St. Mary's Law Journal

Volume 5 | Number 1 Article 12

3-1-1973

The United States Government Breached Its Fiduciary Duty by Paying Oklahoma Estate Tax on the Property of a Noncompetent Osage Indian without Determining Whether Intervening Cases and Internal Revenue Rulings Had Removed the Requirement for Paying the Tax.

Phyllis Wilson Gainer

TAXATION—INDIAN TRUST PROPERTY—STATE INHERITANCE TAX—THE UNITED STATES GOVERNMENT BREACHED ITS FIDUCIARY DUTY BY PAYING OKLAHOMA ESTATE TAX ON THE PROPERTY OF A NONCOMPETENT OSAGE INDIAN WITHOUT DETERMINING WHETHER INTERVENING CASES AND INTERNAL REVENUE RULINGS HAD REMOVED THE REQUIREMENT FOR PAYING THE TAX. *Mason v. United States,* 461 F.2d 1364 (Ct. Cl. 1972), *cert. granted,* 41 U.S.L.W. 3388 (U.S. Jan. 16, 1973) (No. 72-654).

A representative of the federal government, acting as trustee for certain property of the estate of Rose Mason, a noncompetent Osage Indian, prepared and filed an Oklahoma estate tax return on behalf of her estate. The administrators of the estate, as plaintiffs in this case, now claim that the necessity for paying the Oklahoma estate tax on the type of property involved was so unclear that the federal representative breached his fiduciary duty as trustee in paying the tax before having the matter judicially determined. The United States Government, as defendant, claims that the trust obligation was not breached because the payment was based on a 1948 Supreme Court case which approved the payment of the same tax involved in the instant case. Held—*Judgment for plaintiff.* The United States breached its fiduciary duty by paying Oklahoma estate tax on the property of a noncompetent Osage Indian without determining whether intervening cases and Internal Revenue rulings had removed the necessity of paying the tax.

The nature of the federal-Indian relationship must be briefly explained to aid in understanding the legal status of Indian lands and why attempted state taxation of such lands creates judicial problems. An often cited authority on the federal attitude towards Indians is *Worcester v. Georgia.*[1] In that case Chief Justice Marshall held that the Indian territories constituted entities completely separate from the states, and that all business with Indians should be carried on solely by the United States.[2] In another case he likened the federal-Indian relationship to that of guardian and ward.[3] Statute replaced treaty as the method of dealing with Indians in 1871,[4] and since then official policy has vacillated between attempts at creating self-sufficient tribal units and assimilating Indians into the American culture.[5]

1. 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832). The case involved attempted enforcement of a state statute regulating access of white men to Indian land. Chief Justice Marshall found the basis of federal power over Indians in the Constitution, federal laws, treaties, and history. *Id.* at 544-61, 8 L. Ed. at 498-501.

2. *Id.* at 557-59, 8 L. Ed. at 499-500. Indian tribal properties were thought of as constituting sovereign nations, and this analogy is borne out by the fact that Indians were long dealt with by treaty agreement.

3. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17, 8 L. Ed. 25, 31 (1831).

4. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1970)).

5. *See generally* Comment, *State Taxation of Indian Income,* 1971 LAW & SOC.

Today, the federal government remains the main regulatory body over Indians,[6] and an area in which it is still involved to a great extent is that of turning ownership of tribal lands over to the Indians themselves.

Through various enactments, the federal government has adopted the use of individual allotment of Indian tribal lands to settle the questions of use and ownership of the lands. The basic legislation in the area is the General Allotment Act of 1887.[7] Any tribe coming under the Act had the land belonging to it "patented" to individual members of the tribe.[8] The land was to be held in trust for 25 years, a period which has since been extended.[9] Upon either the individual Indian being declared competent, or the end of the trust period, the land is to be conveyed in fee to the individual allottee, free of all charge or encumbrance whatsoever.[10] Although the Osage tribe was specifically excluded from the General Allotment Act,[11] arrangements for land and mineral right distribution were made in a separate act in 1906.[12] The tax policies regarding the lands and mineral rights held by the federal government have changed and evolved through the years.

