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THE TAXATION OF INDIAN PROPERTY

By ROBERT C. BROWN*

No one can consider the status of the American Indians and fail to remark on their peculiar and practically unique legal position. The relation between these original inhabitants of our country, who by changing circumstances are now in, but hardly of, our nation, and the governments, state and federal, which we have established, is completely impossible to define and almost equally impossible to understand.¹

Our dual system of state and nation rarely fails to confuse any governmental problem, and it has not been without its customary affect on this one. The United States constitution makes a few references to the Indians,² but these are not conclusive as to the power and duty of governing them, as the Supreme Court decided in United States v. Kagama.³ In this case, however, the Court decided that the federal government had the full power to govern the Indians and that the states do not inherently have any such power. The Court reached this conclusion not because of any constitutional provision, but on a consideration of general policy and the necessities of the case, saying:

“These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which

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¹See Thayer, A People Without Law, an article discussing the peculiar legal position of the Indians, published in the Atlantic Monthly in 1891, and reprinted in his “Legal Essays” at page 91. See also the article by Ray A. Brown, The Indian Problem and the Law, (1930) 39 Yale L. J. 307, for an excellent discussion of contemporary administrative problems in connection with the Indians.

²Art. I, sec. 3, superseded by the fourteenth amendment, sec. 2, both providing for the appointment of representatives among the states according to numbers “excluding Indians not taxed;” Art I, sec. 8, par. 3, giving Congress power “To regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes.”

³(1886) 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228.
it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen."

It is the federal government, then, and not the states, which is to govern and protect the Indians; and this activity is a federal function, as immune from improper state interference, by taxation or otherwise, as any other federal function. It is the purpose of this paper to consider the powers of taxing the Indians and their property, not only by the states, but by the federal government, and by the Indian tribes themselves.

In seeking to construct machinery for governing the Indians, the federal government originally made large use of the Indian tribes. These tribes are not now of such great importance, but many of them still exist, continue to have some slight and subordinate governmental powers, and what is vastly more important, still own, or at least exclusively occupy, large tracts of land. The status of these tribes is itself a puzzling question. They are recognized by our government as something analogous to states, but they are certainly not states in the international sense, and they are not foreign states. In so far as they are permitted to exercise governmental powers, they are not bound by the provisions of the federal constitution. But in this respect, and even as holders of property, they act only in subordination to the national government, which may take from them all powers and even their tribal property without giving the tribes any right to legal redress.

The present tendency is to do away with the tribal autonomy and, so far as possible, to assimilate the Indians into our body politic. For example, a recent statute has made all Indians born within its territory, citizens of the United States. This is the culmination of a long series of statutes which had already very largely accomplished this result piecemeal. But, for such reasons

4(1886) 118 U. S. 375, 383, 6 Sup. Ct. 1109, 30 L. Ed. 228.
7Cherokee Nation v. So. Kansas Ry. Co., (1890) 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295, holding that Congress may authorize a railroad to condemn a right of way through lands granted to an Indian tribe, although the tribe had been granted not only the title but also very full governmental powers over these lands.
as are set forth in the above quotation from *United States v. Kagama*, the federal government has still to act with reference to the Indians—to protect them, and sometimes to keep them in order. The full power of the United States over its Indian citizens was definitely settled in the leading case of *Tiger v. Western Investment Co.* where the Court, speaking by Mr. Justice Day, said:

“It may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body and not for the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.”

**The Federal Government as Protector of the Indians**

As we have seen, the federal government considers itself as the guardian of the Indians. No doubt this is a necessary relation, as the Indians need protection both against the states, and not infrequently against their own improvident action. The only difficulty is that there is no superior authority to whom this particular guardian may be compelled to account, and the dealings of our government with its Indian wards have not infrequently amounted to what in the case of an ordinary guardian would be both legally and morally a gross breach of trust. Against such actions the Supreme Court has not felt itself able to protect the Indians, but it has done what it could to insure justice, by construing all agreements between our government and the Indians in favor of the latter. It is considered that the superior authority can well afford to bear the burden of a strict construction against itself of its own necessarily somewhat arbitrary acts with respect to an inferior race, particularly when that race is weaker not only in legal position, but also in education and business ability. Thus, it is a settled rule that Indian treaties will be construed as the Indians themselves would have understood the language. And

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9(1886) 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228.
11(1911) 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738.
13European nations who occupied portions of North America, such as the Spanish and the French, recognized from very early times that the Indians were not in a position to deal with white men on an equal footing, and that they required special protection. See Chouteau v. Molony, (1854) 16 How. (U.S.) 203, 14 L. Ed. 905.
in legal controversies between the Indians and the United States, all doubtful points are to be adjusted in favor of the former. Since the states have no power over the Indians, there is no rule that the language of Congressional statutes giving rise to a controversy between the Indians and the states should likewise be construed in favor of the Indians. And it has also been held that the principle of construction in favor of the Indians as against the United States does not apply to a Congressional statute having no features of an agreement.

One of the conspicuous phases of federal legislation for the protection of the Indians has been in connection with intoxicating liquor. Indeed, practically the entire scope of the exercise of the power of Congress to regulate commerce "with the Indian Tribes" has been in connection with endeavors to keep the white man's "fire-water" away from the Indians, to whom, as has been the case with so many primitive peoples, it has been particularly destructive. Here the Supreme Court has sustained the most stringent exercises of the federal power, and without requiring attention to be paid to state rights, or even Indian rights of property. Thus, Congress has been held to have the power to prohibit the sale of liquor to Indians living on land owned in fee by their tribe. So it may prohibit the introduction of liquor into an Indian reservation from a point within the state in which the reservation is situated, so that interstate commerce is not involved. Nor does the admission of a state have any effect upon laws forbidding the sale of liquor to Indians living in the territory from which the state was formed. It has even been held that the

