CHAPTER 6

THE SCOPE OF STATE POWER OVER INDIAN-AFFAIRS

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SECTION 1. INTRODUCTION

That state la&s^1 have no force within the territory of an Indian tribe in matters affecting Indians. is a general proposition. that has not been successfully challenged, at least in the United States Supreme Court, since that Court decided, in *Worcester* v. *Georgia*,[2] that the State of Georgia had no right to imprison a white man residing on an Indian reservation, with the consent of tribal and federal authorities, who refused to conform to state laws governing Indian affairs. In that case the court declared, *per* Marshall, *C. J.:*

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, 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, or in conformity with treaties, and with the acts of congress. (P.560.)

The State of Georgia never did carry out the mandate of the Supreme Court in this case,[3] and many other state courts and state legislatures since the decision in this case have likewise refused to acknowledge the implications of the decision. Nevertheless, when critical cases have been presented to the United States Supreme Court, the principles laid down in *Worcester v. Georgia* have been repeatedly reaffirmed.[4]

The reasons judicially advanced for this incapacity of the states to legislate on Indian affairs have been variously formulated in different cases, although the actual decisions of the Supreme Court have followed a consistent pattern. 'One of the most persuasive considerations as to the lack of state power is the inclusion in enabling acts and state constitutions of express disclaimers of state jurisdiction over Indian lpds.^5 One of the most famous statements explanatory of the' limitations upon State power in this field is the statement *in United States* v. *Kagama*,[6] a case which upheld the constitutionality of congressional legislation on offenses between Indians committed on an Indian reservation:

> It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them;' and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.
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> * * * * *

[1] Specific bodies of state law are dealt with in other chapters of this work. Thus. state laws involving questions of discrimination against Indians, in the matter of franchise or in other respects. are dealt with in Chapter 8. State laws of inheritance are Considered in Chapters 10 and 11. State laws on taxation are analyzed in Chapter 13. Those state laws which deal with Indian hunting and fishing rights are treated in Chapter 14. sec. 7. *Chapter* 15 touches upon state laws relating to recognition or protection of tribal property. Chapters 18 and 19 deal respectively with criminal and civil jurisdiction of state courts as well as federal and tribal courts.

[2] 6 Pet. 515 (1532).

[3] See Chapter 7, sec. 2. *Cf.* Report and Remonstrance of the Legislature of Georgia, Sen. Doc. No. 98, 21st Cong., 1st sess. (March 8, 1830).

[4] For au analysis of these cases, sea F. S. Cohen, Indian Rights and the Federal Courts (1940). *24* Minn. L. Rev. 145.

[5] "* * * said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *." Act of July 16. 1894, sec. 3. 28 Stat. 107, 108 (Utah). Accord: Act of June 20. 1910. secs. 2, 20, 36 Stat. 557 (New Mexico and Arizona). And cf. Act of June 16. 1906, sec. 28. 34 Stat 267. 281 (Oklahoma).

[6] 118 U. S. 375 (1896).

[7] The omission of this comma in the official United States Report has created some confusion as to the meaning of this sentence. Without the comma, the sentence seems to suggest that the weakness and helplessness of the Indians is due in part to treaties and that it is because of the weakness and helplessness of the Indians that the Federal Government may exercise the power of protection. With the comma, the sentence suggests rather that the factual situation of weakness and helplessness is only part of the basis of legal power, the other, and legally more important. basis being the obligations assumed by the United States towards Indian tribes by treaty. This comma is found in the Supreme Court Reporter edition of the opinion (6 Sup. Ct. 1109).

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes. (Pp. 383-385.)

Insofar as this argument relies upon treaties it is legally unassailable, for the treaties made between the Federal Government and the Indian tribes are part of the supreme law of the land[8] and, as we have already noted, these treaties quite generally promised the tribes, either expressly or by implication, that they would not be subject to the sovereignty of the individual states, but would be subject only to the Federal Government.

On the other hand, insofar as the opinion in the *Kagama* case relies upon the factual helplessness of the Indians, the enmity of the state populations, and the impossibility of state control, serious questions may be raised both as to the validity of the argument and as to its scope and application, when the factual premises noted no longer correspond to the facts. It would, however, be a digression at this point to analyze the various doctrines advanced in support of the conclusion that, within the Indian country in matters affecting Indians, federal law applies to the exclusion of state law.[9]

It is enough for the present to note that the domain of Power of the Federal Government over Indian affairs marked out by the federal decisions is so complete that, as a practical matter, the federal courts and federal administrative officials now generally proceed from the assumption that Indian affairs are matters of federal, rather than state, concern, unless the contrary is shown by act of Congress or special circumstance. Thus, without questioning the constitutional doctrine that states possess original and complete sovereignty over their own territories save insofar as such sovereignty is limited by the Federal Constitution, a sense of realism must compel the conclusion that control of Indian affairs has been delegated; under the Constitution, to the Federal Government and that state jurisdiction in any matters affecting Indians can be upheld only if one of two conditions is met: either that Congress has expressly delegated back to the state, or recognized in the state, some power of government respecting Indians; or that a question involving Indians involves non-Indians to a degree which calls into play the jurisdiction of a state government. Of these two situations, the former is undoubtedly more definite and therefore simpler to analyze. Such an analysis requires a listing of the acts of Congress which confer upon the states, or recognize in the states, specific powers of government with respect to Indians.

