HANDBOOK OF FEDERAL. INDIAN LAW

CHAPTER 1

THE FIELD OF INDIAN LAW: INDIANS AND THE INDIAN COUNTRY

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SECTION 1. THE FIELD OF INDIAN LAW

Indians are human beings, and like other human beings become involved in lawsuits. Nearly all of these lawsuits involve problems in the law of contracts, forts, and other recognized fields which have no particular relevance to Indian affairs. In many cases the only legal problems presented are of this character. Not every lawsuit, therefore, which involves Indians can be considered a part of our Indian law. Conversely. not every case that presents a problem of Indian law involves Indians as litigants. Most of the land in the United States, for example, was purchased from Indians, and therefore almost any title must depend for its ultimate validity upon issues of Indian law even though the last Indian owners and all their descendants be long forgotten.

Our subject, therefore, cannot be defined in terms of the parties litigant appearing in any case. It must be defined rather in terms of the legal questions which are involved in a case. Where such questions turn upon rights, privileges, powers, or immunities of an Indian or an Indian tribe or an administrative agency set up to deal with Indian affairs, or where governing rules of law are affected by the fact that a place is under Indian ownership or devoted to Indian use, the case that presents such questions belongs within the confines of this study.

Further, we shall use the term "federal Indian law" to ever not only decisions of courts, strictly so-called, but also decisions of administrative agencies and such materials, contained in statute, treaty, Executive order, or governmental regulation custom and practice, as are accorded, by courts and administra-. tors, 'the force of law."

This subject matter is treated, in the course of this volume. from several distinct perspectives.

In the present chapter the scope of federal Indian law is con sidered, particularly in terms of the class of persons and placer with which this branch of law deals.

The following three chapters treat, from an historical perspec tive, the three basic strands of development which make up the federal Indian law--administration (Chapter 2), treaty-making (Chapter 3). and legislation (Chapter 4).

The following three chapters deal with the problems of federal Iudian law in terms of the question, "From what governmental source do legal relations flow?" These chapters deal, respec ively, with the powers of federal (Chapter 5) state (Chapter 6), a.nd tribal (Chapter 7) governments.

Chapters 8 to 1'7 treat the substantive law of the field from he standpoint of the generic question: What are the rights, powers, privileges, and immunities of the parties?

Of these chapters, the first four deal with the legal status of individual Indians, treating personal rights and liberties (Chaper 8). rights of participation in tribal property (Chapter 9), individual rights in personal property (Chapter l0), and individual rights in real property (Chapter 11).

The following two chapters deal with rights, vested both in tribes and in individuals. which are subsumed under the headings 'Federal Services for Indians" (Chapter 12) and "Taxation" [Chapter 13).

The substantive rights, powers, privileges, and immunities of Indian tribes form the subject of Chapters 14 and 15, the former dealing generally with "The Status of Indian Tribes," the' latter with "Tribal Property."

The final two chapters of this substantive law section of the Handbook- deal with matters involving primarily the legal position of two classes of non-Indians who have a special relation to Indian affairs, to wit: traders (Chapter 16) and purveyors Of liquor (Chapter 17).

Chapters 18 and 19 deal with problems of court jurisdiction, 'he former in the field of criminal law, the latter in the field of civil law.

The last.four chapters of this Handbook treat of four groups of Indians occupying peculiar positions in the law. Chapter 29 deals with the Pueblos of New Mexico: Chapter 21 analyzes the peculiar problems of the Natives of Alaska; Chapter 22 comments briefly on the New York Indians ; and Chapter 23 offers a ketch of "Special Laws Relating to Oklahoma."

With these comments on the substance and structure of the volume. we turn to a more explicit delimitation of the persons and places that are the primary subjects of our federal Indian law.

In this demarcation of domains we may properly begin by considering the various definitions that have been offered of the terms "Indian" and "Indian country."

SECTION 2. DEFINITIONS OF "INDIAN"

The term "Indian" may be used in an ethnological or in a legal sense. Ethnologically, the Indian race may be distinguished from the Caucasian, Negro, Mongolian, and other races. If a person is three-fourths Caucasian and one-fourth Indian, it is absurd, from the ethnological standpoint, to assign him to the Indian race. Yet legally such a person may be an Indian. From a legal standpoint, then, the biological question of race is generally pertinent, but not conclusive. Legal status depends not only upon biological, but also upon social factors, such as the relation of the individual concerned to a white or Indian community. This relationship, in turn, has two ends-an individual and a community. The individual may withdraw from a tribe or be expelled from a tribe; or he may be adopted by a, tribe. He may or may not reside on an Indian reservation. He may or may not be subject to the control of the Federal Government with respect to various transactions. All these social or political factors may affect the classification of an individual as. an "Indian" or a "'non-Indian" for legal purposes, or for certain legal purposes. Indeed, in accordance with a statute reserving jurisdiction over offenses between tribal members to a tribal court, a white man adopted into an Indian tribe has been held to be an Indian,' and the decided cases do not foreclose the argument that a person of entirely Indian ancestry who has never had any relations with any Indian tribe or reservation may be considered a non-Indian for most legal purposes.

What must be remembered is that legislators, when they use the term "lndian" to establish special rules of law applicable to "Indians," are generally trying to deal with a group distinguished from "non-Indian" groups by public opinion,' and this public opinion varies so widely that on certain reservations it is common to refer to a person as an Indian although 15 of his 16 ancestors, 4 generations back, were white persons; while in other parts of the country, as in the Southwest, a person may be considered a Spanish-American rather than an Indian although , his blood is predominantly Indian.

The lack of unanimity which exists among those who would attempt a definition of Indians is reflected in the difference in instructions to the enumerators of the 1930 and 1940 censuses. In the 1930 census enumerators were-instructed to return as Indians not only those of full Indian blood, but also those of mixed white and Indian blood, "except where the percentage of Indian blood is very small" or where the individual was "regarded as a white person in the community where he lives." The instructions further specified **that "a person of mixed Indian and Negro** blood shall be returned as a Negro unless the Indian blood predominates and the status as an Indian is generally accepted in the community."

