

CHAPTER 17

INDIAN LIQUOR LAWS

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SECTION 1. HISTORICAL BACKGROUND

Restrictions on traffic in liquor among the Indians began in early colonial times, in a few of the colonies.¹ The Indians themselves at various times sought to curb their consumption of strong drink,² and it is worthy of note that the first federal control measure³ was enacted, at least in part, in response to the verbal plea of an Indian chief to President Thomas Jefferson on January 4, 1802.⁴

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

¹ Mass. Colonial Laws, 1660-72 (Whitmore 1889), p. 161: The Charters of the Province of Pennsylvania and City of Philadelphia (Franklin 1742), c. 106, p. 41: Acts of the General Assembly of the Province of New Jersey, 1753-61 (Nevill 1761), sec. 2, p. 125.

² See F. W. Hodge, Handbook of American Indians, H. Doc. No. 926, pt. 2, 59th Cong., 1st sess., (1905-6), p. 799; American State Papers, vol. 7 (Indian Affairs, class II, vol. 1) (1789-1815), p. 655.

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 :

. . . But, father, nothing can be done to advantage unless the great council of the Sixteen Fires, now assembled, will prohibit any person from selling any spirituous liquors among their red brothers.

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 that 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. 1) (1789-1815) p. 655.)

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.⁵

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 vending or distributing of spirituous liquors among all or any of the said Indian tribes, anything herein contained to the contrary thereof notwithstanding."⁶

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.⁷

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.⁸

⁵ American State Papers, vol. 7 (Indian Affairs, class II, vol. 1) (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. Ca 1912 B. 1090, 1091.

⁷ See fn. 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 the Liquor Traffic (1911) pp. 183-238.

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

The power of the Federal Government over traffic in intoxicating liquors with the Indians may be said to be derived from several sources.⁹ Among these may be mentioned, first, the

⁹ In *United States Express Co. v. Friedman*, 191 Fed. 673 (C. C. A. 8, 1911), rev'g 180 Fed. 1006 (D. C. W. D. Ark. 1910), the power is said to be derived from five sources, as follows:

First, the treaty-making power. Second, the power to regulate interstate commerce. Third, the power to regulate commerce with the Indian tribes. Fourth, the ownership, as sovereign, of lands to which the Indian title has not been extinguished. Fifth, the plenary authority arising out of its guardianship of the Indians as an alien but dependent people. (At p. 674.)

clauses in the Constitution investing Congress with authority to regulate commerce with the Indian tribes¹⁰ and to dispose of and make all needful rules and regulations respecting the ter-

See also *Worcester v. Georgia*, 6 Pet. 515 (1832), where Chief Justice Marshall intimates that the authority of the Federal Government to control "all intercourse" with the Indians is traceable to the clauses in the Constitution relative to war and peace, of making treaties and of regulating commerce with foreign nations and among the several states and with the Indian tribes. For a further discussion of the sources and limits of federal power, see Chapter 5, sec. 1.

¹⁰ U. S. Const., Art. I, sec. 8, cl. 3.

ritory and other property of the United States;¹¹ second, the clause in the Constitution relative to the making of treaties;¹² and third, the recognized relation of tribal Indians to the United States.¹³ The first, of course, relates to the powers of Congress; the second to those of the treaty-making department, and the third, the broadest and most important of all, refers to the powers of both.

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, 1863,¹⁴ with the Chippewas, and by the Convention with Russia of April 5-17, 1824.¹⁵ 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.¹⁶ 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.¹⁷ 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 Yankton Sioux.¹⁸

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.¹⁹

¹¹ U. S. Const., Art. IV, sec. 3, Cl. 2.

¹² U. S. Const., Art. II, sec. 2, cl. 2.