[8] *United States v. Forty-Three Gallons of Whiskey*, 93 U. S. 188 (1876); *Worcester v. Georgia*, 6 Pet. 515 (1832); *Fellows v. Blacksmith*, 19 How. 366 (1856); United *States v. New York Indians*, 173 U. S. 464 (1899). See *United States v. Winans*, 198 U. S. 371, 379, 384 (1905). *Cf.* *United States v. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 703 (1899); *United States v. Rickert*, 188 U. S. 432, 437, 438 (1903); *United States v. Seminole Nation*, 299 U. S. 417, 428 (1937), *cert.* granted 299 U. S. 526; *Wallace v. Adams*, 204 U. S. 415 (1907). See chapter 3, sec. 3.

[9] For further discussion of these doctrines see Chapter 4, sec. 2, and Chapter 5.

SECTION 2. FEDERAL STATUTES ON STATE POWER

It will be convenient to group the federal statutes which grant or recognize state power over Indian affairs into two categories: (a) those that apply throughout the United States; and (b) those that apply only to particular tribes or areas.

A. GENERAL STATUTES

The most important field in which State laws have been applied to Indians by congressional fiat is the field of inheritance. In the absence of federal legislation, it is established that all questions relating to descent and distribution of the property of individual Indians are governed by the laws and customs of the tribe to which the Indians belong.[10] A given tribe may, of course, adopt such state laws as it considers suitable, and it may do this either by ordinance,[11] or, in conjunction with the Federal Government, by treaty.[12] Without such action of the tribal or the Federal Government, state laws of inheritance have no application to Indians residing on an Indian reservation.

This situation, however, has been greatly changed by congressional legislation affecting Indians to whom reservation lands have been allotted in severalty. The most important portion of this congressional legislation is contained in Section 5 the General Allotment Act,[13] providing:

> That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allot-

[10] See Chapter 7. sec. 6 and Chapter 11. sec. 6.

[11] See 55 I. D. 14, 42 (1934). See also Chapter 7. sec. 6.

[12] Thus, e. g., Article 8 of the Treaty of February 27, 1867. with the Pottawatomie Indians. 15 Stat. 531; 533 provides:

> Where allottees under the treaty of eighteen hundred and sixty-two shall have died, or shall hereafter decease, if any dispute shall *arise* in regard to heirship to their property, it shall be competent *for* the business committee to decide such question, taking for their rule of action the laws of inheritance of the State of Kansas * * .

[13] 24 Stat. 388. 389; amended Act of March 3, 1901, sec. 9, 31 Stat. 1058, 1085; 25 U. S. C. 348.

This section as originally enacted, also provided:

> That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided: and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act.

The General Allotment Act expressly exempted from its operation the territory occupied by the Five Civilized Tribes and the Miamies and Peorias, and Sacs and Foxes in the Indian Territory, now a part of the State of Oklahoma. and also the reservation of the Seneca Nation of New York Indians in the State of New York. as to which see *United States ex rel. Kennedy v. Tyler*, 269 U. S. 13 (1925), aff'g. *United States ex rel. Pierce v. Waldow*, 294 Fed. 111 (D. C. W. D. N. Y. 1923). See also *New York v. Dibble*, 21 How. 366 (1858).

The Confederated Wea, Kaskaskia, Peoria. Piankeshaw, and Western Miamies were allotted under the Act of March 2, 1889. 25 Stat. 1013. but by that Act, the provisions of the General Allotment Art were extended to these tribes. The same is true as to other tribes allotted under special acts of Congress. such for instance as the Chippewas of Minnesota, who were allotted under the Act of January 14. 1889. 25 Stat. 642. in accordance with the provisions of the General Allotment Act. The Quapaw Indians were allotted under the Act of March 2, 1895. 28 Stat. 876, 907, without reference to the General Allotment Act. and would seem to have been excluded from the provisions of that Act, so that the laws of Kansas did not apply to them.

The Sacs and Foxes were allotted under the Act of February 13. 1891, 26 Stat. 749. and under the provisions of that Act they became subject

> tees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom allotment shall have been made, *or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located,* and that at the expiration of said period the United States will convey the same by patent to said Indian, *or his heirs as aforesaid,* in fee, discharged of said trust and free of all charge or incumbrance whatsoever. [Italics supplied.]

