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Indians - Crimes by Indians out of Indian Country or Reservation - Jurisdiction of State to Arrest Indian on the Reservation

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INDIANS—CRIMES BY INDIANS OUT OF INDIAN COUNTRY OR RESERVATION—JURISDICTION OF STATE TO ARREST INDIAN ON THE RESERVATION—Petitioner, an enrolled member of the Devils Lake Sioux Tribe, was arrested without a warrant on the Fort Totten Indian reservation by a Ramsey County deputy sheriff on February 3, 1968.[1] The deputy sheriff incarcerated the petitioner in the Ramsey County jail and filed a complaint the next day charging petitioner with larceny of an automobile. The alleged offense presumably was committed in Ramsey County outside the exterior boundaries of the Fort Totten reservation. Petitioner subsequently sought his release by means of a writ of habeas corpus, claiming that the deputy sheriff had no authority to make the arrest as the state had no jurisdiction over the Fort Totten reservation.[2] The writ was quashed by the Ramsey County District Court. In an original proceeding for habeas corpus, the North Dakota Supreme Court *held* that the state had jurisdiction to arrest the petitioner on the reservation for an alleged offense committed off the reservation and quashed the writ. *Fournier v. Roed*, 161 N.W.2d 458 (N.D. 1968).

On March 3, 1966, a theft of some jewelry was reported by

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born, 370 Mich. 47, 120 N.W.2d 737 (1963). The cases concern the use of a corridor for the alleged purpose of discriminatory exclusion. The former case was initiated before Gomillion v. Lightfoot, 364 U.S. 339 (1960) and the latter arose after Lightfoot. Although they concern incorporation rather than annexation they are useful examples of judicial concern with regard to changing municipal boundaries.

1. The opinion does not state whether the arrest was made pursuant to the "fresh pursuit" doctrine. *See, e.g.*, N.D. CENT. CODE § 29-06-05 (1960).

2. It is interesting to note that in 1946, the Congress granted North Dakota concurrent criminal jurisdiction with the federal government over Fort Totten Indian reservation. 60 Stat. 229 (1946). But in State v. Lohnes, 69 N.W.2d 508 (N.D. 1955), the court held that before such jurisdiction could be effective the people of North Dakota had to indicate their consent to accept such jurisdiction by amending § 203 of the state constitution which provided that:

> The people inhabitating the state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States . . . .

The state never accepted criminal jurisdiction over Fort Totten Indian reservation although § 203 of the constitution was amended in 1959 to allow the state, under such terms and conditions as the state deemed proper, to accept jurisdiction over the Indian lands as Congress may delegate. N.D. SESS. LAWS ch. 430 (1959). The amendment was in response to § 6 of Public Law 280 of the 83rd Congress, 67 Stat. 590 (1953), which allowed states such as North Dakota to unilaterally assume civil and criminal jurisdiction over the Indian reservations provided that the state removed any constitutional impediments such as represented by § 203 of the North Dakota Constittuion. See 18 U.S.C. § 1162 (1964) and 28 U.S.C. § 1360 (1964).

In 1963 the legislature acted to accept civil jurisdiction over the Indian reservations, but not criminal jurisdiction. *See* N.D. CENT. CODE ch. 27-19 (Supp. 1967). The state did not make assumption of jurisdiction a unilateral act (as allowed by Public Law 280) but rather required that the Indians first consent to the extension of state jurisdiction over their lands. N.D. CENT. CODE § 27-19-01 (Supp. 1967). As yet, no tribe in North Dakota has consented to state jurisdiction to this writer's knowledge. Hence, the state has no civil or criminal jurisdiction over any of the reservations.

