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## The Legal Status of the California Indian

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LEGAL STATUS: THE SUPREME COURT AND THE EXECUTIVE

IN ORDER to ascertain the legal status of the normal citizen it is sufficient to examine the decisions of the highest court upon the subject. Such a citizen can be trusted to see to it that his actual position in the polity conforms to his status as judicially declared. Indeed he is encouraged to do so. Our form of government presupposes energetic and litigious citizens, active in the protection of their rights of property and person, and wielding ballots and newspapers.

The Indian is in different case. Our institutions are alien both to his experience and to his temperament. Moreover they were not framed with a view to the exercise of unchecked control over dependent aborigines. It is therefore not extraordinary that a gross discrepancy exists between the status of the Indian, as declared by the Supreme Court of the United States, and his actual status, as the administration of the federal wardship of his person and property in fact defines it.

Throughout a century the Supreme Court has maintained, without qualification, and at times in terms measured but indignant, the positive duty of the United States toward its Indian wards.<sup>67</sup>

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<sup>67</sup> *Cramer v. U. S.* (1923) 261 U. S. 219, 232, 67 L. Ed. 622; *U. S. v. Kagama* (1886) 118 U. S. 375, 384, 30 L. Ed. 228, 6 Sup. Ct. Rep. 1109; *Fellows v. Blacksmith* (1856) 60 U. S. (19 How.) 366, 370, 15 L. Ed. 684; *Worcester v. Georgia* (1832) 31 U. S. (6 Pet.) 515, 561, 595, 8 L. Ed. 483. See also article by Austin Abbott, *Indians and the Law*, 2 *Harvard Law Review*, 167, 171.

"To the credit of our judiciary, be it said, the courts have constantly upheld the rights of the inferior and weaker race as against the superior and the stronger." W. B. Hornblower, *The Legal Status of the Indians*, 14 *Reports of the American Bar Association*, 261 (1891).

"Nothing could be fairer than the policy of the United States with respect to the Indians than that which is to be derived from the executive and legislative declarations and the judicial decisions hereinbefore quoted. Unfortunately the governmental practice has not accorded with theory. The two have been wide apart." J. C. Wise, *A Plea for the Indian Citizens of the United States*, V, *Congressional Record* of December 15, 1925.

On occasion, however, the attitude of the court toward the Indians them-

According to its decisions, the Indian occupies a most favored status, because of his primitivity, his priority on the continent, and his helplessness. His unfortunate experiences at American hands in the past do but add, in its view, to the present responsibility of his guardian.<sup>68</sup> As a corollary to this favorable position, treaties and agreements to which the Indian is a party,<sup>69</sup> and on occasion statutes affecting his status and his rights,<sup>70</sup> are to be given a liberal construction.

As noble declarations of a standard of conduct, these decisions are convincing. They picture the relation of guardian and ward as admittedly it ought to be. But any attempt to clarify the status of the Indian must be abortive that does not frankly recognize that the status thus described by the court is largely ideal and fictitious, no more, indeed, than a counsel of perfection, seldom in fact approached. The actual legal status of a given Indian is in the main fixed by the executive department to whose charge Congress,<sup>71</sup> having absolute power,<sup>72</sup> has remitted him, with well-nigh complete authority.<sup>73</sup> This plenary guardianship is one that necessarily

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selves, in its estimate of their character and capacities, and consequently of their status, has shown a tendency to alter, in admitted response to altered local attitudes. For instance, for a sympathetic attitude toward the Pueblo Indians, see *U. S. v. Joseph* (1877) 94 U. S. 614, 24 L. Ed. 295; for the contrary, *U. S. v. Sandoval* (1913) 231 U. S. 28, 58 L. Ed. 107, 34 Sup. Ct. Rep. 1.

<sup>68</sup> *U. S. v. Kagama*, 118 U. S. 375, 384.

<sup>69</sup> "But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized without exception for more than a hundred years. . . ." *Choate v. Trapp* (1912) 224 U. S. 665, 675, 56 L. Ed. 941, 32 Sup. Ct. Rep. 565. See also *Starr v. Long Jim* (1913) 227 U. S. 613, 623, 57 L. Ed. 670, 33 Sup. Ct. Rep. 358; *Jones v. Meehan* (1899) 175 U. S. 1, 11, 44 L. Ed. 49, 20 Sup. Ct. Rep. 1.

<sup>70</sup> *Alaska Pacific Fisheries v. U. S.* (1918) 248 U. S. 78, 89, 63 L. Ed. 138, 39 Sup. Ct. Rep. 40; *Cherokee Intermarriage Cases* (1906) 203 U. S. 76, 94, 51 L. Ed. 96, 27 Sup. Ct. Rep. 29. But see *U. S. v. First Nat. Bank* (1914) 234 U. S. 245, 259, 58 L. Ed. 1298, 34 Sup. Ct. Rep. 846.

<sup>71</sup> The authority of Congress over Indian matters is in the main derived from the Commerce Clause: "The Congress shall have power. . . . To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." U. S. Const., Art. I, § 8 (2). As long as the executive was enabled to make treaties with Indian tribes, by and with the consent of the Senate, he shared in the exercise of that power. When Congress in 1871 forbade future treaties, it resumed full authority and control over the Indians. "But after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress." 118 U. S. 375, 382.

<sup>72</sup> The exercise of its power by Congress is not subject to judicial review. "Plenary authority over the tribal relations of the Indians has been exer-

demands, for its proper exercise, an intelligence, an understanding, and in general an attitude at once practical and altruistic, which Congress and the Department of the Interior can hardly claim to have been theirs.<sup>74</sup>

The stress of the Supreme Court is on the duty of the government toward its wards; that of Congress and its administrative agent, in practice, is rather on the completeness of the continuing control of the wards' persons and property. It is human, doubtless, for a guardian subject to no higher check to exercise his power to the full

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cised by Congress from the beginning, and the power has always been deemed a political one, and not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U. S. 553, 565. See for a recent statement of the doctrine, in application to California Indians, *Super v. Work* (1925) 3 Fed. (2d) 90 (Ct. of App., D. C., appeal pending).

"Because of the peculiar quasi-independent status ascribed to the Indian tribes, and the exclusion of their individual members from the general citizen body of the United States, the political departments of the General Government in the control of them have not been held bound by the constitutional limitations which apply to the citizens of the United States."

1 W. W. Willoughby, *Constitutional Law of the United States* (1910) p. 307.

When Congress passes a law in conflict with an Indian treaty, the Supreme Court must acquiesce. Its own jurisdiction in such a case is confined to pious expressions that Congress will exercise its power only when circumstances demand "in the interest of the country and the Indians themselves" or "from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians." (187 U. S. 553, 566.) But if such good faith in fact did not exist, what then? Alas, the court is helpless. It can only say:

"We must presume that Congress acted in perfect good faith in the dealings 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." (187 U. S. 553, 568.)

<sup>73</sup> Congress attempts the impossible, i. e. the supervision of the Department of the Interior's administration of Indian affairs by two legislative committees, one in each house. Its actual control, save as exercised by withhold of appropriations, is necessarily scant.

The method of exercising the power, in actual contact with the Indians, varies of course with the personality of the agent. It may be indeed, that the day is past when an Indian agent can write with pride to his chief "All offenses are punished as *I deem expedient*, and the Indians offer no resistance" (J. B. Thayer, *A People Without Law*, 68 *Atlantic Monthly* 551, italics author's). But current events, such as (1) the seizure of the Lincoln and Spanish canes, only lately returned to Zuni Pueblo, and as (2) the recent arrest and prosecution of the Taos chiefs, on a charge incontinently dismissed by the federal court, and as (3) the continuing conditions at Yuma, California, as well as (4) the pending bill in the present Congress (H. R. 7826, S. B. 2705) introduced as an administration measure, giving the judges of the so-called "reservation courts", employed at a salary of \$10 per month, the power to sentence an Indian to prison for six months, all attest how inevitable is the autocratic gesture to a democratic bureaucracy, when governing irresponsibly a weaker race.

<sup>74</sup> "He [the Secretary of the Interior] is chiefly occupied in the management of the public lands . . . and with the conduct of Indian affairs, a troublesome and unsatisfactory department, which has always been a reproach

without a concomitant emphasis upon his duty. It is perhaps only to be expected that an impersonal guardian will show greater concern for those wards who have large estates requiring administration than in those who have little or no property. The fact remains that this has been the case.

The average citizen, in any matter touching himself, can force a reconciliation of the discordant viewpoints of the judiciary and the executive. The Indian cannot. Nor can the court itself, any more than it could a hundred years ago, when, upon the question of the treatment due an Indian tribe, a chief executive is reported to have said of a chief justice: "He has made his decision:—Now let him enforce it."<sup>75</sup> Times have changed since the days of Andrew Jackson and John Marshall, and the amenities are now observed between the Executive and the Supreme Court. The incompatible viewpoints persist. The California Indian is a case in point.

Having no treaties with the United States requiring judicial construction, and little property desired by others, the California Indian has appeared infrequently before the Supreme Court, and then, as often as not, when appealing from a conviction for murder. But from these few cases, the distance between the court's theory of Indian status and the actuality becomes clear. The ideal standard, framed long ago to fit independent and integrated tribes to the East, hangs loosely upon the primitive bands of California, scattered and peculiarly harassed by their experience of white men. When the court says of the members of such a band—one of thirty supervised by a single Indian agent,—which clings to some insufficient acres in the San Jacinto Mountains of Southern California,

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to the United States, and will apparently continue so till the Indians themselves disappear or become civilized." 1 James Bryce, *The American Commonwealth* (Revised ed., 1924) p. 88.

