CHAPTER 17

INDIAN LIQUOR LAWS

TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 1. Historical background</td>
<td>352</td>
</tr>
<tr>
<td>Section 2. Sources and scope of federal power re liquor traffic</td>
<td>353</td>
</tr>
<tr>
<td>Section 3. Existing prohibitions and enforcement measures</td>
<td>354</td>
</tr>
<tr>
<td>Section 4. Locality where these measures apply</td>
<td>356</td>
</tr>
<tr>
<td>Section 5. Enforcement agencies, jurisdiction, and procedure</td>
<td>357</td>
</tr>
</tbody>
</table>

SECTION 1. HISTORICAL BACKGROUND

Restrictions on traffic in liquor among the Indians began in early colonial times, in a few of the colonies. The Indians themselves at various times sought to curb their consumption of strong drink, and it is worthy of note that the first federal control measure was enacted, at least in part, in response to the verbal plea of an Indian chief to President Thomas Jefferson on January 4, 1802.

On January 28, 1802, President Jefferson called upon Congress to take some step to control the liquor traffic with the Indians in the following language:

These people (the Indians) are becoming very sensible of the baneful effects produced on their morals, their health, and existence, by the abuse of ardent spirits: and some of them earnestly desire a prohibition of that article from being carried among them. The Legislature will consider whether the effectuating that desire would not be in the spirit of benevolence and liberality, which they have hitherto practised toward these, our neighbors, and which has had so happy an effect towards conciliating their friendship. It has been found, too, in experience, that the same abuse gives frequent rise to incidents tending much to commit our peace with the Indians.

Congress forthwith adopted legislation which authorized the President of the United States "to take such measures, from time to time, as to him may appear expedient to prevent or restrain the vendin or distributing of spirituous liquors among all or any of the said Indian tribes, anything herein contained to the contrary notwithstanding."

With control over treaty-making, the licensing of traders, and the management of Government trading houses, the Executive had ample power to control the situation without a general Indian prohibition law, and 30 years passed before such a law was enacted.

The considerations of benefit to the Indians and protection to the whites thus suggested in Jefferson's message have since continued to influence the deliberations of Congress in its efforts to suppress the traffic in liquor with the Indians.

SECTION 2. SOURCES AND SCOPE OF FEDERAL POWER RE LIQUOR TRAFFIC

The power of the Federal Government over traffic in intiociating liquors with the Indians may be said to be derived from several sources. Among these may be mentioned, first, the

3 Act of March 30, 1802, sec. 21, 2 Stat. 139.
4 In the course of his talk to the President, the Indian chief, Little Turtle, among other things, said:

Father: Your children are not wanting in Industry; but it is the introduction of this fatal poison which keeps them poor. Your children have not the command over themselves, which you have, therefore, before anything can be done to advantage, this evil must be remedied.

Father: When our white brothers came to this land, our forefathers were numerous and happy; but, since their intercourse with the white people, and owing to the introduction of this fatal poison, we have become less numerous and happy. (American State Papers, vol. 7 (Indian Affairs, class II, vol. I) (1789-1815), p. 655.)

5 American State Papers, vol. 7 (Indian Affairs, class II, vol. I) (1789-1815), p. 653
6 Act of March 30, 1802, sec. 21, 2 Stat. 139. 146. An excellent account of the development of Indian liquor laws from 1802 to 1911 will be found in Ann. Cm 1912 B. 1090, 1091.
7 See 35 Inf.
8 23 Cong. Rec., pt. 3, p. 2187 (1892) : 29 Cong. Rec., pt. 2, pp. 893-899 (1897). The view that liquor control aids in maintaining the peace is supported in the Annual Report of Louis C. Mueller, Chief Special Officer of the Office of Indian Affairs, March 28, 1939. The contention that practically every Indian war since the discovery of America has been caused directly or indirectly, by the liquor traffic is put forward by William E. Johnson. The Federal Government and Indian Liquor Traffic (1911) pp. 183-238.