In 1968, Congress ended the possibility of unilateral assumption of state jurisdiction over Indian reservations by requiring that the states secure the Indians consent as a prerequisite to assumption of jurisdiction. Act of April 11, 1968, §§ 401-02, 82 Stat. 78, 79.

the Crosby Jewelry store in Rolla, North Dakota. Rolla is situated in close proximity to the Turtle Mountain Indian reservation. The sheriff of Rolette County was notified shortly thereafter by Indian police on the reservation that a Melvin Poitra had attempted to pawn a watch in a Belcourt bar. Belcourt is located within the exterior boundaries of the Turtle Mountain reservation. The sheriff, accompanied by a clerk of the jewelry store, entered the reservation and were joined by Indian officers. Mr. Poitra was found and the clerk identified him as the person who was present in the store at the approximate time of the offense. A search of the car revealed some of the jewelry items taken from the store. The sheriff arrested Mr. Poitra and took him from the reservation immediately without consulting with tribal officials. Poitra was later convicted of grand larceny in the state courts and sentenced to the state penitentiary. On September 1, 1967, the United States Commissioner of Indian Affairs requested the Solicitor of the Department of the Interior to institute proceedings with the United States Attorney General to secure Poitra's release. It was the Commissioner's contention that Poitra had been illegally arrested by a state officer on the reservation. In a memorandum opinion, the Solicitor's office found no basis for questioning the arrest and advised the Commissioner that a state officer had the authority to arrest an Indian on the reservation for an offense committed off the reservation, notwithstanding the lack of state criminal jurisdiction over the reservation. *I.D. Sol. Mem. Op.* M-36717 (Dec. 22, 1967).

The North Dakota Supreme Court did not refer to the Solicitor's opinion and it is therefore assumed that the court was unaware of the identical position reached by the Solicitor on a similar factual situation. The unanimity of result reached by the federal agency responsible for the administration of Indian affairs and the supreme court of a state with a large Indian population is a significant display of federal and state solidarity in an important aspect of Indian law. The precise question involved in the two decisions was one of first impression and for which no precedent could be found from any other court or administrative body. With this fact in mind, the decisions are even more remarkable.

In both cases, the alleged crime was committed off the reservation. It has long been settled that a crime committed by an Indian while away from the reservation is a matter of state jurisdiction.[3] The fact that an Indian committed the offense has no

3. Pablo v. People, 23 Colo. 134, 46 P. 636 (1896); Ex Parte Moore, 28 S.D. 339, 133 N.W. 817 (1911); State v. La Barge, 234 Wis. 449, 291 N.W. 299 (1940).

In 1885, a federal statute was enacted which gave the territories the power to prosecute Indians for the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny whether the crime was committed on or off the reserva-

special significance. Hence, the Solicitor and the North Dakota Supreme Court were faced only with the issue of whether a North Dakota peace officer has the authority to enter a reservation over which the state has no criminal jurisdiction to arrest an Indian for a misdeed done off the reservation without first securing the permission of tribal officials to arrest the offender or otherwise recognizing any interest of the tribal government in the matter.

The fundamental basis for both decisions was the conclusion that "Indian reservations are not extraterritorial to the states wherein they are located."[4] Both decisions relied heavily on *Organized Village of Kake v. Egan*,[5] wherein the United States Supreme Court stated that state laws may be applied on the reservation to the extent that such laws "would [not] interfere with reservation self-government or impair a right granted or reserved by federal law."[6]

The North Dakota Supreme Court, in addition to the territoriality argument, chose to frame the issue in more emotional tones. The court stated that:

> [W]hat is involved is whether the state courts will be able to be effective in performing their function, or whether they will become helpless when an offense is committed off the reservation by an Indian who escapes to the reservation before he is apprehended.
>
> Is the State, through its failure to assume full criminal jurisdiction on Indian reservations, now to be deprived of the exercise of its sovereign power of the enforcement of law and order within its boundaries outside the Indian reservations?[7]

The court answered its question by holding that where the enforcement of law and order was involved, the state would not be powerless to act on the reservation in the absence of a treaty or federal statute prohibiting such action.[8] Moreover, the court noted that since Indians are now enjoying the status of citizens in North Dakota, they should also be required to assume the duties of citizenship such as obeying the laws of the state while off the reservation.[9]

Aside from the emotional appeal of the court, both the Solicitor's

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tion. Act of March 3, 1885, ch. 341, § 9, 23 Stat. 385. The federal government reserved to itself the power to prosecute Indians for the above enumerated crimes if committed on the reservation, and within the boundaries of any state. The power of the states to prosecute crimes committed by Indians off the reservation was not mentioned in the 1885 statute, but it is safe to presume that such power was implicitly recognized by Congress.

