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Criminal Law - Indians - Statutory Rape Not a Basis for Jurisdiction under Ten Major Crimes Act

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"novel constitutional limitation" upon the state's power to enforce their contracts.[14]

According to construction by the courts in prior decisions this constitutional limitation on the states to enforce their contracts was imposed by the fourteenth amendement.[15] The rule was laid down in *Shelly v. Kraemer* that the enforcement of racially restrictive covenants by the courts is state action in violation of the equal protection clause of the fourteenth amendment.[16] This rule is generally accepted by the courts and the decision in the instant case which follows it is neither new nor novel.[17] Any other would have effectively nullified the decision in *Shelley v. Kraemer* and denied to the negroes the protection from discrimination which the framers of the fourteenth amendment intended them to have.[18]

BAYARD LEWIS

CRIMINAL LAW — INDIANS — STATUTORY RAPE NOT A BASIS FOR JURISDICTION UNDER TEN MAJOR CRIMES ACT — Defendant, a Menominee Indian, was indicted by a federal grand jury for the statutory rape of an Indian girl on the reservation. He moved to dismiss the indictment on the grounds that the federal court lacked jurisdiction to try him. It was *held,* that the motion should be granted. The crime of rape enumerated in the Ten Major Crimes Act[1] must be defined in accordance with the law of the state where the crime is committed, and in Wisconsin, it does not include the carnal knowledge of a female under the age of consent. *United States v. Jacobs,* 113 F.Supp. 203 (E.D. Wis. 1953).

No federal court has jurisdiction to try an Indian for a criminal offense committed on a reservation unless his crime is one covered by the so-called Ten Major Crimes Act.[2] The Act enumerates ten crimes considered offenses if committed by one Indian against another on an Indian reservation. These are murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery and larceny. Carnal knowledge, assault with intent to rape and assault with intent to do great bodily harm were stricken from the Act as amended. Thus, these latter crimes are no longer federal offenses with the meaning of the Act. In respect to the crime of rape, the court will follow the law of the state where the crime was committed.[3] It is interesting to note, however, that as to the other crimes in the Act, this is apparently not so, and the federal courts will disregard state law and follow federal definitions or tribal law where they are concerned.[4]

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14. *See* Barrows v. Jackson, 73 S. Ct. 1013 (1953) (dissent).
15. Shelley v. Kraemer, 334 U.S. 1, 17 (1948); Roberts v. Curtis, 93 F. Supp. 604 (D. D.C. 1950); *see* Correll v. Earley, 205 Okla. 366, 237 P.2d 1017, 1021 (1951).
16. Shelley v. Kraemer, 334 U.S. 1, 17 (1948).
17. Shelley v. Kraemer, 334 U.S. 1, 17 (1948); Roberts v. Curtis, 93 F. Supp. 604 (D. D.C. 1950); *cf.* Civil Rights Cases, 109 U.S. 3, 17 (1883).
18. See the discussion in Nixon v. Herndon, 273 U.S. 536, 541 (1927) (denying negroes the right to vote in Democratic Party primary elections in Texas held violative of fourteenth amendment); see also Buchanan v. Warley, 245 U.S. 60, 77 (1917).

1. 47 Stat. 337 (1932). 18 U.S.C. §548 (1946).
2. State v. District Court, 125 Mont. 398, 239 P.2d 272 (1951).
3. United States v. Jacobs, 113 F.Supp. 203 (E.D. Wis. 1953).
4. Toy Toy v. Hopkins, 212 U.S. 542 (1909); United States v. Kagama, 118 U.S. 375 (1886); *cf.* Earle v. Godley, 42 Minn. 361, 44 N.W. 254 (1890).

The initial impetus behind the enactment of the Ten Major Crimes was an early Dakota case which held that an Indian who murdered another Indian on Indian land would be liable only to the local tribal courts.[5] This case invoked such a storm of criticism that Congress, shortly thereafter, enacted the Seven Major Crimes Act[6] which, through constant revision, became the Ten Major Crimes Act.

The law of Wisconsin differentiates between rape and carnal knowledge and abuse, or statutory rape of a female under the age of consent.[7] As noted above, Congress expressly excluded the crime of statutory rape, as defined by the law of the state where the offense was committed, from the scope of the Act.

An Indian is considered to be under the jurisdiction of the United States as long as he continues to live on a reservation.[8] However, it is well-settled that if an Indian commits a crime against another Indian or a white man while off the reservation, he falls under the jurisdiction of the state in which the crime was committed,[9] since federal jurisdiction extends only to Indian reservations and Indian lands, no distinction being made between the terms "reservation" and "land" for practical purposes.[10] This leads to a distinction between "emancipated" and "unemancipated" Indians, the emancipated, or non- reservation Indians being under the jurisdiction of the state as is any other citizen, and the unemancipated or reservation Indian being under the exclusive jurisdiction of the federal government. In crimes committed by whites against Indians on Indian lands and vice versa, the federal government retains exclusive jurisdiction.[11]

The jurisdictional situations noted above concerning crimes committed by and between the Indian and white races on or off Indian reservations and land leave considerable latitude for hypothesis. What, for instance, would happen if an Indian and a white man, walking together on an Indian reservation, were accosted by a white man and robbed? It has already been stated as a general proposition that crimes committed by whites against Indians on an Indian reservation are punishable in the federal courts, the same being true as relates to crimes committed by Indians against whites on Indian land. However, it is noteworthy that if a white man commits a crime against a white man, even though the two may be on Indian reservation at the time, jurisdiction is in the state courts.[12] When applied to the above hypothesis,

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5. *Ex parte* Crow Dog, 109 U.S. 556 (1883).

