Marquette Law Review

Volume 25
Issue 2 *February 1941*

Article 7

1941

Criminal Law - Crimes Committed by or Against Indians On and Off Reservations in the State - Jurisdiction of a State Court

Herman J. Glinski

jurisdictions, as exemplified in *McElwain* v. *Allen,* 241 Mass. 112, 134 N.E. 620 (1922), would probably hold a cemetery a charitable corporation for the purpose of receiving a charitable gift, but when such a decision would deprive employees of benefits explicitly granted to them by an exercise of the police power, these same jurisdictions will hold that a cemetery is not a charitable corporation.

LLOYD J. PLANERT.

Criminal Law—Crimes Committed by or Against Indians On and Off Reservations in the State—Jurisdiction of State Court.—The defendant, a Chippewa Indian listed on the Indian rolls of the Lac Du Flambeau band of Lake Superior Indians in Wisconsin, was charged with wrongfully having in his possession parts of a doe deer during the closed season in violation of the state game laws. By stipulation it was agreed that the crime was committed on lands located adjacent to an Indian reservation but within territory ceded by the Indians to the United States under various treaties. The defendant admitted his guilt but objected to the jurisdiction of the circuit court. The circuit court adjudged him guilty, providing it had jurisdiction. *Held,* upon certified question, the state court has jurisdiction, notwithstanding the reservation of hunting rights contained in the treaties. *State* v. *La Barge,* 234 Wis. 440, 291 N.W. 299 (1940).

The court rested its disposition of the case upon *State* v. *Morrin,* 136 Wis. 552, 117 N.W. 1006 (1908); *State* v. *Johnson,* 212 Wis. 301, 249 N.W. 284 (1933); *Ward* v. *Race Horse,* 163 U.S. 504, 16 Sup. Ct. 1076, 41 L.Ed. 244 (1896), and *People ex rel. Kennedy* v. *Becker,* 241 U.S. 556, 36 Sup. Ct. 705, 60 L.Ed. 1166 (1916). The gist of these cases is that Congress has the power to abrogate the provisions of an Indian Treaty and that when an act of Congress admits a state into the Union, and declares without reservation that such state shall have all the powers of the other states of the Union, this constitutes an abrogation of any previous treaty stipulation with the Indians within the territory of such state respecting their right to fish and hunt. To exempt such Indians from state laws regulating fishing and hunting within the borders of a state after its admission into the Union would deprive the state of its sovereign power to regulate the rights of hunting and fishing, and would deny to such state admission into the Union on an equal footing with the original states, upon the ground that a treaty with the national government giving the right to hunt and fish within territory which subsequently is embraced within the limits of a state is a privilege in conflict with the act of admitting the state into the Union on an equality with the other states and is repealed thereby.

For many years the policy of the United States was to give the Indians themselves jurisdiction of crimes committed by one Indian against another of the same tribe, and accordingly it was uniformly held that the United States courts had no jurisdiction of such crimes. *United States* v. *Rogers,* 4 How. 567, 11 L.Ed. 1105 (1846); *Nofire* v. *United States,* 164 U.S. 657, 17 Sup. Ct. 212, 41 L.Ed. 588 (1897). Neither the federal or state courts had jurisdiction of these offenses, such offenses being punishable solely by the laws of the tribe. *Ex parte Kan-gi-shun-ca,* 109 U.S. 556, 3 Sup. Ct. 396, 27 L.Ed. 1030 (1883); Act March 3, 1885 (23 St. at L. 385); Pen. Code § 328. This original policy was changed in 1885 when Congress conferred jurisdiction on the federal courts of the more serious crimes committed by an Indian against another Indian or other person within the limits of an Indian reservation located within a state, and on territorial courts when the reservation was located within the limits of a territory.

Kitto v. *State,* 98 Neb. 164, 152 N.W. 380 (1915); *United States* v. *Kagama,* 118 U.S. 375, 6 Sup. Ct. 1109, 30 L.Ed. 228 (1886).

The jurisdiction of the Federal Government over Indian tribes, and over the members of such tribes while they are on an Indian reservation is exclusive. As a consequence of this principle, it follows that while they are on their reservations the state within which the reservation is located can in no way control or govern them. *Buck* v. *Branson,* 34 Okla. 807, 127 Pac. 436, 50 L.R.A. (N.S.) 876 (1912); *Apapas* v. *United States,* 233 U.S. 587, 34 Sup. Ct. 704, 58 L.Ed. 1104 (1914); *State* v. *Campbell,* 53 Minn. 354, 55 N.W. 553, 21 L.R.A. 169 (1893); *Donnelly* v. *United States,* 228 U.S. 243, 33 Sup. Ct. 449, 57 L.Ed. 820, Ann. Cas. 1913E 710. But there are a few early decisions to the contrary. See *State* v. *Harris,* 47 Wis. 298, 2 N.W. 543 (1879); *State* v. *Doxtater,* 47 Wis. 278, 2 N.W. 439 (1879); *Deragon* v. *Sero,* 137 Wis. 276, 118 N.W. 839, 20 L.R.A. (N.S.) 842 (1908). Although an Indian becomes a full-fledged citizen of the United States, yet if he continues to live on a reservation he is subject to the exclusive jurisdiction of the United States. See Notes: Ann. Cas. 1914B 652; Ann. Cas. 1915D 371. Congress can provide that the laws of the state shall extend over and apply to Indian country. *Eddy* v. *Lafayette,* 163 U.S. 456, 16 Sup. Ct. 1082, 41 L.Ed. 225 (1896).