As will be readily perceived, these, provisions entirely withdraw from the operation of tribal laws and customs all matters of descent and partition concerning allotments made to Indians under the General Allotment Act, and the laws of the state in which the land is situated must govern such matters, except insofar as these matters are otherwise covered by federal statutes.

The scope of state power in the matter of inheritance of allotments has been considerably limited however, by legislation which confers upon the Secretary of the Interior full power to determine heirs and to partition allotments.[14] Thus, for example, the Supreme Court has held [15] that a will made by an Indian woman in accordance with departmental regulations, and approved by the Secretary of the Interior, devising her restricted land to others than her husband, was valid, notwithstanding a provision in the Oklahoma law prohibiting a married woman from bequeathing more than two-thirds of her property away from her husband.

The Court said :

> The Secretary of the Interior made regulations which were proper to the exercise of the power conferred upon him and the execution of the act of Congress, and it would seem that no comment is necessary to show that § 8341 [Oklahoma Code] is excluded from pertinence or operation. (P. 324.)
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> * * * * *
>
> In a word, the act of Congress is complete in its control and administration of the allotment and of all that is connected with or made necessary by it, and is antagonistic to any right or interest in the husband of an Indian woman in her allotment under the Oklahoma Code. (P. 326.)

In a later case approving this decision,[16] the Court sustained the validity of a lease made by an Indian on his family homestead which violated an Oklahoma statute requiring execution by both spouses. The Court said :

> Nor is the validity of the extension lease affected by the provision in the Oklahoma constitution that nothing in the laws of the United States shall deprive any Indian or other allottee of the benefit of the homestead laws of the State. Whether or not this provision was intended to do more than to protect the allottees from the enforced seizure of their homesteads, it is sufficient to say that, whatever its purpose, it can have no more effect than the Oklahoma statute in giving validity to laws of the State repugnant to the reserved power of the United States in legislating in respect to the lands of Indians. Neither the constitution of a State nor any act of its legislature, whatever rights it may confer on Indians or withhold from them, can withdraw them from the operation of an act which Congress passes concerning them in the exercise of its paramount authority. *United States* v. *Holliday*, 3 Wall. 407, 419. (P. 497.)

A second field in which state law has been extended to Indian reservations by congressional flat is the realm of laws covering "inspection of health and educational conditions" and the enforcement of "sanitation and quarantine regulations" as well as "compulsory school attendance." By the Act of February 15, 1929,[17] Congress authorized the enforcement of such laws upon Indian reservations by state officials "under such rules, regulations, and conditions as the Secretary of the Interior may prescribe."

A third body of state laws is extended over Indian reservations by section 289 of the Criminal Code [18] which makes offenses by non-Indians against Indians and by Indians against non-Indians punishable in the federal courts in accordance with state laws existing at the time of the federal enactment in question.[19]

It will be noted that the foregoing statute is expressly made inapplicable to any offense committed by and against an Indian, by the terms of section 218 of, title 25 of the U. S. Code.[20]

Apart from these three fields there has been no general congressional legislation authorizing the extension of state laws to Indians on Indian reservations."

Within those three fields it is probable that any devolution of authority from Congress to the states may be revoked at such time as Congress sees fit.[22]

B. SPECIAL STATUTES

Apart from the general statutes noted in the preceding section, a number of acts of Congress dealing with particular tribes or areas confer various powers upon state courts, state legislatures, and state administrative officials. These statutes deal most commonly with such subjects as crimes,[23] taxation,[24] pro-

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to the laws of the Territory of Oklahoma. And the Osages, were allotted under the Act of June 28. 1906, 34 Stat. 539, and under the provisions of that Act became subject to the laws of that Territory. See, however. see. 6 of the Act of 1906, *supra.* See also sec. 3 of the Act of April 18, 1912. 37 Stat. 86, subjecting the persons and property of Osage Indians to the jurisdiction of the county courts of Oklahoma in probate matters. As to the Five Civilized Tribes of Oklahoma, see *Stewart* v. *Keyes,* 295 U. S. 403 (1935), pat. for rehearing den., 296 U. S. 661 (1935).

[14] Act of June 23, 1910. 36 Stat 855. 25 U. S. C. 371; Act of May 18. 1916. 39 Stat. 123. 127, 25 U. S. C. 321. See Chapter 10, sec. 10 ; Chapter 11, sec. 6; Chapter 5. sec. 10.

[15] *Blanset* v. *Cardin,* 256 U. S. 319 (1921).

[16] *Sperry Oil Co. v. Chisholm, 264* U. S. 488 (1924).

[17] 45 Stat. 1185. 25 U. S. C. 231. And see Taylor Grazing Act of June 28, 1934; 48 Stat. 1269, amended June 26, 1936, 49 Stat. 1976, discussed in 56 I. D. 38 (1936).

[18] 18 U. S. C. 468; derived from: R. S. § 5391 ; Act of July 7, 1898. sec. 2, 30 Stat. 717 ; Act of June 15, 1933, '48 Stat. 152.