"It [the reservation system] assumes that the Federal executive can administer a paternal government over widely scattered local communities. For such a function it is peculiarly unfitted. The attempt to engraft a Russian bureaucracy on American Democracy is a foredoomed failure. . . . Our government is founded on the principle of local self-government; that is, on the principle that each locality is better able to take care of its own affairs than any central and paternal authority is to take care of them. The moment we depart from this principle we introduce a method wholly unworkable by a Democratic nation." Lyman Abbott, *Our Indian Problem*, 167 *North American Review*, 721-3 (1898).

<sup>75</sup> 4 A. J. Beveridge, *Life of John Marshall* (1919) pp. 539-51; *Worcester v. Georgia* (1832) 31 U. S. (6 Pet.) 515, 8 L. Ed. 483; *Cherokee Nation v. Georgia* (1831) 30 U. S. (5 Pet.) 1, 8 L. Ed. 25; 2 J. P. Cotton, Jr., *Constitutional Decisions of John Marshall* (1905) p. 335; cf. W. W. Story, *Life and Letters of Joseph Story* (1851) pp. 79, 83, 87; 2 J. F. Dillon, *John Marshall, Life, Character and Judicial Services* (1903) pp. 86, 392, 484; 2 C. Warren, *The Supreme Court in United States History* (1922) p. 219.

"... the accused were tribal Indians, leading a tribal life, and living on a tribal reservation under the control of the United States,"<sup>76</sup>

the statement has more than a flavor of unreality. The court may say, speaking generally, but in a case involving a Hoopa Indian,

"These Indian tribes *are* the wards of the Nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen. . . .

"The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell."<sup>77</sup>

But the reader's mind irresistibly gravitates toward the incident of the "lost" treaties, and the fact that no attempt to right that wrong has ever been made by the omnipotent guardian. And when more recently, speaking of some "scattered", non-tribal Indians in Northern California, the court quotes the above language from the Kagama case, and adds:

"This duty of protection and power extend to individual Indians, even though they may have become citizens. . . . "The

<sup>76</sup> *Apapas v. United States* (1914) 233 U. S. 587, 590, 58 L. Ed. 1104, 34 Sup. Ct. Rep. 704. It was of Indians on these thirty reservations that the Chairman of the Board of Indian Commissioners lately said, in connection with the fact that the census figures of their numbers were "exceedingly misleading":

"First, the census figures give both resident and nonresident Indians, and oftentimes there are but three or four families on a reserve making a total population, perhaps, of less than 20 people. The balance of the enrolled population, because of their employment, are living in towns or other places where there are various kinds of work which yield them good wages.

"Second, the total acreage of some of the reservations include many square miles of the roughest kind of mountain lands, which are not available even for grazing. The actual cultivated acreage will be confined, perhaps, to but 2 or 3 per cent of the total area. In addition much of the usable land is available only in case it can be irrigated, and the supply of water is by no means unlimited." Fifty-sixth Annual Report of Board of Indian Commissioners (1925) p. 25.

<sup>77</sup> *United States v. Kagama*, *supra*, n. 67.

civil and political status of the Indians does not condition the power of the government to protect their property or to instruct them. Their admission to citizenship does not deprive the United States of its power or relieve it of its duty',"<sup>78</sup>

the contrast between this attitude and that of the executive seems unbridgeable. For the position of the latter is that once an Indian is admitted to be a citizen he is the state's concern. A recent instance, where the need of homeless and indigent Indians in Inyo County was called to the attention of the federal executive, may serve to make this clear. The answer reads in part:

"While it is appreciated that there are a number of scattered Indians in the State of California who are unable to provide themselves with the necessities of life, funds at our disposal for relief purposes are very limited and must be conserved as far as possible for use in cases of emergency among *reservation Indians* who have no source of aid when destitute other than the Federal Government. The *scattering bands* of Indians in the State of California have for some time been considered as citizens and the responsibility for their care when indigent, devolves upon local or state officials rather than upon this Service, just the same as if they were white persons in similar circumstances."<sup>79</sup>

<sup>78</sup> Cramer v. United States, *supra*, n. 67.

<sup>79</sup> Letter of Hon. John H. Edwards, Assistant Secretary of the Interior, dated March 31, 1925, addressed to a representative of the California State Federation of Women's Clubs. Cf. *infra*, n. 112.

The Assistant Secretary is now in direct charge of Indian affairs, whereas in 1913 it was the First Assistant Secretary. It was this position which Franklin K. Lane, when Secretary of the Interior, in March, 1913, urged Dean John H. Wigmore to fill, saying: "We can save a great people; and the First Assistant has this matter as his special care. I do not know of any place in the United States which calls for as much wisdom and for as great a soul as this particular job. . . . You can do more good in four years in this place than you can possibly do in forty where you are now. There are a lot of men who can teach law, and lots of men who can write the philosophy of law, but there are few men who can put the spirit of righteousness into the business, social and educational affairs of an entire race." Franklin K. Lane, *Letters of (1922)* p. 132.

The manner in which the federal guardianship of Indians in California has been exercised through seventy-five years can be judged by the actual conditions recently and still prevailing among the wards. The facts revealed by official reports, on California Indians, are available and startling. See especially: Survey of C. E. Kelsey, Report of Special Agent for California Indians, to Commissioner of Indian Affairs, March 21, 1906 (Carlisle, 1906) reprinted in Hearings before Subcommittee of the Committee on Indian Affairs, H. R. 66th Congress, March 23, 1920, pp. 122-39; survey of U. S. Public Health Service (1913) H. R. Doc. No. 1038, 62d Congress, 3d session; survey of Malcolm McDowell, Fifty-first Annual Report of Board of Indian Commissioners (1920) pp. 39-79; Report of Chairman Vaux, on Mission Indians of California, Fifty-sixth Annual Report of Board of Indian Commissioners (1925) pp. 25-8; also Reports of A. F. Gillihan, M. D., State District Health Officer, to State Board of Health, on Northeastern California Indians (1921) and on Southern California Indians (1925) (unpublished, but copy available in State Library at Sacramento).

Thus the executive will act, on occasion, to protect the property rights of scattered Indians, by carrying a question, as it did recently in the Kramer case,<sup>80</sup> to the Supreme Court of the United States, on behalf of three non-tribal, "civilized" Indians. Yet when famine stalks through the arid wastes of Inyo,—where, of 1418 Indians 759 are classed as "homeless, without fixed location or property,"<sup>81</sup> Congress and the executive wash their hands of the duty which the judiciary states is absolute, and comfortably assume, without inquiry, that a remote and undeveloped county, trained by all past history to believe the Indian exclusively a federal concern, will look after their "wards".

#### LEGAL STATUS: THE SUPREME COURT OF CALIFORNIA

In order to obtain definitions of the status of California Indians based on realities one must go to the decisions of the Supreme Court of the state. That tribunal has no esoteric standard to uphold; it is also nearer the *locus in quo*.

Whenever the court had occasion, even in earlier days, to consider whether a particular Indian was a tribal Indian or not, it looked at his cultural, social and economic circumstances, and applied rules of common sense before fixing his legal status.<sup>82</sup> As early as thirty years ago it recognized that California Indians in general are

"Most of them civilized to a certain degree, and perhaps none of them living under any well defined tribal government."<sup>83</sup>

<sup>80</sup> 261 U. S. 219, 228. The court clearly recognizes the non-tribal character of the Indians in question: "The action of these individual Indians in abandoning their nomadic habits and attaching themselves to a definite locality, reclaiming, cultivating, and improving the soil and establishing fixed homes thereon, was in harmony with the well-understood desire of the government."

<sup>81</sup> Information given by Mr. Ray R. Parrett, Indian Agent at Bishop, Cal., to chairman of committee on land situation, Indian Section, Commonwealth Club of California. See also Los Angeles Times, issue of March 22, 1925.

<sup>82</sup> *People v. Antonio* (1865) 27 Cal. 404. "Here it does not appear that the defendant is a member of any tribe of Indians, having its chief and tribal laws, nor that the tribe of which his ancestors may have been members was ever recognized or treated with by the government. On the contrary, it appeared that he had lived among the whites for several years. He had his own cabin, and about three acres of land around it, which he cultivated, and on which he raised vegetables. He was asked what he did to support his woman, and replied: 'I sheared sheep around, and hunted, and worked for anybody. Herded sheep for anybody.'" *People v. Ketchum* (1887) 73 Cal. 635, 638, 15 Pac. 353.

<sup>83</sup> *People v. Bray* (1894) 105 Cal. 344, 347, 38 Pac. 731. "There are thousands of California Indians to be found in this state, most of them civilized to a certain degree, and perhaps none of them living under any

Three recent decisions warrant detailed attention. In the first of these, an Indian had been refused registration as an elector, on the ground that his race prevented him, although born in California, from being a native citizen of the United States. The Supreme Court of California, in declaring him a citizen, does so independently of the terms of the Dawes Act, although it reinforces its decision by reference to the latter.<sup>84</sup>

Mr. Justice Shaw reviews those controlling decisions holding that a tribal Indian is not a citizen, because a member of a distinct, alien political society and therefore "not born . . . in the United States and subject to the jurisdiction thereof."<sup>85</sup> He points out that the tribal Indians there considered belonged to tribes whose separate existence had been recognized, by the negotiation of treaties and otherwise, by the executive and by Congress. Other Indians, however, as clearly belonged to tribes which had "totally extinguished their national fire, and submitted themselves to the laws of the State",<sup>86</sup> or which were "small remnants of tribes, . . . surrounded by white population, and who, by their reduced numbers, had lost the power of self-government."<sup>87</sup> Such Indians were born subject to the jurisdiction of the United States and were citizens. To which class did the petitioner belong?

