

II

Less tangible than the possession of common property, but perhaps equally important in the continuity of a social group, is the existence of common enjoyments. In community life, as in marriage, community of interest in the useless and enjoyable things of life makes for stability and loyalty.

A governmental organization must do a good many unpleasant jobs. Arresting law-breakers and collecting taxes are not activities that inspire gratitude and loyalty. Thus government comes to be looked upon as a necessary evil, at best, unless it actively sponsors some of life's every-day enjoyments. An Indian tribe that enriches the recreational life of its members through the development of community recreational facilities is building for itself a solid foundation in human loyalty.

There is no doubt that the remarkable tenacity of traditional government in the Pueblos of New Mexico derives in large part from the role which that government plays in the popular dances, communal hunts, and similar social activities. To relieve the barrenness of life on some of the northern reservations, is a task hardly less important than the reestablishment of the economic basis of life. * * *

In this field, much will depend upon the attitude of Indian Service officials, and particularly upon the attitude of teachers, social workers, and extension agents. It will be hard for them to surrender the large measure of control that they now exercise over the recreational and social life of the reservations, but unless they are willing to yield control in this field to the tribal government, that government may find itself barred from the hearts of its people.

III

Outside of Indian reservations, local government finds its chief justification in the performance of municipal services, and particularly the maintenance of law and order, the management of public education, the distribution of water, gas, and electricity; the maintenance of health and sanitation, the relief of the needy, and activities designed to afford citizens protection against fire and other natural calamities. On most Indian reservations all of these functions, if performed at all, are performed not by the tribal councils but by employees of the Indian Service. Thus the usual reason for the maintenance of local government is lacking.

The cure for this situation is, obviously, the progressive transfer of municipal functions to the organized tribe. Already some progress has been made in this direction in the field of law and order; Codes of municipal ordinances are being adopted by several organized tribes judges are removable, in some cases, by the Indians to whom they are responsible; and the czaristic powers of the Superintendent in this field have been substantially abolished. In the other fields of municipal activity no such change has yet taken place.

Where Indian schools are maintained, the Indians generally have nothing to say about school curricula, the appointment or qualifications of teachers, or even the programs to be followed in the commencement exercises. Many reasons will occur to the Indian Service employee why the tribal government should have nothing to say about Indian education. It will be said that the Federal Government pays for Indian education and should therefore exercise complete control over it an ironic echo of the familiar argument that real-estate owners pay for public education and should therefore control it. It will be said that Indians are not competent to handle educational problems. It will be said that giving power to tribal councils will contaminate education with "politics."

None of these objections has any particular rational force. In several cases teachers are now being paid not out of Federal funds but out of tribal funds. So far as the law is concerned, an act of Congress that has been on the statute books since June 30, 1834, specifically provides that the direction of teachers, and other employees, even though they be paid out of Federal funds, may be given to the proper tribal authorities wherever the Secretary of the Interior (originally, the Secretary of War) considers

the tribe competent to exercise such direction. Indians are considered competent enough to serve on boards of education where public schools have been substituted for Indian Service schools. And there is no good reason why tribal "politics" deserves to be suppressed, anymore than national "politics." If these common arguments are without rational force, they are nevertheless significant because they symbolize the unwillingness of those who have power, positions, and Salaries, to jeopardize the status quo.

This is true not only in the field of education. It is true in the field of health, community planning, relief, and all other municipal services. It is true of government outside of the Indian Service, and perhaps it is true of all human enterprise. The shift of control from a Federal bureau to the local community is likely to come not through gifts of delegated authority from the Federal bureau, but rather as a result of insistent demands from the local community that it be entrusted with increasing control over its own municipal affairs.

Where this demand for local autonomy is found, there is ground to hope that a tribal constitution will prove to be a relatively permanent institution as human institutions go. Where this demand is not found, there is reason to believe that the tribal government will not be taken very seriously by the governed, that Indian Service control of municipal functions will continue until superseded by state control, and that the tribe will disappear as a political organization.

IV

A fourth source of vitality in any tribal constitution is the community of consciousness which it reflects. Where many people think and feel as one, there is some ground to expect a stable political organization. Where, on the other hand, such unity is threatened either by factionalism within the tribe or by constant assimilation into a surrounding population, continuity of tribal organization cannot be expected.

A fifth source of potential strength for any tribal organization lies in the role which it may assume as protector of the rights of its members.

In most parts of the country, Indians are looked down upon and discriminated against by their white fellow-citizens. They are denied ordinary rights of citizenship—in several states even the right to vote—in a few states the right to intermarry with the white race or to attend white schools—in most states the right to use state facilities of relief, institutional care, etc. Discrimination against Indians in private employment is widespread. Social discrimination is almost universal. The story of Federal relations with the Indian tribes is filled with accounts of broken treaties, massacres, land steals, and practical enslavement of independent tribes under dictatorial rule by Indian agents.

It is not to be wondered at that this history of discrimination and oppression has left a bitter, rankling resentment in the hearts of most Indians. A responsible tribal government must express this resentment, and express it in more effective ways than are open to an individual; otherwise it has failed in one of its chief functions. Where there is a popular Consciousness of grievances, the governing body of the community must seek their redress, whether against state officials, Indian Service employees, white traders, or any other group. To be in the pay of any such group is, on most reservations, a black mark against a popular representative.

In this field of activity, tribal governments can achieve significant results. A council, for instance, that employs an attorney to enjoin the enforcement of an unconstitutional statute depriving Indians of the right to vote is likely to secure a first lien on the respect Of its constituency and materially increase the life expectancy of the tribal constitution. A tribal council that makes a determined fight to secure enforcement, of laws—some of them more than a hundred years old—granting Indians

preference in Indian Service employment will win Indian support—even if it loses its immediate light. So with many other common grievances: on which collective tribal action is possible. A rubber stamp council that simply takes what the Indian Office gives it is not likely to establish permanent foundations for tribal autonomy. Rubber is a peculiarly perishable material, and it gives off a bad smell when it decays.

There is, then, no single answer that can be given to the question, "How long will Indian constitutions last?" We may be sure that different constitutions will perish at different ages. Some, no doubt, have been still-born. Such constitutions may exist in the eyes of the law but not in the hearts of the Indians, and at the first signal of official displeasure, they will disappear. Other constitutions represent realities as stable as the reality that is the United States of America or the City of St. Louis.

SECTION 4. THE POWER TO DETERMINE TRIBAL MEMBERSHIP⁷⁶

The courts have consistently recognized that in the absence of express legislation by Congress "to the contrary, an Indian tribe has complete authority to determine all questions of its own membership."⁷⁷ It may thus by usage or written law, or by treaty with the United States or intertribal agreement,⁷⁸ determine under what conditions persons shall be considered members of the tribe. It may provide for special formalities of recognition, and it may adopt such rules as seem suitable to it, to regulate the abandonment of membership, the adoption of non-Indians or Indians of other tribes, and the types of membership or citizenship which it may choose to recognize. The completeness of this power receives statutory recognition in a provision that the children of a white man and an Indian woman by blood shall be considered members of the tribe if, and only if, "said Indian woman was * * * recognized by the tribe."⁷⁹ The power of the Indian tribes in this field is limited only by the various statutes of Congress defining the membership of certain tribes for purposes of allotment or for other purposes,⁸¹ and by

⁷⁶ For an analysis of congressional power over tribal membership, see Chapter 5, sec. 6. For an analysis of federal administrative power on the same subject, see chapter 5, sec. 13.

⁷⁷ There is no dispute as to the plenary power, of Congress, over the field of tribal membership. See *Wallace v. Adams*, 204 U. S. 415 (1907), end Chapter 5, sec. 6.

⁷⁸ It must be noted that property rights attached to membership are largely in the control of the Secretary of the Interior rather than the tribe itself. See, sec. 8, *infra*, end see Chapters 5, 9, and 15.

⁷⁹ See *Delaware Indians v. Cherokee Nation*, 193 U. S. 127 (1904).

⁸⁰ 25 U. S. C. 184 declares:

all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood end 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, and no prior Act of Congress shall be construed as to debar such child of such right. (Act of June 7, 1897, c. 3, sec. 1, 30 Stat. 62, 90.)

The phrase "recognized by the tribe" is construed in *Oakes v. United States*, 172 Fed. 305 (C. C. A. 8, 1909); *Pape v. United States*, 19 F. 2d 219 (C. C. A. 9, 1927); *United States v. Rolfsen*, 38 F. 2d 806 (C. C. A. 9, 1930), rev'd 283 U. S. 753 (1931); 43 L. D. 149 (1914); 50 L. D. 551 (1924).

⁸¹ Various enrollment statutes provide for enrollment by chiefs, with departmental approval. Act of March 3, 1881, sec. 4, 21 Stat. 414, 433 (Miami); Act of March 2, 1889, 26 Stat. 1013 (United Peorias and Miamies), construed in 12 L. D. 168 (1890); Act of February 13, 1891, 26 Stat. 749, 753 (Sac and Fox and others). *Of. Act of June 18, 1926*, 44 Stat. 1609 (requiring the Secretary to enroll for allotment a person adopted by the Kiowa tribe); Act of June 28, 1898, sec. 21, 30 Stat. 495, 502 ("Cherokee . . . lawfully admitted to citizenship by the tribal authorities"). Other statutes provide for enrollment by the Secretary of the Interior, with the assistance of chiefs. Act of May 19, 1924, 43 Stat. 132 (Lac du Flambeau) end Act of June 15, 1934, 48 Stat. 965 (Menominee) (action by the Secretary after findings by Menominee Tribal Council).

