their membership. to share in proceeds arising from sale of lands of Cherokee Nation, the Court stated:

> If Indians • • • wish to enjoy the benefits of the common property of the Cherokee Nation. in whatever form it may exist. they must • • • be readmitted to citizenship • • • They cannot live out of its Territory. evade the obligations and burdens of citizenship. and at the same time enjoy the benefits of the funds and common property of the Nation. (P. 311.)

[33] In the case of *Cherokee Nation* v. *Journeycake*, 155 U. S. 196 (1894). the Supreme Court discussed the rights of the Delaware Indians to share in the property rights of the Cherokee Nation. under the contract entered into between the Delawares and the Cherokees on April 8. 1867. in pursuance of a treaty entered into between the United States and the Cherokee Nation. July 19. 1866 (14 Stat. 799. 803). The court decided :

> Given therefore. the two propositions that the lands are the common property of the Cherokee Nation. and that the registered Delawares have become incorporated Into the Cherokee Nation and are members and citizens thereof, it follows necessarily that they are equally with the native Cherokees the owners of and entitled to share in the profits and proceeds of these lands. (Pp. 210-211.)

See *also Cherokee Intermarriage Cases*, 203 U. S. 76 (1906), and *Delaware Indians* v. Cherokee *Nation*, 193 U. S. 127 (1904). for a discussion of the rights of the Delawares in Cherokee property.

In the case of the *Cherokee Nation v. Blackfeather*, 155 U. S. 218 (1894). the court applied the rule of the *Journeycake* case to the Shawnees who were admitted to the Cherokee Nation.

[34] See Chapters 1, 5, 7.

[35] *Gritts* v. *Fisher*, 224 U. S. 640. 642 (1912) ; *La Roque* v. *United States*, 239 U. S. 62 (1915).

[36] See Op. Sol. I. D., D42071. December 29. 1921.

[37] Op. Sol. I. D.. M.15954. January 8, 1927 ; Op. Sol. I. D., M.13270, November 6, 1924 ; OP. Sol. I. D.. M.27381, December 13, 1934.

right to share in tribal property has been denied to certain special classes of tribal members. On the other band, the right to share in tribal property has been extended to various classes of non-members.

The most important class of members excluded from the right to share in tribal property comprised white men marrying Indian women who, under special tribal laws, were admitted to tribal membership or "citizenship," but were not, in many cases, given any rights at all in tribal property.

The problem created by the claims of those people is discussed in the *Cherokee Intermarriage Cases.*[38] The court traces the policy of the United States and the tribal government to keep tribal property from coming into the bands of whites who married Indians solely for the purpose of sharing in the tribal wealth.[39]

The' policy of the United States toward the rights of non-Indians who claimed rights because of intermarriage is indicated by the Act of August 9, 1888,[40] which, excluding the Five Civilized Tribes from its scope, provided':

> * * * no white -man, not otherwise a member of any tribe of Indians, who may hereafter marry, an Indian woman, member of any Indian tribe * * * shall by such marriage hereafter acquire any right in any tribal property, privilege, or interest whatever to which any member of such tribe is entitled.

An analogous problem arose when the slaves residing in the Indian Territory Were granted freedom and citizenship by the Emancipation Proclamation and the Thirteenth Amendment to the United States Constitution. The rights of these "freedmen" in tribal property are elsewhere discussed.[41]

As already noted, the original rule was that existing membership was the requisite for sharing in tribal property. But the beginning of the allotment system, and the policy of encouraging the abandonment of tribal relations led to the modification of this rule.[42]

In order to persuade Indians to forsake tribal habits and adopt the white man's civilization, various acts[43] were passed and treaties[44] adopted, guaranteeing to those Indians who complied with this policy the same rights to share in tribal property, as if they had remained with the tribe.[45] Four of these acts, general in their terms, deserve special mention:

(1) The Act of March 3, 1875,[46] applying to Indians who had abandoned or who should thereafter abandon their tribal relations to settle under federal homestead laws,[47] declares :

> That any such Indian shall be entitled to his distributive share of * * * tribal funds, lands, and other property, the same as though be had maintained his tribal relations * * *.[48]

However, where specially provided, such as in the Act of February 6, 1871,[49] Indians who wished to leave the tribe and at the same time receive certain lands as their allotments, bad to relinquish their rights to share in any further distribution' of tribill assets. The Treaty of November 15, 1861,[50] with the Pottaw&tomie Nation, discussed in *Goodfellow* v. *Muckey*,[51] provided that those of the tribe who had adopted the customs of the whites and who were willing to abandon all claims to the common lands and funds would have lands allotted to them in everalty.

(2) Section 6[52] of the Act of February 8, 1887,[53] declares :

> * * * and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States and is entitled to all the rights. privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United

[38] 203 U. S. 76 (1906).

[39] In 1874, the Cherokee National Council adopted a code which admitted white men to citizenship, and it one paid a sum of $500 (the approximate value of the share of each Indian) into the national treasury, he became entitled to a share in 'tribal property. But even this privilege was withdrawn in 1877. and so from that date, whites intermarrying into the Cherokee Nation were admitted to citizenship upon the condition that they should not thereby acquire an estate or interest in the communal property of the nation. In the ease of *Whitmire* v. *Cherokee Nation,* 30 C. Cls. 138. 152 (1895). the court quotes a section of the Cherokee code and adds : "The idea therefore existed. both in the mind and in the laws of tbe Cherokee people. that citizenship did not necessarily extend to or invest in the citizen a personal or individual interest in what the constitution termed the 'common property,' 'the lands of the Cherokee Nation.'"

[40] C. 818. see. 1, 25 Stat. 392, 25 U. S. C. 181.

[41] See Chapter 8. sec. 11.

[42] In 1909. Mr. Justice Van Devanter, then on the Circuit Court of Appeals. wrote :

> For many years the trestles and legislation relating to the Indians proceeded largely upon the theory that the welfare of hoth the Indians and the whites required that the former be kept in tribal communities separated from the latter. and while that policy prevailed, effect was given to the original rule respecting the right to share in tribal property; but Congress later adopted the policy of encouraging individual Indians to abandon tbeir tribal relations and to adopt the customs. habits. and manners of civilized life. and. as an incident to this change in policy. statutes were enacted declaring that the right to share in tribal property should not be impaired or affected by such a severance of tribal relations. whether occurring theretofore or thereafter. (*Oakes* v. United *States,* 172 Fed. 305. 308 (C. C. A. 8. 1909).) See Chapter 11. sec. 1.

[43] *E. g.*, the Act of December 19, 1854. 10 Stat. 598. 599. promised that the property rights of the mixed bloods in the tribal property of the Chippewas would not be impaired if they remained on the lands ceded to the United States and separated from the tribe.

[44] *E. g.*, Treaty with Choctaws, September 27, 1830. 7 Stat. 333, discussed in *Winton* v. *Amos,* 255 U. S. 373. 388 (1921).

[45] *Oakes* v. *United States,* 172 Fed. 305 (C. C. A. 8. 1909) ; *United States ex rel. Besaw* v. Work, 6 F. 2d 694 (App. D. C. 1925) ; *Pape* v. *United States,* 19 F. 2d 21.9 (C C. A. 9, 1927).

[46] 18 Stat. 402. 420.