"He was born in California, after its admission into the Union, and has always resided there. At the time of the treaty of Queretaro his ancestors were wild and uncivilized Indians settled in and permanently inhabiting Indian villages in the region now forming Lake County. Then, and for several years thereafter, they lived in tribes and maintained tribal relations, the nature of which is not stated. The name of the tribe is not given. It does not appear that it was known by any name. *The United States has never made any treaty with the tribe, or with any tribe of which it ever formed a part, or with the particular group or village of Indians with whom the plaintiff associates and resides. It does not appear that the original tribe had any form of government, laws or regulations of any kind. He is one of a group of Indians residing in Lake County, and who, although surrounded by white neighbors, practically associate exclusively with each other and with other Indians in that and adjacent counties. The group has no tribal*

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well-defined tribal government; they live generally by themselves, in small villages or communities, and yet are in constant contact with the white race, most of them, at times, being employed as laborers in the harvest fields, and in fishing, or as servants in families, or otherwise." Cf. as to Yuma Indians, *Jaeger v. United States* (1894) 29 Ct. Cl. 172.

<sup>84</sup> *Anderson v. Mathews* (1917) 174 Cal. 537, 163 Pac. 902.

<sup>85</sup> U. S. Const., Art. XIV, § 1.

<sup>86</sup> *Fletcher v. Peck* (1810) 10 U. S. (6 Cranch) 87, 146, 3 L. Ed. 162.

<sup>87</sup> *Worcester v. Georgia* (1832) 31 U. S. (6 Pet.) 515, 580, 8 L. Ed. 483.

*laws or regulations, and no organization or means of enforcing any such laws or regulations. The only sort of communal organization or semblance of political autonomy it has consists of the fact that one of them has the title of 'Captain,' and is treated as their leader or spokesman and receives some deference and respect on that account. But he has no authority. Disputes are sometimes submitted to him for settlement, but his decisions are considered wholly advisory. Each party accepts or rejects them as he chooses, and there is neither enforcement nor means of enforcement thereof.*"<sup>88</sup>

Ethen Anderson had never paid taxes. The federal government had some years before bought a tract of land in Lake County, to provide homes for the band of which he was a member, and had trust allotted a parcel of it to him. There he resided, with Indian neighbors, when he was not employed elsewhere. The government maintained an Indian school in another Indian village nearby, and furnished transportation, to and from school, for the children of Anderson's village. It did more:

*"The Indian agent at Round Valley Reservation furnishes some food and clothing to these Indians in cases of extreme necessity 'and attends to their ordinary wants.' No explanation is given of the meaning of the phrase just quoted. In no other manner has the United States dealt with these Indians or recognized their distinct or communal existence, separate from other inhabitants of the State."*<sup>89</sup>

Anderson and his fellow Indians maintained themselves in part by wage-work on their white neighbors' farms, in part by catching fish and gathering acorns. They acknowledged themselves bound by state laws, without question. They wore American garb. Anderson himself was married according to state law.

Once these various facts are set out, Mr. Justice Shaw finds no difficulty in disposing of the case. There never was any tribe to which Anderson could have owed allegiance, ergo, he was born "subject to the jurisdiction" of the United States.

*"The plaintiff, and the group of Indians with whom he associates, do not belong to any tribe that was ever known or recognized as such by the United States as a distinct political community. The tribe, so far as we know, never had a tribal government of any sort. Admitting that the original tribe may have had such government, yet the plaintiff's group never had any form*

<sup>88</sup> Anderson v. Mathews, 174 Cal. 537, 542-3. (Italics added.)

<sup>89</sup> Anderson v. Mathews, 174 Cal. 537, 543-4. (Italics added.)

of self-government of any kind. Neither the members of the group nor, so far as known, the members of the tribe, were subject to or owed allegiance to, any government, except that of the United States and the State of California, and, prior to 1848, that of Mexico. . . .

*"It is proper to add that the establishment of a school by the federal government for the use of these Indians, and the purchase of land for allotment to them, does not constitute a recognition of them as a distinct tribe with independent self-government."*<sup>90</sup>

The opinion, with its realistic tests, is illuminating. It looks at the California Indian with an eye undimmed by preconceptions. It sees that the Indian nations or tribes of the Eastern States had no equivalent in California; tribes here were rather small, loose groups or bands; the United States, which failed to make treaties with them, has not otherwise recognized them as semi-independent political units; although living untaxed on government land, and receiving education and other aid at federal expense, they are citizens.<sup>91</sup>

In *Anderson v. Mathews*<sup>92</sup> the Indian in question lived on government land held in trust for him, but not within the limits of a reservation. In the next case considered by the California court the Indian, John Mack, was a resident of one of the many small, dry reservations in Southern California.<sup>93</sup> He had been injured in the course of his employment as a teamster, outside the reservation, but had not filed an application for compensation within the statutory period. The statute expressly excepted, from such limitation of time, an injured person who was "incompetent". The Industrial Accident Commission found that Mack was "an unallotted tribal Indian, incapable of handling his own affairs", and ruled that the statute of limitations was not a bar to his recovery. The Supreme Court of California annulled the award. Mr. Justice Richards said, in part:

*"In the decision of the Commission herein the applicant for an award is referred to as 'an unallotted tribal Indian.' The evidence, however, discloses that he is not a member of any known tribe of Indians and that certainly he is not a member of any of those well-known Indian tribes who have at times in our national history come into treaty relations with the United States government, in which the rights and status of their members have been*

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<sup>90</sup> *Anderson v. Mathews*, 174 Cal. 537, 545, 546-7. (Italics added.)

<sup>91</sup> It is this decision which has led the Indian Bureau to state categorically that it washes its hands of scattered Indians and scattering bands, in California. See, *supra*, n. 79.

<sup>92</sup> *Supra*, n. 84.

<sup>93</sup> *Francisco v. I. A. C.* (1923) 192 Cal. 635, 221 Pac. 373.

defined. On the contrary, the undisputed evidence before the Commission showed that John Mack belonged to that identical type of Indian the status of which was defined by this court in the case of *Anderson v. Mathews*, 174 Cal. 537 [163 Pac. 902], wherein it was held that an Indian, native of California, not a member of any known or recognized tribe having communal laws, customs, or institutions of its own and having been treated by the United States government as a distinct political community, but who, on the contrary, had conformed to the habitudes of American citizens or inhabitants of the white race; who had married under state laws, lived with his wife and offspring after the manner of American families, sought and found employment in the vocations usual to people of his class and locality, regardless of race, and *who had generally been accorded the benefits and been subject to the burdens of local and state laws*, was to be treated as other persons are treated in relation to the rights, duties, exemptions, and privileges under such laws. It was also held in that case that *the mere fact that the federal government had established schools or purchased lands for ultimate allotment for Indians of this type, or had at times furnished them with food or clothing according to their needs, did not constitute such a recognition of their status as members of a distinct tribe or class which would exempt them from the ordinary operation of state institutions or statutes so as to bring them within the doctrine of Elk v. Wilkins*, 112 U. S. 94 [28 L. Ed. 643, 5 Sup. Ct. Rep. 41, see, also, Rose's U. S. Notes], as to their rights and duties of citizenship. (2) In harmony with the views expressed in the foregoing opinion *John Mack*, the applicant for an award before the Industrial Accident Commission *was not, by reason of the fact that he was an Indian, or that he lived upon the Martinez reservation, entitled to any other privileges or exemptions than those which the statute, the aid of which he was invoking, afforded to all other employees who might be seeking similar awards for injuries arising out of and in the course of their employment.*"<sup>94</sup>

The opinion then proceeds to discuss specifically the claim that Mack was "incompetent" merely because he was an Indian:

"Looking to the language of the foregoing section of the code it would appear plain that the applicant, John Mack, is not to be classed as incompetent merely because he is an Indian, for the reason that Indians as such are not included in the class of incompetent persons which the section enumerates. Neither, as we have seen, is he to be held to be incompetent merely because he is an Indian of the type disclosed by the proceedings before the Commission and defined by the foregoing decision in the case of *Anderson v. Mathews*, *supra*."<sup>95</sup>

<sup>94</sup> *Francisco v. I. A. C.*, 192 Cal. 635, 639-40. (Italics added.)

<sup>95</sup> *Francisco v. I. A. C.*, 192 Cal. 635, 641.

Nor was Mack *in fact* incompetent. He had received a fair education, knew several trades, received highest current wages, and spoke Spanish as well as English and his native language. The opinion goes on:

"While it is true that John Mack displayed in his character and conduct the simple, trustful, and even childlike qualities typical of the California Indian, it is impossible, in the light of the foregoing undisputed evidence, to arrive at the conclusion that he was possessed of any such weakness of mind as to be unable, unassisted, to properly manage and take care of himself or his property so as to come within the designation of an incompetent person within the intent and meaning of the foregoing section of the Code of Civil Procedure. The decision of the Commission was evidently based upon a misconception of his status because of the fact that he was an Indian, living upon unallotted lands in a federal reservation. As such he had become the employee of an employer, and being injured in that capacity, came within the beneficent provisions of the Workmen's Compensation Act of this state, and has chosen to make application for relief within its terms; but having thus sought its benefits, he must be held also to an assumption of its burdens, one of which was the requirement that he should file his application for relief within six months from the date of his injuries."<sup>96</sup>

The decision is interesting because it shows how the insecure economic status of the California Indian complicates his legal status. Elsewhere, the reservation Indian is in general able to eke out an existence on his tribal lands, and so does not inmix himself into state-controlled situations; in California the Indian, even though he lives on a reservation, must work outside for a living. Thus he enters into the general economic life, and, as well as the non-tribal Indian not living on a reservation, is

"accorded the benefits and (is) subject to the burdens of local and state laws."