[19] Congress has not attempted to give force to state laws later enacted, apparently having in mind: the possibility that; such legislation might be considered an unconstitutional delegation of power or a violation of Constitutional requirements of certainty in penal legislation. *Cf. Wayman* v. *Southard,* 10 Wheat. 1 (1825) ; *Field V. Clark. 143* U. S. 649 (1891) ; *Wichita Railroad* v. *Public Utilities Com.,* 260 U. S. 48 *(1922)* ; *Hampton & Co.* v. *United States,* 276 U. S. 394 (1928) ; *Panama Refining Co. v. Ryan,* 293 U. S. 388 (1935).

[20] R. S. § 2146, amended by Act of February 18, 1875, 18 Stat. 316, 318. See Chapter 7, sec. 9; Chapter 18. sec. 3.

[21] Note, however, the legalization of state-federal administrative cooperation by the Johnson-O'Malley Act of April 16, 1934, 48 Stat. 596, amended *Act* of June 4. 1936, 49 Stat. 1458, 23 U. S. C. 452 et *seq.* And see Chapter 4. sec. 15; Chapter 12, sec. 1.

[22] See *Truskett v. Closser,* 236 U. S. 223 (1915) : *Rice* v. *Maybee,* 2 F. Supp. 669 (D. C. W. D. N. Y. 1933) ; *People ex rel. Cusick* v. *Daly, 212 N. Y.* 183, 196–197, 105 N. E. 1048 (1914):

[23] Act of February 21. 1863. sec. 5, 12 Stat 658. 660 (Winnebago) ; Act of June 8. 1940 (Pub. No. 565. 76th Cong.) (State of Kansas).

[24] Act of March 3. 1921, 41 Stat. 1249. 1251. authorizing State of Oklahoma to tax oil and gas production from Indian lands (upheld in 33 Op. A. G. 60 (1921) discussed in Op. Sol. I. D., M.26672, September 22, 1931) : Act of May 10. 1928, 45 Stat. 495. 496 (subjecting mineral production from Five Civilized Tribes' lands in Oklahoma to state taxes). *Cf.* Act of June 26. 1936, sec. 1. 49 Stat. 1967. See Chapter 13, secs 2. 5 ; Chapter 23. sec. 9.

bate,[25] acquisition of water rights,[26] recording laws,[27] and liens upon cut timber.[28]

In Oklahoma there has been a particularly broad devolution of powers to the state government.[29] The organs of the state government however, in exercising such powers have been considered federal agencies. Thus in *Parker* v. *Richard* [30] the Supreme Court, in referring to the authority of the county courts of Oklahoma under section 9 of the Act of May 27, 1908,[31] said:

> * * * That the agency which is to approve or not is a state court is not material. It is the agency selected by Congress and the authority confided to it is to be exercised in giving effect to the will of Congress in respect of a matter within its control. Thus in a practical sense the court in exercising that authority acts as a federal agency; and this is recognized by the Supreme Court of the State. *Marcy* v. *Board of Commissioners*, 45 Oklahoma 1. (P. 239.)

[25] Act of April 30, 1888, 25 Stat. 94, 98 (Sioux); Act of March 2, 1889, 25 Stat. 888, 891 (Sioux); Act of January 12, 1891, 26 Stat. 712 (Mission); Act of February 13, 1891, 26 Stat. 749, 751 (Sac and Fox); Act of June 28, 1906, 34 Stat. 539 (Osage); Act of April 18, 1912, 37 Stat. 86 (Osage); Act of June 14, 1918, 40 Stat. 606 (Five Civilized Tribes); Act of February 27, 1925, 43 Stat. 1011 (Osage). For a discussion of the provisions of these acts see Op. Sol. I. D., M.18008, December 18, 1925; Op. Sol. I. D., October 4, 1926; Op. Sol. I. D., D-46929, September 30, 1922; Op. Sol. I. D., M.24293, June 19, 1928.

[26] Act of March 3, 1905, 33 Stat. 1016, 1017 (Shoshone) discussed *In re Parkins*, 18 F. 2d 642, 643 (D. C. D. Wyo. 1926).

[27] Act of February 19, 1875, 18 Stat. 330, 331 (Seneca).

[28] Act of March 31, 1882, 22 Stat. 36, 37 (Wisconsin).

[29] See Chapter 23, secs. 3–10.

[30] 250 U. S. 235 (1919).

[31] 35 Stat. 312, 315.

SECTION 3. RESERVED STATE POWERS OVER INDIAN AFFAIRS

While the general rule, as we have noted, is that plenary authority over Indian affairs rests in the Federal Government to the exclusion of state governments, we have likewise noted two major exceptions to this general rule: First, where Congress has expressly declared that certain powers over Indian affairs shall be exercised by the states, and second, where the matter involves non-Indian questions sufficient to ground state jurisdiction.

