

a trespasser.<sup>86</sup> *Shulthis v. McDougal*,<sup>87</sup> describes the nature of the interest held by an occupant of Creek lands, as follows:

From the time they took up their residence west of the Mississippi, the Constitutions of the Five Nations provided that their land should remain "common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them." The term "improvements," as here used, meant not only betterments, but occupancy. *Cherokee Nation v. Journeycake*, 155 U. S. 196, 210, \* \* \*. These "improvements" passed from father to son, and were the subject of sale, with the single restriction that they should not be sold to the United States, individual states, or to individual citizens thereof.

As the foregoing cases indicate, the federal courts have given full weight to the arrangements made by the various tribes with respect to the individual occupancy rights of tribal members.

Congress has repeatedly given recognition to such occupancy rights, as, for example, by providing that compensation be made directly to occupants of tribal land for damage done or property taken in railroad building across such land.<sup>88</sup> There have been occasions, however, when Congress has felt compelled to modify these tribal arrangements by federal legislation. The Five Civilized Tribes are a case in point.

The following statement of conditions in the lands of the Five Civilized Tribes is found in the Report by the Senate Committee on the Five Civilized Tribes, May 1894:<sup>89</sup>

A few enterprising citizens of the tribe, frequently not Indians by blood but by intermarriage, have in fact become the practical owners of the best and greatest part of these lands, while the title still remains in the tribe—theoretically for all, yet in fact the great body of the tribe derives no more benefit from their title than the neighbors in Kansas, Arkansas or Missouri \* \* \*.<sup>90</sup>

These conditions were cited in justification of congressional acts providing for the redistribution of occupancy rights and ultimately for the allotment of lands of the Five Civilized Tribes.<sup>91</sup>

Under the Act of June 18, 1934,<sup>92</sup> the problem of individual rights in tribal land assumes a new importance by reason of the provision prohibiting future allotments in severalty.<sup>93</sup>

On unallotted reservations, tribal constitutions often provide for a single form of assignment, under which each head of a family is entitled to secure the occupancy of a tract of standard acreage under a tenure dependent upon use.<sup>94</sup>

On allotted reservations, the land problem is more complicated, and two types of assignment are common, "standard" assignments and "exchange"<sup>95</sup> assignments. Standard assign-

ments are usually made to landless Indians or to Indians having a lesser amount of land than the standard acreage fixed by the tribe, and are generally made for the purpose of establishing homes. The tribal constitution and the assignment form generally provide that a standard assignment shall be canceled if the land is not beneficially utilized by the assignee for a specified period of time. Exchange assignments may be made to Indians who have an interest in severalty in some land in consideration of their surrendering such interest. Exchange assignments generally include more extensive rights of lease and transfer than are provided in connection with standard assignments, and in this respect approach more nearly to the character of allotments. The chief respects in which exchange assignments differ from allotments are: (1) land under such assignment cannot be alienated (apart from exchanges of land of equal value) during the life of the assignee except to the tribe, whereas allotted land may be transferred, upon the removal of restrictions or the issuance of a fee patent by the Secretary of the Interior, to any individual, Indian or non-Indian; (2) land under an exchange assignment is not inheritable in the strict sense of the term, as is allotted land, but is subject to reassignment to qualified members of the tribe designated by the original assignee, provided the land is neither subdivided into portions too minute for economic use nor reassigned to persons holding more than a designated maximum acreage of tribal land; (3) land under an exchange assignment is tribal land and is subject to all the protections which the law throws about tribal land.

The rights to improvements placed by individual Indians on the land are, under many constitutions, distinguished from the assigned right of user in the land itself, and are made transferable by devise, lease, or operation of law to certain members of the tribe upon approval by the tribe.<sup>96</sup>

It has been administratively held that a tribal grant of occupancy rights to its members does not necessarily involve the conveyance of any *interest* in tribal land, since the occupant may hold a position similar to that of a licensee.<sup>97</sup>

On the other hand, it has been held that an individual member of an Indian Pueblo has such an occupancy interest as will, under the Taylor Grazing Act,<sup>98</sup> justify a preference in the award of grazing rights on the public domain.<sup>99</sup>

At this stage in the development of the forms of assignment it is important to avoid over-generalizations on the nature of the legal rights thus created. Possibly a suggestive analogy to the member's occupancy right in tribal land is the right of a member of a membership corporation to reside in an allocated tract of the society's estate.

## B. IMPROVEMENTS

With reference to improvements placed upon the land, an occupant may acquire a vested right, subject to the limitations of tribal rules and customs.<sup>100</sup> It has been said that the individual has a vested right in such improvements, even as against the tribe because they are his own property; they are not the

<sup>86</sup> *Hunt v. Hicks*, 3 Ind. T. 275, 54 S. W. 818 (1900) (Cherokee).

<sup>87</sup> 170 Fed. 529, 533-534 (C. C. A. 8, 1909), app. dism. 225 U. S. 561 (1912).

<sup>88</sup> See, for example, sec. 3 of the Act of March 2, 1899, 30 Stat. 990, 991, amended by the Act of February 28, 1902, 32 Stat. 50, 25 U. S. C. 314. And see acts cited in Chapter 15, fn. 14.

<sup>89</sup> Sen. Rept. No. 377, 53d Cong. 2d sess. (1894), cited in *Stephens v. Cherokee Nation*, 174 U. S. 445 (1899), and *Heckman v. United States*, 224 U. S. 413, 434 (1912).

<sup>90</sup> For a further statement of conditions, see *Woodward v. de Graf-fenried*, 238 U. S. 284 (1915).

<sup>91</sup> See Chapter 23.

<sup>92</sup> Secs. 1 to 19, 48 Stat. 984, 25 U. S. C. 461-479.