¹³ See *United States v. Kagama*, 118 U. S. 375, 383-384 (1886). See also *United States v. Nice*, 241 U. S. 591 (1916); *United States v. Sandoval*, 231 U. S. 28 (1913), rev'g 198 Fed. 539 (D. C. N. M. 1912); *United States v. McGowan*, 302 U. S. 535 (1938), rev'g 89 F. 2d 201 (C. C. A. 9, 1937), aff'g *United States v. One Chevrolet Sedan*, 16 F. Supp. 453 (D. C. Nev. 1936).

¹⁴ Ratified with amendments March 1, 1864; amendments assented to April 12, 1864; proclaimed May 5, 1864, 13 Stat. 667. Other treaty provisions containing prohibitions against the sale or introduction of liquor are: Treaty of April 5, 1824, with Russia, 8 Stat. 302, Art. 5; Treaty of May 15, 1846, with the Comanche, I-on-i, Ana-da-ca, Cadoc, Lapan, Long-wah, Keechy, Tah-qah, Carro, Wichita, and Wacoe Tribes of Indians, 9 Stat. 844, Art. XII; Treaty of July 23, 1851, with the See-see-toan and Way-pay-toan bands of Dakota or Sioux Indians, 10 Stat. 949, Art. 5; Treaty of August 5, 1851, with Med-ay-wa-kan-toan and Wah-pay-koo-tay bands of Dakota or Sioux Indians, 10 Stat. 954, Art. VI; Treaty of May 30, 1854, with the united tribes of Kaskaskia and Peoria, Piankeshaw and Wea Indians, 10 Stat. 1082, Art. 10; Treaty of October 17, 1855, with Blackfoot and other tribes of Indians, 11 Stat. 657, Art. 13; Treaty of February 11, 1856, with the Menominee tribe of Indians, 11 Stat. 679, Art. 3; Treaty of April 19, 1858, with the Yankton Tribe of Sioux or Daçotah Indians, 11 Stat. 743, Art. XII; Treaty of October 14, 1864, with the Klamath tribe of Indians, Moadoc tribe of Indians and the Yahooskin band of Snake Indians, 16 Stat. 707, Art. IX.

¹⁵ Ratified with amendments March 1, 1864; amendments assented to April 12, 1864; proclaimed May 5, 1864, 13 Stat. 667.

¹⁶ U. S. Const., Art. VI, cl. 2; Willoughby, *The Constitutional Law of the United States* (2d ed. 1929), sec. 303, p. 548. See Chapter 3, sec. 1.

¹⁷ Act of March 3, 1871, 16 Stat. 544, 566. See Chapter 3, sec. 6.

¹⁸ See Act of August 15, 1894, 28 Stat. 286. The selling or giving away of intoxicants upon ceded territory is forever prohibited by Art. XVII of the Yankton agreement (p. 318). Introduction of intoxicants is prohibited for 25 years by Art. IX of the Nez Perce agreement (p. 330).

¹⁹ *United States v. Forty-three Gall. Whiskey*, 108 U. S. 491 (1883); *g. c.* 93 U. S. 188 (1876); *Ex parte Webb*, 225 U. S. 663 (1912); *United States v. Wright*, 229 U. S. 226 (1913); *United States v. Sandoval*, 231 U. S. 28 (1913); *Perrin v. United States*, 232 U. S. 478 (1914); *United States v. Shaw-Mux*, 27 Fed. Cas. No. 16268 (D. C. Ore. 1873)

The power over commerce with the Indians is distinct from that over interstate commerce in that traffic with the Indian tribes and may be regulated regardless of state lines. Thus, the Indian commerce power covers traffic which may be wholly within one state.²⁰

It is to be noted that regulation under this power is not limited to transactions in which a tribe acts as an entity but extends to transactions with individual members of each tribe.²¹ The Supreme Court has stated this principle in the following terms:

Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian tribes, means commerce with the individuals composing those tribes.²²