Another procedure involved a commission including Indian members, acting with the approval of the Secretary of the Interior. See Act of

One who seeks a mathematical formula can perhaps measure the life expectancy of various tribal constitutions by assigning numbers to the factors we have discussed—the extent to which the organized tribe ministers to the common economic needs of the people, the degree in which the organized tribe satisfies recreational and cultural wants; the extent and efficiency of municipal services which the tribe renders, the general social solidarity of the community, and the vigor with which the tribal government expresses the dissatisfactions of the people and organizes popular resentment along rational lines. More generally one can say that a constitution is the structure of a reality that exists in human hearts. An Indian constitution will exist as long as there remains in human hearts a community of interdependence, of common interests, aspirations, hopes, and fears, in realms of art and politics, work and play.

the statutory authority given to the Secretary of the Interior to promulgate a final tribal roll for the purpose of dividing and distributing tribal funds.⁸²

The power of an Indian tribe to determine questions of its own membership derives from the character of an Indian tribe as a distinct political entity. In the case of *Patterson v. Council of Seneca Nation*⁸³ the Court of Appeals of New York reviewed the many decisions of that court and of the Supreme Court of the United States recognizing the Indian tribe as a "distinct political society, separated from others, capable of managing its, own affairs and governing itself"⁸⁴ and, in reaching the conclusion that mandamus would not lie to compel the plaintiff's enrollment by the defendant council, declared:

Unless these expressions, as well as similar expressions many times used by many courts in various jurisdictions, are mere words of flattery designed to soothe Indian sensibilities, unless the last vestige of separate national life has been withdrawn from the Indian tribes by encroaching state legislation, then, surely, it must follow that the Seneca Nation of Indians has retained for itself that prerequisite to their self-preservation and integrity as a nation, the right to determine by whom its membership shall be constituted. (P. 736.)

It must be the law, therefore, that, unless the Seneca Nation of Indians and the state of New York enjoy a relation inter se peculiar to themselves, the right to enrollment of the petitioner, with its attending property rights, depends upon the laws and usages of the Seneca Nation and is to be determined by that Nation for itself, without interference or dictation from the Supreme Court of the state. (P. 736.)

After examining the constitutional position of the Seneca Nation and finding that tribal autonomy has not been impaired by any legislation of the state, the court concludes:

The conclusion is inescapable that the Seneca Tribe remains a separate nation; that its powers of self-government are retained with the sanction of the state; that the ancient customs and usages of the nation except in a few particulars, remain, unabolished, the law of the Indian Land; that in its capacity of a sovereign nation the Seneca Nation is not subservient to the orders and directions of

March 3, 1921, 41 Stat. 1355 (Ft. Belknap), construed in *Stoockey v. Wilbur*, 58 F. 2d 522 (App. D. C. 1932). Still other statutes provide for enrollment by the Secretary of the Interior. See Chapter 5, sec. 6. Even in these cases, the Secretary sometimes utilized a roll prepared by officers of the tribe. See *Jump v. Ellis*, 100 F. 2d 130 (C. A. 10, 1938), cert. den. 306 U. S. 645 (1938).

The Occasionally Congress has specifically required that the Interior Department recognize a tribal adoption. See Act of April 4, 1910, sec. 36 Stat. 269, 280 (Kiowa).

⁸² 25 U. S. C. 163. (June 30, 1919, c. 4, sec. 1, 41 Stat. 3, 9). See Chapter 5, secs. 12 and 13, Chapter 9, sec. 6, and Chapter 10, sec. 4.

⁸³ 245 N. Y. 433, 157 N. E. 734 (1927).

⁸⁴ Marshall, C. J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 15 (1831).

the courts of New York state; that, above all, the Seneca Nation retains for itself the power Of determining who are Senecas, and in that respect is above interference and dictation. (P. 738)

In the case of *Waldron v. United States*,⁸⁵ it appeared that a woman of five-sixteenth Sioux Indian blood on her mother's side, her father being a white man, had been refused recognition as an Indian by the Interior Department although, by tribal custom, since the woman's mother had been recognized as an Indian, the woman herself was so recognized. The court held that the decision of the Interior Department was contrary to law, declaring :

In this proceeding the court has been informed as to the usages and customs of the different tribes of the Sioux Nation, and has found as a fact that the common law does not obtain among said tribes, as to determining the race to which the children of a white man, married to an Indian woman, belong; but that, according to the usages and customs of said tribes, the children of a white man married to an Indian woman take the race or nationality of the mother.⁸⁶ (P. 419.)

In the *Cherokee Intermarriage Cases*,⁸⁷ the Supreme Court of the United States considered the claims of certain white men, married to Cherokee Indians, to participate in the common property of the Cherokee Nation. After carefully examining the constitutional articles and the statutes of the Cherokee Nation, the court reached the conclusion that the claims in question were invalid, since, although the claimants had been recognized as citizens for certain purposes, the Cherokee Nation had complete authority to qualify the rights of citizenship which it offered to its "naturalized" citizens, and had, in the exercise of this authority, provided for the revocation or qualification of citizenship rights so as to defeat the claims of the plaintiffs. The Supreme Court declared, *per Fuller, C. J.* :

⁸⁵ 143 Fed. 413 (C. C. S. D. 1906). Also see Chapter 1. sec. 2

⁸⁶ To the effect that tribal action on recognition of members is conclusive "as there was no treaty, agreement, or statute of the United States imposing upon any officer of the United States the power to make a complete roll, and declaring that the acts of said officer should be conclusive upon the questions involved," see *Sully v. United States* 195 Fed. 113, 125 (C. C. S. D. 1912) (suit for allotment).

The same view is maintained in 19 Op. A. G. 115 (1888). In a case in which exclusive power to determine membership was vested in the tribal authority by treaty:

... It was the Indians, and not the United States, that were interested in the distribution of what was periodically comin to them from the United States. It was proper ther that they should determine for themselves, and finally, who were entitled to membership in the confederated tribe and to participate in the emoluments belonging to that relation.

The certificate of the chiefs and councillors referred to it possibly as high a grade of evidence as can be procured of the fact of the determination by the chiefs of the right of membership under the treaty of February 23, 1867, and seems to be such as is warranted by the usage and custom of the Government in its general dealings with these people, and other similia tribes. (P. 116.)

See to the same effect: *In re William Banks*, 26 L. D. 71 (1896) *Black Tomahawk v. Waldron*, 19 L. D. 311 (1894); 35 L. D. 549 (1907) 43 L. D. 125 (1914); 20 Op. A. G. 711 (1894); *Western Cherokees v United States*, 27 C. Cls. 1, 54 (1891), mod. 148 U. S. 427, 28 C. Cls 557; *United States v. Heyfron* (two cases), 138 Fed. 964, 968 (C. C. Mont. 1905); Memo. Sol. I. D., May 14, 1935 (Red Lake Chippewa) and see Memo Sol. I. D., December 18, 1937 (Kansas and Wisconsin Pottawatomie). As was said in the last cited memorandum:

... However, if the Prairie Band still refuses, in the light Of this information, to accept the children into membership, the Department is without power to enroll the children of its own accord, and the Business Committee should be so informed. While the Department may approve or disapprove adoptions into the tribe and expulsions therefrom made by the tribal authorities no case holds that the Department, in the absence of express statutory authorization, may grant a person tribal membership over the protest Of the tribal authorities. Such action would be contrary to the rules enunciated in the cases and to the position taken by the Department in the drafting of tribal constitutions.

⁸⁷ 203 U. S. 76 (1906).

The distinction between different classes of citizens was recognized by the Cherokees in the differences in their intermarriage law, as applicable to the whites and to the Indians of other tribes; by the provision in the intermarriage law that a white man intermarried with an Indian by blood acquires certain rights as a citizen; but no provision that if he marries a Cherokee citizen not of Indian blood he shall be regarded as a citizen at all; and by the provision that if, once having married an Indian by blood, he marries the second time a citizen not by blood, he loses all of his rights as a citizen. And the same distinction between citizens as such and citizens with property rights has also been recognized by Congress, in enactments relating to other Indians that the Five Civilized Tribes. Act August 9, 1888, 25 Stat. 392, c. 818; act May 2, 1890, 26 Stat. 96, c. 182; act June 7, 1897, 30 Stat. 90, c. 3. (P. 88.)