The instrumentality theory, grounded on the idea that a state could not tax a means (instrumentality) that the federal government was using to achieve a stated goal, was long a basis for denying direct taxation of Indian

---

ORDER 355, 358-59; Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 CALIF. L. REV. 1261-66 (1971).

6. States have been granted some specific authority over sanitation, health, and school attendance enforcement. 25 U.S.C. § 231 (1970). Also, Public Law 280 provides for some states to have jurisdiction over criminal matters on reservations, if the tribe so consents. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, *as amended*, Act of Apr. 11, 1968, § 401(a), 82 Stat. 78 (codified in part at 18 U.S.C. § 1162 (1970)).

7. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49 (1970)). Each tribal member received rights to up to 80 acres of agricultural land or 160 acres of grazing land. 25 U.S.C. § 331 (1970).

8. The term "'patent," as used in the Act, was an unfortunate use of the word. The "patents" issued in conformity with the statutes only entitled the holder to a conveyance of the land represented by the patent, on the occurrence of one of several happenings. United States v. Rickert, 188 U.S. 432, 436, 23 S. Ct. 478, 480, 47 L. Ed. 532, 535 (1903).

9. 25 U.S.C. § 348 (1970). The trust periods have been extended by various executive orders as provided for in the Act. *See* historical notes, *Id.*

10. *Id.* Competence in reference to Indians is equated with being able to manage one's own affairs. Mason v. United States, 461 F.2d 1364, 1367 (Ct. Cl. 1972), *cert. granted*, 41 U.S.L.W. 3388 (U.S. Jan. 16, 1973) (No. 72-654).

11. 25 U.S.C. § 339 (1970).

12. Act of June 28, 1906, ch. 3572, 34 Stat. 539. Under the act each specially enrolled Osage Indian received a 160-acre homestead plus an equal share of excess land. The homestead was made inalienable and nontaxable until further act of Congress. Although the land will be turned over at the end of the trust period, or when the individual is declared to be competent, the homestead is to remain inalienable and nontaxable for an additional 25 years.

While the land was allotted individually, the mineral rights were to be held in trust for the tribe as a whole. Each specially enrolled tribal member became entitled to 1/2229th share of the distributable income from the sale of the minerals. These shares are called headrights.

trust land.[13] This theory, along with the special federal-Indian relationship, served to foster an assumption of general nontaxability of Indian trust property. Just prior to, and immediately following the abandonment of the instrumentality theory,[14] the courts started to inspect more closely the widely allowed Indian trust tax exemptions. It was held that income earned on trust fund income was subject to federal income tax,[15] and later that since taxation of the transfer of property is based upon a different end than direct taxation of property, no extension of tax exemptions to include transfer of property could be found in the acts of Congress regarding Indians.[16] During this period, however, trust property held by noncompetent Indians was considered to be not subject to federal income tax.[17]

The problem of state inheritance taxation of Indian trust property was specifically dealt with by the Supreme Court in 1942, and again in 1948. The decision of *Oklahoma Tax Commission v. United States*[18] held that Oklahoma could impose an estate tax on restricted property of an Osage Indian. The Court reached its decision on two grounds; first, that the legislative history of the Osage Allotment Act could not sustain an intention to grant such a tax exemption, and second, that the normal rule against tax exemption through statutory implication should be applied.[19] This decision was extended in *West v. Oklahoma Tax Commission*[20] to include trust property of a noncompetent Osage Indian. The court stated that the basic reason for not extending the few exemptions given by the Osage Allotment Act was that an inheritance tax rests on a different basis than a tax levied on the property itself, in that an inheritance tax is imposed on the shifting

13. United States v. Rickert, 188 U.S. 432, 437, 23 S. Ct. 478, 480, 47 L. Ed. 532, 536 (1903). This case involved an attempt to directly tax Indian trust property, and the court held that trust property "is part of the national policy by which the Indians are to be maintained . . . . To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race . . . ." The theory comes from McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819).

