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THE INDIAN PROBLEM AND THE LAW

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When the first settlers from Europe arrived upon the North American continent they were immediately presented with an "Indian problem." This problem has been with them and their descendants ever since, and to-day it is far from being solved. It is true that at present it is not very pressing from the standpoint of the dominant white race. Most of the Indians' possessions of value have passed into our hands, and dangers from hostile uprisings have long since passed into history. Looking at the situation through the eyes of the Indian, however, it is doubtful whether his condition at any time has been as critical as it is to-day. His ancient heritage is in the hands of others, his customary mode of life is largely impossible, and even the means of subsistence, which he and his ancestors possessed, have vanished. Not having yet achieved the education and the economic competence necessary to survive in the struggle for existence with his non-Indian neighbors, he, and with him the American people, squarely face the issue whether he shall sink into the disease, poverty, and crime ridden stratum of society, or whether he shall survive as a respectable and self sustained part of our society.

There are indications that this question has at last penetrated the public conscience. Sensational magazine literature,[1] a Senatorial investigation,[2] and the appointment as Indian Commissioner and Assistant of two prominent Philadelphia business men,[3] long interested philanthropically in the Indian, have served to turn attention to the government's Indian wards. The problem to-day is one of race conservation and advancement.

[1] See Collier, *Are We Making Red Slaves?* Survey, Jan. 1, 1927; Connolly, *Cry of a Broken People*, Good Housekeeping, Feb., March, May, 1929.

[2] Not yet completed. See address of Senator Wheeler of the Committee, U. S. Daily, Aug. 13, 1929.

[3] Charles J. Rhoads and J. Henry Scattergood.

It is therefore, in large part, a problem for the physician, educator, and social worker. In it, however, there inhere certain fundamental and unique legal problems, an understanding and solution of which will be necessary before a satisfactory future for the Indian people can safely be predicted.[4]

ADMINISTRATION OF JUSTICE AMONG THE INDIANS

One of the most interesting and important of the Indian's legal problems is that of providing for him a rational and appropriate system of civil and criminal law. At present there is great doubt and uncertainty, not merely whether in given cases he is subject to the jurisdiction of the state or federal government, but whether indeed he is subject to any law at all. The principles on which the Indian's status rests were early enunciated by Chief Justice Marshall in the well known cases of *Cherokee Nation v. Georgia*,[5] and *Worcester v. Georgia*.[6] In the first of these the Cherokee Tribe was declared to be "a distinct political society, separated from others, capable of managing its own affairs, and of governing itself," but dependent nevertheless on the United States, to whom the relation therefore "resembles that of a ward to his guardian."[7] This crystallized in the *Worcester* case into the specific holding that the federal government had jurisdiction, exclusive of the states, over the Indian tribes, their territory, their persons and their property.

Criminal Justice

Around these cases has been built much of the juristic and legislative structure of the law relating to the Indians. The theory of tribal autonomy enunciated above was given Congressional recognition in the act of 1834,[8] which, while extend-

[4] The material for the present article was gathered by the writer, who was the legal specialist on the Indian Survey Staff of the Institute for Government Research, which at the request of Mr. Hubert Work, then Secretary of the Interior, made an exhaustive and scientific study into the Indian problem in all its phases. See MERIAM, THE PROBLEM OF INDIAN ADMINISTRATION (1928).

[5] 5 Pet. 1 (U. S. 1831).

[6] 6 Pet. 515 (U. S. 1832).

[7] See, to the same effect, United States v. Kagama, 118 U. S. 375, 382, 6 Sup. Ct. 1109, 1113 (1886); United States v. Quiver, 241 U. S. 602, 603, 36 Sup. Ct. 699, 700 (1916).

[8] 4 STAT. 729, 733 (1834), 25 U. S. C. §§ 217, 218 (1926).

"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 offences by one Indian against the person or property of another to be dealt with according to their tribal customs and laws." United States v. Quiver, *supra* note 7, at 603.

ing the federal criminal laws over the "Indian country," [9] exempted from such extension "crimes committed by one Indian against the person or property of another Indian." [10] But with the intrusion of white settlements, the breaking up of the reservations, the crumbling of tribal authority, and the subsequent entry of the Indian people into the economic and social life of the surrounding communities, tribal autonomy in serious criminal matters became impossible. It was necessary to extend over the Indians the authority and law of the white man. By the act of March 3, 1885,[11] it was provided that all Indians committing within the limits of an Indian reservation the crimes of murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, or larceny, whether against the person or property of another Indian or of any other person, should be subject to the same laws and tried in the same courts as are all other persons committing said crimes within the exclusive jurisdiction of the United States. This grant of juris-

[9] The term "Indian country" was first defined by statute as including all that part of the United States west of the Mississippi River, not within Missouri, Arkansas, or Louisiana, to which the Indian title had not yet been extinguished. While the definition has long since dropped out of the statutes, the term "Indian country" yet remains.

It has been judicially determined to include Indian reservations, whether originally Indian lands or whether created by executive order out of the public domain. Donnelly v. United States, 228 U. S. 243, 33 Sup. Ct. 449 (1913). And also Indian allotments in "open reservations" as long as the United States retains an interest in them for the purpose of its guardianship over its wards. United States v. Pelican, 232 U. S. 442, 34 Sup. Ct. 396 (1914).

[10] In 1854 this exemption was further extended to include Indians who had been "punished by the local law of the tribe." 10 STAT. 270 (1854), 25 U. S. C. § 218 (1926). This statute does not have the effect of extending the federal laws over Indian reservations, where the alleged crime in no way involves Indians themselves. So to extend the federal law would be contrary to the equality of the states protected by the Constitution. The subsequent admission of a state impliedly repeals the above statute pro tanto. *Cf.* United States v. McBratney, 104 U. S. 621 (1881); Draper v. United States, 164 U. S. 240, 17 Sup. Ct. 107 (1896) (both cases of murder where neither the accused nor his victim were Indians). But when the crime is committed by a white man against the person or property of an Indian the federal jurisdiction attaches, for the Indians are wards of the United States, and remain under its protection in spite of the state sovereignty. Donnelly v. United States; United States v. Pelican, both *supra* note 9.

In a few cases the United States at the time of the creation of a state has specificially reserved to it jurisdiction over the Indian reservation including non-Indians, but it requires a very clear expression of this intent for the Court to allow the jurisdiction. *Cf.* The Kansas Indians, 5 Wall. 737 (U. S. 1867); Hollister v. United States, 145 Fed. 773 (C. C. A. 8th, 1906); United States v. McBratney; Draper v. United States, both *supra*.

[11] 23 STAT. 385 (1885), 18 U. S. C. § 548 (1926).

diction was sustained in the case of *United States v. Kagama*[12] by reliance on the federal government's guardianship over the Indian people. It is apparent, however, that as a criminal code for the Indians, the above legislation is very incomplete. Such offences as assault with intent to rape, incest, adultery, embezzlement, to mention only a few, are not covered by the statute. As to these the federal courts lack jurisdiction.[13] It is also plain both from a wording of the statute and from a decent regard for state sovereignty that the federal court's jurisdiction extends no further than the boundaries of the reservations.[14]

As to state jurisdiction over Indian crimes, it includes those of all descriptions committed by the Indians off their reservations.[15] As to crimes committed on the reservations, there is some conflict in the cases, but the majority view, influenced by the tendency of the state prosecutors and courts to evade rather than seek responsibility, is that the federal authority is exclusive. This view is supported with respect to the eight crimes enumerated in the federal statute in a dictum by the United States Supreme Court,[16] which the state courts have not been loath to accept.[17] Also, where the alleged crime is not included within this federal list, the better opinion undoubtedly is that expressed by the Minnesota court as follows:

"By the act of 1885, presumably, Congress has enumerated all the acts which in their judgment ought to be made crimes when committed by the Indians, in view of their imperfect civilization. For the state to be allowed to supplement this by making every act a crime on their part which would be such if committed by a member of our more highly civilized society would be not only

[12] *Supra* note 7.