* * * The laws and usages of the Cherokees, their earliest history, the fundamental principles of their national policy, their constitution and statutes, all show that citizenship rested on blood or marriage; that the man who would assert citizenship must establish marriage; that when marriage ceased (with a special reservation in favor of widows or widowers) citizenship ceased; that when an intermarried white married a person having no rights of Cherokee citizenship by blood it was conclusive evidence that the tie which bound him to the Cherokee people was severed and the very basis of his citizenship obliterated. (P. 95.)⁸⁸

An Indian tribe may classify various types of membership and qualify not only the property rights, but the voting rights of certain members.⁸⁹ Similarly, an Indian tribe may revoke rights of membership which it has granted. In *Roff v. Burney*,⁹⁰ the Supreme Court upheld the validity of an act of the Chickasaw legislature depriving a Chickasaw citizen of his citizenship, declaring :

The citizenship which the Chickasaw legislature could confer it could withdraw. The only restriction on the power of the Chickasaw Nation to legislate in respect to its internal affair is that such legislation shall not conflict with the Constitution or laws of the United States, and we know of no provision of such Constitution or laws which would be set at naught by the action of a political community like this in withdrawing privileges of membership in the community once conferred. (P. 222.)

The right of an Indian tribe to make express rules governing the recognition of members, the adoption of new members, the procedure for abandonment of membership, and the procedure for readoption, is recognized in *Smith v. Bonifer*.⁹¹ In that case the plaintiffs' right to allotments depended upon their membership in a particular tribe. The court held that such membership was demonstrated by the fact of tribal recognition, declaring :

Indian members of one tribe can sever their relations as such, and may form affiliations with another or other tribes. And so they may, after their relation with a tribe has been severed, rejoin the tribe and be again recognized and treated as members thereof, and tribal rights and privileges attach according to the habits and customs of the tribe with which affiliation is presently cast. As to the manner of breaking off and recasting tribal affiliations we are meagerly informed. It was and is a thing, of course, dependent upon the peculiar usages and customs of each particular tribe, and therefore we may assume that no general rule obtains for its regulation.

⁸⁸ See, to the same effect, 19 Op. A. G. 109 (1888).

⁸⁹ Thus in 19 Op. A. G. 389 (1889), the view is expressed that a tribe may by law restrict the rights of tribal suffrage, excluding white citizens from voting, although by treaty they are guaranteed rights of "membership." Accord : 8 Op. A. G. 300 (1857).

⁹⁰ 168 U. S. 218 (1897). And see Memo. Sol. I. D., February 18, 1938, to the effect that a tribal roll may be amended pursuant to a tribal constitution.

⁹¹ 154 Fed. 883 (C. C. D. Ore. 1907), *aff'd sub. nom. Bonifer v. Smith*, 166 Fed. 846 (C. C. A. 9, 1909). s. c. 132 Fed. 889 (C. C. D. Ore. 1904).

Now, the first condition presented is that the mother of Philomme was a full-blood Walla Walla Indian. She was consequently a member of the tribe of that name. Was her status changed by marriage to Tawakown, an Iroquois Indian? This must depend upon the tribal usage and customs of the Walla Wallas and the Iroquois. It is said by Hon. William A. Little, Assistant Attorney General, in an opinion rendered the Department of the Interior in a matter involving this very controversy:

That inheritance among these Indians is through the mother and not through the father, and that the true test in these cases is to ascertain whether parties claiming to be Indians and entitled to allotments have by their conduct expatriated themselves or changed their citizenship."

But we are told that:

"Among the Iroquoian tribes kinship is traced through the blood of the woman only. Kinship means membership in a family; and this in turn constitutes citizenship in the tribe, conferring certain social, political, and religious privileges, duties, and rights, which are denied to persons of alien blood." Handbook of American Indians, edited by Frederick Webb Hodge, Smithsonian Institute, Government Printing Office, 1907,

Marriage, therefore, with Tawakown would not of itself constitute an affiliation on the part of his wife with the Iroquois tribe, of which he was a member, and a renunciation of membership with her own tribe. * * * (P. 836.)

Considering a second marriage of the plaintiff to a white person, the court went on to declare:

* * * But notwithstanding the marriage of Philomme to Smith, and her long residence outside of the limits of the reservation, she was acknowledged by the chiefs of the confederated tribes to be a member of the Walla Walla tribe. From the testimony adduced herein, read in connection with that taken in the case of *Hy-yu-tse-mil-kin v. Smith*, supra, it appears that Mrs. Smith was advised by Homily and Show-a-way, chiefs, respectively, of the Walla Walla and Cayuse tribes, to come upon the reservation and make selections for allotments to herself and children, and that thereafter she was recognized by both these chiefs, and by Peo, the chief of the Umatillas, as being a member of the Walla Walla tribe. It is true that she was not so recognized at first, but she was finally, and by a general council of the Indians held for the especial purpose of determining the matter. (P. 838.)

Where tribal laws have not expressly provided for some certificate of membership,⁹² the courts, in cases not clearly controlled by recognized tribal custom, have looked to recognition by the tribal chiefs as a test of tribal membership.⁹³

The weight given to tribal action in relation to tribal membership is shown by the case of *Nofire v. United States*.⁹⁴ In that case the jurisdiction of the Cherokee courts in a murder case, the defendants being Cherokee Indians, depended upon whether the deceased, a white man, had been duly adopted by the Cherokee Tribe. Finding evidence of such adoption in the official records of the tribe, the Supreme Court held that such adoption deprived the federal court of jurisdiction over the murder and vested such jurisdiction in the tribal courts.

A similar decision was reached in the case of *Raymond v. Raymond*⁹⁵ in which the jurisdiction of a tribal court over an adopted Cherokee was challenged. The court declared, *per Sanborn, J.*

* * * It is conceded that under the laws of that nation the appellee became a member of that tribe, by adoption

through her intermarriage with the appellant. It is settled by the decisions of the supreme court that her adoption into that nation ousted the federal court of jurisdiction over any suit between her and any member of that tribe, and vested the tribal courts with exclusive jurisdiction over every such action. *Alberty v. U. S.*, 162 U. S. 490, 16 Sup. Ct. 864; *Nofire v. U. S.*, 164 U. S. 657, 658, 17 sup. Ct. 212. (P. 723.)

It is of course recognized throughout the cases that tribal membership is a bilateral relation, depending for its existence not only upon the action of the tribe but also upon the action of the individual concerned. Any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses,⁹⁶ although it has been said that such termination will not be inferred "from light and trifling circumstances."⁹⁷

Apart from the foregoing cases, there are a number of decisions ex&ding from rights of tribal membership persons claiming to be members' who have been recognized neither by the tribal nor by the federal authorities.⁹⁸ Such cases, of course, cast little light on the scope of tribal power.

The tribal power recognized in the foregoing cases is not overthrown by anything said in the case of *United States ex rel. West v. Hitchcock*.⁹⁹ In that case, an adopted member of the Wichita tribe was refused an allotment by the Secretary of the Interior because the Department had never approved his adoption. Since the Secretary, according to the Supreme Court, had unreviewable discretionary authority to grant or deny an allotment even to a member of the tribe by blood, it was unnecessary for the Supreme Court to decide whether refusal of the Interior Department to approve the relator's adoption was within the authority of the Department. The court, however, intimated that the general authority of the Interior Department under section 463 of the Revised statutes¹⁰⁰ was broad enough to justify a regulation requiring departmental approval of adoptions, but added that since the relator would have no legal right of appeal even if his adoption without Department approval were valid, "it hardly is necessary to pass upon that point."¹⁰¹

While the actual court decisions in the field of tribal membership are all consistent with the view that complete power over tribal membership rests with the tribe, except where Congress otherwise provides, the opinion in the West case appears to diverge from this view. Several alternative ways of reconciling the apparent conflict of judicial views in this field have been suggested. The Interior Department has expressed its view in these terms :

The power of an Indian tribe to determine its membership is subject to the qualification, however, that in the distribution of tribal funds and other property under the supervision and control of the Federal Government, the action of the tribe is subject to the supervisory authority of the Secretary of the Interior.¹⁰² The original power to

⁹² See Chapter 8, sec. 10B(1). And see Chapter 14, secs. 1 and 2, on termination of tribal relations by groups.

⁹³ See *Wesina v. United States*, 245 Fed. 411, 420 (C. C. A. 8, 1917) (suit for allotment). Accord: *Wau-pe-man-qua v. Aldrich*, 28 Fed. 489 (C. C. Ind. 1886). But cf. *Sac and Fox Indians v. United States*, 45 C. Cls. 287 (1910), aff'd 220 U. S. 481 (1911).

⁹⁴ See, for example, *Reynolds v. United States*, 205 Fed. 685 (D. C. S. D. 1913); *Oakes v. United States*, 172 Fed. 305 (C. C. A. 8, 1909); 20 L. D. 167 (1895); 42 L. D. 489 (1913).

⁹⁵ 205 U. S. 80 (1907).

¹⁰⁰ Duties of Commissioner.—The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe have the management of all Indian affairs and of all matters arising out of Indian relations. 25 U. S. C. 2.

¹⁰¹ Accord: *LaClair v. United States*, 184 Fed. 128 (C. C. E. D. Wash. 1910) (declining to pass on necessity of departmental approval of adoption in allotment case).

¹⁰² Citing: *United States ex rel. West v. Hitchcock*, 205 U. S. 80 (1907); *Mitchell v. United States*, 22 F. 2d 771 (C. C. A. 9, 1927); *United*

⁹² See 19 Op. A. G. 115 (1888).

⁹³ *Hy-yu-tse-mil-kin v. Smith*, 194 U. S. 401, 411 (1904); *United States v. Higgins*, 103 Fed. 348 (C. C. D. Moot. 1900).

