

Many Indians mentioned that Congress designates a certain portion of the Indian appropriation "for civilization purposes." They have their own theories as to how the not-yet-achieved end may be hastened. Their pessimism as to the acceptance by the government of any Indian ideas which involve real innovation or reconstruction makes them contend that in coöperation with their brothers on the reservation they must seek by group action and expression to correct certain existing wrongs. The objectives most frequently set forth may be listed without discussion of their merits:

1. Set aside the present denial of the Indian's right to a dignified means of presenting to the agency or department his views and problems on matters affecting his welfare.
2. Prevent the very general courtesy, harshness, and unsympathetic attitude on the part of agency employees.
3. Break down the refusal to explain to Indians the uncomprehended procedures and inconsistent policies subject to arbitrary reversal.
4. Secure a determination of general or individual enrollment rights, without Indians being saddled with court costs, and with such decisiveness that the arbitrary charges and reversals of the government in the past may not reoccur, and this by some other means than the government's present proposal that Indians incur the expense of legal counsel so that the government may ascertain the Indian's legal status and the accuracy of government solicitors' opinions heretofore accepted by the government and sometimes later set aside.
5. Do away with the present practice of forcing the Indians to lease land they desire to farm; or at least prevent leases and grazing permits at less than current rates in the same locality.
6. Demand reliable bondsmen of lessors and provide for adequate procedures to collect bond for breach of contract.
7. Secure the restriction of non-Indian cattle to the designated leased area so as to prevent devastation of Indian ranges, and authorize the sale of predatory horses that consume Indian ranges.

CHAPTER XIII

LEGAL ASPECTS OF THE INDIAN PROBLEM

The study of the legal aspects of the Indian problem has been confined to broad matters having an important bearing on the social and economic conditions of the Indians. The major findings and recommendations will be briefly presented at the outset and will be followed by the more detailed considerations.

The present situation with respect to the maintenance of order and the administration of justice among restricted Indians on the reservation is unsatisfactory. The United States courts have jurisdiction over them with respect only to certain crimes specifically designated by Congress. Other crimes and misdemeanors if punishable at all are under the jurisdiction of the Courts of Indian Offenses or of the superintendent if no such court has been established. In some instances the state courts have assumed some jurisdiction over restricted Indians, but generally they have withdrawn when their jurisdiction has been challenged. The situation has been briefly characterized by an Idaho court as "government in spots."

The subject of marriage and divorce has been left without statutory regulation, except that children of marriages by Indian custom are declared legitimate for purposes of inheritance. The old Indian tribal forms and tribal morality have apparently largely disappeared, and the present situation among the younger Indians seems to be one of freedom which may at times lead to license. At present the main restraining influences appear to be the Courts of Indian Offenses and the superintendents, who use such powers and persuasion as they possess.

Such great differences exist among the several jurisdictions with respect to such vital matters as the degree of economic and social advancement of the Indians, their homogeneity, and their proximity to white civilization, that no specific act of Congress either conferring jurisdiction on state courts or providing a legal code and placing jurisdiction in the United States courts appears practicable. The law and the system of judicial administration, to be

effective, must be specially adapted to the particular jurisdiction where they are to be applied, and they must be susceptible of change to meet changing conditions until the Indians are ready to merge into the general population and be subject like other inhabitants to the ordinary national and state laws administered by the United States and state courts exercising their normal jurisdiction.

The questions of how far the Indians in a given jurisdiction have advanced, of what body of law relating to domestic relations and crimes and misdemeanors is best suited to their existing state of development and of what courts can best administer these laws are too minute and too subject to change to warrant a recommendation that Congress attempt to legislate in detail for each jurisdiction.

The situation is clearly one where the best results can be secured if Congress will delegate its legislative authority through a general act to an appropriate agency, giving that agency power to classify the several jurisdictions and to provide for each class so established an appropriate body of law and a suitable court system. The power should also be given that agency from time to time to advance the classification of any jurisdiction and to modify either the law or the court organization insofar as they are made by the agency and not by state law or act of Congress. The actions of the agency with respect to this authority should be given full publicity by suitable proclamations, orders, or regulations.

The officer with final authority to promulgate the decisions should probably be either the Secretary of the Interior or the President of the United States. The detailed study and investigation and the recommendations should originate in the Indian Service. The perfecting of this system should be one of the major projects of the recommended Division of Planning and Development.

Many Indians have so far advanced that they safely may be made subject to the law of the states wherein they reside with respect to crimes, misdemeanors, and domestic relations. Where the local courts would be impartial, open to the Indians, and easily accessible, there is no reason why justice should not be administered for Indians in such courts. Even among these Indians the national government may still have to provide for law and enforcement officers, either by coöperation with the states, or by supplying its own, and it will also have to arrange for legal aid for Indians

so that the requirements of law will be observed in matters such as divorce. After a group has once been placed fully under the state jurisdiction, it should remain there.

But even where the Indians of this class have so far advanced that the laws of the state wherein they reside may be applied to them, conditions may be such as not to warrant the placing of jurisdiction in the state courts. Investigations may disclose one or more of the following reasons for not placing the administration in the state courts: (1) The state is not willing to assume the responsibility; (2) the state courts are so remote from the Indians that the procedure is impracticable; or (3) the local sentiment toward Indians in the communities where the state or county courts are located is so hostile or so indifferent to their social and moral conditions that Indians would either get an unfair trial or no trial at all. In this class of jurisdictions, serious cases should be brought before the regular United States courts and minor offenses before such special inferior courts as may seem best adapted to the conditions in the particular jurisdiction. The power to establish appropriate special inferior courts should be vested in the agency to which Congress delegates its authority. They might be either Indian courts or special justices appointed through the United States courts.

The second class should consist of those jurisdictions where the Indians have not advanced sufficiently to warrant the extension to them of the state laws. In these jurisdictions the Court of Indian Offenses should be continued much in the present form, but strengthened by better qualified social workers, industrial leaders, and others among the government employees. In a large measure it should continue to be a court of common sense, determining both the law and the fact and to a reasonable degree the penalty. Either the Indian offender or the superintendent, however, should have the right to have the case transferred to the United States court or to the state court if the state court is available. If the case is thus transferred to a United States court, it would seem that the court should apply federal law if the offense is one for which Congress has made special provision, but that if it is one not covered by federal statute the state law should be applied. If the case is transferred to a state court, the state law in its entirety should be applied. It is not believed that the Indian will often apply for a

transfer of a case. The superintendent should ask for a transfer in all cases where the United States court now has jurisdiction and in other cases where the offense is serious or where the defendant has often been before the Court of Indian Offenses and is not influenced by it.

In this class of jurisdictions the state law of marriage and divorce cannot well be applied in detail, but the effort should be made to educate the Indians toward its observance, since family continuity is a matter that is more effectively controlled indirectly by public opinion than directly by law. Marriages should be registered at the agency or one of its sub-divisions, a certificate of marriage issued and a marriage register kept. The Court of Indian Offenses should have jurisdiction to grant divorces on such grounds as it sees fit. The object should be not so much to change speedily and rigorously the Indians' customs and standards of morals as gradually to educate them to an understanding of the fact that these are matters in which the civilized state has an interest and that untrammelled license means some trouble. In such jurisdictions the Indian Court might well impose a slight penalty for failure to comply with the simple, easily performed requirement to register marriage.

The Rio Grande Pueblos, and possibly some other special groups, on detailed study may be found to require peculiar treatment. The general law recommended should give the executive agency to which Congress delegates its power authority to establish a system of law and administration adapted to local conditions. Careful study will be necessary to determine the facts and to devise the system.

The survey staff found no evidence that warrants a conclusion that the government of the United States can at any time in the near future relinquish its guardianship over the property of restricted Indians secured to the Indians by government action. Although the staff believes in the transfer of the activities relating to the promotion of health, education, and social and economic advancement of the Indians to the several states as rapidly as the states are ready effectively to perform these tasks, it is of the opinion that the guardianship of property should be the last duty thus transferred if it is transferred at all.

The legal staff of the Indian Service charged with the duty of protecting Indian rights should be materially strengthened and should be authorized to act more directly. The Service should have one high position for a general counsel or solicitor who should be directly in charge of the legal work of the Service under the general direction of the Commissioner. It should have an adequate number of either full or part-time attorneys in the field in close touch with the several jurisdictions, who may give prompt and energetic attention to matters involving Indian rights. Although the United States district attorneys will doubtless still have to be generally responsible for the actual conduct of cases involving Indian rights, they should be aided and assisted by these local attorneys of the Indian Service, who should be held primarily responsible for the full and detailed preparation of the cases.

In cases where the Indian is poor and unable himself to pay court costs and attorneys fees, he should be aided by these attorneys and money should be made available to meet necessary costs. Indians who have sufficient funds of their own should be required to pay costs, and if they prefer to retain attorneys of their own choice in individual suits should be permitted to do so.

The attitude of the Indian Service as a whole, and especially of its legal department, should invariably be that its duty is to protect to the utmost the rights and interests of the Indians. Even if some of the officers believe that the Indian's opponent has in some respects a meritorious case, the Service itself should be extremely slow in effecting any compromise. As a guardian or trustee, its compromise should properly be acceptable to the court and subject to its approval. It would seem, as an almost invariable rule, much safer to carry the litigation through and to let a duly constituted court make the decision rather than for the Service itself to compromise without court action.

The facts apparently abundantly justify the present legislation which vests in the Interior Department the function of passing upon wills and the administration of estates of restricted Indians. In the main part of this report detailed suggestions are made regarding procedure which need not be summarized here.

The legislation releasing certain of the Indians of the Five Civilized Tribes of Oklahoma from restrictions and giving the Oklahoma courts jurisdiction over the administration of the estates

of deceased Indians and the power to appoint guardians was unquestionably premature and has resulted most disastrously. The restrictions still remaining should be continued after 1931 for a considerable period. Sufficient authority already exists to permit the department to release individual competent Indians from restrictions.