In connection with the power to regulate commerce with the Indian tribes there exists also the authority granted by the Constitution to do all things necessary and proper by way of carrying out its provisions.²³ Pursuant to this power and the power over the territory and other property belonging to the United States,²⁴ the Federal Government has imposed liquor restrictions on lands ceded to it by the Indians when these lands adjoined Indian country.²⁵ The purpose of this measure was to prevent sale of liquor on the boundaries of the land retained by the Indians. Except for these extensions of the Indian liquor laws to "buffer" areas, the states would have had the exclusive police power thereon. Such extensions have been repeatedly upheld by the United States Supreme Court.²⁶ The power lasts only so long as Indians are present on the retained reservation lands of the Government.²⁷ In 1934, Congress withdrew liquor restrictions from the "buffer" lands.²⁸

Congress may also enact such measures to aid in the enforcement of the prohibition statutes, as are "directed at the means in the accomplishing of the violation of the

Farrell v. United States, 110 Fed. 942 (C. C. A. 8, 1901); *United States v. Wirt*, 28 Fed. Cas. No. 1197 U. S. 488 (1905), subject to federal Indian liquor laws. This holding governed the courts from 1905 to 1911, 317 (1911), and *ex post facto* 391 (1916).

²⁰ F. H. Cooke, *The Commerce Clause of the Federal Constitution* (1908), pp. 62-64; 1 Willoughby, *The Constitutional Law of the United States* (2d ed. 1929), sec. 226, pp. 397-398; *Dick v. United States*, 208 U. S. 340 (1908); *United States v. Forty-three Gallons of Whiskey*, 93 U. S. 188 (1876), rev'g 28 Fed. Cas. No. 15136 (D. C. Minn. 1874).

²¹ *Browning v. United States*, 6 F. 2d 801 (C. C. A. 8, 1925), cert. den. 269 U. S. 568 (1925); *United States v. Shaw-Mux*, 27 Fed. Cas. No. 16268 (D. C. Ore. 1873); *United States v. Nice*, 241 U. S. 591 (1916); *United States v. Holliday*, 3 Wall. 407 (1865); *United States v. Flynn*, 25 Fed. Cas. No. 15124 (C. C. Minn. 1870).

²² *United States v. Holliday*, *supra*, p. 417. Also see Chapter 5, sec. 3, I, sec. 8, cl. 18.

²³ U. S. Const., Art. IV, sec. 3, cl. 2.

²⁴ Act of December 19, 1854, 10 Stat. 598 (Chippewa); Act of March 1, 1895, 28 Stat. 693 (Indian Territory); Act of March 20, 1906, 34 Stat. 80 (Kiowa, Comanche, and Apache); Act of June 16, 1906, 34 Stat. 267 (Oklahoma, Indian Territory, New Mexico, and Arizona); Act of May 6, 1910, 36 Stat. 348 (Yakima); Act of June 20, 1910, 36 Stat. 557 (New Mexico and Arizona); Act of May 11, 1912, 37 Stat. 111 (Omaha); Act of July 22, 1912, 37 Stat. 197 (Colville); Act of February 14, 1913, 37 Stat. 675 (Standing Rock); Act of May 31, 1918, 40 Stat. 592 (Fort Hall); Act of June 1, 1920, 41 Stat. 751 (Crow).

²⁵ *Perrin v. United States*, 232 U. S. 478 (1914); *Dick v. United States*, 208 U. S. 340 (1908); *United States v. Forty-three Gallons of Whiskey*, 93 U. S. 188 (1876).

²⁶ *Perrin v. United States*, *supra*.

²⁷ Act of June 27, 1934, 48 Stat. 1245, 25 U. S. C. 254.

statute.²⁹ Statutes providing for search and seizure, and libel and forfeiture have been uniformly upheld.³⁰ As possession of

intoxicants in Indian country leads to infractions of the Indian liquor laws. Congress may forbid possession.³¹

²⁹ *Commercial Investment Trust v. United States*, 261 Fed. 330. 333 (C. C. A. 8, 1919).

³⁰ Act of March 2, 1917. 39 Stat. 969, 970. was upheld in *Commercial Investment Trust v. United States*, supra; and *United States v. One Buick Roadster, Automobile*, 244 Fed. 961 (D. C. E. D. Okla. 1917).