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14Jones v. Meehan, (1899) 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49.
15Choctaw Nation v. United States, (1886) 119 U. S. 1, 7 Sup. Ct. 75, 30 L. Ed. 306.
17United States v. First National Bank, (1914) 234 U. S. 245, 34 Sup. Ct. 846, 58 L. Ed. 1298. It is submitted that this limitation is unsound; the construction on doubtful points should be in favor of the Indians under all possible situations. No criticism can be made of the decision in this particular case, as the terms of the Congressional statute were entirely clear; but the language of the court to which attention has been called, seems unfortunate.
18Constitution, art. I, sec. 8, par. 3.
federal government may constitutionally forbid the sale of liquor in areas adjoining an Indian reservation, so that the Indians will not be tempted by the close proximity of this forbidden beverage;\(^{22}\) but it may well be doubted whether this extreme doctrine would still be adhered to.\(^{23}\)

The eighteenth amendment to the constitution, and the Volstead Act, which have extended the protection against pollution by intoxicating liquors from the lowly Indian to members of supposedly more intelligent races, have in a sense made all these Indian liquor cases somewhat obsolete. However, they still have certain importance as showing the wide powers which the federal government has with respect to Indians, even those residing within the limits of the states. It might seem that the states were likewise powerless with respect to the taxation of Indians within their borders, particularly since a federal instrumentality is involved here. The rules against the burdening by the states of such an instrumentality are much more stringent than when merely commerce is involved. As was pointed out by Mr. Justice Holmes in *Gillespie v. Oklahoma*,\(^ {24}\)

"The criterion of interference by the States with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the States are to exist and make laws. . . The rule as to instrumentalities of the United States on the other hand is absolute in form and at least stricter in substance."\(^ {25}\)

This indicates quite correctly that the test is more severe here than where only commerce is concerned. But where Indian commerce is concerned, the restrictions against state action are, or may be made, absolute, in order to protect the Indians. It does not

\(^{22}\)United States v. 43 Gallons of Whiskey, (1876) 93 U. S. 188, 23 L. Ed. 846.

\(^{23}\)In United States v. 43 Gallons of Whiskey, (1876) 93 U. S. 188, 23 L. Ed. 846 the language of the court is sufficiently broad to cover the proposition for which the case has been cited in the text; but in fact the land had previously belonged to the Indians, and the treaty under which it was taken over by the United States provided that the land should remain subject to the federal laws forbidding the sale of liquor. The subsequent case of *Dick v. United States*, (1908) 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. 520 followed the holding of the Whiskey case, but repudiated its broad language just referred to. The Dick Case held that the sale of liquor could be forbidden on the land in question only because it had previously belonged to the Indians, and the treaty by which the Indians relinquished their title so provided.


follow that such protection requires entire freedom from taxation.

At any rate, this is a matter solely within the control of Congress. What the Indians need for protection against state action—or the action of the federal government—is to be determined by Congress without any right of appeal to the courts. And what Congress desires with respect to taxation or anything else it can almost invariably secure, any injustice to the states or to the Indians themselves to the contrary notwithstanding.

For example, we may consider the matter of treaties. As already said, the government originally treated the Indian tribes as separate states, in the sense that they could make war and conclude treaties with the United States; and a large number of such treaties were in fact made, many of which are still in effect. In 1871 the government changed its policy by Congressional act—without going through the useless formality of consulting the Indians—and formally put an end to the negotiation of treaties with the Indians (though existing treaties were not interfered with). Professor Thayer expressed the opinion that this statute does not represent any fundamental change of policy, since in fact agreements with Indian tribes continued to be made, so that the real reason for the statute was to give the House of Representatives a share in the formulation of these agreements, which it would not have had if they were called treaties.

But even the documents dignified by the name of treaties do not accord any real protection to the Indians against the federal government. It is true that in case of doubt Congressional legislation will be construed by the Court so as not to interfere with existing Indian treaties. But the power of Congress to abrogate Indian treaties or, as is more usual, to proceed at its own discretion without any regard to the treaties is undoubted. It may perhaps be said that Indian treaties are in this respect like all other treaties, which may no doubt be abrogated or intentionally violated by one of the parties. But the practical difference is that

27Thayer, Legal Essays 116.
a treaty with a state in the international sense cannot be broken by our government without liability under international law (whatever this may amount to), whereas Indian treaties may be broken without any legal responsibility.

Cases may occur where the abrogation of an Indian treaty is clearly for the best interests of the Indians. But this is a political question, and one which is conclusively settled by Congress. If the treaty is in fact disregarded, the Court does not consider itself at liberty to pass on the motives of Congress, and it is quite clear that gross injustice has not seldom resulted. Lone Wolf v. Hitchcock is an example of the extreme limits to which Congress may go in this particular. Here Congress authorized the sale of Indian lands, which sale was in violation of an existing treaty. Some members of the tribe whose lands were being sold (but a less number than was required by the treaty) did sign an agreement approving the sale, but these Indians claimed that they had been induced to sign by fraud. Furthermore, Congress did not even comply with the terms of the later agreement. But all this, the Court held, raised no judicial question; the will of Congress over the Indians is supreme. It is not clear, of course, that any real injustice was done to the Indians in this particular case, but such arbitrary power of one party is certainly somewhat dangerous.

In the case of Ward v. Race Horse, on the other hand, it seems that the Court permitted a gross injustice to Indians, for which Congress was hardly to blame. Here a treaty with an Indian tribe gave them the right to hunt on all unoccupied lands of the United States. Later, Wyoming, where these lands were, was admitted as a state and the rights of the Indians were not explicitly reserved. The state then passed a statute forbidding such hunting, and the majority of the Supreme Court, speaking by Mr. Justice White, held that this statute might be enforced against the Indians, the admission of Wyoming having abrogated the treaty. There is no doubt that Congress had power to do away with the treaty, but it is submitted that its action required no such

32 (1903) 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299.
33 (1896) 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244.
TAXATION OF INDIAN PROPERTY

construction, particularly in view of the usual policy of the Court to construe doubtful acts of Congress in favor of the Indians. The majority insisted that the United States had even a moral right to abrogate the treaty because it gave rights only so long as the land was owned by the government; but the government in fact still owned the land where the hunting had been done. Besides, there seems to be no evidence of an intent by Congress to take away the treaty rights of the Indians; the omission to reserve them explicitly may more reasonably be regarded as a mere oversight, or that Congress regarded specific language to this effect as unnecessary. The dissenting opinion by Mr. Justice Brown is quite convincing, and it seems to reach a much fairer and more desirable result.