[13] United States v. Quiver, *supra* note 7 (adultery); United States v. King, 81 Fed. 625 (E. D. Wis. 1897) (assault with intent to rape); Ex parte Hart, 157 Fed. 130 (D. Ore. 1907) (incest).

These decisions are based partly on the exception in 25 U. S. C. §§ 217, 218, *supra* note 8, and partly on the theory of tribal autonomy. In United States v. Quiver it was argued that the crime of adultery did not come within the statutory exception since not committed *against* the person or property of another, but was a voluntary act. The Court refused to give this narrow construction, saying that it was the intent of Congress "that the relations of the Indians among themselves—the conduct of one towards another—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise."

[14] Pablo v. People, 23 Colo. 134, 46 Pac. 636 (1896); State v. Spotted Hawk, 22 Mont. 33, 55 Pac. 1026 (1899); State v. Tilden, 27 Idaho 262, 147 Pac. 1056 (1915); State v. Buckaroo Jack, 30 Nev. 325, 96 Pac. 497 (1908); State v. Superior Court, 107 Wash. 238, 181 Pac. 688 (1919).

[15] See cases *supra* note 14.

[16] See United States v. Kagama, *supra* note 7, at 383.

[17] Ex parte Cross, 20 Neb. 417, 30 N. W. 428 (1886); State v. Howard, 33 Wash. 250, 74 Pac. 382 (1903); State v. Columbia George, 39 Ore. 127, 65 Pac. 604 (1901); *cf.* Ex parte Van Moore, 221 Fed. 954 (D. S. D. 1915).

inappropriate, but also practically to arrogate the guardianship over these Indians, which is exclusively invested in the general government." [18]

This division of authority between federal and state governments, giving rise to doubts and conflicts in any event, is rendered even more confusing by the process through which the Indian reservations have been allotted in severalty to the members of the tribes occupying them, and as a result of which the Indians themselves have been started on the way to full freedom from federal control. In the first place, land allotted to the Indians, though in severalty, is still considered "Indian country," or an "Indian reservation," within the statutes [19] and decisions above outlined, so long as the United States retains title as trustee, which is normally twenty-five years. These Indian allotments have in time become interspersed with the holdings of white settlers, thus creating a confusion of jurisdictions which has been aptly described as "government in spots." [20] On the personal side, all Indians receiving allotments were by the original act of 1887 [21] expressly declared to "have the benefit of and be subject to the laws both criminal and civic of the State or Territory in which they may reside," and in addition, if born within the United States, to be citizens thereof.[22] By subsequent

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[18] Minnesota v. Campbell, 53 Minn. 354, 359, 55 N. W. 553, 555 (1893). A contrary view is expressed in Kitto v. State, 98 Neb. 164, 171, 152 N. W. 380, 383 (1915): "Congress has not reserved to the Federal Courts the jurisdiction to punish for misdemeanors. If such jurisdiction is not vested in the state courts, it is not vested anywhere and the perpetrator of misdemeanors of all kinds on an Indian reservation may go unpunished. Such clearly was not the intention of Congress." See note to this case in L. R. A. 1915F 587. A recent case in accord with Minnesota v. Campbell is State v. Big Sheep, 75 Mont. 219, 243 Pac. 1067 (1926).

Two federal courts have spoken with decisive force to the effect that the state game laws cannot be enforced against Indians on their reservations. In re Blackbird, 109 Fed. 139 (D. Wis. 1901); In re Lincoln, 129 Fed. 247 (N. D. Cal. 1904).

[19] See *supra* notes 8 and 11.

[20] See State v. Lott, 21 Idaho 646, 660, 123 Pac. 491, 496 (1912).

[21] 24 STAT. 390 (1887), 8 U. S. C. § 3 (1926).

[22] In In re Heff, 197 U. S. 488, 25 Sup. Ct. 506 (1905), the Supreme Court first held that the effect of this provision was to remove the allotted Indian, whether his title was restricted or not, from federal guardianship and place him as any other citizen under state law. While the case involved the sale of liquor to an allotted Indian, the language of the Court was such as to indicate that it was considered that the allotted Indian was removed from the domain of the federal statutes specifically relating to him as an Indian. A number of lesser courts so held. In re Now-Ge-Zhuck, 69 Kan. 410, 76 Pac. 877 (1904); United States v. Kiya, 126 Fed. 879 (D. N. D. 1903); State v. Lott, *supra* note 20.

The Heff case was overruled in Hallowell v. United States, 221 U. S. 317, 31 Sup. Ct. 587 (1911), and in United States v. Nice, 241 U. S. 591,

amendment,[23] however, the time of such subjection to state law was postponed until the expiration of the federal trust period and the grant of title in fee to the Indian. The mere fact of citizenship, now conferred on all Indians born in the United States,[24] does not change their status under the rules we are now considering,[25] but on the grant of the title in fee, the Indian does assume the full rights and responsibilities of citizenship and is subject like any other person to the laws of the state wherein he resides.[26]

It is apparent that there is a considerable hiatus in the criminal laws relating to the Indians. This is partially filled by the jurisdiction of the so-called Courts of Indian Offences, which are presided over by Indian judges, appointed by the superintendents of the respective reservations and responsible to them. But their legal foundation is rather insecure, for their only Congressional authority is the annual appropriations by Congress for the pay of the judges, and the only judicial sanction is an early federal decision of the district court for the state of Oregon, which bases their authority on the Secretary of the Interior's power to make rules and regulations for the Indians.[27] These courts have been severely criticised as incompetent and arbitrary,[28] and it

36 Sup. Ct. 696 (1916), holding that the mere fact that the Indian had become a citizen and subject to state law did not abrogate the United States authority over him, and that he was still subject to legislation created for his control and protection.

[23] Act of May 8, 1906, 34 STAT. 182 (1906), 25 U. S. C. § 349 (1926).

[24] 24 STAT. 390 (1887), 8 U. S. C. § 3 (1926).

[25] See cases cited *supra* note 22.

[26] Eugene Sol Louie v. United States, 274 Fed. 47 (C. C. A. 9th, 1921); State v. Smokalem, 37 Wash. 91, 79 Pac. 603 (1905); State v. Nimrod, 30 S. D. 239, 138 N. W. 377 (1912). A number of state courts have made the question of the status of "Indian" turn on whether the individual concerned has severed his tribal relations. State v. Howard, *supra* note 17; People v. Ketchum, 73 Cal. 635, 15 Pac. 353 (1887); Minnesota v. Campbell, *supra* note 18. There is no federal authority for this view.

In Oklahoma, the Indians of the Five Civilized Tribes are by special act of Congress under the authority of the state as far as responsibility for crime is concerned. See 30 STAT. 83 (1897); 33 STAT. 573 (1904); *cf.* Palmer v. Cully, 52 Okla. 454, 153 Pac. 154 (1915).