In the 1940 census on the other hand, enumerators were directed that "a person of mixed white and Indian blood should be returned as Indian, if enrolled on an Indian agency or reservation roll; or if not so enrolled, if the proportion of Indian blood is on&fourth or more, or if the person is regarded as an Indian in the community where he lives." The provision concerning persons of mixed Indian and Negro blood was changed to provide for the return of such an individual as Negro, unless the Indian blood very ***definitely*** predominates and he is universally accepted in the community as an Indian.'

Recognizing the possible diversity of definitions of "Indianhood," we may nevertheless and some practical value in a definition of "Indian" as a person meeting two qualifications: (a) **That some of his ancestors lived in America before its discovery** by the white race, and ***(b)*** that the individual is considered an "Indian" by the community in which he lives.

The, function of a definition of "Indian" is to establish a test whereby it may be determined whether a given individual is to be excluded from the scope of legislation dealing with Indians.

A typical statute dealing with Indians is the Trade and Intercourse Act of 1834 which in section 25 provides:

> * • • That *so* much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of tbe

[1] *Nofire* v. United *States,* 164 U. S. 657 (1897).

[2] A graphic example of the borrowing by courts of uncritical impressions of what constitutes an Indian is found in a series of cases on the question whetber the natives of the Pueblos are "Indians." In 1869, the Supreme Court of the Territory decided that they could not be considered Indlans because they were "honest. industrious, and law abiding citizens:' and "a people living for three centuries in fenced abodes and cultivating the soil for the maintenance of themselves and families. and giving an example *of virtue. honesty,* and industry to their more civilized neighbors.' United *States* v. *Lucero,* 1 N. M. 422, 438, 442 (1869). In 1876; the Supreme Court, likewise, held that these people could not be considered Indians because they were "a peaceable, industrious, intelligent, honest and virtuous people • • • Indians only in feature. complexion, and a few of their habits • • ● ." *United States v. Joseph, 94* U. S. 614 616 (1876). So long as these impressions continued to prevail, efforts of the Indian Bureau to assert Cull powers of "guardianship" over the Pueblos were unsuccessful. See Chapter 20. sec. 3. *infra.* In 1913 however, the Indian Bureau compiled enough reports of immorality among the Pueblos to convince the Supreme Court that its earlier observations of Pueblo character bad been based upon erroneous information and that these people were really Indians needing Indian Bureau supervision. The Court, *per* Van Devanter, *J.,* quoted at. length from agents' reports of drunkenness, debauchery. dancing. and communal life in support of the conclusion that they were Indians. being a "simple, uninformed and inferior people." *United States v. Sandoval,* 231 U. S. 28. 39-47 (1913) It may bc doubted wbetber the conception of what makes a man an Indian. implicit in all these opinions, would be accepted today.

The test of *"common* understanding" is advanced by Cardozo, *J.,* in *Morrison* v. *California,* 291 U. S. 82. 86 (1934). in support of tbe view that "not improbably" a person with Indian blood of less tban one-Courtt degree is to be regarded as an Indian.

*The Indian population. of the United States and Alaska, 1930, U. S. Department of Commerce, Bureau of the Census, Washington, D. C. For a discussion of statutes distinguishing between Indlans and freedmen see Chapter 8, sec. 11.

[4] The results of the 1940 census are not available at the time of publication of this book *so* that it *Is* not possible to compare the possible differences in results occasioned by the difference of instructions to enumerators. In the census of 1910, though the question of who should be returned as Indian was left to the discretion of the enumerator, he was obliged, once he had decided an individual was an Indian, to obtain information concerning tribe and· blood. According to the census of 1930 there were 332,393 Indians in continental United States and 29,983 in Alaska, while in 1910 there were 265,683 Indians in continental United States and 25.331 in Alaska. In commenting on the results of these two censuses, Dr. George B. L. Arner, in The Indian Population of the United States and Alaska, 1930-U. S. Department of Commerce, Bureau of the Census, stated:

> in the case of the Indian population, rates of increase or decrease are of little significance, as the size of the Indian population depends entirely upon the attention paid to the enumeration of mired bloods, and the interpretation of the term "Indian" in the instructions to enumerators. It Is not without significance that at the two censuses in which specific questions were asked as to tribe and blood. tbe number of Indians should have been much larger than at censuses in which these questions were not asked, If the definition of the Indian population were limited to Indians maintaining tribal relations, the enumeration of the Bureau of Indian Affairs is probably more nearly accurate than that of the census. This enumeration in 1932, sbowed a total of 228.381. On the otber band. if all persons baving even a trace of Indian blood were returned as Indians. the number would far exceed even the total returned at the census of 1930. , (P. 2.1

As of January 1, 1939, the Bureau of Indian Affairs estimated that there were under its jurisdiction 351.878 Indians in continental United States and 29,983 in Alaska, or a total of 381.861. · This number includes individuals of as little as 1/64 Indian blood entitled to certain rights or benefits as Indians, as well as wblte persons adopted Into an Indian tribe. Statistical Supplement to the Annual Report of the Commissioner of Indian Affairs, 1939.

[5] Act of June 30. 1834. sec. 25.4 Stat. 729, R. S. § 2145, 25 U. S. C. 217.

United States, shall be in force in the Indian country: *Provided,* The same shall not extend to crimes committed by one Indian against the person or property of another Indian. (P. 733.)

Lacking other criteria than the words of the statute, the courts have, reasonably enough, taken the position that the term "Indian" is one descriptive of an individual who has Indian blood in his veins and who is regarded as an Indian by the society of Indians among whom he lives. Thus, in holding that a white man who is adopted into an Indian tribe does -not thereby become an Indian within the meaning of the foregoing statute,* the Court, in *United States v.* ***Rogers,'*** said:

> * * * And we think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced 'in the execution above mentioned. He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian ; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,- of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs. (Pp. 572 573.)

