CHAPTER 18

CRIMINAL JURISDICTION

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SECTION 1. INTRODUCTION

Criminal jurisdiction [1] in Indian law involves an allocation of jurisdiction of the Federal Government, such as the offense authority among federal, tribal, and state courts. This allocation of authority depends in general upon three factors: subject matter, locus, and person.

Jurisdiction of the federal courts must be based, in every instance, upon some applicable statute, since there is no federal common law of crimes. From the standpoint of areas of application, the federal criminal statutes relating to Indian affairs are of three types:

(*a*) Those that apply regardless of the locus of the offense, such as the crime of selling liquor to an Indian; [2]

(*b*) Those that apply within areas under the exclusive of receiving stolen goods; [3] and

(*c*) offenses punishable only when committed within the "Indian country" or within "an Indian reservation," such as, for example, the offense of possessing intoxicating liquors in the Indian country.[4]

The jurisdiction of tribal courts depends also upon the factors of subject matter, locus, and person, and the same may be said of state court jurisdiction. Since this study is primarily devoted to federal Indian law, only incidental attention will be paid to tribal and state penal laws relating to Indian affairs. Limitations upon the application of such laws contained in federal statutes will, however, be examined.

[1] On civil jurisdiction see Chapter 19.

[2] see Chapter 17. sec. 3.

[3] R. S. § 5357, Act of March 4. 1909, sec. 288. 35 Stat. 1088, 1145, 17 U. s. c. 467.

[4] See 25 U. S. C. 244. and see Chapter 17. sec. 3.

SECTION 2. CRIMES IN INDIAN COUNTRY

Since there is a considerable body of federal legislation penalizing various acts committed on Indian reservations or within Indian country, the question may be raised in any case involving such legislation whether the offense charged was in fact committed within an Indian reservation or in the Indian country. The definition of these terms has been considered elsewhere.[5] For present purposes it is enough to summarize general conclusions which are elsewhere noted:

(1) Tribal land is considered Indian country for purposes of federal criminal jurisdiction.[6]

(2) An allotment held under patent in fee and subject to restraint against alienation is likewise considered Indian country for purposes of federal criminal jurisdictiioa.[7]

(3) An allotment held under trust patent. with title in the Government, is likewise considered Indian country during the trust period.[8]

(4) Rights-of-way across an Indian reservation are considered "Indian country" for some or all purposes of federal criminal jurisdiction.[9]

[5] See Chapter 1. sec. 3 : Chapter 5 ; Chapter 6.

[6] See Chapter 1, sec. 3.

[7] *United States v. Ramsey, 271 U. S. 467 (1926).*

[8] *United States* v. *Sutton,* 215 U. S. 291 (1909). revg. 165 Fed. 253 (D. C. E. D. Wash.. 1908) ; *Hallowell* v. *United States,* 221 U. S. 317 (1911) ; *United States v. Pelican,* 232 U. S. 442 (1914) : *Ex parte Pero,* 99 F. 2d 28 (C. C. *A.* 7. 1938) ; *Ex parte Van Moore. 221* Fed. 954 (D. C. S. D.. 1915).

[9] The Act of June 28, 1932, 47 Stat. 336. amended sec. 548 of title 18 of the United States Code, which originally applied "within the limits of any India" reservation" so as to apply "on and within any Indian reservation under the jurisdiction of the United States Government, including rights of way running through the reservation."

Interpreting this phrase, the Solicitor of the Interior Department declared:

> * * * it is my opinion that the amendment should be given its apparent and normal meaning; namely, that the specific reference to rights-of-way was intended to provide for Federal jurisdiction over all rights-of-way running through any Indian reservation. This is advanced as the proper position for this Department to take in view of the following considerations.
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> 1. The probable judicial construction of the amendment would be that the amendment was intended to include within Federal Jurisdiction all rights-of-way because of the previous division of jurisdiction over rights-of-way in Indian reservations. Prior to the passage of the amendment the courts had concluded that rights-of-way to which the Indian title had not been extinguished remained part of the reservation and within Federal jurisdiction; whereas other rights-of-way to which such title bad been extinguished were subject to State Jurisdiction. A court would presume that in view of this state of the law any amendment referring to rights-or-way generally would be intended to provide a uniform rule. If only a statement of existing law had been intended. the reference in the amendment would rather have been to rights-of-way to which the Indian title had not been extinguished, or no mention of the subject would have been made at all.
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> Moreover, it would be presumed by a court that this Depart-

(5) It is questionable whether land held by an Indian under a fee patent without restriction is Indian country for purposes of federal criminal jurisdiction; the weight of authority is that the land is not "Indian country" within the meaning of federal penal statutes.[10]

The territorial limits of the jurisdiction of tribal courts and courts of Indian offenses[11] have not been considered in detail in any reported case. The following discussion is taken from an administrative ruling by the Solicitor for the Interior Department dealing with the question: [12]