But the Ward Case stands for the undoubted proposition that the federal government may generally, as an exercise of its power over the Indians, subject them to the jurisdiction of the state within which they dwell. On the other hand, the states have no power to remove the Indians from federal jurisdiction and protection. They may confer upon the Indians such privileges to participate in state government as they deem proper, but all this does not abate in the slightest degree the power of the national government.

In fact, Congress has provided for the government and the protection of the Indians in a manner quite thorough, and, if properly administered, reasonably enlightened. Not only are there regulations with respect to liquor, but there are other statutes dealing with crimes against the Indians and to some extent by them. Even contracts with Indians are carefully supervised by the national government so as to prevent overreaching of the Indians. And there is an elaborate and, it is to be feared, somewhat bureaucratic organization under the administration of the secretary of the interior, for the handling of Indian affairs. The net result is that all Indian matters are within the jurisdiction of

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34 See also United States v. McBatney, (1882) 104 U. S. 621, 26 L. Ed. 869.
the federal government, and no others have any right to interfere
without its permission. This applies to taxation and everything
else.

THE INDIAN LAND SITUATION

In considering the question of Indian taxation, the status of the
land occupied by them must obviously be considered, since the
bulk of state taxation which would affect the Indians is on or
with respect to such land.

In the beginning, the Indians were regarded as having a mere
right of occupancy in the lands where they lived.39 The title to
such lands was in the United States, so that the Indians could
not sell natural growths from such lands, though of course they
could dispose of any crops actually raised by them.40 Under these
conditions, it would seem clear that the states would have no
power to lay any tax burdens upon this land, any more than they
could upon any other land owned and used by the federal govern-
ment. The situation is not changed by the establishment of In-
dian reservations; these are still government owned lands as to
which the Indians have no rights enforceable against the gov-
ernment.41

In recent years, however, many Indians have secured substan-
tial ownership in tracts of land. As in most government dealings
with the Indians, the matter was done piece-meal, tribe by tribe,
or sometimes even by lesser units, so that a considerable number
of Indians owned land individually before the government recog-
nized it as a definite policy as to all.

This change of policy was largely accomplished by the General
Allotment Act of 1887. This Act did not apply to all the Indians,
several tribes, including the Five Civilized Tribes inhabiting the
Indian Territory, which has since become a part of Oklahoma,
being omitted. However, it covered all Indian tribes except those
explicitly named, and provided for the allotment to individual
Indians of tracts of land for their own use. It was provided that

39Johnson v. M'Intosh, (1823) 8 Wheat. (U.S.) 543, 5 L. Ed. 681;
41It is true that there are treaties and agreements purporting to
give certain tribes collective ownership of tracts of land occupied by
them. However, in view of the full powers to deal with such lands
assumed by the federal government, it would seem that the alleged
ownership by the Indian tribes is not to be regarded as having much
practical effect.
the United States would retain title of these lands for a period of 25 years after allotment, in trust for the allottee, who should in the meantime be unable to alienate them without the consent of the government. At the end of the twenty-five year period the allottee should become the owner of the land, with all the rights and duties of any other landowner in the state where the land is situated. The federal government reserved power to extend the trust period, if deemed desirable. Under this act, numerous allotments have been made, and large amounts of land are still held by the federal government in trust for the respective allottees.

The other important kind of division for the benefit of Indians, which concerns us here, is that typified by the Atoka Agreement with the Choctaw and Chickasaw tribes, made in 1897 and embodied in the Curtis Act passed the next year. These tribes were two of the Five Civilized Tribes occupying parts of Indian Territory, and, as already seen, not entitled to the benefits of the General Allotment Act. Here there was a like provision for allotments of land to individual members of the tribes, but without any provision for the United States holding legal title to the allotted lands in trust. There were, however, certain restrictions on alienation of the lands. It was also provided that "all the lands allotted shall be non-taxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent."

The foregoing covers the situation of the bulk of the land now occupied by Indians. Such land is either owned (legally or at least in substance) by the United States and occupied by Indian tribes, or else has been allotted to individual Indians under the General Allotment Act, the Atoka Agreement, or similar legislation. At one time the Supreme Court seemed to be trying to make a special rule for the New Mexico Pueblos. In United States v. Joseph, it was held that land of such a Pueblo was not subject to the jurisdiction of the United States. The Court said that these Indians were civilized, that the Pueblos owned the land under title derived from Spain before the United States obtained jurisdiction of the territory, and that their rights were prior to those of the federal government and to be enforced in the courts of...

43Somewhat similar arrangements were made with the other Civilized Tribes.

42(1877) 94 U. S. 614, 24 L. Ed. 295. See also United States v. Pico, (1867) 5 Wall. (U.S.) 536, 18 L. Ed. 695.
the territory, like those of any landowner. It is said that this peculiar rule applied only to highly civilized Indians, and probably to none but Pueblo Indians, with the possible exception of certain Indians living in the state of New York.

It is not believed that this attempt of the Court to keep certain Indians immune from federal control has been successful. Indeed, the authority of the Joseph Case is greatly diminished by the more recent case of United States v. Sandoval, holding that Congress may prohibit sales of liquor to New Mexico Pueblo Indians. In support of its conclusion the Court quoted much material from reports of Indian agents to show that these Pueblo Indians were very ignorant and degraded. The Court practically admitted that it had been mistaken as to the facts concerning these Pueblo Indians when it made the decision in the Joseph Case, and so limited that case as to make it practically of no effect. It is clear that for all practical purposes there are now only two classes of Indian lands—those owned by the government and occupied by tribes or parts of tribes, and land allotted to individual Indians.

