California Law Review

Volume 14 | Issue 2 Article 1

January 1926

The Legal Status of the California Indian

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California Law Review

Volume XIV JANUARY, 1926 Number 2

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Introductory

The Supreme Court of the United States once said, of Indians in general, but in a case involving a California Indian in particular:

> "The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character."[1]

That relation, which has passed through many shifting phases, through colonial and frontier periods to Western settlement and the increasingly intensive development of natural resources, is now entering upon a new aspect. For in 1924 Congress conferred citizenship upon all non-citizen Indians born within the United States.[2]

This statute cannot fail to have a repercussion upon the states. For, in the first instance, under the Fourteenth Amendment, it automatically grants to tribal Indians, although living on reservations an approximation to their ancient life, the status of citizens of the several states.[3] In a number of states, including California,[4] they become electors.[5]

But the interest of the state is not limited to the fact that this recent act adds a new and alien element to its citizenry. It is perforce much wider. The statute of 1924 is but the last step in a policy, adhered to by the Congress and the executive of the United States through the last fifty years, of which the states are only today be-

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[1] U. S. v. Kagama (1886) 118 U. S. 375, 381, 30 L. Ed. 228, 6 Sup. Ct. Rep. 1109.

[2] 43 U. S. Stats. at L. (1924) 253, U. S. Comp. Stats. § 6371 5/6, Fed. Stats. Ann. (2d ed., 1924 Supp.) 63.

[3] U. S. Const., Art. XIV, § 1.

[4] Cal. Const. (1879) Art. II, § 1: "Every native citizen of the United States. . . shall be entitled to vote at all elections."

[5] A different result possibly obtains in a state like New Mexico, which entered the Union under a special compact with the United States, exempting Indian lands from taxation, and with a constitution excluding from the electorate "Indians not taxed." N. Mex. Const., Art. VII, § 1.

coming clearly aware. This policy, adopted after the disappearance of the last frontier, frankly aims at the destruction of the tribal relations of the Indian, who usually is rooted in his tribal life and land, and at "individualizing" him into a normal American.[6] With the merits of this policy this paper has nothing to do, save in so far as pointing out the existing confusion in the position of Indians before the law, largely attributable to it, may imply a criticism.

Two or three of the earlier steps taken in the furtherance of the policy, with their results, must be briefly noted. In 1871 Congress declared that Indians should no longer be dealt with by treaty;[7] no longer were they to be considered, as for the preceding two hundred and fifty years they had been, as alien, semi-independent, self-governing nations; treaties in the past had specified the minimum of federal assistance to which they were entitled, hereafter they were to have no such contractual assurance. In 1885, crimes committed on reservations became justiciable in the federal courts;[8] prior to that time the Indian tribes had themselves policed the "Indian country". In 1887, by the terms of the so-called Dawes Act, American citizenship was for the first time conferred upon all Indians who lived apart from a tribe and had "adopted the ways of civilized life";[9] since such Indians *ipso facto* became citizens of the state, the way was thus opened for the eventual declaration of the federal executive that their welfare was the concern of the state alone;[10] in California, where a large number of the Indians are non-tribal, though living in "scattering bands", this shift of responsibility from nation to state is of prime importance. By the same statute a new impetus was

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[6] "A policy decided upon to abolish, as rapidly as possible, the tribal relations and governments, to extinguish the Indian titles to lands, and to incorporate the individual Indians in the general citizen bodies of the States and Territories in which they live". 1 W. W. Willoughby, The Constitutional Law of the United States (1910) p. 311.

"Of late years a new policy has found expression in the legislation of Congress,—a policy which looks to the breaking up of tribal relations". Brewer, J., in Matter of Heff (1905) 197 U. S. 488, 499, 49 L. Ed. 848, 25 Sup. Ct. Rep. 506. Cf. A. H. Snow, The Question of Aborigines in the Law and Practice of Nations (1921) p. 55.

[7] "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or force with whom the United States may contract by treaty". 16 U. S. Stats. at L. 566. U. S. Comp. Stats. § 4034.

[8] 23 U. S. Stats. at L. 385, U. S. Comp. Stats. § 10502.

[9] 24 U. S. Stats. at L. 390, U. S. Comp. Stats. § 3951. Prior to this act, a number of individual Indians had become merged in the citizenry of the several states; and, in some of the original thirteen states, which had retained jurisdiction over their Indians since the colonial period, Indians in general had by statute become citizens. See articles by James B. Thayer, A People Without Law, 68 Atlantic Monthly, 540, 676.

[10] See infra, ns. 79 and 112.

given to the process of breaking up the tribal land by apportioning it into individual "allotments", in fee simple, to be held in trust by the government for a certain period; as a rule, as soon as this period has elapsed the land has swiftly passed from the grasp of the unsophisticated owner, to whose tradition the concept of individual property was alien, into the grasp of more tutored, non-Indian hands.

