(Wheelock case)

West De Pere, Wis., June 15, 1909.

The Secretary of the Interior,

Washington, D. C.

Sir :

This cause was begun in the County Court for the County of Outagamie, State of Wisconsin, on petition of Hattie Smith, widow of Ezekiel Smith, deceased, representing among other things, that Ezekiel Smith of the Oneida Reservation, an inhabitant of said County, died intestate on the fourteenth day of October, 1907, at said place, leaving estate to be determined: that the petitioner is the widow of said Ezekiel Smith, deceased, and praying that administration of said estate be granted to her.

And said petition coming on to be heard at the special term of said County Court, held at the Court House in the City of Appleton, County of Outagamie, State of Wisconsin, after due personal service of a notice thereof, on Taylor Smith, a person claiming to have an interest in the said estate, at least ten days prior to the day designated, it was stipulated by and between Cady, Strehlow & Joseph, attorneys for Hattie Smith, and Mr. M. E. Davis, attorney for Taylor Smith, that the claim, right and interest to said estate of the said Taylor Smith, should be submitted to the Court for its determination before any further proceedings were taken.

The County Court, after hearing the evidence, in an oral opinion decided against Taylor Smith. Whereupon appeal was taken, and a change of venue secured, to the Circuit Court for the County of Brown, State of Wisconsin. After hearing practically the same evidence which was submitted to the County Court for Outagamie Co., that Court reversed the decision of the lower Court and declared, in a written opinion, Taylor Smith to be an heir of Ezekiel Smith, deceased, by virtue of the amendment to the federal

N.B.

(over)

From this decision Hattie Smith appeals direct to the Secretary of the Interior by petition for the ascertainment who are the heirs of Ezekiel Smith, deceased, as contemplated by the federal statutes, and the issue of a patent in fee simple to her under the provision of the Act of Congress approved May 20, 1908.

The allotment of land, in severalty, to the members of the Oneida Indian tribe of Wisconsin was made under the provisions of the Act of February 8, 1887. The granting clause of that Act reads as follows:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows;

To each head of a family, one quarter of a section;
To each single person over eighteen years of age, one eighth of a section;
To each orphan child under eighteen years of age, one eighth of a section; and
To each other single person under eighteen years now living or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one sixteenth of a section; Provided, That in case there is not sufficient land in any of said reservation to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations, shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act."

There being not sufficient lands upon the Oneida Indian Reservation to allot lands to each individual of the classes named and as provided in the above Act, the land was allotted as follows:

as such by the Indians themselves, who have no part in the enforcement of that law nor even the interpretation of it. In consequence

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The opinion of the Supreme Court of the State of Wisconsin proceeds upon the supposition that illegitimate children viewed as such by Indian custom, do not occupy the same status as to right of inheritance occupied by illegitimate children viewed as such under the state laws, for it uses the following language:

"It was manifestly intended that the word "heir" as used in this part of the Act, should include the children of Indians coming within the classes specified, namely, first, the children born to ' Any male and female Indian(who) shall have co-hbaited together as husband and wife according to the custom and manner of Indian life.' This class of children are to be taken and deemed to be the legitimate issue of the Indians so living together. The intent of this provision for the purpose of this Act was evidently to make this class of children, who are legitimate under Indian custom and manner, legitimate within the State or Territory where they reside, tho the laws of such State or Territory might not recognize them as legitimate, because their parents were not married according to the laws of such State or Territory. The other class is comprehended in the phrase immediately following the part last above quoted. It reads: 'And every Indian Child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child.' It is urged that the trial courts construction, that they formed a class different from the first, which included all the illegitimate children of the father who are not issue of him and a female cohabiting together as husband and wife according to the custom and manner of Indian life, rendered the previous class an unnecessary one because this latter class would include all illegitimate children. It is evident that this class of children is constituted of those who are illegitimate according to Indian custom and manner, as well as by the laws of the State or Territory where theyvreside, and as such might accordingly not occupy the same status as to the right of inheritance that the first class do, whose legitimacy recognized according to Indian custom and manner is imported into the State or Territory where they reside and given effect for the purpose of this Act. Recognition of this difference in their status by Indian custom and manner and the law of the State or Territory makes the Act inclusive of all Indian children not born in lawful wedlock according to the law of the state of Territory of their residence. It seems that Congress, in the ovident purpose of caring for all Indians as its wards, whether legitimate or illegitimate, framed this statute so as to include all Indian children, legitimate or illegitimate underthe codes of the Indians or of the State or Territory where they reside."