Fortunately evidence tends to show an awakening public conscience in Oklahoma, and the state courts are probably furnishing the Indians greater protection than in the past. The situation is, however, far from satisfactory. It is recommended that the duties and functions of the government probate attorneys among the Five Civilized Tribes be materially increased and made a strong organization for the effective protection of the rights and interests of these Indians and that further safeguards be provided for the Indians who lease their lands.

Many tribal claims are in process of adjudication, but some have not yet reached the preliminary stage of being approved by Congress for presentation to the Court of Claims. It is extremely important that all claims be settled at the earliest possible date. It is therefore recommended that a special commission be appointed to study the remaining claims and to submit recommendations to the Secretary of the Interior regarding their merits, so that those which are meritorious may be submitted to Congress with a draft of a suitable bill authorizing their settlement before the Court of Claims.

The Volume and Complexity of Indian Law. The law governing Indians in the United States is exceptionally voluminous and complex. The explanation of this fact lies in the history of the relations of the national government to the several Indian tribes.¹ In the colonial period and in the period of national government prior to 1871, the Indian tribes, or groups of affiliated tribes, were

¹ For a recently prepared brief history of the administration of Indian affairs, see Schmeckebier, *The Office of Indian Affairs*, pp. 1-60. This monograph also includes as Appendix 5 (pp. 397-508) a classified compilation of such laws as relate to the organization of Indian affairs, the duties of officers of the government, and the general rights, privileges, and restrictions of the Indians in force July 1, 1927. The full text of the appropriation act for 1928, insofar as it relates to Indian affairs, is included. No laws relating to particular tribes or reservations have been included.

treated as separate and distinct, though subordinate nations. Agreements were entered into with them through formal treaties, which were passed by the Senate of the United States in substantially the same manner as were treaties with foreign nations. In 1867, the House of Representatives gave notice of its objection to this procedure, which tended to limit its functions in respect to the administration of Indian affairs, and in 1871 the treaty period ended. Subsequently, legislative action was taken through the ordinary congressional procedure for public bills.

The treaty period had, however, laid a distinctive legal foundation for each of the several tribes or affiliated tribes which had to be recognized in subsequent legislation. Thus, even today, Congress has to consider many different bills relating to Indian affairs, some of them applying to only a few hundred Indians, and the annual appropriation act contains many sections which have fairly remote historical origins.

The treaties, laws, executive orders, and proclamations relating to Indians up to December 1, 1912, fill three substantial volumes in Mr. Charles J. Kappler's compilation entitled "Indian Affairs: Laws and Treaties." Several volumes and pamphlets are required to cover the subsequent legislation, executive orders, and regulations.

Serious question must be raised as to the wisdom of permitting all this diversity and complexity to continue indefinitely. It throws an enormous burden on all three branches of the national government, the legislative, the executive, and the judicial, and must be exceedingly confusing to Indians who seek to know their status. At present any effort at codification would doubtless be premature, as many Indian tribes still have outstanding unsettled claims against the government which perhaps generally have their origin in old treaties. The question of these claims is considered at length in a later part of the present chapter, where it is recommended that they be disposed of at the earliest possible date so that the Indians may know where they stand and settle down to a reasonably well defined economic situation, free from the uncertainties arising from the existence of material unsettled claims. An added argument in favor of early action is that it would pave the way for a great simplification in the administration of Indian affairs. With these claims

largely out of the way, it would seem practicable for a specially appointed commission, after considerable arduous labor, to effect a codification of law relating to Indians which will be at once reasonably simple and well adapted to modern conditions. Many archaic provisions relating to special tribes can be eliminated, and the whole problem placed on a more workable basis. Conceivably a situation might be created whereby Congress could confine its own work with respect to Indian legislation to broad matters of general policy, leaving to the executive branch of the government the matters of detail. To a certain extent such a procedure has already been followed, but an examination of a recent report by the chairman of the House Committee on Indian Affairs² shows clearly that Congress is at present called upon to consider a mass of detailed provisions regarding Indian affairs to which few Congressmen outside of the Committee on Indian Affairs can give much attention, and even the members of the committee must often depend for advice and information largely on the executive branch of the government.

The Scope of the Survey's Legal Work. The present survey has not itself attempted to give detailed consideration to this great body of existing law relating to the several Indian tribes. A commission to undertake such an examination and a codification would have to be almost as large as the present survey staff and would have to give more time to the work than the survey has spent in its entire program. Such a commission, too, would have to have authority to negotiate with the several Indian tribes to agree on a basis for terminating some of the existing rights of the Indians that are carried over from ancient treaties and are now of little value in a program for the advancement of the Indians. Some of these rights hark back to the days when the policy of rationing was at its height.³

² Congressional Record, March 2, 1927.

³ An act of Congress, approved April 30, 1908 (35 Stat. L., 73), authorized the Commissioner of Indian Affairs to negotiate with the several tribes for the purpose of terminating the annuities agreed upon in the treaties by crediting a lump sum to the credit of the tribal funds, subject to approval by Congress. Some of the annuities have been paid but several are still in force. (See Schmeckebier, p. 195.) One of the oldest remaining is that in the

The policy of the survey has been to confine its activities in the legal field to those matters which affect primarily the general social and economic status of the Indians and throw light upon the broad general administrative problems of the service.

The first question to be briefly discussed will be that of citizenship, not because it is regarded as the most essential legal matter involving the social and economic conditions of the Indians but because the legal import of citizenship appears not generally understood. Much confusion appears to exist in the public mind and among the Indians as to what legally results from the status of a citizen.

The second subject to be considered is the highly important one from the social standpoint of the maintenance of order and the administration of justice among the Indians. Under this general heading will be taken up not only the criminal law and criminal

treaty made on November 11, 1794, with the Six Nations of New York. The provision for an annuity in this treaty reads as follows:

"In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792; (it appears that this treaty was never ratified by the Senate), making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the Superintendent appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid."

Other provisions regarding supplying special types of employees, such as blacksmiths and maintaining schools and teachers, are still in effect. In some instances blacksmiths may no longer be needed and the Indian children might be better and more economically educated in public schools. A commission to modernize the existing law would have to have an authority similar to that given the Commissioner of Indian Affairs in the effort to abolish annuity programs.

procedure, but also the closely related field of domestic relations, because a breach of the law relating to domestic relations is so generally under the American legal system a punishable offense. Since the Courts of Indian Offenses, established under the regulation of the Service and supported by appropriations⁴ by Congress, do not distinguish between the criminal law, and the law of torts, and the law of contracts, it has seemed simpler to consider these subjects more or less together, rather than to adhere to a more orthodox legalistic arrangement that would necessitate considerable duplication and would be largely artificial insofar as the majority of Indians under the jurisdiction of the government are concerned.

The third broad subject to be considered from the legal standpoint relates to the activities of the government as guardian and trustee of Indian property. Under this broad heading will be taken up the administrative questions of the conservation of Indian interests by legal action, the administration of the estates of deceased Indians, and the highly important immediate question of the taxation of lands purchased by the government for the Indians through the use of the Indians' restricted funds. Two matters relating to special groups of Indians will also be considered under this general subject, the administration of the property interests of the Five Civilized Tribes in Oklahoma and the work of the Pueblo Land Board in New Mexico.

The last broad subject to be treated is that of Indian tribal claims against the government. No effort has been made to determine the merits of the several claims, since such an undertaking is far beyond the scope of the present survey and would require years of work with an enormous mass of detail, as is clearly shown in the subsequent discussion of such claims. The question of these claims is considered only from the standpoint of legal administration.

Citizenship. Congress by the act of June 2, 1924 (43 Stat. L., 253), conferred citizenship on all Indians born within the territorial limits of the United States, so that at present all Indians born in this country are citizens of the United States. Many Indians had, however, secured citizenship long before that act. The general allotment act, generally known as the Dawes Act, approved February 8, 1887 (24 Stat. L., 338), had provided that complete

citizenship be conferred upon all Indians to whom allotments were made in accordance with the act and declared those citizen Indians subject to state and territorial laws. Citizenship was also conferred on any Indian born within the territorial limits of the United States, "who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life." On May 8, 1906, the Burke Act (34 Stat. L., 182) was approved which changed the provision of the Dawes Act respecting citizenship. Instead of becoming a citizen at the time an allotment was first made, the Indian became a citizen only after the fee patent was granted. By the act of March 3, 1901 (31 Stat. L., 1447), citizenship was conferred on all Indians in the Indian Territory. Thus it is apparent that many Indians were already citizens at the time of the passage of the blanket act of 1924 declaring all Indians born in the United States citizens.

Citizenship Not Incompatible with Guardianship and Special Legislation. Although prior to the passage of this recent act citizenship was often associated with the possession of a property right, a trust patent under the Dawes Act or a fee patent under the Burke Act, legally there is no intrinsic relation between the two. Citizenship is a personal and political right, whereas title to land either in trust or in fee is a property right. The Supreme Court of the United States has held, moreover:

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.⁴

This decision clearly is in accordance with the law as it is applied to white citizens. Among whites the fact of citizenship does not preclude guardianship, nor does it give unlimited control over any property the title to which is vested in the citizen. Children under legal age are citizens, but they cannot sell their property or enter into a valid contract. Many adult citizens are in different ways deprived of their control over their property either by court action or by the action of the persons through whom they received their

⁴ *United States v. Nice*, 241 U. S. 598 (1916).

property. The status of the restricted citizen Indian with respect to his property secured through the government is like that of a citizen child with respect to his, except that under existing law the Indian may be declared competent and thereby be given full control. It should be noted, moreover, that this restfiction applies only to property secured to the Indian by governmental action. It does not apply to property secured by the Indian for himself through his own efforts. He ordinarily has complete control of his own earnings and of any property purchased with his earnings. In this respect, too, the position of the Indian is similar to the beneficiary through the acts of others, unless through court action a person is declared incompetent to manage his own property.