> May an Indian court exercise jurisdiction over acts committed by Indians on unrestricted lands within an Indian reservation, where the Indians concerned are properly before the court?
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> Questions of court "jurisdiction" frequently turn out upon analysis to be a confused mixture of questions dealing with international law, constitutional law, statutory construction and common law principles. It is important, therefore, that we define the question that concerns us as clearly and realistically as possible. In asking whether an Indian court has "jurisdiction" over acts committed in certain areas we are concerned to ascertain whether such a court commits a wrongful act, that is to Say, an act which is punishable, actionable, or enjoinable in a State or Federal court, if it orders the trial and punishment of an Indian who is before the court, on the basis of an act which that Indian has performed in the area designated.
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> A question of jurisdiction arises when an Indian who is before an Indian court claims that the judges of such court are acting without proper authority and that such action, therefore, constitutes assault, false imprisonment. trespass, or some similar offense under State or Federal law. It is, therefore, necessary in passing upon such a jurisdictional question to inquire into the basis of authority upon which an Indian court acts. This is a subject which has been dealt with elsewhere at some length.[13]
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> Whether the Indian Court is an administrative Court of Indian Offenses or a tribal court, it appears that each has sufficient authority to include in its jurisdiction. the trial and punishment of offenses by Indians which were committed on unrestricted land.
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> If, on the one hand, Courts of Indian Offenses be considered, as suggested in the *Clapox* case, to be not regular judicial bodies but "mere educational and disciplinary instrumentalities," the propriety of educational and disciplinary action which such "courts", undertake will depend upon the relationship between the court and the person disciplined. On this view the location of the offense to which the discipline is directed becomes unimportant. An Indian Service hospital treats a diseased Indian regardless of where the disease was acquired. An Indian Service teacher may control the conduct of his pupils and administer discipline on a railroad car traveling through Texas, as well as on restricted Indian land. (See *Peck v. A. T. & S. F. Ry.* Co., 91 S. W. 323.) An Indian will be regarded as married or divorced, a member of a given tribe, an eligible candidate for a certain position or office, regardless of where the acts leading to such a personal status may have taken place. So, if action of a Court of Indian Offenses is regarded as "educational and disciplinary" rather than strictly judicial, such action is not restricted in its horizon to a given territory. The Indian who assaults his fellow-tribesman on fee patented land within the reservation is subject to disciplinary action by the Court of Indian Offenses in the same measure as if the offense had been committed on restricted Indian land. Perhaps the closest analogy for this "educational and disciplinary" theory of the functions of a Court of Indian Offenses is to be found in the common law of domestic relations. The common law still confers a disciplinary power upon parents with respect to their children. To a certain extent. guardians generally may exercise such power over their wards. In none of these cases is the exercise of such authority limited by any consideration of the locality of the misconduct. (See *Townsend* v. *Kendall, 4* Minn. 412, 77 Amer. Dec. 534.)
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> In United *States* v. *Earl*, 17 Fed,. 75. it was held that an Indian ward off the reservation nevertheless was in the charge of an Indian agent within the meaning of a statute forbidding the sale of liquor to such Indians. In *Peters* v. *Malin*, 111 Fed. 244. the court stated that wherever Indians are maintaining their tribal relations, the control and management of their affairs is in the Federal Government irrespective of the title to the land upon which they might, for the time being, be located. In that case the State law of guardianship was held not to apply to tribal Indians either at an industrial school off the reservation or on a reservation the title to which was in the Governor of Iowa. Moreover, the State criminal law was held not to apply to the removal of a child from a reservation and his detention from a Government school, indicating that these acts outside the reservation were of concern only to the Federal Government because of the personal relationship between the Government and its wards. "The relation of dependency existing between tribal Indians and the national government does not grow out of the ownership of the land either by the Indians or the government." (Page 250.)
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> This principle has been followed in administrative practice since the beginning. The Superintendents and the Courts of Indian Offenses have not in the past refrained from using corrective measures for violations of the regulations because the violations occurred on nontrust land. It may be doubted whether the Indian courts have ever made a practice of inquiring into the title of the land where the violation occurred. Nor have the departmental regulations required such inquiry and restraint The 1904 law and order regulations of the Indian Office (sections 584–591, Regulations of the Indian Office, 1904) gave the Courts of Indian Offenses original jurisdiction over Indian offenses, including participating in the Sun Dance, contracting a plural marriage, preventing the attendance of children at school, and other misdemeanors committed by Indians "belonging to the reservation," without any limitation as to where the offense might be committed. It was not intended that Indians could dance the Sun Dance and practice polygamy with impunity simply because they did so on nontrust land. Such a distinction would have defeated the educational purpose of the regulations. On the contrary, the 1904 regulations went so far as to

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ment and Congress would have been concerned to do away with the unsatisfactory situation resulting from the uncertain Status of jurisdiction over rights-of-way on Indian reservations. would be in conformity with the basic principle of statutory construction that legislation is intended to correct existing evils. The evil to be remedied in this instance was the uncertainty and confusion resulting from the fact that on each reservation there were a number of rights-of-way, whose ownership status depended on different statutes and regulations and the title to which could be definitely ascertained only through judicial statement, and that. although the title thereto had been determined, there was still the administrative difficulty arising from differences in jurisdiction over small strips of territory. This administrative difficulty was referred to by the Supreme Court in the case of United States v. *Soldana*, 246 U. S. 530. in which Justice Brandeis said that to except the highway strip from the reservation would cut the reservation in two and make it more difficult, if not impossible, to protect the Indians as the criminal statute intended.

2. If the amendment Is given its obvious construction, that of covering all rights-of-way under Federal jurisdiction, the construction would be consistent with the Policies of the Department based upon its own research and that of responsible organizations. The survey of law and order within Indian reSeVatiOns in the Northwest made by the institute for Government Research and submitted to the Senate Committee on Indian Affairs in 1932 (Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 72d Congress. 1st session, Part 26, page 14137), recommended that legislation be drafted defining the term Indian reservation for purposes of Federal jurisdiction as including all rights-of-way regardless of their ownership. The Law and Order Regulations of the Department. approved November 27, 1935. and based upon a survey made by this Department of jurisdictional problems, defined Indian reservations for the purposes of tribal jurisdiction as including roads and other parts of the reservation not necessarily in Indian ownership. This type of provision has likewise been included in many tribal law and order codes. (Memo. Sol. I. D.. July 3. 1940.)

[10] *Cf. Eugene Sol Louie* v. *United States*, *274* Fed. 47 (C. C. A. *9* 1921); *State* v. *Monroe*, *83* Mont. *556. 274* Pac. 840 (1929).

[11] See *for* regulations on Law and Order on Indian Reservations, 25 C. F. R. 161.1–161.306.

[12] Memo. Sol. I. D., April 27, 1939.

[13] See Chapter 7, sec. 9.

authorize police surveillance of the Indians leaving the reservation and to contemplate their arrest and punishment for infraction of the rules outside the reservation (sections 585–589).