In spite of the totally different history of the few remaining Indians of New York, the state court there has held that it has no jurisdiction over any of the eight offences designated by the federal statute. People v. Daly, 212 N. Y. 183, 105 N. E. 1048 (1914). It is doubtful, however, if the courts of that state would hold that they are utterly lacking in jurisdiction over Indian crimes on the reservations, for New York has in fact exercised considerable control over the Indians within her borders. See dictum in Mulkins v. Snow, 232 N. Y. 47, 51, 133 N. E. 123, 124 (1921).

[27] United States v. Clapox, 35 Fed. 575 (D. Ore. 1888).

[28] See *Reservation Courts of Indian Offenses*, Hearing on H. R. 7826 before the Committee on Indian Affairs, House of Representatives, 69th Cong. 1st Sess., which contains many of the conflicting opinions in regard to these courts.

must be admitted that they are far different from those to which we are accustomed to look for standards of procedure and substantive justice. The regulations of the Indian Bureau of 1904, which in theory contain the code for guidance of the judges, are archaic, fragmentary, and in addition probably unread by nine out of ten of the Indian judges. In fact the deliberations of the judges are governed not so much by legal rules and principles as they are by the common sense and native intuition of the Indians who preside over them.[29]

The writer is inclined to be lenient towards the Courts of Indian Offences. It must be remembered that the matters with which they deal are domestic difficulties, small personal property disputes, and petty offences, such as drunkenness, minor assaults, and the less gross sexual offences, which while abhorrent to the morals of more advanced communities are not necessarily considered such by the majority of Indians. There are also great numbers of the reservation Indians who have but imperfect command of the English language, and even less understanding of the ways of the white man and the white man's laws. For such cases and for such people, a local court, where without the expense of hired attorneys the Indians may appear before their own people and in their own way and in their own tongue have their cases considered and justice administered, has much to recommend it. While the power of imprisonment in the hands of these informal courts may seem dangerous, in actual practice the sentence means not actual incarceration but a term of labor about the agency grounds or fields, with generous allowances for good behavior administered by the superintendent. The truth seems to be that in general the courts are defective not in the severity, but in their inability to deal with serious cases of hardened offenders. In fact when a case of this sort arises it is usually the practice for the superintendent to turn the matter over to the state or federal authorities, where the way of the unlettered and impecunious Indian offender may indeed be hard.[30] It is

[29] The writer attended a session of the Court of Indian Offences at the Pima Indian Reservation in Arizona. One case involved an alleged assault, and the other a complaint by a mother that the accused Indian was having illicit relations with her daughter, the parties apparently desiring marriage, to which the mother objected. In the first case the judges found that both accuser and accused were drunk and sentenced them both to two months "in jail." In the second case, the offence not being denied, the accused received a sentence for six months, but the judges declined to interfere with any desired marriage. The procedure in each case was for the two judges to call each party and witness before them separately and alone and ask them to tell the story. One judge served as interrogator and the other as scribe. After the parties and their witnesses had all been heard, the judges conferred, agreed on their decision, and announced it "in open court." The Indian Survey Staff found that this was the usual procedure, though at some reservations the witnesses were heard openly.

[30] On a certain reservation on the Pacific coast the incident came to the

not contended that the Courts of Indian Offences are solutions of this phase of the Indian legal problem. They are not appropriate to the younger educated Indians, too often over-sophisticated in the wiles and crimes of the lower type whites in the communities surrounding the reservations; but for remote tribal groups where respect for the older men of the tribe still survives, and where decent state courts are not reasonably adjacent, they do play a part in the administration of justice not to be too harshly condemned.

Civil Justice

While the theory of tribal allegiance and federal guardianship has served in criminal matters to place the Indian in a special category, such has not generally been the result in matters of civil rights. The Indian, whether tribal and a ward of the government or not, may, except where specially restricted by act of Congress,[31] make contracts,[32] acquire and dispose of property,[33]

writer's attention of certain Indians who had been unruly and vicious and exceedingly troublesome to the superintendent. He turned the cases over to the federal district attorney. In one case an indictment was secured for assault with intent to rape. The accused Indians were compelled to secure legal counsel, who demanded $1000 for their services, a sum far beyond the reach of the accused. Incidentally the crime charged was not within the jurisdiction of the federal court, but there was no one to present this to the court in behalf of the accused. In a liquor case on this same reservation the Indians were found guilty and fined $150, and being unable to pay, spent a month in confinement in the county jail.

[31] There are several specific restrictions on the rights of the Indians to contract. 25 U. S. C. § 68 (1926) forbids any person employed in the Indian service to have any interest or concern in trade with the Indians. Section 81 makes void any contract with an Indian for services concerning his lands or claims against the United States unless executed with prescribed formalities and approved by the Secretary of the Interior. 38 STAT. 97 (1913), 25 U. S. C. § 85 (1926), avoids contracts concerning tribal property in the hands of the United States unless the consent of the United States has previously been given. Also where the United States holds title to Indian allotments in trust, the Indian of course cannot make any binding contracts in respect thereto. 24 STAT. 389 (1887), 25 U. S. C. § 348 (1926).

By act of Feb. 27, 1925, it was provided as a measure of protection for the wealthy Osage Indians of Oklahoma that no contract for debt of any such Indian not having a special certificate of competence should be valid unless approved by the Secretary of the Interior. 43 STAT. 1011 (1925).

[32] Stacy v. LaBelle, 99 Wis. 520, 75 N. W. 60 (1898) (goods purchased); Ke-tuc-e-mun-quah v. McClure, 122 Ind. 541, 28 N. E. 1080 (1890) (promissory note); Rubideaux v. Vallie, 12 Kan. 28 (1873) (same); Postoak v. Lee, 46 Okla. 477, 149 Pac. 155 (1915) (for services rendered); Whirlwind v. Von der Ahe, 67 Mo. App. 628 (1896) (recovery by Indian for employer's breach of contract to hire); In re Stinger Estate, 61 Mont. 173, 201 Pac. 693 (1921) (promissory note); DeNoya v. Hill Investment Co., 33 Okla. 663, 127 Pac. 444 (1912) (same).

[33] Rider v. La Clair, 77 Wash. 488, 138 Pac. 3 (1914); McClain v. Miller,

and sue and be sued in the state or federal courts. [34] In addition, where his property is held in his behalf in trust by the United States, the federal government, as well as the Indian, may sue in respect thereto.[35] But it has been held that, where there is a dispute regarding the beneficiary rights to lands so held by the United States, the act of Congress allowing suits in respect thereto to be brought in the federal courts is exclusive,[36] and where the question relates to testate or intestate succession the statute vesting the determination of the question in the Secretary of the Interior precludes resort to any other tribunal.[37]

With respect to marriage and divorce, however, the Indian is governed by his own custom and not by state law.

"The general rule is that marriages valid by laws of the country where they are entered into are binding here, though not solemnized in accordance with the provisions of our laws; and the same rule must be adopted in relation to these Indian marriages where the tribal relation still exists. Under the laws of the United States they are recognized as capable of managing their own affairs, including their domestic relations, and those persons who were recognized by the Indian custom and law as married persons must be so treated by the courts, and their children cannot be regarded as illegitimate." [38]

This theory has received additional sanction from the act of Congress which recognizes as legitimate the offspring of an Indian man and woman cohabiting together as man and wife according to the Indian customs.[39] While mere sexual relations do not constitute marriage by Indian custom,[40] the cases recog-

95 Kan. 794, 149 Pac. 399 (1915); Bem-Way-Bin-Ness v. Eshelby, 87 Minn. 108, 91 N. W. 291 (1902).

[34] Mo. Pac. Ry. v. Cullers, 81 Tex. 382, 17 S. W. 19 (1891); Y-Ta-Tah-Wah v. Rebock, 105 Fed. 257 (C. C. N. D. Iowa 1900); Jones v. Eisler, 3 Kan. 134 (1865); Brown v. Anderson, 61 Okla. 136, 160 Pac. 724 (1916); Felix v. Patrick, 145 U. S. 317, 12 Sup. Ct. 862 (1892); Ain-dus-o-kee-shig v. Beaulieu, 98 Minn. 98, 107 N. W. 820 (1906); Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578 (1911).