<sup>93</sup> Op. Sol. I. D. M. 27770, May 22, 1935.

<sup>94</sup> E. g., Constitution and Bylaws of Papago Tribe, Ariz., approved January 6, 1937, Art. 8, sec. 3. Constitution and Bylaws of Pyramid Lake Palute Tribe, Nev., approved January 15, 1936, Art. 7, sec. 3.

<sup>95</sup> E. g., Constitution and Bylaws of Cheyenne River Sioux, S. D., approved December 27, 1935, Art. 8, sec. 4.

Constitution and Bylaws of Lower Sioux Community, Minn., approved June 11, 1936, Art. 9, secs. 1, 5.

<sup>96</sup> E. g., Constitution and Bylaws of Fort Belknap Community, Mont., approved December 13, 1935, Art. V, secs. 5, 7, 8.

<sup>97</sup> Memo. Sol. I. D., October 21, 1938 (Palm Springs); Memo. Sol. I. D. April 14, 1939 (Pueblo of Santa Clara).

<sup>98</sup> Act of June 28, 1934, 48 Stat. 1269, as amended June 26, 1936, 49 Stat. 1976, and July 14, 1939 (Pub., No. 173—76th Cong., 1st sess.).

<sup>99</sup> Eligibility of Indians and Indian Pueblos for Grazing Privileges under the Taylor Grazing Act, 56 I. D. 79 (1937); see, also, Rights of Pueblos and Members of Pueblo Tribes under the Taylor Grazing Act, 56 I. D. 308 (1938).

<sup>100</sup> See Chapter 7, sec. 8.

property of the tribe and his right to them is not derived as an interest in tribal property.<sup>101</sup>

However, the occupant's right of use and disposition of the improvements is qualified by the fact that he does not own the land and that the tribe, in granting him the right of occupancy, may impose as conditions certain terms affecting improvements. In effect, tribal laws and customs represent conditions upon the grant of individual occupancy rights, to which the individual is deemed to consent upon receiving such rights.<sup>102</sup>

The laws of many tribes contain provisions regarding the placing of improvements upon tribal land by an occupant.<sup>103</sup> For example, the laws of the Cherokee Nation compelled the occupant to place at least \$50 worth of improvements upon the land he occupied within 6 months of locating thereon or else the land reverted to the nation.<sup>104</sup> Various tribal constitutions permit the holder of an assignment of land from the tribe to make improvements on the land and allow him to dispose of them by will or by other methods, under such rules and regulations as the tribal council may direct. It is also generally provided that permanent improvements may not be removed from the land without the consent of the tribal council.<sup>105</sup>

The claim of the individual Indian to the improvements he has placed upon tribal land has been frequently recognized by Congress. Allotment acts generally provided that the Indian who held certain lands as an occupant and had made improvements thereon had prior right of selecting these lands as his allotment.<sup>106</sup> The practical value of this was that he could, if he wished, retain a favorable location and save himself the expense of moving and making improvements elsewhere.<sup>107</sup>

Various statutes recognize the right of the individual who has occupied or placed improvements upon tribal land to the value of

<sup>101</sup> Memo. Sol. I. D., October 21, 1938 (Palm Springs). The tribe does not own the improvements placed on tribal land by or under direction of individual members of the tribe. Where the occupant leases, with approval of the tribe and the Department of the Interior, the land and improvements, "there should be a definite provision as to the division of rentals between the individual as the owner of improvements, and the tribe as the owner of the land." *Of. Memo. Sol. I. D., October 20, 1937 (Ft. Belknap).*

<sup>102</sup> See Chapter 7, sec. 8.

<sup>103</sup> See Chapter 15, secs. 9 and 18B.

<sup>104</sup> Compiled 1892, Art. III.

<sup>105</sup> *E. g.*, Constitution and Bylaws of the Oglala Sioux of Pine Ridge Reservation, approved January 15, 1936, Art. 10, sec. 9; Constitution and Bylaws of the Colorado Pine Indians, approved August 13, 1937, Art. 8, sec. 9; Art. 1, sec. 2 of the Cherokee Constitution (1892) provided that improvements might be made by the individual occupant and recognized his vested rights therein. The improvements were inheritable and subject to sale, the only restriction being that they were not to be sold to the United States, to any of the states, or to any citizen of the state. The purpose of this restriction was to keep tribal members in possession. See *Cherokee Trust Funds*, 117 U. S. 288, 305 (1886); *Shulthis v. McDougal*, 170 Fed. 529, 534 (C. C. A. 8, 1909), app. dism. 225 U. S. 561 (1912).

Improvements and inclosures on lands held in occupancy made in furtherance of agriculture and grazing purposes by members of the Five Civilized Tribes were permitted to pass by quitclaim deed or bill of sale from one member to another. See *United States v. Rea-Read Mill & Elevator Co.*, 171 Fed. 501, 504 (C. C. E. D. Okla. 1909).

<sup>106</sup> "That all allotments . . . shall be selected . . . in such manner as to embrace the improvements of the Indians making the selection." is the provision found in sec. 2. of the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U. S. C., secs. 331, 332, 333, 334, 348, 349, 381, 339, 341, 342, and sec. 9 of the Act of March 2, 1889, 25 Stat. 888 (Sioux).

Art. 3 of the Agreement of June 6, 1900, 31 Stat. 672, between the Shoshones and the United States provided that the Indians who had taken possession of lands under a prior agreement (Act of February 23, 1889, 25 Stat. 687) and were occupying them as tribal lands and had made improvements thereon had a preference in selecting such lands as contained the improvements for their allotments. See *Skocm v. United States*, 273 Fed. 93 (C. C. A. 9, 1911), and see Art. 3 of the Agreement with the Crow Indians, ratified April 27, 1904, c. 1924, 33 Stat. 352.