4. *I.D. Sol. Mem. Op.* M-36717 (Dec. 22, 1967) at 3; Fournier v. Roed, 161 N.W.2d 458, 466 (N.D. 1968).
5. 369 U.S. 60 (1962).
6. *Id.* at 75.
7. Fournier v. Roed, 161 N.W.2d 458, 465 (N.D. 1968).
8. *Id.* at 465.
9. *Id.* at 466.

opinion and the court's decision have considerable support in the law, especially regarding the territorial concept. In order to properly understand the relationship between the Indian reservations and the states where they are located, a historical perspective is necessary. The Fort Totten Indian reservation will be given particular emphasis.

Until 1871, the United States dealt with the Indian tribes by treaty,[10] recognizing the tribes as sovereign powers. The various reservations created by treaties were treated as dependent nations within the states or territories where they were located.[11] Evidence of this was manifested in the statutory requirement,[12] repealed in 1934,[13] of a passport issued by the Department of the Interior for anyone wishing to enter the reservations.

In many of the treaties, there was express language to the effect that the reservation lands formed no part of the state or territory where they were located and could only be included as a part of the state or territory involved with the permission of the Indians residing on such reservation.[14] In 1861, the Organic Law for the Territory of Dakota provided that:

> [N]othing is this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, *or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Dakota,* until said tribe shall signify their assent to the President of the United States to be included within the said Territory. . . .[15]

The Fort Totten Indian reservation was not in existence when the Dakota Territory was established in 1861. When the reservation was created by treaty in 1867,[16] the territory comprising the reservation consisted of unappropriated public lands. Article IV of the treaty did not specify that the reservation was to form no part of

10. The treaty making era ended in 1871, 16 Stat. 566 (1871), 25 U.S.C. § 71 (1964), but that is not to say that the obligations created by treaty were no longer enforced. Indeed, in the instant case, the North Dakota Supreme Court conceded that if a treaty provision prohibited the state from entering the reservation to arrest Fournier, the treaty would prevail. Fournier v. Roed, 161 N.W.2d 458, 465 (N.D. 1968).
11. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556 (1831).
12. R.S. § 2134 (1878).
13. Act of May 21, 1934, ch. 321, 48 Stat. 787.
14. *See, e.g.*, Treaty with the Cherokee Indians, art. 5, 7 Stat. 481 (1835); Treaty with the Choctaw Nation, art. IV, 7 Stat. 334 (1830).
15. Act of March 2, 1861, ch. 86, 12 Stat. 239 (emphasis added).
16. 15 Stat. 505 (1867).

the Territory of Dakota but only stated that the lands were to be "set apart" for the use of the Indians.[17] "Set apart" has been construed by one court as being synonymous with "dedicated" and such language does not indicate an intent to create a separate political entity apart from the state but rather to appropriate certain public lands for a particular use, such as a reservation.[18]

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17. *Id.*

18. Yellowstone Park Transportation Co. v. Gallatin County, 27 F.2d 410 (D. Mont. 1928). The case was overruled, however, by the Ninth Circuit Court of Appeals a short time later [see 31 F.2d 644 (9th Cir. 1920), *cert. denied,* 280 U.S. 555 (1929)]. The court indicated that when Montana ceded complete jurisdiction over a portion of its territory to the United States, the jurisdiction of Montana was completely inoperative in the ceded territory except such jurisdiction as the state reserved. The court did not deal with the term, "set apart", as the district court defined it.

The court of appeals also stated that the "sole and exclusive jurisdiction" in the federal government over Yellowstone National Park is inconsistent with any theory of concurrent jurisdiction by the state over such lands. *Id.* at 646.

In Surplus Trading Co. v. Cook, 281 U.S. 647, 650, 651 (1929), the Court stated that:

> It is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. On the contrary, the lands remain part of her territory and within the operation of her laws, save the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.
>
> A typical illustration is found in the usual Indian reservation set apart from a State as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life. Such reservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have restricted application to the Indian wards.

