

THE INDIAN BEFORE THE LAW

An inquiry at this date into the legal status of the Indian, and a glance at the record of long years of conflict and association with white men in America will, it is thought, exhibit in full operation some of the forces that are making for advance in modern jurisprudence. The period has been one of progress and reform, as well in political and legal theory as in the mechanical and practical arts of civilized life. The motives and ideals of the white man have changed much more rapidly than the condition of the aborigines. Our oldest institutions of learning were once training schools for missionaries. Dartmouth College was avowedly founded in part to promote the Christianization of Indians.¹ Our views of national sovereignty, imperial policy and the rights of States have undergone radical reconstruction.² The rights of citizenship in the State and Nation, still call forth learned and authoritative definition and pronouncement by divided courts. Besides the red man, the black man, the yellow man, the brown man, the Creole and the Porto Rican have asked for political power, or claimed citizenship by right of birth under constitutions and laws that have been but ill understood.³

When the Anglo-Saxon brought with him to America his elaborate system of free institutions, developed through centuries of struggle with the nobles, monarchs and ecclesiastical potentates of Europe, he little thought of welcoming to his political fellowship and to the fullness of civic privilege the Indian, the Chinaman and the Filipino. Nor has all this been done as yet, unless, perhaps, we know not always what we do. Some newer *Magna Charta* may yet be discovered to match the contents of the Fourteenth Amendment. A man might be born in New York of Chinese parents, necessarily unnaturalized, and claim, under the Constitution, to be a citizen of the United States, only to be told that such citizenship means nothing more of privilege than the freedom to sue in Federal Courts, while it might mean, that

¹ *Dartmouth College v. Woodward*, 4 Wheaton, 518.

² *Dred Scott v. Sandford*, 19 How., 393; *Slaughter House Cases*, 16 Wall., 36; *Strauder v. West Virginia*, 100 U. S., 303; *De Lima v. Bidwell*, 182 U. S., 1; *Kepner v. U. S.*, 195 U. S., 100; *Fourteen Diamond Rings v. U. S.*, 183 U. S., 176.

³ *Hawaii v. Mankichi* 190 U. S., 197; *Dorr v. U. S.*, 195 U. S., 138.

because of race and color, he was still left liable to deportation from his native land.⁴

The Anglo-Saxon settled on the American Continent to find a refuge from political oppression. His first wars were to maintain a foothold against savages, and later for self-defense and national integrity. In these recent years his humanitarian sentiment has found new wards appealing to him for protection (besides the aboriginal Indians of the mainland), and he has drawn his sword in the interest of the oppressed populations of the Antilles and the islands of the Far Orient, and now seems ready, like Hercules of old, to go forth armed upon the face of the whole earth, beating down wickedness wherever he can find it. And all this is not unconstitutional. From time to time, the flag comes down in near and distant seas, and patriotic freemen, grateful for past assistance, try their hands at self-government.

Columbus had as one professed end and purpose of his explorations, the conversion of the heathen to the true faith of Christ. He died, as another has said, in ignorance of the real grandeur of his discovery. The natives were called Indians, because it was believed that their island home was on the frontier of India. The true motives of the admiral have well been called in question; but there can be no room for doubt as to others. From the beginning until now, there have never been wanting zealous missionaries of the cross to risk life itself in the propaganda of religion among the redmen of the Occident. The Bible was translated into many tongues, and the rude jargon of the savage was spelled into letters by the man of God. The romance of the early days was written by Christian priests, and our first actual knowledge of life among the Indians was derived from missionary sources. These were not always of the best, as, for example, the first descriptive sketch of Niagara Falls from the pen of a Jesuit priest. Perhaps, a love of the marvelous was mingled with a desire to get credit for heroic achievement in an age when travelers were not particular to seek for scientific exactness.