<sup>107</sup> This explains why, in the selection of allotments, contention arose as to who had been entitled to occupancy rights.

these improvements when they have been taken from him or destroyed.<sup>108</sup>

### C. GRAZING AND FISHING RIGHTS<sup>109</sup>

Even in the absence of particular assignments of individual tracts, arrangements limiting the use of tribal lands are frequently imposed, either by tribal or by federal authorities, for the purpose of defining and protecting the rights of all the members of the tribe, including those yet unborn.<sup>110</sup> This control has been exercised most notably to prevent exploitation of tribal grazing lands by a small number of stock owners and to protect the economic life of the tribe against the damages resulting from serious overstocking of the range and soil erosion.<sup>111</sup>

In the case of *United States v. Barquin*,<sup>112</sup> the court considered regulations promulgated by the Commissioner of Indian Affairs governing grazing on the Shoshone Indian tribal lands. The regulations provided generally for the free grazing by each family of a limited number of stock, which were to be branded. Indians were allowed to graze cattle in excess of this number by securing a permit and paying a small fee. The court held that an Indian who grazed cattle in violation of these regulations was guilty of trespass and enjoined him from so using the tribal lands.<sup>113</sup>

In the case of *United States v. Bego*,<sup>114</sup> and related cases, the court had before it the power of the Department of the Interior to make grazing regulations on Navajo tribal lands.<sup>115</sup> Consent

<sup>108</sup> Act of February 13, 1871, 16 Stat. 410 (Menomonee); Act of May 8, 1872, 17 Stat. 85 (Kansas); Act of February 19, 1875, 18 Stat. 330 (Seneca); Act of May 15, 1882, 22 Stat. 63 (Miami); Act of February 20, 1895, 28 Stat. 677 (Ute); Act of March 2, 1907, 34 Stat. 1220 (Cherokee); Act of June 3, 1924, 43 Stat. 357 (Red Lake); Act of January 29, 1925, 43 Stat. 795 (Indians in New Mexico or California).

<sup>109</sup> This section deals only with rights in tribal property. On rights pertaining to adjacent public lands, under the Taylor Grazing Act, see fns. 98 and 99, *supra*.

<sup>110</sup> Tribal constitutions sometimes provide that in issuing grazing permits or leasing tribal lands preferences shall be given to Indian cooperative associations and to individual members of the tribe. See, *e. g.*, Constitution of the Cheyenne River Sioux Tribe, South Dakota, Art. VIII, sec. 3.

<sup>111</sup> The purposes of the general grazing regulations issued by the Secretary of the Interior is set forth as follows:

(a) The preservation . . . of the forest, the forage, the land, and the water resources. . . and the building up of these resources where they have deteriorated. (b) The utilization of these resources for the purpose of giving the Indians an opportunity to earn a living through the grazing of their own livestock. (c) The granting of grazing privileges on surplus range lands . . . in a manner which will yield the highest return consistent with undiminished future use. (d) The protection of the interests of the Indians from the encroachment of unduly aggressive and anti-social individuals. 25 C. F. R. 71.3.

<sup>112</sup> (D. C. Wyo. 1928, unreported) D. J. File No. 90-2-8-24.

<sup>113</sup> In the case of *United States v. Jensen*, unreported (D. C. E. D. Wash. 1926), a member of the Yakima tribe was adjudged guilty of trespassing on tribal lands when he grazed sheep upon the tribal reservation without securing a permit from the Secretary of the Interior, in accordance with regulations promulgated by the Secretary. See also *United States v. Olney*, unreported (D. C. E. D. Wash. 1919), holding that the Secretary of the Interior has the authority to require an Indian user of tribal grazing lands to first secure a permit and to require him to pay a fee for cattle grazed in excess of the number prescribed as "free" under Department of the Interior regulations.

<sup>114</sup> (D. C. Ariz. 1939, unreported) D. J. File No. 90-2-8-24-3.

<sup>115</sup> As promulgated, June 2, 1937, these regulations provided, in part:

1. The Commissioner of Indian Affairs shall establish land-management districts within the Navajo and Hopi Indian Reservations, based upon the social and economic requirements of the Indians and the necessity of rehabilitating the grazing lands.

2. The Commissioner of Indian Affairs shall promulgate for each land management district the carrying capacity for livestock.

3. The Superintendent shall keep accurate records of ownership of all livestock.

4. The Superintendent shall reduce the livestock in each district to the carrying capacity of the range.

5. The Superintendent is authorized to assess and collect trespass fees and, with the consent of the tribal council of the Navajo Indians, he may also assess and collect grazing fees upon all stock owned in excess of the base preference number and upon all non-productive stock owned below the base preference number.

Regulations governing grazing in the Navajo and Hopi Reservations are codified in 25 C. F. R. 72.1-72.13.

of the Navajo tribe to the federal grazing regulations had been duly obtained. The court held that under these regulations the Secretary of the Interior could require the removal of horses from the reservation in excess of the number permitted, and in its decree the court compelled the individual stock owners to remove their excess stock. In addition, the court disposed of questions that might cause future litigation by including a declaratory judgment to the following effect:

\* \* \* the Secretary of the Interior of the United States is vested with the power, right, and authority to promulgate rules and regulations for the protection of the tribal lands of the Navajo Reservation within the State of Arizona, and to the effect and extent necessary to prevent waste caused by overgrazing and to prevent unfair or unreasonable monopolization of tribal range by individuals, and to provide by rules and regulations a maximum carrying capacity of such districts as may be fixed and determined by said rules and regulations.