Elsewhere, the Indian's status is, as the Supreme Court of the United States describes it, "anomalous";<sup>97</sup> in California, where the Indian living on a reservation is a tribal Indian, according to the federal courts, but is something else, according to the state courts, his status becomes ambiguous.<sup>98</sup>

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<sup>96</sup> *Francisco v. I. A. C.*, 192 Cal. 635, 642-3.

<sup>97</sup> *United States v. Kagama*, *supra*, n. 67.

<sup>98</sup> Statutes of limitations do not usually run against tribal Indians. *Schrimpscher v. Stockton* (1902) 183 U. S. 290, 296, 46 L. Ed. 203, 22 Sup. Ct. Rep. 107. Cf. 31 C. J. 484.

These two decisions respectively declaring the average California Indian to be a voter and a competent person were followed by one announcing the state's interest in his having a schooling that met the standards set by the state for its other citizens. Alice Piper, an Indian girl of 15 years, living in Inyo County, was refused admittance into a state school. The trustees of Big Pine School District justified the exclusion (1) by citing the terms of the Political Code providing that districts, where an Indian school established by the United States government was available, could exclude Indian children from the district school,<sup>99</sup> and (2) by pointing out the existence of such a federal Indian School within their district. Alice Piper and her parents questioned the constitutionality of this Code section, and the court upheld their contention.<sup>100</sup>

The facts in the case simplified the problem before the court. For the district's answer admitted:

"that both parents and petitioner are citizens of the United States and of this state and that neither the petitioner nor either of her parents has ever lived in tribal relations with any tribe of Indians or has ever owed or acknowledged allegiance or fealty of any kind to any tribe or 'nation' of Indians or has ever lived upon a government Indian reservation or has at any time been a ward or dependent of the nation."<sup>101</sup>

The parents therefore belonged

"to that group of Indians commonly known as California Indians, who do not, and have not within the memory of man, belonged to any tribe of Indians recognized as such by the United States as a distinct political community,"<sup>102</sup>

and the principles laid down in *Anderson v. Mathews*<sup>103</sup> were applicable.

<sup>99</sup> "It is further provided that in school districts in California where the United States government has established an Indian school, or in an area not to exceed three miles from the said Indian school, the Indian children of the district, or districts, eligible for attendance upon such Indian school, may not be admitted to the district school." Cal. Pol. Code, § 1662.

<sup>100</sup> *Piper v. Big Pine School Dist.* (1924) 193 Cal. 664, 226 Pac. 926.

<sup>101</sup> *Piper v. Big Pine School Dist.*, 193 Cal. 664, 666. The admission of the answer that neither child nor parent "has at any time been a ward or dependent of the nation" looks, of course, to actual wardship or dependency, and takes no account of the ideal view of the federal courts that every Indian is a ward and in some measure dependent. Mr. Justice Seawell seems to recognize this view, when he later says, "No dispute arises here as to the political or civil status of petitioner. She is the descendant of an aboriginal race whose ancient right to occupy the soil has the sanction of nature's code. Since the founding of this government its policy has been, so far as feasible, to promote the general welfare of the American Indian, even to the point of exercising paternal care. . . ." 193 Cal. 664, 671.

<sup>102</sup> *Piper v. Big Pine School Dist.*, 193 Cal. 664, 672.

The existence of a federal Indian School in the district, which the petitioning child could attend, is, in the view of the court, no justification of her exclusion. The state's interest in the education of its citizens, according to its own standards, is too great, the constitutional guarantees too clear, the direct economic advantages of graduating through established grades and, perhaps, progressing thence into high school and state university, are too valuable, to permit of such justification.

"To argue that petitioner is eligible to attend a school which may perchance exist in the district but over which the state has no control is to beg the question. However efficiently or inefficiently such a school may be conducted would be no concern of the state."<sup>104</sup>

#### TAX-EXEMPTION OF INDIAN PROPERTY AS IT AFFECTS INDIAN STATUS

The status of the California Indian, as described by the Supreme Court of the state is definite. It recognizes facts. The typical Indian of California is a non-tribal, non-reservation Indian.<sup>105</sup> He may or may not be, to some undefined extent, a ward of the United States; at all events he is, even eliminating from consideration the general citizenship statute of 1924, a citizen of the state, with all the privileges and subject to most of the obligations that that term implies.

*There* is the nub of the difficulty, however,—“to most of the obligations” only, not to all. The state has itself recognized in the past that Indians, even when they are citizens, present a special case, justifying special treatment, “in view of their well-known race peculiarities and their relations to society.”<sup>106</sup>

He is now expressly exempted from the application of the general law punishing vagrancy.<sup>107</sup> He is discharged from rendering

<sup>103</sup> *Supra*, n. 84.

<sup>104</sup> *Piper v. Big Pine School Dist.*, 193 Cal. 664, 673.

<sup>105</sup> The Indians on the Yuma, Tule River, Hoopa and Round Valley reservations may, possibly, be exceptions. They were not recognized by treaty, but their reservations are larger and more self-containing than others in California, and life on them approximates more nearly to that of so-called reservation Indians.

<sup>106</sup> *People v. Bray*, 105 Cal. 344, 347. For instance, the tribal Indian, for some time to come, can hardly be expected to conform rigidly to state laws on marriage and divorce.

<sup>107</sup> “Every person (except a California Indian) without visible means of living who has the physical ability to work, and who does not seek employment, nor labor when employment is offered him . . . is a vagrant.” Cal. Pen. Code, § 647. This section is a far cry from the earlier statutes putting Indian labor on the auction-block. See n. 44, *supra*.

military service.<sup>108</sup> Doubtless these distinctions survive from the past, and do not apply with force today, when the Indian is so frequently a wage earner and, by the hundreds, volunteers for war. But a more important distinction exists, created by federal authority, namely, the fact that the Indian, living on reservations, however small, or on trust allotted land, is not taxed and is not subject to taxation.<sup>109</sup> In sparsely settled counties, where Indians are numerous, will the actual status of an Indian approximate to that described by the state Supreme Court? In answer, it may be pointed out that this dilemma was more than hinted at in the Piper case, where the court said:

“Respondents call our attention to the serious effect that the issuance of the writ will have upon the respondent district. Big Pine School District is located in a sparsely settled portion of the state and contains a number of Indian children, who, it is fairly inferable, attend the Indian or federal school, either as a matter of choice or under the belief that they may not, as a matter of right, attend the district school. It appears from the papers in the case that children of non-taxpaying Indian parents are, by government rule or upon other authority, eligible to attend the federal school, but Indian children whose parents are taxpayers are not admitted into said school. The effect of this decision, it is suggested, will probably cause a greatly increased attendance of Indian children upon the district school who cannot be cared for because of the economic or administrative problem which it will create. No doubt it would add to the cost of the district should it be required to maintain a separate school for Indian children, but this is a consequence for which the courts are not responsible. The economic question is no doubt an important matter to the district, but it may very properly be addressed to the legislative department of the state government.”<sup>110</sup>

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<sup>108</sup> “Every able-bodied male citizen of this state, except Mongolians and Indians, between the ages of eighteen and forty-five years, not exempt by law, is subject to military duty.” Cal. Pol. Code, § 1895.

<sup>109</sup> *United States v. Rickert* (1903) 188 U. S. 432, 47 L. Ed. 532, 23 Sup. Ct. Rep. 478; *United States v. Pearson* (1916) 231 Fed. 270.

<sup>110</sup> *Piper v. Big Pine School Dist.*, 193 Cal. 664, 674. Commissioner McDowell says: “In the mountain districts where much of the land, being public domain or national forests, is untaxed and therefore provides no revenue, the school districts are poor. It is in such sections where most of the nonreservation Indians live, and if a new district school is built for them it would stand in a place so remote from a white community that it would be necessary to build a home for the teacher in addition to the school-house, for no white woman would live with an Indian family.

“This requirement, Mr. Wood thought, practically prohibits the organization of new school districts in the mountain country where the Indians live, for the expense of building the school and teacher’s house and of maintaining the school during the probationary period of a year would be too large for a poor school district to handle, and the board of supervisors

The question is a political one, but it may be doubted if reference to the state legislature alone is sufficient for its solution. It is for Congress, first, to act. So long as the historical and continuing federal guardianship over Indian reservations, trust allotments, timber sales, lease moneys, and other tribal and individual trust funds, continues, Congress cannot wash its hands of future responsibility for the persons of its wards merely by granting to Indians the boon of an equivocal citizenship.

"No representation without taxation" is an understandable reaction to Indian citizenship on the part of a mountain or desert county. It has been so in the past. It was so in the eighties and nineties, when Indian citizenship, after the enactment of the Dawes Act, was under discussion. Theodore Roosevelt, after a visit to certain reservations, wrote as follows:

"I was told here, as elsewhere, that the Indian did not get full justice in the white courts, the curious feature of it being that the whites were very reluctant to punish one Indian for committing a crime against another Indian, because the Indians pay no taxes on their land, and they are therefore unwilling to allow them to be any expense to the county. This feeling in reference to the Indians' non-payment of land tax was very strong elsewhere. I wish the government would pay the taxes for them, out of the proceeds from their lands."<sup>111</sup>

A quotation from an article by Mr. Austin Abbott, published in 1888, may also be made:

"the exemption from taxation for many years to come accorded to lands owned by Indians in severalty, while intended to protect them from fraud and improvidence in the earlier years of citizenship, makes it impracticable to require Indians to do their part in the ordinary methods of local government for the maintenance of courts and police, the establishment of highways and schools, or any other incidents of local self-government. . . . After allotments are made, a quarter of a century must be allowed before

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simply would not attempt to build the school, even though the members might be willing to help educate the children.