In proceeding to analyze this latter exception to the general rule, we may note that in point of constitutional doctrine, the sovereignty of a state over its own territory [32] is plenary, and therefore the fact that Indians are involved in a situation, directly or indirectly, does not *ipso* facto terminate state power. State power is terminated only if the matter is one that falls within the constitutional scope of exclusive federal authority.^33

A case in which the factors of situs, person and subject matter all point to exclusive federal jurisdiction, as, for example, in a transaction involving a transfer of restricted property between Indians on an Indian reservation, the basis of exclusive federal power is clear. On the other hand, where all three factors point away from federal jurisdiction, the power of the state is clear. There exists, however, a broad twilight zone in which one or two of the three elements noted—situs, person and subject matter—point to federal power and the remainder to state power. These are the situations which require analysis and the various combinations of these factors present six situations for consideration.

(A) Indian outside Indian country engaged in non-federal transaction.

(B) Indian outside Indian country engaged in federal transaction.

(C) Indian within Indian country engaged in non-federal transaction.

(D) Non-Indian outside Indian country engaged in federal transaction.

(E) Non-Indian in Indian country engaged in federal transaction.

(F) Non-Indian in Indian country engaged in non-federal transaction.

A brief discussion of these six type-situations is in order.

A. INDIAN OUTSIDE INDIAN COUNTRY ENGAGED IN NON-FEDERAL TRANSACTION

It is undoubtedly true, as a general rule; that an Indian who is "off the reservation" is subject to the laws of the state or territory in which he finds himself, to the same extent that a non-Indian citizen or alien would be subject to those laws.[34]

B. INDIAN OUTSIDE INDIAN COUNTRY ENGAGED IN FEDERAL TRANSACTION

To the general rule set forth in the preceding paragraph, an exception must be noted; If the subject matter of the transaction is a subject matter over which Congress has asserted its constitutional-power, the state must yield to the superior power of the nation.^35 For example, Congress has taken the position that its constitutional concern with Indian tribes requires a prohibition of sales of liquor to all "ward" Indians, even outside of Indian reservations, and the courts have upheld this exercise of power.^36 Under the circumstances, any state interference with this prohibition would undoubtedly be held invalid.

A second example may be found in the realm of restricted personal property of Indians. Where, for example, a herd of cattle is held by an Indian or an Indian tribe subject to federal restrictions upon alienation,^37 it seems clear that the removal of the property from the reservation would not free it from such federal restrictions, and any state laws or proceedings inconsistent with federal control would be clearly unconstitutional.[38]

The line between federal transactions which are of such concern to the Federal Government that the state cannot legislate in the matter and other transactions on which the state is permitted to legislate, is not always easy to draw. Where, for

[32] Ordinarily an Indian reservation is considered part of the territory of the state. Utah *and Northern Railway* v. *Fisher*, 116 U. S. 28 (1885) But in some cases, the enabling net or other congressional legislation or the state constitution itself, declares that Indian reservations shall not be deemed part of the territory of the state. See, for example *The Kansas Indians*, 5 Wall. 737 (1866); *Harkness* v. *Hyde*, 98 U. S 476 (1878), qualified in *Langford* v. *Monteith*, 102 U. S. 145 (1880).

[33] See sec. 1, *supra*; and see Chapter 5.

[34] *Hunt* v. *State*, 4 Kan. 60 (1866) (murder of Indian by Indian); *In re Wolf*, 27 Fed. 606, 610 (D. C. Ark. 1886) (conspiracy by Indians to obtain money by false pretences from Indian nation In D. C.); State v. *Williams*, 13 Mont. 335, 43 Pac. 15 (1895) (murder of Indian *by* Indian); *Pablo v. People*, *23* Colo. 134, 46 Pac. 636 (1896) (murder of Indian by Indian); *State* v. *Spotted Hawk*, *22* Mont. *33*. 55 Pac. 1026 (1899) (murder of white man by Indian); State v. *Little Whirlwind*, 22 Mont. 425. 56 Pac. 820 (1899) (murder of white man by Indian); *Ex parte* Moore, 28 S. D. 339. 133 N. W. 817 (1911) (murder of Indian by Indian on public domain allotment). commented on In Ann. Cas. 1914 B, 648, 652 And see state cases collected in Note 13. Ann. Cas. 192.

[35] See Chapter 7, sec. 9. fn. 213; and see Chapter 18. sec. 2. *Cf.* The Kansas Indians, 5 Wall. *737*. 755, 756 (1866), "If under the control of Congress, from necessity there can be no divided authority. • • • There can be no question of State sovereignty In the case, • • • ."

[36] See Chapter 17. sec. 3.

[37] See Chapter 10. see. 12.