A similar problem has arisen in connection with the regulation of individual fishing rights in tribal waters. In the case of *Mason v. Sams*,<sup>116</sup> the court considered the power of the Secretary of the Interior to promulgate regulations with respect to the use by tribal Indians of waters in the Quinaielt Reservation which had been reserved for the exclusive use of the Indians by the Treaty of July 1, 1855, and January 25, 1856, with the Qui-nai-elts and Quil-leh-utes.<sup>117</sup> The scheme of regulations in question has been promulgated by the Department of the Interior, without tribal consent. Under these regulations certain members of the tribe were granted exclusive fishing rights at favored locations upon payment of prescribed fees, and other members were excluded therefrom. The court held that these regulations were invalid. The decision in *Mason v. Sams* is distinguishable from the grazing cases discussed above in two respects: first, certain individual members of the tribe were entirely excluded from the right to fish in tribal waters, in *Mason v. Sams*, while in the grazing cases no member of the tribe was entirely deprived of grazing rights on tribal land; secondly, tribal authority for the regulations in question was lacking in *Mason v. Sams* and present in the *Bega* case. (Whether it was present in the other grazing cases is not clear.)

#### D. RIGHTS IN TRIBAL TIMBER

Where a tribe possesses property rights in timber, the question arises: What right has a member of the tribe to cut and to use or sell tribal timber?

By the general Act of February 16, 1889,<sup>118</sup> for example, the President of the United States was authorized to permit, at his discretion and under such regulations as he might prescribe, Indians living on reservations or allotments, the fee to which was in the United States, to cut, remove, sell or otherwise dispose of dead timber, standing or fallen, on such lands. Pursuant to this statute, permission was given to Indians of the Chippewa reservation in Minnesota to cut tribal timber, subject to certain regulations. As discussed in the case of *Pine River Logging Co. v. United States*,<sup>119</sup> the regulations permitted "deserving Indians, who had no other means of support, to cut for a single season a limited quantity of dead and down timber \* \* \*, and to use the proceeds for their support in exact proportion to the scale

<sup>116</sup> 5 F. 2d 255 (D. C. W. D. Wash. 1925).

<sup>117</sup> 12 Stat. 971.

<sup>118</sup> C. 172, 25 Stat. 673, 25 U. S. C. 196. On the right of Indians, under departmental regulations, to cut and sell tribal timber, see Act of March 31, 1882, 22 Stat. 36, entitled:

An act to confirm certain instructions given by the Department of the Interior to the Indian agent at Green Bay Agency, in the State of Wisconsin, and to legalize the acts done and permitted by said Indian agent pursuant thereto.

<sup>119</sup> 186 U. S. 279, 285-286 (1902).

of logs banked by each, provided that ten per cent of the gross proceeds should go to the stumpage or poor fund of the tribe \* \* \*." <sup>120</sup> The facts in the *Pine River Logging Co.* case disclosed that the Commissioner of Indian Affairs had approved contracts between several Indians and a logging company for the cutting of a certain amount of dead timber. In its decision the court held that both the Indians and the logging company were trespassers and were liable to the United States for the value of the timber cut in excess of the amount stated in the contract.<sup>121</sup>

Other acts relating to specific tribes provided that the timber on tribal lands was to be cut and sold under federal supervision and the proceeds thereof were either to be spent for the benefit of the tribe or distributed per capita.<sup>122</sup>

The general Act of June 25, 1910,<sup>123</sup> contains authority for the sale of mature living and dead and down timber from the unallotted lands of any reservation, except the Osages, the Five Civilized Tribes, and the reservations of Minnesota and Wisconsin.

Pursuant to the foregoing acts, the Department of the Interior has issued general forest regulations.<sup>124</sup> Insofar as these acts and regulations deal with the rights of the tribe in tribal timber they are elsewhere considered.<sup>125</sup> The right of the individual Indian to cut tribal timber is covered by section 20 of the current regulations which appears as section 61.27 of Title 25 of the Code of Federal Regulations.

Section 61.27 establishes a permit system whereby permits approved by duly authorized representatives of the tribe are required for the cutting of timber by individual Indians on tribal lands. As stated in the regulation, the system was devised to meet the needs of "Indians and other persons for limited quantities of timber for domestic, agricultural, and grazing purposes." Individual Indians who need timber for personal use may receive permits without the payment of stumpage charge, but the trees so cut are to be designated by a forest officer or other agency employee. The maximum value of the stumpage which may be thus cut by one person in any one year is not to exceed \$100. Should the individual require more timber for his needs, he may purchase the surplus tribal timber or timber otherwise authorized for sale (61.13). The Indian is given the preference of buying stumpage not exceeding \$5,000 in value in open market without having to bid therefor, provided the tribe consents to the sale (61.17).

<sup>120</sup> *Ibid.*

<sup>121</sup> For a later act relating to rights of individual Chippewas in tribal timber, see the Act of June 27, 1902, 32 Stat. 400.

<sup>122</sup> *E. g.*, Act of June 12, 1890, c. 418, 26 Stat. 146 (Menomonee), discussed in *United States ex rel. Besau v. Work*, 6 F. 2d 694 (App. D. C. 1925), and supplemented by the Act of June 28, 1906, c. 3578, 34 Stat. 547; Act of December 21, 1904, c. 22, 33 Stat. 595 (Yakima); Act of April 23, 1904, 33 Stat. 302 (Flathead). *Cf.* sec. 4 of the Act of March 3, 1921, 41 Stat. 1355 (Fort Belknap), which affirms the right of the individual Indian to cut timber on tribal land. The foregoing statute also provides that the head of a family may take coal from unleased tribal lands for domestic use (sec. 6).