⁹⁴ 164 U. S. 657 (1857).

⁹⁵ 83 Fed. 721 (C. C. A. 8, 1897). Accord: 7 Op. A. G. 174 (1855) But cf. 2 Op. A. G. 402 (1830).

determine membership, including the regulation of membership by adoption, nevertheless remains with the tribe . . . *¹⁰⁸ (pp. 39-40.)

An alternative formula for reconciling the cases in this field is suggested in the case of *Sloan v. United States*,¹⁰⁹ in which the distinction was drawn between adoption, which is a tribal matter, and departmental action in recognizing such adoption. The court declared:

* * * claimants who cannot bring themselves within the provisions of the act of 1882 by showing that when that act took effect, they were residing on the reservation in the tribal relation, but who claim that, as a matter of fact, they were recognized by the tribe to be members thereof, cannot rightfully expect that the courts will refuse to accept and follow the ruling of the department upon the question of such recognition. The agents charged with the duty of making the allotments, who visit the tribe, have a much better knowledge of the action taken by the tribe than can be gained by the court; and their decision upon a fact of this nature, especially when duly affirmed by the officers of the interior department, should ordinarily be accepted as conclusive. In the numerous reports of the allotting agents introduced in evidence in these cases it is reported that none of the several claimants are recognized by the tribe as members entitled to allotments, and these findings of fact have been approved by the secretary of the interior, and they will, for the reasons stated, be accepted as final by this court in the further consideration of these suits. (p. 292.)

Another basis, not radically different from the two views above suggested, that would permit a reconciliation of all the cases and dicta, is the idea of tribal membership as a relative affair, existing in some cases for certain purposes and not for others. Precedent for this idea may be found in *United States v. Rogers*,¹⁰⁶ where Chief Justice Taney held that although a white man, by arrangement with an Indian tribe, might become a member thereof, he could not thereby divest the federal courts of jurisdiction over him as a "white man." On this view it might be said that for purposes in which the tribe has the last word, tribal adoption is valid without reference to departmental approval,¹⁰⁶ while for those purposes in which departmental action is authorized, the department may demand the right to approve or disapprove adoption.

Whatever may be the exact extent of departmental power in this field, in view of the broad provisions of the Wheeler-Howard Act it has been administratively held that the Secretary of the Interior may define and confine his power of supervision in accordance with the terms of a constitution adopted by the tribe itself and approved by him.

The written constitutions of tribes which have organized under the Act of June 18, 1934, contain provisions on membership which vary considerably. Generally these constitutions provide that descendants of two parents, both of whom are mem-

States v. Provoe, 38 F. 2d 799 (C. C. A. 9, 1930), rev'd. on other grounds, 283 U. S. 753 (1931). See also *Widbur v. United States*, ex rel. Kadrie, 281 U. S. 206 (1930).

¹⁰⁸ 55 1. D. 14, 39 (1934).

¹⁰⁴ 118 Fed. 283 (C. C. D. Neb. 1902), app. dism. 193 U. S. 614 (1904).

¹⁰⁶ 4 How. 567 (1846). Accord: *Westmoreland v. United States*, 155 U. S. 545 (1895); *United States v. Ragsdale*, 27 Fed. Cas. No. 16,113 (C. C. Ark. 1847).

¹⁰⁸ This finds support in such cases as *Katzenmeyer v. United States*, 225 Fed. 523 (C. C. A. 7, 1915), holding that for purposes of applying federal liquor laws, application for adoption and approval by the tribe establish tribal membership. And cf. *United States v. Higgins*, 110 Fed. 609 (C. C. Mont. 1901).

Theoretical justification for this view is offered by Wharton, *A Treatise on the Conflict of Laws or Private International Law* (3d ed. 1905), vol. 1, sec. 252.

bers of the tribe, shall be deemed members of the tribe. With respect to the offspring of mixed marriages, constitutions differ. Some make the membership of such offspring dependent upon whether his degree of Indian blood is, more than one-half or one-quarter. Others make the membership of such offspring depend upon whether its parents maintain a residence on the reservation. Nearly all tribal constitutions provide for adoption through special action by the tribe, subject to review by the Secretary of the Interior. The general trend of the tribal enactments on membership is away from the older notion that rights of tribal membership run with Indian blood, no matter how dilute the stream. Instead it is recognized that membership in a tribe is a political relation rather than a racial attribute. Those who no longer take part in tribal affairs, who do not live upon the reservation, who marry non-Indians, may retain their claims upon tribal property, but most Indian tribes now deny such individuals the opportunity to claim a share of tribal assets for each child produced. The trend is toward making the sharing in tribal property correlative with the obligations that fall upon the members of the Indian community.¹⁰⁷

One conclusion is clear, from the cases and developments above discussed: that a number of generalities in common currency on the subject of tribal membership must be severely qualified before they can be accepted as sound statements of law. For it is clear that such power as rests in the tribes with respect to membership has been and is being exercised along widely divergent lines.

¹⁰⁷ Typical membership provisions in tribal constitutions are the following:

Article III of the Constitution of the Jicarilla Apache Tribe, approved August 4, 1937

Membership in the Jicarilla Apache Indian Tribe shall extend to all persons of Indian blood whose names appear on the official census roll of the Jicarilla Apache Reservation of 1937; and to all children of one-fourth or more Indian blood, not affiliated with another tribe, born after the completion of the 1937 census roll to any member of the Tribe who is a resident of the Jicarilla Apache Reservation. Membership by adoption may be acquired by a three-fourths majority vote of the tribal council and the approval of the Secretary of the Interior.

Article II of the Constitution of the Hopi Tribe, approved December, 19, 1936

SECTION 1. Membership in the Hopi Tribe shall be as follows: (a) All persons whose names appear on the census roll of the Hopi Tribe as of January 1st, 1936, but within one year from the time that this Constitution takes effect corrections may be made in the roll by the Hopi Tribal Council with the approval of the Secretary of the Interior.

(b) All children born after January 1, 1936, whose father and mother are both members of the Hopi Tribe.

(c) All children born after January 1, 1936, whose mother is a member of the Hopi Tribe, and whose father is a member of some other tribe.

(d) All persons adopted into the Tribe as provided in Section 2. SEC. 2. Nonmembers of one-fourth degree of Indian blood or more, who are married to members of the Hopi Tribe, and adult persons of one-fourth degree of Indian blood or more whose fathers are members of the Hopi Tribe, may be adopted in the following manner: Such person may apply to the Kikmongwi of the village to which he is to belong for acceptance. According to the way of doing established in that village, the Kikmongwi may accept him, and shall tell the Tribal Council. The Council may then, by a majority vote have that person's name put on the roll of the Tribe, but before he is enrolled he must officially give up membership in any other tribe.

Article III of the Constitution of the Seneca-Cayuga Tribe of Oklahoma, ratified May 15, 1937

The membership of the Seneca-Cayuga Tribe of Oklahoma shall consist of the following persons:

1. All persons of Indian blood whose names appear on the official census roll of the Tribe as of January 1, 1937.

2. All children born since the date of the said roll, both of whose parents are members of the Tribe.

3. Any child born of a marriage between a member of the Seneca-Cayuga Tribe and a member of any other Indian tribe who chooses to affiliate with the Seneca-Cayuga Tribe.

4. Any child born of a marriage between a member of the Seneca-Cayuga Tribe and any other person, if such child is admitted to membership by the Council of the Seneca-Cayuga Tribe.

Tribal constitutional provisions on membership are construed in Memo. Sol. I. D., April 12, 1938 (Rosebud Sioux), and Memo. Sol. I. D., July 12, 1938 (Rosebud Sioux).

Thus, for example, it is frequently said that a person cannot be a member of two tribes at once. This undoubtedly represents a well-established policy with respect to allotment and other distribution of tribal property or federal benefits.¹⁰⁸ It cannot, however, be validly inferred from this that two tribes could not formally recognize the membership of a single individual, for voting or other purposes. So, too, the generalities to be found in several cases as to the tribal membership of offspring of mixed marriages fail to correspond to the realities of tribal

action. One may find, in the decided cases, two principles which, between them, cover the field: *partus sequitur ventrem*¹⁰⁹ and *partus sequitur patrem*.¹¹⁰ This pair of principles is, of course, totally useless when it comes to reaching or predicting particular decisions.

¹⁰⁸ See *Mandler v. United States*, 49 F. 2d 201 (C. C. A. 10, 1931), rehearing den., 52 F. 2d 713 (C. C. A. 10, 1931); 19 L. D. 329 (1894).

¹⁰⁹ *United States v. Sanders*, 27 Fed. Cas. No. 16220 (C. C. A. Ark. 1847); *Alberty v. United States*, 162 U. S. 499 (1896).

¹¹⁰ *Ex parte Reynolds*, 20 Fed. Cas. No. 11719 (D. C. W. D. Ark. 1879); *United States v. Ward*, 42 Fed. 320 (C. C. S. D. Cal. 1890); *United States v. Hadley*, 99 Fed. 437 (C. C. Wash 1900); *United States v. Higgins*, 110 Fed. 609 (C. C. Mont. 1901).