However, whatever may be the disciplinary authority of the Secretary of the Interior over the conduct of Indian wards outside an Indian reservation, the Indian reservation itself has been considered an area peculiarly set apart as a domain within which the Federal Government exercises guardianship over the Indians. This guardianship is extended to all the Indians within the reservation, regardless of their residence or temporary location on unrestricted land. In the early days after the allotment act there was a tendency to withdraw protection from citizen and fee-patented Indians. This tendency was later reversed and Federal guardianship over tribal members has been recognized in spite of citizenship, possession of fee patents or residence on unrestricted land. A recent and far-reaching recognition of administrative supervision over all Indians within the boundaries of the reservation is found in the case of *United States* v. *Dewey County*, 14 F. (2d) 784 (D. C.; S. D.. 1926); Aff'd *Dewey County* v. *United States*. 26 F. (2d) 435 (C. C. A. 8th, 1928). The following quotations which uphold the authority of the Department to make rules and regulations governing all the Indians on the reservation, particularly fee-patent Indians residing on fee-patented lands, are set forth because of their peculiar applicability to the questions involved:

> "In the light of the plain determination of the question of the right, the power, and the duty of Congress to terminate this relation of guardian and ward, the [fee patent] Indians named in the complaint must be held to be wards of the government, unless there is legislation of Congress plainly indicating the intent and purpose to terminate the relation. Defendant urges consideration of the Act of June 25, 1910 (36 Stat. 855) . . .
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> "This, in my judgment, is far short of a congressional declaration that the relationship of guardian and ward shall, by the issuance of the [fee] patent. cease. It is simply a step recognizing some progress by the Indian as being competent to handle the particular piece of land, and the act grants to him only the power to manage and dispose of the particular land.- There is neither language plainly expressing. nor from which it may be reasonably inferred, that there is any intent or purpose that they should be taken out of the tribe of Indians, that their tribal relations should cease, and they should have no further interest in the tribal lands or in the moneys to be paid for such lands; that *they should*, from *that time forward. not be subject to the agent provided for the band of Indians to which they belong, nor to the rules and regulations promulgated-by the Indian Department as to the government of the reservation and all of the Indians thereon,* the education of their children, and the policy that the agent is required to work out with and for the members of the tribes. * * *
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> "In the absence of further declaration on the part of Congress that the guardianship of the government shall terminate as to these Indians, it *seems* clear that it must be so held as to those Indians to whom [fee] patents have *been* issued, who *are* found by this record to be members of the Cheyenne band of Sioux Indians; that they all had their allotments; that they all resided on their [fee patent] allotments *or* near them within *the original limits of the Cheyenne River reservation, and some* of *them* within *the diminished portions thereof;* that all of said Indians, at all times mentioned in the complaint, appeared on the rolls at the Cheyenne River agency: that they are entitled to participate and partake of tribal funds and of the rents and profits of all tribal lands, together with the fact that the government maintains an agency and *agent in charge of said tribe of Indians,* including *these particular Indians named in the complaint.* are still wards of the government; that the government is still the guardian of all of these Indians, with control of their property, except in so far as that control of their property is released by the legislation above referred to, and the Indians are thereby granted the power to manage and control the particular piece of land involved in the fee-simple patent." [Italics supplied.]

The foregoing authorities make it clear that if Indian courts are viewed as administrative agencies of the Interior Department, their authority is not limited to offenses committed on restricted land.

If, on the other hand, the Indian courts are viewed as tribal courts, deriving their power from the unextinguished fragments of tribal sovereignty, it must be recognized that this sovereignty is primarily a personal rather than a territorial sovereignty. The tribal court has no jurisdiction over non-Indians unless they consent to such jurisdiction. Its jurisdiction is solely a jurisdiction over persons. We most therefore beware of reading into the measure of this Jurisdiction the common law principle of the territoriality of criminal law. As was said in the ease of *Ex parte Tiger*, 47 S. W. 304, 2 Ind. T. 41,

> "If the Creek Nation derived its system of jurisprudence through the common law, there would be much plausibility in this reasoning. But they are strangers to the common law. They derive their jurisprudence from an entirely different source. and they are as unfamiliar with common-law terms and definitions as they are with Sanskrit or Hebrew."

We most recognize that the general common law doctrine of the territoriality of criminal law has validity in practice only insofar as it is embodied in our criminal statutes. It is not a principle of logic or eternal reason. There are numerous well-recognized exceptions to this doctrine.

There are, in the first place, certain offenses for which citizens of the United States are punishable in United States courts, no matter where the offenses are committed (e. g.. 18 U. S. C., Secs. 1, 5). The power of the Federal Government to govern the conduct of our citizens abroad by subjecting them, when they return to this jurisdiction, to trial and punishment for offenses committed abroad, has never been successfully challenged. (See The Appollon, 9 Wheat. 362. at 370.) If this power has been exercised, in fact, only in exceptional cases, that *is* because *as a matter* of *policy* it is generally believed that the power to punish for extra-territorial offenses should be invoked only under special circumstances.

A second departure from the general role of territoriality is presented by the jurisdiction vested in Congress over Indian affairs. It is well settled that this Congressional jurisdiction does not apply simply to the "Indian country" but applies to offenses no matter where committed:

> "The question is not one of power in the national government, for, as has been shown, congress may provide for the punishment of this crime wherever committed in the United States. Its jurisdiction is coextensive with the subject-matter-the intercourse between the white man and the tribal Indian-and is not limited to place or other circumstances." (*United States* v. *Barnhart*, 22 *Fed.* 288.)

Again, it is a matter of policy, and not of law, to say how far Congress should extend its laws over Indians "off *the* reservation." The Indian liquor laws are the outstanding instance of a jurisdiction not limited to offenses committed within the reservation. (25 U. S. C. Sec. 241.)

A third recognized departure from the territorial principle is found in the application of Federal laws to our citizens in certain Eastern countries. Americans committing offenses in uncivilized countries. for instance. are triable before United States consuls (22 U. S. Code, Sec. 180), and Americans committing offenses in China are triable in the United States Court for China (*Biddle* v. *United States*. 156 Fed. 759) over which the Circuit Court Of Appeals for the Ninth Circuit exercises appellate jurisdiction (22 U. S. Code. Secs. 191-202).

A fourth important limitation upon the doctrine of territoriality is the rule that in civil cases a court which has jurisdiction over the parties may consider all the elements of the case regardless of geographical considerations.