Though a white man cannot by association become an Indian, within the application of the foregoing statute, an Indian may, nevertheless, under some circumstances, lose his identity as an Indian. It has been held that the General Allotment Act' operates to make Indians who are descendants of aboriginal tribes, but who have taken up residence apart from any tribe and adopted habits of civilization, non-Indians, within the meaning of an Alaska statute defining Indians for the purpose of liquor regulation as "aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood who have not become citizens of the United States." [9]

In upholding the constitutionality of the federal statute making murder of an Indian by another Indian on an Indian reservation a federal crime, the Supreme Court declared:

> the fair inference is that the offending Indian shall belong to that or some other tribe.

On the other hand, an Indian does not lose his identity as such within the meaning of federal criminal jurisdictional acts, even though he has received an allotment of land, is not under the control or immediate supervision of an Indian agent, and has become a citizen of the United States and of the state in which he resides."

Within the meaning of those various statutes which though applicable to Indians do not define them, the courts, in defining the status of Indians of- mixed Indian and other blood," have largely followed the test laid down in *United States v.* ***Rogers,"*** to the effect that an individual to be considered an Indian must not only have some degree of Indian blood but must in addition Se recognized as an Indian. In determining such recognition the courts have heeded both recognition by the tribe or society of Indians and recognition by the Federal Government as expressed in treaty and statute."

Thus in ***United States v. Higgins*** [s] it was said :

> In determining as to what class half-breeds belong, we may refer, then, to the treatment and recognition the executive and political departments of the government have accorded them. (P. 350.)
>
> Considering the treaties and statutes in regard to half-breeds, I may say that they never have been treated as white people entitled to rights of American citizenship. Special provision has been' made for them,-special reservations of land; special appropriations of money. No such provision has, been made for any other class. It is well known to those who have lived upon the frontier in America **that,** as a rule, half-breeds or mixed-blood Indians have resided with the tribes to which their mothers belonged ; that they have, as a rule, never found a welcome home with their white relatives, but with their Indian kindred. It is but just, then; that they should be classed as Indians, and have all of the rights of the Indian. In 7 **Op. Attys.** Gen. 746, it is said, "Half-breed Indians are to be treated as Indians, in all respects, so long as they retain their tribal relations." (P. 352.)

[6] **Act** of June 30. 1834, 4 Stat. 729.

[7] **4 How. 567 (1848). Accord:** *Unfted* ***States*** *v. Ragsdale, 27* **Fed. Cas.** *No.* **18113 (C.** *C.* **Ark., 1847) ;** ***Ex*** *Parte* ***Morgan,*** *20* **Fed. 296 ID. C. W. D. Ark., 1883) ;** ***Westmoreland v.*** *Unfted* ***States,*** **155 U. S. 545 (1895) ;** ***Alberty*** *v.* **United** *States,* **162 U. S. 499 (1896) (holding that a Negro does not by adoption into a tribe become an Indian).**

The same rule would seem to apply to a white man married to an Indian woman and residing on a reservation. **At** least. **it** has been **held** that a white man, married to an Indian woman, residing **on** a reservation. and made a **member of** the tribe or **nation, is** not an Indian entitled to **share in tribal** funds **or** in **the** allotment **of Indian** lands. Red ***Bird v.*** *Unfted States. 203* **U. S. 76 (1906).**

[8] **Act of February 8. 1887. 24 Stat. 388. 25 U. S. C. 331. et sea.**

[9] ***Nagle*** **v.** ***United States,*** **191 Fed. 141 (C. C. A. 9, 1911).**

[10] ***United States v. Kagama,*** **118 U. S. 375, 383 (1886). And see Chapter 14, fn. 9.**

[11] *United* ***States*** **v.** ***Flynn,*** **25 Fed. Cas. No. 15124 (C. C. Minn. 1870) ;** ***Hallowell*** **v.** ***United*** *States.* **221 U. S. 317 (1911) ;** *Unfted* ***States*** *v.* ***Kiya,*** *126* **Fed. 879 (D.** *C. N.* **D. 1903) ;** *Unfted* ***States*** *v.* ***Celestine,*** **215 U. S.** *278* **(1909) ;** *United* ***States*** *v. Button,* **215 U. S.** 291 **(1909).** Also **see** Chapter 8, sec. 2C.

-The term "mired blood Indian" **has** been held ta include not **only** those **of half white or more than half white blood. but every Indian having an identifiable admixture of white blood. however small.** ***United States*** *v. Detroit First Nut.* ***Bank,*** **234 U. S. 246 (1914) ;** *State v.* ***Nicolls,*** **61 Wash. 142, 112 Pac. 269 (1910). For a discussion of distinctions based on degrees of Indian blood, see Chapter 8. sec. 8B(1) (a).**

