

THE NATIONAL
INDIAN DEFENCE ASSOCIATION,

1425 New York Avenue,

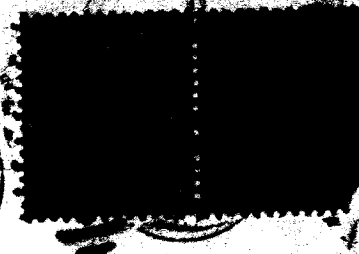
WASHINGTON, D. C.

*Atty A. J. Willard's views
relative to Indians'
rights to sue in Court.*

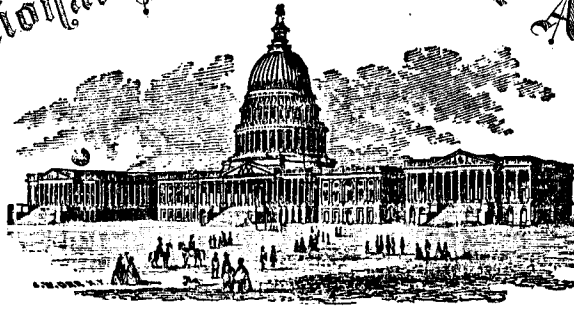
1887.

Col. S. W. Gray
Eufaula

Ind. Terr.



The National Indian Defence Association,



Room 5, 1425 New York Avenue,

Washington, D. C., ——— Sept. 27 1887 7

Col. G. W. Grayson

Dear Colonel

Your letter of the 22^d is at hand, and furnishes me an opportunity, much desired, to explain to you the plan of our operations. I will first answer the direct question you put, and then say something more general.

You instance the case of the Pawnees, and ask how suit ~~ca~~ can be maintained in behalf of that tribe for the protection of ~~th~~ their landed interests. The circumstances attending the title of the Pawnees makes it a fair instance for considering the question put by you, although that tribe not being included in the proclamation it is not in a condition demanding immediate attention. The land of the Pawnees was bought for the Pawnees with their own money. As I have not had occasion to look for that purpose I do not know whether any deed or patent of their land was ever made out by the Land Office. Assuming that no such evidence of their ownership has been made by the U.S. they have a clear right to have their title evidenced and any other citizen or corporation thus situated would have the right to go into a court of equity for the purpose of compelling the delivery of a deed or patent, provided

such a proceeding could be instituted against the U.S. Again if the government should undertake to proceed against the Pawnees under

the severalty act, and the transaction was between individuals, the party threatened would have the right to go into a court of equity for an injunction to quiet his title. Again, if a public officer undertakes to encroach upon the property of a citizen, either to deprive him of such property or to destroy its value or usefulness, the injured party would have the right to go into a court of equity for an injunction to prevent such unlawful act. Now you perceive that if our ideas of the unconstitutional character of the severalty act are correct then a state of relations would exist between the Pawnees and the U.S. which if it existed between private individuals would justify a bill in equity for relief. The question then arises, can such a suit be brought against the U.S.?

The Act of March 3, 1887 provides as follows: All claims founded upon the constitution of the U.S. or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the U.S., or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the U.S. either in a court of law, equity or admiralty if the U.S. were suable may be brought in the Court of Claims. Prior to this law no suit of a purely equitable nature could be brought in that court, but that restriction is now removed, and wherever an individual could sue another individual in a court of equity, he may now sue the U.S. in the court of claims.

Here the main question put by you arises, - Can such a suit

be brought by or in behalf of Indians or an Indian tribe? At the foundation of the inquiry is the broad proposition that all persons can sue in the courts of the U.S. or of the states, who have a cause of action and parties defendant of which the court can take jurisdiction, without regard to age, nationality, race or any other condition whatever. But the court must have jurisdiction of the case and of the parties defendant. How is it then, you ask, that a doubt has been created as to the right of the Indian to sue? As to the right of the Indian to sue in the courts of the U.S. there has been made a question. In an early case it was held that an Indian Tribe could not sue as a foreign nation in the Supreme Court of the U.S. As it regards suits in the Circuit and District Courts of the U.S. with the exception of a limited class of cases arising under the laws of the U.S. suits there can only be brought by a citizen of one State against citizens of another state. As the Indians are not citizens of any state they cannot sue in the U.S. courts except in that limited class of cases in which they are seldom interested, all questions of their land and property not appertaining to that class of which the courts of the United States have original jurisdiction. As it regards the state and territorial courts a practical difficulty exists arising from the fact that those courts have no jurisdiction within the reservations as between Indians, and no jurisdiction of questions relating to the title to land within the reservations. None of these difficulties exist as it regards the courts of the District of Columbia where the defendants can be brought within the jurisdiction of those courts.