In State v. Denoyer, 6 N.D. 586, 72 N.W. 1014, 1016 (1897) the North Dakota Supreme Court drew a distinction between lands ceded to the federal government and occupied as a fort, arsenal, or other such purpose as allowed by art. I, § 8, clause 17 of the United States Constitution, and the public lands generally:

> In the former cases jurisdiction is exclusive for all purposes. Persons residing upon such tracts are not regarded as citizens of the state that may surround such tracts. They can claim none of the privileges and immunities given by the laws of such state. Nor can the state courts punish for any crime committed upon the tract by whomsoever committed, and, *unless the right is specially reserved, state officials cannot enter upon a tract for the purpose of serving a warrant of arrest for a crime committed elsewhere, or for the purpose of serving any process whatever.* (emphasis supplied)

The court concluded that an Indian reservation was created for a special purpose but that federal jurisdiction was not exclusive over the reservation. The United States had retained only such jurisdiction necessary for the disposition of and title to the land, the fulfilling of treaty obligations, and the protection of the Indians.

Section 204 of the North Dakota Constitution specifically provides for areas within the state which are used for forts, arsenals, and other areas that the Denoyer court mentioned as being exclusively federal islands within the state. The specific constitutional reservation of jurisdiction is interesting:

> Jurisdiction is ceded to the United States over the military reservations of Fort Abraham Lincoln, Fort Buford, Fort Pembina and Fort Totten [not including the Indian reservation], heretofore declared by the president of the United States; provided, legal process, civil and criminal, of this state, shall extend over such reservations in all cases in which exclusive jurisdiction is not vested in the United States, or of crimes not committed within the limits of such reservations.

If jurisdiction over such federal areas as arsenals is plenary, and the state only has such jurisdiction as may be specifically reserved by constitution or statute, it would seem, according to the Denoyer case, that the other public lands appropriated for purposes such as Indian reservations, hold no special jurisdictional problems for the state. But even in the national parks, which are part of the public domain, the federal government has specifically spelled out the states' jurisdiction over such lands. For example, concerning Mt. Ranier National Park, it is provided that:

> Sole and exclusive jurisdiction is assumed by the United States over the territory embraced within the Mount Ranier National Park, saving, however,

In 1880, the United States Supreme Court held that where a treaty with the Nez Perce tribe did not contain a clause excepting the reservation from the boundaries of Utah, the state's jurisdiction extended to the reservation, at least to the extent that process could be served there on non-Indians.[19] The Court implied, however, that Indians on the reservation might not be amenable to the state's jurisdiction. The case merely stands for the proposition that where non-Indian interests are involved, the state is not precluded from exercising its jurisdiction over territory, albeit an Indian reservation, which is within the exterior boundaries of the state and has not been specifically excepted therefrom by any treaty provision. Applying the principle of *Langford v. Monteith* to the instant case, there can be little doubt that the Fort Totten Indian reservation is a physical part of North Dakota and the state arguably has the power to apply its law on the reservation as long as such application does not "interfere with reservation self-government or impair a right granted or reserved by federal law." As noted previously, the territorial concept of the reservation as a part of the state wherein it is located, was the cornerstone of the instant decisions' holdings that a state could arrest an Indian on the reservation for an alleged offense committed off the reservation without any permission from tribal authorities.

Even though the state might have territorial jurisdiction over the reservation, both the Solicitor and the supreme court were still faced with the question as to whether the state action interfered with tribal self-government or violated a treaty or federal law. Neither the court nor the Solicitor found any such impediment in view of the fact that the alleged offenses were committed off the reser-

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> to the State of Washington the right to serve civil or criminal process within the limits of aforesaid park in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said state but outside of said park . . . . All the laws applicable to places under the sole and exclusive jurisdiction of the United States shall have force and effect in said park. All fugitives from justice taking refuge in said park shall be subject to the same laws as refugees from justice found in the State of Washington.

39 Stat. 243 (1916), 16 U.S.C. § 95 (1964). For similar provisions, see 39 Stat. 521 (1916), 16 U.S.C. § 124 (1964) [Crater Lake National Park]; 45 Stat. 1536 (1929), 16 U.S.C. § 198 (1964) [Rocky Mountain National Park].

