American Legal History – Russell

JOHN W. NOBEL, SEC'Y OF THE INTERIOR, RULES OF INDIAN COURTS AND "WHAT IS AN INDIAN?", H.R. DOC NO. 1, pt. 5 at 28-37 (1892).

REPORT

OF THE

SECRETARY OF THE INTERIOR;

BEING PART OF

THE MESSAGE AND DOCUMENTS

COMMUNICATED TO THE

TWO HOUSES OF CONGRESS

AT THE

BEGINNING OF THE SECOND OF THE FIFTY-SECOND CONGRESS

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IN FIVE VOLUMES.

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INDIAN COURTS.

1. *Districting of reservation.*-Whenever it shall appear to the Commissioner of Indian Affairs that the best interests of the Indians on any Indian reservation will be subserved thereby, such reservation shall be divided into three or more districts, each of which shall be given a name by which it shall thereafter be designated and known. As far as practicable the county lines established by the laws of the State or Territory within which the reservation is located shall be observed in making the division, provided that each district shall include, as nearly as can be, an equal proportion of the total Indian population on the reservation. All mixed bloods and white persons who are actually and lawfully members, whether by birth or adoption, of any tribe residing on the reservation shall be counted as Indians. Where the lands of the reservation have not been surveyed or where it is not practicable to observe the State or Territory county lines on the reservation, the lines of the district shall be defined by such natural boundaries as will enable the Indians to readily ascertain the district in which they reside.

2. *Appointment of judges.*-There shall be appointed by the Commissioner of Indian Affairs for each district a person from among the Indians of the reservation who shall by styled "judge of the Indian court." The judges must be men of intelligence, integrity, and good moral character, and preference shall be given to Indians who read and write English readily, wear citizens' dress, and engage in civilized pursuits, and no person shall be eligible to such appointment who is a polygamist. Each judge shall be appointed for the term of one year, subject, however, to earlier removal from office for cause by the Commissioner of Indian Affairs; but no [29] judge shall be removed before the expiration of his term of office until the charges against him, with proofs, shall have been presented in writing to the Commissioner of Indian Affairs, and until he, shall have been furnished a copy thereof and given opportunity to reply in his own defense, which reply shall also be in writing and be accompanied by such counter proofs as he may desire to submit.

3. *District courts.*-Each judge shall reside within the district to which he may be assigned and shall keep an office open at some convenient point to be designated by the Commissioner of Indian Affairs; and he shall hold court at least one day in each week for the purpose of investigating and trying any charge of offense or misdemeanor over which the judges of the Indian court have jurisdiction as provided in these regulations: *Provided*, That appeals from his judgment or decision may be taken to the Indian court in general term, at which all the judges on the reservation shall sit together.

4. *Offenses.*-For the purpose of these regulations the following shall be deemed to constitute *offenses*, and the judges of the Indian court shall severally have jurisdiction to try and punish for the same when committed within their respective districts.

(a) Dances, etc.-Any Indian who shall engage in the sun dance, scalp dance, or war dance, or any other similar feast, so called, shall be deemed guilty of an offense, and upon conviction thereof shall be punished for the first offense by the withholding of his rations for not exceeding ten days or by imprisonment for not exceeding ten days; and for any subsequent offense under this clause he shall be punished by withholding his rations for not less than ten nor more than thirty days, or by imprisonment for not less than ten nor more than thirty days.

(b) Plural or polygamous marriages.-Any Indian under the supervision of a United States Indian agent who shall hereafter contract or enter into any plural or polygamous marriage shall be deemed guilty of an offense, and upon conviction thereof shall pay a fine of not less than twenty nor more than fifty dollars, or work at hard labor for not less than twenty nor more than sixty days, or both, at the discretion of the court; and so long as the person shall continue in such unlawful relation he shall forfeit all right to receive rations from the Government.