This decision that citizenship and continued guardianship are not incompatible is not only sound law, it is also sound economic and social policy. In matters pertaining to the ownership and control of property many Indians are in fact children despite their age, and real friends of the Indians can best serve them by having guardianship continued until the Indians through training and experience reach a maturity of judgment which will permit them to control their own property with a reasonable chance of success.

Citizenship and Control of Indian Property by Courts. At this point consideration should perhaps be given the argument that since the Indians are now citizens, the function of administering their property held in trust should be taken away from the Indian Service and the Interior Department and be vested in the courts. The courts, it is argued, have power to appoint guardians for ordinary citizens and to review and, to a certain extent, to control the activities of trustees for such citizens, why should not the courts exercise the same functions for the restricted Indians, thereby releasing them from the guardianship of the Indian Service?

This argument, in the judgment of the survey staff, fails to give full consideration to the administrative problems involved.

The evidence, as has been said, abundantly justifies the conclusion that for thousands of restricted Indians trusteeship and guardianship are still necessary and will be necessary for many years to come. If the United States courts should attempt to deal directly with each individual restricted Indian and to appoint special guardians and trustees for him, they would be completely swamped by the volume of the detailed business. Many of the

estates involved, too, are so small that the expenses of guardians and trustees and of court action could not possibly be met from them. Then, also, the expenses of federal court action would be extremely heavy because the Indians and their property are so remote from the United States courts.

If this jurisdiction should be conferred on the United States courts, apparently the only practicable administrative device would be for the courts to establish a general machinery for guardianship which would closely resemble that now maintained by the Indian Service. Thus the courts would be performing administrative rather than judicial functions.

From the standpoint of economical and efficient administration such a course would be disastrous, because in many jurisdictions the primary difficulties of effective work with Indians are distance and isolation. The courts would either have to appoint the Indian Service employees as guardians and trustees or set up to some extent a duplicate organization, involving an enormous amount of duplication of work, such as travel about the reservation and the maintenance of records and accounts.

In the chapter of this report dealing with general economic conditions the point has been made repeatedly that the trust property of the Indians and their tribal property must be utilized by the Indian Service in advancing the Indians. The restricted property of the Indians and their tribal property are materials to be used in promoting their economic and social advancement. It would be extremely unsound to divide responsibility and authority on theoretical grounds, giving to one agency the guardianship and trusteeship of the property and to another the function of training and stimulating the Indian in the effective economic use of that property. The Indian problem, as has been repeatedly said, is fundamentally a great educational problem. Although for purposes of discussion and consideration it has to be divided into subjects such as health, education, economic conditions, family and social life, and property control, these subjects are only different aspects of the one educational task. The courts could not control one aspect and the executive branch of the government the others without duplication and confusion. The remedy for what is objectionable in the present situation lies not in giving the United States courts jurisdiction over something they are not organized and equipped

to handle but in strengthening the Indian Service so that it can better perform its functions as an educational agency.

The United States courts only have been mentioned in this discussion. Such experiments as have been tried in conferring jurisdiction over Indian property on the state courts have resulted in an exploitation of individual Indians that has no parallel in the administration of the Indian property by the national government. If evidence be required, let anyone contrast the present excellent federal administration of the property of the restricted Osages with the state courts' work among the Five Civilized Tribes or with conditions among the Osages before the passage of recent acts materially strengthening the power of the national government over guardians appointed by state courts.

Political Rights from Citizenship. Citizenship is, as has been said, primarily an individual and political right. It, however, does not carry with it necessarily the right to vote. Prior to the adoption of the Nineteenth Amendment to the Constitution, women in many states were citizens and yet they had no right to vote. The Indian who has been declared a citizen of the United States by statute does not by virtue of that act secure the right to vote in the state in which he resides. With respect to his right to vote he is subject to the state law and must satisfy the requirements of that law before securing the franchise.

In many states the Indians can and do vote. In some of the more sparsely settled Western states, where the Indians form a considerable proportion of the population, their vote is an important factor in closely contested primaries and general elections, and party leaders organize them. Some evidence tends to show that they are appreciative of their political power and are inclined to consider the attitude toward measures in which they are interested, such as tribal claims and water rights. The survey staff, however, made no effort to collect information as to their political affiliation and activities, merely noting what came to the members incidentally.

In at least one state, New Mexico, the state constitution denies to untaxed Indians the right to vote. The act of Congress declaring the Indians citizens of the United States raises sharply the question of the constitutionality of such a provision in any state constitution. Apparently it denies to a citizen of the United States the

right to vote on the ground of race and if so it is in direct conflict with the fifteenth amendment to the Constitution of the United States.

Citizenship Does Not Affect Legal Jurisdiction. Making the Indians citizens of the United States automatically by virtue of the Fourteenth amendment makes them citizens of the state wherein they reside. Except where jurisdiction is conferred upon the United States courts of suits between "citizens of different states," and where the states require citizenship as a qualification for office holding, or sharing in the advantages of the state institutions, such as schools or charities, this fact has but little significance.⁵ In Anglo-American polity civil rights have never been made dependent on political status.

Maintenance of Order and Administration of Justice. The original theory under which the national government proceeded in its relations with the Indians was that they were self-governing communities, with whom the United States dealt only as with nations or tribes and not as with individuals. Intra-tribal matters, including the maintenance of order and the administration of justice, were relinquished to the tribal authorities.⁶ With the intrusion of white settlements, the breaking down of tribal organization, and the subsequent entry of the Indians into the economic and social life of the surrounding white communities, this theory became impossible, and Congress, in the exercise of its paramount authority, found it necessary to extend over the Indians the laws of the white man.

Criminal Law. Early in our history, as an initial step in providing a system of law for the vast domain then occupied by the Indian tribes, Congress extended the federal criminal laws applicable to territory within the exclusive jurisdiction of the United States to include the "Indian country." The theory of tribal autonomy was indicated, however, by excepting from this general extension of law "crimes committed by one Indian against the person or property of another Indian," and cases where the Indian had "been punished by the local law of his tribe."⁷

⁵ See *Piper v. Big Pine School District*, 226 Pac. 926 (Cal. 1924).

⁶ See *Worcester v. Georgia*, 6 Peters (U. S.) 515, 559, 561 (1832); *United States v. Kagama*, 118 U. S. 375, 381, 383 (1886); *United States v. Quiver*, 241 U. S. 602 (1916).

⁷ Code of Laws of the United States, Title 25, Secs. 217-18.

The term "Indian country" has been defined by the courts to include both Indian reservations, whether created by treaty or executive order, and Indian allotments, so long as the title of the United States has not been completely relinquished.⁸ On account of the principle of constitutional law, which emphasizes the equality of the several states and considers that the ordinary civil and criminal jurisdiction of the state extends over the Indian territory within its borders, the above statute has been construed as not to apply to crimes committed by non-Indians in the Indian domain, unless Indian rights and interests are in some way involved.⁹ At various times the federal statutes also made express provision for a few specified crimes committed within Indian reservations, of which the most important had to do with the introduction of intoxicants.¹⁰

A decision of the United States Supreme Court in 1883 to the effect that under the statutes in force at the time the murder of one Indian by another within an Indian reservation was not punishable at all, if not punished by the Indians themselves,¹¹ was the occasion of the passage of what is now Section 548 of the Federal Criminal Code. This section provides that an Indian, who, within the limits of an Indian reservation, commits any one of the eight crimes of murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, burglary, larceny, and arson, shall likewise be subject to the federal statutes relating to such offenses, committed within the exclusive jurisdiction of the United States.¹² Here also the word "reservation" is construed to include unrelinquished

⁸ Donnelly v. United States, 228 U. S. 243 (1913); United States v. Sandoval, 231 U. S. 28 (1913); United States v. Pelican, 232 U. S. 430 (1914).

⁹ United States v. McBratney, 104 U. S. 621 (1881); Draper v. United States, 164 U. S. 240 (1896). In some instances the United States at the time of creating a state reserved to itself complete jurisdiction over Indian reservations, including non-Indians as well as Indians. See the Kansas Indians, 5 Wall. (U. S.) 737 (1867); Hollister v. United States, 145 Fed. 773 (1906).

¹⁰ Code of Laws of the United States, Title 25, Secs. 212-16, 241-53.

¹¹ Ex parte Crow Dog, 109 U. S. 556 (1883).

¹² Code of Laws of the United States, Title 18, Secs. 548, 549. The punishment for the crime of rape may at the discretion of the court be imprisonment instead of death, as is the requirement of the ordinary federal statute on the subject. In South Dakota the federal jurisdiction includes non-Indians as well.

Indian allotments. As a result of this act an Indian who has committed within an Indian reservation one of the above listed felonies, is subject to the jurisdiction of the United States court; if his offence is not included within such list, he is not so subject.¹³

If an Indian, by virtue of the general allotment act,¹⁴ has received a trust patent to his land or, under the Burke Act, a fee patent, he has the benefit of, and becomes subject to, laws both civil and criminal of the state in which he resides. He thus becomes as any other citizen of the state subject to the state laws in most matters, but he is still subject to such laws of the United States relating to Indians as may be passed by Congress in the exercise of its constitutional powers to regulate commerce with the Indian tribes.¹⁵ That the state law extends to all crimes committed by Indians off Indian reservations or restricted allotments, is also clear, but the weight of authority undoubtedly is that if the crime is committed by an Indian on restricted lands, whether it be one of the designated eight felonies or not, the state courts are without jurisdiction;¹⁶ a difficult situation, which the Idaho court has aptly referred to as a "government in spots."¹⁷

From this brief consideration of the existing statutes and decisions it is apparent that there is a great gap in the power of both United States and state courts to punish Indians for committing on Indian lands acts which would be considered in most communities serious public offences.¹⁸ To overcome this unfortunate situa-

¹³ United States v. Quiver, 241 U. S. 602 (1916); United States v. King, 81 Fed. 625 (1897); Ex parte Hart, 157 Fed. 130 (1907) holding, respectively, that the crimes of adultery, assault with intent to rape, and incest are cognizable by the United States courts.