³¹ Acts of May 25, 1918. 40 Stat. 561, 563. and June 30, 1919, 41 Stat. 3, 4, held valid in the following cases: *Kennedy v. United States*, 265 U. S. 344 (1924), question certified from *Kennedy v. United States*, 2 F. 2d 597

(C. C. A. 8, 1924); *Reynolds v. United States*, 48 F. 2d 762 (C. C. A. 10, 1931); *Morris v. United States*, 19 F. 2d 131 (C. C. A. 8, 1927); *Sharpe v. United States*, 16 F. 2d 876 (C. C. A. 8, 1926) aff'g *Ex parte Sharpe*, 13 F. 2d 651 (D. C. N. D. Okla. 1926); *Lucas v. United States*, 15 F. 2d 32 (C. C. A. 8, 1926); *Buchanan v. United States*, 15 F. 2d 496 (C. C. A. 8, 1926); *Renfro v. United States*, 15 F. 2d 991 (C. C. A. 8, 1926).

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.³²

The most important of these measures is the Act of July 23, 1892,³³ as amended in 1938 to read as follows: ³⁴

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 any 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, or 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 allottee 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 imprisonment 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, ale, beer, wine, of 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 where the offense shall have been 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 Re-

vised 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.³⁵

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.³⁶ The Indians included may be located in Indian country or outside of it.³⁷ Indians as well as whites and others may commit this crime,³⁸ but apparently an Indian purchasing or otherwise receiving illicit liquor is not offending against this law.³⁹

The person disposing of liquor to an Indian allottee or ward is not excused because he did not know the recipient was an

³² Act of June 15, 1938. 52 Stat. 696. 25 U. S. C. 241. The first general statutory prohibition against liquor in Indian country was approved July 9, 1832, c. 174. 4 Stat. 564. Two years later Congress first included in sec. 20 of the Act to Regulate Trade and Intercourse with the Indian Tribes of June 30, 1834. 4 Stat. 729. the substance from which the above act was derived. By amendment of February 13, 1862, c. 24, 12 Stat. 338. Indians affected by the law were defined as those under charge of a superintendent or agent, and penalties for selling and introducing were made the same.

The Act of March 15, 1864, c. 33. 13 Stat. 29. added the words "or circuit court" giving that court jurisdiction concurrently with the district courts.

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 "ale, beer, wine, or intoxicating liquors of any kind" were added by the Act of July 23, 1892, 27 Stat. 260. This broadening was made necessary by decisions holding beer not to be within the earlier definition. See *Sartis v. United States*, 152 U. S. 570 (1894); In re *McDonough*, 49 Fed. 360 (D. C. Mont. 1892).

Again, in the Act of January 30, 1897, 29 Stat. 506, the enumeration of liquors was extended to read as in the 1938 amendment above.

The acts of 1892 and 1897 were read together. See *Edwards v. United States*, 5 F. 2d 17 (C. C. A. 8, 1925); *Morgan v. Ward*, 224 Fed. 698 (C. C. A. 8, 1915), cert. den. 239 U. S. 618 (1915).

The sections of the 1938 amendment which are new are the penalty provisions and the provisions allowing prosecution by information for the first offense.

³⁶ Wardship of the Indians and termination of wardship is discussed in sec. 9 of Chapter 8. It may be noted here, however, that the granting of citizenship did not take citizen Indians out of the working of the liquor laws. *United States v. Nice*, 241 U. S. 591 (1916) [overruling *Matter of Hoff*, 197 U. S. 848 (1905)]; *Katzenmeyer v. United States*, 225 Fed. 523 (C. C. A. 7, 1915); *Mosier v. United States*, 198 Fed. 54 (C. C. A. 8, 1912), cert. den. 229 U. S. 619 (1913). The privilege of buying liquor is not one of the privileges of citizenship. *Mulligan v. United States*, 120 Fed. 98 (C. C. A. 8, 1903); *Farrell v. United States*, 110 Fed. 942 (C. C. A. 8, 1901).