14. Helvering v. Mountain Producers Corp., 303 U.S. 376, 386, 58 S. Ct. 623, 627, 82 L. Ed. 907, 914 (1938).

15. Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418, 55 S. Ct. 820, 79 L. Ed. 1517 (1935).

16. Landman v. Commissioner, 123 F.2d 787, 790 (10th Cir. 1941), *cert. denied,* 315 U.S. 810 (1942).

17. Chouteau v. Commissioner, 38 F.2d 976 (1930), *aff'd on other grounds,* 283 U.S. 691, 51 S. Ct. 598, 75 L. Ed. 1353 (1931).

18. 319 U.S. 598, 63 S. Ct. 1284, 87 L. Ed. 1612 (1943). The term "restricted property" refers to property for which title has passed to the individual Indian, but on which rules against alienation remain. The United States retains title for property which is being held in *trust.*

19. *Id.* at 605, 63 S. Ct. at 1287, 87 L. Ed. at 1617. The Court stated that if Congress had desired any additional tax exemptions, it could have said so unambiguously. *Accord,* Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418, 420, 55 S. Ct. 820, 822, 79 L. Ed. 1517, 1519 (1935).

20. 334 U.S. 717, 68 S. Ct. 1223, 92 L. Ed. 1676 (1948).

of economic benefits rather than on the property of which the estate is composed.[21] This case is the last Supreme Court decision on the permissibility of imposition of a state inheritance tax on Indian trust property.

Since the *West* decision a number of courts have spoken on problems closely related to *West*. The leading case is that of *Squire v. Capoeman*,[22] where the Court dealt with an attempt to hold income from the sale of timber from Quinaielt alloted lands subject to a capital gains tax. The Court used two sections of the General Allotment Act and a statement of lenient policy towards Indians, as expressed in *Worcester v. Georgia*, to imply a tax exemption.[23] It implied from these three things that until land is transferred to an individual Indian, an allotment should be free from *all* taxes in order to effectuate the stated policy of bringing Indians to the desired state of independence.[24]

Squire has been the focal point for later cases in extending Indian tax exemptions on trust property even further. In one case, the Court of Appeals for the Ninth Circuit held that California could not impose an inheritance tax on allotted lands of noncompetent Mission Indians.[25] In another case, it was held that royalty income from Osage tribal mineral deposits credited to individual trust accounts was exempt from federal income tax.[26]

---

21. *Id.* at 727, 68 S. Ct. at 1228, 92 L. Ed. at 1682. The fact that the corpus of the trust could be depleted by repeated tapping was discounted by the Court, since that was said to be the intended consequences of inheritance taxes.

22. 351 U.S. 1, 10, 76 S. Ct. 611, 617, 100 L. Ed. 883, 890 (1956).

23. *Id.* at 6-7, 76 S. Ct. at 616, 100 L. Ed. at 888-89. The Act stated both that land would be finally transferred free of all charge or encumbrance whatsoever, and that on declaration of competence, a fee simple for land allotted would be given and thereafter all restrictions as to sale, encumbrance, or taxation would be removed. 25 U.S.C. §§ 348-49 (1970).

Chief Justice Marshall stated that "the language used in treaties with the Indians should never be construed to their prejudice." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582, 8 L. Ed. 483, 508 (1832), *quoted in* Squire v. Capoeman, 351 U.S. 1, 7, 76 S. Ct. 611, 616, 100 L. Ed. 883, 889 (1956).

24. Squire v. Capoeman, 351 U.S. 1, 8-9, 76 S. Ct. 611, 616, 100 L. Ed. 883, 889-90 (1956).

25. Kirkwood v. Arenas, 243 F.2d 863 (9th Cir. 1957). The land involved in this case was allotted under the Mission Indian Act, which provided that at the end of the trust period land would be conveyed free of all charges and encumbrances. Mission Indian Act of Jan. 12, 1891, ch. 65, 26 Stat. 712. The court reasoned that on the basis of *Squire* the land involved was exempt from direct taxation, and since *Oklahoma Tax Comm'n v. West* stated that land exempt from direct taxation would also be exempt from state inheritance taxes, the land in question was exempt from California estate taxes. Kirkwood v. Arenas, 243 F.2d 863, 869 (9th Cir. 1957).