¹⁴ 24 Stat. L., 388, Sec. 6.

¹⁵ United States v. Nice, 241 U. S. 591 (1916).

¹⁶ State v. Condon, 79 Wash. 97 (1914); State v. Columbia George, 39 Ore. 127 (1901); Ex parte Cross, 20 Neb. 417 (1886); Ex parte Van Morore, 221 Fed. 954 (1915); State v. Big Sheep, 75 Mont. 219 (1926); Minnesota v. Campbell, 53 Minn. 354 (1893); In re Blackbird, 109 Fed. 139 (1901); In re Lincoln, 129 Fed. 247 (1904).

¹⁷ State v. Lott, 21 Idaho, 645 (1912).

¹⁸ In the hearing before the House Committee of the Sixty-ninth Congress on H. R. 7826, Assistant Commissioner Merritt listed the following crimes which are unpunishable by state or United States courts when committed by an Indian against an Indian on an Indian reservation: Assault with intent to commit rape, assault with intent to commit great bodily harm, but not with intent to kill or with a dangerous weapon, robbery, mayhem, adultery, malicious mischief, resisting an officer, rescue, forgery, perjury, subornation

tion the national government has created certain Courts of Indian Offenses, presided over by Indian judges, the only statutory authority for which is the various appropriations by Congress for the payment of the salaries of the judges. The only decision sustaining them is that by the District Court of Oregon, rendered nearly forty years ago,¹⁹ in which their authority is said to rest on the general power of the Secretary of the Interior to make rules and regulations for the management of Indian affairs. The regulations under which the courts operate are contained in the archaic regulations of the Indian Office bearing the date 1904.²⁰

Domestic Relations. The domestic relations of the Indians are left almost entirely to their own determination. The courts of the several states, when called upon to consider the validity of marriages and divorces by so-called Indian custom, have almost uniformly upheld them on the theory that the national government has recognized the autonomy of the Indians in such matters and thus removed them from the realm of state law in this respect.²¹ The attitude of the national government is further indicated by the provision in the statutes relating to inheritance of Indian lands; that "whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life, the issue of such cohabitation shall be for the purposes aforesaid taken and deemed to be the legitimate issue

of perjury, receiving stolen goods, kidnapping, fraud, embezzlement, conspiracy, trespass, breaking down fences, disturbing the peace, unlawful cohabitation, fornication, seduction, carnal knowledge, statutory rape, bigamy, polygamy, lewdness, soliciting female for immoral purposes, desertion of wife and family, etc. There is no decision involving a case, in which an Indian has committed crime under the federal statutes outside of the enumerated eight offences, where the injured person was a non-Indian, or where the crime was primarily against the government instead of another person. It is possible that in such a case the extension of the federal criminal laws by Sections 217-18 of Title 25 of the Code of Laws would bring such a crime within the cognizance of the United States courts.

¹⁹ United States v. Clapox, 35 Fed. 575 (1888).

²⁰ In Oklahoma the Indians of the Five Civilized Tribes are under the jurisdiction of the state as far as the responsibility for crime is concerned. With respect to other Indians in the state, they are probably in the same situation as the Indians in our other western states, although the matter does not seem to have been directly adjudicated. See, however, United States v. Ramsey, 46 Sup. Ct. 559 (1926).

²¹ Earl v. Godley, 42 Minn. 361 (1890); La Framboise v. Day, 136 Minn. 239 (1917); Cyr v. Walker, 29 Okla. 281 (1911).

of the Indians so living together.²² Although the courts recognize the extreme informality of Indian marriage and divorce, not every sexual relation constitutes an Indian marriage; the relations between the parties must be continuous and complete and such as is usual between persons lawfully married.²³ The similitude of the Indian custom marriage to the common law marriage of our own judicial polity is indicated by the fact that in Oklahoma, where the state laws apply to the Indians of the Five Civilized Tribes, Indian custom marriages have been sustained as common law marriages under the state law, and divorces many times inferred from the fact of long and continuous separation.

Personal and Property Rights. In spite of the Indian's freedom from the criminal and family laws of the several states, and notwithstanding the guardianship of the national government, he is not precluded from resorting to the state and United States courts to enforce his personal and property rights.²⁴ In order to afford him additional protection, it is provided by federal statute that the United States District Attorney shall represent him in all suits at law or in equity.²⁵ Like all other persons, the Indian may acquire property, may make contracts when not expressly forbidden by the national government in the exercise of its authority as guardian, and may sue in the courts to enforce his rights in connection therewith, as well as to obtain redress for personal injury, or restriction of his liberty.²⁶ It is doubtful, however, when his property is unallotted and still under tribal control, whether the state courts would interfere in disputes between individual Indians concerning such property.²⁷ Different considerations also arise when the controversy concerns property which the United States is holding for him in trust. The federal statute²⁸ allowing any Indian to bring proceedings in the United States District Court to determine his right to

²² Code of Laws of the United States, Title 25, Sec. 371.

²³ Fender v. Segro, 41 Okla. 318 (1913).

²⁴ Missouri Pacific Ry. v. Cullers, 81 Texas 382 (1891); Brown v. Anderson, 61 Okla. 136 (1916); Felix v. Patrick, 145 U. S. 317 (1892).

²⁵ Code of Laws of the United States, Title 25, Sec. 175.

²⁶ Stacy v. Labelle, 99 Wis. 520 (1898); Rubideaux v. Vallie, 12 Kan. 28 (1873); Postoak v. Lee, 46 Okla. 477 (1915); In re Stingeis Estate, 61 Mont. 173 (1921); Bem-Way-Bin-Ness v. Eshelby, 87 Minn. 108 (1902); Rider v. LaClair, 77 Wash. 488 (1914).

²⁷ Peano v. Bremner, 20 S. D. 342 (1906); Mulkins v. Snow, 232 N. Y. 47 (1921); United States v. Seneca Nation, 274 Fed. 946 (1921).

²⁸ Code of Laws of the United States, Title 25, Secs. 345-46.

an allotment of land under the laws of the United States has been held to vest exclusive jurisdiction in such court, so that the state courts may not decide disputes concerning the title to land in which the United States still retains an interest.²⁹ But in spite of this, the individual Indian, or the United States suing in his behalf as guardian, may sue in the state courts in all matters concerning such land if the question of the title obtained by him from the United States is not involved.³⁰

Situation with Respect to Jurisdiction Unsatisfactory. This situation with respect to jurisdiction is undoubtedly unsatisfactory. The Indian race is progressing to a condition where it will soon be required to assume full responsibility in the political, social, and economic affairs of county, state, and nation. The tribal organization, on which was predicated a large measure of Indian self-government, has largely vanished except in some of the pueblos³¹ and in a few other closed reservations. It is unthinkable that in the laws governing these people the important matters of crime and domestic relations should be omitted. Doubt as to the exact jurisdiction of the state and national governments leads, moreover, to uncertainty and confusion. Those cognizant of Indian affairs have often called attention to the situation, and although considerable disagreement exists as to the means to be adopted to remedy conditions, opinion is particularly unanimous that some legislation is needed to correct the present uncertain and unsatisfactory state of affairs.³²

The Economic and Social Conditions Affecting Law and Judicial Administration. Any system of law and administration for the Indians must accord with the character and condition of the

²⁹ Mackay v. Kalyton, 204 U. S. 458 (1907).

³⁰ Felix v. Patrick, 145 U. S. 317 (1892); Tiger v. Western Investment Co., 221 U. S. 286 (1910); Smith v. Mosgrove, 51 Ore. 495 (1908); Fraze v. Piper, 51 Wash. 278 (1908); Blackbody v. Maupin, 38 S. D. 621 (1917); United States v. O'Gorman, 287 Fed. 135 (1923).

³¹ The so-called tribal councils are akin to business committees, concerned chiefly with the preservation and utilization of the tribal resources, and the presentation of grievances arising in the government's administration of Indian affairs.

³² See, for example, the annual reports of many agency superintendents, the annual reports of the Board of Indian Commissioners, the forty-fourth Annual Report of the Indian Rights Association, and the hearing before the Committee on Indian Affairs of the House of Representatives of the Sixty-ninth Congress on H. R. 7826.

people to whom it applies, and this primary consideration makes any uniform solution of the problem impossible. The Indian people vary greatly in the degree to which they have assimilated white customs and standards of living. The Pueblos, Navajos, and Apaches are among those who have retained a large measure of their tribal life, customs, and language, while the Chippewas, Klamaths, Omahas, Yakimas, Winnebagoes, and many of the Indians of Oklahoma are among those who have discarded most of their primitive habits in favor of the typical manner of life of the surrounding white community. Even within the separate tribes vast differences are found between individuals. Many of the older people know no language other than their native tongue and have adopted few of the customs and ideas of the white people, whereas many of the younger Indians have received some education in the schools, speak English reasonably well, and by close contact know intimately the vices as well as the virtues of the Caucasian race. These vast differences have received no formal recognition in law except insofar as trust patents under the Dawes Act or patents in fee under the Burke Act have been given to individual Indians, which action as has been seen, has the effect of removing them in part at least from the jurisdiction of the national government.

A vast difference also exists between the various Indian groups with respect to their geographical, social, and political environment. Certain tribes, such as the Papagoes, Navajos, and Apaches, are homogeneous Indian communities, so isolated as to be fairly free from interference and influence by any surrounding white population. Such Indians as the Pueblos, Menominees, and Crows constitute fairly compact racial groups, but they are contiguous to good sized white communities so that there is naturally considerable intercourse between the two. Then, on many open reservations the Indians are still present in large numbers, but sometimes the white settlers constitute a large proportion of the population. Lastly, there are Indians still under government supervision, who are scattered over large sections of country, and who constitute but a small part of the population which is predominantly white. The Five Civilized Tribes of Oklahoma and the Indians of California are conspicuous examples of this class of the Indian people.