If, then, an Indian court is to be considered a judicial organ of Indian tribal sovereignty, he must recognize that this sovereignty is not a strictly territorial sovereignty, but primarily a, personal sovereignty. We may therefore approach the problem of defining the scope of this sovereignty without begging the question by assuming in advance that the sovereignty is limited to any particular kind of land. The recognized exceptions to the usual rule of territoriality are closer to the situation here presented than the rule itself.

In defining the powers of an Indian tribe we look to Federal laws and treaties not for the basis of sovereignty but for the limitations on tribal powers.[14]

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In the absence of Federal law to the contrary, it is for the tribe to decide as a matter of its own public policy whether members of the tribe who may properly appear before the judicial agency of the tribe, shall be triable and punishable for acts committed on unrestricted land. The answer given to this question in the Law and Order Regulations approved by the Secretary of the Interior November 27, 1935, and approved by numerous tribal councils- before and after that date, is unmistakable. Section 1 of Chapter 1 reads:

> "A Court of Indian Offenses shall have jurisdiction over all offenses enumerated in Chapter 5, when committed by an Indian, within the reservation or reservations for which the Court is established.
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> "With respect to any of the offenses enumerated in Chapter 5 over which Federal or State courts may have lawful jurisdiction, the jurisdiction of the Court of Indian Offenses shall be concurrent and not exclusive. It shall be the duty of the said Court of Indian Offenses to order delivery to the proper authorities of the State or Federal Government or of any other tribe or reservation, for prosecution, any offender, there to be dealt with according to law or regulations authorized by law, where such authorities consent to exercise jurisdiction lawfully vested in them over the said offender.
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> "For the purpose of the enforcement of these regulations, an Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction, and a 'reservation' shall be taken to include all territory within reservation boundaries, including fee patented lands, roads, waters, bridges, and lands used for agency purposes."

The question remains, then, whether this statement of authority is in conflict with any Federal law.

That the original sovereignty of an Indian tribe extended to the punishment of a member by the proper tribal officers for depredations or other forms of misconduct committed outside the territory of the tribe cannot he challenged. Certainly we cannot read into the laws and customs of the Indian tribes a principle of territoriality of jurisdiction with which they were totally unfamiliar, and which no country has adopted as an absolute rule. That Indian tribes friendly to the United States acted to punish their members for depredations committed against whites outside of the Indian country is a matter of historical record. Will any one claim that such punishment was unconstitutional? The fact is that the United States, over a long period, encouraged the Indian tribes to help in controlling the conduct of their members outside of the Indian country, and in order to encourage such control made the tribe responsible for such individual offenses.

The analysis of Federal laws applicable to the situation under consideration indicates that the right of Indian tribal authorities to punish errant members of the tribe for offenses, no matter where committeed, has not only never been denied but has been positively recognized. The act of June 30, 1834 (4 Stat. 731), which is still in many respects the basis of Indian administration, placed upon the Indian "nation or tribe" the responsibility of securing redress for depredations committed by individual members of the nation or tribe outside of, as well as within, the Indian country.[15]

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This provision placing responsibility upon the tribal authorities for the wrongs of individual Indians committed outside of the reservation clearly contemplates that the tribal authorities will deal in proper fashion with such individual Indians. While the occasion that gave rise to this legislation may have disappeared, the judicial basis of tribal action which the legislation assumed has never been challenged.

Provisions similar to that above quoted are found in many treaties with Indian tribes. (See for instance Treaty with the Kiowas, etc., May 26, 1837 (7 stat. 533). Secs. 3, 5; Treaty with the Comanches, etc., July 27, 1853 (10 Stat: 1013), Art. 5; Treaty with the Rogue River Indians, September 10, 1853 (10 Stat. 1018), Art. 6; Treaty with the Blackfeet, October 17, 1855 (11 Stat. 657), Art. 11.)

Federal laws affecting the personal status of Indians have no direct bearing upon our present problem. The General Allotment Law of February 8, 1887 (24 Stat. 390), as amended, by the act of May 8, 1906 (34 Stat. 182), provides:

> "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside * * *." (25 U. S. C. sec. 349.)

Because of this provision fee patent allottees have been held to be subject to the laws of the State wherever they may be within the reservation. *Eugene Sol Louie v. United States*, *274* Fed 47 (C. C. A. 9th, 1921); *State v. Monroe*, 83 Mont. 556, 274 Pac. 840 (1929). However, this fact does not mean that so long as the fee patent Indians live within the outer boundaries of the reservation and maintain tribal relations they are not also subject to the rules and regulations of the Department and to the tribal ordinances governing tribal members. That they are so subject is stated in the recent case of *United States v. Dewey County*, from which extensive quotation to this effect is given above.

Moreover, the allotment act certainly did not make a fee patented allotment a place of sanctuary on which even an unallotted member of the tribe may commit offenses without the risk of future punishment by his tribe. Fee patented lands are undoubtedly subject to State jurisdiction, but in the words of the Supreme Court, there is "no denial of the personal jurisdiction of the United States". (*United States* v. *Celestine*, 215 U. S. 278, 291), and neither is there any denial of the personal jurisdiction of the tribe. It is for the Federal Government itself to decide whether it shall retain jurisdiction over certain offenses by Indians, e. g., liquor offenses on fee patented land, and relinquish to the State jurisdiction over certain other offenses. Likewise, it is for the Indian tribe itself, subject only to limitation by Congress, to decide whether it shall retain jurisdiction over certain offenses committed by members of the tribe on such land.

The fact that Federal courts have refrained from taking jurisdiction of Indian offenses on fee patented lands does not negative the jurisdiction of the Indian courts. Since the fallacy of identifying the jurisdiction of the one with the other is a ready one, an analysis of the fundamental distinctions between them is desirable.

The Federal District Courts have been authorized by Congress to exercise jurisdiction over specific crimes committed by Indians or white people against Indians in the "Indian country" and in "Indian reservations." The Federal courts have no jurisdiction other than that granted by Federal statute. On the other hand, the Indian tribes retain all their original jurisdiction over their members except as may be limited by Federal statutes. Likewise, the authority of the Department to exercise administrative supervision over Indians is not based

[14] See Chapter 7, sec. 2.

[15] See R. S. § 2156, 25 U. S. C. 229.

upon a statutory specification of crimes and criminal jurisdiction but, as previously indicated, upon a statutory duty of guardianship and Congressional authorization to maintain order on Indian reservations. See *United States v. Quiver*, 241 U. S. 602, at 605.