The general result of the policy of "individualization" has been to accelerate the pauperization of non-tribal Indians at the same time that it increased their numbers. While Congress has steadily cut down appropriations for Indian health, education and welfare service, and the Indian Bureau has increasingly limited its services to Indians living on reservations, the State has come to realize the shift in responsibility only through the increasing need revealed within its borders and the dangers it created to its general citizenry. In California, where the Indians, for fundamental reasons to be noted later, have always received less than their quota of support at the hands of the federal government, the act of 1924 granting citizenship to tribal Indians brings the state face to face with a large and definite responsibility of which, during its growth, it has been barely cognizant.

An inquiry into the present status of the California Indian may therefore not come amiss. And since that actual status depends in large part upon his original character and disposition, and upon his earlier experience of Europeans and white Americans, and his status among them, a review of his recent past seems proper.

Prior to Contact with White Civilization

In 1769 some 150,000 to 200,000 aborigines, nearly all of them in small bands of 50 to 200, occupied the area now known as California. Culturally they were at several removes from their more energetic brethren across the Sierras. If the testimony of the shell-mounds is to be credited, they had lived in California as long as three thousand five hundred years. But life had not pressed them hard. Needs were simple to satisfy, in a land where winter was mild, where acorns were plentiful, and where hills and streams teemed with game and fish. Their social evolution had been slow. They spoke 21 distinct languages, with 135 separate dialects.[11] One or

[11] A. L. Kroeber, in 5 Z. Eldredge's History of California (1915) pp. 125-6. Same author, Handbook of the Indians of California (1925) Bureau of American Ethnology Bulletin No. 18, pp. 830, 922. Cf. C. Hart Merriam, The Indian Population of California (1905) 7 The American Anthropologist, N. S., 594-606.

two only of their groups approached the integrated tribal life of the Indians farther to the East.[12] The legal concept of semi-independent, self-governing nations, applicable enough to the Six Nations who had united in the Iroquois League of Nations, to the Cherokees who had adopted a written constitution and devised an alphabet, or to the Pueblo Indians of the Southwest living in walled towns surrounded by irrigated fields, was hardly applicable to these primitives of the Pacific Coast.[13]

These Indians were for the most part peaceful and unwarlike, certainly by comparison with most of the tribes across the Sierras.[14] They were to experience, in three brief generations, a peculiar course of events.

The Spanish Period (1769-1823)

During fifty years the Franciscan friars were establishing their missions along the coast, for two-thirds the length of California. Their chief aim, the conversion and baptism of the natives, was achieved often by raids inland and by force. Many Indians were concentrated about the missions, in groups much larger than they had heretofore known. They were taught and compelled to work. On the whole they were treated not unkindly, and revolts among them were exceedingly few. The fact that fifteen soldiers could police and garrison a presidio of one to two thousand Indians, surrounded by their wilder relatives roaming at large, reveals "the sluggish, tractable character of the original Californians in its best aspect".[15]

The mission system, however, was paternalistic. The Indians were in complete tutelage to the friars, who prohibited their practice of their primitive religions. They became, under zealous instruction,

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[12] "Tribes did not exist in California in the sense in which the word is properly applicable to the greater part of the North American Continent.... The marginal Mohave and the Yuma are the only Californian groups comparable to what are generally understood as 'tribes' in the central and eastern United States." A. L. Kroeber, Handbook of the Indians of California, p. 830.

[13] "What were at first called tribes, are in reality nothing more than villages, or 'rancherias', as, following usage, they are still generally called. In the absence of any federative principles or higher organization, these independent rancherias were the ultimate political units, and in one sense the tribes, of the California Indians. Of such village communities, each with its own chief, and each free to conduct war or negotiate peace at the will of its own members only, there must have been about one thousand in California." A. L. Kroeber, History of California, pp. 126-7.

[14] Certain groups to the north (Shastas, Pitts, Modocs), as well as the more highly organized Mohaves and Yumas on the southeastern border, were more warlike.

[15] A. L. Kroeber, History of California, p. 122.

"blacksmiths, shipwrights, carpenters, tailors, shoemakers and masons. . . . Many of them could read and write".[16] But they lost their old religions and traditions and their incipient tribal relations. If catastrophe should overtake the Mission establishments, the Mission Indians would lose their recent security, and at the same time be without many of their original native adaptations.[17]

THE MEXICAN PERIOD (1823-1848)

While the revolution of Mexico against Spain began in 1810, it was 1823 before independence was achieved. Remote California did not feel the full effect of the new, anti-clerical order until ten years later. Friction between the friars and the civil authorities became more frequent, but actual secularization of the missions did not begin until 1833. It was rapidly pressed to completion in the next four years.[18]

The Franciscans had in theory administered the properties surrounding the Missions not as owners, but as tutors for their primitive charges. The revolution terminated the tutelage and proceeded to a distribution of mission lands and cattle among the Indian converts.[19] In the process of allotment much of the property passed, through fraud, directly into the hands of the Spanish-Californians. Most of those Indians who received their parcels soon lost them to more provident white men.[20] The result of the revolution was that many of the Indians returned to the tules and the primitive life; others became vaqueros and artisans on the ranchos, which multiplied in number with the success of the revolution. These latter Indians in many instances established themselves in pueblos or Indian villages expressly reserved to their use by the large landowners.