Restrictions on Alienation of Indian Lands

But more important, from the consideration of taxation, than the technical question of ownership, is that of the power of alienation. It is obvious that this has a very close relation to taxation. If land can be freely alienated, it is presumptively subject to taxation, or at least there is no reason to suppose that there is any implied exemption. But if a legal restriction upon alienation is imposed, particularly when, as in the case of Indians, the restriction is primarily to protect the owners from their own ignorance and improvidence, the restriction goes a long way toward implying exemption from taxation. Otherwise, the restriction upon voluntary alienation is likely to be ineffective—the person protected from losing his land through his voluntary alienation is just as likely to lose it in fact through an involuntary alienation under state authority, because of non-payment of taxes.

The power of the federal government to restrict or prohibit alienation of lands owned by Indians is undoubted. It is true that no restrictions on alienation are implied merely because the owner of the land is an Indian; they must be express. But if an ex-

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press limitation upon alienation is imposed by Congress upon Indian land, it is valid even though the Indian owner is a United States citizen. Furthermore, the period of restriction may be extended by Congress, and this power may be delegated to an executive officer. But of course such restrictions cannot be made retroactive, so as to invalidate a conveyance made by an Indian before the restriction has been imposed.

It is obvious that this power includes that of permitting alienation upon such terms as Congress or the federal officer delegated with the power deems advisable from the standpoint of the protection of the Indians. Such conditions are rigidly construed in order fully to protect the Indians. Thus in *United States v. Noble*, an Indian allottee of land was forbidden to alienate it for twenty-five years, but in the meantime was permitted to make mining leases for not exceeding ten years. It was held that assignments by him of rent to be received under mining leases which he had made were wholly invalid, and that leases for the full ten year period made during an existing lease to take effect at its expiration were also void. The Court considered that both of these expedients involved an alienation which was broader in effect than the kind permitted. Likewise, it was held in *Sunderland v. United States*, where the secretary of the interior had been delegated with authority to permit alienations by Indians notwithstanding a general prohibition of alienations by Congress, that he might permit alienation of some land by an Indian and that when the proceeds were used in the purchase of other land he might insist that this latter land should be under the same restriction against alienation as that previously owned, and accordingly that a sale of the substituted land by the Indian was invalid.

Obviously, the states will be compelled to recognize and give effect to these federal restrictions against the alienation of Indian land. Thus, in *Bunch v. Cole*, an Indian had made a lease not complying with the restrictions of a federal statute. When he sued in the state court to set aside the lease and recover the

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48 *Wilson v. Wall*, (1868) 6 Wall. (U.S.) 83, 18 L. Ed. 727.
49 (1915) 237 U. S. 74, 35 Sup. Ct. 532, 59 L. Ed. 844.
50 (1924) 266 U. S. 226, 45 Sup. Ct. 64, 69 L. Ed. 259.
profits, he was met by a state statute which, as construed by the state court, treated the lease as a tenancy at will, and so denied him recovery of the profits earned by the lessee. On appeal to the United States Supreme Court, this decision was reversed, that Court holding that the state statute as thus construed is unconstitutional, and that the lease must not be given effect for any purpose whatever. But, on the other hand, where federal restrictions have been removed, the government has nothing further to do with the matter, and the right of the Indians to set aside their conveyances, if any, is solely in accordance with the state law.\[5\]

That this condition of the law sometimes gives rise to rather peculiar results is shown by the recent decision in *Sperry Oil & Gas Co. v. Chisholm.*\[5\] Here an Indian had been allotted a tract of eighty acres, of which thirty acres was designated as a homestead. At that time he had no power to convey the land except with the consent of the secretary of the interior, but he later leased the entire tract with the consent of the secretary. Later still, all restrictions on alienation of the fifty acres outside the homestead were removed. Subsequently, the Indian allottee, who had in the meantime married, executed a renewal lease of the whole 80 acres, his wife not joining. The secretary of the interior approved the renewal lease so far as the homestead was concerned, but quite naturally took no action with respect to the other fifty acres.

By the state law, the lease was wholly invalid because not joined in by the wife, and in fact the state constitution explicitly provided that no federal law should deprive any Indian or other allottee of the benefit of the homestead law of the state.

The Supreme Court held, however, that the lease of the homestead property, having been made in accordance with the laws of the United States, was valid; that the state laws could not have any effect upon it. But as to the other fifty acres, all restrictions on alienation by federal law having been repealed, it was subjected to the state law, and since the renewal lease was invalid by that law, it should be set aside. The result of sustaining the lease upon the homestead property where the federal government was

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still enforcing restrictions, and setting it aside as to the other land where all federal restrictions had been removed, seems certainly very curious; but it is strictly in accordance with the settled principle that federal regulation of the alienation of Indian land prevails over state rules, but that when such regulation is given up by the national government, the land comes entirely under the laws of the state.

AUTHORITIES WITH RESPECT TO TAXATION

The discussion of the rules with respect to the alienation of Indian land, which has just been concluded, is particularly apposite in connection with state taxation of such property. But before passing to this subject, it will be convenient to consider the power of taxation of the Indians themselves, and of the federal government.

As for the Indians, it is obvious that no powers of taxation can exist except with the consent of the federal government, express or implied. Such powers are undoubtedly given to some extent to certain tribes, though they are exercised only subject to the supervision of the government. Apparently the only case of this sort which has actually come before the Court is Morris v. Hitchcock, where it appeared that Congress had by the Curtis Act permitted the Cherokee Indians to pass laws for the governing of their territory, subject to the approval of the president of the United States. They passed an act imposing heavy taxes upon cattle grazing in their country, and this act was approved by the president. The statute was upheld by the Court as tending to keep from the Cherokee country people whom the Indians did not want there. This, it will be noted, was only in form a taxation measure; it was actually a police measure for a purpose distinctly approved by the national government. The problem of the taxation of Indians and others by Indians is thus not a particularly difficult or important one; it is only a question of the wishes of the national government.