[38] *Cf.* United *States* v. *Cook*. 19 Wall. 591 (1873); *Pine River Logging Co. v. United States*, 186 U. S. 279 (1902) (tribal timber illegally alienated); discussed in Chapter 15, sec. 15.

example, hunting or fishing rights off the reservation have been promised to Indians, the question has arisen whether such rights may be controlled by state conservation statutes. In the present state of the law, no simple answer can be given to the question^39 Likewise, the question of whether taxable land purchased for Indians, outside 'of a reservation, and held subject to federal restrictions upon alienation, is immune from the tax laws of the state, has given rise to considerable litigation.^40 In this situation it seems that, despite the federal concern in the subject matter, the state may levy property taxes if Congress is silent, but may not do so if Congress prohibits such legislation.^41

C. INDIAN WITHIN INDIAN COUNTRY ENGAGED IN NON-FEDERAL TRANSACTION

It is well settled that the state has no power over the conduct of Indians within the Indian country, whether or not the conduct is of special concern to the Federal Government.[42] Thus Indian marriage and divorce, offenses between Indians, and sales of personal property between Indians are matters over which the state cannot exercise control, so long as the Indians concerned remain within the reservation.^43 This disability has generally 'been explained in terms of tribal sovereignty and a federal policy of protecting such tribal sovereignty against state invasion. Thus, in denying state jurisdiction over adultery among Indians on an Indian reservation, the Supreme Churt declared in *United States* v. *Quiver*,[44] per Van Devanter, *J.*:

> At an early period It became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with. according to their tribal customs and laws • . * • (Pp. 603–604.)

Whether the local state laws may be applied to the Indians of a tribe with their consent, expressed through agreement or otherwise, is a question which the Supreme Court does not seem to have passed upon squarely." There is no doubt that many tribes in the past have accepted state laws.[46] Indeed, in the early years of the Republic, it appears that various treatles were made between Indian tribes and, the various states.^47 The validity, however, of such formal or informal arrangements, has not been definitely established. It would seem that if state laws are adopted by Indian tribes, they have effect as tribal laws and not simply as exercises of state sovereignty.[48]

[39] See Chapter 14. sec. 7 ; and Chapter 15, sec. 21.

^40 see Chapter 13.

[41] *Ibid.*

[42] See Chapter 7.

[43] *Ibid.*, and see Chapter 13, sec. 5. And see Memo. Sol. I. D.. April 26, 1939. holding that the State of California is without jurisdiction to compel Indians residing on rancherias within the state to take out licenses for dogs owned by them.

[44] 241 U. S. 602 (1916).

[45] *Cf. United States ex rel. Kennedy* v. *Tyler.* 269 U. S. *13 (1925).*

[46] See, for example, the discussion of New York Indians in Chapter 22. and the comments on the Eastern Cherokee of North Carolina in Chapter 14. sec. 2.

[47] See *Cherokee Nation v. Georgia,* 5 Pet. 1. (1831) ; *Seneca Nation* v. *Christy,* 126 N. Y. 122. 27 N. E 275 (1891) ; 2 Op. A. G. 110 (1828) Rice, The Position of the American Indian in the Law of the United States (1934). 16 J. Comp. Leg. 78, 85. While the Constitution forbids 'a state's entering into any treaty. alliance. or confederation (Art. 1 sec. 10, discussed in *Worcester* v. *Georgia,* 6 Pet. 515, 579 (1832)). the position has been taken by at least one state court that this did not Prevent treaties Or compacts for the extinguishment of Indian title between states and Indian tribes. *Seneca Nation v. Christy, supra.*

[48] "An Indian tribe may, if it so chooses, adopt as its own the laws of the State in which it is situated and may make such moditications in these laws as it deems suitable to its peculiar conditions." 55 I. D. 14. 42 (1934).

D. NON-INDIAN OUTSIDE INDIAN COUNTRY ENGAGED IN FEDERAL TRANSACTION

Although ordinarily a non-Indian outside of Indian country is in no way subject to federal law governing Indian affairs, and is wholly subject to state law, there are certain subject matters in which the federal interest is so strong that even with respect to non-Indians outside the Indian country, federal law will supersede state law. Such a matter, for instance, is the transfer from one non-Indian to another of restricted property unlawfully taken from 'an Indian reservation.[49] Another example may be found in the realm of transactions between an employee of the Indian Bureau and a third party, consummated outside of the Indian country, which involve a personal interest in Indian trade.^50 This class of transactions in which non-Indians outside of the Indian country must take account of federal Indian law, is extremely limited in scope, applying primarily to matters involving 'property in which the Federal Government has an interest," and to the personnel of the Indian Service itself.[50]

E. NON-INDIAN IN INDIAN COUNTRY ENGAGED IN FEDERAL TRANSACTION

If, where the subject matter is of federal concern, 'a non-Indian is subject to federal. rather than state jurisdiction, even for acts occurring outside of an Indian reservation. *a fortiori* he is subject to federal jurisdiction for acts of federal concern committed within an Indian reservation. Indeed, there is a very broad realm of conduct in which non-Indians on an Indian reservation are subject to federal rather than state power. With respect to ail offenses committed by whites against Indians on an Indian reservation, state jurisdiction yields to federal jurisdiction,[52] although in fact the Federal Government has adopted state laws in providing for the punishment of such offenses by the federal courts.[54] Likewise, there are various reservation, offenses for which Congress has prescribed penalties enforceable in federal courts, which are applicable to non-Indians, and in some instances to Indians as well.[55] It has been administratively held that even a state officer cannot claim the protection of state law if he enters an Indian reservation without congressional authorization for the purpose of searching an Indian's home for property thought to be in the unlawful possession of the Indian."