Since such specific statements of federal jurisdiction are contained in the statutes dealing with that part of the public lands used for parks, it is arguable that the federal government does not, as Denoyer suggests, assume plenary jurisdiction only over arsenals and forts, but assumes complete jurisdiction over all of the public domain appropriated for particular purposes save that which is granted to or reserved by the states. As the above statute dealing with Mt. Ranier National Park indicates, the state is given power to serve process, civil and criminal, within the park for acts committed outside the park, in accordance with the reservation of jurisdiction contained in WASH. REV. CODE ANN. § 37.08.200 (1964), ceding exclusive jurisdiction of the park area to the federal government. Section 203 of the North Dakota Constitution, vesting "absolute jurisdiction" over Indian lands in the federal government, does not reserve any similar jurisdiction in the state of North Dakota. Therefore, it could be argued that the state has no jurisdiction to serve criminal or civil process on the Indian reservations in the absence of an authorizing federal statute. *See* Yellowstone Park Transportation Co. v. Gallatin County, 31 F.2d 644 (9th Cir. 1929), *cert. denied*, 280 U.S. 555 (1929).

19. Langford v. Monteith, 102 U.S. 145, 147 (1880).

vation. Therefore, it was impliedly held that the tribal government had no interest in a tribal member's depredations off the reservation superior to that of the state's interest in taking the offender from the reservation without first requesting tribal officials to surrender the suspect.

Tribal self-government is a somewhat elusive term and difficult to define. Since 1934, under the guiding provisions of the Wheeler-Howard Act,[20] the federal government has reversed its prior policy of integrating the Indians and their reservations into contemporary white society by means of the allotment system[21] and has chosen instead to follow a policy of strengthening tribal relationships.[22] Under the Wheeler-Howard Act, most of the tribes adopted constitutions and entered into a new era of self-government with only the federal government as a superior power able to limit the Indians' exercise of self-governmental functions.[23] One author has stated that the powers of Indian self-government

> include the power . . . to adopt and operate under a form of government of the Indians' choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice.[24]

If the Indian tribes are truly sovereign entities with the concommitant power to administer law and order on their reservations, it would appear that a tribe has a legitimate interest in the conduct of an alleged offender against state law who is present on the reservation. Moreover, is it not reasonable to assume, under the banner of sovereignty, that the tribal government should at least be consulted before any tribal member is taken from the reservation to answer for a crime allegedly committed off the reservation? If Indian sovereignty does not extend this far, then section 1841 of the Navajo Tribal Code is indeed a futile exercise:

> Whenever the Chairman of the Tribal Council is informed and believes that an Indian has committed a crime outside of Indian country in Arizona, New Mexico, or Utah and is present on the Navajo Reservation using it as an asylum from prosecution by the state, the Chairman may order any Navajo policeman to apprehend such Indian and deliver

20. 48 Stat. 984 (1934), 25 U.S.C. §§ 461-79 (1964).
21. General Allotment Act, 24 Stat. 388, *as amended*, 25 U.S.C. §§ 331-58 (1964).
22. *Cf.* Organized Village of Kake v. Egan, 369 U.S. 60, 73 (1961).
23. For a list of those tribes adopting constitutions under the Wheeler-Howard Act, *see* U.S. DEP'T. OF THE INTERIOR, FEDERAL INDIAN LAW 409 n. 29 (Oceana reprint 1966).
24. Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145, 147 (1940).

him to the proper state authorities at the Reservation boundary.[25]

Section 1842 provides that:

> If any person being arrested as provided in section 1841 of this title so demands, he shall be taken by the arresting policeman to the nearest Court of the Navajo Tribe, where the judge shall hold a hearing, and if it appears that there is no probable cause to believe the Indian guilty of the crime with which he is charged off the reservation, or if it appears that the Indian probably will not receive a fair trial in the state court, the judge shall order the Indian released from custody.[26]

The 1868 treaty with the Navajos did not contain a provision that the reservation was to form no part of the surrounding states.[27] It would therefore appear that the Navajo reservation has a similar status to the Fort Totten reservation, and would also be subject to the state's jurisdiction under the territorial concept. But the Navajos evidently consider the control of an Indian on the reservation who has committed an offense off the reservation as a matter affecting their right of self-government. It is doubtful that a state, in the exercise of its sovereign powers, would not come to a similar conclusion if one of its citizens was taken from the state to answer for an offense committed elsewhere. If it were otherwise, there would be no need for the constitutional[28] and statutory[29] procedures regarding extradition among the states and territories.