For several centuries no trustworthy census enrolled and enumerated the brave warriors of the many nations with the squaws and papooses of the mighty hunters of the forests; and all figures, affecting to exhibit the native population of the western world, were simply a series of guesses. To-day, statisticians do

⁴ *U. S. v. Wong Kim Ark*, 169 U. S., 649; *U. S. v. Ju Toy*, 198 U. S., 253.

not hesitate to tell us that the number of redmen within our territorial limits is now, and perhaps always has been, within historic times, somewhere around three hundred thousand souls. The report of the Commissioner of Indian Affairs in 1907, gives the following summary of the population of Indians:

Population of Five Civilized Tribes, including freedmen and intermarried whites.....	101,228
Population exclusive of Five Civilized Tribes....	197,244

Total Indian population, exclusive of Alaska.... 298,472

Some anthropologists say that the Indian is undergoing a process of self-extinction; that, soured on the civilization of the white man, he refuses to summon children into the world, only to see his happy hunting grounds narrowed in area, while he is pushed steadily away from the bones of his forbears towards the setting sun. The Indian quickly contracts the vices of civilization, while he practices few of its virtues. He cannot be taught the dignity of labor, and the restraints of artificial life irk and annoy him. He takes kindly to our fire-water as a beverage, achieves excellence at football, and leads the world in the Marathon race. His long distance vision is great, and as a marksman and rifle shot, a faunal naturalist and hunter of big game, he is to be highly respected.

It may well be doubted whether the graduate of Carlisle and Hampton can go back to his childhood home and radiate the culture of our Eastern schools among his native redmen, indoctrinating them with classical philology and modern science, mathematics and physics. Thirty years ago, Professor Sumner told his students that it would be hard to get savages, for many generations devoted to hunting and war-like pursuits, to leap at a single bound into the fullness of an agricultural condition, without lingering at the intermediate stage of the herdsman. He, therefore, suggested that, if it was thought desirable to save the Indian to the civilization of the future, he might first be tried in the life of the cowboy of the West, working out of doors, riding horseback, and enjoying the strenuousness of an athlete.

It is said that the dark complexion and curly hair of many Italian laborers whom we see every day in America, come from a strain of blood of African negroes in the veins of the lower orders of Sicilians and natives of southern Italy. The official figures of our national census include among the colored population those

who have a quarter, an eighth, or even a less proportion of African blood. Sociologists thus speculate and prophecy that a full-blooded negro will some day be unknown in the United States. While much of myth and legend has obscured the true story of Pocahontas, and while most historians, with Bancroft, pass in silence over the heroic achievement of the Indian maid in saving the life of Captain John Smith from the peril of Powhatan's club, still Pocahontas surely lived, and Pocahontas surely married a white man and gave her blood to John Randolph of Ronanoke, and others. But no one will say that the experiment thus made of the intermarriage of the redman and the paleface was a success. Those who know the Indian like him for what is Indian in him,—“for his splendid inherited physique, kept up “because he glories, like his ancestors, in fresh air, in freedom, in “activity, in feats of strength; for all his old contempt for hunger, “thirst, cold and danger; and for the spirit of manly independence “which makes him resist becoming a pauper and a slave to the “whites.”⁵

The pioneer from Europe immediately upon landing, came into collision with the Indian. Besides teaching him religion, he engaged him in trade, paid him in baubles and glass beads for the pelts of beavers and bought land from him. The feudal law of property, when applied to the holdings and bargains of the natives, showed the Indian to be without a title to real estate. No deed of record or written testament showed ownership in the actual occupant; and a convenient rule was developed that no instrument of conveyance from an individual Indian could give a valid title to a purchaser. What knew this simple son of the forest of fee simple and fee tail, of *jus in re* or *jus ad rem*?

The Indians, it has been held, have a certain possessory right to the soil. But the fee remains in the United States, or in the State where the land lies, and the people have an ultimate title, so that Indian tribes cannot sell to other nations.⁶

Indian laws of descent of realty and distribution of personalty, and other native laws and customs have full validity and effect.⁷ The same holds true as to taxation and the organization of courts, such as “The Peacemaker's Court” of the Seneca Indians, in New

⁵ See *Report of Commissioner of Indian Affairs for 1905*, p. 12.

⁶ *Worcester v. Georgia*, 6 Pet., 515; *Choctaw Nation v. U. S.*, 179 U. S., 494.

⁷ *Jones v. Meehan*, 175 U. S., 1.