SECTION 5. TRIBAL REGULATION OF DOMESTIC RELATIONS

The Indian tribes have been accorded the widest possible latitude in regulating the domestic relations of their members.¹¹¹ Indian custom marriage has been specifically recognized by federal statute, so far as such recognition is necessary for purposes of inheritance.¹¹² Indian custom marriage and divorce has been generally recognized by state and federal courts for all other purposes.¹¹³ Where federal law or written laws of the tribe do not cover the subject, the customs and traditions of the tribe are accorded the force of law, but these customs and traditions may be changed by the statutes of the Indian tribes.¹¹⁴ In defining and punishing offenses against the marriage relationship, the Indian tribe has complete and exclusive authority in the absence of legislation by Congress upon the subject. No law of the state controls the domestic relations of Indians living in tribal relationship, even though the Indians concerned are citizens of the state.¹¹⁵ The authority of an Indian tribal council to appoint guardians for incompetents and minors is specifically recognized by statute,¹¹⁶ although this statute at the same time deprives such guardians of the power to administer fed-

eral trust funds. Property relations of husband and wife, or parent and child, are likewise governed by tribal law and custom.

The case of *United States v. Quiver*¹¹⁷ provided a critical test of the doctrine of Indian self-government in the field of domestic relations. The case arose through a prosecution for adultery in the United States District Court for South Dakota. Both of the individuals involved were Sioux Indians and the offense was alleged to have been committed on one of the Sioux reservations. The Department of Justice authorized prosecution on the theory that Congress had, by section 3 of the Act of March 3, 1887,¹¹⁸ terminated the original tribal control over Indian domestic relations.

The question was: Did this statute, which applied to all areas within the exclusive jurisdiction of Congress, apply to the conduct of Indians on an Indian reservation? The Supreme Court held that it did not. The analysis of the subject by Mr. Justice Van Devanter is illuminating, not only on the immediate question of jurisdiction over adultery, but on the broader question of the civil jurisdiction of an Indian tribe:

At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and, offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws. Thus the Indian Intercourse Acts of May 19, 1796, c. 30, 1 Stat. 469, and of March, 1802, c. 13, 2 Stat. 139, provided for the punishment of various offenses by white persons against Indians and by Indians against white persons, but left untouched those by Indians against each other; and the act of June 30, 1834, c. 161, Sec. 25, 4 Stat. 729, 733, while providing that "so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country," qualified its action by saying, "the same shall not extend to crimes committed by one Indian against the person or property of another Indian." That provision with its qualification was later carried into the Revised Statutes as Secs. 2145 and 2146. This was the situation when this court, in *Ex parte Crow Dog*, 109 U. S. 556, held that the murder of an Indian by another Indian on an Indian reservation was not punishable under the laws of the United States and could be dealt with only according to the laws of the tribe. The first change came when, by the act of March 3, 1885, c. 341, Sec. 9, 23 Stat. 362, 385, now Sec. 328 of the Penal Code, Congress pro-

907., governing payments of funds by governmental agencies "to incompetent adult Indians or minor Indians, who are recognized wards of the federal government, for whom no legal guardians or other fiduciaries have been appointed." Memo. Sol. I. D., March 25, 1936.

¹¹⁸ *Hicks v. Butrick*, 12 Fed. Cas. No. 6458 (C. C. D. Kan. 1875).

¹¹⁹ 241 U. S. 602 (1916).

¹²⁰ That section provides:

That whoever commits adultery shall be punished by imprisonment in the penitentiary not exceeding three years; * * * (24 Stat. 635, 18 U. S. C. 516.)

¹¹¹ On the application of tribal custom in domestic relations to the natives of Alaska, see 54 I. D. 39 (1932). And see Chapter 21, sec. 6.

¹¹² Sec. 5, Act of February 28, 1891, 26 Stat. 794, 795, as embodied in 25 U. S. C. 371, provides:

Descent of land.—For the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of section 348 of this title, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together.

And see Act of March 3, 1873, sec. 11, 17 Stat. 566, 570 (Pensions to "widows of colored or Indian soldiers").

¹¹³ See Note (1904) 13 Yale L. J. 250, and cases cited.

¹¹⁴ It has been held that a tribal ordinance authorizing divorce by tribal action does not by implication abolish tribal custom divorce. *Barnett v. Prairie Oil & Gas Co.*, 19 F. 2d 504 (C. C. A. 8, 1927), aff'g sub. nom. *Kunkel v. Barnett*, 10 F. 2d 804, cert. den. 275 U. S. 563.

¹¹⁵ *In re Lelah-puc-ka-chee*, 98 Fed. 429 (D. C. N. D. Iowa, 1899), holding state court without jurisdiction to appoint guardian of tribal Indian. See Chapter 12, sec. 2. Cf. *Davison v. Gibson*, 56 Fed. 443 (C. C. A. 8, 1893), holding law of forum applicable to question of married woman's property if tribal law is not shown.

¹¹⁶ *Yakima Joe v. To-is-lap*, 191 Fed. 516 (C. C. D. Ore. 1910).

¹¹⁷ R. S. § 2108, 25 U. S. C. 159.

Adoption on the Crow Reservation is governed by the Act of March 3, 1931, c. 413, 46 Stat. 1494.

Appointment of guardians among the Pottawatomies was governed by Art. 8 of the Treaty of February 27, 1867, 15 Stat. 531; among the Ottawas by Art 8 of the Treaty of June 24, 1862, 12 Stat. 1237. And cf. Act of February 13, 1891, 26 Stat. 749, 752 (Sacs, Foxes, Iowas); Act of March 2, 1889, 25 Stat. 980, 994 (Peoria, etc.).

To the effect that state court action in the matter of adoptions is not entitled to departmental recognition if the tribe has set up its own Procedure for adoption, see Memo. Sol. I. D., December 2, 1937.

The Interior Department has taken the position that guardians appointed by a Court of Indian Offenses are "legal guardians" within the meaning of such legislation as the Act of February 25, 1933, 47 Stat.

vided for the punishment of murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary and larceny when committed by one Indian against the person or property of another Indian. In other respects the policy remained as before. After South Dakota became a State, Congress, acting upon a partial cession of jurisdiction by that State, c. 106, Laws 1991, provided by the act of February 2, 1903, c. 351, 32 Stat. 793, now Sec. 329 of the Penal Code, for the punishment of the particular offenses named in the act of 1885 when committed on the Indian reservations in that State, even though committed by others than Indians, but this is without bearing here, for it left the situation in respect of offenses by one Indian against the person or property of another Indian as it was after the act of 1885.

We have now referred to all the statutes. There is none dealing with bigamy, polygamy, incest, adultery or fornication, which in terms refers to Indians, these matters always having been left to the tribal customs and laws and to such preventive and corrective measures as reasonably could be taken by the administrative officers. (Pp. 603-605.)

Recognition of the validity of marriages and divorces consummated in accordance with tribal law or custom is found in numerous cases.¹²¹

Legal recognition has not been withheld from marriages by Indian custom, even in those cases where Indian custom sanctioned polygamy. As was said in *Kobogum v. Jackson Iron Co.*:¹²²

* * * The testimony now in this case shows what, as matter of history, we are probably bound to know judicially, that among these Indians polygamous marriages have always been recognized as valid, and have never been confounded with such promiscuous or informal temporary intercourse as is not reckoned as marriage. While most civilized nations in our day very wisely discard polygamy, and it, is not probably lawful anywhere among English speaking nations, yet it is a recognized and valid institution among many nations, and in no way universally unlawful. We must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid which by Indian usage are so regarded. There is no middle ground which can be taken, so long as our own laws are not binding on the tribes. They did not occupy their territory by our grace and permission, but by a right beyond our control. They were placed by the constitution of the United States beyond our jurisdiction, and we had no more right to control their domestic usages than those of Turkey or India. * * * We have here marriages had between members of an Indian tribe in tribal relations, and unquestionably good by the Indian rules. The parties were not subject in those relations to the laws of Michigan, and there was no other law interfering with the full jurisdiction of the tribe over personal relations. We cannot interfere with the validity of such marriages without subjecting them to rules of law which never bound them. (Pp. 605-606.)

Despite a popular impression to the contrary, marriage in accordance with tribal law or custom has exactly the same validity

¹²¹ *Johnson v. Johnson*, 30 Mo. 72 (1860); *Boyer v. Dively*, 58 Mo. 510 (1875); *Earl v. Godley*, 42 Minn. 361. 44 N. W. 254 (1890); *People ex rel. LaForte v. Rubin*, 98 N. Y. Supp. 787 (1905); *Ortley v. Ross*, 78 Nebr. 339. 110 N. W. 982 (1907); *Yakima Joe v. To-is-Zap*, 191 Fed. 516 (C. C. Ore. 1910); *Cyr v. Walker*, 29 Okla. 281, 116 Pac. 931 (1911); *Buck v. Branson*, 34 Okla. 807, 127 Pac. 436 (1912); *Butler v. Wilson*, 54 Okla. 229, 153 Pac. 823 (1915); *Carney v. Chapman*, 247 U. S. 102 (1918); *Hallowell v. Commons*, 210 Fed. 793 (C. C. A. 8, 1914); *Johnson v. Dunlap*, 68 Okla. 216, 173 Pac. 359 (1918); *Davis v. Reeder*, 102 Okla. 106, 226 Pac. 880 (1924); *Pompey v. King*, 101 Okla. 253, 225 Pac. 175 (1924); *Proctor v. Foster*, 107 Okla. 95, 230 Pac. 753 (1924); *Unussee v. McKinney*, 133 Okla. 40, 270 Pac. 1096 (1928); and cf. *Connolly v. Woolrich*, 11 Lower Can. Jur. 197 (1867). See, also, *Parr v. Colfax*, 197 Fed. 302 (C. C. A. 9, 1912); *Porter v. Wilson*, 239 U. S. 170 (1915); and see Wharton, *Conflict of Laws* (3d ed. 1905), vol. 1, sec. 123a.