<sup>123</sup> 36 Stat. 855, 857, sec. 7, 25 U. S. C. 407. The disposition of timber belonging to the Five Civilized Tribes is governed by the Act of June 28, 1898, 30 Stat. 495; Act of January 21, 1903, 32 Stat. 774; Act of April 26, 1906, 34 Stat. 137; Act of August 24, 1912, 37 Stat. 497. Timber on reservation lands in Minnesota and Wisconsin may be sold in accordance with the provisions of the Acts of February 16, 1889, 25 Stat. 673, 25 U. S. C. 196, the Act of March 28, 1908, 35 Stat. 51 (Menominee), and the Act of May 18, 1916, 39 Stat. 123, 137 (Red Lake).

<sup>124</sup> 25 C. F. R. 61.1-61.29. Office of Indian Affairs, Department of the Interior, General Forest Regulations, approved April 23, 1936. It is provided that the regulations may be superseded by special instructions to particular reservations or by provisions of tribal constitutions, bylaws, or charters, or any authorized tribal action of the tribes thereunder. 25 C. F. R. 61.6.

<sup>125</sup> See Chapter 15, secs. 15, 19.

## SECTION 6. INDIVIDUAL RIGHTS UPON DISTRIBUTION OF TRIBAL PROPERTY

The extent of individual participation in the distribution of tribal property is governed, in the first instance by the federal statute or treaty authorizing the distribution, or, where the federal law is silent, by the law or custom of the tribe.

Apportionment and distribution of tribal funds may be affected by acts passed by Congress in the exercise of its plenary power over tribal property.<sup>126</sup> The manner in which the plenary power over tribal property could be exercised to affect the individual's rights is discussed elsewhere.<sup>127</sup>

## A. MODES OF DISTRIBUTION

Where Congress has prescribed the method of distributing tribal property, equal division per capita has been the general rule.<sup>128</sup> This method of apportionment is consistent with the nature of the individual's interest in tribal property and is found in numerous treaties and acts providing for the distribution of tribal property.<sup>129</sup> "Every member of the tribe has an interest in preventing one member from getting more than his share \* \* \*"<sup>130</sup>

However, the act, treaty, or custom providing for distribution may restrict the class of those entitled to participate in a given distribution or deviate from the equality rule by differentiating among various classes of participants. Certain classes of members may receive more tribal property at given times than others.<sup>131</sup>

Even in the same class there have been inequalities in the distribution of tribal assets. For example, many allotments were made on the basis of acreage rather than value, although equality of acreage might co-exist with wide inequality of values.

Ordinarily, in the distribution of money, the wants of all individuals are, for all practical purposes, infinite and equal, and equal per capita distribution is a well-nigh universal rule.<sup>132</sup>

Where, however, the Federal Government has provided for a distribution of land or overcoats or teams of oxen, differentia-

tions have frequently been made between adults and infants or between heads of families and dependents or between men and women.<sup>133</sup> Likewise, where divisions exist within a tribe, based upon separations in migration, degree of blood, or other historical factors, these factors have frequently been taken into account in treaties and statutes.<sup>134</sup>

Occasionally Congress, instead of specifying a total amount to be distributed within a given class, has allocated out of the tribal estate a fixed amount of money or property to each member of a tribe,<sup>135</sup> or to each member who meets certain qualifications.<sup>136</sup>

<sup>128</sup> Thus, for example, the original General Allotment Act of February 8, 1887, sec. 1, 24 Stat. 388, 25 U. S. C. 331, authorized the allotment of land in these terms:

To each head of a family, one-quarter of a section;  
To each single person over eighteen years of age, one-eighth of a section;  
To each orphan child under eighteen years of age, one-eighth of a section; and  
To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section.

<sup>134</sup> An example of a treaty provision modifying the general rule of equality is Art. 10 of the Treaty of October 1, 1859, with the Sacs and Foxes of the Mississippi, 15 Stat. 467, 470. Under this treaty half-bloods and intermarried Indians might receive certain tribal lands assigned to them in severalty, but then they would have no share in other tribal property, even though they remained members of the tribe.

See, for example, secs. 4 and 5, Act of July 29, 1848, 9 Stat. 252, 264-265 (N. C. Cherokees); Act of January 18, 1881, 21 Stat. 315 (Winnebago Indians); Act of October 19, 1888, 25 Stat. 608 (Cherokee freedmen); Act of October 1, 1890, 26 Stat. 636 (Shawnee and Delaware Indians and Cherokee freedmen); Act of March 3, 1893, 27 Stat. 744 (Stockbridge and Munsee tribe); Act of April 28, 1904, 33 Stat. 519 (Wyandotte Indians); Act of March 1, 1907, 34 Stat. 1055 (Sac and Fox Indians); Act of August 11, 1916, 39 Stat. 509 (Rosebud Sioux Reservation); Act of March 4, 1917, 39 Stat. 1195 (Santee Sioux); Act of April 14, 1924, 43 Stat. 95 (Chippewas of Minnesota); Act of May 3, 1928, 45 Stat. 484 (Sioux Tribe); Act of March 4, 1929, 45 Stat. 1550 (Loyal Shawnee Indians); Act of March 3, 1931, 46 Stat. 1495 (Blackfeet Tribe).