"It would appear, then, from Mr. Wood's statement, that since neither the State nor county can build a district school and State aid toward the payment of the teacher can not be had until after the school has been running for a year, at least, that some way will have to be devised by which the United States Government can erect a new school building and maintain the school for a year. This matter is an important one and should enter largely into any consideration of ways and means to accelerate the education of nonreservation Indian children." Fifty-first Annual Report of Board of Indian Commissioners, p. 54.

<sup>111</sup>Theodore Roosevelt, Report to U. S. Civil Service Commission, upon a visit to certain Indian reservations (1893) p. 22.

the lands can all be subjected to taxation, and, therefore, before the State and Territorial courts can be expected to bear the burden of administering justice to Indians and whites without distinction."<sup>112</sup>

Speaking more plainly, of the twenty-five year allotments authorized by the Dawes Acts, Professor Thayer said:

"Since the Indian land cannot be taxed for twenty-five years, the United States Government should pay the local taxes; otherwise these poor people, when enlarged, cannot get any proper help from the authorities of their counties or states. What an undesirable neighbor will he be who pays no taxes, and expects other people to tax themselves to support him in the matter of roads, schools and courts! This mischief has already been bitterly felt among the Omahas and others."<sup>113</sup>

The same condition prevails today in California. A quotation from the report of the Board of Indian Commissioners to the Secretary of the Interior, after a personal survey of conditions made by Commissioner McDowell, two or three years after the decision in *Anderson v. Mathews*,<sup>114</sup> will serve to make this clear.

"The court held that a non-reservation Indian of California, even though he might be a ward of the Government, was a citizen of the state. This decision, while it gave the Indians the right to vote—few of them have taken advantage of the right—placed the sick, indigent, old, and helpless in a perilous situation; it developed a wide difference of opinion in the matter of caring for them.

"It is held by some authorities that the Indians, being wards of the Government, should be taken care of exclusively by the Government; that the Indians, being citizens of the State, should be taken care of exclusively by the State; that as the Indians are both wards of the Government and citizens of the State they should be taken care of by both Government and State.

"I found the popular idea to be that the Government and the State should co-operate in the care of the sick, indigent, old, and helpless Indians. The difficult factor in this proposition is co-operation between the Government and local authorities—how can it be effected? There would be no trouble if the county author-

<sup>112</sup> Austin Abbott, *Indians and the Law*, 2 *Harvard Law Review*, 167, 175-6.

<sup>113</sup> James B. Thayer, *A People Without Law*, 68 *Atlantic Monthly*, 681.

Cf. Hon. Hubert Work, Secretary of the Interior, who says: "Because the Indians pay no State taxes and dwell on reservations with fixed boundaries located within States which have no direct jurisdiction, State governments take little interest in them." *Annual Report of Secretary of Interior*, 1925, p. 19.

<sup>114</sup> *Supra*, n. 84.

ities clearly recognized their responsibility in the matter. In some counties Indians are admitted to the county hospitals, poorhouses, and other institutions; in others they are not.

"The Indian Office seems to take the view that since the Supreme Court of the State has definitely decided that the non-reservation Indians are citizens of California they should be recognized as citizens by county authorities and admitted to county institutions on the same footing as other citizens; that at least the county should be willing to pay half of the expenses for their care in hospitals, poorhouses, etc.

"The Indian Office may be right, but what if a sick, indigent Indian is refused medical and hospital attention by the county and the Government refuses to give him needed care because the county will not do its part and the Indian dies during the debate? This might happen, and probably will happen, unless a practical arrangement for active co-operation is effected between the Government and county.

"Congress can appropriate money for the care of the sick and distressed Indians, and the Indian Office can use the money for that purpose, but neither Congress nor the Indian Office can force the county authorities of California to do their part at the risk of Indians dying because neither party to the controversy pays any attention to him. Every Indian official in California told me his allotment of funds for the care of old, destitute, sick, and helpless Indians never is enough; that every year the demand exceeded the allowance.

"I wrote to a number of county physicians and health officers in California with the purpose of developing their idea in regard to the care of needy Indians. The replies to my inquiry indicated that the health officials are about evenly divided between those who think the Government should take care of the Indians and those who are in favor of Government and county co-operation."<sup>115</sup>

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<sup>115</sup> Fifty-first Annual Report of Board of Indian Commissioners, p. 59. That the contingency so envisaged by Commissioner McDowell, of a sick Indian dying while federal and county authorities debated who should take care of him, is not visionary, see Report (unprinted) of Dr. A. F. Gillihan to State Board of Health on certain Indians of Northeastern California, May, 1921, pp. 45-59; also pp. 1-2, where he says:

"It is for this reason that the State has never been concerned in the care of the sick and indigent Indian. He has always been known as the ward of the United States Government. However, it would appear that when the United States allotted land to the Indians and provided reservations for them, the federal government began an attempt to relieve itself gradually of this guardianship. From the point of view which one obtains in the field, it is very hard to discover whether the Indians are wards or not. In one instance they appear to be, while in another they do not. From the information actually obtained on the ground, the impression is gained that the Government, through its Indian Department, still most closely controls the Indians' land and the distribution of any moneys obtained by the sale thereof, but is endeavoring to shift the responsibility of caring for sick and indigent Indians onto the county in which they may reside; that is, to place the sick and indigent Indians with the county's general sick and indigent. Counties,

The *impasse*, in other states than California, is not necessarily so severe. There the "Indian country" contains land of value, and this, when allotted in fee simple and eventually patented to an individual Indian, at length becomes subject to taxation.<sup>116</sup> Its owner does not come wholly empty-handed to the banquet of citizenship. He brings new assets to the common hotchpot. Not so the Indian in California. His land has not been fee simple allotted. If it were so allotted, it would make no difference. For reasons known to history, which does not hold his guardian blameless, his estate is small both in extent and in intrinsic value.

In all states containing Indians, and more particularly in California, it is not merely the making of Indian land taxable that the situation demands. Indians for a long time to come will form a very especial class of citizens. The handicap under which they suffer is very largely one of federal incidence—a fact recognized by the Supreme Court when it spoke of "their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them."<sup>117</sup>

Congress first, as the historic guardian and the political body primarily responsible, ought to act. If it desires to slough off a portion of its responsibility, it should frankly say so to the states, and invite them, on fair terms, to undertake that portion of the guardianship which it has so signally failed to administer with success.<sup>118</sup> Its present attempt silently to assume that the states will take care of the wards it has set adrift is not only cowardly and

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naturally, have not been in sympathy with this movement. When the Indian is sick or in need, he dies or recovers, (it seems quite immaterial which) while officials of the federal government and of the county government are exchanging mutual felicitations in regard to his care."

<sup>116</sup> This result obtains under an amendment of 1906 to the Dawes Act: "Sec. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law." 34 U. S. Stats. at L. 182, U. S. Comp. Stats. (1918) § 3951. A further provision gives power to the Secretary of the Interior to shorten the trust period in the case of any allottee and to issue to him a patent in fee simple "and thereafter all restrictions as to sale, incumbrance *and taxation* of said land shall be removed." (Italics added.) *McCurdy v. United States* (1916) 246 U. S. 263, 62 L. Ed. 706, 38 Sup. Ct. Rep. 289; *Goudy v. Meath* (1906) 203 U. S. 146, 51 L. Ed. 130, 27 Sup. Ct. Rep. 148.

<sup>117</sup> 118 U. S. 375, 384; 261 U. S. 219, 232.

<sup>118</sup> Two or three quotations, on the federal failure in the matter of health, may be of interest.

"In 1920 the medical officers of the Indian service, after examining 66,718 Indians, estimated that 24,773 had tuberculosis, latent and active, and 30,795

cruel, but, worse, infantile. Once it admits the necessity of co-operation, and its willingness to assist financially at least during the long period of transition, the state legislatures and the state educational, health and social agencies, can bestir themselves. Perhaps then the definitions of the legal status of the Indian, as separately given by the United States and by the state tribunals, will tend to approximate one another, and his actual status, as determined by Indian Bureau and by county authorities, will be somewhere in the same vicinity.

#### THE ACT OF CONGRESS OF 1924 CONFERRING CITIZENSHIP

In the introduction to these articles reference was made to the recent statute making citizens of all tribal Indians.<sup>119</sup> It may be well to consider at this point what effect, if any, this Act of Congress has had upon the status of such Indians.

It was assumed in the past, and before the case was actually pre-

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were afflicted with the dreadful, but preventable, eye disease, trachoma. . . . The death rate for the United States, as a whole, in 1920 was 13.8 per thousand as against 22.33 for Indians." Malcolm McDowell, of Board of Indian Commissioners, Some Memoranda Concerning American Indians, 1923, Appendix A to The Indian Problem, Resolution of Committee of One Hundred, 68th Congress, 1st Session, H. R. Document No. 149.

"There is, broadly speaking, no Indian health service, and very little is done to prevent the occurrence of disease. . . . On the Navajo reservation . . . the death rate from tuberculosis is appalling—2,847 per hundred thousand, or 48 per cent of all causes, and the frequency of trachoma is not less than 25 per cent." Frederick L. Hoffman, Conditions in the Indian Medical Service, 75 Journal of American Medical Association (1920) 494: cf. id. 691. See, also 45 The Survey, 466 (Dec. 25, 1920).