6. 23 Stat. 362, 385 (1885); 38 U.S.C. §24 (1946); Cohen, Handbook of Federal Indian Law 362, 1945. (It is noteworthy that the tribes themselves retain jurisdiction of crimes committed on Indian lands by Indians against Indians when the crimes fall outside the scope of the Act.)

7. Wisconsin Statutes 340.46, 340.47 (1949).

8. *In re* Long's Estate, 207 Okl. 259, 249 P.2d 103 (1952).

9. *In re* Wolf, 27 Fed. 606 (D.C. Ark. 1886); United States v. Kiya, 126 Fed. 879 (D. N.D. 1903); *Ex parte* Moore, 28 S.D. 339, 133 N.W. 817 (1911). (The first two cited cases hold that the state has exclusive jurisdiction over crimes committed by Indians off the reservation only in the absence of a statute or treaty to the contrary. This is evidently a broad construction of the well-settled rule that Congress has exclusive and plenary power to legislate concerning Indians.)

10. Donnelly v. United States, 228 U.S. 243 (1912). (Indian country includes those lands set aside for, or allotted to Indians, not previously occupied by them.)

11. Donnelly v. United States, *supra*, note 10; State v. LaBarge, 234 Wis. 440, 291 N.W. 299 (1940).

12. United States v. McBratney, 104 U.S. 621, (1882); 47 Stat. 337 (1932), 18 U.S.C. §548 (1946); 35 Stat. 329 (1909), 18 U.S.C. §549 (1946). Cohen, Handbook of Federal Indian Law 365 (1945) (For purposes of jurisdiction over crimes committed by

this creates an interesting situation. Is one to draw the conclusion from the law as it now stands that the crime against the white man is an offense punishable in the state court while the crime against the Indian is punishable in the federal courts? Such a conclusion as this would certainly lead one to view that our jurisprudence as to this question, is, to say the least, rather cumbersome. Nevertheless, the answer to the question posed in the hypothesis above is in the affirmative. The only situation where the state is allowed jurisdiction of offenses on Indian land is in the case of crimes committed by whites against whites thereon.[13]

However, federal jurisdiction over Indian affairs is not so broad and all-encompassing as to rob the state of its police power in respect to Indians for the mutual good of the state and the Indians themselves.[14] A typical form of this type of regulation may be found in state statutes prohibiting the sale of beer or any form of hard liquor to Indians.[15]

In North Dakota, exclusive jurisdiction over Indian affairs has been expressly ceded to the federal government by constitutional provision.[16] Thus, it is an open question whether the law in Wisconsin on this matter would apply here, since a search of the Wisconsin statutes and constitution reveals no such cession. It is, therefore, perfectly possibly that in North Dakota, the federal courts have exclusive jurisdiction over all crimes committed by Indians or against Indians on Indian land, irrespective of the Ten Major Crimes Act. However, it is arguable that since Congress may use its exclusive jurisdiction at its discretion, the state may be said to have had jurisdiction over crimes falling outside the scope of the Act ceded back to it.

The law on this entire question seems to represent a doubtful policy, since legislative and judicial authority seem to have joined forces to form a legalized discrimination against the Indian. It seems that much difficulty, both on a legal and an ethical plane, might be avoided if Indians were treated just as other citizens in respect to their legal rights. In the light of present-day social policies, it seems unfortunate to categorize the Indian as "emancipated" or "unemancipated." Society would be well rid of the latter classification.

DOUGLAS BIRDZELL

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one non-Indian against another on an Indian reservation, the reservation is generally considered to be a part of the state where the crime was committed, and jurisdiction is thus in the state. However, this does not hold true where the federal government has expressly retained jurisdiction, the common case being when the crime falls within the scope of the Ten Major Crimes Act.)

13. Donnelly v. United States, 228 U.S. 243 (1912) (The district courts of a territory have jurisdiction over the crime of murder committed by any person other than an Indian on an Indian reservation within its territorial limits.) *Ex parte* Konaha, 43 F. Supp. 747 (E.D. Wis. 1945) (Here, the court held that an Indian who negligently struck and killed a pedestrian while driving on a state highway within the limits of an Indian reservation was guilty of a misdemeanor within the meaning of the Ten Major Crimes Act, and that the federal court had jurisdiction over the offense, since the granting of a right of way to the state for construction of a highway over Indian land does not extinguish the Indian title nor does it deprive the federal courts of jurisdiction.)

14. New York v. Dibble, 21 How. 366 (U.S. 1859).

15. N.D. Rev. Code 5-0210 (1943); "No person shall sell beer to a minor, incompetent person, Indian, as defined by federal law, or a person who is an inebriate or habitual drunkard." N.D. Rev. Code 5-0318 (1943). "No person shall sell any liquor to a minor, incompetent person, Indian as defined by federal law, or a person who is an inebriate or habitual drunkard."

16. N.D. Const. Art. XVI. §203 (2).