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Courts - Jurisdiction - State Assumption of Jurisdiction over a Divorce Action between Enrolled Reservation Indians

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The case can also be viewed as a further recognition of the basic principles of our federal system, which allow the states to develop their own approaches to issues not demanding of national uniformity and which hold that power not expressly delegated to the national government is reserved to the states.

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COURTS—JURISDICTION—STATE ASSUMPTION OF JURISDICTION OVER A DIVORCE ACTION BETWEEN ENROLLED RESERVATION INDIANS

Plaintiff and defendant were both enrolled members of Indian tribes[1] and both resided within the exterior boundaries of Indian reservations.[2] They were married pursuant to Montana law outside the boundaries of any Indian reservation. Northern Cheyenne Indian marriages have been performed and divorces granted pursuant to Montana law since 1937, when the Northern Cheyenne Tribal Council adopted a provision in the tribal code requiring all marriages and divorces to be so consummated.[3] Plaintiff filed for a divorce in the state district court and defendant was served with process while she was within the boundaries of a Montana reservation. Defendant moved to dismiss the action on the grounds the state court lacked personal and subject matter jurisdiction. The district court granted the motion to dismiss on both counts. Plaintiff appealed. The Montana Supreme Court reversed and *held* that since the marriage took place off the reservation, the tribal ordinance effectively granted the district court jurisdiction over the divorce action and validated the service of process on the defendant inside the reservation. *Bad Horse v. Bad Horse,* ——Mont.——, 517 P.2d 893 (1974).

The Indian tribes were once separate nations within the United States. Conquest and the imposition of treaties induced these nations to surrender their complete independence and the right to go to war. In return, the tribes were given federal protection, aid, and grants of land. In 1830, Georgia attempted to impose its laws on the Cherokee Reservation. In *Worcester v. Georgia,*[4] which chal-

1. Plaintifff is an enrolled member of the Northern Cheyenne Indian Tribe. Defendant is an enrolled member of the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota.

2. Plaintiff resides within the boundaries of the Northern Cheyenne Indian Reservation. Defendant was residing at Poplar, Montana, located within the boundaries of the Fort Peck Indian Reservation when served with process.

3. N. CHEY. TRIBAL CODE, ch. 3, § 1 (1966) provides:

> All Indian marriages and divorces must be consummated in accordance with the laws of the State of Montana, except that no common-law marriages shall be recognized within the bounds of the Northern Cheyenne Reservation.

4. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

lenged the constitutionality of those laws, Chief Justice Marshall laid down the broad principles which became accepted as law.[5]

> The Cherokee nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, . . . and with the acts of congress. The whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States.[6]

With the exception of a few cases,[7] the basic policy underlying *Worcester* has survived.[8]

Another attempt to define the tribal-state jurisdictional relationship came in 1959. *Williams v. Lee*[9] involved a civil suit in Arizona Superior Court against reservation Indians for goods sold to them by a non-Indian operating a reservation store. Congress had previously shown its willingness to allow any state to assume jurisdiction over reservation Indians by enacting a general statute allowing the people or state legislature to affirmatively accept such responsibility.[10] Since Arizona had not accepted jurisdiction in accordance

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5. Williams v. Lee, 358 U.S. 217, 219 (1959).
6. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).
7. Suits by Indians against non-Indians have been sanctioned in state courts. *See* United States v. Candeleria, 271 U.S. 432 (1926); Felix v. Patrick, 145 U.S. 317 (1892). State courts have been allowed to assume jurisdiction of the prosecution of one non-Indian for the murder of another non-Indian within reservation boundaries. *See* New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1881).
8. *But see* Organized Village of Kake v. Egan, 369 U.S. 60, 72-74 (1962):

> The general notion drawn from Chief Justice Marshall's opinion in Worcester v. Georgia, [31 U.S. (]6 Pet.[) 515, 561[(1832)] . . . that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to close analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law, ...
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> The policy of assimilation was reversed abruptly in 1934. A great many allottees of reservation lands had sold them and disposed of the proceeds. Further allotments were prohibited in order to safeguard remaining Indian properties . . . .
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> Concurrently the influence of state law increased rather than decreased. . . . Congress in 1929 authorized the States to enforce sanitation and quarantine laws on Indian reservations, to make inspections for health and educational purposes, and to enforce compulsory school attendance. . . . In 1934 Congress authorized the Secretary of the Interior to enter into contracts with States for the extension of educational, medical, agricultural, and welfare assistance to reservations, ... During the 1940's several States were permitted to assert criminal jurisdiction, and sometimes civil jurisdiction as well, over certain Indian reservations. . . . A new shft in policy toward termination of federal responsibility and assimilation of reservation Indians resulted in the abolition of several reservations during the 1950's. . . .
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> In 1953 Congress granted to several States full civil and criminal jurisdiction over Indian reservations, consenting to the assumption of such jurisdiction by any additional States making adequate provision for this in the future. . . . Thus Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall.