(c) Practices of medicine men.-Any Indian who shall engage in the practices of so-called medicine men, or who shall resort to any artifice or device to keep the Indians of the reservation from adopting and following civilized habits and pursuits, or shall adopt any means to prevent the attendance of children at school, or shall use any arts of a conjurer to prevent Indians from abandoning their barbarous rites and customs, shall be deemed to be guilty of an offense, and upon conviction thereof, for the first offense shall be imprisoned for not less than ten nor more than thirty days: *Provided*, That for any subsequent conviction for such offense the maximum term of imprisonment shall not exceed six months.

(d) Destroying property of other Indians.-Any Indian who shall willfully or wantonly destroy or injure, or, with intent to destroy or injure or appropriate, shall take and carry away any property of any other Indian or Indians, shall, without reference to its value, be deemed guilty of an offense, and upon conviction shall be compelled to return the property to the owner or owners, or, in case the property shall have been lost, injured, or destroyed, the estimated full value of the same; and in addition he shall be imprisoned for not exceeding thirty days; ant the plea that the person convicted or the owner of the property in question was at the time a "mourner," and that thereby the taking, destroying, or injuring of the property was justified by the customs or rites of the tribe, shall not be accepted as a sufficient defense.

(e) Immorality.-Any Indian who shall pay, or offer to pay, money or other thing of value to any female Indian, or to her friends or relatives, or to any other person, for the purpose of living or cohabiting with any such female Indian not his wife, [30] shall be deemed guilty of an offense, and upon conviction thereof shall forfeit all right to Government rations for not exceeding ninety days, or be imprisoned for not exceeding ninety days, or both, in the discretion of the court. And any Indian who shall receive, or offer to receive, money or other valuable thing in consideration for allowing, consenting to, or practicing such immorality, shall be punished in the same manner as providing for the punishment of the party paying, or offering to pay, said consideration.

(f) Intoxication and the introduction of intoxicants.-Any Indian who shall become intoxicated, or who shall sell, exchange, give, barter, or dispose of any spirituous, vinous, fermented, or other intoxicating liquors to any other member of an Indian tribe, or who shall introduce, or attempt to introduce, under any pretense whatever, any spirituous, vinous, fermented, or other intoxicating liquors on an Indian reservation, shall be deemed guilty of an offense, and upon conviction thereof shall be punishable by imprisonment for not less than thirty nor more than ninety days, or by a fine of not less than twenty nor more than one hundred dollars, or both, in the discretion of the court.

5. *Misdemeanors*.-The judges of the Indian courts shall also have jurisdiction within their respective districts to try and punish any Indian belonging upon the reservation for any misdemeanor committed thereon, as defined in the laws of the State or Territory within which the reservation may be located; and the punishment for such misdemeanors shall be such as may be prescribed by such State or Territorial laws: *Provided*, That if an Indian who is subject to road duty shall refuse or neglect to work the roads the required number of days each year, or to furnish a proper substitute thereof, he shall be deemed guilty of a misdemeanor, and shall be liable to a fine of one dollar and fifty cents for every day that he fails to perform road duty, or to imprisonment for not more than five days: *And provided further*, That if an Indian refuses or neglects to adopt habits of industry, or to engage in civilized pursuits or employments, but habitually spends his time in idleness and loafing, he shall be deemed a vagrant and guilty of a misdemeanor, and shall, upon the first conviction thereof, be liable to a fine of not more than five dollars, or to imprisonment for not more than ten days, and for any subsequent conviction thereof to a fine of not more than ten dollars, or to imprisonment for not more than thirty days, in the discretion of the court.

6. *Judges to solemnize marriages*.- The said judges shall have power also to solemnize marriages between Indians. They shall keep a record of all marriages solemnized by them, respectively, and shall issue certificates of marriage in duplicate, one certificate to be delivered to

the parties thereto and the duplicate to be forwarded to the clerk of the court in general term, hereinafter provided for, to be kept among the records of that court; and for each marriage solemnized the judge may charge a fee not to exceed one dollar.