Although some of the treaties with the Indian tribes contained specific provisions regarding extradition of Indians from the reservations,[30] there is no case which this writer has found involving the question of whether a state can use extradition proceedings to secure the custody of an Indian offender on the reservation in the

25. NAVAJO TRIBAL CODE, tit. 17, § 1841 (1962). The explanatory material following the section states that

> [e]xisting law provides no method whereby Indians alleged to have committed crimes off the Navajo Reservation, and fled into a part of the Reservation in the same state where the alleged crime occurred, can be arrested for such crimes and delivered to the proper state authorities for trial, and similarly there is no method whereby Indians who have committed offenses on the Reservation and fled off the Reservation can be arrested and brought to trial in the Tribal Courts, and
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> (2) Unless such situation is remedied the Reservation may become an asylum for criminals, and Tribal law and order may be subverted.

The material goes on to urge the Secretary of the Interior to request legislation from Congress authorizing the Navajo tribe to execute extradition agreements with the states. *See also* TURTLE MOUNTAIN TRIBAL CODE § 1.0710 (1968).

26. NAVAJO TRIBAL CODE, tit. 17, § 1842 (1962).

27. Treaty with the Navajos, 15 Stat. 667 (1868).

28. U.S. CONST. art. IV, § 2, clause 2.

29. *See* 18 U.S.C. §§ 3181-95 (1964).

30. Treaty with the Cherokee Nation, art. 11, 7 Stat. 39 (1791); Treaty with the Wiandots, art. 6, 7 Stat. 28 (1789).

absence of a treaty provision allowing extradition.[31] In 1833, however, a federal district court held that the Governor of Arkansas was not authorized to honor a demand from the chief of the Cherokee Nation for the extradition to the reservation of a person who allegedly committed a crime there.[32] The court held that an Indian reservation is neither a state nor a territory and therefore not within the constitutional and statutory terms concerning interstate extradition.[33] The court reached its conclusion by examining the relevant treaty and found that the Cherokee reservation contained a clause which excepted the reservation lands from the territorial limits of any state or territory.[34] Query if the result of the case would have been different had the reservation been included as a part of the state where it is located such as the Fort Totten reservation.

The court also noted that states and territories are populated by citizens of the United States and the reservations are not, as further authority for the conclusion that a reservation is not a state or a territory.[35] Since 1924, Indians have enjoyed the status of United States citizens.[36] The reasons for the holding of *Ex Parte Morgan* having largely disappeared, it might be well to end its long life at this point by allowing extradition between the states and the Indian reservations.[37] Such a result would properly recog-

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31. Notwithstanding any treaty provisions, the following statute, repealed by the Act of May 21, 1934, ch. 321, 48 Stat. 787, appears to have limited the authority to secure fugitives in the Indian country to federal officers:

> The superintendents, agents, and subagents shall endeavor to procure the arrest and trial of all Indians accused of committing any crime, offense, or misdemeanor, and of all other persons who may have committed crimes or offenses within any State or Territory, and have fled into the Indian country, either by demanding the same from the chiefs of the proper tribe, or by such other means as the President may authorize. The President may direct the military force of the United States to be employed in the apprehension of such Indians, and also in preventing or terminating hostilities between any of the Indian tribes. [R.S. § 2152 (1852)]

The statute speaks in terms of "demanding" the fugitive from the chief of the tribe and is reminiscent of an extradition proceeding. *See* N.D. CENT. CODE § 29-30-02 (1960).

In an opinion by the United States Attorney General in 1877, the Solicitor-General was of the opinion that the proper Indian agent should remove fugitives from the reservation rather than the military forces. The opinion also noted that "[n]o doubt, upon application by the civil authorities of Texas to the proper [Indian] agent, the fugitives in question will be surrendered to justice." 15 OP. ATT'Y. GEN. 601, 602 (1877).

In 25 U.S.C. § 231 (1964), the states are given authority to enter the reservations for the purpose of enforcing state laws concerning sanitation, quarantine, and compulsory school attendance. But the state may enforce compulsory school attendance laws only if the tribe elects to be governed by those laws. Sanitation and quarantine law enforcement does not require the Indians' consent. This limited authority of state officers to enter the reservation should not be taken as a carte blanche by the state for intrusion on reservation lands for all purposes, including the action taken in the instant case.