[35] Heckman v. United States, 224 U. S. 413, 32 Sup. Ct. 424 (1912); Bowling v. United States, 233 U. S. 528, 34 Sup. Ct. 659 (1914); United States v. Board of Commissioners, 251 U. S. 128, 40 Sup. Ct. 100 (1919); Sunderland v. United States, 266 U. S. 226, 45 Sup. Ct. 64 (1924).

[36] McKay v. Kalyton, 204 U. S. 458, 27 Sup. Ct. 346 (1907).

[37] Hallowell v. Commons, 239 U. S. 506, 36 Sup. Ct. 202 (1916).

[38] See Earl v. Godley, 42 Minn. 361, 362, 44 N. W. 254, 255 (1890). *Accord:* La Framboise v. Day, 136 Minn. 239, 161 N. W. 529 (1917); Cyr v. Walker, 29 Okla. 281, 116 Pac. 931 (1911); Buck v. Branson, 34 Okla. 807, 127 Pac. 436 (1912); Kalyton v. Kalyton, 45 Ore. 116, 74 Pac. 491, 78 Pac. 332 (1903); Kobogum v. Jackson Iron Co., 76 Mich. 498, 43 N. W. 602 (1889); Ortley v. Ross, 78 Neb. 339, 110 N. W. 982 (1907).

[39] 26 STAT. 795 (1891), 25 U. S. C. § 371 (1926).

[40] "An irregular, limited, or partial cohabitation is not sufficient to create a presumption in favor of marriage. It must be continuing and complete,

nize that under Indian custom marriage and divorce may be extremely informal. In the case of *Proctor v. Foster*,[41] the husband, Louis Proctor, a full blooded Creek Indian, started living with a Creek woman by the name of Sehoke about the year 1884. They lived together as man and wife and had three children. But when Sehoke married Louis, she had a ten year old daughter, and when this daughter grew to womanhood Louis ceased his marriage relations with Sehoke and commenced cohabitation with the daughter Ellen. Sehoke in the meantime continued to live in the same two room house with Louis and Ellen. There was no evidence of any ceremony of any kind in the making of these changes, but the Oklahoma court sustained them as Indian marriages and divorces.[42]

The Indian Bureau has attempted administratively and through the Courts of Indian Offences to enforce some compliance by the Indians with orthodox views of family life, but when the law recognizes the loose custom marriage, and ignores fornication and adultery, the task is difficult. It is rendered more perplexing by the fact that state and federal courts and the Courts of Indian Offences ordinarily refuse to grant divorces to Indians married in the customary fashion. Uncas, a blind Apache Indian, was deserted by his wife, and a small boy whom he hired to lead him around ran away. He wished to remarry in order to obtain a helpmate in his infirmity, but being a Christian Indian and a government employee, he sought first to secure a divorce from his faithless wife, but neither the state court nor the reservation superintendent could help him. Although by so doing he jeopardized his governmental position and his standing in his church, he took the law into his own hands, and married again by Indian custom.

The lack of law and law enforcement in so much of the field in criminal matters, particularly the non-application of the state laws of marriage and divorce to the Indian wards of the govern-

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and such as is usual between persons lawfully married." Fender v. Segro, 41 Okla. 318, 323, 137 Pac. 103, 105 (1913).

[41] 107 Okla. 95, 230 Pac. 753 (1924).

[42] See also remarks of the court in Ortley v. Ross, *supra* note 38, at 341, 110 N. W. at 983: "The evidence shows that the laws and customs of the Santee Sioux Indians place slight restrictions on matrimonial alliances between members of the tribe, that polygamy was practiced with impunity, and that the only ceremony requisite was a mutual agreement between the parties to live together as husband and wife, and that this relation might be dissolved by mutual consent at any time, leaving the parties free to marry again at pleasure."

The likeness of Indian custom marriage to so-called common-law marriage of our own laws is indicated by the fact that in Oklahoma, where the state laws apply to the Indians of the Five Civilized Tribes, Indian marriages are sustained as common law marriages. Palmer v. Cully, 52 Okla. 458, 153 Pac. 154 (1915).

ment, has been greatly deplored. The Board of Indian Commissioners in 1918 viewed with alarm the increased immorality among the Indians and attributed much of it to the lack of law just discussed.[43] Their recommendations for more specific and inclusive laws were repeated in later years. There are few who would admit that the present situation is satisfactory. But dissents arise when remedies are proposed. There are those who object to the Courts of Indian Offences as arbitrary and bureaucratic, and who at times seem to have a naive faith in the elusive phrase, "due process of law," and in the "right" of these simple, unlettered, and impecunious people to be tried by regularly constituted courts of justice.[44] Furthermore, while there is one group who would remedy immorality and crime among the Indian people by a wholesale extension to them of our laws, specifically those of marriage and divorce, another class see in the move only a further attempt of a despotic government to rob an ancient race of its sacred and established family and religious traditions.[45]

The writer suggests that in the present situation the great need is for realism instead of theory and sentiment. No one solution of the problem is possible, for the Indians of the United States differ greatly in environment, tribal allegiance, and in the degree to which they have assimilated our civilization. For those semi-independent tribes which are considerably removed from contacts with the outside world and which still retain the Indian language, customs, and authority, the method of administration should be as simple, adaptable, and educational as possible. The report of the Indian Survey Staff [46] recommends for these groups the retention of the Courts of Indian Offences for minor civil cases and misdemeanors. The dangers of executive domination and discrimination were considered to be outweighed by the advantages of a local tribunal, composed of Indians, speaking the Indian tongue, and administering justice according to local understandings and principles. There should indeed be more definite regulations governing the courts, and both the parties litigant

[43] See the published reports of the Board of Indian Commissioners, 1918, 1919, 1923, 1925, 1926.

[44] See H. R. 9315, 69th Cong., 1st Sess., introduced by Congressman Freer, which contained among other provisions the following: "That hereafter, any Indian charged with a crime or misdemeanor against any other Indian or other person committed on an Indian reservation shall be guaranteed due process of law." This was aimed at an abolition of the Courts of Indian Offences.

[45] See *Reservation Courts of Indian Offences*, Hearing on H. R. 7826, 69th Cong., 1st Sess.; 44th ANNUAL REPORT, INDIAN RIGHTS ASSOCIATION (1926); in both of these places there are stern denunciations of the Courts of Indian Offences.

[46] See MERIAM, *op. cit. supra* note 4, at 777.

and the court itself should be enabled to transfer cases to the state or federal courts, if it is deemed that justice may be better administered there. If, as is strongly urged, expert social workers are placed on the different reservations, a system similar to our urban juvenile and small claims courts may well be established, and more desirable social views gradually inculcated among the Indians themselves through the medium of their own tribunals.