7. *Indian court in general term.*- The judges of the Indian court shall sit together at some convenient place on the reservation, to be designated by the Commissioner of Indian Affairs, at least once in every month, at which sitting they shall constitute the Indian court in general term. A majority of the judges appointed for the reservation shall constitute a quorum of the court and shall have power to try and finally determine any suit or charge that may be properly brought before it; but no judgment or decision by said court shall be valid unless it is concurred in by a majority of all the judges appointed for the reservation, and in case of a failure of a majority of the judges to agree in any cause, the same shall be continued, to be again tried at a subsequent term of the court. The court in general term shall be presided over by the senior judge in point of service on the reservation, and in case there be no such senior judge, the Commissioner of Indian Affairs shall designate on of the judges to preside.

8. C*lerk of court.*- The judges of the court at the first general term, and annually thereafter, shall elect from among the Indians on the reservation some person of [31] good moral character who can read and write English readily, wears citizen's dress, and engages in civilized pursuits, to be the clerk of the court in general term. He shall serve for one year, and it shall be his duty to receive and carefully preserve all papers filed in any case submitted for adjudication by the court, keep a docket of all cases and a proper record of the action taken by the court in each case, receive and preserve the duplicate marriage certificates furnished him by the several judges of the districts of the reservation as heretofore provided, and perform all other duties usually required of clerks of courts of ordinary jurisdiction in the State or Territory within which the reservation may be, except such duties as may require the possession of a seal.

9. *Jurisdiction of court in general term.*- The court in general term, organized as above provided, shall have jurisdiction to try all appeals by persons convicted before any judge of any offense or misdemeanor, as the same are defined and prescribed in these regulations, and to render judgment therein.

The said court shall have the same probate jurisdiction over the administration and settlement of estates of Indians belonging on the reservation as is exercised at the time by the courts of probate, in the State or Territory within which the reservation may be, over the settlement or administration of estates of citizens of said State or Territory: *Provided*, That the probate jurisdiction of said court shall extend only to the disposition according to law of such property as members of the tribe may have in their possession on the reservation at the time of their deaths, and to the execution of wills affecting such property.

The said court shall have exclusive jurisdiction over all civil controversies arising between Indians belonging on the reservation.

10. *Practice, pleadings, etc.*- The practice, pleadings, and forms of proceedings in probate and civil causes shall conform as near as may be to the practice, pleadings, and forms of proceedings existing at the time in like causes in the probate courts and the courts of justices of the peace in the State or Territory within which the reservation may be; and the plaintiff shall be entitled to like remedies by attachment or other process against the property of the defendant, and for like causes, as may at the time be provided by the laws of said State or Territory.

11. *Agents to compel attendance of witnesses and enforce orders of the court.*- That the orders of the court in general term and of the judges of the several districts may be carried into full effect, the United States Indian agent for the agency under which the reservation may be is hereby authorized, empowered, and required to compel the attendance of witnesses at any session of the court, or before any judge within his proper district, and to enforce all orders that may be passed by said court, or a majority thereof, or by any judge within his proper district; and for this purpose he may use the Indian policy of his agency.

WHAT IS AN INDIAN?

In close connection with the subject of Government control over the Indians and methods of administration, an interesting question has recently arisen, namely, What is an Indian? One would have supposed that this question would have been considered a hundred years ago and been adjudicated long before this. Singularly enough, however, it has remained in abeyance, and the Government has gone on legislating and administering law without carefully discriminating as to those over whom it had a right to exercise such control. The question has arisen latterly in connection with the allotment of lands, and the specific case is the following:

[32] Black Tomahawk, a full-blood Sioux Indian, and Mrs. Jane E. Waldron, a woman of mixed Sioux Indian and white blood, both claim a specific tract of land as their allotment under section 13 of the act of March 2, 1889 (25 Stats., 888, 892), "to divide a portion of the reservation of the Sioux nation of Indians in Dakota into separate reservations," etc.

That section reads as follows:

> Any Indian receiving and entitled to rations and annuities at either of the agencies mentioned in this act at the time the same shall take effect, but residing upon any portion of said Great Reservation not included in either of the separate reservations herein established, may, at his option, within one year from the time when this act shall take effect, and within one year after he has been notified of his said right of option in such manner as the Secretary of the Interior shall direct, by recording his election with the proper agent at the agency to which he belongs, have the allotment to which he would be otherwise entitled on one of said separate reservations upon the land where such Indian may then reside, etc.