FEDERAL CLAUSES IN THE CONSTITUTION INVESTING THE CONGRESS WITH AUTHORITY TO REGULATE COMMERCE WITH THE INDIAN TRIBES AND TO Dispose OF AND MAKE ALL NECESSARY RULES AND REGULATIONS RESPECTING THE TRADE OF THE INDIANS WITH THEIR ENEMY NATIONS, AND AMONG THE SEVERAL STATES AND WITH THE INDIAN TRIBES. For a further discussion of these clauses, see Chapter 5, sec. 1.
9 U. S. Const., Art. I, sec. 8, cl. 3.
The treaty-making power has been exercised, in conjunction with the congressional power to carry out the terms of treaties by legislative enactments, to impose prohibitions against the liquor traffic by direct treaties with the Indians, as was done, for example, in the Treaty of October 2, 1880, with the Chippewas, and by the Convention with Russia of April 5-17, 1824. Treaties and legislative enactments of the United States are of equal dignity, so that the restrictions against intoxicants in the former have the force of law. Similar in effect to treaties with the Indian tribes are "agreements," which were resorted to after the policy of dealing with the Indians by treaty was abandoned. These agreements, however, received their legal force from acts of Congress ratifying and adopting them. They are exemplified by the agreements with the Nez Perce Indians and the Yakton Sioux.

The power to regulate commerce with the Indian tribes is really the constitutional backbone of federal legislation against traffic in liquor with the Indians. The courts have upheld this power with respect to tribal Indians, and the Indian country.


3 Ratified with amendments March 1, 1864; amendments assented to April 12, 1864; proclaimed May 5, 1864. 13 Stat. 667.

4 U. S. Const., Art. IV, sec. 2, Cl. 2.


6 The act of March 20, 1906, contains a provision that "no Indian may use, possess, sell, or offer for sale any intoxicating liquor with intent to defraud the United States in any claim for taxes thereon."
INDIAN LIQUOR LAWS

SECTION 3. EXISTING PROHIBITIONS AND ENFORCEMENT MEASURES

Pursuant to the foregoing federal powers, Congress has evolved a system of prohibitions and enforcement measures against traffic in liquor with the Indians, and in the Indian country. The most important of these measures is the Act of July 23, 1892, as amended in 1938 to read as follows:"

Any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian who is a ward of the Government under charge of an Indian superintendent or agent, or to any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottees without the consent of the United States, shall be punished for the first offense by imprisonment for not more than one year, and by a fine of not more than $500, and for the second offense and each offense thereafter by imprisonment for not more than five years, and by a fine of not more than $2,000. Provided, however, That the person convicted shall be committed until fine and costs are paid: And provided further, That first offenses under this section may be prosecuted by information, but no person convicted of a first offense under this section shall be sentenced to be imprisoned in a penitentiary or required to perform hard labor. It shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, alcohol, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department. All complaints for the arrest of any person or persons made for violation of any of the provisions of this section shall be made in the county in which the offense was committed, or if committed upon or within any reservation not included in any county, then in any county adjoining such reservation; but in all cases such arrests shall be made before any United States court commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the State in which such reservation is located to issue warrants for the arrest and examination of offenders by section 1014 of the Revised Statutes [18 U. S. C. 591] as amended. And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense.

This statute defines two distinct prohibitions. The first is directed against any disposition of intoxicants to any Indian who has an allotment, title to which is restricted or held in trust by the Federal Government, or to any Indian who is a ward or under the guardianship of the United States. The Indians included may be located in Indian country or outside of it, as whites and others may commit this crime, but apparently illicit liquor is not an offense against an Indian allottee or ward because he did not know the recipient was an Indian. The person introducing liquor to an Indian allottee or ward is not excused as possession of liquor laws. Congress may forbid possession.  

As the substance of this law was enacted in the R. S. § 2139. Indians "in the Indian country" were excepted from its penalties. This exception was repealed by the Act of February 27, 1877, 19 Stat. 240, 244, which was an act to correct errors in the Revised Statutes. The words "beer, wine, or intoxicating liquors of any kind" were added by the Act of July 23, 1892, 27 Stat. 250. This broadening was made necessary by decisions holding beer not to be within the earlier definition. See Bartis v. United States, 172 U. S. 570 (1894); In re McDonald, 49 Fed. 300 (D. C. Mont. 1893).

Again, in the Act of January 30, 1897, 29 Stat. 506, the enumeration of liquors was extended to read as in the 1935 amendment above. The acts of 1892 and 1897 were used together. See Edwards v. United States, 5 F. 2d 17 (C. C. A. 9, 1925); Morgan v. Ward, 224 Fed. 536 (C. C. A. 8, 1915), cert. den. 239 US 618 (1915).