The enforcement of order and the administration of justice among the Indians is greatly hampered by the fact that they are

often situated, either remote from county seats and other places where court meets and general legal business is transacted, or else they are contiguous to cities and villages where the general standard of morality and law observance, among whites as well as Indians, is low.

Disaster to the government's wards will also inevitably follow any solution of the problem which neglects to consider their prevailing poverty and their ignorance of, and inexperience in, matters of property and contract, and, indeed, of laws and lawyers.

The Indians Not Generally Lawless. As a general statement it may be said that the Indians are peaceable, tractable individuals, not inclined to commit serious crimes. This is particularly true of those, who preserving a large measure of their tribal life and customs, live remote from white communities and have but little money to spend in acquiring the luxuries and vices of the white man. Even among the Indians of Oklahoma and California, closely intermixed with the white population, there is little, if any, complaint of crimes of violence or of serious breaches of the public peace. The above favorable generalizations, however, cannot be made concerning certain individual Indians. These are almost always found among Indians who have proceeded far from tribal life and ways, and have assimilated a considerable amount of education and white manners of life. The possession of an income sufficient to allow them to remain idle but insufficient to satisfy their desires, makes them dissatisfied and truculent. The adjacent white towns and villages, where they usually congregate, have low standards of morals and order, and constitute a poor environment for a people just emerging into the political, economic, and social life of the time. The education they have received makes them cognizant of past and present wrongs to their people, of the instability of the control which is exercised over them by the agency superintendent, and of the jurisdictional doubts which hinder action by other state and federal officers. The habit of obedience to tribal authority and to the superintendent's executive orders is vanishing, and there is nothing to replace it.

The Conditions with Respect to Domestic Relations. Concerning those crimes and misdemeanors committed by Indians, which are euphemistically termed moral offences, complaints from responsible

sources have become so numerous that bills were introduced in the last Congress to remedy the situation. The subject of Indian marriage, divorce, and family life is a sensitive one, touching closely the instincts, customs, and religion of the Indian race. A careful analysis will show that there are really two phases to the problem. The first question is whether an attempt should be made to supplant Indian ideals and customs of family life by compelling a full compliance with the state laws of marriage and divorce, which require the securing of a license and the ceremony before clergyman or civil authority in the one case and the submission to a judgment of a court of law in the other. The second is the question of remedying as speedily and completely as possible the laxity of morals, especially the looseness of sexual relations, which would be reprehensible under any mode of life, white or Indian.

The object to be sought, of course, is a continuity of the family life and a proper rearing of children. With respect to the rearing of children the problem is not serious, for the testimony is overwhelming that the Indian mother and her male relatives will care for her children, even though the father repudiates all obligation for them. If the Indian were left alone in his native ways, and if the government were not attempting to adjust him to the prevailing civilization of the state and nation, the problem might well be left to the Indian to solve by his own methods. The government, however, is attempting to do that very thing. In the schools it teaches the student to read and write the English language, to wear the clothes of our civilization, and to conform to most of our customs and habits. In the remote tribes and among those who have retained in large measure the morals and customs of Indian life, little compliance is found with the forms and ceremonies of marriage under state law; but it is among the educated, sophisticated, and presumably "civilized" young Indians that the true moral delinquency exists. The Indian custom marriage and divorce seems ill-defined and not well understood, but it is not within the province of this chapter to enter into an ethnological or historical discussion of the topic. Suffice it to say that at the present time Indian-custom marriage very commonly means simply to commence living together in family relation, and Indian custom divorce means to cease such living. With the younger educated Indians, no longer influ-

enced by the old tribal domestic life and morals, the fluidity of Indian custom marriage and divorce may become simply an opportunity for license.

The only instruments for combating the evil at present are the Courts of Indian Offenses, where they exist, and the persuasion or coercion of the agency superintendent. Real progress is made difficult by the lack of jurisdiction in the state and United States courts and by the inconsistency of the government in recognizing, for purposes of inheritance, Indian custom marriage and divorce, and at the same time in attempting by executive plea and threat to secure a compliance with civilized ideas on the subject.

Even the Indian who desires to travel along the way of the white man may find his path strewn with obstacles. Uncas Noche, a blind interpreter at the Mescalero agency, deserted by his wife, was left well nigh helpless. A little boy, whom he hired to lead him about, also failed him. In this exigency Uncas sought another wife, but being a Christian Indian and a government employee, first went to the state court to secure a divorce from his unfaithful spouse. The state judge disclaimed jurisdiction in such a case and left him without relief. The superintendent, to whom he next appealed, was without authority to grant divorces. Uncas accepted the alternative of technical bigamy to practical helplessness. His choice, however, led to disgrace within his church and to threatened loss of his position with the government.

Any attempt to extend the state law of marriage and divorce *in toto* to such people as the Navajos, who, far removed from white contacts, roam over a wide domain and retain much of their tribal life and customs, would, it is believed, prove unjust and abortive. Any general extension of the state law by act of Congress should except such Indians. The effort should, however, be made to lead them by gradual steps up to an accepted standard of marriage which would be conducive to greater continuity of family life. Recording the fact of marriage by the Indians at the agency, the issuance of a certificate thereof, and the keeping of a marriage register would be aids in the education of the Indians along the lines that the several states have found conducive to individual and family welfare. In order to render to divorce a form and legal sanction which would not be so expensive and cumbersome as to

be unattainable by most of this class, the Court of Indian Offences should be vested with jurisdiction to grant divorces. In the same court slight punishments should be imposed for those who in their family relations neglect the formalities above suggested.

Many Indians should be placed under the state law in their domestic affairs as in other matters. This action should be determined by their ability to speak and read English, by their competency in economic striving, by their participation in the social concerns of the community, by the possibility of access to the appropriate judicial and administrative offices of the state, and by their non-susceptibility to effective federal or tribal control. Of course, no interference with existing marital relations should be attempted. Even with such people it is a prime necessity that a system of legal aid and the coöperation of state and county officers be assured, in order that the extension of law so decreed may exist in practice as well as in the statutes of Congress.

The Use of Intoxicants. The problem of the use of intoxicants by the Indians is not substantially different from the same problem in the surrounding white communities. The greatest difficulties occur in the open reservations and at the agencies where the Indians make frequent visits to the nearby towns and cities to procure liquor. The latter difficulty can be solved only by sympathetic coöperation with the local authorities. Generally the best results are obtained by the special prohibition enforcement officers of the Indian Service, who, although they may have several states within their respective territories, are able to make intensive efforts at the particular reservations where their services are in greatest need. A chief liquor enforcement officer, devoting a large part of his time to active field work, should be employed to supervise and coöordinate their work. In the whole field of prohibition enforcement among Indians there can be no relaxation of vigilance. Increased, rather than diminished, appropriations for the work should be sought.

The practice of employing the local farmer, stock man, or field clerk as a liquor officer is not desirable. He soon becomes known and his work becomes difficult. Then, his police duties are a hindrance to obtaining coöperation from the Indians in the industrial and social phases of his work.

Gambling. Gambling, chiefly detrimental because of its interference with the regularity of income, is not generally regarded as a

pressing problem. Effective suppression of the practice away from the reservation is almost impossible where the local sentiment permits gambling, or where, as in the State of Nevada, there is no law against it. As the Indian is developed socially, and as his time becomes in greater measure occupied by productive effort, the evil will gradually shrink to the place usually occupied by it in the normal American rural or urban community.

Civil Disputes Not Involving Domestic Relations. The adjustment of civil disputes, other than domestic troubles, is not a serious problem on the Indian reservations. The Indian has but little property and little to cause dispute between himself and his neighbor. His real estate is under the control and protection of the United States, and legal action in respect thereto is usually taken by the national government in the United States courts. Minor matters, such as controversies in regard to some article of personal property, petty assaults, and family quarrels are dealt with by the Court of Indian Offenses as adequately as could be expected of any tribunal. As above stated, the extending of the jurisdiction of this court to include divorce would, as applied to the less advanced Indians, be advisable in order to secure for them a more nearly complete system of law and justice.

Present Methods of Administering Justice. The division of jurisdiction between state and United States courts whereby certain offenses committed away from the Indian lands are punishable in the state courts, certain other offenses committed on Indian lands are punishable in the United States courts, and still other offenses committed on reservations or restricted allotments are unpunishable by either state or federal authorities, is uncertain and demoralizing. In some instances the state courts, in order to provide some semblance of law and order, have enforced their authority on the reservations without legal warrant, but eventually the jurisdictional question has been raised by attorneys appearing in behalf of Indian clients, and thereafter such courts have declined to take cognizance of the cases. Even where the state has undoubtedly authority in law for assuming jurisdiction over the Indian, it will frequently refuse to exercise it, partly because the Indian escapes the payment of taxes for the support of the state and local governments and partly because he is considered the exclusive problem

of the national government. Praiseworthy examples of coöperation have existed between the agency authorities and the local police officers and magistrates in the suppression of the sale to Indians of liquor and proprietary alcoholic medicines. Another excellent palliative for the situation, adopted by some local judges and Indian superintendents, is the practice of summoning before the village or city courts drunk or disorderly Indians and committing them to the Indian superintendent to carry out the sentence imposed. At other times the lack of proper laws or the apathy of the constituted authorities leads to seemingly excusable but unwise attempts to maintain order by illegal means. When such attempts are thwarted, as they inevitably are, the resulting situation is worse than before, for the victory gained renders the lawless even more intolerant of restraint.