¹²² 76 Mich. 498, 43 N. W. 602 (1889).

that marriage by state license has among non-Indians. Many Indian tribes have a clearly defined marriage ritual.¹²³ Some tribes have provided for regular tribal marriage licenses, the validity of which has been affirmed by the United States Supreme Court.

The jurisdiction of a tribal court over divorce actions has been recognized by federal and state courts.¹²⁴

The basis of tribal jurisdiction over divorce was set forth with lucidity in the case of *Wall v. Williamson*:¹²⁵

It is only by Positive enactments, even in the Case of conquered and subdued nations, that their laws are changed by the conqueror. (P. 51.)

The fact that Indians may obtain marriage licenses from state officials does not deprive the tribe of jurisdiction to issue a divorce where the parties are properly before tribal court. In this respect Indians are in the same position as persons who, after marrying under the law of one state, may be divorced under the law of another state or of a foreign nation.¹²⁷

¹²³ Under Chapter 3, sec. 2. of the Law and Order Regulations approved by the Secretary of the Interior November 27, 1935, 25 C. F. R. 161.28, it became the duty of each tribal council to determine the procedure to be followed in tribal custom marriage See fn. 130, *infra*.

¹²⁴ *Nofire v. United States*, 164 U. S. 657. (1897).

¹²⁵ *Raymond v. Raymond*, 83 Fed. 721 (C. C. A. 8, 1897); 19 Op. A. G. 109 (1888).

¹²⁶ 8 Ala. 48 (1845).

¹²⁷ In upholding the power of a tribal court to issue a divorce decree where one of the parties was a non-Indian, the Solicitor for the Interior Department declared (Memo. February 11, 1939):

A divorce action has been frequently described as an action in rem in which the res is the marital status of the parties. It is necessary for a court to have jurisdiction of the res in order to grant a divorce, although it need not have jurisdiction of both the parties. It is well established that a State court has the necessary jurisdiction of the marital status where the plaintiff is a resident of the State and the State is the location of the marital domicile, even though the State has no jurisdiction of the defendant spouse who is not a resident or a citizen of the State and can be reached only by constructive notice. *Atherton v. Atherton*, 181 U. S. 155; *Haddock v. Haddock*, 201 U. S. 562; *Delaney v. Delaney*, 13 Pac. (2d) 719 (Cal. 1932), 86 A. L. R. 1321.

The foregoing principles are based upon the interest of the State in the marital status of its residents, and this interest is considered sufficiently great to permit a State to act upon the marital status of a resident in certain cases even though the other party was never within the jurisdiction of the State. As said by one court:

"Every State or sovereignty has the right to determine the domestic relations of all persons having their domiciles within their (sic) territory and where the husband or wife is domiciled within a particular State, the courts of that State can take jurisdiction over the status, and for proper cause act on this rem and dissolve the relation." *Coffey v. Coffey*, 71 S. W. (2d) 141, 142 (Mo. 1934).

If the foregoing principles are applied to such a situation as that now presented, a tribal court could exercise jurisdiction to grant a divorce to a tribal member residing on the reservation whose spouse has abandoned the marital domicile on the reservation, regardless of the tribal membership or race or residence of the other spouse.

Reliance need not be placed entirely upon application of these general principles of jurisdiction, however, in order to sustain the jurisdiction of a tribal court to divorce tribal members from white spouses, since a number of cases have already recognized as valid marriages and divorces under tribal law between tribal members and white persons. *Wall v. Williamson*, 3 Ala. 48; *Wall v. Williams*, 11 Ala. 826; *Morgan v. McGhee*, 5 Humph. (Tenn.) 14; *Johnson v. Johnson's Administrator*, 30 Mo. 72, 77 Am. Dec. 598; *La Riviere v. La Riviere*, 77 Mo. 512; *Cyr v. Walker*, 29 Okla. 281, 116 Pac. 931, 35 L. R. A. (n. s.) 795; 14 R. C. L. 122. The foregoing cases determine that a white person who established a residence among an Indian tribe in its territory will be considered married to or divorced from a tribal member according to the law of the tribe. In the leading case of *Cyr v. Walker*, *supra*, an adopted member of the tribe divorced his white wife on the reservation under tribal law and the validity of this divorce was recognized even though the parties had been married under State law. In all of these cases the divorce was an Indian custom divorce through separation by mutual consent or by abandonment by one of the parties. The principle, however, would not be affected because an Indian tribe may now require formal tribal court action in place of the earlier Indian custom.

The *Cyr* case would seem to go so far as to recognize a tribal divorce by a tribal member against a white person who did not consent to the divorce. However, it is not necessary to decide at this time whether such a principle would now be accepted so that a tribal member could obtain a divorce in a tribal court against a white spouse who objected to the jurisdiction of the

It is, however, a matter of state law whether state courts will recognize the validity of such divorces. In the absence of reported decisions on this point it is not possible to say with any certainty how states are likely to treat such tribal divorces in cases that come up in state courts. So far as the Federal Government is concerned, the validity of such divorces is conceded.¹²⁸ The current Law and Order Regulations of the Indian Service, approved by the Secretary of the Interior on November 27, 1935,¹²⁹ recognize the validity of Indian custom marriage and divorce and leave it to the governing authorities of each tribe to define what shall constitute such marriage and divorce.¹³⁰ These regulations

also authorize decrees by Courts of Indian Offenses compelling payment for support,¹³¹ and judgments on the issue of paternity.¹³²

The constitutions for tribes organized under the Act of June 18, 1934, generally provide for the exercise by the tribal council and tribal court of general jurisdiction over domestic relations.¹³³ Generally no departmental review of such tribal action is required.

A few of these tribal constitutions provide that all marriages shall be in conformity with state law.¹³⁴ Several tribes have adopted special ordinances governing domestic relations.¹³⁵

¹²⁸ C. F. R. 161.30, 161.64 A superintendent may enforce such a judgment against the defendant's restricted funds. Memo. Sol. I. D., September 8, 1938.

¹²⁹ 25 C. F. R. 161.30.

¹³⁰ Thus, for example, the Constitution of the Fort Belknap Indian Community, Montana, approved on December 13, 1935, provides:

Article V, Section 1. *Enumerated powers.*—The council of the Fort Belknap Community shall have the following powers, the exercise of which shall be subject to popular referendum as provided hereafter:

(o) To regulate the domestic relations of members of the community.

¹³⁴ See, e. g., the Constitution of the San Carlos Apache Tribe, approved January 17, 1936, which provides:

Article V, Section XII. *Domestic relations.*—The council shall have the power to regulate the domestic relations of members of the tribe, but all marriages in the future shall be in accordance with the State laws.

¹³⁵ The Code of Ordinances of the Gila River Pima-Maricopa Indian Community (1936) provides:

CHAPTER 4. DOMESTIC RELATIONS

SEC. 1. *Marriage.*—The Community Court may issue marriage licenses to proper persons, both of whom are members of the Community. Any tribal custom marriage not so licensed shall not be recognized as valid.

SEC. 2. *Divorce.*—The Community Court may issue decrees of divorce for causes which it deems sufficient, where both parties are members of the Community.

SEC. 3. *Recording of Marriages and Divorces.*—All Indian marriages and divorces, whether consummated in accordance with the State law or in accordance with Community Ordinances, shall be recorded within thirty days at the agency.

court. All that need be decided at this time is that under the accepted divorce law a tribal member may obtain a tribal divorce from a white spouse who has consented to the jurisdiction of the tribal court or who has abandoned his tribal spouse and his marital domicile on the reservation. It might be pointed out that an unjustified abandonment is itself an implied consent to a divorce action by the abandoned spouse in the court of the latter's domicile. (See *Delaney v. Delaney*, supra, at 723.)

¹²⁸ The Comptroller General, however, ruled otherwise in a case where a divorce action was pending in a state court. Settlement Certificate, Claim No. 013388 (25), January 23, 1936.

¹²⁹ See 55 I. D. 401. (1935).

¹³⁰ Chapter 3, sec. 2.

Tribal Custom Marriage and Divorce.—The Tribal Council shall have authority to determine whether Indian custom marriage and Indian custom divorce for members of the tribe shall be recognized in the future as lawful marriage and divorce upon the reservation, and if it shall be so recognized, to determine what shall constitute such marriage and divorce and whether action by the Court of Indian Offenses shall be required. When so determined in writing, one copy shall be filed with the Court of Indian Offenses, one copy with the Superintendent in charge of the reservation, and one copy with the Commissioner of Indian Affairs. Thereafter, Indians who desire to become married or divorced by the custom of the tribe shall conform to the custom of the tribe as determined. Indians who assume or claim a divorce by Indian custom shall not be entitled to remarry until they have complied with the determined custom of their tribe nor until they have recorded such divorce at the agency office.