[13] ***Supra,*** **fn. 7.**

[14] **Numerous** treaties. as **well as** statutes. have recognized individuals **of mixed blood as Indians. Treaty of September 29. 1817, with the Wyandot and other tribes. 7 Stat. 163 ; Treaty of October 6. 1818, with the Miami Indians, 7 Stat. 191 ; Treaty of August 4. 1824. with the Sac and Fox Indians, 7 Stat. 229: Treaty of November 15, 1824. with the Quapaw Indians. 7 Stat. 233: Treaty of June 2. 1825, with the Osage Indians, 7 Stat. 240: Treaty of June 3. 1825. with the Kansas Indians, 7 Stat. 245 ; Treaty of August 5. 1826, with the Chippewas,** 7 **Stat. 291 ;** Treaty of October **16,** 1826, with the Pottawatomie Indians, 7 Stat. 298, **299; Treaty of October 23, 1826, with the Miami Indians,' 7 Stat. 302: Treaty of August 1. 1829. with the Winnebago Indians. 7 Stat. 324: Treaty of July 15. 1830, with the Sioux Indians,** 7 **Stat. 330: Treaty of August 30. 1831. with the Ottawa Indians,** 7 **Stat. 362: Treaty of September 15, 1832. with the 'Winnebago Indians, 7 Stat. 372: Treaty of September 21, 1832. with the Sac and Fox Indians, 7 Stat. 374: Treaty of October 27, 1832, with the Pottawatomie Indians, 7 Stat. 400; Treaty of March 28. 1836. with the Ottawa and other Indians, 7 Stat. 493: Treaty of July 29. 1837, with the Chippewa Indians, 7 Stat. 537; Treaty of September 29, 1837, with the Sioux Indians, 7 Stat. 639; Treaty of November 1, 1837, with the Winnebago Indians. 7 Stat. 546: Treaty of October 4. 1842. with the Chippewa Indians, 7 Stat. 692: Treaty of October 18. 1848. with the Menominee Indians, 9 Stat. 952: Treaty of March 15, 1854. with the Ottoe and Missouria Indians, 10 Stat. 1038: Treaty of February 22. 1855, with the Chippewa Indians, 10 Stat. 1169; Treaty of February 27, 1855. with the Winnebago Indians, 10 Stat. 1174: Treaty of September 24. 1867. with the Pawnee Indians, 11 Stat. 731; Treaty of Marcb 12, 1858. with the Ponca Indians, 12 Stat. 999 ; Treaty of September 29. 1865. with the Osage Indians, 14 Stat. 689: Treaty of October 14, 1865. with the Cheyenne Indians, 14 Stat. 705; Treaty of March 21, 1868, with the Seminole Indians, 14 Stat. 756: Act of April 27. 1816. 6 Stat. 171 ; Act of June 30. 1834, 4 Stat. 740; Act of March 2. 1837. 6 Stat. 689; Act of June 5. 1872, 17 Stat. 226 : 25 U. S. C. 479. 25 U. S. C. 163: Act of May 27, 1908, 35 Stat. 312, 25 U. S. C. 184. 28 U. S. C. 41(24).**

In at least one treaty, children are described as quarter-blood Indians. Treaty of September 29. 1817. with the Wyandot and other tribes, 7 Stat. 163.

[15] **103 Fed. 348 (C. c. Mont. 1900).**

Presumptively, a person of mixed blood residing upon a reservation, and enrolled in a tribe, is an Indian for purposes of legislation on federal criminal jurisdiction." It has been held" that an individual of less than one-half Indian blood enrolled in a tribe and recognized as an Indian by the tribe is an Indian within **the** Act of March 4, 1909," extending federal jurisdiction to rape committed by one Indian against another within the limits of an Indian reservation. Likewise, it has been held that **mixed** bloods who are recognized by the tribe as members thereof may properly receive allotments of lands as Indians. In ***Bully v. United States,'"*** where one-eighth bloods were involved, the court stated that the persons were "of sufficient Indian blood to substantially handicap them in the struggle for existence," and held that they were Indians and were entitled to be enrolled as such.

Citizenship has been denied a person of half white and half Indian blood on- the ground that such an individual is not a "white person" within the meaning of that phrase as used in the statute."

On the question of the status of offspring of white and Indian or Negro and Indian parents, there are conflicting lines of authority. One holds to the common law doctrine that the offspring of free parents assumes the status of the father; the other to the general tribal custom that the offspring assumes the status of the mother.

In the first category are decisions to the effect that the off spring of the union between a white man [t]) and an Indian woman or between a Negro [n] and an Indian woman assume the status of the father and are therefore not Indians within the meaning of statutes extending or denying federal jurisdiction over crime! committed by an Indian against another Indian. And there are holdings. that where a child is born off the reservation of a white father and an Indian mother, he will not, by returning to the reservation, and receiving an allotment of land as an Indian, be classed as an Indian so as either to exempt his property from state taxation [25] or to bring himself within the criminal jurisdic tional statutes relating to Indians.'

In the second category we And many cases which follow the usual tribal custom wherein it is held that the offspring of an Indian mother and a white or Negro father assumes the status of the mother." Here again the ultimate question of the status of he individual will depend on his or his mother's recognition as an Indian by the tribe. In this connection the language of the court in Waldron ***v. United States*** may be noted:

> • In this proceeding the court has been informed as to the usages and customs of the different tribes of the Sioux Nation, and has found as a fact that the common law does not obtain among said tribes, as to determining the race to which the children of a white man. married to an Indian woman, belong; but that, according to the usages and customs of said tribes, the children of a white man married to an Indian woman take the race or nationality of the mother.
>
> * * * * * * * 'The United States have never, so far as legislation is concerned, recognized the technical rule of the common law in reference to the children born of a white father and an Indian mother. In 1897. Congress in the Indian appropriation act of that year (Act June 7, 1597, c. 3, 30 Stat. 90), declared:
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> > "That all children. born of a marriage heretofore solemnized between a white man and au Indian woman by blood and not by adoption, where.. said Indian woman is at this time. or was at the time of her death. recognized by the tribe, shall have the &me rights and privileges to the property of the tribe to which the mother belongs or belonged at the time of her death by blood, as any other member of the tribe, and no prior act of Congress shall be construed as to debar such child of such rights."
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> * * * * *
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> In ***Davison*** v. Gibson, 56 Fed. 445, 5 C. C. **A. 546,** the Circuit Court of Appeals of this circuit said:
>
> > "It is common knowledge, of which the court should take judicial knowledge, that the domestic relations of the Indians of this country have never been regulated by **the** common law of England, and that that law is not adapted to the habits, customs, and manners of the Indians."
>
> The court has considered the cases cited by counsel for defendants wherein, upon certain facts, persons were held not to be Indians; but these cases either seek to invoke what they say was the common law, or are in criminal proceedings. These cases, so far as they seek to invoke the common law to the Indians, are not followed, for reasons herein stated, and, so far as they seek to **construe** criminal statutes, are inapplicable as there is a wide distinction to be made between the construction of a criminal statute and a contract between a tribe of Indians and the United States. (Pp. 419-420.)

That, however, even with reference to statutes on federal. criminal jurisdiction, the child of an Indian mother may assume her status is borne out by the decision of the court in ***United*** States v. Sanders.=

Likewise, it has been held [30] that the child of a white father and an Indian mother, abandoned by the father and residing In tribal relationship with the mother, is an (Indian within the meaning of a statute defining the offense of selling liquor to Indians.

In the foregoing discussion notice has been taken with but a single exception only of those statutes wherein no definition of the word "Indian" was attempted.