The Federal court exercises an absolute and exclusive jurisdiction over Indians when their crimes fall within the circumstances covered by the statutes. There is no statutory authority for concurrent jurisdiction of State and Federal courts when an Indian or Indian land becomes subject to State jurisdiction.[16] If the Federal courts have jurisdiction, the State courts do not, and vice versa. However, there is no prohibition on a determination by the Interior Department to exercise corrective measures over Indians within the reservation when the State has jurisdiction but refuses to handle the case or upon a similar determination by the tribe that members uncorrected by State action shall be subject to correction by the tribal court.

Furthermore, the Federal courts are exercising judicial power as courts established by Congress pursuant to the United States Constitution, whereas the Department through the Court of Indian Offenses is not exercising judicial power but administrative guardianship powers and the tribe is exercising tribal powers over the persons of its members. The establishment of an Indian court and the extent of its jurisdiction is, therefore, in both cases an administrative policy question. No court is established where there is little restricted land. Courts are established, however, where there is much restricted land within a reservation. The Federal courts are obligated to take Jurisdiction of crimes coming within the Federal statutes upon restricted lands regardless of administrative need. It would not be argued that there is any obligation on the part of the Department to provide corrective measures on such restricted lands if it is not advisable or necessary. In other words, it has often been recognized that the Jurisdiction of the Federal courts and of the Indian courts does not coincide, since they derive their authority from different powers and function for different purposes.

I have reviewed the Federal laws which might be viewed as restricting or limiting the power of an Indian court to try and to punish an Indian for an offense committed on unrestricted land within a reservation. I find no Federal law imposing any such limitation.

Is there any provision of the Federal Constitution that precludes such exercise of jurisdiction? Would such an exercise of authority, in an area where the State may exercise a concurrent jurisdiction, constitute "double jeopardy" and violate the Fifth Amendment to the Federal Constitution?

Even if it could be maintained, in the face of the decision in *Talton v. Mayes*, 163 U. S. 376. that constitutional limitations under the "due process" clause are applicable to an Indian court, there is no force in the argument that the exercise of jurisdiction by such a court in these cases would subject the offender to "double jeopardy." The fact that an offense committed outside of restricted Indian lands may be subject to punishment in State courts does not make it unconstitutional for the court of another sovereignty to punish the same person for the same act. The decided cases clearly establish the principle that an individual who in a single act offends against the laws of several jurisdictions may be constitutionally punished by the agencies of each jurisdiction.[17]

* * * * *

In view of these decisions of the United States Supreme Court it is clear that the fact that an act is punishable in State courts is no bar to punishment in an Indian court. There remains, of course, a question of public policy to be considered in asserting jurisdiction over acts which are subject to another jurisdiction. This question is met by a specific provision in the Law and Order Regulations above set forth, under which cases in which Indian tribal jurisdiction is concurrent with State jurisdiction are to be turned over to State authorities, *if such authorities are willing to exercise jurisdiction.* This is undoubtedly a reasonable provision in view of the fact that the State may be, in many cases, unwilling to exercise even an admitted Jurisdiction over Indians with respect to acts committed on unrestricted Indian lands within a reservation.

It should further be noted that the Law and Order Regulations do not purport to cover offenses committed outside Of -Indian reservations. There is therefore no immediate occasion to consider the legal and administrative problems that would be raised by any such exercise of jurisdiction. It is enough for our present purposes to note that the exercise of jurisdiction by an Indian court, under the departmental. law and order or tribal codes, does not diminish the jurisdiction of State courts, does not subject the offender to "double jeopardy," and is not prohibited by any known Federal statute.

There remains the final question whether the action of an Indian court in trying and punishing an Indian for an offense committed within the jurisdiction of the State courts may violate any State law. While it is impossible to decide an issue of this sort in the abstract with entire certainty; it is enough to say that I know of no State legislation which would interfere with such exercise of Jurisdiction by an Indian court. and since the matter is one that concerns the relations between an Indian and his tribe it would appear to be a matter on which State legislation would be ineffective. *Worcester v. State of Georgia*, 6 Pet. 514; United *States* v. *Quiver*, 241 U. S. 602; *United States v. Hamilton*. 233 Fed. 685; In *re Blackbird*. 109 Fed. 139; *In re Lincoln*. 129 Fed. 247 :-and see Opinion M. 28568, approved December 11, 1936. on the right of State game wardens to make searches on an Indian reservation.

In view of the foregoing authorities, I am of the opinion that an Indian court which orders the trial and punishment of an Indian before the court, on the basis of acts committed on unrestricted lands within an Indian reservation, does not offend against any State or Federal law.[18]

In certain offenses the nature of the offense and the character of the *locus in quo* establish federal jurisdiction without reference to the question whether the accused or the injured party is an Indian.[19] In other offenses, jurisdiction depends among other things upon the persons involved. in the following sections (3-6) we shall deal with jurisdiction over offenses in Indian country as affected by the character of the parties.

[16] This statement must now be qualified because of the passage of the Act of June 8. 1940. Public No. 565—76th Cong., which conferred jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations in the state.

[17] See Moore v *Illinois*, 14 How. 13. 19 (1852); United States v. *Lanza*, 260 U. S. 377. 379-380. 382 (1922).

[18] Further discussion in the memorandum cited reaches the conclusion that Indian police may make arrests of Indians on unrestricted lands within a reservation.

[19] "In this offense (introducing liquor into Indian country) neither race or color are significant." *United States* v *Sutton*. *215* U. S. 291. 295 (1909). Accord: *Perrin* v. *United States*, *232* U. S. 478 (1914).

SECTION 3. CRIMES IN INDIANCOUNTRY BY INDIAN AGAINST INDIAN

Offenses committed by Indians against Indians within the Indian country are ordinarily subject to the jurisdiction of tribal courts. This is a consequence of the doctrine of tribal self-government.[20] In determining whether an offense by an Indian against an Indian falls within the jurisdiction of tribal courts, we look to federal laws and treaties only for the limitations on tribal authority. The most important of such limitations is found in the Act of March 3. 1885.[21] This act brought

[20] See Chapter 7. sec. 9.