York.⁸ The State of New York succeeded to the rights of the English Crown to lands within its borders, with the exclusive right to extinguish Indian title by purchase.⁹ Neither Spain nor Mexico recognized the primitive title of the Indian.¹⁰ But in New Mexico, the Pueblo Indians have an indefeasible title, guaranteed by the Treaty of Guadalupe Hidalgo.¹¹

As a rule, tribal Indians in reservations occupy land at the will of the government.¹² So it has been held that the title of the Cherokee Indians is a base, qualified or determinable fee with a possibility of reversion in the United States.¹³

The United States may exercise the right of eminent domain over Indian lands for telegraph and telephone lines.¹⁴ And a State has the same powers.¹⁵ An individual Indian can acquire no vested right in tribal land. Nor can an Indian convey to a foreigner his interest in lands belonging to the tribe.¹⁶ But Indian tribes may cede their lands to the government.¹⁷ And an individual may get a good title to lands of an Indian tribe by a treaty between the United States and the tribe.¹⁸ A treaty with Indians may be superseded by a subsequent Act of Congress, as in the case of a statute validating certain leases made in New York by Seneca Indians.¹⁹ Lands secured to Indians by treaty cannot be taxed for any purpose by the State in which they lie.²⁰

The national and tribal relations of the Indians were early recognized. The painted soldiers on the warpath followed the leadership of a big chief. Kinship in the flesh rather than territorial propinquity,—to use the phrase of Sir Henry Maine,—was the bond of Indian society, and the real basis of their political and tribal cohesion. It remains the same to-day. Whole nations of Indians have been transported bodily westward across the continent, and have still preserved their tribal unity and solidarity

⁸ *Jameson v. Pierce*, 102 A. D. (N. Y.), 618.

⁹ *Seneca Nation v. Christie*, 126 N. Y., 122.

¹⁰ *U. S. v. Wilson*, 1 Black, 267.

¹¹ 9 *U. S. St. at Large*, 922.

¹² *Lone Wolf v. Hitchcock*, 187 U. S., 553.

¹³ *U. S. v. Old Settlers*, 148 U. S., 427.

¹⁴ *Cherokee Nation v. R. R.*, 135 U. S., 641.

¹⁵ *France v. Erie R. R.*, 2 Hun. (N. Y.), 513.

¹⁶ *Goodell v. Jackson*, 20 John, 693; *Buttz v. N. P. R. R.*, 119 U. S., 55.

¹⁷ *Lone Wolf v. Hitchcock*, 187 U. S., 553.

¹⁸ *Jones v. Meehan*, 175 U. S., 1.

¹⁹ *Shongo v. Miller*, 169 N. Y., 586.

²⁰ *In re N. Y. Indians*, 5 Wall., 761.

intact. The Cherokee Nation has been recognized as a distinct political community, having its own constitution and laws, and power to administer the same.²¹

From the beginning, the international sovereignty of Indian tribes has been clearly recognized by our Federal government in two ways, namely, by according them the full honors of belligerents in war, and by negotiating formal treaties with their chieftains. Scores of such treaties are mentioned in the reports of the Secretary of the Interior, and if they were not sworn to in Christian fashion over the bones of the saints, they were at least solemnized and ratified by smoking the pipe of peace, which answered the same purpose.²²

If there is any more impressive way of according the full honors of sovereignty to Indian rulers it is by engaging them in battle,—the argument of kings. This, too, has had precedents from the earliest days.

Still such sovereignty of Indian chiefs is hardly more than the demi-sovereignty of our modern publicists, or probably much less than that. It seems more akin to the pious frauds of our early law, and our modern methods of dealing with infants and incompetents. At any rate, while we may have deceived the Indian by our elaborate display of the forms of diplomacy, we have never deceived ourselves. The Supreme Court of the United States has not hesitated to say that no other acknowledged sovereign nation would be allowed by us to establish diplomatic relations with any of the American Indians within the confines of the United States. Then too, it must always be remembered that international law, so called, is a truly Christian code to whose benign authority and protection pagans, and even the Moslem, cannot successfully

²¹ *Cherokee Fund Cases*, 117 U. S., 288; *Delaware Indians v. Cherokee Nation*, 193 U. S., 127.

²² *Blackfeather v. U. S.*, 190 U. S., 368.

The United States has made hundreds of treaties with various Indian tribes. These treaties have been collected and published in one volume by order of Congress. A number of them are included in Vol. VII of the *Statutes at Large*.