Under this provision it appears that Mrs. Jane E. Waldron, a quarter-blood Santee, established her residence on a tract of land near the city of Pierre, S. Dak., on July 4, 1889, and Black Tomahawk established his residence on the same tract between the dates of July 20 and 30, 1889; that on September 10, 1890, Mrs. Waldron recorded her selection of the tract as her allotment at the Cheyenne River Agency, and on October 4 following Black Tomahawk recorded at the same agency his selection of the tract as his allotment.

The assistant attorney-general, to whom the case was referred by you, gave an opinion dated November 27, 1891, that Mrs. Waldron is not an Indian, and was not at the date of the act referred to entitled to receive rations and annuities at the Cheyenne River Agency, on the ground that the common-law rule "that the offspring of free persons follows the condition of the father prevails in determining the status of children born of a white man, a citizen of the United States, and an Indian woman his wife;" * * * "children of such parents are therefore by birth not Indians, but citizens of the United States, and consequently not entitled to allotments under the act of March 2, 1889." (Department Decisions, Vol. 13, p.683)

In that decision the Department concurred, by letter of December 14, 1891, but it subsequently suspended action under this decision and recalled the case, and it is now held in the Department under readvisement.

The question involved in this case is one of greatest importance to a large number of persons who have been regarded and treated as Indians and who regard themselves as

members of Indian tribes with rights of property as such. In fact, few, if any, cases are presented for the consideration of this office affecting the lands and funds of Indian tribes that do not in a greater or less degree involve this question. I have therefore given much thought to the subject solely with a view to as-[33]certaining what are the actual rights of half-breeds and mixed-bloods, and who are Indians within the meaning of the laws of the United States relating to the lands and funds of the Indian tribes. I had the honor to submit my views on this subject to you in a special report of March 17, 1982, as follows, viz:

> First. "Indians" is the name given by Columbus and the early voyagers to the natives of America under the mistaken impression that the newly discovered country was part of India. This mistaken impression was due to the theory of Columbus, as frequently stated in history, that by sailing westward the eastern part of India would eventually be reached, and doubtless also to the swarthy complexion and other physical likenesses of the American to the East Indians.
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> Second. As used at the present time the term "Indian" is generally understood to mean a member of one of the several nations, tribes, or bands of native Americans. These nations, tribes, or bands were treated by the English settlers and by the European countries under whose authority America was settled, and subsequently by the United States which succeeded to the rights of all the countries, as district political communities, at first independent, but now dependent upon our Government for protection in their rights. An Indian is one, therefore, who owes allegiance, primarily, to one of these political communities; and secondarily, if at all, to the United States. He is one who is practically identified with the native Americans, and is thereby in his ordinary relations of life separated from all other people of the republic.
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> Third. On account of their ignorance, their savage condition, and their customs and habits, the Indians were never deemed to have any right of property in the soil of the portion of country over which the tribe or band has established by force of strength the right to roam in search of game, etc., or which had been set apart for its use by treaty with the United States, act of Congress, or Executive order, but only to have the right to occupy said portion of country. The fee in the lands of the country occupied and roamed over by the Indians was deemed to be first in the European sovereigns or countries, but is now held to be in the Government of the United States. The right of occupancy, however, was a valuable right, and one which the early settlers and the Government of the United States have always respected, and for the relinquishment of which in certain portions of America valuable considerations have been paid. This right has been treated as an encumbrance upon the fee, and grants made of land to which the Indian right of occupancy had not been extinguished by the Government have been made subject to this right. Each member of an Indian tribe has been deemed to have an equal interest in the property of his tribe, whether it be in the occupancy of lands or right in the lands or moneys. In a property sense, therefore, an Indian is one who is by right of blood, inheritance, or adoption, entitled to receive the pro rata share of the common property of the tribe.
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> Fourth. In the early history of America many white men were adopted into Indian tribes, and in accordance with the customs of those tribes became recognized by the authorities thereof as members and entitled to all the rights therein that the members of the Indian blood were entitled to and enjoyed. After the relations between this Government and the Indian tribes assumed the form which has been likened to that of guardian and ward, provision was made in many of the Indian treaties for the regulation of such adoption of whites into Indian tribes as well as for the regulation of adoption therein of Indians of different tribes, nations, or bands, and in many cases the United States have been given the right to supervise and approve or disapprove such adoption thereafter made as the best interests of the Indian tribes would seem to demand.
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> Even as early as 1638 the English of Connecticut entered into a treaty with the Quinnipiacs, a small band located in the vicinity of the bay of New Haven, in which the Indians covenanted to admit no other Indians among them without first having leave from the English. See De Forrest's History of the Indians of Connecticut, page [34] 162, *et seq.* Those white men who were adopted into Indian tribes, as above stated, in nearly all cases contracted marriages with members of the tribe in which they had become incorporated, and the issue of these marriages were always