Much more important is the question of the federal taxation of Indians. Here there is certainly no question of power, and in fact it is generally held that Indians are subject to taxation under the federal Revenue Acts, except where there are specific exemp-

54(1904) 194 U. S. 384, 24 Sup. Ct. 712, 48 L. Ed. 1030.
tions, such as the exemption of income from allotted lands. Even here, the Indian seems to be compelled to stand upon his own feet, and take the same precautions as any other taxpayer, since it has been held that an Indian who pays federal taxes upon income from allotted land is barred from recovering the taxes if he fails to claim refund within the time specified in the Revenue Act.

In *The Cherokee Tobacco*, a treaty with the Cherokee Nation provided that the Indians of that tribe might sell their products free from any United States tax. Later a federal statute imposed a tax upon all tobacco grown within the boundaries of the United States, whether in a collection district or not. It was held that the statute superseded the treaty, and so the tobacco produced by the Cherokees was taxable. The dissenting opinion by Mr. Justice Bradley argued with considerable force that the treaty should not be considered to have been abrogated by a merely general statute; but there was no dispute as to the power of Congress to impose this or any other taxes upon Indians, which could be constitutionally imposed upon white men similarly situated.

On the other hand a strong argument of policy can be made against imposing burdensome federal taxation upon the Indians. If the Indians are wards of the United States and therefore entitled to special protection, it would seem that their guardian should be very chary in taxing them. But thus far the Court has not given much weight to this argument. In *Heiner v. Lewellyn*, the Court held that the white lessee of Indian allotted lands was subject to federal income tax. Of course, this is an easier case than the taxation of the incomes of the Indians themselves, although if one is disposed to carry the protection of the Indians to such an extreme length, it might well be said that their lessees should be exempted from taxation, so that the Indians would be able to lease their lands upon better terms. But Mr. Justice Stone, writing for a unanimous Court, rejected this idea, and intimated a decided opinion that the Indians themselves were

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55See the rulings of the Bureau of Internal Revenue, and decisions of the Board of Tax Appeals, collected in Commerce Clearing House 1929 Supplement to Consolidated United States Income Tax Laws, page 338.
57(1871) 11 Wall. (U.S.) 616, 20 L. Ed. 227.
58(1927) 275 U. S. 232, 48 Sup. Ct. 65, 72 L. Ed. 256.
taxable upon their own income. It was argued in favor of the white taxpayers, on the basis of cases to be hereafter considered, that such income could not be taxed by the states. The Court conceded this, but stated that any restrictions on the states had no application to the federal government.

The result of these authorities seems fairly clear. The federal government has full power to tax the Indians directly, or indirectly by taxing those who lease Indian property. Whatever arguments there are against imposing such taxation are purely matters of policy, for the consideration of Congress alone. The Court will sustain any federal taxation upon or with respect to Indians which it would sustain if they were white men.

But the states are in quite a different position, and their powers of taxation of Indians are much more limited. Attempts by them to impose taxation which will burden the Indians within their borders are apt to run foul of the principle that the states may not tax federal instrumentalities—or, to put what is essentially the same thing so far as this particular matter is concerned, such taxation may be considered to take from the Indians the protection which it is the business of the federal government to accord.

Of course the states may by agreement limit their power to tax Indians, and this without regard to the power and duty of the federal government to protect. An attempt by the state to take away such an agreed exemption may, however, come before the Supreme Court under the allegation that the state is violating the contract clause of the federal constitution. But this is not a particularly important doctrine because of the settled rule that tax exemptions are strictly construed.

The matter of state taxation of Indian reservations is very simple, and indeed does not seem to have been affirmatively litigated. There can be no doubt that such taxation is beyond the power of the state—if for no other reason, because reservation land is property of the United States, used for the federal function of protecting the Indians.

But a somewhat different line of reasoning was used in the leading case of *The Kansas Indians*. The Court here spoke of the tribal lands as belonging to the tribe. In a sense this was

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59 New Jersey v. Wilson, (1812) 7 Cr. (U.S.) 164, 3 L. Ed. 303.
60 (1867) 5 Wall (U.S.) 737, 18 L. Ed. 667.
true, since the land had been granted to the tribe by a treaty with the United States. There was the additional and extremely important fact that many of the members of the tribe had received patents of lands in severalty (but with restrictions against alienation) and these individual holdings were to a large extent interspersed among holdings of white men.

The Court decided that none of this Indian land, whether held in common by the tribe, or in severalty by individuals, was subject to state taxation. The reasoning was that the tribe was a distinct people, not in any way subject to the state laws. This of course involves the question of the nature of the Indian tribes, which has already been considered; here they were treated as states in such sense as to be immune from the laws of the member of the federal union within whose boundaries they were located. The taxing authorities argued that the distribution of the Indian holdings among white holdings, and the consequent mingling of the races, showed that the tribe had ceased to exist. But to this the Court answered:

"The action of the political department of the government settles, beyond controversy, that the Shawnees are as yet a distinct people, with a perfect tribal organization. While the general government has a superintending care over their interests, and continues to treat them as a nation, the State of Kansas is estopped from denying their title to it."61

The same doctrine was followed in The New York Indians, where it was held that the state could not tax tribal lands which had been sold by the Indians, but were still in their possession pending their removal to the West—which was likely to take several years.63 The state statute contained a proviso that no tax sale should affect the right of the Indians to occupy the land, but this was held not to save it, since the Court felt that such sales might lead to the disturbance of the Indians by unauthorized persons.

The Court thus forbids anything which can possibly be construed as state taxation of tribal lands. Where, however, the tribe has ceased to exist as such within the state, lands owned by Indians formerly members of the tribe are subject to state taxation.