The sections of the 1935 amendment which are new are the penalty provisions and the provisions allowing prosecution by information for the first offense.


Indian, or a “ward of the Government,” or because he mistook him for a Mexican or white. The second prohibition defined in the statute is directed against the introduction or attempt to introduce any intoxicants into Indian country. To offend against the ban on introducing liquor it is enough that one is the means of carrying the liquor within the limits of Indian country, knowing of its presence and transportation. The person so introducing alcohol need not have any intent to introduce, that is, he need not know that he has entered Indian country. But an intent is necessary to constitute the crime of attempting to introduce liquor into Indian country. In both the introduction and the attempt to introduce, the destination, intentionally or unwittingly, must be the Indian country. The mere transportation through Indian country is not within this act when the destination is beyond.

As the courts repeatedly held that possession of liquor in Indian country was not alone sufficient to show introduction, Congress in 1916 enacted the following law to bolster this weak spot:

* * *

A possession by a person of intoxicating liquors in the country where the introduction is prohibited by treaty or Federal statute shall be prima facie evidence of unlawful introduction.

In 1918, as an additional aid to enforcement, Congress provided that possession in Indian country shall be an independent offense. The statute reads:

* * *

Possession by a person of intoxicating liquors in the Indian country where the introduction is or was prohibited by treaty or Federal statute shall be an offense and punished in accordance with the provisions of the Acts of July twenty-third, eighteen hundred and ninety-seven (Twenty-seventh Statutes at Large, page two hundred and sixty), and January thirtieth, eighteen hundred and ninety-seven (Twenty-ninth Statutes at Large, page five hundred and six).

The elements of this offense are possession, which means physical control and power to dispose of liquor, knowledge of possession, and location of the liquor within the limits of Indian country. Apparently, knowledge of possession in another is not enough, nor is drinking from the bottle of another enough. But where the accused is found with a full liquor bottle, which he breaks, it has been held that these facts are evidence of possession, knowledge, and control.

The early Trade and Intercourse Act of 1834 contained a measure to facilitate enforcement of the liquor prohibitions, which is still in force. It provided:

That if any person whatever, shall, within the limits of the Indian country, set up or continue any distillery for manufacturing ardent spirits, liquor, and beer and other intoxicating liquors named, in the Act of January thirtieth, eighteen hundred and ninety-seven (Twenty-ninth Statutes at Large, page five hundred and six), he shall forfeit and pay a penalty of one thousand dollars; and it shall be the duty of the superintendent of Indian affairs, Indian agent, or sub-agent, within the limits of whose agency the same shall be set up or continued, forthwith to destroy and break up the same.

Other enforcing acts, including provisions for search, seizure, and forfeiture of goods and vehicles, have been enacted from time to time as conditions required. This legislation also had its inception in the Trade and Intercourse Acts of May 6, 1822, and of June 30, 1834, and their modified provisions are as follows:

See 2140. If any superintendent of Indian affairs, Indian agent, or sub-agent, or commanding officer of a military post, has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any ardent spirits, liquor, or wine, or other intoxicating liquors named in the Act of January thirtieth, eighteen hundred and ninety-seven (Twenty-ninth Statutes at Large, page five hundred and six), into the Indian country in violation of law, such superintendent, agent, or commanding officer may cause the boats, stores, packages, wagons, sleds, and places of deposit of such person to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such person, shall be seized and delivered to the proper officer, and shall be proceeded against, by libel in the proper court, and forfeited, one-half to the informer and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bond put in suit. It shall moreover be the duty of any person in the service of the United States, or of any Indian, to take and destroy any ardent spirits or wine found in the Indian country, except such as may be introduced therein by the War Department. In all cases arising under this and the preceding section [27 Stat. 260 and 29 Stat. 506, as amended by 52 Stat. 636], Indians shall be competent witnesses.