It is unnecessary to state that perusal of the opinions quoted discloses great unfamiliarity with the policy of the Government and with the domestic conditions surrounding Indians living on the reservations in general.

The contention of Judge Hastings, in the Thomas House case, that the illegitimate children were not taken care of by the Government at the time it allotted the lands of the Oneida Indians,

in severalty, is overthrown by the fact that Taylor Smith, plaintiff in this action, an illegitimate child, received an allotment of twenty-six acres upon the Oneida Indian Reservation and received a trust patent therefor on the thirteenth day of June 1892, while Hattie Smith, the petitioner herein, who is not a bastard, received no allotment of land, being neither a single person nor head of family. (See Act Feb. 8, 1887, quoted herein.)

The assumption of the Supreme Court of the State of Wisconsin that illegitimate children viewed as such by Indian custom, do not occupy the same status as to rights of inheritance enjoyed by illegitimate children viewed as such under the State laws, appears to be taken merely to bring the interpretation and conclusion reached by Judge Hastings and it within the scope of, and to harmonize with facts and conditions which have no real existance, or if existing have no bearing or appreciable influence upon the objects to be attained. The Congress undoubtedly intended that the Act of Feb. 28, 1891, should be enforced by the Federal and State Courts and not by the Tribal Courts whose existance came to an end, as such, when the Indians accepted allotments of their lands in severalty and became citizens of the United States. Both the Federal and State courts limit to children born in lawful wedlock, and deny to children born out of lawful wedlock, the right to inherit from the father. The amendment under consideration, it must be admitted, was intended to be a command to the Federal and State courts, to enlarge this limitation and for no other purpose. Within the view of the Federal and State Courts, no classes of illegitimates existed --- whether born as a result of illicit intercourse or under sanction of Indian custom, all such were regarded as illegitimate. No purpose can be served therefore, by interpreting and construing the said ammendment so as to define illegitimate children who are regarded as such by the Indians themselves, who have no part in the enforcement of that law nor even the interpretation of it. In consequence

by the Act other than the one general class of illegitimates regarded as such by the State. The only point at issue, therefore, is, to what extent is this enlargement to be carried.

In considering this question I desire to quote the following as a text:

"The reason of the law or of the treaty -- that is to say, the motive which led to the making of it, and the object in contemplation at the time, is the most certain clue to lead us to the discovery of its true meaning: and great attention should be paid to this circumstance, whenever there is question either of explaining an obscure, ambiguous, indeterminate passage in a law or treaty, or of applying it to a particular case. When once we certainly know the reason which alone has determined the will of the person seeking, we ought to interpretate and apply his words in a manner suitable to that reason alone; otherwise he will be made to speak and act contrary to his intention, and in opposition to his own views."

Vattel, Book II, ch. 17, sec 287.

The Indian Office, soon after the passage of the Act of Feb. 8, 1887, in attempting to put the law into effect, became aware of many conditions in the domestic life of the Indians which the law did not provide for. For instance, many Indian tribes were living under tribal customs which permitted a man to marry a woman and live with her, as husband and wife, for a period of five or ten years, or until he has had four or five children born to him by this wife, then leaving her to marry another woman, repeating this change of wives, perhaps, several times before his decease...Such marriages as that, being notorious and open co-habitation, were recognized by the tribe as legal and proper from their standpoint of moral view. In such cases the State and Territorial court could not recognize any of the children of such marriages as legitimate and capable of inheriting from the father because none of the marriages were solemnized

no classification of illegitimates could have been contemplated by the Act other than the one general class of illegitimates regarded as such by the State. The only point at issue, therefore, is, to what extent is this enlargement to be carried.

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