The *Statute of March 3, 1871*, provides that "no Indian nation or tribe within the territory of the United States, shall be acknowledged or recognized as an independent nation or tribe with which the United States may contract by treaty, but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

appeal.²³ How can the poor Indian claim this as his just heritage? The anomalous relations of the Indians to the Federal government are thus apparent.²⁴

That this policy, pursued for so many years, is now unnecessary and indefensible is clearly manifest in the Act of Congress to the effect that no treaties shall hereafter be made with Indians. Such an act, while undoubtedly representing fully the unanimous opinion of American statesmen, might still, perhaps, be no more than a declaration of policy, considering that the treaty-making power is the political rather than the legislative arm of the government. Perhaps this discussion is hardly more than juggling with words. "Agreements" are now made with Indians, like the agreement with the Seminole Nation, ratified by Congress on July 1, 1908, (*30 Stat. at L.*, 567), providing for royalties produced from allotted lands in that tribe.

As to personal status, the Indian is not, in general, a citizen of the United States by birth, because not born, in the language of the Fourteenth Amendment, subject to the jurisdiction thereof.²⁵ But Indians may be naturalized, individually or collectively, by treaty or by statute. Every Indian in the Indian Territory is a citizen by statute. So, too, is he, if he has received an allotment of lands in severalty pursuant to statute.²⁶ In such cases he may vote, serve as a juror, testify as a witness in court, and sue and be sued.

Indian tribes are semi-independent, political communities, subject to the government of the United States. They are not foreign nations.²⁷ Their relation to the Federal government is that of a ward to his guardian.²⁸ The right of Indians to levy war and conclude peace has been judicially recognized.²⁹

Treaties with Indians have the same dignity and effect as treaties with a foreign nation. They are the supreme law of the

²³ Dr. Woolsey defines International Law as "the aggregate of rules which Christian States acknowledge as obligatory in their relations to each other, and to each other's subjects." Christian publicists have queried whether compacts could lawfully be made with infidels like Mohammedans.

International Law, Sect. 5-8.

²⁴ *U. S. v. Kagama*, 118 U. S., 375.

²⁵ *Elk v. Wilkins*, 112 U. S., 94.

²⁶ *24 U. S. Stat. at Large*, 390—the Dawes Bill.

²⁷ *Cherokee Nation v. Georgia*, 5 Pet., 1.

²⁸ *U. S. v. Kagama*, 118 U. S., 375.

²⁹ *Montoya v. U. S.*, 180 U. S., 261.

land.³⁰ In this way, Indians may acquire and sell land. Such a treaty may be superseded by a later Act of Congress.³¹ The words of an Indian treaty are to be understood in the sense in which they would be understood by Indians.³² In the interpretation of agreements and treaties with Indians, ambiguities should be resolved from the standpoint of the Indians.

Individual Indians have acquired allotments of tribal lands by Act of Congress.³³ Such acts are liberally construed to effect their purpose of encouraging the Indians to break up their tribal relations, and adopt the customs of civilized life by abolishing tenure in common, and promoting settled habits of industry and enterprise.³⁴ Any person of Indian blood, who has been unlawfully excluded from an allotment, may sue therefor in the Circuit Court.³⁵

The right of an individual Indian to convey his holding rests on treaty or statute.³⁶ When the right of alienation is restricted, the grantee of an Indian can get no title even by prescription. The President of the United States has no authority by virtue of his office to insert in a patent a restriction against alienation.³⁷ The restrictions on the right of alienation may extend to timber.³⁸ The title of Indians to lands belonging to the tribe is more than the right of mere occupation, and although the actual title may be in the United States, it is held in trust for the Indians, and the restraint on alienation should not be exaggerated.³⁹ When Indians are entitled to allotments, the Secretary of the Interior is to determine who are members of the tribe; and mandamus will not lie to control his decision. The Department of the Interior has control over the adoption of whites into the Indian tribes.⁴⁰ Congress has power to determine who are citizens in Indian tribes, and to create an Indian court.⁴¹

³⁰ *U. S. v. N. Y. Indians*, 173 U. S., 464; *Wiggan v. Connolly*, 163 U. S., 56.

³¹ *Ward v. Race Horse*, 163 U. S., 504.

³² *Choctaw Nation v. U. S.*, 119 U. S., 1.

³³ 24 U. S. Stat. at Large, 388; 26 U. S. Stat. at Large, 794.

³⁴ *Sloan v. U. S.*, 118 Fed. Rep., 283.

³⁵ *Hy-yu-tse-mil-kin v. Smith*, 194 U. S., 401.

³⁶ *Webster v. Reid*, 11 How., 437.