The Court of Indian Offenses. For the punishment of petty offenses and the settlement of minor civil disputes the only judicial machinery available is the Court of Indian Offenses. There are only about thirty such courts. More than one-half of the reservations exist without them. Concerning these courts it is hard to make generalizations, for they vary greatly, particularly in the degree of success with which they perform the duties required of them. Regulations of the Department of the Interior for 1904 provide a limited code which is supposed to govern their jurisdiction and practice, but it is doubtful whether one in ten of the judges has ever read any of it, and certain it is that it has little practical effect in governing their deliberations. The provision of the regulations which gives to the court both jurisdiction over "misdemeanors" and the civil jurisdiction of a justice of the peace is certainly indefinite and broad enough to cover a wide range. A study of the records of various courts indicates that the usual matters considered by them involve drunkenness, sexual offenses, minor assaults, domestic troubles, and personal property disputes involving small values. The decision rendered in these cases depends not upon code or precedent, but upon that subtle quality of the mind called common sense and upon an understanding of the current native ideas of property and justice. No sharp division is drawn between criminal and civil jurisdiction. An attempt to make an exact category of offenses and disputes would be hazardous on account of a lack of

nomenclature understood by the Indians. No evidence was found, however, of any attempt to inflict punishments for acts which would not ordinarily be considered public or private wrongs.

The consensus of opinion is that the Indian judge is one of the higher types of Indian, usually one of the older men, who, though he may lack the formal education of the younger people, still possesses a high degree of integrity and a native intelligence and shrewdness which secure for him a position of standing in his tribe. The Indian judges are appointed by the superintendents and usually serve for many years through the terms of several superintendents. A difficulty in their selection arises from the existence of factions on the reservations, and hence unless care be taken there may be a tendency to exercise favoritism or spite in the decision of cases. This may be the explanation at one reservation of the frequent insistence of the Indian judges that punishment be imposed for minor infractions such as intoxication, in spite of the fact that the offenses in question had been committed three, four, or even nine months previous to any complaint to the agency authorities. Local Indian politics constitute one of the reasons why several judges instead of one are usually appointed, and constitute also a reason why the popular election of judges might lead to bad results, since the dominant faction might elect all the judges.

The procedure of the court is generally informal. The judges meet on certain prescribed days at longer or shorter intervals according to the amount of business. If an offense has been committed or a dispute has arisen, the parties are notified to be present at that time and to bring their witnesses. At the Flathead Reservation the practice was followed of arresting the alleged offender at the time complaint was made, and of keeping him near the agency office working until the day of trial. The sentence which usually followed was then dated from the time of the arrest. The Indian police apparently have little trouble in securing the attendance of parties at the sittings of the court.

The actual trial of the cases requires but little formality. At one of the several sessions of Courts of Indian Offenses attended by members of the survey staff, the two Indian judges took their seats in the agency office. The Indian policeman and one of the agency employees were present. While one of the judges interrogated each witness separately, the other witnesses being excluded from

the room, the other judge made an abstract of the testimony. The colloquy was in the native tongue, but the record was made in English. After the testimony was taken the judges conferred with each other. The parties and their witnesses were then called in and sentence was pronounced. This seems to be about the customary procedure, although in some courts the witnesses testify in open court. Although a more careful keeping of records is desirable,³³ the absence of a formal code and the informality of the proceedings are not causes for alarm. Such a manner of handling cases has been found wisest and most expeditious for the juvenile courts, the courts of domestic relations, and the small claims courts of our large cities, which are so satisfactory in dealing with matters analogous to many of those handled by the Court of Indian Offenses.³⁴ A formal, complicated, or technical system of procedural and substantive law could not be administered by the Indian judges, and even if it could be, would not result in a higher type of justice. As Elihu Root has said, "There is no reason why a plain honest man should not be permitted to go into court and tell his story and have the judge before whom he comes permitted to do justice in that particular case, unhampered by a great variety of statutory rules."³⁵

The sentence of the court is usually imprisonment, although infrequently a fine is imposed to be paid in property. Imprisonment does not, however, mean actual incarceration, but rather a term of labor about the agency grounds, on the roads, or on the irrigation ditches.

There are jails, but they are ordinarily only places of temporary confinement and are frequently kept unlocked. At some reservations the prisoners are detained in the jail at night, while at others they are permitted to remain in their own homes. A much needed improvement at most agencies is the repair and renovation of the

³³ At the Pine Ridge Agency in cases of any importance the evidence is recorded in the Indian tongue and is subsequently translated if the superintendent so directs.

³⁴ Herbert Harley, Secretary of the American Judicature Society, Conciliation procedure, American Academy of Political and Social Science, Annals, March, 1926; Small claims courts, Bureau of Labor Statistics, Bulletin 398; Flexner and Oppenheim, Legal aspects of the juvenile court, 1922.

³⁵ Quoted in "Justice and the Poor," Carnegie Foundation for the Advancement of Teaching, Bulletin 13.

building used for confining prisoners so that it will be at least secure, habitable, and sanitary for the unfortunates who are retained there. The sentences imposed by the courts vary, of course, on different reservations and for different offenses. Sometimes they are as short as a few days, and they have been known to extend to four months. The superintendent has control over the execution of the sentence, and almost invariably liberal allowances are made for good behavior and extra work, so that the longer sentences are greatly shortened. It is also a frequent practice, if the services of the prisoner are needed, to suspend the sentence or even to sentence the offender to perform certain work on his own property or on the property of a relative. Thus, in an extremely informal way, the practice accords with the work of probation officers and parole boards and with the indeterminate sentence of the state courts. With the establishment of social service work on the reservation and the coöperation of trained workers with court and superintendent, a true probationary system could easily result from the present rough framework of the Indian courts.

The charge is frequently made that the Indian judges are dominated by the superintendents. At some reservations where the superintendent conducts the prosecution of the case or even acts as one of the judges, this is undoubtedly true. In fact, at ten reservations the regular Court of Indian Offenses has been abandoned and the superintendent himself has assumed the rôle of judge. At many other places, however, the decision of the Indian judges is untrammeled, and the only interference by the superintendent is an occasional diminution of punishment. Although the superintendent should not attempt to control the action of the court, and certainly should not himself act as judge, it is extremely desirable that he advise the court when requested, veto its actions when arbitrary and unjust, and assist in enforcing its judgments.

Among the Senecas of New York, the Peace Makers Courts are entirely uncontrolled by outside governmental authority, and the unfortunate result has been a reign of unshamed corruption. The fear of arbitrary action by the superintendents is based more on theory than on fact. In the community adjacent to the Indian reservations, the superintendent ordinarily ranks among the very best in ability and integrity, certainly much above the usual justice of the peace. As Mr. Justice McKenna once said of the Blue Sky

Commissioners, when the bogey of arbitrary executive action was raised, "We must accord to (him) a proper sense of duty and the presumption that the function entrusted to him will be executed in the public interest, not wantonly or arbitrarily."²⁸ The critics of the government policy in this respect have adduced practically no well founded cases of unjust action by the Courts of Indian Offenses, or by the superintendent, and on the reservations little complaint is heard from the Indians. In fact, if the superintendent wishes to be particularly severe on a particular Indian, the usual means of attaining his desire is to turn the individual over to the state or United States courts for attention. The practice in Canada should be cited where the superintendent acts as a magistrate, hearing and disposing of the cases that come before him.

One exceptionally able mixed-blood Indian employee of the government, whose sympathy for and interest in the Indians do not seem to be open to question, makes this noteworthy point. When an Indian offender is brought before the Court of Indian Offenses, neither he nor his family feels under obligation to retain an attorney or to go to any other special expense in the matter. If on the other hand he is taken before a white man's court, either state or federal, he and his family, if not his friends, will spend all they can raise in his defense, because to them imprisonment in the white man's institutions, even if only for a few months, is an extremely severe penalty, as it goes so counter to Indian nature. This particular Indian is strongly in favor of retention of the Indian court for the economically backward Indians, because it is suited to their condition and does not impose great financial burden on the offender and his family.

The chief criticism of the Court of Indian Offenses is its inadequacy in dealing with serious cases or hardened offenders. For the vicious and unruly characters about some of the reservations, more severe treatment is necessary than the quasi-paternal admonitions and the slight punishments which it is possible to inflict by executive measure. For matters within their proper scope the Indian courts are extremely well suited to accomplish the tasks laid upon them.

²⁸ Hall v. Geiger-Jones Co. 242 U. S. 539 (1917).

The Pueblos. The Pueblo Indians of New Mexico constitute such a peculiar and complicated problem that particular attention must be given to them. There are twenty of these pueblos or villages located in a territory one hundred and fifty miles long from north to south. Some of the pueblos are well populated and prosperous, while others are slowly approaching extinction. The pueblo of Laguna is notable in having adopted many of the ways and customs of the white people, while others, as Taos and Santo Domingo, cling to the ancient tradition. Within some of the separate pueblos there exist two parties, the conservatives who resent any inroads on native customs and ideals, and the progressives who desire to follow more closely the life and habits of the white folks about them. Parties, or clans, within the pueblos exercise strong political power and dominate in the election of pueblo officers. To render the situation doubly difficult, many good people in Santa Fé and Albtiquerque have interested themselves in these Indians, and the government in any action it takes must count on their influence with the Indians. The local courts, particularly the justices of the peace, are controlled by the Mexican element in the population, and the one thing concerning which opinion is unanimous is that it would be most unwise to subject the Indians to their jurisdiction.

The governing agents in each pueblo are a governor and council, ostensibly elected by popular vote, but in fact nominated by the cacique, or religious head of the pueblo, and largely controlled by him. After open hearing, the governor and council administer justice; the criminal sentence is either a fine or a whipping. Although the progressive elements complain of the harsh and brutal actions of the ruling conservative faction, the vast majority of the Indians, without doubt, desire to keep intact their ancient tribal government, which would include, of course, such methods of justice. Apparently in some of the pueblos the tribal authority is ineffective in maintaining order and a condition approaching lawlessness exists.