32. Ex Parte Morgan, 20 F. 298 (W.D. Ark. 1883).

33. *Id.* at 304, 305.

34. *Id.* at 305.

35. *Id.* at 306.

36. 43 Stat. 253 (1924), 8 U.S.C. § 1401(a)(2) (1964).

37. Since extradition is provided for in the various national parks, *supra* note 18, a part of the public domain just as Indian reservations are, there seems to be no valid reason why the federal government cannot adopt some form of extradition provisions for the reservations. An Indian reservation is surely an equal sovereign with any of the national parks.

nize the sovereignty of the reservations as political bodies within the community of sovereign states comprising this country. This is not to say that the reservations should enjoy equal sovereign status with the states, but only that such degree of sovereignty as the reservations possess should be recognized and respected.

But *Ex Parte Morgan* is apparently still alive. In 1941, the Department of the Interior rendered the following statement:

> If an Indian has fled from the reservation where he has committed an offense and is within the jurisdiction of the State, the question of extradition is the same whether or not the State is the one in which the reservation is located. In either case there can be no extradition unless State officers are authorized to extradite fugitives from Indian reservations. It has long been decided that extradition by a state is not a matter of discretion or comity but is governed exclusively by the Constitution and laws of the United States.[38]

The statement indicates that since the reservation officials have no authority to request extradition (under the authority of *Ex Parte Morgan*), neither does the state have such authority to extradite Indians from the reservation. This supposed dual inability to bring fugitives to justice is an untenable situation. But if the solution to the problem can be found in allowing state officers to take an Indian from the reservation without requesting the fugitive's surrender from tribal authorities in accordance with the North Dakota Supreme Court's decision in *Fournier v. Roed*, then the remedy should be made mutual by allowing Indian police to make an arrest off the reservation of a fugitive from their jurisdiction. Indeed, such reciprocity is entirely logical if, as the court indicates, the reservation is not extraterritorial to the state and the reservation boundaries have no special significance as far as law enforcement is concerned.

In addition to asserting the state's sovereign power over the reservation, the court held that no federal statute or treaty was shown which precluded the state from taking the action in question.[39] An examination of the treaties affecting the Fort Totten reservation indicates that no such impediment exists. But a federal statute dating back to 1834 is quite helpful. The statute provides that:

> If any Indian, belonging to any tribe in amity with the United States, shall, . . . pass from Indian country into any State or Territory inhabited by citizens of the United States,

38. 57 Interior Dec. 344, 345 (1941).
39. Fournier v. Roed, 161 N.W.2d 458, 465 (N.D. 1968).

> and there take, steal, or destroy, any horse, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, . . . may make application to the proper superintendent, agent, or subagent, who, upon being furnished with the necessary documents and proofs, shall . . . make application to the nation or tribe to which such Indian shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time not exceeding twelve months, . . . such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury.[40]

The statute would seem to indicate that state officers cannot enter the reservation to retrieve property stolen by an Indian off the reservation but that a proper application must be made to the tribe for satisfaction. If this is true as to property, should the state have any greater authority to enter the reservation to arrest the offender? If the reservation's boundaries limit the state's authority to exercise its powers regarding property within the reservation, it seems inconceivable that the same limitation would not be applied concerning persons.

The supreme court sought to reinforce its holding by alluding to the fact that Indians are now citizens and therefore should obey the laws of the state in force outside of the reservation.[41] No one can deny the propriety of that proposition, but the issue of the *Fournier* case cannot be so circumscribed. What is at stake here is not the avoidance by an Indian from state prosecution for his offenses committed off the reservation, but rather whether the state must recognize some degree of sovereignty and control of the tribal government over the reservation's inhabitants. This is so since tribal officials would undoubtedly turn an offender over to state authorities for prosecution upon being shown probable cause to believe that an offense has been committed by a member of the tribe. But if the state may disregard any interest which the tribal government has in the matter, as the instant decisions indicate, then the sovereignty of tribal government has indeed been dealt a most damaging blow.

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40. R.S. § 2156, 25 U.S.C. § 229 (1964).
41. Fournier v. Roed, 161 N.W.2d 458, 466 (N.D. 1968).