³⁷ *United States v. Belt*, 128 Fed. 68 (D. C. M. D. Pa. 1904).

³⁸ *United States v. Miller*, 105 Fed. 944 (D. C. Nev. 1901); *United States v. Shaw-Hux*, 27 Fed. Cas. NO. 16268 (D. C. Ore. 1873).

³⁹ *Lott v. United States*, 205 Fed. 28 (C. C. A. 9, 1913) (under Alaska liquor law). But see Acts of May 25, 1918, 40 Stat. 561, 563, and June 30, 1919, 41 Stat. 34, prohibiting possession.

³² For a definition of "Indian country" see Chapter 1, sec. 3. For the purpose of the liquor laws it means all lands and reservations. Indian title to which has not been extinguished. The leading liquor cases applying this definition are *United States v. Le Bris*, 121 U. S. 278 (1887); *Bates v. Clark*, 95 U. S. 204 (1877). See also the Act of June 27, 1934, C. 846, 48 Stat. 1245. 25 U. S. C. 254.

³³ 27 stat. 260.

³⁴ Act of June 15, 1938. 52 Stat. 696, 25 U. S. C. 241. This act expressly repealed similar provisions in the Act of January 30, 1897, 29 Stat. 506.

Indian or a "ward of the Government," or because he mistook him for a Mexican or white.⁴⁰

The second prohibition defined in the statute is directed against the introduction or attempt to introduce any intoxicants into Indian country.⁴¹ 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.⁴² The person so introducing alcohol need not have any interest in it.⁴³ Nor need he have any intent to introduce, that is, he need not know that he has entered Indian country.⁴⁴ But an intent is necessary to constitute the crime of attempting to introduce liquor into Indian country.⁴⁵ 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.⁴⁶

As the courts repeatedly held that possession of liquor in Indian country was not alone sufficient to show introduction,⁴⁷ Congress in 1916 enacted the following law to bolster this weak spot:

* * * 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.⁴⁸

In 1918, as an additional aid to enforcement, Congress provided that possession in Indian country shall be an independent offense.⁴⁹ 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 two (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,⁵¹ and location of the liquor within the limits of Indian country.⁵² Apparently, knowledge of possession in another is not enough, nor is drinking from the bottle of another enough.⁵³ But where the accused is found with a full liquor

⁴⁰ *Scheff v. United States*, 33 F. 2d 263 (C. C. A. 8, 1929); *Feeley v. United States*, 236 Fed. 903 (C. C. A. 8, 1916); *Lott v. United States*, *supra*; *United States v. Stofello*, 8 Ariz. 461, 76 Pac. 611 (1904). Officers of the Indian Service, however, are instructed to resolve doubts in favor of the vendor in cases involving Indians resembling other nationalities.

⁴¹ An Indian may be convicted of introducing liquor into Indian Territory, *Clairmont v. United States*, 225 U. S. 551 (1912). See also fn. 30, *supra*.

⁴² *Archard v. United States*, 212 Fed. 146 (C. C. A. 8, 1914).

⁴³ *Ibid.*

⁴⁴ *United States v. Leathers*, 26 Fed. Cas. No. 15581 (D. C. Nev. 1879).

⁴⁵ *United States v. Stephens*, 12 Fed. 52 (D. C. Ore. 1882).

⁴⁶ *Butterfield v. United States*, 241 Fed. 556 (C. C. A. 8, 1917); *Townsend v. United States*, 265 Fed. 519 (C. C. A. 8, 1920); *United States v. Tadish*, 211 Fed. 490 (D. C. Ariz. 1913).

⁴⁷ *Collier v. United States*, 221 Fed. 64 (C. C. A. 8, 1915); *Chambliss v. United States*, 218 Fed. 154 (C. C. A. 8, 1914); *Parks v. United States*, 225 Fed. 369 (C. C. A. 8, 1915); *Cecil v. United States*, 225 Fed. 368 (C. C. A. 8, 1915); *Goff v. United States*, 257 Fed. 294 (C. C. A. 8, 1919).