Although the federal. constitutional jurisdiction *over* matters affecting Indian affairs on an Indian' reservation has generally been viewed as an exclusive jurisdiction, excluding all state legislation. an exception to the general rule has been recognized where the state legislation supplements the protection of Indians provided by federal law. Such state legislation, which may be termed "ancillary" to federal law, is upheld in *State* of

[49] See fn. 38. *supra.*

[50] See Chapter 2. sec. 3B.

[51] *See Oregon v. Hitchcock, 202 U. S.* 60, 68–69 (1906) : *Naganab* v. *Hitchock. 202* U. *S. 473* (1906) ; *Winters* v. *United States, 207* U. S. 564 (1908) : *United States* v. *Winans.* 198 U. S. 371 (1905) ; *Morrison* v. *Work, 266* U. S. 481. 487-488 (1925) ; *Unfted States v. Morrison, 203* Fed. 364 (C. C. Colo. 1901).

[52] See Chapter 2. sec. 3B. and Chapter 16.

[53] See Chapter 18. sec. 5. There may be situations. however, in which a concurrent Jurisdiction may be exercised by the state to protect Indians against non-Indians. *State of New York v. Dibble,* 62 U. S. 366 (1858), discussed in Chapter 15, sec. 10C. .

[54] *See* sec. *2A, supra.*

[55] See Chapter 18. sec. 3.

[56] 56 I. D. 38 (1936).

New York v: Dibble,[57] where the Supreme Court, in upholding a state prohibition against trespass upon, Indian lands. declared :

> The statute in question is a police regulation for the protection of the Indians from intrusion of the white people, and to preserve the peace. It is the dictate of a prudent and just policy. Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and 'protect these feeble and helpless bands from Imposition and intrusion. The power of a State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered. The act is therefore not contrary to the Constitution of the United States. (P. 370.)

Other cases have applied this rule to state laws forbidding sale of liquor to Indians,[58] and to other protective and ancillary legislation.[59]

F. NON-INDIAN IN INDIAN COUNTRY ENGAGED IN NON-FEDERAL TRANSACTION.

The mere fact that the locus of an event is on an Indian reservation does not prevent the exercise of state jurisdiction where the parties : involved are not Indians and the subject matter of the transaction 'is not of federal concern. Thus, it has been held that murder of a non-Indian by a non-Indian on an Indian reservation in the absence of express federal legislation to the contrary. is a matter of exclusive state jurisdiction.[60] Likewise the validity' of state taxation of personally of a non-Indian Within Indian country has been sustained^61

G. SUMMARY

The rules applicable to each of the foregoing types of situations are not established beyond the possibility -of doubt, and they leave much room for debate in defining the three factors in terms-of which these rules have been formulated: "Indian:' [62] "Indian country," [63] and "transaction of federal concern." [64] But these are questions ,elsewhere treated,^65 and the views above expressed on the various combinations of factors necessary to support state jurisdiction on Indian matters are probably as close to the actual decisions as any simple scheme can come. The foregoing sections may be summarized in two propositions :

(1) *In matters involving only Indians on an Indian reservation, the state has no jurisdiction in the absence of specific* legislation *by Congress.*

(2) *In all other cases, the state has* jurisdiction *unless there is involved a subject matter of special federal concern.*

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[57] 21 How. 366 (1858). See Chapter 15. sec. 10C.

[58] *State v. Kenney,* 145 Pac. 450 (Wash. 1915) ; *State* v. *Mamlock,* 58 Wash. 631, 109 Pac. 47 (1910).

[59] See *State* v. *Wolf,* 145 N. C. 440, 59 S. E. 40 (1907) (upholding state law requiring school attendance of Eastern Cherokee Indians), commented on In Note, Ann. Cas. 1915D, 371.'

[60] *United States* v , *McBratney,* 104 U. : S. 621 (1881) ; *Draper* v. *United States,* 164 U. S. 240 (1896) ; and see Chapter 7, sec. 9 and Chapter 18, sec. 6.

[61] *Thomas* v. *Gay,* 169 U. S. 264 (1898). And see Chapter 13. sec. 4.

[62] The definition of "Indian" is considered in Chapter 1, sec. 2. On the question of the' applicability of state laws, special importance should be assigned to the cases which suggest that when tribal existence ceases, Indians cease to be under federal jurisdiction and become subject to' state control.