9. William v. Lee, 358 U.S. 217 (1959).
10. The Act of 1953, 67 Stat. 588 (1953), *as amended* 25 U.S.C. § 1322(b) (1970), pro-

with this statute, the Supreme Court held that to allow the state court to exercise jurisdiction in the case "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."[11] The standard applied in *Williams* was whether in the absence of any "governing Acts of Congress, . . . the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[12] The *Williams* test is reflected in *Organized Village of Kake v. Egan*,[13] wherein the Court, in discussing the state's jurisdiction over Indian reservations, stated,

> [O]n reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.[14]

The Supreme Court ruled in *Kennerly v. District Court*[15] that

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vided the procedure for this assumption of jurisdiction:

> Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a state, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing Statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, that the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.
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> Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Id.

Section 7 was repealed by the Civil Rights Act of 1968, 25 U.S.C. § 1323(b) (1970). But § 1323(b) provides that "such repeal shall not affect any cession of jurisdiction made pursuant to . . . [sec. 7] prior to its repeal." The repeal of sec. 7 reflected Congress' intent as stated by Senator Ervin in comments relevant to Title IV of the Civil Rights Act of 1968, 25 U.S.C. § 1322(a) (1970):

> This title repeals section 7 of Public Law 280, 83d Congress (67 Stat. 588) and authorizes States to assert civil . . . jurisdiction in Indian country only after acquiring the consent of the tribes in the States by referendum of all reservation Indians.

114 CONG. REV. 394 (1968).

The Civil Rights Act of 1968, Title IV, § 402(a), 25 U.S.C. § 1322(a) (1970), was adopted in the following form:

> The consent of the United States is hereby given to any state not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country . . . or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and affect within such Indian country or part thereof as they have elsewhere within that State.

11. 358 U.S. at 223.
12. *Id.* at 220.
13. Organized Village of Kake v. Egan, 369 U.S. 60 (1962).
14. *Id.* at 75. This case involved the question of whether Alaska could regulate trap-fishing by the Kake and Angoon tribes. It was held that Alaska could regulate the fishing because no reservation existed from which the right to fish might be implied.

The same question was involved in Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962), but the Metlakatla lived on a reservation. The State of Alaska here was not allowed to regulate the Metlakatla's trap-fishing.

15. Kennerly v. District Court, 400 U.S. 423 (1971).

a state was required to strictly follow either the procedure set down in the Act of 1953[16] or in the procedure in the Civil Rights Act of 1968[17] if it is to assume civil jurisdiction over Indian country. The acceptable procedure under the Act of 1953 would have been affirmative legislative action by the state while the Civil Rights Act of 1968 requires tribal consent, manifested by a majority vote of the enrolled Indians of the affected reservation, as a prerequisite to the assumption of state jurisdiction.[18] The current federal position is that state laws are not applicable to tribal Indians except where Congress has authorized state intervention.[19]

Since *Kennerly,* the Montana Supreme Court has held that Montana courts did not have jurisdiction over a real estate mortgage foreclosure decree on Indian trust lands on the Crow Reservation[20] or over Indian juveniles involved in alleged acts of delinquency on the reservation[21] because of the state's failure to conform to the formal jurisdictional assumption procedures in the Act of 1953 or the Civil Rights Act of 1968. In 1973, in *State ex rel, Iron Bear v. District Court,*[22] the Court assumed jurisdiction of a divorce action between two enrolled Indians living on an Indian reservation. The Court reasoned that the state retained jurisdiction over areas of the law where it was not preempted by Congress or where it did not infringe upon the Indians' right to govern themselves.[23]

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16. 67 Stat. 588 (1953), *as amended* 25 U.S.C. §§ 1320-23 (1970).

17. 25 U.S.C. § 1323 (1970).

18. Kennerly v. District Court, 400 U.S. 423, 429 (1971). This case was concerned solely with the procedural aspects by which tribal consent must be manifested under the Civil Rights Act of 1968, and does not consider their consent as to place, time, or geographical considerations.

In *Kennerly* the state was not allowed to assume civil jurisdiction over an action to recover a debt owed by reservation Indians to a grocery store on the reservation. The Court held that a unilateral action by the Tribal Council in enacting a tribal law conferring concurrent jurisdiction on the state was insufficient to vest the state with civil jurisdiction under the Act of 1953, the state not having taken the requisite affirmative legislative action, or under the Civil Rights Act of 1968, there never having been an election to obtain tribal consent as required. Kennerly v. District Court, 400 U.S. 423 (1971).

19. McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).

North Dakota's jurisdiction over Indians and Indian country is governed by N.D. CENT. CODE § 27-19 (Supp. 1973), which provides for the assumption of state jurisdiction over civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens upon petition of a majority of the adult enrolled residents, upon the affirmative vote of the majority of the enrolled adult residents, or upon individual acceptance of state jurisdiction by individual Indians. The North Dakota Supreme Court has decided that state jurisdiction over civil causes of action arising on the reservation was completely disclamed by N.D. CENT. CODE § 27-19 (Supp. 1973) unless accepted in the manner specified in that chapter. *In re* Whiteshield, 124 N.W.2d 694 (N.D. 1963). Recently the Court reaffirmed this position and decided that where the Indians had not accepted state jurisdicion over civil suits the state court did not have jurisdiction over a cause of action involving enrolled members of a reservation that arose out of an automobile accident within the exterior boundaries of the reservation. The Court denied plaintiff's claim that she was being denied due process if the state court wasn't allowed to assume jurisdiction on the ground that the plaintiff had the same privileges as any other citizen in maintaining suits in the courts of North Dakota; the courts would be without jurisdiction if anyone tried to bring a suit against an Indian. Gourneau v. Smith, 207 N.W.2d 256 (N.D. 1973).

20. Crow Tribe v. Deernose, 158 Mont. 25, 487 P.2d 1133 (1971).

21. Blackwolf v. District Court, 158 Mont. 523, 493 P.2d 1293 (1972).

22. State *ex rel.* Iron Bear v. District Court, ——Mont.——, 512 P.2d 1292 (1973).

23. *Id.* at ——, 512 P.2d at 1299. There was a 1938 tribal enactment ceding jurisdiction over divorce matters to the State of Montana and the Court noted that the power to grant a

The *Kennerly* holding was avoided, since the Court in *Iron Bear* "did not consider the jurisdiction remaining in the state after federal action or tribal assumption of government. . . ."[24] The Court held that strict compliance with the *Williams* test in these residual jurisdictional areas sufficed to authorize the Court to assume jurisdiction of this divorce action.[25]

In *Bad Horse v. Bad Horse*[26] the Montana Supreme Court departed from its position in *Iron Bear*[27] and adopted the rationale that had been expressed in a concurring opinion in that case. Jurisdiction was assumed because the marriage took place off the reservation pursuant to the laws of Montana. If the marriage had been performed within the boundaries of the reservation, the Court would have been forced to recognize the *Kennerly* prerequisites to the assumption of state jurisdiction over this action. The Court noted that there is no denial of equal protection even though subject matter jurisdiction is denied because of the federal prohibition against the state's assumption of jurisdiction of Indian civil actions arising on the reservation except as provided by law.[28] The Court cited the Civil Rights Act of 1968,[29] in which federal consent is given to any state to assume jurisdiction over Indian causes of action arising within Indian country. The Court reasoned that this statute did not hamper the state's assumption of jurisdiction because the statute was simply inapplicable to the action. The marriage was performed outside the boundaries of the reservation.[30]

The Court also proceeded to find the *Williams* infringement test inapplicable.[31] The *Williams* test has traditionally been applied to cases involving non-Indians[32] and was designed to resolve the tribal-state jurisdictional conflict which arises in a cause of action to which Indians and non-Indians are parties.[33] Such a conflict did not exist in *Bad Horse*, because the 1937 tribal provision, providing that all marriages and divorces be consummated in accordance with Montana law,[34] effectively vacated the tribe's jurisdictional interest in the subject matter.[35]

The Court here is "concerned with protecting the equal rights

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divorce had not been preempted by the federal government. The Indians' right to self-government is not infringed because the power to terminate a marriage contract is not one which will interfere with tribal sovereignty.

24. *Id.* at ——, 512 P.2d at 1297.
25. *Id.*
26. Bad Horse v. Bad Horse, ——Mont.——, 517 P.2d 893 (1974).
27. State *ex rel.* Iron Bear v. District Court, ——Mont.——, 512 P.2d 1292, 1299 (1973).
28. ——Mont——, 517 P.2d 893, 894 (1974).
29. Civil Rights Act of 1968, Title IV, § 402(a), 25 U.S.C. § 1322(a) (1970).
30. ——Mont——, 517 P.2d 893, 895 (1974).
31. *Id.* at 895-96.
32. McClanahan v. Arizona State Tax Commissioner, 411 U.S. 164, 179 (1973).
33. ——Mont.——, 517 P.2d 893, 895-96 (1974).
34. *Id.* at 896.
35. *Id.* at 895.