[47] While this act is directed particularly at Indians acquiring homesteads on the public domain, it has been referred to as applying to any, Indians abandoning their tribal relations. *Oakes* v. United *States,* 172 Fed. 305. It is believed, however, that this act can be restricted in the following manner. The well-recognized purpose of this act and of similar acts preserving interests in tribal property to Indians abandoning their tribal relations was to induce Indians to leave their tribal life on the reservations and to take up the habits and customs of civilized life in white communities. See *Oakes* v. United *States,* at 308; *United States* v. *Besaw,* 6 F. (2d) 694, 697 (Ct. App. D. C. 1925). In fact, the phrase "abandonment" of tribal relations" has continuously been interpreted as meaning a physical abandonment of the tribe and the reservation and an undertaking to live as a white person. An example of such an interpretation of the phrase in the Act of 1875 is the Circular of Instructions issued by the General Land Office on March 25. 1875. requiring Indians desiring to take advantage of the benefits of the Act of 1875 to make affidavit that they have adopted the habits and Pursuits Of civilized life (2 C. L. 0. 44). In all cases of which I have knowledge so far brought into court or before the Department for adjudication of the rights of Indians under the 1875 or 1887 acts. the Indians had physically abandoned their tribe and reservation and this was assumed to prove abandonment of tribal relations.

In view of this purpose of Congress to induce Indians to leave the reservations and the interpretation of the statutory language "abandonment of tribal relations" it may be said that the Act of 1875 would not apply to Indians who wish to relieve themselves of membership in a tribe but who. nevertheless. remain upon the reservation of the tribe and continue living as other members of the tribe and continue enjoying the Federal protection of reservation life. Memo. Sol. I. D.. March 19. 1938.

[48] The Act of January 18. 1881. 21 Stat. 315. 318. gave to those Winnebago Indians of Wisconsin who abandoned their tribal relations and wished to use the money for purposes of settling a homestead on the public domain a pro rata share in the distribution of tribal funds.

[49] 16 Stat. 404 (Stockbridge and Munsee).

[50] 12 Stat. 1191.

[51] 10 Fed. Cas. No. 5537 (C. C. Kans. 1881).

[52] This section was amended by the Act of *May* 8, 1906, 34 Stat. 182, 25 U. S. C. 349.

[53] 24 Stat. 388. 390.

States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.[54]

In the case of *Reynolds* v. *United States,"* a Sioux woman who had been born on the reservation and was a member of the tribe was taken from the reservation by her father. She moved away from the reservation, adopted the habits of white people and married a white man. Her rights to share in the tribal property were recognized, under the 1887 statute.

(3) By section 2 of the Act of August 9, 1888,[56] rights in tribal property were preserved to Indian women who thereafter married citizens of the United States and became citizens also.

(4) In furtherance of its policy to induce Indians to break away from the tribal mode of life, Congress included in the Appropriation Act of June 7, 1897,[57] the following provision granting rights in tribal property to the children of certain Indian women who had left the tribe :

> That all children born of a marriage heretofore solemnized between a white man and. an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe shall have the same rights. and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe . * * *[58]

Because this statute creates a new class of distributees in tribal property and, to. that extent, decreases the property right of those distributees otherwise entitled to share, it has been strictly construed. It does not include the children of a marriage between two Indians ;[59] it does not include the children of a marriage between an Indian man and a white woman ;[60] it does not save any rights of children of an Indian woman who married a white man after June 7, 1897 ;[61] it does not save the rights of children whose Indian mother had married a white man before that date, but who was a member by adoption only, or if she had been 'a member by blood, who was not considered a member at that date or at her death if it had occurred prior to that time,= Nor does it create any rights in any lineal descendants other than children of the Indian woman.

The rights of children of a tribal member are discussed. in *Halbert v. United States:*[62]

> The children of a marriage between ad Indian woman and, a white man, usually take the status of the father; but if the wife retains her tribal membership and the children are born in the. tribal environment and there reared by her, with the husband failing to discharge his 'duties to them, they take the status of the mother.
>
> Whether grandchildren of such a marriage have tribal membership or otherwise depends on, the status of the father or mother as the case may be, and not on that of a grandparent.
>
> As to marriages occurring before June 7, 1897 (as the marriages here did), between a white man and an Indian woman, who Was Indian by blood rather than by adoption-and who on June 7, 1897, or at the time of her death, was recognized by the tribe-the children have the same right to share in the division or distribution of the property of the tribe of the mother as any other member of the tribe, but this is in virtue of the Act of June 7, 1897.