While for many of the Mission Indians the abrupt termination of the benevolent autocracy of the padres was a fearful blow, for a number of the more independent, who were able to meet the not

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[16] Wm. Heath Davis, Sixty Years in California (S. F. 1889) p. 8. Cf. Alfred Robinson, Life in California Before the Conquest (S. F. 1925) p. 43; 13 H. H. Bancroft, History of the Pacific States (1884) p. 617.

[17] "It is clear that, in general, decrease of the native race is directly in proportion to immediacy and fullness of contact with superior civilization... First of all, it is established that the tribes that were completely devoted to mission life are gone. Many are wholly extinct; the most fortunate may amount to one-hundredth of their original numbers." A. L. Kroeber, Handbook of the Indians of California, p. 888.

[18] 2 T. H. Hittell, History of California (1898) pp. 181-90.

[19] J. A. Rockwell, Spanish and Mexican Law in Relation to Mines and Titles to Real Estate (1851) Appendices Nos. 13 and 14, pp. 455 et seq.

[20] A. L. Kroeber, History of California, p. 124; 29 H. H. Bancroft, History of the Pacific States (1888) p. 230.

over-strenuous demands of California's golden age, it offered a measure of opportunity. They now had a definite economic and social value in that pastoral society. Moreover they were emancipated. They could freely hold property and, subject to a property qualification, could vote. The Mexican revolution, achieved in large part by men of Indian blood, had abolished all the ancient discriminations. Even before freedom had been wholly won, the revolutionists, by the Plan of Iguala, had declared:

> "All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens of the monarchy, with a right to be employed in any post, according to their merits and virtues."[21]

The Treaty of Cordova, which sought to establish peace between New and Old Spain, and the Declaration of Independence, and the constitutions which followed it, expressly affirmed the principles of the Plan; several acts of the first Mexican Congress gave effect to these principles.[22] Of this succession of liberalizing manifestos the Supreme Court of the United States was to say:

> "These solemn declarations of the political power of the government had the effect, necessarily, to invest the Indians with the privilege of citizenship as effectually as had the Declaration of Independence of the United States of 1776, to invest all these persons with those privileges residing in the country at the time, and who adhered to the interests of the colonies."[23]

Cession and American Immigration

Forcible conversion by the padres to a semi-civilized life; then, either a regression to aboriginal conditions or an adaptation to ranch or village life, spiced with economic and political independence—these were the preludes to a yet more drastic experience.

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[21] Plan of Iguala, February 4th, 1821; Frederick Hall, The Laws of Mexico (1885) p. 63.

[22] One of these acts declared "the equality of civil rights to all the free inhabitants of the Empire, whatsoever may be their origin in the four quarters of the earth"; another affirmed "the union of all Mexicans, of whatever race"; yet a third statute, expressly referring to the scheme of racial equality prescribed by the Plan of Iguala, provided that "in any register, and public and private documents, on entering the name of citizens of this empire, classification of them with regard to their origin shall be omitted". A later statute, relating to the pre-emption of land, also stressed the end of all racial inequalities. Finally, the two successive constitutions of Mexico preserved the principles so established. See U. S. v. Ritchie (1855) 58 U. S. (17 How.) 525, 538-9, 15 L. Ed. 236; Frederick Hall, op. cit.

[23] U. S. v. Ritchie, 58 U. S. (17 How.) 525,539.

The bulk of American immigration to California, following upon the Mexican War and the discovery of gold, was strongly race-conscious. It suffered from what the most penetrating critic of the State's early social history called

> "a diseased local exaggeration of our common national feeling towards foreigners . . . a hearty American contempt for things and institutions and people that were stubbornly foreign".[24]

The time and place were ripe, for such an exaggeration. The immigration from Europe and the nativist parties; the long contest over slavery, now approaching another crisis; the discussion over the Wilmot Proviso, affecting the status of all territories secured from Mexico; the recent war and the fact that California was part of a "conquest"; the fact that the Hispanic occupants of California were darker in skin,[25] of a different religious communion, and of an easy-going temperament — these, and other elements, shaped the attitude of the immigrants.

They could not, in their nature, be overly sympathetic with the duskier-hued occupants of their promised land. And if Mexicans weren't "human beans", what were Indians? Many of the early Americans, coming overland, had suffered at the hands of hostile tribes west of the Sierras. They were in no mood to distinguish between Apache and Comanche on the one hand and the pastoral half-Christian Mission Indian on the other. Only by having in mind this potent race complex of the average forty-miner is it possible to understand the sudden change that took place in the position of the California Indian.

THE CONSTITUTIONAL CONVENTION OF 1849

There was at first a moment of comparative respite, but one with its own significant gesture. The Convention that met at Monterey consisted predominantly of Americans of an earlier immigration, who were more or less familiar with California social conditions.[26]

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[24] Josiah Royce, California, A Study of American Character (1914) pp. 275-6.