For those Indians who are scattered in individual family groups through large areas peopled predominantly by non-Indians, and also for those larger bodies who have attained substantially the knowledge, economic efficiency, and moral responsibility of their white neighbors, the proper recourse seems to be to the state and federal courts,[47] the latter doubtless having, as at the present, jurisdiction of the more serious felonies. As the various tribes develop they should, of course, pass from the first to the second group, and that this may occur reasonably and promptly, the law should be framed to permit this to happen through the expedient of Congress enacting the governing principle, and leaving to the executive the power to decide, when the facts call for its application. Also, when the Indian is placed under the laws of the white man, there should be a vast strengthening in the forces of legal aid for the Indians, for many of these inexperienced and impecunious people will suffer, as do the same class of people everywhere, where they are unaided in the courts of law.[48]

In the matter of substantive law, and this means largely that governing domestic relations, a similar division to that just proposed should be made. To place Indians of the first class above mentioned under the state laws of marriage and divorce will prove either abortive or cruel. Not to place the Indians of the second class under state or federal laws is to legalize fornication and adultery. Thousands of young people of the Indian race, though economically incompetent and therefore still government wards, have been educated in the governmental schools and sophisticated by the ways of our so-called civilization. To compel them to comply with our laws governing family and social relations is not an interference with Indian customs and traditions, for these have ceased to occupy any place in their lives, except as a convenient excuse for license. The laws of the state should not at present be extended wholesale to the old tribal groups where Indian custom and tradition still prevail, but these groups should nevertheless be gradually educated to a comprehension of

[47] It is believed that the better system of criminal law to apply to the Indian people would be the state law. The federal laws are too specialized and not sufficiently inclusive to constitute a working criminal code.

[48] See MERIAM, *op. cit. supra* note 4, at 776, 780, for a more complete development of a system of legal aid for the Indian people.

the principles which our laws of marital relations embody. This might be done by such simple expedients as the registering of the fact of marriage with the superintendent of the Indian agency, and the decree of divorce by the Court of Indian Offences. Many would object to any attempt to change the Indians' moral and religious views, and the proposition involves the much larger question of the government's goal in dealing with the Indian people. A certain liberality of spirit resents any "Americanization" of the Indian, preferring that he be preserved in his ancient life, culture, government, morals, and religion. There is indeed much worth preserving, but it must be recognized that an inexorable destiny dooms the ancient primitive life of the Indian before the advance of our modern civilization. What is worthy and capable of preservation, for example, his crafts, his arts, his literature, and many would say his religion, should be preserved; but eventually he will take his place in our economic and social life, and it is not an arbitrary arrogance which would educate him so that he may peacefully and profitably dwell in such an environment.[49]

INDIAN PROPERTY

Tribal Lands and Funds

A goodly share of the Indian problem to-day centers about his property. When the nations of Europe laid claim to the continent of North America by discovery and settlement, they recognized the possessory rights of the Indian occupants. In an early case the Supreme Court said:

"One uniform rule seems to have prevailed . . . ; that friendly Indians were protected in possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of individuals located on particular spots. . . . Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its conclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals." [50]

This Indian occupancy, however, had to give way to the demands

[49] See Austin, *Why Americanize the Indian?* Forum, September, 1929, for a sane argument for a preservation of the ancient Indian culture. See also MERIAM, *op. cit. supra* note 4, at 86–89, for a general statement of the ultimate goal of work with the Indians.

[50] Mitchel v. United States, 9 Pet. 711, 745 (U. S. 1835).

of the immigrants from Europe for more land, and the United States by treaty of cession with the tribes acquired this occupancy right in return for money, chattels, and a confirmation to the tribe of a new location. But as the new reservations were in turn being demanded by the pressure of the westward moving white population the Indian found himself again and again moved to still more remote and barren places.[51] In the case of some of the tribes of the arid southwest, such as the Pueblos, Navajos, Papagoes, and Pimas, their reservations are their ancestral homes, confirmed to them by statute or treaty, while in other cases the Indians occupy lands set apart for them out of the public domain by executive order based on Congressional authorization.

But although the sacredness of the right of the Indian to his lands has often been declared, the right of ownership is not his, for the fee title to the lands is in the United States, which holds such lands in trust for its Indian wards.[52] In such capacity it

[51] In Leavenworth R. R. v. United States, 92 U. S. 733, 743 (U. S. 1875), Davis, J., said: "The United States has frequently bought the Indian title to make room for civilized men,—the pioneers of the wilderness—but it has never engaged in advance to do so, nor was constraint, in theory at least, placed upon the Indians to bring about their acts of cession."

The Court does well to state that constraint *in theory* was not used. The history of the government's treaty making with the Indians is not a chapter of which to be proud. An example may be given. The United States had "under the most solemn guarantee" provided for the Cherokee Indians a permanent home that should never "be embarrassed by having extended around it the lines or placed over it the jurisdiction of a territory or State." The United States failed in numerous attempts to get the Indians to consent to a dissolution of the tribal government and the consequent opening up of their territory to white settlement. Finally by act of June 28, 1898, 30 STAT. 495, Congress made direct provision for such dissolution and opening, but provided that if the Indians prior to the going into effect of this statute ratified certain tentative agreements theretofore made between the commissioners of the United States and of the tribe, that the act of Congress should not apply. See MILL, OKLAHOMA INDIAN LAND LAWS (1924) c. 1, for a short history of the opening of Indian Territory; MCLAUGHLIN, MY FRIEND THE INDIAN (1910) c. 16, 17, for an account of the methods by which land cessions were obtained.

In Heckman v. United States, *supra* note 35, at 428, 32 Sup. Ct. at 425, there is a short account of the transactions by which Cherokee Indians were removed from southeastern United States into what is now Oklahoma, and their lands finally opened to white settlement. See also Goodrich, *The Legal Status of the California Indian* (1926) 14 CALIF. L. REV. 83, 157, for an account of the merciless treatment accorded the Indian of that state by the early settlers and the faithlessness of Congress in the situation.

[52] In the case of the Cherokee nation the United States had issued a patent in fee. Nevertheless the United States exercised over such land its powers of guardianship. Cherokee Nation v. Hitchcock, 187 U. S. 294, 23 Sup. Ct. 115 (1902). The executive order reservations were ruled by Mr. Justice Stone while Attorney General not to come within the designation of the words "the public domain" in a statute authorizing the leasing of

holds, protects, improves, leases, and sells the Indian properties. If there be income from the land, it is collected by the government, and either preserved in a fund for the Indian owners, or disbursed to them as Congress in its wisdom has seen fit to provide.[53]

This discretionary and paternalistic power of the government over the Indian property has often been delegated by Congress to the executive. Thus the General Allotment Act of 1887[54] authorizes the President, whenever in his opinion a reservation may advantageously be used for agricultural and grazing purposes, to allot it in severalty to the individual members of the tribe owning the reservation, and to negotiate with the tribe for the purchase by the United States of the unalloted portion of the lands, such agreement of purchase to be subject, however, to Congressional approval. Authority is given to the Secretary of the Interior to execute leases of tribal lands for mining purposes,[55] and also to sell the timber located on such lands.[56] While in some cases the Indian tribe or council may lease or sell its lands, such sales are subject to the approval of the Secretary of the Interior.[57]

The question of the government's power and responsibility in dealing with Indian lands is almost invariably treated as a political one, concerning which the courts will not take jurisdiction. But the United States may be made liable for breaches of trust in cases where it has submitted itself to the jurisdiction of the Court of Claims,[58] and the administration may be enjoined from confiscation of Indian property in a manner unauthorized by statute.[59]

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such lands for oil and gas. He assimilated such lands to Indian reservations in the usual sense in which the customary relation of the United States and the Indians existed. 34 Op. Att'y Gen. 171, 181 (1924).