In the distribution of tribal assets, the visible evidence of one's right to share is the appearance of his name on the appropriate "roll." If membership was the requisite, he had to be on the "membership roll." As a practical matter, acts and treaties providing for distribution of tribal property had to and did set a specific date as to when status must exist. Generally those who did not have a status entitling them to share on that date could not participate even though they might have had such a status before and after that date.[64]

[54] In view of this act, "the mere. transfer of citizenship is not important, so. far as the Question of the rights in tribal property is concerned." *United States ex rel. Besaw v. Work,* 6 F. 2d 694, 698 (App. D. C. 1925).

[55] 205 Fed. 685 (D. C. S. D. 1913).

[56] C. 818, *25* Stat. 392. See also *Pape v. United States, 19* F. 2d 219 (C. C. A. 9, 1927), holding that an Indian woman may receive a share in tribal property even if she marries a white man, becomes a citizen of the United States, has severed tribal relations and has adopted civilized life. *Work* v. *Gouin,* 18 F. 2d 820 (App. D. C. 1927). holding that a Chippewa woman, though married to a white man and separated from the tribe, was entitled to share in tribal fund.

[57] 30 Stat. 62, 90. 25 U. S. C. 184.

[58] *Cf. Stookey* v. *Wilbur, 58* F. 2d 522 (App. D. 'C. 1932). (Act invoked by Secretary of the Interior; Court declined to issue mandamus to compel Secretary to restore certain names to tribal rolls.)

[59] Memo. Sol. I. D., December 18, 1934.

[60] *Ibid.*

[61] *Pape v. United States,* 19 F. 2d 219 (C.-C. A. 9,' 1927).

[62] *Oakes v. United States,* 172 Fed. 305 (C. C. A.. 8. 1909).

[63] *283* U. S. *753, 763-764* (1931). rev'g sub *nom. United States* v. *HaZberl, 38* F. 2d 795 (C. C. A. 9. 1930).

[64] For examples of such rolls, see the Act of March 1, 1901, 31 Stat. 861, 869–870 (Creek) and the Act of June 30. 1902, 32 Stat. 500, 501-*502* (Creek). See Chapter 23. sec. 7. For a discussion of the power of Congress and the Secretary over enrollment, see Chapter 5, secs. 6 and *1 3* .

SECTION 4. TRANSFERABILITY OF THE RIGHT TO SHARE

Ordinarily, a right to participate in tribal property cannot be alienated, either voluntarily or by operation of law.[65] To be entitled to share, the participant's children must have a status in their own right; they may be entitled to share as members, but not as heirs.[66]

However, interests in tribal property may be made transferable by congressional act[67] or tribal law and custom.[68] In such event, alienability may be limited to transfer only by operation of law.[69]

Under the Wheeler-Howard Act, shares in the assets of an Indian tribe or corporation may be disposed of to the Indian , tribe or corporation from which the shares were derived or to its successor with the approval of the Secretary of the Interior, but alienation to others is prohibited. The Secretary of the Interior is authorized to permit exchanges of shares of equal value whenever such exchange is expedient and for the benefit of cooperative organizations.[70]

[65] *Sloan* v. *United States.* 118 Fed. 283 (C. C. Nebr. 1902). app. dism. 193 U. S. *614 (1904). Woodbury* v. *United States, 170* Fed. 302 (C. C. A. 8. 1909) ; *cf. Doe* v. *Wilson, 23 How. 457* (1859) ; *Crews* v. *Burcham,* 1 Black 352 (1861).

[66] *Cf. Woodbury* v. *United States, 170* Fed. 302 (C. C. A. 9. 1909).