Although Congress has classified Indians for various particular purposes, it has never laid down a classification and either specified or implied that individuals not falling within the classifica**tion were not Indians. In various enactments classification has**

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[16] ***Famous Smith v. United States,*** **151 U. S. 60 (1894).**

[17] ***United States v. Gardner,*** **189** Fed. 690 **(D.** C. E. D. **Wis. 1911) Accord : *State* v. Campbell, 53 Minn. 354, 55 N. *W.* 553 (1893).**

[18] **35 Stat. 1088. 1151.**

[19] ***Sloan v. United States,*** **118 Fe& 283 (C. C.'Neb. 1902).**

[20] **195 Fed. 113 (C. C. S. D. 1912).**

[21] ***In re Camille,*** *6* **Fed. 256 (C. C. Ore. 1880) (Construing R. 8. § 671.** "On tribal power over determination **of membership see Chapter 7 sec. 4.**

[23] ***Ex Parte Reynolds,*** *20* Fed. **Cas.** No. 11719 (D. **C. W. D. Ark. 1879).**

[24] ***United States v. Ward,*** **42 Fed. 320 (C. C, S. D. Cal. 1890).**

[25] ***United States v. Higgins,*** **110 Fed. 609 (C. C. Mont. 1901). Se Chapter 13, sec. 4.**

[26] ***United States v. Hadley,*** **99 Fed.** *437 (C. C.* **Wash. 1900). Se Chapter 18.**

[27] **In *United States v. Higgins,* 103 Fed. 348, 352 (C. C. Mont. 1900) it was held that one horn of a white father and an Indian mother, an who was a** recognized member of the tribe of Indians in which **his mothe belonged, was not subject to taxation under the laws of the state in whic be resided. In *Vezina v. United States,* 246 Fed. 411 (C. C. A. 8. 1917** the **daughter** of a **half-** to three-fourths blood **Chippewa woman and** white **man was** held to be **by** blood a member of the Fond du **Lac Ran** of **Chippewas of** Lnke **Superior. the court** thereby overruling the **actio of the Department of Indian Affairs in refusing enrollment and allotmen to the daughter. And in *Alberty v. United States,* 162 U. S. 499 (18961 the court held that an illegitimate child. born of an Indian man and colored** woman, takes **the** status of its mother and is therefore not a **Indian.**

[28] **143 Fed. 413 (C. C. S. D. 1905) : see also *Sioux Mixed* Blood, 20 Op. A. G. 711 (1894).**

[29] **27 Fed. Cas. No. 16220 (C. C. Ark. 1847). Cf. *Ex Parte Pero,* 99 F. 2d 28 (C. C. A. 7, 1938) (holding that the child of an Indian mother and a half-blood father who lives on the reservation and is recognized as an Indian. is-an Indian within federal criminal jurisdictional statutes).**

[30] ***Farrell v. United States,*** *110* **Fed. 942 (C. C. A. 8, 1901). Accord: *Halbert* v. United *States,* *283* U. *S. 753* (1931).**

been based primarily upon the presence of some quantum of Indian blood. Thus, the Indian Appropriation Act of May 25, 1918," provides :

> No appropriation, except appropriations made pursuant to treaties, shall be used to educate children of less than one-fourth Indian blood * • *

For the purpose of controlling the traffic in liquor with the Indians Congress has classified Indians under the "charge of any Indian superintendent or agent."" By a later act" the classification was changed to include "any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government." or "any Indian a ward of the Government under charge of any Indian superintendent or agent" or "any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship." This classification is perhaps as broad as any that may be found in congressional enactment, extending as it does to all mixed bloods providing only that they be considered as wards of the government"

Various special acts relating to certain tribes have provided for the removal of restrictions on alienation from lands of the members of the tribe of less than one-half Indian blood.' Other acts have used the term "mixed blood."[m]

In the Act of March 4, 1931, relating to the Eastern Band of Cherokees of North Carolina, Congress states:

> * * * That thereafter no person of less than one-sixteenth degree of said Eastern Cherokee Indian blood shall be recognized as entitled to any rights with the Eastern Band of Cherokee Indians except by inheritance from a deceased member or members: * * * (P. 1516.)

Congress had previously recognized Indians of less than this degree of blood for in the Act of June 4, 1924,~ it provided:

> That any member of said band whose degree of Indian blood is less than one-sixteenth may, in the discretion of the Secretary of Interior, be paid a cash equivalent in lieu of au allotment of land. (P. 379.)

A recent statutory definition of an Indian is that contained in the Indian Reorganization Act, which in section 19 provides:

> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.[m] (P. 933.)

in this act as in the foregoing acts, the definition of "Indian" is limitcd in its connotation to the purposes of the legislation.

Apart from statute, the administrative agencies of the Federal government dealing with Indian affairs commonly consider a person who is of Indian blood and a member of a tribe, regardless of degree of blood, an Indian."

Thus the Indian Law and Order Regulations approved by the Secretary of the Interior on November 27, 1035," contain the provision :

> For the purpose of the enforcement of the regulations in this part, an Indian shall be deemed to he any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction • * *.

This definition exemplifies the idea that in dealing with Indians the Federal Government is dealing primarily not with **a particular race as such but with members of certain social-political groups towards which the Federal Government has assumed special responsibilities.**

"40 Stat. 564. 25 U. S. C. 297.

[32] Act of July 23, 1892, 27 Stat. 260, 261.

[33] Act of January 30, 1897, 29 Stat. 506. Sea Chapter 17.

[34] For a discussion of wardship see Chapter 8, sec. 9.

[35] Act of May 27, 1908, 35 Stat. 312 (Five Civilized Tribes) ; Act of March 3, 1921, 41 Stat. 1249 (Osage).

[36] Act of June 21. 1906. 34 Stat. 353; Act of March 1, 1907. 34 Stat 1034.

[37] 46 Stat. 1518.

[38] 43 Stat. 366.

[39] Act of June 18. 1934. 48 Stat. 984, 25 U. 8. C. 461, et seq.

[40] For further definitions of Alaskan natives as Indians see Chapter 21, sec. 1.