The following Appropriation Acts include special provisions for per capita payments to specified individuals or classes of individuals within a given tribe: Act of March 3, 1855, sec. 3, 10 Stat. 686 (North Carolina Cherokees); Act of July 31, 1854, sec. 8(7), 10 Stat. 315, 333 (Cherokees); Act of August 18, 1856, sec. 14, 11 Stat. 81, 92 (Cherokees east of the Mississippi); Act of June 14, 1858, 11 Stat. 362 (Cherokees); Act of March 3, 1875, 18 Stat. 402, 412 (Kickapoo); Act of July 4, 1884, 23 Stat. 70, 81 (Kickapoo); Act of June 29, 1888, 25 Stat. 217, 222-223 (Kickapoo); Act of March 3, 1891, 26 Stat. 989, 1010 (Creek Nation of Indians); Act of June 10, 1896, 29 Stat. 321, 334 (Flandreau Band of Sioux and Santee Sioux in Nebraska) and pp. 358-359, Art. II (Apache, Mohave, and Yuma); Act of July 1, 1898, 30 Stat. 571, 578 (Kickapoo); Act of March 1, 1899, 30 Stat. 924, 931 (Kickapoo); Act of March 3, 1905, 33 Stat. 1048, 1052 (Kickapoo) and pp. 1078-1079, Art. II (Port Madison Indian Reservation) Act of March 4, 1929, 45 Stat. 1562, 1587 (Saint Croix Chippewas of Minnesota); Act of May 14, 1930, 46 Stat. 279, 285 (Sioux).

Special rights of participation in tribal property granted to mixed bloods of various tribes gave rise to "half-breed scrip." Act of July 17, 1854, 10 Stat. 304 (Sioux Nation). See also Appropriation Act of March 3, 1855, 23 Stat. 362, 368 (Kaw or Kansas Tribe).

<sup>135</sup> Act of August 22, 1911, 37 Stat. 44 (Choctaw, Chickasaw, Cherokee, and Seminole Indians); Act of November 19, 1921, 42 Stat. 221 (Chippewas of Minnesota); Act of January 25, 1924, 43 Stat. 1 (Chippewas of Minnesota); Act of January 30, 1925, 43 Stat. 798 (Chippewas of Minnesota); Act of February 19, 1926, 44 Stat. 7 (Chippewas of Minnesota); Act of March 15, 1928, 45 Stat. 314 (Chippewas of Minnesota); Act of April 28, 1928, 45 Stat. 467 (Shoshones and Arapahoes of Wyoming); Act of May 11, 1928, 45 Stat. 497 (Rosebud Sioux Indians); Act of May 26, 1928, 45 Stat. 747 (Pine Ridge Sioux Indians); Act of December 23, 1929, 46 Stat. 54 (Chippewas of Minnesota); Act of March 24, 1930, 46 Stat. 88 (Shoshone and Arapahoe); Act of April 15, 1930, 46 Stat. 169 (Pine Ridge, South Dakota); Act of February 3, 1931, 46 Stat. 1060 (Shoshone and Arapahoe); Act of February 14, 1931, 46 Stat. 1102 (Menominees of Wisconsin); Act of February 14, 1931, 46 Stat. 1107 (Chippewas of Minnesota); Act of February 12, 1932, 47 Stat. 49

<sup>126</sup> See Chapter 5, sec. 5B.

<sup>127</sup> See Chapter 5, sec. 5.

<sup>128</sup> On the application of this rule to the allotment of tribal land, see Chapter 11. The application of this rule in the distribution of annuities is discussed in Chapters 10 and 15.

<sup>129</sup> *E. g.*, Act of April 30, 1888, c. 206, 25 Stat. 94 (Sioux Nation); Act of April 27, 1904, c. 1620, 33 Stat. 319 (Devils Lake Reservation Indians); Act of June 28, 1906, c. 3578, 34 Stat. 547 (Menominee); Act of March 2, 1907, c. 2536, 34 Stat. 1230 (Rosebud Sioux).

<sup>130</sup> *Tiger v. Twin State Oil Co.*, 48 F. 2d 509, 511 (C. C. A. 10, 1931), aff'g sub nom. *Kemahah v. Shaffer Oil and Refining Co.*, 38 F. 2d 665 (D. C. N. D. Okla. 1930).

<sup>131</sup> In passing upon the distributing of a tribal fund created for the purpose of paying to certain Stockbridge-Munsee Indians their share in tribal property, said Indians having been erroneously omitted from the distribution of an earlier fund, the Solicitor of the Department of the Interior declared:

The fund created was for one purpose only. Consequently there is no merit to the contention that if the fund be tribal or communal then it must be subject to disbursement for tribal expenditures generally, and that it is necessarily individual and not tribal because all members do not participate in its distribution. The very purpose of the appropriation refutes the contention. Op. Sol. I. D., 42071, December 29, 1921.

*Of.* Treaty of March 28, 1836, with the Ottawas and Chippewas, 7 Stat. 491, providing for payments of different amounts to different classes of half-breeds.

<sup>132</sup> Per capita payment was made the general rule, except where the interest of the Indians or some treaty stipulation otherwise required, by sec. 3 of the Act of March 3, 1853, 10 Stat. 226, 239. This provision superseded a provision to the same general effect in sec. 3 of the Act of August 30, 1852, 10 Stat. 41, 56, which made permanent the clause which had been included as a limitation upon the appropriations made by earlier appropriation acts. See section 3 of Act of July 21, 1852, 10 Stat. 15, 23. Recent statutes providing for per capita distribution of various funds are cited in fn. 135 and 144 *infra*.

To equalize allotments, various acts provide for the payment<sup>137</sup> or the withholding of payment<sup>138</sup> of tribal funds to individuals.

### B. TIME OF DISTRIBUTION

Ordinarily, acts providing for the distribution of tribal assets provide for the immediate payment of the entire share to those entitled to it. Individual rights vest immediately upon segregation, and the tribal character of the property is extinguished.<sup>139</sup>

In some special acts providing for distribution of tribal property, Congress has seen fit to withhold payment of some or all of the Indian's share until some future time.<sup>140</sup>

(Chippewas of Minnesota); Act of June 14, 1932, 47 Stat. 306 (Red Lake of Minnesota); Act of June 14, 1932, 47 Stat. 307 (Menominees of Wisconsin); Act of January 20, 1933, 47 Stat. 773 (Chippewas of Minnesota); Act of June 3, 1933, 48 Stat. 112 (Menominee); Act of June 15, 1933, 48 Stat. 146 (Seminole); Act of June 16, 1933, 48 Stat. 254 (Red Lake); Act of May 7, 1934, 48 Stat. 668 (Chippewas of Minnesota); Act of July 2, 1935, 49 Stat. 444 (Red Lake); Act of June 20, 1936, 49 Stat. 1568 (Blackfeet).