[67] *E. g.,* Act of March 1. 1901, 31 Stat. 861. 864. and Act of June 30, 1902. c. 1323, 32 Stat. 500 (Creek allotments and funds), Act of June 28. 1906, c. 3572, 34 Stat. 539. and Act of April 18. 1912, 37 Stat. 86 (Osage allotments and funds), For a discussion of these statutes, see Chapter 23.

[68] See see. 5.

[69] Act of June 28. 1906. 3572, 34 Stat. 539 (Osage), providing for descendibility did not make interest assignable. Op. Sol. I. D., M.8370, August 15, 1922. Act of April 18. 1912. 37 Stat. 86 (Osage), providing for descendibility did not make right assignable. *Taylor* v. *Tayrien,* 51 F. 2d 884 (C. C. A. 10. 1931). cert. den., 284 U. S. 672 (1931).

[70] Act of June 18, 1934, sec. 4, 48 Stat. 984, 985 ; 25 U. S. C. 464.

SECTION 5. RIGHTS OF USER IN TRIBAL PROPERTY

While property may be vested in a tribe, it is generally the individual members of the tribe who enjoy the use of such property. The question of what rights of user are enjoyed by individual Indians in tribal property may conveniently be considered under four headings:

(A) Occupancy of particular tracts.
(B) Improvements.
(C) Grazing and fishing rights.
(D) Rights in tribal timber.

A. OCCUPANCY OF PARTICULAR TRACTS

We have elsewhere noted[71] that it is a distinctive characteristic of tribal property that the right of possession is vested in the tribe as such, rather than in individual members

Nevertheless, as a practical matter, some orderly distribution of occupancy among the members of the tribe is generally necessary in order that the land may be used. Hence, it comes about that individuals are given rights of occupancy in certain tracts of tribal land. The tribe may formally assign a right of occupancy to an individual, or if an individual is in possession by tribal law, usage and custom, a right of occupancy may -come to be. recognized without such formal assignment.[72]

The right of an Indian tribe to grant occupancy rights in designated tracts is specified in certain treaties.[73]

Many treaties recognize the value of individual occupancy rights on tribal, land as well as the individual ownership of improvements, and provide for payments to such individuals for loss or destruction of such rights and improvements.[77]

The limitations on the rights of an individual occupant have been defined in several cases. In *Reservation Gas Co. v. Snyder,*[78] it was held that an Indian tribe might dispose of minerals on tribal lands which had been assigned to individual Indians for private occupancy, since the individual occupants had never been granted any specific mineral rights by the tribe.

In *Terrance* v. *Gray,*[79] it was held that no act of the occupant of assigned tribal land could terminate the control duly exercised by the chiefs of the tribe over the use and disposition of the land.

In *Application of Parker,*[80] it was held that the Tonawanda Nation of Seneca Indians had the right to dispose of minerals on the tribal allotments of its members and that the individual allottee had no valid claim for damages.

The nature of the rights conferred by an Indian tribe upon its members with respect to land occupancy depends upon the laws, customs. and agreements of the tribe. In the case of United *States* v. *Chase,*[81] the Supreme Court held that the making of assignments of land of the Omaha tribe to individual members did not preclude. a later revocation of such assignments when the tribe decided that the reservation should be allotted; even though the original assignments were made pursuant to a specific treaty provision. were approved by the Commissioner of Indian Affairs, and guaranteed the possessory right of the assignee. The court-*per* Van Devanter, *J.*, characterized these arrangements as:

> * * * leaving the United States and the tribe free to take such measures for the ultimate and permanent disposal of the lands, including the fee, as might become essential or appropriate in view of changing conditions, the welfare of the Indians and the public interests. (P. 100.)

Referring to the rights of an occupant of lands of the Cherokee Nation, the court in *The Cherokee Trust Funds,*[82] declared:

> He had a right to use parcels of the lands thus held by the Nation, subject to such rules as its governing authority might prescribe; but that right neither prevented nor qualified the legal power of that authority to cede the lands and the title of the Nation to the United States.