Under this statute federal enforcement officers have the right to search and seize the boats, stores, packages, wagons, etc., without warrant. But federal officers may not make unreasonable searches as they are subject to the Fourth Amendment to the United States Constitution. And the Act of August 27,
SECTION 4. LOCALITY WHERE THESE MEASURES APPLY

The statutes examined above comprise the existing prohibitions and enforcement measures concerning the Indian liquor traffic. But the picture is not complete without an understanding of the locality where these measures apply. Recent statutes have made this fairly clear with regard to lands within the United States proper. First, the Act of June 27, 1934, provides:

That hereafter the special Indian liquor laws shall not apply to former Indian lands now outside of any existing Indian reservation in any case where the land is no longer held by Indians under trust patents or under any other form of deed or patent which contains restrictions against alienation without the consent of some official of the United States Government: Provided, however, That nothing in this Act shall be construed to continue or repeal the provisions of the Indian liquor laws which prohibit the sale, gift, barter, exchange, or other disposition of beer, wine, and other liquors to Indians of the classes set forth in the Act of January 30, 1897 (29 Stat. L. 506), and section 241, title 25, of the United States Code.

The purpose of this act is to repeal old treaty and statutory provisions whereby lands ceded to the United States, but adjoining Indian lands retained, were subjected to the Indian liquor laws.

Second, ordinarily fee patented, unrestricted lands are not subject to the liquor laws. Congress has sometimes continued the Indian liquor laws in such lands.

Third, the Act of March 2, 1917, brought Osage County, Oklahoma, within the Indian liquor laws.

Fourth, by the Act of March 5, 1934 that part of Oklahoma, Formerly known as “Indian Territory,” in which all liquor traffic was forbidden by the Act of March 1, 1886, was released from the restrictions of the Indian liquor laws except as to lands on which Indian schools are or may be located. Reservation lands, allotted lands under restrictions or covered by trust patents outside of Indian reservations, and Osage County, in Oklahoma, remain as Indian country in the enforcement of liquor laws.

An interesting question arises with regard to reservation lands newly purchased and set aside for the Indians. Are those lands subject to the Indian liquor laws? This question has been decisively settled in the affirmative in the recent opinion of the United States Supreme Court in United States v. McGowan.

by the court thereof or other person, shall be subject to the seizure, libel, and forfeiture provided in section twenty-two hundred and forty of the Revised Statutes of the United States.

This act is broader than the search and seizure provisions in the Act of 1834 in these respects: (1) Search and seizure may be made outside Indian country when the vehicle taken is used in the attempt to introduce liquor into Indian country. (2) Automobiles and any other vehicles are included, (3) “the thing involved [automobile or other vehicle], and not its owner is the offender *** ***.” The vehicle is forfeited without regard to ownership. Finally, it should be noted that these enforcement measures apply solely to Indian liquor laws and cannot be used as a basis for search, seizure, and libel of goods, vehicles, etc., used in any other illicit traffic.

The passage of the Eighteenth Amendment, the National Prohibition Act, and repeal of both had no effect to supplant or repeal any of the special Indian liquor laws.

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References:

- 30 Stat. 909, 970.
- United States v. One Buick Roadster Automobile, 244 Fed. 901 (D. C. E. D. Okla. 1917).
- United States v. One Chevrolet Coupe Automobile, 58 F. 2d 235 (C. C. A. 9, 1919).
- United States v. One Buick Roadster Automobile, 244 Fed. 901 (D. C. E. D. Okla. 1917).
- Hawley v. United States, 15 F. 2d 621 (C. C. A. 8, 1925).
Only two statutory exceptions exist to the prohibitions against liquor in Indian country. The first relates to the use of sacramental wine: as follows:

- It shall not be unlawful to introduce and use wines solely for sacramental purposes, under church authority, at any place within the Indian country or any Indian reservation, including the Pueblo Reservations in New Mexico.

The second exception permits liquor for lawful purposes, in Osage County, Oklahoma.

Perhaps still another exception may be found in the provisions of the Act of June 16, 1933, making “3.2 beer” a matter of local option in Oklahoma.

Alaska is not covered by the Indian liquor laws. Congress has always legislated specially for that territory with regard to liquor and has granted the power to control the liquor trade to the territorial legislature by the Act of April 13, 1934.

Indian country and that the special Indian liquor laws did not extend to the new territory. In the following year, Congress extended the Indian liquor laws to Alaska by the Act of March 3, 1873, 17 Stat. 310, 580. Again by the Act of May 17, 1834, 23 Stat. 24, Congress prohibited importation, manufacture, and sale of intoxicants to all of Alaska and its inhabitants. This measure was amended by the Act of March 3, 1899, sec. 142, 30 Stat. 1253, 1274, to limit the prohibition to selling to Indians.