<sup>137</sup> The Act of April 30, 1888, 25 Stat. 94 (later amended by the Act of June 21, 1906, 34 Stat. 325, 326), established the right to "Sioux benefits" in the following terms:

\* \* \* That each head of family or single person over the age of eighteen years, who shall have or may hereafter take his or her allotment of land in severalty, shall be provided with two milch cows, one pair of oxen, with yoke and chain, one plow, one wagon, one harrow, one hoe, one axe, and one pitchfork, all suitable to the work they may have to do, and also twenty dollars in cash. (P. 101.)

And see Act of March 3, 1909, 35 Stat. 751 (Quapaw, Modoc, Klamath); Act of June 1, 1938, 52 Stat. 605 (Klamath).

<sup>138</sup> See the Act of April 26, 1906, c. 1876, 34 Stat. 137 (Five Civilized Tribes).

<sup>139</sup> See the Act of March 1, 1901, 31 Stat. 861, 862-863 (Creek).

<sup>140</sup> Parallel problems arise in the law of corporations, future interests, and trusts. See *Copsoell v. Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059 (1905), aff'd sub nom. *Jerome v. Copsoell*, 204 U. S. 1 (1907), holding that the declaration of a dividend, payable at some future date, creates a debt in favor of the stockholder against the corporation. When a fund out of which the dividend is to be paid is segregated, a trust for the benefit of the stockholders is imposed upon the segregated fund. See *New York Trust Co. v. Edwards*, 274 Fed. 952 (D. C. S. D. N. Y. 1921); *Staats v. Biograph Co.*, 236 Fed. 454 (C. C. A. 2, 1916). See also *Hayward v. Blake*, 247 Mass. 430, 142 N. E. 52 (1924), to the effect that income accruing to a life tenant during his lifetime, but not yet payable at the date of his death, is payable to his estate.

<sup>141</sup> The Act of January 14, 1889, 25 Stat. 642, provided for the sale of certain tribal lands of the Chippewa Indians of Minnesota. Sec. 7 provided in part:

That all money accruing from the disposal of said lands \* \* \* shall be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years \* \* \* and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years \* \* \* be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians \* \* \*; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares: \* \* \* The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually \* \* \* until such time as said permanent fund \* \* \* shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund \* \* \*.

Under this act, three-fourths of the interest is to be paid annually to the eligible Indians in equal shares per capita. Any advances made can come only from the interest, and the Secretary of the Interior cannot segregate and advance to any individual Chippewa his pro rata share of the permanent fund. If he were allowed to do this, there is a possibility that the permanent fund set apart for the benefit of all Chippewas might be seriously depleted or exhausted (Op. Sol. I. D., M.11879, May 31, 1924). The policy behind keeping the fund intact for the period of 50 years was to prevent the Indians from squandering their wealth; it was

### C. THE LIMITS OF LEGISLATIVE DISTRIBUTION

Oftentimes, the act or treaty providing for the distribution of tribal lands or tribal funds does not state specifically the proportion each member is to receive, but leaves the distribution to the decision of the tribe.<sup>141</sup> Tribal charters generally limit the amount and mode in which tribal property may be distributed,<sup>142</sup> and in some cases prohibit any per capita distribution of tribal funds.<sup>143</sup>

So long as the Federal Government sought to achieve the breaking up of tribal estates, legislative distribution of tribal funds was the order of the day.<sup>144</sup>

supposed that, during the 50-year period, they would have become sufficiently educated to realize the value of their property.

However, by virtue of the Act of May 18, 1916, c. 125, 39 Stat. 123, 135, the Secretary of the Interior was authorized in his discretion to advance to any individual entitled to participate in the permanent fund of the Chippewas

\* \* \* one-fourth of the amount which would now be coming to said Indian under a pro rata distribution of said permanent fund: Provided further, That any money received hereunder by any member of said tribe or used for his or her benefit shall be deducted from the share of said member in the permanent fund of the said Chippewa Indians in Minnesota to which he or she would be entitled \* \* \*.

(Discussed Op. Sol. I. D., M.15954, January 8, 1927.)

The question of the proportionate distribution of the interest accruing upon the Chippewa fund was discussed in an opinion of the Solicitor of the Interior Department (Op. Sol. I. D., M.15954, January 8, 1927).

<sup>141</sup> The Act of March 3, 1839, 5 Stat. 349, 350, providing for the division and distribution of lands belonging to the Brothertown Indians by a board of commissioners, stated that it was the duty of the board "to make a just and fair partition and division of said lands among the members of said tribe, or among such of them as, by the laws and customs and regulations of said tribe, are entitled to the same, and in such proportions and in such manner as shall be consistent with equity and justice, and in accordance with the existing laws, customs, usages, or agreements of said tribe." Numerous other acts which leave the distribution of tribal property to the tribe itself are discussed in Chapter 15, secs. 23 and 24.

<sup>142</sup> For example, the corporate charter of the Winnebago Tribe of Nebraska, ratified August 15, 1936, provides:

The Tribe may issue to each of its members a nontransferable certificate of membership evidencing the equal share of each member in the assets of the Tribe and may distribute per capita, among the recognized members of the Tribe, all profits of corporate enterprises or income over and above sums necessary to defray corporate obligations and over and above all sums which may be devoted to the establishment of a reserve fund, the construction of public works, the costs of public enterprises, the expenses of tribal government, the needs of charity, or other corporate purpose. No such distribution of profits or income in any one year amounting to a distribution of more than one-half of the accrued surplus, shall be made without the approval of the Secretary of the Interior. No distribution of the financial assets of the Tribe shall be made except as provided herein or as authorized by Congress.