But Indians, although living on a reservation and maintaining tribal relations, are amenable to the laws of the state when they are off the reservation. *Ex parte Moore,* 28 S.D. 339, 133 N.W. 817, Ann. Cas. 1914B 648 (1911). In the absence of a statute or treaty provision granting or retaining jurisdiction in favor of the United States, the state courts have exclusive jurisdiction over crimes committed by tribal or other Indians within the state and outside the limits of any Indian reservation. *In re Wolf,* 27 Fed. 606 (D.C. Ark. 1886); *United States* v. *Kiya,* 126 Fed. 879 (D.C. N.D. 1903); *United States* v. *Frank Black Spotted Horse,* 282 Fed. 349 (D.C. S.D. 1922); *United States* v. *Sa-coo-da-cot,* 27 Fed. Cas. No. 16, 212, 1 Dill. 271, 1 Abb. 377 (C.C. Neb. 1870); *Draper* v. *United States,* 164 U.S. 240, 17 Sup. Ct. 107, 41 L.Ed. 419 (1896); *United States* v. *La Plant,* 200 Fed. 92 (D.C. S.D. 1911). Under its police power a state within whose borders a tribe is located may exercise a police power over the persons and property of such Indians, so far as necessary to preserve the peace of the state and protect the tribe from imposition and intrusion, *e.g.,* prohibiting the settlement on Indian lands of persons other than Indians. *New York* v. *Dibble,* 21 How. 366, 16 L.Ed. 149 (1859). Thus, a state can prohibit the sale of intoxicating liquors to Indians in the exercise of its police power. *State* v. *Mamlock,* 58 Wash. 631, 109 Pac. 47 (1910). But it is settled that the use of intoxicating liquors on an Indian reservation cannot be regulated by the state within whose borders the reservation is located in the absence of an act so providing. *United States* v. *Sandoval,* 231 U.S. 28, 34 Sup. Ct. 1, 58 L.Ed. 107 (1913). Unless restricted by treaty with the Indian tribe or by the act admitting the state into the Union or by other acts of Congress then in existence, the state jurisdiction extends over the territorial limits of an Indian reservation so as to apply to all crimes committed thereon by persons not members of the tribe against other non-members of the tribe, and in such case the United States courts have no jurisdiction. *United States* v. *McBrantey,* 104 U.S. 621, 26 L.Ed. 869 (1882). Again, Indians are amenable to state laws for murder or other offenses against such laws, committed by them off the reservation and within the limits of the state, even though the crime is committed against an Indian of the same tribe. *State* v. *Campbell, supra; Pablo* v. *People,* 23 Colo. 134, 46 Pac. 636 (1896).

Clearly and logically, it follows that crimes committed outside of a reservation by white persons against Indians are also punishable under the laws of the state where such crime is committed. *State* v. *Campbell, supra.* Even a clause in an enabling act providing that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States," does not deprive the state courts of such exclusive jurisdiction over crimes on Indian reservations not committed by or against Indians. *United States* v. *Kagama, supra.* But *Donnelly* v. *United States, supra,* held that the jurisdiction of the federal courts over Indian reservations within state limits extends not only to crimes committed by an Indian, but also to crimes committed on the reservation against an Indian by a white person. An Indian who has taken land in severalty and who has voluntarily taken up within the limits of the state his residence separate from any tribe of Indians, and who has adopted habits of civilized life, is amenable to the general criminal laws of the state as to all criminal offenses, although committed within an Indian reservation, excepting only where the acts of Congress, by express provisions, in particular cases made the law of the United States applicable to such Indians. *Kitto* v. *State, supra; State* v. *Nimrod,* 30 S.D. 239, 138 N.W. 377 (1912).

The federal court has jurisdiction of a crime committed against an allottee Indian, or an allotment held in trust by the United States for the allottee, within the trust period. *United States* v. *Pelican,* 232 U.S. 442, 34 Sup. Ct. 396, 58 L.Ed. 676 (1914). The federal court has jurisdiction of a crime committed on an Indian reservation by an Indian allottee who has not received a patent from the United States and is under the charge of a United States agent. *State* v. *Condon,* 79 Wash. 97, 139 Pac. 871 (1914). But the United States courts have no exclusive jurisdiction over an offense committed by one Indian against another Indian on an Indian allotment upon the public domain outside the boundaries of any reservation and within the limits of the state. *Ex parte Moore, supra.* As to whether the federal courts have jurisdiction of offenses committed on Indian reservations by or against Indian allottees, who, by statute, have become citizens or have been made subject to state laws, there is an apparent lack of harmony in the decisions. It has been decided in some cases that the federal courts have jurisdiction. *United States* v. *Logan,* 105 Fed. 240 (C.C. Ore. 1900); *State* v. *Columbia George,* 39 Ore. 127, 65 Pac. 604 (1901). Other cases hold that the jurisdiction is in the state courts. *Louie* v. *United States,* 274 Fed. 47 (C.C.A. 9th 1921); *In re Now-ge-zhuck,* 69 Kan. 410, 76 Pac. 877 (1904); *State* v. *Lott,* 21 Idaho 646, 123 Pac. 491 (1912).

HERMAN J. GLINSKI.

Criminal Law—Misprision of Felony.—The defendant, having knowledge of the commission of the offense of armed robbery, failed to make a disclosure of this felony to the proper authorities and did nothing toward the apprehension of the persons guilty of the crime. The defendant was not a police officer. He had received no compensation for his failure to report the crime. Later the defendant was convicted of misprision of a felony due to his non-disclosure of the facts of the crime.

Held, Judgment reversed. Mere silence is not sufficient to be regarded as "concealment" of a felony unless such, in purpose, is in aid of an offender and of such nature as to constitute one an accessory after the fact. Short of this, the old time common law offense of misprision of a felony is not now a substan-