The right of the occupant has been likened to that of a licensee or tenant at will. But, In order to assure the occupant of land some security in his possession, tribal law and custom may' recognize his right of possession to the extent that the right of occupancy may not be revoked at the mere caprice of tribal officials.

Typical of the laws of the Five Civilized Tribes with respect to occupancy rights was the Creek 'Act of 1889 by which the Creek Nation conferred on each citizen of the nation who was the head of a family and engaged in grazing livestock the right to enclose for that purpose one square mile of public domain without paying compensation. Provision was made for establishing, under certain conditions, more extensive pastures near the frontiers to protect the occupants against the influx of stock from adjacent territories.[83] Various laws of the Five Civilized Tribes provided for the sale or lease of these rights in tribal lands to other members of the tribe.[84] Under these laws, the rights of the grantor and the grantee or the lessor and lessee were protected in tribal and territorial courts. If the lessee refused to surrender possession after the expiration of his term, the lessor could maintain an action of ejectment in federal courts.[85] Adverse possession could run against an occupant. The occupant could maintain an action of forcible entry and detainer against

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[71] Chapter 15, sec. 1.

[72] Memo. Sol. I. D.. October 21. 1938. "If 'no definite land assignments are made, It is possible that individual members may assert occupancy rights in tribal land based upon long-continued usage." On the power of the tribe over Individual rights of occupancy in tribal land, see Chapter 7.

[73] See. for example. Art. VI of the Treaty of September 24. 1857, with the Pawnee Indians. 11 Stat. 729. which provided in part:

> * * * if they think proper to do so. they may divide said lands among themselves, giving to each person. or each head of a family. a farm, subject to their tribal regulations, but In no instance to be sold or disposed of to persons outside, or not themselves of the Pawnee tribe.

And see Art. IV of the Treaty of March 6, 1865. with the Omaha Indians *14* Stat. 661. construed *in United States* v. *Chase, 245* U. S. *89* (1917).

On the development of Individual allotments. see Chapter 11.

[77] See, for example : Treaty of January 24. 1826. with the Creek Nation of Indians. 7 Stat. 286: Treaty of August 8, 1831, with the Slmwnees, Senecas, and Wyandots. 7 Stat. 355; Treaty of May 20. 1842. with the Seneca Nation of Indians. 7 Stat. 586; Treaty of June 5 and 17, 1846, with the various Bands of Pottawautomie, Chippewa, and Ottawa Indians. 9 Stat. 853: Treaty of August 6. 1846. with the Cherokee Nation, 9 Stat. 871: Treaty of October 18. 1846. with the Menomonee Tribe of Indians, 9 Stat. 952: Treaty of February 5. 1856. with the Stockbrjdge and Munsee Tribes of Indians. 11 Stat. 663 ; Treaty of June 9. 1855, with the Walla-Walla, Cayuse, and Umatilla Tribes and Bands of Indians. 12 Stat. 945; Treaty of June 9. 1855, with the Yakama, 12 Stat 951.

[78] 150 N. Y. Supp. 216 (1914).

[79] 156 N. Y. Supp. 916 (1916).

[80] *237 N. Y.* Supp. 134 *(1929).*

[81] 245 U. S. *89* (1917).

[82] 117 U. S. *288. 308 (1886).*

[83] *See Turner* v. *United States, 248* U. S. 354 (1919). Art. X of the Compiled Laws of the Cherokee Nation (1892) limited each citizen *Of* the nation to 50 acres of land for grazing purposes. attached to his farm.

[84] *E. g.*, Compiled Laws of Cherokee Nation (1892). Art. XXIII. sec. 706.

[85] *Gooding* v. *Watkins.* 5 Ind. *T.* 578. 82 *S.* W. *913* (1904), rev'd on other grounds, 142 Fed. 112 (C. C. A. 8. 1905) (Chickasaw).