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61(1867) 5 Wall. (U.S.) 737, 756, 18 L. Ed. 667.
62(1867) 5 Wall. (U.S.) 761, 18 L. Ed. 708.
TAXATION OF INDIAN PROPERTY

unless forbidden by some other federal law. And even an Indian reservation does not continue to be exempt from taxation when no longer owned by the federal government nor used by the Indians. Thus, a railroad right of way procured by the consent of Congress through a reservation is subject to state taxation.

As has been said, the immunity of the Indians and their property from state taxation extends much further than tribal lands; it applies wherever the tax is considered by the Court to burden an instrumentality of the federal government for the protection of the Indians and the regulation of their affairs. But a purely charitable institution not under government supervision, although in fact devoting its entire resources and activities to the help of the Indians, cannot claim to be a federal instrumentality, so as to have the same tax immunity. And apparently a federal instrumentality for dealing with Indian matters may be subjected to liability to an assessment for improvements benefitting its property—such assessment being in theory not a tax but rather a payment for benefits conferred.

While liability to state taxation has been considered by the Court as having some bearing as to whether or not a particular Indian has become a United States citizen, yet it is clear that the fact that all Indians are now United States citizens does not of itself subject them to state taxation. This does not remove them from the jurisdiction and protection of the federal government. It is entirely clear that many Indians are still ignorant and degraded, and that the subjecting of them to ordinary tax burdens would probably mean the loss of all their property, and the result-

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64Pennock v. Commissioners, (1881) 103 U. S. 44, 26 L. Ed. 367.
68Choctaw, etc., Railroad Co. v. Mackey, (1921) 256 U. S. 531, 41 Sup. Ct. 582, 65 L. Ed. 1076. The court, however, puts its decision partly on the ground that the railroad, which had been built originally for the purpose of developing Indian lands, had become part of a through line, and so was now less clearly to be considered as a governmental instrumentality for the assistance of the Indians.
ing poverty and dependence, which only the careful protection of the national government can avoid.\textsuperscript{71}

On the other hand, there must be some methods by which the Indians can be subjected to state taxation. To give them even such restricted immunity as is now allowed is undoubtedly one of the causes for their frequent local unpopularity. But this is unavoidable, though Thayer suggested that the federal government should pay the local taxes on Indian property\textsuperscript{72}—a suggestion which naturally was not regarded with favor by Congress. But certainly a time must come when the Indians no longer need the crutches of tax exemption.

As has been said, this is closely connected with the question of alienation. Where all restrictions on this power of the Indians have been removed, the result is presumptively to subject these same Indians to local taxation. As the Court said in \textit{Goudy v. Meath}:\textsuperscript{73}

"That Congress may grant the power of voluntary sale, while withholding the land from taxation or forced alienation, may be conceded. . . . But while Congress may make such provision, its intent to do so should be clearly manifested, for the purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw this protection and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation. In other words, that the officers of a state enforcing its laws cannot be trusted to do justice, although each and every individual acting for himself may be so trusted.\textsuperscript{74}

It follows that the removal of restrictions on alienation ordinarily means subjection to state taxation, and not infrequently Congress has explicitly so provided. There would seem to be no difficulty in the proposition that Congress, in its plenary power over the Indians, can not only protect them from state taxation, but also may in its discretion subject them thereto.\textsuperscript{75}

But an important limitation of this principle appears in


\textsuperscript{72}Thayer, \textit{Legal Essays} 127.

\textsuperscript{73}(1906) 203 U. S. 146, 27 Sup. Ct. 48, 51 L. Ed. 130.

\textsuperscript{74}(1906) 203 U. S. 146, 149, 27 Sup. Ct. 48, 51 L. Ed. 130.

Here the Atoka Agreement was involved, and this, as already shown, provided for non-taxability for twenty-one years, if the land remained in the hands of the original allottee that long. It was made alienable in part before that time, but the non-taxability was not to be lost unless the privilege of alienation was actually availed of. Very soon after the Agreement was made, Oklahoma, where the lands were, was admitted as a state (in fact, this had been the chief purpose of the Agreement), and Congress promptly followed this measure by another which subjected the allotted lands to local taxation.

The question involved in this case was the constitutionality of this latter measure. The Court unanimously held it invalid, and that the Indians were entitled to the tax exemption set forth in the Atoka Agreement. It was held that the Agreement constituted a contract and that the latter statute was an abrogation of the contract. There is no specific provision in the constitution forbidding the federal government to pass laws impairing the obligation of contracts, as there is in the case of the states, but the Court held that such action was in violation of the fifth amendment, as depriving the Indians of their property without due process of law.

Conceding the soundness of this position, yet the obvious question still remains why, in view of the full power over the Indians which the Government has, it could not take this action. The Court met this point by distinguishing tribal and private property, saying:

"The tribes have been regarded as dependent nations, and treaties with them have been looked upon not as contracts, but as public laws which could be abrogated at the will of the United States. . . . But there is a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law." 78

For all that, the result of the case is somewhat surprising. The authority of Congress had not previously been supposed to have been less sweeping in the case of the individual Indian than in the case of the tribe. No doubt, most Congressional interferences with individual Indians had been for their benefit, but this had not

77 Art. I, sec. 10, par. 1.
previously been supposed to be a judicial question. At any rate, the case stands for the proposition that the federal government may not take away an exemption from state taxes given to individual Indians, and upon which they have relied. It has also been held that where such taxes had been exacted from Indians they may recover them from the officials to whom they made payment, although the payment cannot be proved to have been made under duress. Where, however, an Indian secures permission to alienate land previously inalienable, which permission is coupled with a condition that the land shall be subject to taxation in the hands of the transferee, the condition is valid and enforceable.