regarded by the Indians as members of the tribe to which their Indian parent belonged by blood. Of course the illegitimate issue of white men and Indian women would follow the status of the Indian mother.

Fifth. Besides the cases of white persons adopted into Indian tribes, many white men have gone among the Indians and, without becoming adopted, married members of the tribe according to the Indian custom. While the authorities of the tribe in these cases always deemed and treated the issue of such marriages as members of the tribe, and while such issues would seem, in the light of the decision of the circuit court for the northern district of Oregon *in re* Camille (6th Federal Reporter, 256), not to be white persons in the sense in which that expression is used in the naturalization laws of the United States (section 2169, Revised Statutes), yet in the light of the rule of common law as laid down in *ex parte* Reynolds (5th Dillon, 394) they are citizens of the United States in the sense that the courts of the United States would have jurisdiction to try and punish them for crimes committed by them in the Indian country. They have, however, been uniformly treated by the executive of the Government as Indians in all respects; in other words, as having a right by inheritance to receive a pro rata benefit from the property of the tribe to which their Indian parent belonged, both lands and funds.

There appears to have been no adjudication of the rights of these persons, commonly known as half-breeds and mixed bloods, by the courts; but, under date of July 5, 1856, Attorney-General Cushing expressed the opinion (7th Opinion, 46) that half-breeds (and in his opinion he seems to use the expressions half-breeds and mixed-bloods interchangeably), should be treated by the executive as Indians in all respects so long as they retain their tribal relations. One of the most intelligent Indians known in the history of our dealings with the Indians was John Ross, a Cherokee chief, who was a half-breed, yet he was always treated as an Indian, and his descendants are now regarded and treated as Indians.

Sixth. Under the rule upon which a family is constructed among civilized nations the predominate principle is descent through the father. The father is the head of the family. When a man marries, his wife separates herself from her family and kindred and takes up her abode with the husband, assumes his name, and becomes subordinate, in a sense, to him. In many cases the eldest son becomes the heir, and in all social and political arrangements the relationship through the father is the dominant one.

Among the North American Indians, however, the line of descent in many tribes (though not in all at the present day) is through the mother, and in many instances the wife and not the husband is recognized as the head of the family. Often when an Indian marries instead of taking his wife to his home he goes to hers and becomes absorbed in her family. But even among tribes having descent in the male line there are notable survivals of "mother right," as it is called by some; for example, the Dakota mother-in-law (even among the Santees in 1871) can take her daughter from the husband and give her to another man.

This radical difference in tracing descent, establishing relationship, constituting towns and communities, and determining inheritance must be taken into account in construing any question like that under discussion.

In his history of the Indians of Connecticut, De Forrest recites that although a chieftainship among these Indians was an hereditary office, the sons of the chief would not inherit unless their mother was of noble blood. He says that this custom was also in vogue among the Iroquois and the Indians of the Antilles, and doubtless among most of the aborigines of America, and he cited the case of the sons of Momojoshuck, the earliest grand sachem of the Nehantics, whose name has descended to our times, who did not succeed to the chieftainship of their father because they were not of pure royal blood, their mother not being noble.