<sup>143</sup> For example, the corporate charter of the Gila River Pima-Maricopa Indian Community (ratified February 28, 1938) provides, in sec. 8: "No per capita distribution of any assets of the community shall be made."

<sup>144</sup> Act of June 10, 1872, 17 Stat. 388 (Ottawa); Act of March 3, 1873, 17 Stat. 623 (Ottawa); Act of May 15, 1888, 25 Stat. 150 (Omaha); Act of August 19, 1890, 26 Stat. 329 (Omaha tribe); Act of February 13, 1891, 26 Stat. 749 (Sac and Fox and Iowa); Act of August 11, 1894, 28 Stat. 276 (Omaha); Act of February 20, 1895, 28 Stat. 677 (Ute); Act of February 28, 1899, 30 Stat. 909 (Pottawatomie and Kickapoo); Act of June 6, 1900, 31 Stat. 672 (Fort Hall); Act of February 28, 1901, 31 Stat. 819 (Seneca); Act of February 20, 1904, 33 Stat. 46 (Red Lake); Act of April 23, 1904, 33 Stat. 254 (Sioux); Act of April 23, 1904, 33 Stat. 302 (Flathead); Act of April 27, 1904, 33 Stat. 319 (Devils Lake); Act of April 27, 1904, 33 Stat. 352 (Crow); Act of April 28, 1904, 33 Stat. 567 (Grande Ronde); Act of December 21, 1904, 33 Stat. 595 (Yakima); Act of March 3, 1905, 33 Stat. 1016 (Shoshone or Wind Apache); Act of March 20, 1906, 34 Stat. 80 (Kiowa, Comanche, and Apache); Act of March 22, 1906, 34 Stat. 80 (Colville); Act of June 14, 1906, 34 Stat. 262 (Indians in Richardson County, Nebraska); Act of May 30, 1908, 35 Stat. 558 (Fort Peck); Act of February 18, 1909, 35 Stat. 628 (Omaha and Winnebago); Act of March 3, 1909, 35 Stat. 751 (Quapaw); Act of May 13, 1910, 36 Stat. 368 (Richardson County, Nebraska); Act of May 11, 1912, 37 Stat. 111 (Omaha); Act of July 1, 1912, 37 Stat. 187 (Winnebago); Act of February 14, 1913, 37 Stat.

In recent years, however, the Federal Government, recognizing that per capita payments would lead to the dissipation of the tribal estate and the creation of new demands upon the Federal Treasury on the part of individual Indians, has sought to discourage the per capita distribution of tribal funds,<sup>146</sup> except

675 (Standing Rock); Act of August 26, 1922, 42 Stat. 832 (Riverside County, California); Act of May 19, 1924, 43 Stat. 132 (Lac du Flambeau Band of Chippewas); Act of January 7, 1925, 43 Stat. 726 (Omaha); Act of February 9, 1925, 43 Stat. 820 (Omaha); Act of March 3, 1927, 44 Stat. 1369 (Kiowa, Comanche, and Apache); Act of March 3, 1927, 44 Stat. 1389 (Cheyenne River); Act of March 3, 1927, 44 Stat. 1397 (Fort Hall); Act of April 29, 1930, 46 Stat. 260 (Iowa); Act of March 2, 1931, 46 Stat. 1481 (Fort Berthold); Act of March 4, 1931, 46 Stat. 1526 (Puyallup); Act of March 3, 1933, 47 Stat. 1488 (Utes); Act of June 20, 1936, 49 Stat. 1543 (Crow); Joint Resolution of June 20, 1936, 49 Stat. 1569 (Fort Belknap). For a fuller discussion of problems involved in pro rata division of tribal property, and general statutes on the subject, see Chapter 15, secs. 22-24, and Chapter 10, secs. 4-5.

<sup>146</sup> Prohibitions against or limitations upon per capita payments are found in the following general statutes: Act of March 3, 1927, 44 Stat. 1347 (tribal oil and gas rentals); Act of June 18, 1934, 48 Stat. 984 (making distribution of tribal assets subject to tribal consent). Pro-

where such funds represent continuing income,<sup>147</sup> or where prior legislative commitments preclude application of the current policy of conserving the tribal estate.

The federal policy of discouraging per capita distribution of tribal funds, coupled with a tendency to cut down federal use of tribal funds for Indian Service administration, has made the activity of the tribe itself in distributing tribal property or rights of user therein a matter of increasing importance.<sup>147</sup>

Prohibitions against per capita payments are likewise found in the following special statutes: Act of May 18, 1928, 45 Stat. 602 (Indians of California); Act of December 17, 1928, 45 Stat. 1027 (Winnebago); Act of February 20, 1929, 45 Stat. 1249 (Nex Perce); Act of February 23, 1929, 45 Stat. 1256 (Coos Bay, Lower Umpqua and Siuslaw); Act of February 23, 1929, 45 Stat. 1268 (Kansas); Act of April 21, 1932, 47 Stat. 87 (Wichita and affiliated bands); Act of June 19, 1935, 49 Stat. 388 (Tlingit and Haida); Act of August 30, 1935, 49 Stat. 1049 (Chippewa). A precursor of this prohibition against per capita distribution is found in the Act of March 3, 1863, 12 Stat. 819 (Sioux).

<sup>147</sup> Act of June 15, 1934, 48 Stat. 964 (Menominee); Act of August 25, 1937, 50 Stat. 811 (Palm Springs).

<sup>147</sup> See Chapter 7, sec. 8.