The question suggests itself as to whether Choate v. Trapp has any application to federal taxes. If The Cherokee Tobacco is to be regarded as still authoritative, it would seem not, since it was held in the Tobacco Case that the federal government could revoke a tax exemption previously accorded to the Indians even though the period for such exemption had not yet expired. Yet it seems extremely hard to reconcile the reasoning in these two cases, and the Choate Case would seem to offer an opportunity for presenting a strong argument to the Court that a denial by Congress of an exemption from federal taxes previously promised to individual Indians would constitute a violation of the fifth amendment. Perhaps this is largely a theoretical question, since it is probable that no such promises will be made. And it seems not improbable that even if the case were presented, the Court would adhere to its reasoning in The Cherokee Tobacco, since it could reasonably be held that the power of the federal government over the Indians is still unlimited when it alone is concerned, even though it is limited when it seeks to subject them to the power of the states.

Passing now to the question what Indian property is exempt from state taxation, it is clear, of course, that allotments made under the General Allotment Act are thus exempt, so long as the land is held in trust by the United States. Unlike the Atoka

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79 Ward v. Love County, (1920) 253 U. S. 17, 40 Sup. Ct. 419, 64 L. Ed. 751.
82 (1871) 11 Wall. (U.S.) 616, 20 L. Ed. 227.
Agreement, there is no express provision for such exemption, but it is specified that at the end of the trust period the United States will convey legal title to the allottee of all lands to which he is then entitled “free from all charge or incumbrance”—a promise which could not be fulfilled if the land was subject to tax incumbrances. It is also held that permanent improvements upon restricted allotted lands are free from taxation, although such improvements are personal property according to the state law. And even personal property—usually live stock—furnished by the Government for use on the land is also exempt from local taxation.84

On the other hand, cattle and other live stock not owned by Indians but being grazed on their land by their permission, are subject to local taxation.85 Here it could be argued that permitting such local taxation burdens the Indians in the use of their lands, since they could probably obtain better terms from those with whom they contract if they were able to offer them the advantage of tax exemption for their stock. The Court, however, considers that this advantage is too remote. Besides, there must certainly be some limit to the advantages which can properly be given to the Indians at the expense of the states.

But it does not follow that persons who deal with Indians for the use of Indian property are never entitled to take advantage of the tax exemption to which the property is entitled. Thus, in Choctaw, Oklahoma & Gulf R. R. v. Harrison,86 the state imposed a tax on gross sales of coal mined by the plaintiff from Indian land held under the Atoka Agreement. It was held that such a tax was invalid as imposing a direct burden upon an instrumentality of the United States. The Court stated, however, that a tax upon the stock of coal as personal property would have been sustained.

But this last dictum was repudiated in Jaybird Mining Co. v. Weir,87 where it was held that ore taken from restricted Indian

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84 United States v. Rickert, (1903) 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532. But where leases of unallotted Indian lands, whether or not within reservations, are made, the production is subject to state taxation. 25 U. S. C. A. secs. 398 and 398e.


87 (1914) 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234.
property under the terms of a governmental lease was not subject, while in the hands of the lessee, to the ordinary state property tax. The court relied upon the fact that the Indian owner had a certain interest in the ore for his royalty; but it cannot be that a tax levied upon the ore would have diminished this royalty. The only way to support the decision is to say that the Government, by offering to the lessee freedom from property taxes upon the products, could thereby make better terms for its Indian ward. It would seem that this argument is pretty far-fetched, practically as much so as the benefit which the Indians might obtain by securing exemption from state taxation of the live stock belonging to white men, which they permitted to graze on their land; and this benefit was considered too remote by the Court. In the *Jaybird Case*, Mr. Justice McReynolds, who had written the opinion of the Court in *Choctaw, Oklahoma & Gulf R. R. Co. v. Harrison*, dissenting in a very brief opinion, stating that he thought the burden upon the federal instrumentality too remote; Mr. Justice Brandeis also dissented in a much longer and rather convincing opinion. The case shows a determination by the Court to carry the exemption of allotted Indian lands from state taxation, as long as such exemption lasts, to its extreme limit.

Another problem, which does not seem to be precisely covered by the cases, is that of the taxability by local authorities of personal property owned by lessees of Indian land but used by them in developing the land. Examples of this sort of property are mining machinery and oil well equipment. This is not so clear a case for exemption as the actual products from the land, but it seems to be a stronger case than that of live stock pastured on the land. While it is, at best, a matter of speculation, it would seem that this situation is a trifle closer to the ore case, since this machinery is necessary in order to make any use of the leased property, and so its exemption would have a direct effect in enabling the Government to make better terms for its Indian wards. Therefore, it seems likely that the Court would apply the analogy of the *Jaybird Case* here, and would hold such machinery nontaxable.

A somewhat similar case to those just considered is *Indian Oil Co. v. Oklahoma*. Here Indian land containing gas and oil

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was leased to the plaintiff for exploitation of these mineral resources, the lease providing for the payment of royalties to the Indian owners, and being approved by the secretary of the interior. The plaintiff was a domestic corporation of Oklahoma, where the land was. In assessing the franchise tax of the plaintiff, which was based upon the value of its property, the state included the value of this lease. This tax was sustained by the state supreme court, on the theory that the lease was subject to state taxation. On rehearing, that court adhered to its former result, but on a different basis, holding that the lease was not taxable as property, but that the company was taxable on the full value of its capital stock, including in such value the value of the lease.

This decision was reversed by the United States Supreme Court, which held that the lease was an instrumentality of the United States, and could not be taxed either by including it as a part of the property furnishing the basis for computing the franchise tax, or by taxing the full value of its capital stock, which included the lease. It will be noted that neither form of taxation was, strictly speaking, a direct tax upon the lease, and that the result was that the state would have to deduct the value of the lease if it computed the franchise tax upon the basis of the value of the stock of the company, even though, as quite frequently happens, the market value of the stock did not reflect the value of the assets of the corporation.

But the Court has gone still farther and has held in *Gillespie v. Oklahoma* 90 that a state may not even tax the net income of the lessee from restricted Indian lands, on the ground that such a tax would hamper the United States from making the best terms possible for its Indian wards. The Court conceded that such a tax upon an instrumentality of interstate commerce would be sustained, but, as already shown, drew a distinction between interstate commerce and federal instrumentality cases. This was not a matter of real difficulty, but the Court was apparently more troubled to distinguish the cases holding that live stock of white men grazing on Indian lands with Indian permission was subject to state taxation. It merely said that such taxation "obviously is more remote." The opinion was written by Mr. Justice Holmes, Justices Pitney, Brandeis, and Clark dissenting without opinion.