³⁷ *Francis v. Francis*, 203 U. S., 233.

³⁸ *Starr v. Campbell*, 208 U. S., 527.

³⁹ *U. S. v. Paine Lumber Co.*, 206 U. S., 467.

⁴⁰ *West v. Hitchcock*, 205 U. S., 80.

⁴¹ *Wallace v. Adams*, 204 U. S., 415.

The wealth of the Cherokee Nation became so great that white men married Indian women to get a share in the public domain, which they claimed, although they had abandoned their Cherokee wives and had since married white women: such claims were rejected by the court.⁴² Under the power to regulate commerce with Indian tribes, Congress may prohibit all intercourse with them, except under license.⁴³ This power may be exercised wherever Indian tribes exist.⁴⁴ State game laws may be enforced against Indians.⁴⁵

The selling or furnishing intoxicating liquor to Indians is a crime by Act of Congress.⁴⁶ An Indian, such as a student at the Carlisle School, as well as any other person, may be charged with this crime.⁴⁷ Such laws may remain in force, notwithstanding the place where the offense is committed, is within the limits of a State.⁴⁸ An Indian who has received an allotment and patent for land is no longer a ward of the government, but a citizen of the United States, and is not subject to Indian police regulations, such as the Act of January 30, 1897, (*29 St. at Large, 506*), prohibiting the sale of liquors to Indians, which does not apply to an allottee Indian who became a citizen under the Act of February 8, 1887.⁴⁹

Under the Indian Depredation Act of March 3, 1891, the tribe, and the United States as well, are liable for injuries to the owner of property taken or destroyed in an Indian raid. A squaw-man, or one who marries an Indian woman and is domiciled with his property among the Indians, cannot recover for such depredation.⁵⁰ Prior to 1885, crimes committed in the Indian country were within the exclusive jurisdiction of Federal Courts, except in cases where one Indian committed a crime against the person and property of another Indian, in which case Indian tribal law prevailed, and State Courts had no jurisdiction. By Act of Congress of March 3, 1885, jurisdiction in case of murder and some

⁴² *Cherokee Intermarriage Cases*, 203 U. S., 76; *U. S. v. Cherokee Nation*, 202 U. S., 101.

⁴³ *Worcester v. Georgia*, 6 Pet., 515.

⁴⁴ *U. S. v. 13 Gallons of Whiskey*, 93 U. S., 188; *U. S. v. Holliday*, 3 Wall., 407.

⁴⁵ *Ward v. Race Horse*, 163 U. S., 504.

⁴⁶ *27 U. S. Stat. at Large*, 260; *29 U. S. Stat. at Large*, 506.

⁴⁷ *U. S. v. Miller*, 105 Fed. Rep., 944.

⁴⁸ *Dick v. U. S.*, 208 U. S., 340.

⁴⁹ *In re Heff*, 197 U. S., 488.

⁵⁰ *Janis v. U. S.*, 32 Ct. Cl., 407.

other felonies, when committed by an Indian, was vested in the United States and Territorial Courts.⁵¹

Indians maintaining tribal relations cannot be taxed by a State; nor can a State tax personal property furnished to Indian allottees by the government to enable them to maintain themselves.⁵² The relation between the government and the Indians is that of guardian and ward, but the government is not constitutionally bound to continue this relationship, and may abandon such guardianship, and leave the ward to become *sui juris*.⁵³

The last annual report of the Commissioner of Indian Affairs, dated September 30, 1908, shows that progress is still being made in disposing of the clouds that hang over many of the titles to Indian lands. The Secretary of the Interior was authorized by an act of the present Congress, to issue patents in fee directly to purchasers of lands sold either by an allottee or his heirs, through the medium of the department, while the special accomplishment of the recent session was the enactment of a law releasing or relieving the restrictions on the alienation of certain Indian lands in that part of Oklahoma that is occupied by the Five Civilized Tribes.⁵⁴ So our national policy continues to be that of "a benevolent guardian, engaged in raising a race of human beings from barbarism to civilization."⁵⁵

Isaac Franklin Russell.

⁵¹ 23 U. S. Stat. at Large, 385.

⁵² U. S. v. Rickert, 188 U. S., 432.

⁵³ In re Heff, 197 U. S., 488.

⁵⁴ 35 Stat. at Large, 312.

⁵⁵ The Commissioner of Indian Affairs.