[35] The old English common law, which makes the father the controlling factor and determines relationship through him, does not seem applicable to the condition of things such as is found among the American Indians, where the mother, and not the father, is the chief factor.

Seventh. *Status of Indian women married to citizens of the United States.*- Under date of February 10, 1855, an act of Congress was approved (10 Stats., 604) which provides that "any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed herself a citizen." As the courts have declared that an Indian can not be naturalized under our general naturalization law (6th Federal Reporter, 256), an Indian woman under the statute just quoted could not by marriage with a citizen of the

United States become a citizen herself. By the act of August 9, 1888 (25 Stats., 392), Congress declared that any Indian woman (except a member of the Five Civilized Tribes) who should thereafter marry a citizen of the United States should be deemed a citizen herself by virtue of such marriage, but that in thus becoming a citizen she should in no way forfeit any of her rights to an interest in the property of her tribe.

According to this an Indian woman married to a citizen of the United States prior to August 9, 1888, not only did not become a citizen herself by reason of such marriage, but she did not lose her connection with her tribe nor cease to be an Indian; so that the law of descent among the Indians, which is often through the mother, would seem to have included her offspring as members of her tribe.

Since the passage of that act, however, the effect of the marriage of an Indian woman to a citizen of the United States upon the status and rights in her tribe of her offspring by such marriage is totally different. Now, and hereafter, by her marriage to a citizen, she separates herself from her tribe and becomes identified with the people of the United States as distinguished from the people of her tribe. Her children will be citizens of the United States in all respects, and in no respect can they be deemed to be members of her tribe. They are Americans, not Indians. They would therefore have no right to share in the property of the tribe, except such as they might take by representation of the mother. As long as the mother remains a member of the tribe her interest in the tribal property is only a personal interest, and at her death reverts to the benefit of the tribe. This would seem right in view of the fact that her children are also deemed to be members of the tribe and have status and rights of their own therein. They belong to the tribe, and in case of her death they are cared for and supported by it. Bust as shown, above when she separates herself from her tribe and becomes a citizen of the United States by intermarriage, her children will be citizens and will not have any status or rights of their own by law in the mother's tribe. They could not take allotments or receive annuities in the absence of treaty provision to that effect, but they could inherit the land allotted to the mother and the moneys payable to her. In such an instance I think that justice would demand that the joint-tenancy feature of survivorship, which is present in all Indian tenures, so long as tribal relation is in force, should be deemed to be eliminated so far as regards her undivided as well as her divided proportion of the tribal property, and her interest should be permitted to descend to her children in case of her death before partition occurs and a settlement of tribal matters is made. By this I mean that where an Indian woman has by virtue of the act of August 9, 1888, become a citizen of the United States and dies before allotment of the lands of her tribe occurs, or before the final distribution of the tribal funds takes place, such children (the issue of the marriage by virtue of which she became a citizen of the United States) as may survive her should be allowed to take by representation of the allotment she would be entitled to receive if alive, and her pro rata of the funds of the tribe; but they should not be permitted to receive allotments in their own right or any pro rata of their own of said lands or funds.

Another provision is made in the act of August 9, 1888, which I regard as significant, and that is where, in section 1, Congress declares "That no white man not otherwise a member of any tribe of Indians who may hereafter marry an Indian [36] woman, a member of any Indian tribe in the United States or any of its Territories, except the Five Civilized Tribes in the Indian Territory, shall by such marriage hereafter acquire any right to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled."

This is an evidence to my mind that Congress not only regarded mixed bloods of a tribe as having rights in the tribal property, privileges, and interests in the tribe, but it is implied also that the white father had, by his marriage with an Indian, acquired certain rights, privileges, and interests in the tribe.