The Court of Claims has original jurisdiction of any suit against the U.S. if of the class named in the act recited, wherever the same may have arisen, whether within a State, Territory or an Indian Reservation, so that no question of a limit of jurisdiction can arise in such a case. As to this court the sole question is, can an Indian maintain an action against the U.S. and the answer is that he can if he can maintain an action against an individual and no one will dispute that such an action can be brought by an Indian in the courts of this District.

It is a much more difficult question whether an Indian Tribe can sue in its tribal name. Where a tribe has political recognition as to its internal government, as is the case with the leading ~~in~~ tribes in the Indian Territory there can be no doubt, but as it regards the lesser tribes whose internal system is not recognized by the government it is much more doubtful. Let us assume that the Pawnees are not entitled to be recognized in the courts as a tribe capable of maintaining suits in the tribal name and the question arises whether that would exclude the consideration of their legal rights from the courts. If they are not entitled to sue in their tribal name it is difficult to see how practically they could maintain ~~a~~ suit at common law for matters of tribal concern, for in those courts all the persons having a common interest must be brought in as parties. But in courts of equity this is not the case. Where a large class of persons have common rights and grievances a limited number of them may sue in the name and as representatives of the whole body in the courts of equity.

What I have said indicates the course we would pursue

in such a case as that of the Pawnees. In that case we would file a bill in equity in the name of a limited number of the members of the tribe, preferably chiefs and headmen, for the tribe at large, and as representatives of the tribal community, asking that the title of that tribe might be quieted, a patent issued to them for their lands bought with their own money, and that the officers of the U.S. might be enjoined from attempting to enter upon and disturb their possession or make grants or patents of their lands.

I have no doubt of the right of Indians to maintain such a bill and there is no judicial decision that I have ever found that warrants the statement that such a bill cannot be maintained.

Thus much for the case of the Pawnees, and now we will look at the question in a broader light. We regard it as of especial importance that the Indian Territory and the great Sioux reservation should not be broken up, but exist as a place of refuge for the scattered tribes in the last resort. We feel that the severalty law must be stopped before its execution has gained such headway as to be incapable of being arrested. Up to the present time the course of the administration has been timid and wavering as it regards the enforcement of this law. They are evidently trying to feel their way along without exciting strong popular reaction.

As yet the only tribes proclaimed for the application of the act are a few that the government either has treaties with, that enables them to make division in severalty, or where the tribe has no title. In the case of the Modocs, the government purchased the land they occupy and paid for it out of its own money and has never given

them any title. Of course in such a case there would be no ground to resist their action, for the tribe could not show that the purchases had been made with its money. The case of the Quapaws I have not yet examined but intend to do so. The Yankton Sioux, who are included, hold under a treaty that authorizes the Secretary of the Interior to survey and allot their lands. The Winnebagoes held their late reservation under a similar treaty authorizing division in severalty by the Secretary, but purchased their present land by a treaty that contains no similar provisions. There is a grave question, in their case, whether the provisions of their former treaty for severalty were abrogated when the land was sold, or remain and are attached to the lands acquired thereunder. This case appears rather doubtful to make a stand upon. That you see that the government up to date have not been willing to rest their action wholly upon the severalty law. This I regard as a feeler and the next effort will be a little bolder unless our efforts are continued with the utmost vigor. If we give up the fight, which would only be for want of funds, I have no doubt that they would ruthlessly take the subject by the throat.

Our desire is to be ready for the first case in which they attempt to enforce the severalty act without any other treaty authority, to file a bill in the Supreme court of the District for an injunction, and also to make a case in the court of claims against the U.S. both cases having the same general object so that we may get the best result that can be had in either court.

I must close here although there is much more that I would like to say to you on the subject, but that must be reserved

for a future occasion. If there is anything as to which you desire further information or if there any suggestions that you can make to help us let me hear from you.

With Kindest regards

A. J. Milner