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Criminal Law - Jurisdiction - Indians

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circumlocution employed." *State, ex rel.* v. *Mitchell,* 31 Ohio St. 592.

The Wisconsin Constitution, in common with many other states, in Article 4, Section 32, declares that general laws must be enacted, and that they shall be uniform in their operation throughout the state. "A statute would not be constitutional * * * which should select particular individuals for a class or locality and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same class or locality are exempt. * * * Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government." *Cooley Constitutional Limitations,* 391.

In *Johnson* v. *City of Milwaukee,* 88 Wis. 383, at 390-2 the court lists certain well established rules by which the propriety of the classification may be tested. *"One rule* is: All classification must be based upon substantial distinctions which make one class really different from another * * * . *Another rule* is: The classification adopted must be germane to the purpose of the law * * * . *Another rule* is: The classification must not be based upon existing circumstances only * * * . *Another rule* is: To whatever class a law may apply, it must apply to each member thereof * * * ." *Adams* v. *Beloit,* 105 Wis. 363: *State, ex rel. Risch* v. *Trustees,* 121 Wis. 44; *State, ex rel. Morgan* v. *Dornbrook,* 188 Wis. 426. In applying these rules to the instant case, one cannot help but come to the conclusion that the statute in question was special legislation. The constitutional provisions (Art. 4, Sec. 31, 32) are certainly free from ambiguity. The language is plain, simple, direct and commanding. It expressly prohibits the legislature from enacting any special laws for the amendment of charters of cities. Since the legislature attempted to do this very thing in Section 62.075, the statute is of necessity unconstitutional.

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CRIMINAL LAW—JURISDICTION—INDIANS. *State* v. *Rufus,* (Wis.) 237 N.W. 67. Fifty years ago, in a prosecution by the state of an Indian for adultery committed on an Indian reservation, the Wisconsin Supreme Court decided that the state courts had jurisdiction of violations by Indians of state criminal statutes. State v. Doxtater, 47 Wis. 278. In this case the court recognized only two possible limitations which might be imposed on such jurisdiction: existing treaties with the Indians, and acts admitting the state into the union. It was held,

however, in the absence of such restrictions, that the state court had jurisdiction.

At about this same time (1883) the United States Supreme Court denied that Federal Courts had jurisdiction of offences committed by Indians, on the theory that the policy of the United States was to have the tribes themselves punish them. In re. Crow Dog, 109 U.S. 556. Very obviously, this gave the Indians undue liberties and privileges, and so accordingly in 1885 Congress enumerated certain crimes, eight in number, that were punishable by the United States. (18 USCA 548.) This act was declared constitutional on the ground that while the Indian was not a citizen, he was nevertheless within the geographic limits of the United States, and therefore subject to the laws passed by Congress for his protection. U. S. v. Kagama, 118 U.S. 375. This same case denied state jurisdiction for the very general reason that the Indian owes no allegiance to the state, and the state offers him no protection.

It requires little argument to establish the justice of protection of the Indians by the United States; and the authorities overwhelmingly concede this exclusive jurisdiction over the crimes enumerated in the Federal statute. But Congress has enumerated only eight offences. As to all the others, it has been held quite uniformly, and apparently solely on the authority of U. S. v. Kagama (supra) that neither the United States nor the states have jurisdiction, the intent of Congress evidently being that the tribes should take care of these offences. There were only three cases opposed to this line of authority: State v. Doxtater, 47 Wis. 278; State v. Harris, Id. 298; and Kitto v. State, 98 Neb. 164, of which only the last was decided subsequent to the Congressional enactment. For this reason the Wisconsin court felt constrained to overrule its earlier holding, and in State v. Rufus (237 N.W. 67) adopted the majority view.

State v. Rufus involved the crime of statutory rape committed by an Indian upon an Indian, and on an Indian reservation. Statutory rape is not one of the crimes mentioned in the Federal statute. The Wisconsin court denied jurisdiction, proceeding on the theory first set out in Worcester v. Georgia (31 U.S. 515) and developed in the Kagama case (supra), viz., that the tribes are the wards of the United States, and are in a state of pupilage, and are, for that reason, exclusively under United States protection. The states, it is said, cannot legislate as to Indians, for according to the Kansas Indians Case, there cannot be divided authority. 5 Wall. 737. That is, both the United States and the states cannot legislate on the same subject.

While the result reached in State v. Rufus was inevitable, it was, nevertheless, another step in a somewhat unfortunate direction since

it represents another unpunished crime. Against the reasons advanced in the decision, several criticisms may be projected. At the outset, conceding the status of the Indian as a ward, it is only reasonable that he should be protected as fully as possible, and not, if possible, by half way measures. Since Congress has failed to protect him as against all but eight major offences, what sound reason can be adduced against the state's filling the gap, and providing for the punishment for the other offences? None has been brought forward, except that since the Indian is not highly civilized, modern complex laws made for highly civilized society, should not be imposed on him. But it must not be forgotten that while this argument was unassailable a hundred years ago, it has lost most of its strength, until today it is of very doubtful force, in view of the increased civilization among the Indians. Then too, it is doubtful whether our modern criminal laws are actually so much more complex and more unsuited to a "primitive" people than were the laws of several hundred years ago.

It has been said further that the states shall not legislate on this subject since that is a matter exclusively for Congress. This exclusive right is rested on the theory that the Indians are wards of the United States, owe no allegiance to the states, and, what is more important, receive no protection from the states. But even conceding so broad a statement that the State does not protect the Indian, is it not largely because the federal government has taken from the states the right to legislate as to the Indian that the states are not offering the Indian the protection to which he may be entitled?

While the writer has no reason fervently to espouse the cause of the Indian, yet it seems to him that a humanitarian public policy should dictate fuller protection of the Indian. The present state of the law falls short of this. But state legislation would seem constitutionally possible, and not at all unsatisfactory.

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Equity—Adjoining Landowners—Encroachments. In the case of Fisher vs. Godman, et al., 237 N.W. 93 (Wis.), the plaintiff sought to obtain a mandatory injunction ordering the defendants to remove a part of their building which protruded into the soil of her lot. The complaint alleged that, in the process of constructing an apartment building on their own property, the defendants excavated and removed a portion of her lot and built the heavy foundation and wall which projected into her land and which the defendants claimed they had a right to maintain. It further alleged that the plaintiff was thereby prevented from the full use and enjoyment of her property, that the value