[21] 23 Stat. 362. 385. 18 U. S. C. 548. Later amendments of this act and problems *raised* in its application are discussed in Chapter 7, secs. 2 and 9.

under federal jurisdiction certain offenses committed by Indians against Indians, notably murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. In later years robbery, incest, and assault with a dangerous weapon were added to this list.[22] A few other federal statutes relating, mostly to non-Indians as well as Indians are applicable to offenses by Indians against Indians committed on an Indian reservation.[23]

It has been held that where jurisdiction over murder or manslaughter is thus conferred upon the federal courts such jurisdiction is exclusive and the tribal courts may not act to punish a member of the tribe who has killed another member.[24] Authority on this point, however, is not conclusive, and it would be a rash inference that a tribe is precluded from dealing with such matters as petty larceny between members of a tribe.

While, as noted, the jurisdiction of the tribe over offenses between Indians does not depend upon federal statutory authority, it may be noted that the policy of the Federal Government to respect such tribal jurisdiction is embodied in a series of statutes stretching back to the Act of March 3, 1817,[25] which, after establishing federal jurisdiction over Indian offenses, declared:

> *Provided,* That nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offence committed by one Indian against another, within any Indian boundary.

Early treaties guaranteeing tribal jurisdiction over matters affecting only Indians have been elsewhere discussed.[26]

[22] Act of March 4, 1909, sec. 328, 35 Stat. 1088, 1151; Act of June 28, 1932, 47 Stat. 336, 337.

[23] See Chapter 7, fn. 225.

[24] *United States* v. *Whaley,* 37 Fed. 145 (C. C. S. D. Cal. 1888); and see Chapter 7, fn. 227.

[25] 3 Stat. 383. See sec. 4, *infra.*

[26] See Chapter 3, sec. 3D and E.

SECTION 4. CRIMES IN INDIAN COUNTRY BY INDIAN AGAINST NON-INDIAN

An Indian committing offenses in the Indian country against a non-Indian is subject to the Act of March 3, 1885, section 9,[27] which, with an amendment, became section 328 of the United States Criminal Code of 1910 and now is section 548 of title 18 of the United States Code,[28] providing for the prosecution in the federal courts of Indians committing, within Indian reservations, any of 10 (formerly 7, then 8) specially mentioned offenses whether against Indians or against non-Indians.[29] Apart from these: "ten major crimes" an Indian committing offenses in the Indian country against a, non-Indian is subject to the code of federal territorial offenses,[30] except in two situations: (*a*) Where he "has been punished by the local law of the tribe," and (*b*) "where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." The substance of the present law on this subject goes back to early treaties, some of which antedated the Federal Constitution stipulating that Indians committing offenses against citizens of the United States should be delivered up by their tribes to the nearest post, to be punished according to the ordinances of the United States.[31]

The first federal enactment dealing generally with crimes by Indians against non-Indians in Indian country was the Act of March 3, 1817.[32] This provision was subsequently incorporated in section 25 of the Trade and Intercourse Act of 1834,[33]

[27] 23 Stat. 362. 385, 18 U. S. C. 548. Interpreted *Gon-Shay-Ee, Petitioner,* 130 U. S. 343 (1889).

[28] Under this section, as originally enacted, the enumerated crimes were within the jurisdiction of territorial courts when sitting as such, and not when sitting as federal district or circuit courts. *Gon-Shay-Ee, Petitioner,* 130 U. S. 343. (1889). . This was true regardless of whether the offense was committed within an Indian reservation. Captain dock, Petitioner, 130 U. S. 353 (1889). For a complete history of this act see *United States* v. *Kagama,* 118 U. S. 375 (1886).

[29] Murder committed by an Indian against a non-Indian on a United States Indian reservation is a crime against the authority of the United States and within the cognizance of federal courts without reference to the citizenship of the accused. *Apapas* v. *United States. 233* U. S. 587 (1914). For the purposes of enforcement of 18 U. S. C. 548, the son of an Indian mother and a half-breed father, both of whom were recognized as Indians and maintained tribal relations, and who himself lived on a reservation and maintained tribal relations and was recognized as an, Indian, was an "Indian" within the meaning of the federal statute. *Ex Parte Pero, 99* F. 2d 28 (C. C. A. 7, 1938), cert. den. 306 U. S. 643. Also see *Alberty* v. United *States,* 162 U. S. 499 (1896).

It is not clear whether or how far the Act of 1885 applied to the so-called "Indian Territory." By Art. 13 of the Cherokee Treaty of July 19, 1866, 14 Stat. 799, 303 (see Chapter 1, sec. 2), the establishment of a court of the United States in the Cherokee territory was provided for

> * * * with such jurisdiction and organized in such manner as may be prescribed by law. *Provided:* That the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption. shall be the *only parties,* [italics added] or where the cause of action shall arise in the Cherokee nation, except as otherwise provided in this treaty.

Further, sec. 30 of the Act. of May 2, 1890, 26 Stat. 81, 94, providing a temporary government for the Territory of Oklahoma and enlarging the jurisdiction of the United States court in the Indian Territory. provided

> • • • That the Judicial tribunals of the Indian nations shall retain exclusive Jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the *only parties* [italics added]; * * *

and see. 31 declared that

> • • • nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood, or adoption, are the *sole parties,* [italics added] nor so as to interfere with the right and power of said civilized nations to punish said members for violation of the statutes and laws enacted by their national councils where such laws are not contrary to the treaties and laws of the United States.