of a person under the Montana Constitution to maintain an action in the courts of this state."[36] Equal protection exists only when the state courts are open to all persons on an equal basis.[37] Indians are state citizens and thus are equally entitled to bring any action in state courts that has not been expressly retained in the United States by Congress.[38]

To support this position the Court looked to *Bonnet v. Seekins*[39] where the Montana Supreme Court held that Montana Courts are open to Indian citizens in regard to matters not affecting the federal government. Furthermore, the Court found this reasoning in harmony with the aim of the Act of 1953 and the Civil Rights Act of 1968 "to place the Indian in a legal status similar to that of all citizens, and abolish laws which adversely discriminate against the Indians."[40] To deny the plaintiff access to the state courts in this matter would be to deny him a remedy to which others are entitled under the Montana Constitution.[41]

Resolution of the second issue, namely, whether the defendant, who was served with process while on the Fort Peck Reservation, was beyond the personal jurisdiction of the Montana courts, follows from the decision that the state court has jurisdiction over the subject matter.[42] The Court found that once the state court has assumed subject matter jurisdiction and process has been served in accordance with the Montana Rules of Civil Procedure, the defendant cannot claim that the reservation boundaries effectively shield her from state service of process.[43] A federal Indian reservation is not off limits to state process servers.[44]

The general position of the Congress and the federal courts seems clear. The states are prohibited from exercising general civil jurisdiction over Indian causes of action arising within Indian country without the Indian's requesting the states to do so. The Montana Supreme Court is intent on striking at what it calls the "myth of Indian sovereignty [that] has pervaded judicial attempts by state courts to deal with contemporary Indian problems."[45] The Court argues that only by removing the "strictures of Indian sovereignty can the state courts enter the arena and meet the problems of the modern Indian."[46] Only by convincing a majority of Indians on each reservation that the state courts can effectively deal with

36. *Id.*
37. MONT. CONST. art. III, § 3 (1889) and art. II, § 16 (1972).
38. ——Mont.——, 517 P.2d 893, 895 (1974).
39. Bonnet v. Seekins, 126 Mont. 24, 243 P.2d 317 (1952).
40. ——Mont.——, 517 P.2d 893, 896 (1974).
41. *Id.*
42. *Id.* at ——, 512 P.2d at 894.
43. *Id.* at ——, 512 P.2d at 897.
44. *Id.*
45. *Id.*
46. *Id.*

modern Indian problems will the day come when the state courts are asked to enter the arena. Justice demands that remedies be provided where tribal jurisprudence is inadequate and access to state courts is prohibited. But again the Indian citizens hold the key; only when they feel confident that the advantages of state jurisdiction outweigh the disadvantages, will they act.

JOEL JOHNSON

GRAND JURY—WITNESSES—WITNESS MAY NOT REFUSE TO ANSWER QUESTIONS PREDICATED UPON EVIDENCE OBTAINED FROM UNLAWFUL SEARCH AND SEIZURE.

The defendant's place of business was searched by agents of the Federal Bureau of Investigation under a warrant issued in connection with a gambling investigation. The warrant was restricted to the discovery and seizure of bookmaking records and wagering materials. One federal agent, with knowledge of a current federal investigation of loansharking activities, seized suspected loansharking records during the search.

A special grand jury investigating possible loansharking activities subpoened defendant to ask him questions concerning the evidence seized at his place of business. Defendant appeared before the grand jury but refused to testify.[1] After the Government requested transactional immunity for the defendant,[2] the District Court ruled the search and seizure illegal and granted the defendant's motion for suppression and return of the seized evidence.[3] The District Court further ordered that defendant need not answer any of the grand jury's questions concerning the illegally obtained evidence.[4]

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1. The defendant invoked his Fifth Amendment privilege against self-incrimination. United States v. Calandra, 414 U.S. 338, 341 (1974).

2. *Id.* The Government moved for transactional immunity under Section 2514 of Title 18 of the United States Code which, in part, provides:

> No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence . . . against him in any court.

18 U.S.C. § 2514 (1970).

3. In re Calandra, 332 F. Supp. 737, 746 (N.D. Ohio 1971), *aff'd sub nom.* United States v. Calandra, 465 F.2d 1218 (6th Cir. 1972), *rev'd* 414 U.S. 338 (1974). The defendant moved for suppression and return of the evidence under Rule 41(e) of Federal Rules of Criminal Procedure which, in part, provides:

> A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of property. . . . If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial.

FED. R. CRIM. P. 41(e).

4. 332 F. Supp. at 746.