[25] "Afore I came away from hum, I hed a strong persuasion thet Mexicans worn't human beans,—An ourang-outang nation, A sort o' folks a chap could kill An' never dream on't arter, No more'n a feller'd dream of pigs That he hed hed to slarter; I'd an idee that they were built arter the darkie fashion all, An' kickin' colored folk about, you know, 's a kind o' national."—J. R. Lowell, Biglow Papers, First Series, No. II (1846).

[26] Of the thirty-six delegates who were native Americans, nine only had been in the territory less than a year. Among the other twenty-seven were instances of individual residences of ten, sixteen and twenty years. The average residence for the thirty-six Americans was three years. Browne, Debates in the Convention of California (1850) pp. 478-9.

They were throughout urbane, and considerate of the minority of Spanish-Californians who sat with them in Colton Hall. Yet upon race questions this American majority was obdurate. The negro was not wanted in the new free state, and only expediency prevented a direct declaration barring his entrance. At all events he should not vote. The Indian was already here, but he should not remain a citizen and a voter. He should so far as possible revert to the anomalous condition of an Indian, as determined by two hundred years' experience east of the Rockies.

There was a certain difficulty in achieving this result. Under the terms of the treaty of Guadalupe Hidalgo, which was the American muniment of title to California, those Mexican citizens who within a year did not elect to retain their original allegiance acquired "the title and rights . . . of citizens of the United States".[27]

Such persons were to be

> "incorporated into the Union of the United States and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction".[28]

True, it was *for Congress* to admit the new citizens to the rights of citizenship. Yet since the Monterey Convention was meeting because of the failure of Congress to organize the new territory, and its labors must pass under the eye of Congress, its members were under a peculiar obligation to observe the terms of the treaty. Certainly they could not properly discriminate between classes of former Mexican citizens. Yet they did so, admitting those of Spanish and Mexican descent to full partnership and relegating the descendants of Indians to a lower status.

The argument between the majority and those whose respect for the treaty of peace predominated over their race-consciousness, came over the word "white" in the article on suffrage.[29] There was fear that large landowners might, on election day, lead troops of docile

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[27] Treaty of Guadalupe Hidalgo (1848) Art. VIII. Admittedly all Mexicans who failed to act within a year became, without more, citizens of the United States, "otherwise they remained a people without a country." People v. De La Guerra (1870) 40 Cal. 311, 341. Cf. Boyd v. Thayer (1892) 143 U. S. 135, 169, 36 L. Ed. 103; Tobin v. Walkinshaw (1856) 1 McAllister, 186, 193, Fed. Cas. No. 14,070; People v. Naglee (1850) 1 Cal. 232, 251.

[28] Treaty of Guadalupe Hidalgo, Art. IX.

[29] Browne, op. cit. pp. 61-73. Cf. p. 35.

Indians to the polls; fear also lest, if former Mexican citizenship were made the test without qualification of race, a few negros would profit. Certainly one major objection was the novelty of the idea of the Indian as an ordinary citizen.[30] The word "white" stayed in the article,[31] and an amendment granting the vote to those Indians who had been citizens of Mexico and were taxed as owners of real estate, and expressly excepting all negroes, was defeated by a vote of 22 to 21.[32] The Indian had voted for delegates to the convention, but his disability fastened upon him immediately, and he was not allowed to vote upon the question whether the Constitution, framed by those delegates, should be ratified.[33]

THE LEGISLATURE AND INDIAN STATUS

The disfranchisement worked by the Convention was a mild step toward reducing the Indian to the status familiar to the Americans in their states of origin. The first state legislatures reflected more clearly the social ideas of the ever increasing pioneer immigration, and was frankly less considerate of the Indian than the Monterey Convention. The latter, as a concession to the Californians and perhaps as a salve to American consciences, had by the constitution permitted the legislature, by a two-thirds concurrent vote, to admit to the right of suffrage

> "Indians, or the descendants of Indians, in such special cases as such a proportion of the legislative body may deem just or proper".[34]

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[30] One member "did not deny that there had been Indians who had done honor to the legislative halls, but it was better to avoid an evil that we knew not of, than to adopt a loose course which might produce most unfortunate results and incalculable evils. It would compel researches in old edicts and musty records of by-gone days of foreign lands, and in a language of which we were iguorant." Browne, op. cit. p. 306.

[31] Cal. Const., 1849, Art. II, § 1.

[32] Browne, op. cit. pp. 306-7. Six Californians, four foreigu-born, and eight Americans from free and three from slave states, constituted the minority; eleven Southerners, ten Northerners, and one foreign-born (Sutter), voted nay. Ibid., pp. 478-9. Before the conquest, perhaps two hundred Indians had possessed the necessary property qualifications to make them voters. Ibid., p. 307.

[33] Cal. Const., 1849, Schedule, § 6: Browne, op. cit. p. xx. Once California was admitted to the Union, with its discriminatory constitution, the latter doubtless prevailed over the terms of the treaty of Guadalupe Hidalgo (People v. De La Guerra, 40 Cal. 311, 342-4). But that such admission was a breach of the treaty is clear from those opinions that consider the status secured by the terms of the treaty to the Indian inhabitants of various portions of the ceded territory. U. S. v. Ritchie, 58 U. S. (17 How.) 525, 539-40; U. S. v. Lucero (1869) 1 N. Mex. 422. Cf. Downes v. Bidwell (1901) 182 U. S. 244, 279-80, 45 L. Ed. 1088, 21 Sup. Ct. Rep. 770; In Re Minook (1904) 2 Alaska, 200.