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Since net income of lessees of restricted Indian land is non-taxable by the states, it would seem clear that their gross income is likewise exempt. A tax upon gross income is more burdensome than one upon net income. But the only actual decision upon the point is with respect to the Indians themselves. Oklahoma imposes a tax upon lessors of oil and gas property of 3% of the gross royalties received. The Court decided in the recent case of Carpenter v. Shaw91 that such a tax cannot apply to Indians holding land under the Atoka Agreement, the provision in that Agreement that the allotted land shall be non-taxable for a certain period being construed by the Court to include a tax upon income from the leasing of the land.

The only remaining question is with respect to the taxation of property bought by Indians with the proceeds of property itself exempt. In McCurdy v. United States,92 it was held that land purchased by an Indian from money distributed by the national government from a trust fund held by it for the benefit of his tribe was itself subject to state taxation. The Court considered that Congress had not evidenced any intention to exempt such land, and left open the question as to whether it was within its power to do so.

Perhaps not much more is added by Shaw v. Gibson-Zahniser Oil Corporation.93 Here land was purchased for an Indian minor by his guardians, using royalties from a departmental lease of his restricted allotted lands. The secretary of the interior approved the purchase, but with a proviso that the land should not be alienated or leased for a considerable period without the approval of the secretary. This restriction on alienation is valid.94 But the Court here held that the secretary had not attempted to relieve the land thus purchased with the income from tax exempt royalties from state taxation; nor had he power to do so. To the argument that state taxation of such land would be a burden upon a federal instrumentality, the Court, speaking by Mr. Justice Stone, answered:

"In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of

91(1930) 280 U. S. 363, 50 Sup. Ct. 121.
93(1928) 276 U. S. 575, 48 Sup. Ct. 333, 72 L. Ed. 709.
their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. But they are far less intimately connected with the performance of an essential governmental function than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. To hold them immune would be inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility, and would present the curious paradox that the secretary by a mere conveyancer’s restriction, permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility. There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks."

One would gather from this language that the Court feels that it is within the power of Congress to exempt from state taxation land purchased by or for Indians from the earnings of land which was itself not subject to such taxation. It is clear, however, that very explicit language to this effect will be required, and that something more than mere restrictions on alienation will be required, even though such restrictions on alienation would be sufficient to show Congressional intent of freedom from state taxation in the case of the originally allotted land. It is likewise clear that Congress is not likely to enact such clear provisions for tax exemption, the general policy at the present time being to remove such tax exemptions as rapidly as possible, both in the interest of the states and even of the Indians themselves, as encouraging them to stand on their own feet, and become self-supporting. Therefore, land purchased from exempt income by Indians probably can be, but is not and almost certainly will not be, exempted from state taxation.

**Conclusion**

The result is that all taxation of Indians is within the discretion of the federal government. That government has power to impose the same taxes upon Indians that it does upon other persons. To what extent it shall exercise that power is not a judicial question, though it would seem that under the analogy of *Choate v. Trapp*, a tax imposed in violation of an express agreement with

95(1928) 276 U. S. 575, 580, 48 Sup. Ct. 333, 72 L. Ed. 709.

the Indians might possibly (but not probably) be held to be in violation of the fifth amendment.

At any rate, it is clear that the Indians may be entirely exempted from state and local taxation and also from tribal taxation, if the federal government so desires. The government may also, at its discretion, subject them to state taxation, except that it may not do so where there is a contract with the Indians, for which they have given consideration, exempting them from such liability. If by federal law all restraints on alienation have been removed, that is sufficient to show an intent to subject them to state taxation, unless, of course, there is an explicit provision to the contrary, as in the Atoka Agreement.

While the exemption from local taxation continues, it is given very broad scope. So far as the Indians themselves are concerned, it covers not only their land, but also personal property used in connection with it, and also the income derived by them from the land. And lessees of Indian land are exempt from taxation upon the leases, whether the taxation be direct or indirect. They are likewise exempt from taxation on the income from such lands, irrespective of whether the tax is measured by gross or net income. Furthermore, such lessees are not subject to ordinary property taxes upon the products of Indian land, although they are held not to be exempt from local taxation on live stock grazed on Indian lands. This principle would seem to extend to all property brought by them on the land merely for safe-keeping or nurture, as distinguished from property like mining machinery, which is brought on the land for the purpose of developing it, and which is probably exempt from local taxation. The basis for all these exemptions is that the leases and the lessees themselves are federal instrumentalities for benefiting the Indian wards of the government. It would seem, however, that even federal agencies in the strictest sense are subject to assessments for local improvements.

It is obvious that the existence of such a large amount of non-taxable property is a distinct embarrassment to states like Oklahoma which have many Indians within their borders. It might perhaps have been better if the Court had not been quite so stringent in its requirements as to the non-taxability of Indian property. No one ought to desire any relinquishment of full
protection of the Indians, but it is questionable whether they benefit very much from some of the more extreme forms of tax exemptions accorded to the lessees of their lands. But however this may be, the problem should largely solve itself very soon. The present policy of the Government is to do away, so far as possible, with restrictions of all sorts on Indian property. Restrictions on local taxation of such property exist only for a limited period, and the bulk of them will soon expire. No doubt the federal government will still have to look after a considerable number of Indians who cannot be educated in such a manner as to be able to take care of themselves. Perhaps arrangements can be made to subject the lands of these incompetent Indians to local taxation; at any rate, the burden upon the states should be greatly lessened when all except such incompetent Indians are subject to local taxation. It may therefore be confidently expected that the problem of the taxation—or perhaps better, lack of taxation—of Indian property, now a very troublesome one, will rapidly carry itself to a satisfactory practical solution.