Eighth. In view of the peculiar relations of Indian tribes with the United States it is a question whether a citizen of the United States can, by becoming a member of one of the tribes without the consent of the Government, be said to have expatriated himself in the sense that he would if he had been naturalized into a foreign nation; but I do not think it can be denied that citizens of the United States who have become incorporated into an Indian tribe with the consent of the United States have expatriated themselves to the extent that they thereafter become entitled to recognition as members of the Indian tribe into which they have been adopted, and become entitled to an equal interest in the common property of the tribe. This principle appears to be recognized by the court

in the case of *ex parte* Reynolds, above referred to. The issue of marriages between such white persons and Indians of the tribe into which they have been adopted are therefore to all intents and purposes just as much members of the tribe as are the issue of marriages of Indian members of the tribe of the full blood, and just as much entitled to benefits from the common property of the tribe.

Ninth. In dealing with Indian matters the Government has treated with Indian nations, tribes, or bands as solid bodies politic, and, prior to 1871, so far as individuals composing them have been concerned, in the same manner as it would with any foreign power; that is, through the treaty-making power. The individuals of the tribe or nation have not been known in our dealings with the tribe-as for instance, all persons recognized by the Indian authorities as members of the Sioux Nation, whether full-bloods, half-breeds, mixed bloods, or whites, have been treated as the Sioux Nation, and rights have vested under treaties and agreements in half-breeds, mixed bloods, and whites that can not be taken away or ignored by the Government.

Where, by treaty or law, it has been required that three-fourths of an Indian tribe shall sign any subsequent agreement to give it validity, we have accepted the signatures of mixed bloods of the tribes as sufficient, and have treated said agreements as valid for the purpose of the relinquishment of the rights of the tribe in lands owned, occupied, or claimed by it, and large sums of money have been appropriated and paid to the Indians, including mixed bloods and whites, in consideration for the relinquishment or cession of lands made thereunder. Also, where Congress has required a census to be taken of an Indian tribe (as in the case of the Chippewas, 25 Stats., 642), the roll of names submitted of those recognized by the Indians as members of their tribe, including half-breeds and mixed bloods, has been accepted by the executive department of the Government without question as conforming to the requirements of the statute.

These acts of the Government-acceptance of their signatures to agreements relinquished rights in lands and their enrollment as beneficiaries under an agreement with an Indian tribe-have fixed the status of mixed bloods as Indians in the sense that they have an interest in the common property of the tribe to which they severally claim to belong. To decide at this time that such mixed bloods are not Indians, so that they can not claim a right in the property of the tribe of which they claim and are recognized to be members, would unsettle and endanger the titles to much of the lands that have been relinquished by Indian tribes and patented to citizens of the United States.

Tenth. Under the general allotment act, as well as under special acts and agreements, lands have been allotted and patented to the Indians by the Government, recognizing as Indians full bloods, half-breeds and mixed bloods without distinction. [37] Allotting agents have been instructed that where an Indian woman is married t a white man she is to be regarded as the head of a family, and while her husband is excluded from the direct benefits of the law, she and her children are to have its full benefits.

Eleventh. It is also worthy of consideration in this connection that the United States Government has been and is the trustee of vast sums of Indian money, and that it has from time to time disbursed this money by paying it per capita to the Indians, recognizing as Indians all who are borne upon the rolls and recognized by the Indians themselves as members of their tribes, including half-breeds and mixed bloods. If therefore these latter are not Indians and as such are not entitled to share in the Indian money, it is a serious question whether the “real Indians” to whom the money rightfully belongs have not an equitable claim against the United States for misappropriation of their funds.

In view of these considerations it seems to me, with my present light, that in determining the rights and privileges of mixed bloods we must give the term “Indian” a liberal and not a technical or restrictive construction. It must be construed in its historical and not in its ethnological significance. The law of descent must be determined not after Roman or English precedents, but in accordance with Indian usage and our American administrative sanction. Any other conclusions announced now as a binding rule, having retroactive consequences, would result in invalidating treaties and agreements, disregarding vested rights, and introducing confusion into the entire Indian question.

Of course, when the Indians shall have become citizens of the United States by taking allotments, or otherwise, the law of inheritance, where not fixed by specific statutes, will be determined by the common law as applied to all other classes of people.

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