The time available did not permit the survey staff to make the intensive study necessary to arrive at a proper solution of this difficult problem. The members of the staff are agreed, however, that although some change in the existing situation is necessary, no drastic step should be taken without a thorough investigation in the field and a careful consideration of all possible means of deal-

ing with the situation. It is therefore recommended that a special commission be employed to perform this important task and to report its findings to the Department of the Interior.

Suggested Remedies in the Field of Order and Justice. Any system of law and law enforcement for the Indians will have to be adapted to the conditions of the several different tribes, according to their environment and their economic, intellectual, and moral status. Different solutions will be required for different problems. Adaptability is much more to be desired than uniformity. Eventually all Indians in the United States will be assimilated into our social, economic, and political life, and therefore it is highly desirable that the law and the system of administering the law applied to them shall educate and prepare them for a final and complete subjection to the system of Anglo-Saxon jurisprudence under which the American people live today. Utopia cannot be expected from legislative enactment, for it will be impossible by any system of law and order to provide moral habits of life for the Indian, or to secure for him completely his person and property, when such matters are but little regarded by the white people in the community where he lives.

Certain Classes of Indians Should Be Under State Law Except as to Property. Many Indians, except for the supervision of property interests and the furnishing of medical, educational, and social service, should be placed entirely under the state law. These are of two kinds: first, those groups like the California Indians, who are so widely scattered that no reasonable number of Indian Office agents can effectively maintain order and administer justice among them; and secondly, those advanced groups, who by education, training, and economic competency are able to regulate their conduct and to preserve their property interests with an understanding of, and a responsibility to, the ordinary laws governing in the community.

United States Courts or State Courts to Apply State Law. Much may be said in favor of placing jurisdiction over such Indians in the United States rather than in the state courts. The trial by the United States courts of certain felonies is an established and well received mode of procedure, and there is undoubtedly basis for the belief that such courts are less susceptible to local

prejudice and will afford a greater measure of justice to the Indians than do state tribunals.

On the other hand there are several objections to this course. The United States courts are often remote from the Indians. Giving them jurisdiction will preserve the present divided jurisdiction over the Indians according to the situs of crime and the property status of individual Indians. As there is no federal civil law as such and as the federal Criminal Code is very specialized and incomplete, it is advisable that the state law, whether administered by United States or state courts, should be applied. Again, any attempt to place upon the United States judges the burden of administering the petty civil and criminal jurisdiction of a justice of the peace, or county court, is bound to prove abortive.

Probably the best results in dealing with such Indians will be obtained by conferring on the state court exclusive jurisdiction in all actions for divorce, in all civil matters up to a given maximum (say \$500), and in all cases of misdemeanors. The United States court could then be vested with jurisdiction over the larger civil cases, and other felonies. In case of claim of prejudice in the state court opportunity should be given to remove the case to the United States court. Although this solution of the problem still leaves a possibility of vexations in the division of jurisdiction over felonies according to the situs of the crime and the status of the Indian, felony cases are not large in number, and in any event the greater assurance to the Indian of a fair and unprejudiced trial will justify the inconvenience.

Necessity for Organized Effort and Legal Aid Where State Law Is Applied. No immediate reformation in the affairs of the Indians can be expected, however, from any bare enactment of Congress. In order that the states may be brought to assume the enlarged jurisdiction over the Indian wards of the national government, some organized effort must be made through conference with governors, with attorneys general, and with associations of judges and county attorneys, to awaken a more lively interest in the Indians. A clear determination of the extent of the state's jurisdiction in Indian matters will in itself lead to greater activity by the state authorities, who now with considerable justice excuse their non-action by the plea that their authority in the case is uncertain.

In order that the extension of the normal processes of government over the Indians may not lead to misunderstanding, abuses, and oppressions, some organized system of legal aid should be provided for the ignorant and needy among them. For even among the class of Indians who are now under consideration, there are many who are unacquainted with the white man's laws and methods of business, and have not sufficient means to hire competent legal help. "The way of the unlettered and impecunious has never been easy before the law,"²⁷ and although the educated Indian with means seldom lacks an attorney to protect his interests, his less fortunate brother should not be allowed to suffer for lack of legal assistance. No Indian should be brought before a court for a criminal offense without capable and honest counsel to defend him, nor should his interests in civil matters be unguarded because he cannot procure proper legal services. A more adequate system of legal aid for the Indians, which should include the payment of court costs in necessary cases, is greatly needed. A recommendation to this effect is made later in the report.

Among Other Classes of Indians the Court of Indian Offenses Still Needed. Among the remote tribes, less far advanced on the way to amalgamation with the white population, a dual system of the administration of civil and criminal justice seems necessary. For misdemeanors, small civil cases, and family disputes the jurisdiction of the Courts of Indian Offenses should be preserved. It is believed that these courts are preferable to the proposed substitute of ²⁸ white magistrates appointed by and accountable to the United States District Court. In the first place, near many reservations it is doubtful whether men of sufficient character, training, and ability to perform the function would be available. To appoint magistrates located many miles from the homes of the Indians would be almost as bad as requiring the Indian to resort to the regular state courts. In the second place, no person of an alien race, speaking a strange and unknown tongue, and compelled to act through interpreters, could as well understand the psychology of the Indian and the complications of the various cases, or as

²⁷ Justin Miller, Difficulties of the poor man accused of crime, Amer. Acad. of Pol. and Soc. Science, *Annals*, March, 1926; Reginald Heber Smith, Justice and the poor.

²⁸ See H. R. 9315, Sixty-ninth Congress, first session.

wisely or as surely administer justice among the Indians, as could the Indian judges who preside over the Courts of Indian Offenses. In many cases the appointee of the United States court would be compelled to rely upon the superintendent for advice, and his decision would be as much under the influence of that officer as are the decisions of the present Indian courts. The regulations of the Interior Department should be revised, however, with a view to defining in non-technical language the offenses cognizable by the court and the punishments to be decreed for violations thereof. Especially should provision be made for securing the investigation and advice of the social agencies of the reservation in all cases where family interests are in any way affected.

Transfer of Cases from Court of Indian Offenses. For the more serious crimes involving the possibility of weighty punishments the Court of Indian Offenses is not suitable, and here the jurisdiction should be in the United States court, as in the case of the two classes of Indians previously considered. Even where the offenses committed are not classed as felonies, there will be found on the various reservations certain Indians who are disorderly, unamenable to ordinary discipline, and even vicious. For such as these the quasi-paternal jurisdiction of the Court of Indian Offenses is inadequate. For the proper control of such people the Court of Indian Offenses, with the approval of the superintendent, should have the power of submitting the entire case to the state court, where the ordinary punishments of the state law can be executed. The state courts should have jurisdiction also in those cases where no Court of Indian Offenses exists. Without some such expedient as this the authority of law will often be flouted by some elements of the Indian population, without adequate means of restraining the evil doers. Also it would be advisable to allow any party to a case to have it removed to the state court if he deems that justice can better be secured there. Such cases will be few, but the opportunity to secure a trial by the regular processes of our judicial system should not be denied.

The Need for an Institution for Delinquents. A serious difficulty in dealing with any group of Indians is the lack of an institution for the training of maladjusted, or delinquent, boys and girls. State or private institutions are not ordinarily open to the Indian youth, and, even if they were, are not suitable places for

these children so close to the primitive life of their ancestors. The sentences of the Court of Indian Offenses leave the offender on the reservation, where the influence exerted is bound to be detrimental to his or her companions. In this dilemma some superintendents have contrived to have the undesirables among their younger people sent to the government boarding schools, where their presence necessitates stern repressive regulations unjust to their innocent fellows. The government should seriously consider the necessity of proper training schools for the care of such unfortunate delinquents. These schools should be located with reference to the accessibility of clinics and other facilities for doing constructive work with problem children and youth.

The Need for Expert Study and Planning. The task of dividing the Indian peoples into classes for the purpose of regulating their family relationships and for administering civil and criminal justice can be accomplished only by detailed and expert study. Also conditions will change, and many of those who now should be subject to executive control must eventually be placed under the ordinary processes of law. For these reasons the separation should be determined by executive investigation rather than by unbending legislative fiat. A statute of Congress which would empower the Secretary of the Interior to establish Courts of Indian Offenses among those Indians found by him to be unsuited in condition, training, and environment to government by the regularly constituted authorities of state and nation, and which would extend the state laws in the manner indicated above to the remaining further advanced people, would furnish opportunity for investigation and change to meet new conditions. This, it is believed, would be sustainable against objection on constitutional grounds. The actual task of making the division would be placed upon the Division of Planning and Development, recommended in another portion of this report.

The Government as Guardian and Trustee of Indian Property. The national government's guardianship of the Indian and its trust title to Indian property impose on that government the duty of protection and advancement of the Indian's interests. This duty is rendered more exacting by the unsophisticated character of the ward and his impoverished condition. The Indians, excepting a few isolated individuals far advanced on the road to economic

competency, must rely upon the government of the United States to protect their property and personal interests unless they depend upon the sporadic attempts of philanthropic friends of the race or upon the dubious attempts of self-seeking traffickers in Indian ignorance and credulity. These Indian property interests include not only individual claims, seemingly insignificant considered singly, although of inestimable gravity viewed in the aggregate, but also vast tribal resources of oil, minerals, timber, and water for irrigation and power.

The task of the government is much more comprehensive than that of the ordinary guardian or trustee, in that it has by congressional enactment assumed the duty of settling the testate and intestate succession to Indian estates instead of entrusting that function to the probate courts of the several states.