[53] There is no uniformity in this respect. The practice varies according to the different tribes and the special acts of Congress applicable to each. Often the matter is complicated by treaty provisions.

[54] 24 STAT. 388 (1887), 25 U. S. C. § 331 (1926), also known as the Dawes Act.

[55] 41 STAT. 31, 1231 (1919, 1921), 25 U. S. C. § 399 (1926). The statute gives this authority only in case of reservations located in certain specified states, which include, however, within their boundaries a considerable part of the Indian peoples.

[56] 36 STAT. 857 (1910), 25 U. S. C. § 407 (1926).

[57] 26 STAT. 795 (1891), 43 STAT. 244 (1924), 25 U. S. C. §§ 397, 398, 398a–402a (1926); 44 STAT. 1347 (1927).

[58] See United States v. Mille Lac Chippewas, 229 U. S. 498, 509, 33 Sup. Ct. 811, 812 (1913).

[59] Lane v. Pueblo of Santa Rosa, 249 U. S. 110, 39 Sup. Ct. 185 (1919). It is also provided by law that an individual Indian claiming the right to an allotment of tribal land may sue for such allotment in the United States courts. See 36 STAT. 1167 (1911), 25 U. S. C. § 345 (1926).

An adjudicated case will show the extent of the government's irresponsible power over Indian property. In *Lone Wolf v. Hitchcock*,[60] it appeared that the United States had made a treaty with the Kiowa, Comanche, and Apache Indians, by which it set aside a reservation for their use. By the terms of this treaty no cession of the lands of the reservation was to be valid unless signed by three-fourths of the adult males of the reservation. Later an agreement was signed between the Indians and commissioners representing the United States to partition a portion of the reservation among the individual members of the tribe and to cede the remainder to the United States for a cash consideration. Congress passed acts to carry the agreement into effect, not, however, without various changes in the agreement. The Indians repudiated the agreement, alleging fraud in the negotiations, an inadequate price for the ceded area, and a failure to secure the signatures of three-fourths of the adult males of the tribe. This last contention was admitted to be true by the Secretary of the Interior. But the Supreme Court refused to interfere at the suit of the protesting Indians. It said:

"The contention in effect ignores the status of the contracting Indians, and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all the power to act, if the assent of the Indians could not be obtained. . . .

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. . . .

"In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property, we may not specially consider the contentions pressed upon our notice that the signing by the Indians of the agreement of October 6, 1892, was obtained by fraudulent misrepresentations and concealment, that the requisite three fourths of adult male Indians had not signed as required by the twelfth article of the treaty of 1867, and that the treaty as signed had been amended by Congress without submitting such amendments to the action of the Indians, since all these matters in any event were solely within the domain of the legislative authority and its action is conclusive upon the Courts. . . .

"Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation v. Hitchcock*, 187 U. S. 294 decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but

[60] 187 U. S. 553, 23 Sup. Ct. 216 (1903).

exercise of such power, a mere change in the form of the investment of Indian tribal property, the property of those, who as we have held were in substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealing with the Indians of which complaint is made and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation." [61]

Claims against the Government

An asset deemed of great importance, but in fact a veritable *Jarndyce v. Jarndyce* to many Indians, are their tribal claims. Breaches of treaty and seizures of land by the federal authorities in past years have given rise to many vast claims [62] against the government. Many of the Indian people are wasting their time and energies in vain longings for the wealth which they expect the allowance of their claims will give. However, there is no general right to sue the government, and because of the Statute of Limitations, the consent to be sued in the Court of Claims is invariably inoperative. An act must be secured from Congress giving the court jurisdiction to entertain a suit. If the statute be liberal in permitting claims to be considered, then the court's investigation will take a wide scope, while if the act is limited, so also must be the investigation. It has not been always easy to secure jurisdictional acts.[63] As they call for the payment of

[61] *Ibid.* 564, 23 Sup. Ct. at 221. In the cited case of Cherokee Nation v. Hitchcock, *supra* note 52, the Court refused to entertain a bill by the Cherokee Nation to enjoin the Secretary of the Interior from leasing, under the authority of acts of Congress, tribal deposits of oil, gas, coal, and other minerals, which leases were contended to be contrary to the treaty rights of the Indians, and an infringement on their fee title to the lands which had been granted to them by previous acts of Congress. The Court said:

"We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise and calculated to operate beneficially to the interests of the Cherokee. The power existed in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts." *Ibid.* 303, 23 Sup. Ct. at 120.

This guardianship is not incompatible with citizenship in the Indian. Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578 (1911).

[62] The claim of the Sioux Indians for lands unlawfully taken by the United States, including the famous gold mining region in the Black Hills of South Dakota, is estimated at eight hundred and fifty million dollars.

[63] A jurisdictional act for the Indians of California for their claim for lands seized from them in the days of 1849, and concerning which treaties were made but suffered to lapse unratified in the United States Senate, was first officially presented to Congress in 1920. It did not pass until 1928.

money they must be approved both by the Department of the Interior and the Budget Board, and frequently bills have been rejected as "contrary to the president's financial policy" of economy, though the writer had not supposed that economy should rightfully include a refusal to pay one's lawful debts. Even when a jurisdictional act has been secured, the situation of the United States is not that of ordinary defendant, for the claimant's choice of an attorney and the terms of its contract are subject to departmental approval, and usually those terms include a grant to the Commissioner and Secretary of the Interior of power to supervise and direct the litigation.[64] While the government's adverse interest as defendant and its trust interest as guardian necessarily conflict, it is a situation hard to avoid, for to allow the tribes to contract freely with their attorneys would without doubt lead to many unconscionable bargains with attorneys willing to profit by Indian credulity and simplicity.[65] Although there is much complaint by Indian attorneys, which is probably justified, concerning the small remuneration allowed, there is but little to show that the government has not fairly carried out its difficult dual role.

The Court of Claims is in many ways an ideal body to handle Indian claims, proceeding as it does entirely on documentary evidence and depositions. The present necessity of securing from Congress a jurisdictional act for each claim, however, is unfortunate, for it introduces too many political considerations into what should be purely judicial questions. Inequality and injustice frequently result. While there has been in the past few years a great increase in the number of permissions granted to Indian tribes to sue on their claims, those remaining should be speedily settled. It is suggested that the appointment of an expert commission to investigate the remaining claims and to report to Congress on their probable validity, together with recommendations for jurisdictional acts, would do as much as anything to satisfy many Indians of the government's good faith in dealing with them, and until this is accomplished, work for and with them will be futile.[66]

It will be many years more before a final judgment can be rendered by the Court of Claims.

[64] See 16 STAT. 570 (1871), 25 U. S. C. § 81 (1926).

[65] There are, in some states, parties collecting large sums from the Indians under promise of prosecuting their claims and of eventually making them all wealthy. They constitute a serious obstacle to those who seek to do serious welfare work with the Indians.

[66] On the general subject of Indian tribal claims see Wise, *Indian Law and Needed Reforms* (1926) 12 A. B. A. J. 37. See also, LEUPP, THE INDIAN AND HIS PROBLEM (1910) 194 *et seq.*; MERIAM, *op. cit. supra* note 4, at 805.