See opinion of Mr. Justice Johnson in *Fletcher, v. Peck, 6* Cranch. 87. 146 (1810). and opinion *of* Mr. Justice McLean in *Worcester* v. *Georgia,* 6 Pet. 515, 580 (1832). See also *Scott* v. *Sanford, 19* How. 393 (1857), where the Supreme Court, with reference to the Indians, said :

> . . . and if an individual should leave his nation or tribe, and take up his abode among the white population, be would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people. (P. 404.)

See also dicta in *The Cherokee Trust Funds.* 117 U. S. 288, 309 (1886) to the effect that the so-called Eastern Band of Cherokee Indians who separated themselves from the main body of the Cherokee Nation in its migration to the West, became "bound" to the state laws of North Carolina. See also and *cf. United States v. Boyd,* 83 Fed. 547 (C. C. A. 4, 1897) ; United *States v. Wright, 53* F. 2d 300 (C. C. A. 4, 1931) ; and *United States* v. *Colvard,* 89 F. 2d 312 (C. C. A. 4, 1937), to the effect that these Indians having been recognized and treated by the Federal Government as a tribe must be regarded as such. For a more extended discussion of tribal existence and its termination see Chapter 14, secs. 1 and 2. On the right of expatriation see Chapter 8, sec. 10B(1).

Also *see Ex parte Kenyon,* 14 Fed. Cas. No. 7720 (C. C. W. D. Ark., 1878) :

> . . . When the members of a tribe of Indians scatter themselves among the citizens of the United States and live among the people of the United States, they are merged in the mass of our people, owing complete allegiance to the government of the United States and of the states where they may reside. and. equally with the citizens of the United States and of the several states, subject to the jurisdiction of the courts thereof. *Ex parte Reynolds* [Case No. 11718]; *United States* v. *Elm* [Id. 15048], opinion by Wallace, *J.* (Senate Report 268, 41st Cong. 3d sess.) p. 11; 2 Story Const. § 1933, *Dred Scott* v. *Sandford,* 19 How. [60 U. S.] 404.

And see cases collected in Note 13, Ann. Cas. 192,193.

A unique situation exists with respect to the Sac and Fox Indians of Iowa. The State of Iowa, which had exercised jurisdiction over these Indians and which held title to their land in trust for them, transferred to' the Federal Government "exclusive jurisdiction of the, Sac and Fox Indians residing in Iowa and retaining the tribal relation, and of all other Indians dwelling with them . . . ". (Act of February 14, 1896. Acts 26th General Assembly; p. '114:) The state, however, reserved from such transfer. jurisdiction of crimes against the state laws committed within the reservation by Indians or others. In *Peters* v. *Malin,* 111 Fed. 244 (C. C. Iowa, 1901) it was held that -this, reservation of authority in the state did not affect the exclusive jurisdiction of the Federal. Government over the relation of the Indians among themselves. See, on this question, Memo. Sol., I. D. June 15, 1940.

Also see *In re Now-ge-zhuck,* 69 Kans. 410, 76 Pac. 877 (1904) ; *State* v. *Big* Sheep, 75 Mont. 219, 243 Pac. 1067 (1926) ; *State* v. *Williams,* 13 Wash. 335, 43. Pac. 15 (1895) : *State* v. *Howard, 33* Wash. 250, 74 Pac. 382 (1903) ; *State* v. *Nimrod,* 30 S. D. 239, 138 N. W. 377 (1912).

Indians residing in Maine, while they have a communal organization for tenure of property and local affairs, are deemed by the courts of the state to be without political organization and to be subject. like other individuals, to game laws of the state. *State v. Newell, 84* Maine 465, 24 Atl. 943 (1892).

It was believed at one time that the grant of citizenship to individual Indians, whether by an act of Congress or by the provisions of a treaty, had the effect of terminating tribal relations, placing the Indians beyond the power of Congress. and subjecting them to state jurisdiction. This view was taken by the United States Supreme Court in the famous case, *Matter of Heff,* 197 U. S. 488 (1905). Later. however, this ruling was ignored in *Hallowell* v. United *States,* 221 U. S. 317 (1911) and *United States v. Sandoval, 231* U. *S. 28 (1913).* and finally expressly overruled in *United States* v. Nice, 241 U. S. 591 (1916). See, in this connection. Chapter 8, sees. 2C and 10B(1).

[63] See Chapter 1, sec. 3; Chapter 18, sec. 2.

[64] See Chapter 13, sec. 1A ; Chapter 14, sec. 7. As noted in the discussion above, the term "transactions of federal concern*' Is used to cover matters. over which the power of the Federal Government has been exercised. whether through legislation. through authorized administrative action, or in any other valid manner. The content of the term is therefore to be found in the materials discussed in various other chapters, particularly Chapters 5. 9, 10, 11, 12, 13, 14, 15, 16. 17. 18, and 19.

[65] See fns. 62. 63, and 64. *supra.*