It will be noted that this act omits that portion of the thirteenth article of the treaty, wherein is reserved to the judicial tribunals of the nation exclusive jurisdiction "where the cause of the action shall arise in the Cherokee Nation," and to that extent apparently supersedes the treaty. Construing the word "parties" as meaning parties to the crime and not simply to the prosecution of the crime, it would appear that the Act of 1885 would apply to the "Indian Territory" only in cases where the offense was one of an Indian against a non-Indian. So construed in *Alberty* v. *United States,* 162 U. S. 499 (1896). Followed in *Nofire* v. *United States,* 164 U. S. 657 (1897). In an indictment for murder in the Chickasaw Nation, Indian Territory, averring both deceased and accused were white men, proof that the deceased was a white man establishes the jurisdiction, and the averment as to the citizenship of the accused is surplusage. *Stevenson* v. *United States,* 86 Fed. 106 (C. C. A. 5, 1898), s. c. 162 U. S. 313 (1896). In a case where the Indian defendant is treated as the sole party, the Indian courts would have Jurisdiction whether, the victim of the crime was Indian or non-Indian. This was done in a case of adultery, in which the name of the prosecuting witness did not appear and since there was no adverse party. the woman being a consenting party, the Indian defendant was regarded as the sole party to the proceeding. In *re Mayfield,* Petitioner, 141 U. S. 107 (1891).

[30] 25 U. S. C. 217–218. See see. 7. *infra.*

[31] See e. *g.,* Act. IX of Treaty of January 21, 1785, with the Wiandots and others. 7 Stat. 16. 17; Art. VI of Treaty of November 28, 1785. with the Cherokee, 7 Stat. 18. And see Chapter 1, sec. 3. fn. 48.

[32] 3 Stat., 383, designating as a crime any act, committed by any person in the Indian country which, under the Laws of the United States. would be a crime if committed in a place over which the United States, had sole and exclusive jurisdiction. That this act comprehended crimes by Indians is indicated by the fact that the general language was qualified by a proviso excepting crimes by Indians against other Indians. The proviso further declared that existing treaties were to remain unaffected.

[33] Act of June 30, 1834, 4 Stat. 729, 733. Section 29 of this act contained a repealer of the 1817 act. Murder committed by an Indian

and became part of section 3 of the Act of March 27, 1854,[34] from which section 2145 of the Revised Statutes, now 25 U. S. C. 217, was derived.

The first of the two exceptions noted-that relating to Indians punished by the local law of the tribe—first appears In the 1854 act.

The second of the exceptions noted-involving cases where treaties have provided for exclusive tribal jurisdiction-has its origin-in the 1817 act.

against a non-Indian without the limits of the state and district of Arkansas and within Indian country, in the absence of a statute attaching the Indian country west of Arkansas thereto, was held not to fall within the jurisdiction of the circuit court, which had no jurisdiction over such country. *United States* v. *Alberty*, 24 Fed. Cas. No. 14426 (C. C. Ark. 1844). The child of an Indian mother and white father was considered to partake of the condition of the mother for the purposes of the criminal provisions of the 1834 Intercourse Act. *United States* v. *Sanders*, 27 Fed. Cas. No. 16220 (C. C. Ark. 1847).

[34] 10 Stat. 269, 270. An offender is amenable for the crime of adultery only to the laws of the nation in accord with *Art.* 13 of Treaty of July 19, 1866, with *the Cherokees.* 14 *Stat. 799. In re Mayfield, Petitioner,* 141 U. S. 107 (1891). Also see *Alberty* v. *United States,* 162 U. 8. 499 (1896); *Nofire* v. *United States,* 164 U. S. 657 (1897); *Famous Smith* v. *United States,* 151 U. S. 50 (1894) (discussing Indian citizenship in reference to applicability of treaty). *A* white man incorporated with an Indian tribe at a mature age, by adoption, does not thereby become an Indian, so as to cease to be amenable to the laws of the United States but he may become entitled to certain privileges in the tribe and also make himself amenable to their laws and usages. Therefore, an article Of a treaty pardoning all offenses committed by citizens of the Cherokee Nation against the nation had the effect of pardoning an Indian who had previously committed murder in Cherokee country against a white man who had been adopted by that tribe. *United States* v. *Ragsdale,* 27 Fed. Cas. No. 16113 (C. C. Ark. 1847). Murder committed by an Indian against a non-Indian in the Indian country, within the boundaries of the territory not coming within any of the exceptions, is within the exclusive jurisdiction of the United States branch of the territorial district court. *United States* v. *Monte, 3 N.* M. 173, 3 Pac. 45 (1884). But cf. *United States* v. *Terrel,* 28 Fed. Cas. No. 16452 (C. C. Ark. 1840).

SECTION 5. CRIMES IN INDIAN COUNTRY BY NON-INDIAN AGAINST INDIAN

Generally speaking, offenses by non-Indians against Indians are punishable in federal courts where the offense is one specified in the federal code of territorial offenses.[35]

This was not always the rule. Early treaties frequently provided that non-Indians committing offenses in the Indian country against Indians should be subject to punishment by tribal authorities.[36] This rule, which followed the usual practice in international treaties, was abandoned after a few years of treaty-making, and many of the later treaties expressly provide that white offenders shall be delivered up to the federal authorities for prosecution.[37]

The exercise of federal jurisdiction over non-Indian offenders against Indians in the Indian country was first put on a statutory basis by the original Trade and Intercourse Act, the Act of July 22, 1790.[38] The relevant sections declared :

> SEC. 5. That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians. which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as If the offence had been committed within the jurisdiction of the state or district to which he or they may belong against a citizen or white inhabitant thereof.
>
> SEC. 6. That for any of the crimes or offences aforesaid. the like proceedings shall be had for apprehending, imprisoning or bailing the offender. as the case may be, and for recognizing the witnesses for their appearance to testify in the case, and where the offender shall be committed. or the witnesses shall be in a district other than that in which the offence is to be tried, for the removal of the offender and the witnesses or either of them, as the case may be, to the district in which the trial is to be had as by the act to establish the judicial courts of the United States. are directed for any crimes or offenses against the United States.