26. Big Eagle v. United States, 300 F.2d 765 (Ct. Cl. 1962). The court, by analogy to *Squire*, used a 1938 amendment to the Osage Allotment Act to imply a tax exemption. *Id.* at 769. The amendment states that "*[A]ll* royalties and bonuses arising therefrom [the Osage mineral property] . . . *shall* be disbursed to members of the Osage Tribe or their heirs . . . ." [Emphasis added.] Act of June 24, 1938, ch. 645, § 1, 52 Stat. 1034.

The *Big Eagle* court followed *Squire* in resolving ambiguities in favor of the Indians and disregarding the usual need for clear expression in order to allow tax exemptions.

The instant case has used the *Squire* decision and the lower court cases, along with Internal Revenue rulings as a basis for disregarding the *West* case.[27] While admitting that a court cannot refuse to follow a higher court ruling directly in point because it disagrees with the reasoning used in a particular case, the court states that where the underpinnings of a decision have been weakened, a lower court may disregard it.[28] The court contends that just such a weakening has occurred in the authority for this case, as it states:

> There has been a marked change in the evaluation of the reasons given by the court for its result in *West* . . . and there has also been a considerable increase in the kinds of taxes with respect to which restricted Indian property has been held immune. In several crucial aspects the essential bases of *West* have been so weakened that, in our opinion, the decision no longer stands as authoritative.[29]

The court feels that *Squire* reversed the holdings of the *West* decision when it stated that the words of the General Allotment Act might be sufficient in themselves to bar *all* taxation of allotted trust property. This is considered to be strong enough authority to disregard the *West* holding that possible depletion of Indian trust property through repeated payment of state death taxes is immaterial.[30] It was also held to do away with the need for specific indications from Congress before Indian property could be made tax exempt.[31] The *Mason* court adds that *West* may have been overruled because of the intervening rulings holding that trust property and income is not subject to direct taxation.[32]

Despite the several reasons given by the court in *Mason* for disregarding the rule of *West*, Judge Skelton, in his dissent, points to some troublesome facts. He first notes that the *West* case has not been overruled, and that it is

---

The decision of United States v. Hallam, 304 F.2d 620 (10th Cir. 1962) held that income derived from Quapaw lands allotted under a special act was exempt from income taxation. Nash v. Wiseman, 227 F. Supp. 552 (W.D. Okla. 1963) extended federal estate tax exemption to land allotted under the General Allotment Act. *But see* Shelton v. Lockhart, 154 F. Supp. 244 (W.D. Mo. 1957).

27. The Internal Revenue Service has responded to the holding of the *Squire* case through several rulings. Rev. Rul. 164, 1969-1 CUM. BULL. 220 directed that trust property held under the General Allotment Act be exempted from federal estate tax. This was extended to property held under the Osage Allotment Act by a Technical Advice Memorandum, August 15, 1969, to the District Director of Internal Revenue in Oklahoma City. Mason v. United States, 461 F.2d 1364, 1371 (Ct. Cl. 1972), *cert. granted,* 41 U.S.L.W. 3388 (U.S. Jan. 16, 1973) (No. 72-654).

28. Mason v. United States, 461 F.2d 1364, 1375 (Ct. Cl. 1972), *cert. granted,* 41 U.S.L.W. 3388 (U.S. Jan. 16, 1973) (No. 72-654).

29. *Id.* at 1375.

30. *Id.* at 1375.

31. *Id.* at 1375.