Individual Indian Property

The executive not only dominates over tribal assets, but also over the individual allotments into which most of the reservations have been divided. With the naive trust that making the Indian an individual land holder would banish his primitive racial instincts and transform him into a self-sustaining and satisfied agriculturist,[67] the government in 1887 provided for the allotment, at the discretion of the President, of the reservations suitable for agriculture to the members of the various tribes in individual tracts of which the standard was eighty acres of agricultural land.[68] But the grant is not absolute, for the United States continues to hold the title in trust for twenty-five years, a period which the President "may in any case in his discretion extend."[69] The Secretary of the Interior is also authorized in his discretion, if satisfied that the Indian allottee is competent to manage his own affairs, to grant a patent in fee, which of course has the effect of removing all restrictions on the holding.[70] While the Indian may select his own allotment[71] and may even by special enactment sue the United States in the District Court to enforce his claims thereto,[72] he has no right to sell, lease, or encumber his land, except by the consent of the government or its designated officers.[73] Also, in the event of a sale or lease, the Secretary of the Interior has a discretion whether to pay to the Indian the proceeds, or to disburse them for him through the Department.[74] In addition, "whenever it shall be made to appear to the Secretary of the Interior that by reason of age, disability, or inability, any allottee cannot personally and with benefit to himself occupy or improve his allotment or any part thereof, the same may be leased" for five years for farming purposes by the Secretary upon such terms as he may prescribe.[75]

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[67] See LEUPP, *op. cit. supra* note 66, at 23, 33, 61, for an account of the allotting acts breaking up the reservations and distributing them to the individual members of the tribes.

[68] 24 STAT. 388 (1887), 25 U. S. C. § 331 (1926). In the case of grazing land the standard allotment is 160 acres, and in the case of irrigable land 40 acres. On many reservations these quantities are varied, as the allotment was made under special acts and not under the general allotment act.

[69] 24 STAT. 389 (1887), 31 STAT. 1085 (1901), 25 U. S. C. § 348 (1926).

[70] 24 STAT. 390 (1887), 34 STAT. 182 (1906), 25 U. S. C. § 349 (1926).

[71] 24 STAT. 388 (1887), 25 U. S. C. § 332 (1926). If the Indian fails to make a selection within four years, then it is the duty of the superintendent of the reservation to make one for him.

[72] 28 STAT. 305 (1894), 31 STAT. 760 (1901), 25 U. S. C. §§ 345, 346 (1926).

[73] See 34 STAT. 1018 (1907), 35 STAT. 444 (1908), 35 STAT. 783 (1909), 36 STAT. 856, 857 (1910), 25 U. S. C. §§ 396, 403–406 (1926).

[74] *Ibid.*

[75] 31 STAT. 229 (1900), 39 STAT. 128 (1916), 25 U. S. C. § 394–395 (1926).

The executive power which controls the allottee also follows him beyond the grave, for the determination of the heirs of the deceased landholder, although according to the law of the state where the land is located, is committed to the Secretary of the Interior, "upon notice and hearing under such rules as he may prescribe. . . and his decision thereon shall be final and conclusive." [76] While the Indian may make a will "in accordance with the regulations to be prescribed by the Secretary of the Interior," it has no force and effect unless approved by him, the statute providing no rules to govern his discretion in this matter.[77]

The regulations which the Secretary is thus authorized to promulgate, while very complete as to procedural matters, are either vague or entirely lacking in substantive provisions. For example, there is no authority in the published regulations for the allowance of claims against decedents, although such claims are customarily received and disposed of, each case being apparently considered on its own merits. There are no mandatory provisions in regard to the execution of wills, except that they may not be oral. While attesting witnesses are contemplated, they do not appear to be essential. Such matters as mental competency, undue influence, the omission of children, the effect of the death of a devisee are entirely undefined, and it does not appear that there is settled practice in any of them. At times certain Assistant Secretaries of the Interior in charge of Indian matters exercised the power of disapproving wills not for illegality alone, but because deemed unwise or improvident, though when the writer made his study of the work of the Bureau, the then Assistant Secretary accorded to the Indian testator the right to make the same disposition of his property as any other citizen in his right mind could make.

To carry out the task of determining heirs and probating wills, there is in the Indian Bureau a probate division, consisting of so-called inheritance examiners, who go into the field to secure the evidence, and an office force which receives the reports of the examiners and either approves or rejects them. Normally each Indian probate passes through the hands of seven persons, and while the more important and interesting cases get very good attention, for there are high class lawyers in the solicitor's office of the Department of the Interior, in general Indian heirship and testamentary proceedings are blessed with too many initials, and too few intellects.

Many object to this executive handling of what is ordinarily

[76] See *supra* note 69; also 36 STAT. 855 (1910), 25 U. S. C. § 372 (1926); Hallowell v. Commons, *supra* note 37.

[77] 36 STAT. 856 (1910), 37 STAT. 678 (1913), 25 U. S. C. § 373 (1926).

entrusted to courts of law, but it is doubtful if any other method would be effective. The assets of most of these estates consist of real estate in remote and inaccessible places. The heirs of the inheritance may be widely scattered, and since they can usually enjoy whatever possession they need of the land without probate proceedings, it is necessary for the government, if it is to keep the title to these lands clear, to go into the Indian country, search out the heirs and witnesses, and make its findings with very little assistance from the natural claimants to the estate? No probate court could or would do this work. If competent men, who do not need constant review of their work, are secured, and if these men are aided by reasonably complete and definite regulations covering the substantive law of the subject, and if court review is granted to correct errors of law and abuses of discretion, administrative handling of the probate work seems the only feasible method.

Criticism

The above brief review of the federal government's power over the property of its Indian wards cannot fail to strike one with its arbitrary and almost unrestrained character. It has been sharply challenged by critics of the government's policy, who claim that in the administration of its trust the government has been not only negligent but positively unfaithful. The items of the indictment are many. It is said that public improvements have been made, the expense of which is made a charge on the Indian's property, the benefit of which inures chiefly to the white population of the state.[78] A bill which was introduced with the claimed approval of the Indian Bureau to settle a long standing land controversy between the Pueblo Indians of New Mexico and certain squatters on their lands aroused a storm of protest from many groups friendly to the Indians, and a more favorable substitute was procured.[79] Secretary Fall proposed to lease certain executive order Indian reservations for oil and gas on the ground that they were a part of the public domain and not properly Indian lands. Under the law, if the Secretary were correct, none of the revenue would go to the Indians. The Attorney General, however, reversed this decision, holding that such lands were not part of the public domain, and not leasable at all. The Indian Commissioner then procured the introduction in Congress of a bill authorizing leasing, but giving

[78] See Collier, *op. cit. supra* note 1, at 453, 474, in regard to the highway bridge near Phoenix, Arizona, constituting a charge against the property of the Pima tribe, and the highway bridge at Lee's Ferry, Arizona, made a charge against the Navajos.

[79] See Bynner, *From Him That Hath Not*, Outlook, Jan. 17, 1923.

to the state 37½% of the royalties in lieu of taxes. Again private individuals, friends of the Indian, secured a new measure which took no part of the Indian revenue, but simply made the prospective lessees' property and the Indians' royalties taxable by the state as other property was taxed by it.[80] A proposal to lease a certain valuable power site on the Flathead Indian reservation in Montana has been bitterly opposed and denounced, as not falling short of confiscation. Similar contentions are being made concerning proposed contracts between an irrigation district near Albuquerque, New Mexico, and the government acting as guardian for the Pueblo Indians, and eminent counsel have been retained by private parties to defend the interests of the Indians. The most celebrated case, involving individual Indian property, is that of Jackson Barnett, an aged, illiterate, and simple minded Cherokee, who had become possessed of millions through the fortunate discovery of oil on his land. A gift of $1,100,000 to his white wife and the American Baptist Home Mission Society, effective after his death, was approved by the Indian Commissioner, but set aside by the United States District Court on the ground that it was evident that the Indian donor did not have sufficient mentality to understand the nature of his immense donation.[81] On the Yuma reservations in Southern California there was a long and constant turmoil, with investigation after investigation arising out of charges of fraud in the leasing of Indian lands, and one employee was dismissed because of proven derelictions.