[34] Cal. Const., 1849, Art. II, § 1.

The first legislature, however, immediately placed itself on record as restricting the vote to white citizens.[35]

It went further. It passed an act "for the government and protection" of Indians whose emphasis, it is fair to say, was on government rather than protection.[36] Under its terms jurisdiction in all cases of complaint by or against Indians was conferred on justices of the peace. If a tribe or village of Indians neglected "to obey the laws", the justice could punish the guilty chiefs or principal men by reprimand or fine "or otherwise reasonably chastise them". A white man injured unlawfully by an Indian could himself, without process, take the offender before the justice. An accused Indian could ask for a jury, but since jurymen must be "qualified electors", the jury would always consist of white men.[37] An Indian convicted of stealing "horses, mules, cattle, or any valuable thing" was subject to fine or to "any number of lashes not exceeding twenty-five", at the discretion of court or jury.

> "When an Indian is sentenced to be whipped, the justice may appoint a white man, or an Indian at his discretion, to execute the sentence in his presence and shall not permit unnecessary cruelty in the execution of the sentence".[38]
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> The same statute provided that in no case could a white man
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> "be convicted of any offense upon the testimony of an Indian or Indians, and in all cases it shall be discretionary with the Court or jury after hearing the complaint of an Indian".[39]

These particular provisions were soon repealed,[40] but others as drastic remained in force, prohibiting Indians from giving any evidence "in favor of or against any white person" in criminal cases, or in any civil action or proceeding "to which a white person is a

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[35] Cal. Stats. 1850, p. 102. Curiously enough, however, a later statute excludes, among other tax-exemptions, "The polls of all Indians except *those who may be entitled to vote*". Cal. Stats. 1851, p. 154. (Italics added.) Actually, the status of a non-tribal Indian as a citizen of the United States, entitled to register and vote, was not determined until 1917. Anderson v. Matthews (1917) 174 Cal. 537, 163 Pac. 902.

[36] Cal. Stats. 1850, p. 408. The state Supreme Court, with unconscious candor, once described it as the "Act for the protection and *punishment* of Indians". People v. Antonio (1865) 27 Cal. 404, 405. (Italics added.)

[37] Cal. Stats. 1850, pp. 288, 300, 441.

[38] Cal. Stats. 1850, p. 409. Yet the constitution of 1849 contained the usual declaration against "cruel or unusual punishments" (Art. I, § 6). In 1865 a mitigating decision held that this act was "obviously intended to be applied to Indians in tribes, or when living in separate communities or companies, and not to a case where an Indian has been living as in this case, for years among white men". People v. Antonio, 27 Cal. 404, 405.

[39] Cal. Stats. 1850, p. 409.

[40] Cal. Stats. 1853, p. 179.

party".[41] The barrier was unconditional, and applied to such a man as Chief Solano, whom the Supreme Court of the United States described as

> "a civilized Indian—a principal chief of his race on the frontiers of California, [who] held a captain's commission in the Mexican army, and is spoken of by the witnesses as a brave and meritorious officer".[42]

The negro's similar disability was removed in 1863, the Indian's continued until the Codes went into effect ten years later. During the early fifties one-fourth part of Indian blood was sufficient to raise the barrier.[43]

The Act of 1850 also provided for the binding out to labor of Indian minors, boys under eighteen, girls under fifteen years of age. Whenever an Indian was convicted of an offense punishable by fine "any white person" might, with the consent of the justice, give bond for the Indian's payment of the fine and costs, "and in such case the Indian shall be compelled to work for the person so bailing", until the fine was paid, at a rate for such labor fixed by the justice. The final section of the act gave any resident citizen of the county the right to complain of

> "any Indian able to work and support himself in some honest calling, not having wherewithal to maintain himself, who shall be found loitering and strolling about, or frequenting public places where liquors are sold, begging or leading an immoral and profligate life";

upon conviction of vagrancy such Indian, unless he could give bond, with good security, that for the next twelve months he would behave himself and "betake to some honest employment for support", was to be hired out

> "within twenty-four hours to the best bidder for any term not exceeding four months".

Such bonded Indians, minors and adults, were to be treated humanely, and properly clothed and fed.[44]

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[41] Cal. Stats. 1850, p. 230; Cal. Stats. 1851, p. 114; Cal. Stats. 1854, p. 67; Cal. Stats. 1861, p. 522; Cal. Stats. 1863, pp. 60, 69.

[42] U. S. v. Ritchie, 58 U. S. (17 How.) 525, 540.

[43] Cal. Stats. 1851, p. 114. One-half was later required.