"At least 30 per cent of all of the 35,000 Navajo Indians are affected by the plague (trachoma) in varying degrees, ranging from the incipient stages to approaching blindness. The survey of seven of the boarding schools attended exclusively by Navajo children disclosed the fact that 46.64 per cent of the pupils were trachomatous". Fifty-fifth Annual Report of Board of Indian Commissioners (1924) p. 20.

The Director of the California State Bureau of Tuberculosis says: "The Indians are not as stupid as most people believe, for we observed two things—whenever we conducted a clinic or offered medical service of any kind with a physician who was not on the staff of the Indian Bureau, the Indians came from all over the country for treatment and were willing to pay in moderation for almost anything that needed to be done, but the moment that we appeared in Shasta County with a dentist and a doctor from the Indian Department, it was almost impossible to get them to come in for treatment of any kind." Quoted in report of Subcommittee on Health, Indian Affairs Section of Commonwealth Club of California, p. 1 (unpublished), May, 1925.

Even the Secretary of the Interior, in his current report, admits that state agencies of health and social service "are in a position to assume these responsibilities for the Indians and perform them *more promptly and sympathetically* than the Federal Government." Hon. Hubert Work, Annual Report of Secretary of Interior, 1925, p. 20. (Italics added.)

<sup>119</sup> "Be it enacted, That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property." 43 U. S. Stats. at L. 253, U. S. Comp. Stats. § 3951aa, Fed. Stats. Ann. (2d ed., 1924 Supp.) 63.

sented, that the grant of citizenship to an Indian would make him, politically speaking, as other men. Certainly this was the prevailing view with regard to the non-tribal Indian. As long ago as the case of historic dicta—that of *Dred Scott*—Chief Justice Taney indulged in the following dictum :

“But they (Indians) may, without doubt, like the subjects of any other foreign government, be naturalized by the authority of Congress, and become citizens of a state, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.”<sup>120</sup>

The opinion that Congress lost jurisdiction over the ancient Americans when it made them 100% Americans was generally held through the period preceding the enactment of the Dawes Act.<sup>121</sup> It even survived that enactment for another generation. When the question was first presented to the Supreme Court, Mr. Justice Brewer said :

“Can it be that because one has Indian, and only Indian, blood in his veins, he is to be forever one of a special class over whom the general government may, in its discretion, assume the rights of guardianship which it has once abandoned, and this whether the state or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound. . . .

“We are of the opinion that, when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of, and requires him to be subject to, the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from federal control, thus created, can not be set aside at the instance of the government without the consent of the individual Indian and the state, and that this emancipation from federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property.”<sup>122</sup>

<sup>120</sup> *Scott v. Sandford* (1857) 60 U. S. (19 How.) 393, 404, 15 L. Ed. 691.

<sup>121</sup> Geo. F. Canfield, *The Legal Position of the Indian*, 15 *American Law Review*, 21, 33 (1881).

For the opinion currently held at and after the adoption of the Fourteenth Amendment, that the provision: “All persons born in the United States, and subject to the jurisdiction thereof, are citizens”, would enfranchise all Indians, see 2 *Cooley's Story, Commentaries on the Constitution* (4th ed. 1873) § 1933, opinion altered in 5th ed., (1891) Vol. 2, § 1933, after the decision in *Elk v. Wilkins* (1884) 112 U. S. 94, 28 L. Ed. 643 5 Sup. Ct. Rep. 51; G. M. Lambertson, *Indian Citizenship*, 20 *American Law Review*, 183 (1886).

<sup>122</sup> *In Matter of Heff* (1905) 197 U. S. 488, 508-9, 49 L. Ed. 848, 25 Sup. Ct. Rep. 506.

A progressive reversal of attitude, however, took place, beginning six years later, as may be seen by the following quotations which lay down the doctrine, now controlling, that the citizen of Indian blood remains a ward:

"Incompetent persons, though citizens, may not have the full right to control their persons and property."<sup>123</sup>

"The mere fact that citizenship has been conferred upon Indians does not necessarily end the right or duty of the United States to pass laws in their interest as a dependent people."<sup>124</sup>

"Citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people."<sup>125</sup>

"The guardianship of the United States continues, notwithstanding the citizenship conferred upon the allottees."<sup>126</sup>

"The guardianship arises from their condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it."<sup>127</sup>

In the course of these decisions the earlier decision of *In Matter of Heff*,<sup>128</sup> given for the court by Mr. Justice Brewer, proved a stumbling-block, and was expressly overruled.<sup>129</sup> The court gradually came to take the definite position that the guardianship continued in force, regardless of citizenship, until expressly surrendered by Congress.<sup>130</sup>

This curious combination of citizenship and tutelage, on a race basis and wholly regardless of individual competency, has naturally called forth criticism. The fact that an Indian, as a citizen, becomes

<sup>123</sup> *Tiger v. Western Investment Co.* (1911) 221 U. S. 286, 315, 55 L. Ed. 738, 31 Sup. Ct. Rep. 578.

<sup>124</sup> *Hallowell v. U. S.* (1911) 221 U. S. 317, 324, 55 L. Ed. 750, 31 Sup. Ct. Rep. 587.

<sup>125</sup> *U. S. v. Sandoval* (1913) 231 U. S. 28, 48, 58 L. Ed. 107, 34 Sup. Ct. Rep. 1.

<sup>126</sup> *U. S. v. Noble* (1915) 237 U. S. 74, 79, 59 L. Ed. 844, 35 Sup. Ct. Rep. 532.

<sup>127</sup> *Winton v. Amos* (1921) 255 U. S. 373, 392, 65 L. Ed. 684, 41 Sup. Ct. Rep. 342. See also *U. S. v. Waller* (1917) 243 U. S. 452, 459, 61 L. Ed. 843, 37 Sup. Ct. Rep. 430; *Williams v. Johnson* (1915) 239 U. S. 414, 421, 60 L. Ed. 358, 36 Sup. Ct. Rep. 150.

<sup>128</sup> *Supra*, n. 122.

<sup>129</sup> *U. S. v. Nice* (1916) 241 U. S. 591, 60 L. Ed. 1192, 36 Sup. Ct. Rep. 696, where it was also said: "Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection." 241 U. S. 591, 598.

<sup>130</sup> "Congress may, if it thinks fit, emancipate the Indians from their wardship, wholly or partially. *United States v. Waller*, 243 U. S. 452, 459; but in respect of the Indians here concerned, that has not been done." *Cramer v. United States*, 261 U. S. 219, 233.

in a sense his own guardian has also been pointed out.<sup>131</sup> But each new case presented to the Supreme Court has resulted in a stronger statement of the doctrine. It is the law, and it applies with force to the statute of 1924 conferring citizenship on tribal Indians. For that statute, as can be readily seen,<sup>132</sup> contains nothing in diminishment of the guardianship.

The statute, then, does not seriously affect the status of the Indians concerned,<sup>133</sup> save, perhaps, further to confuse confusion. They obtain a vote in certain states, and already, where they are a substantial element of the population, candidates for state office have found it worth while to hold rallies and barbecues, Democratic, Republican and Progressive, on the reservations. But since the more personal and important civil rights of these Indians are intimately interwoven with the federal guardianship, and this survives unaltered, the fact that they remain wards far outweighs the fact that they become voters. In a state like New Mexico, where in all likelihood their right to the ballot is barred by special race provisions in the constitution,<sup>134</sup> their status is unaffected. County officials, in various states, may try to assess Indian property, in the mistaken

<sup>131</sup> "Logically it has always seemed to me that the grant of full citizenship was inconsistent with the continuance of a state of pupilage. The Indian who has been made a citizen is a member of the Government which acts as guardian over him. . . . There are Indians . . . sitting today in Congress . . . who . . . are helping the Nation to take benevolent care of themselves." George C. Butte, *The Legal Status of the American Indians* (1912) p. 17. The author also suggests that an Indian might, even, as "a natural born citizen" (U. S. Const., Art. II, § 1(5)) become President and thus, as an official, administer his own estate, as a ward.

While on the subject of unlikely possibilities, it might be further noted that a tribal Indian is now eligible for the Presidency forthwith, whereas he is not so eligible for a seat in either House of Congress until he shall have been a citizen seven (U. S. Const., Art. I, § 2(2)) and nine (U. S. Const., Art. I, § 3(3)) years respectively. Now that all Indians are citizens, perhaps the most archaic provision in the Constitution is the one that eliminates "Indians not taxed" from enumeration, for the purpose of apportioning representatives and direct taxes (U. S. Const., Art. I, § 2 (3)).

<sup>132</sup> See, *supra*, n. 119.

<sup>133</sup> "It must not be thought that injustice to the Indians is a thing of the past. The mere conferring of citizenship upon them has not improved their lot. Today they are subject to disadvantages known to no other citizens. Their situation is without a parallel in history, a fact that must appear from a consideration of the attitude of those executive agencies having charge of them." J. C. Wise, *Indian Law and Needed Reforms*, 12 *American Bar Association Journal*, 38 (January, 1926).

<sup>134</sup> See, *supra*, n. 5.