It is not merely on account of the actual financial loss, however, that the present system is attacked. It cannot be doubted that the withdrawal from the Indian owners of all control over their property is a serious injury to their racial pride, and all but destructive of any sense of initiative and thrift.[82] This is particularly so, when as has been too often the case, the executives in charge of Indian property, irritated by the importunings of their charges, and deeming explanations futile, assume a superior, domineering, and almost insulting attitude, and vouchsafe no information to the Indian owners concerning their property, and the government's plans in regard thereto. That the Indians resent this cannot be denied. At a hearing attended by the writer before a former Commissioner of Indian Affairs, relative to the proposed leasing of an Indian power site, the

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[80] Act of March 3, 1927, 44 STAT. 1347 (1927), 25 U. S. C. § 398a-e (1928). See hearings before sub-committee of the Committee on Indian Affairs of the House of Representatives on H. R. 9133, 69th Cong., 1st Sess., Feb. 19, 1926.

[81] *Cf. Barnett v. Equitable Trust Co.*, 21 F. (2d) 325 (S. D. N. Y. 1927).

[82] See MCLAUGHLIN, *op. cit. supra* note 51, last chapter, "Give the Red Man his Portion."

Indian representative made it quite clear that his people did not object to the leasing, but that they did feel that the tribe should at least be consulted in regard to it. Another intelligent Indian in the writer's presence expressed a similar view in regard to the governmental management of Indian timber property, when he said that if mistakes were to be made in the handling of his assets, he would prefer to make those mistakes himself, rather than to have another make them for him.

While the present condition creates an atmosphere in which distrust and hate are bound to breed, the writer doubts whether in recent years there have been many cases of actionable fraud. The great danger is that a bureaucratically organized and politically controlled body like the Indian Bureau will in cases of conflict between the interests of the Indians and those of their white neighbors tend to compromise the claims of its inarticulate and unsophisticated wards, as an escape from the persistent demands of their opponents, often represented in Congress by politically powerful Congressmen and Senators, whose ill will cannot lightly be incurred.

Many suggestions have been made concerning the Indian property problem. The proposal that all guardianship be released, and that the lands and funds of these still simple and untutored people be turned over to them, free from governmental control, would leave them, as has been proved too often in the past, the helpless prey of merciless and unscrupulous land traders.[83] The remedy may cure the ill, but it would all but kill the patient, and it is difficult to understand how any but the most heartless can seriously consider it. Many, feeling a deep resentment against the Indian Bureau and its methods, would substitute state control for the federal guardianship, but many of the states have proved to be, and doubtless still are, the Indians' worst enemies.[84] Also, the federal government's

[83] In Oklahoma the governmental policy had been to release the Indians of the Five Civilized Tribes from federal guardianship as much as possible. The result was a reign of unexampled fraud and thievery upon the ignorant Indian landholders. At the present time the plight of many of these Indians is the most pitiable of any in the United States. See MERIAM, *op. cit. supra* note 4, at 94.

[84] This has been the case in Oklahoma. In New Mexico it seemed to be the unanimous opinion that the large Mexican population in that state could not be trusted with any control over the Indian or his property. As far as educational, medical, and social work with the Indians is concerned, many of the more progressive states with existing organizations for this work can undoubtedly better accomplish this task than the federal government. Minnesota and Wisconsin are already officially doing considerable relief work for the Indians. California has passed an act authorizing the state to expend in educational and welfare work for the Indians whatever appropriation may be made to it by Congress for that purpose, and has urged Congress to make such appropriations.

organization and records are too valuable to be scrapped. The plausible suggestion has been made that the administration of Indian property should be under the control of the federal courts. The formation of trusts to administer Indian property is also proposed. This reliance on the protection afforded by courts of law and legal institutions seems to the writer rather sanguine. The tribal properties are vast, varied, and scattered. The problems concerning them involve economic, social, and political considerations, calling not so much for rules of law and the judgment of law-trained men as for an administrative personnel of ability, integrity, and human sympathy. On these officials the courts would necessarily rely, and no great advance would be obtained over the present situation, under which a court of equity will give injunctive relief in cases of violations of law by administrative officials, while the Congressional forum is always open to those dissenting from the government's policy.

The administrative method of handling Indian property seems to the writer inevitable, but for its proper success there are several requisites. First, the laws and regulations concerning Indian property should be rewritten with these dual ends in view: one, of preventing fraud and fears of fraud, through the keeping of clear and public records of each step in the handling of Indian assets; and two, of training the Indian people in economic management through an acquaintance with the principal details concerning their property, and through an actual participation where possible in the decisions relating thereto. This last objective might perhaps be accomplished through the creation of corporations to take over many tribal properties, and the inclusion on the governing boards thereof of representatives from the Indian owners.[85] An adequate legal department within the Indian Bureau under the supervision of a general counsel would be a great aid in preventing outside aggressions, and in giving aid and counsel to the Commissioner in the many important legal questions presented to him.[86] Of supreme importance, however, is to have in the office of Indian Commissioner a person thoroughly sympathetic with the Indian race and its aspirations, zealous to protect and advance them, and removed as far as possible from the entanglements of politics. His character and attitude should be reflected in all members of the service, particularly those who come into first hand contact with the Indian people. The problem is not so much one of systems and organizations, as it is one of human understanding and personality.

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[85] See MERIAM, *op. cit. supra* note 4, at 462–466, for a concrete suggestion as to the application of the corporate form for tribal properties.

[86] *Ibid.* 780.

CONCLUSION

In the beginning of this article the statement was made that the Indian problem is largely one of race conservation and advancement. This means, in the large, education, including not merely a common school or vocational training for children, but a process by which young and old, individual and family, community and nation, shall be taught how to live and prosper in the increasingly complex society into which the rapidly turning wheels of fate have brought the Indian people. There is a real danger that good people, incensed by the wrongs that have been done the Indian, will, by stridently demanding that he be given his "rights," ignore the educational task before the American people in preserving and advancing the Indian race. The Indian people are a great and lovable race, and certainly capable of so-called advancement. But it must not be forgotten that they are but a generation or so removed from barbarism. A few years ago the greater part of them were living the lives of nomads, grossly ignorant of the laws, customs, and morals of that race which was to drive them from their ancestral domains and leave them dependent on others for maintenance. We cannot expect that in the few decades that have since passed they are now in a position to enjoy the benefits and receive the protection of a system of law and government designed for the needs of our own advanced civilization.

Administrative direction and special law must needs still exist. The "rights" which we would confer upon them would carry correlative duties, and particularly in property matters would prove disastrous. Equality before the law may mean annihilation. The majority of these people are not able either in understanding or financial ability to take advantage of the courts of justice, against which many more advanced suitors still bitterly complain. As in the juvenile courts we have been compelled to abandon reliance on criminal codes, technical procedure, and bills of rights in dealing with the problems of minors, so very well may the same be necessary in dealing with this race, still in its minority in cultural and economic progress. The emphasis must be on education, not on the granting of rights. In the great task of leading the Indian people to a position of independence and respect, the rule of law must not be made the end of our efforts, but accepted in its true role as but one of the servants in that larger and more comprehensive work.