32. *Id.* at 1378. The *Oklahoma Tax Comm'n v. United States* and *West v. Oklahoma Tax Comm'n* cases were based on the assumption that the property involved was subject to federal income and estate tax. The *West* case stated that the result would be different if these taxes were not applicable.

precisely in point on both law and fact for *Mason.*[33] He further mentions that the laws in regard to Osage trust property have not been altered since *West.*[34] He would retain the distinction made in *West* between taxation on property and taxation on the shifting of property and distinguish the *Squire* case in terms of the kind of tax involved (income as opposed to estate) and the parties involved (living noncompetent as opposed to estate of noncompetent). He further maintains that the lower court rulings discussed by the majority are not in point because they deal either with different allotment acts or different types of taxes, and that they are not controlling because they are from lower courts. While the majority discusses the necessity for taking the position on the case that they feel would be taken on appeal,[35] Judge Skelton says that the Court of Claims is in no position to speculate on what the Supreme Court might do.[36]

It would seem that a close inspection of the various laws enacted by Congress dealing with the problem of Indian lands should provide guidelines for allowing or disallowing tax exemptions on the various land and property held in trust by the federal government. However, the General Allotment Act does not bring up the subject of tax exemption. The closest the Act comes to speaking in terms of a tax exemption is that the lands will be turned over free of all charge or encumbrance whatsoever.[37] Since imposition of taxes could lead to liens on the property, this phrase has often been used to place tax exempt status on trust property. The Osage Allotment Act does speak specifically of tax exemption on the 160 acres allotted as a homestead, and extends nontaxability and inalienability for an additional 25 years after the land is turned over to a competent Indian.[38] The apparent reason for such restrictions is to protect the property from being sold for satisfaction of debts or tax liens, so as to assure the individual Indians a base for economic development. This specific tax exemption, combined with the wording of various amendments to the Osage Allotment Act to the effect that *all* royalties and bonuses shall be turned over to the competent Indians, has now been interpreted to imply that no taxes may be levied on any trust property or income therefrom. The General Allotment Act and Osage Allotment Act have been taken as *pari materia*[39] and decisions on one have been used as authority for decisions involving the other because of the one overall federal policy towards Indians. The courts have ignored, how-

33. *Id.* at 1379.
34. *Id.* at 1379.
35. *Id.* at 1378.
36. *Id.* at 1381.
37. 25 U.S.C. § 348 (1970).
38. Act of June 28, 1906, ch. 3572, § 2, 34 Stat. 542.
39. Big Eagle v. United States, 300 F.2d 765, 771 (Ct. Cl. 1962); *accord,* Kirkwood v. Arenas, 243 F.2d 863, 867 (9th Cir. 1957). Laws which are *pari materia* must be construed with reference to each other.

ever, some further language in the Osage Allotment Act which might be interpreted to show congressional intent to *not* make trust property tax exempt across the board. The Act of April 18, 1912 states:

> That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs . . . . *Provided further* [t]hat nothing herein shall be construed so as to exempt any such property from liability for taxes.[40]

The taxes referred to are not specifically indicated, but these provisions do show that inalienability and trust status may not necessarily be used to imply extensive tax exemptions.[41]

It seems that the specific problems of narrow or broad interpretation of the various Indian allotment acts cannot be viewed in isolation, but rather must be seen in the context of conflicting federal policies. On the one hand, the official method of dealing with statutes which regard Indians is one of leniency, while the normal method of handling tax exemptions is that they should never be implied. These two policies must be balanced by every court which decides whether or not to allow Indian tax exemptions which have not been specifically spelled out. The policy of leniency, as stated by Chief Justice Marshall, has often been used by courts in justifying exemptions,[42] but a different attitude was shown in 1935 by a case which stated that taxation of income from trust funds of an Indian ward is not so inconsistent with the relationship of guardian and ward that exemption is a necessary implication.[43] This set the scene for the strong tone of the *West* decision which insisted on affirmative language before a tax exemption could be allowed.[44] The *Squire* case, however, and those following it, have reembraced the words of Chief Justice Marshall and given the special Indian

40. Act of Apr. 18, 1912, ch. 83, § 7, 37 Stat. 86. Another amendment authorized the payment of certain funds after payment of taxes. Act of June 24, 1938, ch. 645, 52 Stat. 1034. However, the same amendment stipulates payment of all royalties and bonuses on declaration of competence. *Id.* § 3, 52 Stat. at 1035.