[41] Here, too, however, one finds administrative regulations Which classify Indians according to blood quantum for particular purposes. Thus by Executive order of January 31, 1939, Indians of one-fourth or more Indian blood Were exempted insofar as positions in the Bureau of Indian Affairs Were concerned. from Civil Service examination. See Chapter 8, sec. 4B(2). On, the other hand regulations concerning the admission of Indians into Indian hospitals and aanitoria provide that:

> 85.2. Persons who are in need of hospitalization and who are enrolled Indians recognized members of a tribe, and who are unable to provide such hospitalization from their own funds. may be admitted to such institutions.
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> • • • • •
>
> 85.4. Preference should be given to those of a higher degree of Indian blood. • • •

(25 C. F. R. 55.2 and 85.4)

"25 C. F. Et. 161.2.

SECTION 3. INDIAN COUNTRY

Although the term "Indian country" has been used in many senses, it may perhaps be most usefully defined as country within which Indian laws and customs and federal laws relating to Indians are generally applicable. The phrase "generally applicable" is used because for certain purposes tribal law and Until 1817 it is country within which the criminal laws of the custom and federal law relating to Indians have a validity United States are not generally applicable, so that crimes in regardless of locality. Thus, for example, Congress has made Indian country by whites against whites, or by Indians, are not it a crime to sell liquor to Indians anywhere in the United cognizable in state or federal courts," any more than crimes States," and the status which an Indian acquires by tribal committed on the soil of Canada or Mexico. Treaties defined the custom marriage will generally be recognized in all parts of boundaries between the United States. or the separate states. the United States."

The greater part, however, of the body of federal Indian law and tribal law applies only to certain areas which have a peculiar relation to the Indians and which in their totality comprise the Indian country.

The Indian country at any particular time must be viewed with reference to. the existing body of federal and tribal law.

[43] Act of July 23. 1892, 27 Stat. 266. as amended by Act of June 15. 1938. 52 Stat. 696. 25 U. S. C. 241. And see Chapter 17, sec. 3.

[44] 54 I. D. 39 (1932) ; and see R. A. Brown, The Indian Problem and the Law (1930) 39 Yale L. J. 307, 315. See also Chapter 7, sec. 5.

[45] Under the Act of July 22. 1790. 1 Stat. 137, federal jurisdiction was extended over any crime committed by a citizen or inhabitant of the United States against the person or property of any friendly Indian in any town, settlement, or territory belonging to auy nation or tribe Of Indians. Since the act specified tbat it was to be in force only for 2 years. it was superseded by the Act of March 1. 1793. 1 Stat. 329, Which extended federal jurisdiction as before. On criminal jurisdiction see Chapter 18.

and the territories of the various Indian tribes or nations." Within these territories the Indian tribes or nations had not only full jurisdiction over their own citizens, but the same jurisdiction over citizens of the United States that any other power might lawfully exercise over emigrants from the United States Treaties between the United States and various tribes commonly stipulated that citizens of the United States within the territory of the Indian nations were to be subject to the laws of those nations."

It is against this legal background that the first legislative definitions must he understood. As early as July 22, 1790,[a] Congress need the expression "Indian country" in the first, trade and intercourse act, apparently with the meaning of country belonging to the Indians. occupied. by them, and to which the Government recognized them as having some kind of right and title. In the Act of March 11. 1793,- Indian country and Indian territory were used synonymously.

The Act of May 19. l796 contained the first statutory delimitation of Indian country, fixing, according to the then existing treaties, the boundary line between Indian country and the United States. In this act, as in those which followed it, the term "Indian country" is used as descriptive of the country within the boundary lines of the Indian tribes. In 1799, and again in 1802," the boundary of Indian country was redefined by Congress to conform with new treaties. In each instance it was provided that a citizen or inhabitant of the United States committing a crime against a friendly Indian, or Indians within Indian country should be subject to the jurisdiction of the federal courts. In both of these acts the words "Indian country" and "Indian territory" are used synonymously.~

The inconvenience of a territory in which white desperados could escape the force of state and federal law made itself felt in the Act of March 3,1817, which extended federal law to cover rimes committed by an Indian or white person within any own, district, or territory belonging to any nation or tribe of Indians, subject, however, to the limitation that the act should loot be construed to extend to an offense by one Indian against another Indian within any Indian boundary.

Indian country in all these statutes is territory, wherever situated, within which tribal law is generally applicable, federal law is applicable only in special cases designated by statute, and state law is not applicable at all. This conception of the Indian country reflects a situation which finds its counterpart n international law in the case of newly acquired territories, There the laws of those territories continue in force until repealed or modified by the new sovereign. We find that Congress, when called upon to define Indian country in the Act of June 30, l834 said:

> * * * That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that' part of the United States east of the Mississippi' river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

Whether Indian reservations within the exterior boundaries of a state but exempted by treaty or statute from state jurisdiction were included within the foregoing distinction is a question not free from doubt.= Such doubts, however, were resolved by a series of judicia1 decisions and by the failure to include section 1 of the Act of 1834" in the Revised Statutes, thereby repealing it.

No subsequent statutory definition of Indian country appears, though for purposes of defining federal criminal jurisdiction reference is made in numerous acts" to "Indian country."

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[46] Treaty of January 21, 1785, with the Wiandot. Delaware, Chippawa, and Ottawa Nations, 7 Stat. 16; Treaty of November 2P. 1785. with the Cherokees, 7 Stat. 18: Treaty of January 3. 1786. with the Choctaw Nation, 7 Stat. 21: Treaty of January 10. 1786. with the Chickasaw Nation. 7 Stat. 24: Treaty of January 9, 1789. with the Wyandot. Delaware. Ottawa, Chippawa. Pattawattima. and Sac Nations. 7 Stat. 28: Treaty of August 7, 1790. with the Creek Nation, 7 Stat. 35: Treaty of July 2. 1791. with the Cherokee Nation, 7 Stat. 39: Treaty of August 3. 1795. with the Wyandots, Delawares, Sbawanoes, Ottawas, Chipewas. Putawatimes, Miamis, Eel River, Weea's, Kickapoos, Piankashaws, and Kaskaskias, 7 Stat. 49: Treaty of October 2. 1798. with the Cherokee Nation, 7 Stat. 62: Treaty of December 17. 1801, with the Chactaw Nation, 7 Stat. 66 ; Treaty of October 17, 1802, with the Choctaw Nation, 7 Stat. 73: Treaty of November 3, 1804. with the Sac and Fox, 7 Stat. 84: Treaty of July 4, 1805, with the Wyandot. Ottawa, Cbippawa. Munsee and Delaware. Shawanee, and Pottawatima Nations, 7 Stat. 87. See also Chapter 3, secs. 3A(2), 3A(3).