Pending any determination by the Tribal Council on these matters, the validity of Indian custom marriage and divorce shall continue to be recognized as heretofore. (55 I. D. 401, 407 (1935).)

SECTION 6. TRIBAL CONTROL OF DESCENT AND DISTRIBUTION

It is well settled that an Indian tribe has the power to prescribe the manner of descent and distribution of the property of its members, in the absence of contrary legislation by Congress.¹³⁶ Such power may be exercised through unwritten customs and usages,¹³⁷ or through written laws of the tribe. This power extends to personal property as well as to real property. By virtue of this authority an Indian tribe may restrict the descent of property on the basis of Indian blood or tribal membership, and may provide for the escheat of property to the tribe where there are no recognized heirs. An Indian tribe may, if it so chooses, adopt as its own the laws of the state in which it is situated and may make such modifications in these laws as it deems suitable to its peculiar conditions.

The only general statutes of Congress which restrict the power of an Indian tribe to govern the descent and distribution of property of its members are section 5 of the General Allotment Act,¹³⁸ which provides that allotments of land shall descend "according to the laws of the State or Territory where such land is located," the Act of June 25, 1910,¹³⁹ which provides that the Sec-

retary of the Interior shall have unreviewable discretion to determine the heirs of an Indian in ruling upon the inheritance of individual allotments issued under the authority of the General Allotment Law, and section 2 of the same act, as amended by the Act of February 14, 1913,¹⁴⁰ which gives the Secretary of the Interior final power to approve and disapprove Indian wills devising restricted property.

These statutes abolished the former tribal power over the descent and distribution of property, with respect to allotments of land made under the General Allotment Act, and rendered tribal rules of testamentary disposition subject to the authority of the Secretary of the Interior, when the estate includes restricted property. They do not, however, affect testamentary disposition of unrestricted property or intestate succession to personal property or to interests in land other than allotments (e. g., possessory interests in land to which title is retained by the tribe).¹⁴¹ With respect to property other than allotments of land made under the General Allotment Act and similar special legislation, the inheritance laws and customs of the Indian tribe are still of supreme authority.¹⁴²

¹³⁶ See Chapter 5, sec. 11; Chapter 11, sec. 6.

¹³⁷ See *Beaglehole. Ownership & Inheritance in an Indian Tribe* (1935), 20 Ia. L. Rev. 304; Hagan, *Tribal Law of the American Indian* (1917), 23 Case & Com. 735; and see authorities cited supra, sec. 3, fn. 55.

¹³⁸ Act of February 8, 1887, 24 Stat. 388, 389, 25 U. S. C. 348.

Treaties and special statutes occasionally stipulated that state laws were to apply to descent of allotments. See, for example, Article 8 of the Treaty of February 27, 1867, with the Pottawatomies, 15 Stat. 531, 533.

¹³⁹ Sec. 1, 36 Stat. 855, 25 U. S. C. 372.

¹⁴⁰ 37 Stat. 678. See 25 U. S. C. 373.

¹⁴¹ *Gooding v. Watkins*, 142 Fed. 112 (C. C. A. 8, 1905). See Chapter 5, sec. 11 and Chapter 11, sec. 6.

¹⁴² The foregoing general analysis is inapplicable to the Five Civilized Tribes, and Osages, Congress having expressly provided that state probate courts shall have jurisdiction over the estates of allotted Indians of the Five Civilized Tribes leaving restricted heirs (Act of June 14, 1918, c. 101, sec. 1, 40 Stat. 606, 25 U. S. C. 375), and over the estates of Osage Indians (Act of April 18, 1912, sec. 3, 37 Stat. 86). See Chapter 23, secs. 9, 12.

The authority of an Indian tribe in the matter of inheritance is clearly recognized by the United States Supreme Court in the case of *Jones v. Meehan*.¹⁴³ Land had been allotted to Chief Moose Dung. After his death, the Chief's eldest son, Moose Dung the Younger, leased the land in 1891 for 10 years, to two white men, the plaintiffs, on the assumption that he was, by the custom of his tribe, the sole heir to the property and entitled, in his own right, to dispose of it. Thereafter, in 1894, a second lease of the same land was executed in favor of another white man, the defendant. The Secretary of the Interior took the view that the earlier lease was invalid. The Secretary of the Interior approved the second lease, pursuant to a joint resolution of Congress specifically authorizing the approval of the second lease. Under the second lease, the Secretary of the Interior held, the rentals were to be divided among six descendants of the older Chief Moose Dung, and Moose Dung the Younger was to receive only a one-sixth share. Thus the Supreme Court was faced with a clear question: Did Moose Dung the Younger have the right, in 1891, to make a valid lease which neither the Secretary of the Interior nor Congress itself could thereafter annul? Faced with this question, the Court declared, *per Gray, J.*:

The Department of the Interior appears to have assumed that, upon the death of Moose Dung the elder, in 1872, the title in his land descended by law to his heirs general, and not to his eldest son only.

But the elder Chief Moose Dung being a member of an Indian tribe, whose tribal organization was still recognized by the Government of the United States, the right of inheritance in his land, at the time of his death, was controlled by the laws, usages and customs of the tribe, and not by the law of the State of Minnesota, nor by any action of the Secretary of the Interior. (P. 29.)

The title to the strip of land in controversy, having been granted by the United States to the elder Chief Moose Dung by the treaty itself, and having descended, upon his death, by the laws, customs and usages of the tribe, to his eldest son and successor as chief, Moose Dung the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or of Congress, or of the Executive Departments. (P. 32.)

The opinion of the Supreme Court in *Jones v. Meehan* cites a long series of cases in federal and state courts which likewise uphold the validity of tribal laws and customs of inheritance.¹⁴⁴ The upshot of the cases cited is summarized in the words of a New York court:

When Congress does not act no law runs on an Indian reservation save the Indian tribal law and custom.¹⁴⁵

The decision of the Supreme Court in *Jones v. Meehan* is a clear refutation of the theory that in the absence of law plenary power over Indian affairs rests with the Interior Department.¹⁴⁶ The case holds not only that power over inheritance, in the absence of congressional legislation, rests with the Indian tribe, but that Congress itself cannot disturb rights which have vested under tribal law and custom.

Other decisions confirm the rule laid down in the *Moose Dung* case.¹⁴⁷

¹⁴³ 175 U. S. 1 (1899).

¹⁴⁴ *United States v. Shanks*, 15 Minn. 369 (1870); *Dole v. Irish*, 2 Barb. (N. Y.) 639 (1848); *Hastings v. Fanner*, 4 N. Y. 293, 294 (1850); *The Kansas Indians*, 5 Wall. 737 (1866); *Wau-pe-man-qua v. Aldrich*, 28 Fed. 489 (C. C. Ind. 1886); *Brown v. Steele*, 23 Kans. 672 (1880); *Richardville v. Thorp*, 28 Fed. 52 (C. C. Kans. 1886).

¹⁴⁵ *Woodin v. Seeley*, 141 Misc. 207, 252 N. Y. Supp. 818 (1931).

¹⁴⁶ See 20 L. D. 157 (1895), mod. 29 L. D. 628 (1900). See Chapter 5, secs. 7, 8.

¹⁴⁷ See Chapter 10, sec. 10. And see Dembitz, *Land Titles* (1895) vol. 1, p. 498.

In the case of *Gray v. Coffman*,¹⁴⁸ the court held that the validity of the will of a member of the Wyandot tribe depended upon its conformity with the written laws of the tribe. The court declared:

The Wyandot Indians, before their removal from Ohio had adopted a written constitution and laws, and among others, laws relating to descent and wills. These are in the record, and are shown to have been copied from the laws of Ohio, and adopted by the Wyandot tribe, with certain modifications, to adapt them to their customs and usages. One of these modifications was that only living children should inherit, excluding the children of deceased children, or grandchildren. The Wyandot council, which is several times referred to in the treaty of 1855, was an executive and judicial body, and had power, under the laws and usages of the nation, to receive proof of wills, etc.; and this body continued to act, at least to some extent, after the treaty of 1855. * * * under the circumstances, the court must give effect to the well established laws, customs, and usages of the Wyandot tribe of Indians in respect to the disposition of property by descent and will. (Pp. 1005-1006.)

In the case of *O'Brien v. Bugbee*,¹⁴⁹ it was held that a plaintiff in ejectment could not recover without positive proof that under tribal custom he was lawful heir to the property in question. In the absence of such proof, it was held that title to the land escheated to the tribe, and that the tribe might dispose of the land as it saw fit.