41. These special references to taxes may also indicate an attempt to treat the division of mineral headrights in a manner different from those acts in which land division alone is encountered. If this is so, the conclusions drawn by several cases that all Indian allotment acts are *pari materia* are not valid, and the *Squire* decision could only be extended to tribes covered by the General Allotment Act.

42. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582, 8 L. Ed. 483, 508 (1832); *e.g.*, Squire v. Capoeman, 351 U.S. 1, 7, 76 S. Ct. 611, 615, 100 L. Ed. 883, 889 (1956); Choate v. Trapp, 224 U.S. 665, 675, 32 S. Ct. 565, 569, 56 L. Ed. 941, 946 (1912).

43. Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418, 421, 55 S. Ct. 820, 822, 79 L. Ed. 1517, 1519-20 (1935). This case held that income derived from trust income was subject to federal income tax. Another case, in allowing the imposition of an income tax on trust property stated that wardship, without more, does not render an Indian immune from the common burden. Landman v. Commissioner, 123 F.2d 787, 790 (10th Cir. 1941), *cert. denied*, 315 U.S. 810 (1942).

44. West v. Oklahoma Tax Comm'n, 334 U.S. 717, 727, 68 S. Ct. 1223, 1228, 92 L. Ed. 1676, 1682 (1948).

relationship to the federal government an interpretation which again includes tax exemptions.

It becomes apparent that the courts have followed influences external to the statutes themselves in arriving at different rulings through the years on basically the same set of laws. The courts have reflected the varying public attitudes towards Indians in their decisions. While earlier dealings with the Indians may have reflected some of the desire for appeasement which prevailed because of the complete ruination of the Indians' ways of life, the middle decisions of *West* and *Oklahoma Tax Commission* mirrored an era of sweeping tax reform and a desire to do away with tax privileges. *Mason* reflects the recent national embarrassment of finding that many Indians are still dependent on the federal government in the context of a guardian-ward relationship and that in an era of sweeping social reform the Indian has been the forgotten man.[45]

It seems a pity to leave the Indian at the mercy of a court's sentiments. More definite legislation in the entire area of the federal-Indian trust relationship would prove beneficial to both sides, and would relieve the courts of making decisions in what is clearly legislative territory.[46] Until such legislation is passed, the courts, in continuing to interpret the laws which do exist, should consider the moving factors behind the federal-Indian relationship in making their decisions. Whether the goal is assimilation or ethnocentric independence, neither end can be achieved by reducing the value of the Indians' main assets, which is the land they have and what is taken from it.[47] To continue to allow repeated tapping of these resources through the imposition of inheritance taxes is of benefit to no one. Justice Murphy, in his dissent in *Oklahoma Tax Commission v. United States*,[48] placed the problem in proper perspective when he said:

> I dissent because the opinion of the Court rejects a century and a half of history. We are not here dealing with mere property or income that is tax exempt. This is not the ordinary case of government and its citizens, or a group of citizens who seek to avoid their obligations. Our concern here is entirely different. It is with a people who are our wards and towards whom Congress has fashioned a policy of protection due to obligations well known to us all.

Phyllis Wilson Gainer

---

45. "The first Americans—the Indians—are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom." Excerpts from President Nixon's Message on Indian Affairs, N.Y. Times, July 9, 1971, at 1, col. 8, *quoted in* Comment, *The Problems of Indian Poverty: The Shrinking Land Base and Ineffective Education*, 36 ALBANY L. REV. 143 (1971).

46. U.S. CONST. art. I, § 8, cl. 3.

47. Tuttle, *Economic Development of Indian Lands*, 5 U. RICH. L. REV. 319, 321 (1971).

48. 319 U.S. 598, 612, 63 S. Ct. 1284, 1291, 87 L. Ed. 1612, 1621 (1943).