As amended by the Act of February 6, 1909, 35 Stat. 600, 603, the Act of 1899 remains in force. In answer to the question of the Secretary of the Interior as to whether the Indian liquor laws apply to Alaska, the Acting Solicitor of the Department of the Interior in 1937 gave his opinion that they do not. His opinion reached the following conclusion:

It is evident, therefore, that Congress did not regard those provisions [i.e., the Indian liquor laws] as having application to the natives of Alaska; otherwise, the enactment of section 124 above [30 Stat. 1274] would not have been necessary. That the territorial legislature obtained a like view is shown by the fact that it has also seen fit to deal specially with the subject of liquor control among the Alaska natives (see section 496B, Compiled Laws of Alaska, 1833). In any event, the enactment by Congress of a special liquor law for the natives of Alaska makes the general enforcement found in section 241 [25 U. S. C.] locally inapplicable.


** SECTION 5. ENFORCEMENT AGENCIES, JURISDICTION, AND PROCEDURE **

The work of the Office of Indian Affairs in the field of prohibition enforcement was thus described by the Supreme Court, per Hughes, J., in the case of United States v. Birdsell:

- From an early day, Congress has prohibited the liquor traffic among the Indians, and it has been one of the important duties of the Indian Office to aid in the enforcement of this legislation. See act of June 30, 1834, c. 161, sec. 20, 4 Stat. 729, 732; Rev. Stat., secs. 2139, 2140, 2141; act of July 23, 1892, c. 234, 27 Stat. 260; act of January 39, 1897, c. 109, 29 Stat. 506. It has furnished such aid by the detection of violations, by the collection of evidence, and by appropriate steps to secure the conviction and punishment of offenders. The regulations of the office, adopted under statutory authority (Rev. Stat., secs. 465, 2058), have been explicit as to the duties of Indian agents in this respect. In recent years, Congress has made special appropriations “to enable the Commissioner of the Indian Affairs, under the direction of the Secretary of the Interior, to take action to suppress the traffic of intoxicating liquors among Indians” (34 Stat. 328, 1017; 35 Stat. 72, 782; 36 Stat. 271, 1059; 37 Stat. 519), and an organization of special officers and deputies, serving in various states, has been created in the department. Through these efforts numerous convictions have been obtained. The results have been reported to Congress annually by the Commissioner and the appropriations for the continuance of the service have been increased.


2 The nature and extent of this authorized service of the department are shown by the following extract from the Commissioner’s report for the fiscal year ending June 30, 1912: “Until 1906

- enforcement of these statutes and subsequent enactment” (as to the liquor traffic) “was left to Indian agents and superintendents and their Indian police. Assisted so far as might be by local peace officers and by representatives of the Department of Justice. In 1906 criminal dockets in Indian Territory became so crowded and the possibility of early trial so remote that disregard of the statutes forbidding introduction of intoxicants assumed large importance. To meet the emergency Congress, in the act of June 21, 1906, appropriated $25,000 to be used to suppress the traffic in intoxicating liquors among Indians, and in August 1906, a special officer was commissioned and sent to Oklahoma, that he and his subordinates might, through detective operations, supplement the efforts of superintendents in charge of reservations. In the fiscal year 1909, when the appropriation had grown to $40,000, this service began to operate throughout all States where Indians needed protection. In 1911 the service had grown until it had an appropriation of $70,000 and an organization including a chief special officer, 1 assistant chief, 2 constables, 12 special officers, and 143 local deputies stationed in 21 States. The increasing success of the service appears in the fact that in 1900, 561 cases which the service secured came to issue in court, resulting in 548 convictions, whereas in 1911, 1,202 cases came to issue, 1,168 defendants were convicted, and but 34 defendants were acquitted by juries. In 1911 fines imposed amounted to $80,463, or more than the appropriation for the service.” H. Doc. No. 93, 62d Cong., 3d sess., pp. 11. 12.

In the Act of March 1, 1907, Congress empowered special officers to search and seize, and in 1912 gave them the powers of the United States marshals and deputy marshals.

Criminal or libel proceedings are cognizable in the Federal District Court in the district where the offense was committed. The manner of complaint and arrest are governed by the Act of June 15, 1938, set out in full in section 3 of this chapter.