<sup>135</sup> Reports of such attempts, in various states, have been current lately. The idea that the guardianship continues, despite citizenship, is one difficult to grasp instantler.

belief that taxes follow the ballot,<sup>135</sup> but this can be but a momentary annoyance.<sup>136</sup>

On paper, the statute creates some 125,000 new citizens, without giving them any election in the matter.<sup>137</sup> Its immediate importance, however, in the opinion of the undersigned lies not in this numerical fact so much as in the legislative intent behind the statute. There was no obvious reason for suddenly conferring this limited right on the large remnant of tribal Indians. Non-tribal Indians were already citizens, under state decisions or the Dawes Act; tribal Indians who had enlisted in the World War were already provided for under another and optional statute.<sup>138</sup> The only apparent logic behind the Act of 1924 is that of the well established federal policy of unloading responsibility for the Indian on the states.<sup>139</sup> It is as a startling

<sup>136</sup> A more serious view taken of the statute by a Minnesota layman, may be quoted:

"Does this law make anything simpler? Is it anything more than a piece of constitutional legalism which will only complicate a situation now so intricate as to drive students and men of practical affairs into different camps of understanding and policy?

"The law is a most peculiar one. It is entirely without precedent and it is doubtful if Congress considered its consequences at all seriously. As the law now stands the *Indians will become citizens and at the same time remain wards*. Such a status is so anomalous that it may take years to clear up the many questions which will be raised with regard to property. Moreover, certain rights, immunities, and exceptions which Indians have heretofore enjoyed must now legally come to an end. What will be the proximate and final results?" John R. Brown, *Citizens—and Wards Too* (April 15, 1925) 54 *The Survey*, No. 2, 95. (Italics the author's.) See also *Fifty-sixth Annual Report of Board of Indian Commissioners*, 1925, p. 27, where Chairman Vaux states of California Indians: "The act of 1924, conferring citizenship on all Indians, has introduced increased uncertainties of the status of the Mission Indians and the authority of the Government officials over them. I believe they had always been considered as citizens, but the recent stirring up of the question has caused it to assume increased importance. There is a large body of the Indians, possibly as many as one-half, who hold that neither Federal nor State laws apply to them in any way."

<sup>137</sup> "The number of Indians given citizenship by the new legislation is approximately 125,000." Hon. Hubert Work, Secretary of the Interior, *Indian Policies, Comments on Resolutions of the Advisory Council on Indian Affairs* (U. S. Gov. Print. Off. 1924) p. 6. Cf. *Fifty-fifth Annual Report of Board of Indian Commissioners* (1924) pp. 1-2.

<sup>138</sup> 41 U. S. Stats. at L. 350, U. S. Comp. Stats. (1925 Supp.) § 3951a, Fed. Stats. Ann. (2d ed., 1919 Supp.) 275.

<sup>139</sup> The board of Indian Commissioners, alas, it has advisory powers only, says: "There seems to be a somewhat widely spread impression that when President Coolidge signed the Indian citizenship act he, then and there, with a sweep of his pen, ended the Indian problem and laid it away in the archives of history; that there now is no further need of Federal guardianship and trusteeship and, consequently, no further excuse for the continuance of the Bureau of Indian Affairs."

"This board holds views exactly to the contrary. We are of the opinion that the formal merging of the Indian people into the citizenry of the country is a distinct challenge to the Government to intensify its Indian Service activities in order to hasten the day when all supervised Indians may safely

revelation to the states, which have been blind to the operation of the federal Indian policy in its prior manifestations, that the enactment has importance.

STATE RESPONSIBILITY, WITH FEDERAL RETENTION OF  
AUTHORITY AND PROPERTY

Granted the existence and prosecution, during the last fifty years, of the federal policy of shifting on the states the responsibility for the Indian, it may be wondered at both (1) that the states have only lately become cognizant of it, and (2) that no concerted action, between states and nation, has resulted in a practical method of co-operation during the necessary period of transition. The answer is, in part, that the policy has been so gradually prosecuted that the states, accustomed to think of Indians as outside their political and social field, for a long time did not realize its existence and, even later, did not fully admit to themselves its implications. The recent acceleration of the policy, whereof the grant of citizenship to the tribal Indian is but one item of evidence, has stung them out of their complacency.

That the shift in responsibility, for the persons of the wards, has been accomplished in the most shiftless manner possible, is self-evident. Congress was the guardian, the Department of the Interior its executive agent. Was it not incumbent on them, before they discontinued the guardianship in fact, in any particular, to make a frank announcement of their intention to the states concerned, to call them into conference, and to say to what extent federal assistance, during a certain period of joint responsibility, would be forthcoming? An opportunity was lost; the federal guardian preferred quietly to abscond; a new chapter of suffering for the Indian, and increased uncertainty as to his status are the direct results of this last federal defalcation.<sup>140</sup>

The necessities of the case point to the use of federal funds, through state social and educational agencies, as the logical method of co-operation. Yet, so far as the undersigned has been able to

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pass from under supervision by becoming the unrestricted owners of their property and the equals, in all respects, of all other American citizens. We are firmly of the opinion that this change in the civic status of 125,000 Indian persons in bulk is a challenge to Congress to give the substantial aid of sufficient funds to finance adequately the intensified Indian Service activities we are urging." Fifty-fifth Annual Report of Board of Indian Commissioners (1924) p. 2.

<sup>140</sup> See, *supra*, ns. 79 and 115.

discover, no comprehensive, constructive proposal along these lines has ever been made by the federal government to any state.<sup>141</sup> Certainly it has not made any to California.<sup>142</sup> Increasingly do annual federal reports, of commissioners and secretaries, speak of the necessity for co-operation with the states, and of what state social and medical services could and should do. Definite proposals are absent. Seldom is it directly stated that the federal government recognizes its obligation, in such case, to contribute to the budget of such substitutional state services. One such public utterance, however, must be noted:

"I respectfully request you to consider the decentralization of many of the Indian Bureau's activities among the several states having Indian population, asking the State governments to assume responsibility, through their State boards of health, departments of agriculture, boards of charities and welfare, for the improvement, conduct, and supervision of restricted Indians. *The Indian Bureau would then only administer treaty rights, land titles, and*

<sup>141</sup> For instance, the Director of the Bureau of Public Health of New Mexico writes:

"I believe that Congress actually passed an act declaring the Indians to be citizens. However, we have not yet been able to discover just what this means. We have been told that we are expected to 'Take over responsibility for the Indians' health', and yet we can get no concrete proposal of any sort. Since I am the official who would have to make this plan 'work,' I feel I need something much more definite than the mere statement that 'The state must take its share of the responsibility'. . . . How can we assume responsibility for communicable disease control, if we are not able to enforce even rudimentary quarantine? As a practical matter of fact we do not have jurisdiction of any kind over Indian territory." Letter of G. S. Luckett, M. D., Director, to Haven Emerson, M. D., President of American Indian Defense Association, dated August 5, 1925.

<sup>142</sup> When the federal administration is forced in the prosecution of its policy, to fall back upon local agencies, as for instance in the progressive closing of its Indian Schools in California, it does not deal with the central, co-ordinating and responsible authority, the State Board of Education, but with each separate school district. To the latter it pays thirty, or in some cases sixty, cents *per diem* per pupil, and its own responsibility it then considers at an end. Some districts gladly accept the *per diem*, but give little or nothing for it. Truancy becomes rife. There is no supervision by federal or state authority. Of many quotations possible, on the results of this haphazard policy, the following may be made:

"The paying of tuition for the Indian children and the permission to use such funds for their physical welfare is not sufficient to insure them proper education and care. The tuition is regarded merely as an inducement to the district to take the Indians. No report on its disposition is asked for by anyone. . . .

"The attitude toward the Indian is strongly localized. The town of Greenville has fought bitterly against receiving the children from the recently discontinued Greenville Indian School, while Susanville, not a hundred miles away, welcomes Indian children in the schools."

Report of Sub-Committee on Education, Indian Affairs Section of Commonwealth Club of California, p. 6 (unpublished) May, 1925, based on investigations made for the State Superintendent of Public Instruction, 1922 and 1925.

collect the Indian funds, as it now does, and *pay into the respective State treasuries sums the bureau would otherwise expend in these divisions of the service.*"<sup>143</sup>

California at least, among the states, ought not to be content to receive, by way of federal aid, merely those amounts which the United States has been expending of late upon the particular services named, and which are here suggested by Secretary Work as sufficient. For these amounts, partly because of a niggardly policy on the part of Congress, partly because of the tremendous overhead in the federal Indian service, are woefully insufficient, and the condition of indigence, directly traceable to that long continued policy, creates a present crisis. As pointed out by the Chairman of the Board of Indian Commissioners,<sup>144</sup> during the period of transition it is incumbent on Congress to spend more rather than less. California Indians, as we have seen, have in recent times, merely because their initial harsh fate had made them poor, fared meagerly at federal hands. It will therefore take more effort, proportionately, to restore them to the point whence they can gradually progress toward the social and economic level of the general body of citizens. The moneys spent on them in the past, or now, hardly furnish the proper criterion for what ought to be done on their behalf, by federal funds activating state agencies.<sup>145</sup>

Federal action, looking toward practical co-operation with the states, has been awaited in vain. The consequences that might have been foreseen, even by a Congress tempted to play 'possum session after session, are now eventuating. The states are becoming alive to the situation and are taking the initiative. Especially is this true in the Mid-Northwest, where recent scandals in the federal sales of

<sup>143</sup> Address of Hon. Hubert Work, Secretary of the Interior, to the Committee of One Hundred, Dec. 12, 1923, as quoted in Fifty-fifth Annual Report of Board of Indian Commissioners, p. 4. (Italics added.)

<sup>144</sup> See, *supra*, n. 139.