[47] It is interesting to note in this connection that some of the early Trade and Intercourse Acts contained a provision requiring a citizen or inhabitant of tbe United States to acquire a passport before going into the country secured by treaty to the Indians. Act of May 19, 1796, 1 Stat. 469; Act of March 3, 1799. 1 Stat. 743; Act of March 30, 1802. 2 Stat. 139. The provision was modified in the Act of June 30. 1834. 4 Stat. 729 so as not to apply to citizens of the United States. See Chapter 3. sec. 3A(3) : Chapter 4. sec. 6.

[48] Treaty of January 21, 1786. with the Wiandot, Delaware, Chippaws. and Ottawa Nations, 7 Stat. 16; Treaty of November 28, 1785. with the Cherokees, 7 Stat. 18: Treaty of January 3, 1786, with tbe Choctaw Nation. 7 Stat. 21: Treaty of January 10. 1786. with the Chickasaw Nation, 7 Stat. 24 : Treaty of January 31. 1786. with the Sbawanoe Nation, 7 Stat. 26: Treaty of January 9, 1789, with the Wyandot. Delaware, Ottawa, Cbippawa. Pattawattima, and Sac Nations, 7 Stat. 28: Treaty of August 7. 1790. with the Creek Nation. 7 Stat. 35; Treaty of July 2 1791. with the Cherokee Nation, 7 Stat. 39: Treaty of August 3. 1795. with the Wyandots, Delawares, Sbawanoes. Ottawas, Chipewas. Putawatimes. Miamis. Eel River,' Weea's, Kickapoos. Piankasbaws, and Kaskaskias, 7 Stat. 49.

[49] 1 Stat. 137.

[50] 1 Stat. 329. similarly in the Act of March 3, 1799. 1 Stat. 743, and in Act of March 30, 1802. 2 Stat. 139.

[51] 1 Stat. 469.

[52] Act of March 3. 1799. 1 Stat. 743.

[53] Act of March 30. 1802, 2 Stnt. 139.

[54] For a later meaning of the term "Indian territory" see Chapter 23.

[55] 3 Stat. 383.

[56] 4 Stat. 729. In the report of the Committee of Indian Affairs to the House of Representatives concerning, among others, thls act we find the following interesting commentary suggesting a basis for the definition of Indian country as therein contained.

> The *Indian country* * * * will include all the territory of the United States west of the Mississippi. not within Louisiana, Missouri, and Arkansas, and those portions east of that river, and not within the limits of any State, to which the Indian title is not extinguished. The Southern Indians are not embraced within it. Most of them have agreed to emigrate. To all their lands, with the exception of those of a part of a single tribe. the Indian title has been extinguished: and the States in which the Indians of that excepted tribe remain, have extended their laws over them.
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> * * * * *
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> This act is intended to apply to the whole Indian country. as defined in the first section. On the west side of the Mississippi its limits can only be changed by a legislative act: on the east side *of* that river it will continue to embrace only those sections of country not within any State to which the Indian title shall not be extinguished. The effect of the extinguishment of the Indian title to any portion of it, will be the exclusion of such portion from the Indian country. The limits of the Indian country will tbus be rendered at all times obvious and certain. By the intercourse act of 1802. the boundary of the Indian country was a line of metes and bounds, variable from time to time by treaties. And. from the multiplicity of those treaties, it is now somewhat difficult to ascertain what, at any given period, was the boundary or extent of the Indian country. (P. 10.)

I. Rept. No. 474. 23d Cong., 1st sess., vol. 4. May 20. 1834.

[57] It was early held that lands in territorial status to which Indian title bad not been extinguished and wbicb were exempted by trenty or tatute from state jurisdiction remain Indian country within tbe meaning of the 1834 Act. notwithstanding the admission of the state into the Jnion. United *States* v. *Bridleman,* 7 Fed. 894 (D. C. Ore. 1881).

[58] 4 Stat. 729.

[59] R. S. § 5596: *Donnelly* v. *United States, 228* U. S. 243, 268 (1913).

[60] Act of March 27. 1854. 10 Stat. 269. 270: Act of February 18, 1875. 8 Stat. 316. 318. R. S. § 2146. 25 U. S. C. 218. For statutes making it a criminal offense to introduce liquor into "Indian country" see Chapter 7, sec. 8.

Notwithstanding the repeal of section 1 of the Act of 1834' the Supreme Court, when called upon to determine whether certain land was Indian country, applied in a number of instances the definition contained therein. [62]

The first case [63] to reach the Supreme Court after the repeal Of section 1 of the 1834 act involved the legality of the seizure of liquor by a military officer under the authority 'contained in the Act of 1834, as amended by the Act of 1864. The legality of the seizure depended on whether or not it was made* in Indian country, the locus being at a point within the territory of Dakota., In an unusual opinion the Court, per Mr. Justice Miller, made the following observations :

> Notwithstanding the immense changes which have since taken place in the vast region covered by the act of 1834, by the extinguishment of Indian titles, the creation Of States and the formation of territorial governments, Congress has not thought it necessary to make any new definition of Indian country. Yet during all this time a large body of laws has been in existence, whose operation was confined to the Indian country, whatever that may be. And men have been punished by death, by fine, and by imprisonment, of which the courts who so punished them had no jurisdiction, if the offences were not committed in the Indian country as established by law: These facts afford the strongest presumption that the Congress of the United States, and the, judges who administered those 'laws, must have found in the definition of Indian country, in the act of 1834, such an adaptability to the altered cir cumstances of what was then Indian country as to enable them to ascertain what it was at any time since then. (P. 207.)