[44] Cal. Stats. 1850, pp. 408-10. Vagrancy among Indians was doubtless somewhat of an evil in the early fifties, but from the standpoint of the Americans in California a prevailing scarcity of labor was as certainly an evil yet greater. The zeal against the immoral and profligate Indian, who "loitered and strolled about", while so much wealth for the moral and temperate white man awaited development, was not of unmixed righteousness.

Subsequent acts show a continuing interest in minors and idle adults. A statute of 1855 against vagrancy, directed against

"All persons who are commonly known as 'Greasers' or the issue of Spanish and Indian blood, who are vagrants, etc."

is couched in terms abusive, rather than properly descriptive of the offences aimed at.[45] The field of Indians who could be indentured was extended in 1860, so that any person could apply for articles binding available Indian minors, or any Indian adults who were prisoners of war or vagrants, to work for him in trades or in husbandry; boys under fourteen years could be bound until they were twenty-five; those over fourteen until thirty; girls under and over fourteen until they were twenty-one and twenty-five years respectively.[46]

The list of early discriminatory statutes could be extended, but to no purpose.[47] Enough has been said to indicate what the legal status of the Indian was in the California of the fifties and sixties, without touching upon the treatment meted to him outside the law. The legislation affecting him reflects the pioneer spirit, one of whose necessary virtues is ruthlessness toward any element, human or other, which may be thought to endanger the new community. The swift economic development of California was bought at a certain cost of human values. It was the Indian who paid the price.[48]

It ill accorded with the indignation, so lately expressed by American delegates in the Convention at Monterey, against Mexican peonage.

This act of 1850 for the government and protection of Indians has never been repealed *in toto*, and the Code Commissioners feel constrained to mention it recurrently. "It is probably not in force in any particular. In the absence of direct legislation, it is deemed advisable to call attention to it". Deering's General Laws (1923) Act 3578. It ought, of course, to be expressly repealed, in order to clear, however belatedly, a somewhat unsavory record.

[45] Cal. Stats. 1855, p. 217; language amended, Cal. Stats. 1856, p. 32.

[46] Cal. Stats. 1860, p. 196; repealed, Cal. Stats. 1863, p. 747.

[47] The prohibition, under severe penalty, of the sale or gift of firearms to an Indian, was a precautionary measure that doubtless seemed essential at the time. Cal. Stats. 1854, p. 24; Penal Code, § 398. Repealed, Cal. Stats. 1913, p. 57. But it was double edged to the Indian to whom hunting was both an occupation and a necessity, and to whom game, after the whites had scattered it by the use of firearms, was now beyond easy reach of bow and arrow.

A sequence of other statutes either wholly closed, or in various ways limited, entrance of Indian children to the public schools, at all times save in the period 1880-1903. Cal. Stats. 1863, p. 210; Cal. Stats. 1863-4, p. 213; Cal. Stats. 1865-6,p. 398; Cal. Stats. 1869-70, p. 839; Pol. Code (1872) § 1669; Code Am'dm'ts, 1873-4, p. 97; Ward v. Flood (1874) 48 Cal. 36; Code Am'dm'ts, 1880, p. 38, § 26, p. 47, n. 62; Tape v. Hurley (1885) 66 Cal. 473; Wysinger v. Crookshank (1890) 82 Cal. 588; Cal. Stats. 1903, p. 86; Cal. Stats. 1909, p. 86; Pol. Code, § 1662.

Curiously enough, the Indian's intermarriage with the white race was at no time forbidden, though express laws were raised against the admixture of negro and Oriental blood with that of whites.

[48] "It has been the melancholy fate of the California Indians to be more

THE UNITED STATES SENATE AND THE LOST TREATIES

Upon the admission of California into the Union, Washington sought to exercise its guardianship over the Indians of the new state. That it failed adequately to protect them was doubtless in part due to the factor of geographical remoteness, as much as to the executive inertia of the pre-bellum administrations. However, it must be admitted that the opposition of the American settlers of California was from the outset the decisive factor.

The fee simple to lands obtained by conquest, cession, or purchase rests in the sovereign, the United States. But the right of the Indian to a continued occupancy of the lands he has tilled or roamed has been universally recognized throughout our history.[49] Upon the acquisition of new territory the practice has been to make treaties with the Indian tribes, by whose terms the latter agree to keep the peace, surrender their right to an unrestricted nomadic existence, and accept a position of tutelage. In return, the wards are assured of definite reservations, where they may live safe from the encroachments of squatters, and of certain minimum items of aid, measured in health and educational services, and in money, cattle, tools and agricultural implements.

This course was followed in California. Commissioners appointed in 1850 by President Fillmore in the course of the next year negotiated eighteen treaties, along these lines, with 119 Indian tribes or bands of California, substantially affecting the whole state. The Indians surrendered their general claim of occupancy, covering the major part of the state, in return for specific reservations aggregating 7,500,000 acres, and certain stock and implements.