These provisions were reenacted with minor modifications in the later temporary Trade and Intercourse Acts of 1793, 1796, and 1799,[39] and were embodied in the first permanent Trade and Intercourse Act of 1802[40] as sections 2 to 10, inclusive. The general rule established by these statutes was confirmed in the Act of March 3, 1817,[41] which provided:

> That if any Indian, or other person or persons, shall, within the United States, and within any *town,* district, or territory, belonging to any nation or nations, tribe or tribes, of Indians, commit any crime, offence, or misdemeanor, which, if committed in any place or district of country under the sole and exclusive jurisdiction of the United States, would, by the laws of the United States, be Punished with death, or any other punishment. every such offender, on being thereof convicted, shall suffer the like punishment as is provided by the laws of the United States for the like offences, If committed within any place or district of country under the sole and exclusive jurisdiction of the United States.
>
> SEC. 2. That the superior courts in each of the territorial districts, and the circuit courts and other courts of the United States, of similar jurisdiction In criminal Causes, in each district of the United States. in which any offender against this act shall be first apprehended or brought for trial, shall have, and are hereby invested with, full power and authority to hear, try, and punish, all crimes, offences, and misdemeanors, against this act ; such courts proceeding therein, in the same manner as if such crimes, offences, and misdemeanors, had been committed within the bounds of their respective districts: *Provided,* That nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offence committed by one Indian against another, within any Indian boundary.
>
> SEC. 3. That the President of the United States, and the governor of each of the territorial districts. where any offender against this act shall be apprehended or brought for trial, shall have, and exercise, the same powers. for the punishment of offences against this act, as they can severally have and exercise by virtue of the fourteenth and fifteenth sections of an act, entitled "An art to regulate trade and intercourse with the Indian tribes. and to Preserve peace on the frontiers," passed thirtieth March, one thousand eight hundred and two, for the punishment of offences therein described.

The Trade and Intercourse Act of June 30, 1834,[42] reenacted the rule developed in the earlier statutes. This rule was subsequently

[35] See sec. 7. *infra.*

[36] See Chapter 7. sec. 9. fn. 212 ; Chapter 3, sec. 3D(1).

[37] *Ibid.*

[38] Secs. 5 and 6, 1 Stat. 137, 138. See Chapter 4. sec. 2 : Chapter 15, sec. 10A.

[39] Acts of March 1, 1793. I Stat. 329; May 19. 1796. 1 Stat. 469; March 3, 1799, 1 Stat. 743. See Chapter 4. sec. 2 ; Chapter 15. sec. 10A.

[40] Act of March 30, 1802, 2 Stat. 139. see Chapter 4. sec. 3 ; Chapter 15. see. 10A.

[41] 3 Stat. 383.

[42] 4 Stat. 729. See Chapter 4, sec. 6; Chapter 15, sec. 10A.

incorporated in the Revised Statutes as section 2145 and in title 25 of the United States Code as section 217. The exceptions contained in title 25 of the United States Code, section 218, relating to offenses by Indians against Indians and to offenders punished by tribal law have no application to offenses committed by non-Indians against Indians. The third exception in section 218, dealing with the case of a treaty where the exclusive jurisdiction over such offenses is secured to the Indian tribes might have current application, but no such treaty provisions appear to be now in force.

Apart from the foregoing general statutes, Congress has, from time to time, enacted various laws to punish particular offenses committed by non-Indians against Indians within the Indian country.[43]

[43] See Chapter 7, sec. 9, fn. 225.

SECTION 6. CRIMES IN INDIAN COUNTRY BY NON-INDIAN AGAINST NON-INDIAN

Ordinarily offenses committed by a non-Indian against a non-Indian in the Indian country are of no concern to the Federal Government and are punishable by the state.[44] For purposes of criminal jurisdiction, where Indians are not involved, an Indian reservation is generally considered to be a portion of the state within which it is located.[45] Exceptions to this rule exist where Congress has specifically provided for exclusive federal jurisdiction over certain areas.[46]

[44] *United States* v. *McBratney*, 104 U. S. 621 (1881). And see Chapter 6.

[45] The provision of the enabling act of Montana, that all Indian lands within the state "shall remain under the absolute jurisdiction and control of the Congress of the United States," does not amount to a reservation by the United States of jurisdiction over crimes committed on *such* lands by non-Indians against non-Indians and does not deprive the state of its power to try such offenses. *Draper v. United States*, *164* U. S. 240 (1896).

[46] 18 U. S. C. 549 (Act of February 2, 1903, 32 Stat.. 793; Act of March 4, 1909, sec. 329, 35 Stat. 1088, 1151; Act of March 3, 1911, sec. 291, 36 Stat. 1087, 1167). In this connection also see H. Rept. No. 2704, vol. IX, 57th Cong., 1st sess.

SECTION 7. CRIMES IN AREAS WITHIN, EXCLUSIVE FEDERAL JURISDICTION

Section 217, title 25,[47] extends to Indian reservations, with exceptions already noted, "the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia * * *." A list of such offenses will be found in chapters 11 and 13 of title 18. United States Code.[48] This list is meager and inadequate in comparison with most state codes. It is supplemented by section 468 of title 18, United States Code,[49] which makes acts, not made penal by any other laws of Congress, committed upon land within the exclusive jurisdiction of the United States subject to federal prosecution whenever made criminal by state law.

[47] Act of June 30, 1834. sec. 25, 4 Stat. 733 as amended by the Act of March 27. 1854, sec. 3, 10 Stat. 269. 270; R. S. § 2145.

[48] The first of the statutes embodied in this list appears to be the Act of April 30. 1790. 1 Stat. 112.

[49] R. S. § 5391: Act of July 7, 1898. sec. 2. 30 Stat. 717; Act of March 4. 1909. sec. 289, 35 Stat. 1089. 1145 as amended by the Act of June 15. 1933. 48 Stat. 152. See Chapter 6, sec. 2A.

SECTION 8. CRIMES IN WHICH LOCUS IS IRRELEVANT

There are certain offenses covered by federal statutes regarding Indian affairs which are subject to federal jurisdiction regardless of the locus of the offense. Several such offenses are: purchasing I. D. cattle without permission;[50] selling liquor to Indians;[51] making prohibited contracts with Indian tribes.[52]

The power of Congress to punish such crimes outside the Indian country is well established.[53]

[50] Act of March 3, 1865, sec. 8, 13 Stat. 541. 563, R. S. § 2138, as amended by the Act of June 30, 1919, sec. 1. 41 Stat. 3. 9, 25 U. S. C. 214.

[51] See Chapter 17, sec. 3.

[53] Act of March 3, 1871, sec. 3, 16 Stat. 544, 570. R. S. § 2105. 25 U. S. C. 83.

[52] See Chapter 5, sec. 3.