⁴⁸ Act of May 18, 1916, 39 Stat. 123, 124, 25 U. S. C. 245.

⁴⁹ *Brown v. United States*, 265 Fed. 623 (C. C. A. 8, 1920), holds this act constitutional.

⁵⁰ Act of May 25, 1918, 40 Stat. 561, 563; and the Act of June 30, 1919, 41 Stat. 3, 4, 25 U. S. C. 244.

⁵¹ *Buchanan v. United States*, 15 F. 2d 496 (C. C. A. 8, 1926); *Colbaugh v. United States*, 15 F. 2d 929 (C. C. A. 8, 1926).

⁵² *Aldridge v. United States*, 67 F. 2d 956 (C. C. A. 10, 1933).

⁵³ *Colbaugh v. United States*, *supra*.

bottle, which he breaks, it has been held that these facts are evidence of possession, knowledge, and control.⁵⁴ The wording of this statute, though not as detailed in defining prohibited liquors as the Act of June 15, 1938,⁵⁵ is apparently as broad, since it covers any intoxicant.⁵⁶

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 [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)],⁵⁷ 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, 1822,⁵⁸ and of June 30, 1834,⁵⁹ and their modified provisions are as follows:

Sec. 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 spirituous liquor or wine [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)],⁶¹ into the Indian country in violation of law, such superintendent, agent, sub-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. 696], Indians shall be competent witnesses.⁶²

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,

⁵⁴ *Morrison v. United States*, 6 F. 2d 809 (C. C. A. 8, 1925).

⁵⁵ 52 Stat. 696, 25 U. S. C. 241.

⁵⁶ *Sharp v. United States*, 16 F. 2d 876 (C. C. A. 8, 1926), *aff'g. Ex parte Sharp*, 13 F. 2d 651 (D. C. N. D. Okla. 1926).

⁵⁷ The bracketed clause was added to this act by the Act of May 18, 1916, 39 Stat. 123, 124, 25 U. S. C. 252.

⁵⁸ Act of June 30, 1834, 4 Stat. 729, 732, 733, 25 U. S. C. 251.

⁵⁹ 3 Stat. 682.

⁶⁰ 4 Stat. 729.

⁶¹ The bracketed clause was made to apply to this act by the Act of May 18, 1916, 39 Stat. 123, 124, 25 U. S. C. 252.

⁶² Enacted as it now appears in the R. S. § 2140, which is derived from the Act of March 15, 1864, 13 Stat. 29. This act changed the provisions of the Act of June 30, 1834, by omitting necessity for search under regulations provided by the President, and by making it a duty to destroy illicit liquor found in Indian country.

1935,⁶³ imposes criminal liability for unreasonable search of dwellings without a warrant. In case of such unreasonable search the officer, civil or military, also becomes civilly liable.⁶⁴ The early decision of the United States Supreme Court in *American Fur Co. v. United States*,⁶⁵ determined that this act gave authority to search and seize only in Indian country.⁶⁶ As to what might be seized and subject to libel action there was some doubt. The courts decided that the goods forfeited should be only those which were the property of the offender, and forfeited only to the extent of his interest.⁶⁷ When the automobile became perfected and widely used, it began to play an important role in the illicit liquor trade. The Government sought to subject it to libel proceedings under the foregoing statute. The courts determined that automobiles were not known to the legislators who passed the law in 1834, and that automobiles did not fit into the enumeration of wagons, boats, and sleds.⁶⁸ Congress quickly remedied this defect by the Act of March 2, 1917, which provided :

That automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the Indian country, or where the introduction is prohibited by treaty or Federal statute, whether used

⁶³ 49 stat: 872, 877, sec. 201.

⁶⁴ *Bates v. Clark*, 95 U. S. 204 (1877), holding a military officer liable though acting under superior's orders.

⁶⁵ 2 Peters 358 (1829).