The treaties were sent to the Senate on June 1st, 1852, with the President's recommendation that they be confirmed. American California, however, had already been heard from. Its Senate, after

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vilified and less understood than any other of the American aborigines. They were once probably the most contented and happy race on the continent, in proportion to their capacities for enjoyment, and they have been more miserably corrupted and destroyed than any other tribes within the Union. They were certainly the most populous, and dwelt beneath the most genial heavens, and amidst the most abundant natural productions, and they were swept away with the most swift and cruel extermination." 3 Stephen Powers, Contributions to North American Anthropology (1887) (U. S. Geographical and Geological Survey) p. 400.

[49] "The Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred, or, as sometimes expressed, as sacred as the fee of the United States in the same lands." Lone Wolf v. Hitchcock (1903) 187 U. S. 553, 564, 47 L. Ed. 299, 23 Sup. Ct. Rep. 216.

considering reports from a special committee on the Indian treaties, had by a large majority adopted several resolutions, whereof one

> "RESOLVED, That our Senators in Congress be instructed to oppose the confirmation of any and all treaties with Indians of the State of California, granting to Indians an exclusive right to occupy any of the public lands of the State",

and others requested the federal government to remove the Indians bodily from the state in pursuance of a policy "conceived in wisdom and dictated by humanity".[50]

The resolutions do not appear to have been finally acted upon by the Assembly,[51] but there can hardly be any doubt that they expressed the attitude of the majority of pioneer Californians, or that that majority made itself felt at Washington.

In Washington, at that moment, California's Senators held the balance of power in the nice adjustment between Whigs and Democrats. The natural result followed. On July 8th, 1852, the Senate rejected the treaties.[52]

However, the rejection of the treaties did not restore in fact the *status quo*. Although the consideration for which the Indians bargained had failed, the land to which they had surrendered all claim was forthwith surveyed by the United States, and was gradually homesteaded and patented. The reservations provided by the rejected treaties were similarly treated as part of the public domain and opened to entry. As the land was gradually taken up by the settlers, the Indians were scattered and driven to the hills. Many years later, out of the remaining and less desirable public land, small executive-order reservations, in the main wholly inadequate as to acreage, soil and water, have been set aside for the use of approximately one-third of the remaining Indians.[53] Unable in

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[50] Senate Journal, 1852, pp. 600, 197-8 (Minority report, p. 602). Cf. Cal. Stats. 1862, p. 604.

[51] Assembly Journal, 1852, p. 519.

[52] The rejected treaties were by the Senate ordered into secret file, and remained there for fifty-three years. Hence the term "lost", popularly accorded them. On January 18th, 1905, the injunction of secrecy was removed. Fifty-first Annual Report of Board of Indian Commissioners (1920) p. 39-62.

[53] Of this inadequate land there are 517,000 acres in California, much of it waterless or on rocky mountain slopes, as against the 7,500,000 provided in the lost treaties. The California Indians average 32 reserved acres per capita, as against the following: Nevada, 127; Oregon, 260; Washington, 245; Arizona, 440; Montana, 500, and Utah, 1,025 acres per capita. The only two approximately adequate reservations (Hoopa Valley and Round Valley) were obtained by Indians who took up arms and fought against the aggressions of white settlers. Fifty-first Annual Report of Board of Indian Commissioners (1920) pp. 46-7..

the main to make a living on this poor land the occupants usually hire out for wages.

The present status of the California Indian cannot be understood save in the light of this incident of the "lost treaties". Could he have had, as did nearly all other Indians with whom the United States has dealt, the security of the promised reservations, he might have escaped decimation and dispersion at the hands of the sudden host of American settlers. As it was, that slim chance was denied him. The seventeen thousand who survive bear the marks of three generations of fundamental insecurity.[54]

Moreover, the principle that from him that hath not, even that he hath shall be taken away, applies forcibly to this remnant. The Indians of California, unlike many of their brethren to the east of the Sierras, having no splendid estate calling for departmental administration, no large tribal funds demanding investment, no treaties specifying the minimum of governmental assistance to which they are entitled, have definitely been and still are, beyond all other Indians, step-children of the Great White Father at Washington. They are the neediest of their race, and yet they receive, in educational and health services, and in more direct aid, far less per capita than the average throughout the country.[55]

It is necessary to mention these political facts,[56] in order to elucidate the difference between the legal status of the Indian in California, as a federal ward, as declared by the Supreme Court of the United States, and his actual status, as that wardship is administered. Theoretically, the Indian is as cherished in California, by the federal government, as any in the country. Even when the state admits him to citizenship, to state schools and other social

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[54] "The principal cause of the appallingly great and rapid decrease in the Indians of California is not, in my judgment, the number directly slain by the whites, or the number directly killed by whiskey and disease, but a much more subtle and dreadful thing: it is the gradual but progressive and relentless confiscation of their lands and homes, in consequence of which they are forced to seek refuge in remote and barren localities, often far from water, usually with an impoverished supply of food, and not infrequently in places where the winter climate is too severe for their enfeebled constitutions." C. Hart Merriam, op. cit. p. 606.

[55] Annual expenditure, fiscal year 1923-4: California Indians, $29.00 per capita; for all Indians in the United States, $40.00 per capita, or, eliminating Indians who have been fee-simple allotted and so largely released from federal guardianship, $66.00 per capita. (California Indians have not been fee-simple allotted.) Commonwealth Club of California, Indian Section, May, 1925, computations (unpublished) based on Indian Bureau figures in official reports.