Tribal autonomy in the regulation of descent and distribution is recognized in the case of *Woodin v. Seeley*¹⁵⁰ and in the case of *Patterson v. Council of Seneca Nation*.¹⁵¹

In the case of *Y-Ta-Tah-Wah v. Rebock*,¹⁵² the plaintiff, a medicine-man imprisoned by the federal Indian agent and county sheriff for practicing medicine without a license, brought an action of false imprisonment against these officials, and died during the course of the proceedings. The court held that the action might be continued; not by an administrator of the decedent's estate appointed in accordance with state law, but by the heirs of the decedent by Indian custom.¹⁵³ The court declared, *per Shiras, J.*:

If it were true that, upon the death of a tribal Indian, his property, real and personal, became subject to the laws of the state directing the mode of distribution of estates of decedents, it is apparent that irremediable confusion would be caused thereby in the affairs of the Indians * * *. (P. 262.)

In a case¹⁵⁴ involving the right of an illegitimate child to inherit property, the authority of the tribe to pass upon the status of illegitimates was recognized in the following terms:

The Creek Council, in the exercise of its lawful function of local self-government, saw fit to limit the legal rights of an illegitimate child to that of sharing in the estate of his putative father, and not to confer upon such child

¹⁴⁸ 10 Fed. Cas. No. 5,714 (C. C. Kan. 1874). Accord: *Gooding v. Watkins*, 142 Fed. 112 (C. C. A. 8. 1905).

¹⁴⁹ 46 Ran. 1, 26 Pac. 428 (1891).

¹⁵⁰ 141 Misc. 207, 252 N. Y. Supp. 818 (1931), discussed in Note (1932) 9 N. Y. U. L. Q. Rev. 498.

¹⁵¹ 245 N. Y. 433, 157 N. E. 734 (1927).

¹⁵² 105 Fed. 257 (C. C. N. D. Iowa 1900).

¹⁵³ Compare, however, the decision of the Supreme Court of New Mexico in *Trujillo v. Prince*, 42 N. M. 337, 78 P. 2d 145 (1938), holding that an administrator of a Pueblo Indian appointed by a state court was empowered to sue under a state wrongful death statute. The Solicitor for the Interior Department and the Special Attorney for the Pueblo Indians supported the position which the Supreme Court of New Mexico finally adopted, on the ground that the action was not an action over which the tribal courts would have jurisdiction; but was entirely a creature of state legislation operating on events that occurred outside of any reservation. Memo. Sol. I. D., September 21, 1937.

¹⁵⁴ *Oklahoma Land Co. v. Thomas*, 34 Okla. 681, 127 Pac. 8 (1912).

generally the status of a child born in lawful wedlock. (P. 13.)¹⁵⁶

In the case of *Dole v. Irish*,¹⁵⁶ it was held that a surrogate of the State of New York has no power to grant letters of administration to control the disposition of personal property belonging to a deceased member of the Seneca tribe. The court declared:

I am of the opinion that the private property of the Seneca Indians is not within, the jurisdiction of our laws respecting administration; and that the letters of administration granted by the surrogate to the plaintiff are void. I am also of the opinion that the distribution of Indian property according to their customs passes a good title, which our courts will not disturb; and therefore that the defendant has a good title to the horse in question, and must have judgment on the special verdict. (Pp. 642-643.)

In *United States v. Charles*,¹⁵⁷ the distribution of real and personal property of the decedent through the Iroquois custom of the "dead feast" is recognized as controlling all rights of inheritance.

In the case of *Mackey v. Cowe*,¹⁵⁸ the Supreme Court held that letters of administration issued by a Cherokee court were entitled to recognition in another jurisdiction, on the ground that the status of an Indian tribe was in fact similar to that of a federal territory.

In the case of *Meeker v. Kaelin*,¹⁵⁹ the court recognized the validity of tribal custom in determining the descent of real and personal property and indicated that the tribal custom of the Puyallup band prescribed different rules of descent for real and for personal property.

The applicability of tribal law in matters involving determination of heirs¹⁶⁰ is recognized in the Law and Order Regulations of the Indian Service.¹⁶¹ These regulations provide that when any member of a tribe dies,

leaving property other than an allotment or other trust property subject to the jurisdiction of the United States any member claiming to be an heir of the decedent may bring a suit in the Court of Indian Offenses to have the Court determine the heirs of the decedent and to divide among the heirs such property of the decedent¹⁶²

In such suits, the regulations provide:

In the determination of heirs, the Court shall apply the custom of the tribe as to inheritance if such custom is proved. Otherwise the Court shall apply State law in deciding what relatives of the decedent are entitled to be his heirs.¹⁶³

A special provision covers the situation where the statutory jurisdiction of the Department attaches to part of an estate that is otherwise subject to tribal jurisdiction:

Where the estate of the decedent includes any interest in restricted allotted lands or other property held in trust by the United States, over which the Examiner of Inheritance would have jurisdiction, the Court of Indian

Offenses may distribute only such property as does not come under the jurisdiction of the Examiner of Inheritance, and the determination of heirs by the court may be reviewed, on appeal, and the judgment of the court modified or set aside by the said Examiner of Inheritance, with the approval of the Secretary of the Interior, if law and justice so require.¹⁶⁴

The Law and Order Regulations of the Indian Service further provide that Courts of Indian Offenses shall have jurisdiction to probate wills of tribal Indians,

disposing only of property other than an allotment or other trust property subject to the jurisdiction of the United States.¹⁶⁵

Tribal custom is recognized in the provision:

If the Court determines the will to be validly executed, it shall order the property described in the will to be given to the persons named in the will or to their heirs; but no distribution of property shall be made in violation of a proved tribal custom which restricts the privilege of tribal members to distribute property by will.¹⁶⁶

Indian Service regulations covering the determination of heirs and approval of wills¹⁶⁷ provide that the activity of examiners of inheritance in cases of intestate succession shall not extend to unallotted reservations.¹⁶⁸

Tribal constitutions generally provide that the governing body of the tribe shall have power—

to regulate the inheritance of real and personal property, other than allotted lands, within the Territory of the Community.¹⁶⁹

A typical tribal inheritance law, adopted by the Gila River Pima-Maricopa Indian Community on June 3, 1936, is set forth in the footnote below.¹⁷⁰

¹⁶⁴ *Ibid.*

¹⁶⁵ 25 C. F. R. 161.32.

¹⁶⁶ 25 C. F. R. 161.32.

¹⁶⁷ Approved by Secretary of the Interior May 31, 1935. 25 C. F. R., Part 81.

¹⁶⁸ 25 C. A. R. 81.13, 81.23.

¹⁶⁹ Constitution of the Fort Belknap Indian Community of the Fort BeS-Reservation, Mont., approved December 13, 1935, Art. V. Sec. 1(m).

¹⁷⁰ SEC. 6. *Approval of Wills.*—When any member of the tribe dies, leaving a will disposing of property other than an allotment or other trust property subject to the jurisdiction of the United States, the Court shall, at the request of any member of the tribe named in the will or any other interested party, determine the validity of the will after giving notice and full opportunity to appear in court to all persons who might be heirs of the decedent. A will shall be deemed to be valid if the decedent had a sane mind and understood what he was doing when he made the will and was not subject to any undue influence of any kind from another person, and if the will was made in writing and signed by the decedent in the presence of two witnesses who also signed the will. If the Court determines the will to be validly executed, it shall order the property described in the will to be given to the persons named in the will or to their heirs, if they are dead.

SEC. 7. *Determination of Heirs.*—Property of members of the Community, other than allotted lands, if not disposed of by will shall be inherited according to the following rules:

1. The just debts and funeral expenses of the deceased shall be paid before the heirs take any property.
2. If the deceased leaves a surviving spouse, all the property shall go to the surviving spouse, who shall make such disposition as seems proper.
3. If the deceased leaves children or grandchildren, but no spouse, all the property shall go to them.
4. If the deceased leaves no spouse nor descendants, all the property shall go to his or her parents, if either or both is alive.
5. In any other case, the nearest relatives shall inherit.

Where there is more than one heir, all the heirs shall meet and agree among themselves upon the division of the property. If no agreement can be reached among all the interested parties, any party may, upon depositing a fee of five dollars in the Community Court, require the Court to pass on the distribution of the estate.

Where the interested parties agree among themselves on the disposition of the estate, they shall file a report of such distribution with the Community Court.

¹⁵⁶ Accord: *Butler v. Wilson*, 54 Okla. 229, 153 Pac. 823 (1915).

¹⁵⁷ 2 Barb. (N. Y.) 639 (1848).

¹⁵⁸ 23 F. Supp. 346 (D. C. W. D. N. Y. 1938); accord: *George v. Pierce* 148 N. Y. Supp. 230 (1914).

¹⁵⁹ 18 How. 100 (1855). See Chapter 14, sec. 3.

¹⁶⁰ 173 Fed. 216 (C. C. W. D. Wash. 1909).

¹⁶¹ Recognition of tribal rules of descent 'is found in such special legislation as the Act of February 19, 1875, 18 Stat. 330, dealing with leases of Seneca lands, and the Act of March 1, 1901, 31 Stat. 861, dealing with Creek allotments.

To the effect that inheritance of a house on tribal land is governed by tribal rather than state law, see Memo. Sol. I. D., November 18, 1938.

¹⁶² 25 C. F. R. 161.31-161.32.

¹⁶³ Law and Order Regulations, approved November 27, 1935, c. 3, sec.

5. 25 C. F. R. 161.31

¹⁶⁴ *Ibid.*