⁶⁶ See also *Evans v. Victor*, 204 Fed. 361 (C. C. A. 8. 1913), rev'g; 199 Fed. 504 (D. C. E. D. Okla., 1912); *United States v. Twelve Bottles of Whiskey*, 201 Fed. 191 (D. C. Mont. 1912); *Forty-three Cases Cognac Brandy*, 14 Fed. 539 (C. C. Minn., 1882), aff'g *Forty-three Gallons of Cognac Brandy*, 11 Fed. 47 (C. C. Minn. 1882); *United States v. Four Bottles Sour-Mash Whiskey*, 90 Fed. 720 (D. C. Wash., 1898).

⁶⁷ *Shawnee Nat. Bank v. United States*, 249 Fed. 583 (C. C. A. 8. 1918); *United States v. One Automobile*, 237 Fed. 891 (D. C. Mont., 1916); *United States v. Two Gallons of Whiskey*, 213 Fed. 986 (D. C. Mont., 1914).

⁶⁸ *United States v. One Automobile*, *supra*; *Shawnee Nat. Bank v. United States*, *supra*.

by the owner 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.⁶⁹

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 for the attempt to introduce liquor into Indian country,⁷⁰ (2) automobiles and any other vehicles are included, (3) "the thing involved [automobile or other vehicle], and not its owner is the offender * * *."⁷¹ The vehicle is forfeited without regard to ownership.⁷² 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.⁷³

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.⁷⁴

⁶⁹ 39 Stat. 969, 970.

⁷⁰ *One Buick Automobile v. United States*, 275 Fed. 809 (C. C. A. 8. 1921); *United States v. One Ford Five-Passenger Automobile*, 259 Fed. 645 (D. C. E. D. Okla. 1919).

⁷¹ *United States v. One Buick Roadster Automobile*, 244 Fed. 961 (D. C. E. D. Okla. 1917); see also: *Hawley v. United States*, 15 F. 2d 621 (C. C. A. 8. 1926).

⁷² *United States v. One Chevrolet Coupe Automobile*, 58 F. 2d 235 (C. C. A. 9. 1932). As to constitutionality of this legislation, see sec. 1, *supra*, and *Commercial Investment Trust v. United States*, 261 Fed. 330 (C. C. A. 8. 1919).

⁷³ *United States v. One Cadillac Eight Automobile*, 255 Fed. 173 (D. C. M. D. Tenn., 1918).

⁷⁴ *Elam v. United States*, 7 F. 2d 887 (C. C. A. 8. 1925); *Hawley v. United States*, 15 F. 2d 621 (C. C. A. 8. 1926); *Kennedy v. United States*, 265 U. S. 344 (1924), questions certified from *Kennedy v. United States*, 2 F. 2d 597 (C. C. A. 8. 1924) *McOlintic v. United States*, 288 Fed. 781 (C. C. A. 8. 1922); *Morrison v. United States*, 6 F. 2d 809, 811 (C. C. A. 8. 1923); *Browning v. United States*, 6 F. 2d 801 (C. C. A. 8. 1925), cert. den. 269 U. S. 568 (1925).

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 discontinue 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.⁷⁵

⁷⁵ 48 Stat. 1245, c. 846. Accord: Act of June 11, 1934, 48 Stat. 927 (Minnesota Chippewa). But cf. Act of August 31, 1937, 50 Stat. 884 (Crow).

⁷⁶ 73d Cong., 2d sess., Sen. Rept. No. 1423 (1934). And see Memo. Sol. I. D., September 28, 1939, holding that the 1934 act exempts from laws prohibiting introduction of liquor into Indian country certain surplus lands of the Colville Reservation sold to non-Indians.