[56] ". . . . . our Indians. He who tries to fix and express their legal status finds very soon that he is dealing chiefly with their political condition, so little of any legal status at all have Indians". James B. Thayer, op. cit. p. 540.

services, he remains in law a favored ward of the United Statts.[57] This theoretical status, created at a time when the local populations were hostile to the Indian and the federal government was, potentially at least, the active guardian of his welfare,[58] survives in an instance where the guardian is indisputably slothful and the state is at least more indifferent than inimical.

THE MISSION INDIANS AND THE SUPREME COURT OF THE UNITED STATES

In the long run, the Mission Indians who were in occupation of lands covered by Spanish or Mexican grants—most of them containing express reservations in favor of the Indians in occupancy—fared no better. Many of these grants were uncertain in extent, some of them were incomplete as to title, a few were of questionable validity. Squatters took advantage of these uncertainties, and the resulting confusion called for a remedy.

Congress in 1851 enacted a law, similar to those passed after the Florida and the Louisiana Purchases, which required all claimants to land within the state to present, within a given time, their claims for confirmation to a board of land commissioners.[59] The patents of the United States, issued upon the findings of that land board, are the basis today of all those titles whose history antedates the American occupation of California. Not all the Hispanic grants, however, were presented for confirmation. Many grantees failed to act within the period specified by the statute, in reliance upon their complete titles from Spain or Mexico and in the belief that only contested or imperfect or inchoate titles were required to be presented. In this view they were long upheld by the state courts.[60]

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[57] Cramer v. United States (1923) 261 U. S. 219, 67 L. Ed. 622, 43 Sup. Ct. Rep. 342.

[58] "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." U. S. v. Kagama, 118 U. S. 375, 383-4. (Italics the court's.)

[59] 9 U. S. Stats. at L. pp. 631-4, U. S. Rev. Stats. § 658, "And be it further enacted, That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said Commissioners. . . ."

From the findings of the land board appeal lay to the federal District Court, and thence to the Supreme Court of the United States (§§ 9 and 10).

[60] Phelan v. Poyoreno (1887) 74 Cal. 448, 13 Pac. 681, 16 Pac. 241;

The Mission Indians were similarly inactive. The rights of many were customary, derived from a long permissive tenure; the majority were protected not by direct grants to themselves but by conditions expressed in grants to others. If any Indians took thought upon the matter they may well have concluded that since they were now wards of the United States their guardian would take such steps as were necessary to safeguard their rights.

These rights were first tested in the state courts. It was held that the federal statute of 1851 applied to the possessory rights of Indians in general, and that where no claim whatever had been presented to the land board by the grantee of the land, the Indians' right of occupation, which in a measure depended upon that particular grant, was also barred.[61] But where the land was covered by a grant which specifically reserved the Indian right of occupancy, and such grant was presented to the land commissioners and confirmed to the owner of the fee simple, it was held that the confirmatory patent of the United States, even though it made no mention of reserved Indian rights, could not be construed to destroy the right of occupancy.[62]

More than forty years after the American occupation the question was first presented to the highest tribunal.[63] Its interpretation of the statute of 1851 was stricter than that of the California court. It held that all claims, without exception, whether to title or to occupancy, ought to have been presented for confirmation, and that failing presentation and confirmation they were barred. Thereupon the state court felt constrained to overrule its earlier decision in favor of the Indian right of occupancy.[64] The dissent of three of the members of the court is worth quoting:

> "I do not think that they were required to present their claims to the land commission, or that they are even to be charged with knowing that there was such a commission, or with a knowledge of the law generally. They are mere wards of the nation, and it is to be presumed that the nation has always recognized and protected their customary rights, and that all its grants are made with the understanding that the grantees know those rights, and take subject to them."[65]

Dominguez v. Botiller (1887) 74 Cal. 457; Minturn v. Brower (1864) 24 Cal. 644.

[61] Thompson v. Doaksum (1886) 68 Cal. 593, 10 Pac. 199.

[62] Byrne v. Alas (1888) 74 Cal. 628, 16 Pac. 523.

[63] Botiller v. Dominguez (1889) 130 U. S. 238, 32 L. Ed. 926, 9 Sup. Ct. Rep. 525.

[64] Harvey v. Baker (1899) 126 Cal. 262, 58 Pac. 692, affirmed (1901) 181 U. S. 481, 45 L. Ed. 963, 21 Sup. Ct. Rep. 690.

[65] 126 Cal. 262, 279.

Since that time the severe doctrine of Botiller v. Dominguez has been rigidly adhered to. Our own days have seen one substantial remnant of the Mission Indians expelled from the land they peaceably occupied under Spanish and Mexican dispensations and, for some seventy-five years, under American rule.[66]

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(To be concluded)

[66] U. S. v. Title Ins. Co. (1924) 265 U. S. 472, 68 L. Ed. 1110, 44 Sup. Ct. Rep. 621. Cf. same case (1923) 288 Fed. 821.