<sup>145</sup> For instance, of the entire amounts expended on behalf of the California Indians during the five-year period 1920-24, 33.46 per cent is charged to salaries and wages, 21.07 per cent to irrigation work, 10 per cent to miscellaneous, and 8.02 per cent to construction and repair of buildings, while to office and school supplies is allotted, without segregation between the two items, .31 of 1 per cent, and to medical supplies .71 of 1 per cent! The force of this last item can only be realized by seeing actual conditions in the field, or by reading the reports to the State Board of Health, already cited. Computations from official figures furnished at Hearings before a Sub-committee of the Committee on Public Lands and Surveys, United States Senate, 69th Congress, First Session, pursuant to Senate Resolution No. 347, May 25-6, 1925, Part 3, pp. 242-3. (Figures for Sherman Boarding School, attended also by children from other western states, not included.)

Indian lands and timber have awakened the disgusted interest, in Indian Bureau methods, of communities till then dormant. The last Wisconsin legislature appropriated up to \$8,000 annually

"for public health work and the investigation and prevention of disease with special reference to the Indian population of this state."<sup>146</sup>

But at the same time it adopted a joint resolution memorializing Congress to authorize the expenditure of federal funds, appropriated for Indians, through state agencies. The resolution is the first step in a direction that promises effective results, especially if other states follow suit, and is therefore quoted in full below.<sup>147</sup>

Minnesota goes further. Apparently despairing of any effective co-operation with federal authorities, it proposes the drastic remedy of substituting itself, for the federal government, as guardian of the Indians' property.<sup>148</sup> This suggestion, carrying within itself the seed of extermination for 6,000 jobs in the Indian Bureau, approaches *lèse majesté*.

<sup>146</sup> Wis. Laws, 1925, c. 354, p. 471.

<sup>147</sup> "Joint Resolution—Memorializing Congress to authorize the president to expend all or a part of the appropriations which it makes for the education, medical care and industrial assistance to the Indians of this state through the departments of the state government equipped to render this service.

"Whereas, This state is vitally interested in the welfare of the eleven thousand Indians resident in Wisconsin who now constitute a part of its citizenship; and

"Whereas, Congress in accordance with treaties and ancient established policy annually appropriates sums of money for the education, medical treatment and industrial development of the Indians; and

"Whereas, These sums are now uneconomically and in many cases ineffectively expended due to the absence of technical facilities within the Indian Bureau to efficiently handle these sums and its lack of local contacts; and

"Whereas, This state maintains efficient departments of agriculture, education and health which are technically equipped to give the Indians the education, medical care and industrial guidance which they so greatly need at minimum cost; now, therefore, be it

"Resolved by the assembly, the senate concurring, That the Congress of the United States be and is hereby urged to provide in the Interior Department appropriation bill for the fiscal year ending June 30, 1927, that all or a part of the amounts appropriated for the benefit of the Indians in this state be expended through the departments of agriculture, education and health; and be it further

"Resolved, That properly attested copies of this resolution be transmitted to each house of Congress of the United States and to each senator and representative from this State." Wis. Laws, 1925, p. 711.

<sup>148</sup> The Minnesota statute empowers the Governor to appoint a commission of three to negotiate with Congress "for the transferring of any funds, lands and other properties, now held in trust or owing by the United States Government for the Indians of Minnesota, to the State of Minnesota to be held in trust and administered by the State of Minnesota for the benefit of said Indians." Minn. Laws, 1925, c. 291, p. 365.

These steps, taken by other states, show the tendency of the wind. Nor are other weather signs lacking. Rumbles are to be heard from Utah, Arizona and New Mexico. Even the treatment of the Indians on the Yuma Reservation, California, notorious for years, and still continuing, is likely to be aired in the pending Congress.

California itself has until now taken no definite step in the matter of co-operation. But upon the initiative of the Indian Section of the Commonwealth Club of California, and with the active interest and good-will of the state agencies related to education, health and charities, informal preliminaries have, after some study, been taken. As a result the Congress now in session will have brought to its attention a bill, already introduced in the House and Senate, calling for federal and state co-operation on the Indian problem in California, along the lines of the Wisconsin resolution.

Assuming that a policy of progressive co-operation is initiated in California, the increasing power of the state to clarify and shape the status of the Indian within its borders can readily be seen. Various questions delaying the process can also be noted on the horizon, chief among them that of the future of the federal personnel now administering to the California Indian. For many, perhaps most, of this personnel would have difficulty in qualifying under the more rigorous state requirements applying to teachers, nurses, matrons, etc.<sup>149</sup> This question, however, is one of the federal civil service, or of politics,<sup>150</sup> and beyond our immediate scope.

<sup>149</sup> The following quotation, from the same report as the quotations in note 139, may be found pertinent:

"The one Reservation boarding school at \_\_\_\_\_ (a California point) was a disgrace. . . . Only two teachers of academic subjects being employed for 90 children, one of whom was a woman conceded to be somewhat 'queer'; the other a boy just graduated from high school, without teacher's certificate, and a victim of epilepsy. This institution has been described in vivid detail by Dr. Gillihan of the State Board of Health. His statement was found not to be exaggerated."

A writer in the *Journal of the American Medical Association* says:

"It (the Association) should ascertain the educational status of the physicians, among whom there are reasons for believing that there are some not qualified to practice under the state laws". Frederick L. Hoffman, *Conditions in the Indian Medical Service*, op. cit. supra.

<sup>150</sup> The importance of politics in the administration of Indian affairs has unfortunately always been great. Lyman Abbott, 167 *North American Review*, 721-2 (1898); Fifty-fifth Annual Report of Board of Indian Commissioners (1924) p. 44; J. P. Munroe, *Life of Francis Amasa Walker* (1923) p. 129.

While the personnel of the Indian Bureau has improved since 1863, there are still among its number employees to whom Lincoln's parable is applicable: "Bishop, a man thought that monkeys could pick cotton better than negroes could because they were quicker and their fingers smaller. He turned a lot of them into his cotton field, but he found that it took two over-

## CONCLUSION

We have been out of the purely juridical field. Instead of discussing particular cases, however interesting, such as whether an Indian having deer meat in his possession, out of season, on a trust allotment, is amenable to state game laws, or what, if anything, a state health officer can do when a nuisance is maintained on an Indian reservation, a few acres in extent, polluting a stream or other water supply below, we have been considering social, economic and political factors, as well as historical, that have entered or are still present in the Indian problem. The only excuse for the deviation is that of necessity. As Professor Thayer says, "so little of any legal status at all have Indians"<sup>151</sup> that he who would fix and express it must needs go outside of the judicial reports.

If that status is difficult of accurate apprehension by the more or less trained American mind, dealing with its own juridical conceptions and considering a social form of its own creation, it is, needless to say, wholly beyond the comprehension of the primitive victim of that confusion. Franklin K. Lane, when Secretary of the Interior, said:

"That the Indian is confused in mind as to his status and very much at sea as to our ultimate purpose toward him is not surprising. For a hundred years he has been spun round like a blindfolded child in a game of blind man's buff. Treated as an enemy at first, overcome, driven from his lands, negotiated with most formally as an independent nation, given by treaty a distinct boundary which was never to be changed 'while water runs and grass grows', he later found himself pushed beyond that boundary line, negotiated with again, and then set down upon a reservation, half captive, half protégé.

"What could an Indian, simple thinking and direct of mind, make of all this? To us it might give rise to a deprecatory smile. To him it must have seemed the systematized malevolence of a cynical civilization . . . Manifestly the Indian has been confused in his thought because we have been confused in ours."<sup>152</sup>

Of what avail is an amorphous citizenship, to a primitive race, or indeed to anyone, still haunted by so fundamental an insecurity

seers to watch one monkey. It needs more than one honest man to watch one Indian agent." Rt. Rev. Henry B. Whipple, *Lights and Shadows of a Long Episcopate* (1900) p. 136.

<sup>151</sup> See, *supra*, n. 56. Cf. Professor Usher's "The fate of the Indian in the United States, the continued dispossession, the lack of social equality . . . , the lack of legal status." Roland G. Usher, *Pan-Americanism* (1915) p. 296.

<sup>152</sup> Franklin K. Lane, *Administrative Reports of the Department of the Interior for fiscal year ending June 30, 1914* (1915), Vol. I, p. 4.

and governed by a system but slightly improved since Lincoln said of it

*"If we get through this war, and I live, this Indian system shall be reformed!"*<sup>153</sup>

Clarified the Indian status can be, with effort and with a fresh attitude. But not by the present guardian, whose red tape throttles his insufficient social services and who is too conscious of his past inadequacy to desire aught but escape from future responsibility. Hope lies in the states, which have the necessary social machinery and a distinct loss or gain at stake, and, of recent years, experience of the problem of dealing with naturalized, semi-alien citizens of different racial stocks. Indubitably, whether the 17,000 citizens of California who are of Indian blood become assets to the community, or charges upon it, waits upon local action.

For the present, and until such action, the legal status of the Indian, depending as it does upon his social and economic condition, remains as ever anomalous and ambiguous,—and beyond the possibility of satisfactory definition by the undersigned.

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<sup>153</sup> Rt. Rev. Henry B. Whipple, *Lights and Shadows of a Long Episcopate* (1900) p. 137. (Author's italics.)

Bishop Whipple, elsewhere, tells the anecdote thus: "At my first visit to President Lincoln, after the Sioux massacre, there were tears in his eyes, as I told him of our desolated border, and he said with impassioned voice, 'When this civil war is over, if I live, this Indian system of iniquity shall be reformed.'" *Civilization and Christianization of the Ojibways in Minnesota*, 9 Minnesota Historical Society Collections (1901) p. 141.