Second, ordinarily fee patented, unrestricted lands are not subject to the liquor laws. Congress has sometimes continued the Indian liquor laws in such lands.⁷⁷

Third, the Act of March 2, 1917, brought Osage County, Oklahoma, within the Indian liquor laws.⁷⁸

Fourth, by the Act of March 5, 1934⁷⁹ that part of Oklahoma, formerly known as "Indian Territory," in which all liquor traffic was forbidden by the Act of March 1, 1895,⁸⁰ 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*.⁸¹

⁷⁷ See for example Act of June 4, 1920, sec. 9, 41 Stat. 751, 754 (Crow Reservation).

⁷⁸ 39 Stat. 969, 983; amended to except the manufacture and sale of industrial and beverage alcohol for lawful purposes, Act of June 13, 1932, c. 245, 47 Stat. 302.

⁷⁹ 48 Stat. 396, c. 43.

⁸⁰ 28 Stat. 693, 697, sec. 8.

⁸¹ 302 U. S. 535 (1938), rev'g 89 F. 2d 201 (C. C. A. 9, 1937), aff'g *United States v. One Chevrolet Sedan*, 16 F. Supp. 453 (D. C. Nev. 1936) See Chapter I, sec. 3.

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.⁸³

Perhaps still another exception may be found in the provisions of the Act of June 16, 1933,⁸⁴ making "3.2 beer" a matter of local option in Oklahoma.

Alaska is not covered by the Indian liquor laws.⁸⁵ Congress has always legislated specially for that territory with regard

⁸³ Act of August 24, 1912, 37 Stat. 518, 519. 25 U. S. C. 253.

⁸⁴ Act of June 13, 1932, e. 245. 47 Stat.; 302. amending the Act of March 2, 1917, 39 Stat. 969, 983, 25 U. S. C. 242.

⁸⁵ 48 Stat. 311, c. 105.

⁸⁶ The legal statute of Alaskan natives is discussed in Chapter 21, sec. 6. The Act of July 27, 1868. 15 Stat. 234, 241. R. S. § 1955, gave the President power to regulate importation and sale of distilled spirits in Alaska. Four years later the case of *United States v. Seveloff*, 27 Fed. Cas. No. 16252 (D. C. Ore., 1872) decided that Alaska was not

to liquor and has granted the power to control the liquor traffic to the territorial Legislature by the Act of April 13, 1934.⁸⁶

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. 510, 530. 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 142 above [30 Stat. 1274] would not have been necessary. That the territorial legislature entertained 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 4963, *Compiled Laws of Alaska, 1933*). In any event, the enactment by Congress of a special liquor law for the natives of Alaska makes the general enactment found in Section 241 [25 U. S. C.] locally inapplicable.

Op. Sol., I. D., M.29147, May 6, 1937, pp. 18, 19.

⁸⁶ 48 Stat. 583, 584 (Alaska).

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. Birdsall*.⁸⁷

* * * 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 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 Commissioner¹ and the appropriations for the continuance of the service have been increased.²

¹ H. Doc. Vol. 27, 60th Cong., 1st sess., pp. 26-31; H. Doc. Vol. 43, 60th Cons., 2d sess., pp. 34-40; H. Doc. Vol. 44, 61st Cong., 2d sess., pp. 12-15; H. Doc. Vol. 32, 61st Cong., 3d sess., pp. 12-13; H. Doc. Vol. 41, 62d Cong., 2d sess., pp. 32-33.

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 enactments" (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 1 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 1909, 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. 933, 62d Cong., 3d sess., pp. 11, 12.

In the Act of March 1, 1907,⁸⁸ Congress empowered special officers to search and seize,⁸⁹ and in 1912 gave them the powers of the United States marshals and deputy marshals.⁹⁰

Criminal or libel proceedings are cognizable in the Federal District Court in the district where the offense was committed.⁹¹ 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.

⁸⁸ 34 Stat. 1015, 1017.

⁸⁹ *Ibid.*

⁹⁰ Act of August 24, 1912, 37 Stat. 518, 519.

⁹¹ Judicial Code, sec. 24, 28 u. s. c. 41.

⁸⁷ 233 U. S. 223 (1914) (holding that prohibition enforcement was such an official responsibility as would provide basis for bribery indictment).