The Legal Organization and Procedure. In view of the number and importance of the legal questions which arise in the conduct of Indian affairs, it is extraordinary that the Office of Indian Affairs has no high officer corresponding to a general counsel or solicitor. It has a law clerk and several other people with legal training, who either are burdened with a mass of administrative detail or else are narrowly confined to special fields such as probate or irrigation. A number of attorneys in the Office of the Solicitor of the Interior Department are exclusively engaged with Indian matters, but these men are responsible to the Solicitor and to the Secretary of the Interior and not to the Commissioner of Indian Affairs. Their function is chiefly the consideration of the legal phases of propositions which by act of Congress require the approval of the Secretary of the Interior. The opinion of the Solicitor on disputed legal points may be obtained also by formal request of the Commissioner upon the Secretary. The need is for more than this. The Indian Office needs a highly trained lawyer, with necessary assistants, to coördinate, supervise, and expedite the multifarious legal phases of its work. The savings to the Indians and to the government itself in property conserved and in litigation efficiently and expeditiously handled would result in an increased morale within the service and among the Indians and would justify the creation of such an office.

The lack of responsible leadership in the management of the legal affairs of the Indians is chiefly apparent in the conduct of

litigation. The first person to whom legal difficulties are presented is usually the reservation superintendent, who is in direct contact with the Indians and to whom they chiefly look for protection and guidance. The report of the superintendent goes to the Indian Office where it is first referred to the particular division administering the phase of Indian affairs within which the trouble lies. Here the case is really prepared and the recommendations of the Indian Office as to the advisability of suit are made. If a recommendation of suit meet with approval of the Commissioner and his immediate advisers, a letter from him to the Secretary of the Interior, in which the Secretary is requested to present the matter to the Attorney General for such action as he deems fit, is prepared for the Commissioner's signature by the divisional clerk who has investigated the case. In considering the Commissioner's request the Assistant Secretary of the Interior who is particularly entrusted with the administration of Indian matters, is of course guided by the advice of the attorneys of the Solicitor's office. If the Department of the Interior approves the recommendations of the Commissioner of Indian Affairs, the case is referred to the Department of Justice. When the case reaches the Department of Justice the lawyers there review it and, if their opinion is favorable to the commencement of suit, the case is finally sent to the appropriate United States District Attorney, who by statute is entrusted with the conduct of Indian litigation. Thus when the original complaint to the superintendent has finally germinated in effective action, it is too often true that much valuable time has been lost and that the person responsible for the active handling of the case is far removed from Indian interests and contacts.

This circumambulation cannot in the nature of things lead to the best results. The Office of Indian Affairs—which is the developer and organizer of the action, the custodian of the evidence, the governmental party in interest, and the chief point of contact with the government's Indian ward—on reference of the case to the Department of Justice passes from the case as far as its control of the litigation, and one might almost say, as far as its interest in it is concerned. The files of the Office of Indian Affairs contain cases of supreme importance, concerning which no data have been received for the entire year preceding. A lawyer of the highest efficiency and integrity should manage and direct the multifarious

actions brought by the government in the interests of its Indian wards.

In the past certain suits have been brought which involved a legal question of vital importance to large numbers of the government's wards, but only after the litigation has progressed has it been discovered that the particular case involved other facts foreign to the vital point at issue which rendered an adverse decision certain. At times the delay in bringing to a focus contested claims has been extreme. In June of 1921, for example, the Superintendent of the Flathead Agency advised the Commissioner that certain parties had filed mining claims on the timber lands of the Flathead Indians. Although advice was at once given that the claims were without legal basis, it was not until May of 1927 that the case was submitted to the Department of Justice for action. In this case the delay was particularly dangerous, as it involved the probability of the cancellation of large timber sales because of the presence of these trespassers whom the government had failed to remove. If there is uncertainty and hesitation in the larger matters, the usual result in the smaller affairs is that the Indian goes entirely without legal aid, and often loses his rights by default.

A difficulty with the present *modus operandi* is the unsatisfactory nature of the service often rendered by the United States district attorneys. In many cases, particularly in irrigation matters, extremely abstruse and technical problems of law are presented, concerning which the United States district attorneys, with their many other duties, are necessarily not experts. More serious is the fact that they often fail to comprehend and follow the theory and principle of the governmental protection of the Indians. Their sympathies lie not with their clients, but with their clients' opponents. In some instances the Indian Office, working through the Department of Justice, has encountered great difficulty in prevailing upon the United States district attorneys to prosecute cases in which the position of the Office was based on well settled governmental policies in dealing with the Indians. It is not surprising that in such a situation failure often results.

The present situation could be remedied by an organization of a legal force within the Indian Service similar to that already existing within the Bureau of Reclamation. In addition to the general counsel at Washington, heretofore mentioned, there should be in

the field, district counsel situated in the centers of Indian population. These men, perhaps nine or ten in all, should devote their entire time to the legal interests of the Indians, and they would soon become expert in all matters of law relating to them. The nominal conduct of litigation would remain with the United States district attorneys, but these district counsel of the Indian Office, acting under the supervision of the general counsel in Washington, would actually prepare the cases and actively assist in the trials. The actual details of the system would have to be worked out after a careful detailed survey of the field.

The system should probably include attorneys retained for part time in the several localities contiguous to the reservations to attend to minor matters, such as formal appearances and the conduct of petty suits before justices of the peace and the municipal courts. Some such system of legal aid is particularly necessary in the present stage of Indian development. The Indian must eventually come fully under the state law and authority, but in order that he may safely cover the transition period he needs aid and direction. The poor and ignorant in our large cities need the advice and assistance of organized legal aid, and extensive organizations have been established to provide it. Unfortunately such organizations do not often exist in rural communities. The Indian's poor command of English, his lack of training in the customs and business methods of his white neighbors, and his entire psychology of life, which involves little attention to property values, render him unsuited for independent striving for competence in the economic life of the time. To protect him and his property from the illegal acts of his designing neighbors, to advise him as to his rights and liabilities, and to secure him proper representation when he appears before the courts of the land, are duties that the government should not fail to fulfill.

Emphasis must constantly be placed on the fact that in the conduct of the legal affairs of the Indians the national government is in the position of a trustee of the highest type. Before the advancing wave of Anglo-Saxon civilization the Indian has gradually relinquished his vast inheritance, until now, located in a few scattered places in our western country, he has but a remnant of his former possessions left to him. The national government has assumed to act as trustee of this estate, and it goes without saying that its duty is to conserve and develop it.

No general indictment is offered that in recent years the government has been unfaithful to its trust. Its position is, however, a difficult one. Covetousness is not solely an ancient trait. The claims of white settlers to a share in the Indian resources are constantly being pressed upon the government, oftentimes with great astuteness and frequently with a show of justice. In such a situation the Indian lacks the ability and the means properly to present his views, and some of those who present them for him often prejudice more than aid by over-statement and invective. The constituted conservators of the Indian wealth are inevitably tempted to compromise and to assume the rôle of the arbiter rather than of the advocate of Indian claims. Surrender to this temptation offers an enticing escape from political and legal entanglements. Such a surrender is to be deplored. Unless the Indian Office takes its position as the advocate of all Indian rights to the fullest extent compatible with the law, those rights will not be adequately presented before Congress and the courts. Congress and the courts, and not the guardian and trustee of one of the parties, should judge between conflicting claims. In such matters as the lease of the valuable power sites on the Flathead Reservation, the preservation of the rights of the Pueblo Indians in their ancestral domain, the submission of the oil resources of the Navajo Indians to state taxation, and the charging to Indian funds of certain improvements enjoyed by the general public, the Office must be circumspect in order to see that no valid right of its Indian wards is waived. The injury is particularly great when voluntary proponents of the Indian interests present the Indian claims more strongly than does the authorized guardian of Indian interests, and are successful in so doing. The Indian then ceases to regard the government as his protector, but is prone to look upon it with suspicion, a state of mind too often one of the greatest obstacles in the government's task of preserving and advancing the Indian.

Administration of Indian Lands. At several of the reservations the survey staff discovered that ugly charges were being or had been made of misconduct in the administration of Indian lands. With the time and facilities at the disposal of the staff, it was not found practical to sift to the bottom all these charges. The situation at Fort Yuma is an indication of the difficulties encountered in endeavoring to arrive at a conclusion in such cases. Here the

leasing of the Indian lands had been the occasion for constant bickering, and a series of investigations running through the years. Four separate inspectors were sent to this agency to report upon the complaints made concerning the conditions there, and five different reports were submitted, the file constituting a stack of papers and documents over two feet high. In no instance, however, could the inspectors agree among themselves. In 1921 while one inspector reported that the superintendent and farmer were guilty of various derelictions and frauds, the other one exonerated these two men. Subsequent investigations brought the same contradictory results. In the face of these conflicting reports, and in consideration of the tremendous mass of material submitted, no definite findings by the survey could be made without greater expenditure of time than appeared to be justified. It is, however, indubitable that where existing practices permit so much trouble to arise, some change should be made.

At the Quinaielt Reservation, the allotment of lands also has led to much misunderstanding, and an almost total lack of coöperation between the agency forces and their Indian charges. This situation also should be remedied. Both in the making of allotments and in the leasing of lands, safeguards against mistakes and negligence, as well as against possible dishonest practices by the officers in charge would be advanced by a more orderly procedure and the keeping of better records. As was suggested by an employee of the Colville Agency, there should be kept in each agency office in bound form a complete record of each parcel of land on the reservation, from which the present status of the land and its past history could be immediately determined. Serious difficulty arose in the allotments in the Quinaielt Reservation, because of the lack of a proper record of the Indian's original choice of an allotment. These were kept only in the temporary notebooks in the possession of the allotting agent, and the Indian's choice of an allotment did not receive formal governmental sanction until certified to the Secretary of the Interior several years after the choice had been originally made. There seems no reason why the selection of the allotment should not be made a matter of permanent record open to the public. The inability of the Quinaielt Indians to examine the records, documents, and correspondence in relation to the allotments of their land was the occasion of much unfortunate controversy.