After analyzing the definition as contained in section 1 of the 1834 **Act** the Court further said:

> * * * if the section be read as describing lands west of the Mississippi, outside of the States of Louisiana and Missouri, and of the Territory of Arkansas, and lands east of the Mississippi not included in any State, but lands alone to which the Indian title has not been extinguished, we have a description of the Indian country which was good then, and which is good now, and which is capable of easy application at any time.
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> * * * * *
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> It follows from this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision -by treaty or by act of Congress. (Pp. 208-209.)

In following the Bates decision, the courts have held that reservation lands to which Indian title has not been extinguished come within the definition of Indian country ascontained in the 1834 Act, whether situated within a territory [64] or state."

Ordinarily, Indian title is extinguished by cession under treaty or act of Congress, and the land ceases to be Indian country when the cession becomes effective.[m] Where the land, however, is. held by the United States in trust, to be sold for the benefit of the Indian tribe, the courts have held that it remains Indian land" until actually sold.[q]

The first important extension of the rule laid down in the Bates case occurred in 1913 in the case of Donnelly v. ***United States,**** which involved the question of whether the jurisdiction of the United States extended to the crime of murder committed on an executive-order Indian reservation. In holding that federal criminal law was applicable, the Court said:

> It is contended for plaintiff in error that the term "Indian country" is confined to lands to which the Indians retain their original right of possession, and is not applicable to those set apart as an Indian reservation out of the public domain, and not previously occupied by the Indians.
>
> * * * In the Indian Intercourse Act of June 30,1834, 4 Stat. 729. c. 161. the first section defined the "Indian country" for the purposes of that act. But this section was not reenacted in the Revised Statutes, and it was therefore repealed by § 5596, Rev. Stat. ***Es parte Crow Dog, 109*** U. S. ***556,*** 561; ***United States v. Le Bris,*** 121 U. S. 278, ***280; Clairmont v. Uriited States, 225*** U. S. 551, 557. Under these decisions the definition as contained in the act of $334 may still "be referred to in connection with the provisions of its original context that remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes." With reference to country that was formerly subject to the Indian occupancy, the cases cited furnish a criterion for determining what is "Indian country." But "the changes which have taken place in our situation" are so numerous and so material, that the term cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished. And, in our judgment, nothing can more appropriately be deemed "Indian country," within the meaning of those provisions of the Revised Statutes that relate to the regulation of the Indians and the government of the Indian countrv. than a tract of land that, being a part of the public domain is lawfully set apart as an Indian reservation; (P. 268-269.)

In the same year, the Supreme Court in the case of ***United States v. Sandoval***[aD] held that the lands of the Pueblo Indians come within the definition of Indian country for the purpose of federal liquor regulation. The Pueblo lands were not, strictly speaking, a reservation, but were lands held by communal ownership in fee simple. It wouldseem that the 'term Indian country ***as*** applied to the Pueblos means any lands occupied by "distinctly Indian communities" recognized and treated by the Government as "dependent communities" entitled to its protection."

The foregoing decisions are concerned with lands in tribal tenure. While the Supreme Court in the Donnelly case **eliminated** the necessity for original tribal title as a condition to the application of federal criminal law, it failed to consider the applicability of the category of Indian country to the individual Indian holdings.

Under the practice of allotting lands in severalty to individual Indians, title to the allotted land was held in trust by the Government for the benefit of the allottee, or vested **in** the

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'4 Stat. 729, 733.

[62] *Bates v.* ***Clark,*** *95* **U. S.** *204* **(1877) ;** ***Ex Parte Crow Dog,*** **109 U. S. 556 (1883) ;** ***United States*** **v. *LeBris,* 121 U. S. 278 (1887) ;** ***Clairmont*** **v. United States, 225 U. S. 551 (1912).**

[63] *Bates* **v. *Clark,*** *95* **U.** *S. 204* **(1887).**

[64] ***Ex Parte Crow*** *Dog,* **109 U. S. 556 (1883).**

[65] ***United*** **States *v. LeBris,* 121 U. S. 278 (1887). Cf.** ***United States*** **v. *Forty-Three Gallons* of *Whiskey,* 108 U. S. 491 (1883) (holding that, by statute, ceded Indian lauds may remain Indian country for the purpose** of enforcing federal liquor laws) **;** ***Clairmont*** **v.** ***United States,*** **225 U. S. 551 (1912) ;** *Dick. v. United States, 203* **U.** *S. 340* **(1908).**

[66] ***United States*** *v. La Plant, 200* **Fed. 92 (D. C. S. D. 1911) (holding that land held under "mere occupancy" ceased to be Indian reservation land when** ceded, even before sale to private parties) **;** ***United States*** **v. *Myers,* 206 Fed. 387 (C. C. A. 8, 4913).**

[67] *Ash Sheep Co. v. United States,* **252 U. S. 159 (1920), aff'g 250 Fed. 591 (C. C. A. 9, 1918), and 254 Fed, 59 (C. C. A. 9, 1918). And see Chapter 15, sec. 21.**

[68] **228 U. S. 243 (1913). Accord:** *Pronovost v. United States, 232* **u. s. 487 (1914). ("An Indian reservation is Indian country.")**

"231 U. S. 28 (1913).

[70] **For a fuller discussion of this case see Chapter 20, sec. 4.** In holding **tbat jurisdiction to punish the offense of larcency committed within a Pueblo resided in the Federal Government, tbe Court defined Indian country as "any** unceded lands owned or occupied by an Indian nation **or tribe of Indians."** ***United States v. Chavez,* 290** U. S. 357 (1933).

allottee subject to a restraint against alienation. Obviously, in either case tribal title is not involved.

By virtue of a series of murders committed on allotted lands. the Supreme Court was called upon to decide whether such land were Indian country for the purpose of federal criminal jurisdiction. In the case of ***United States v. Pelican,"*** **a case involv**ing the murder of an Indian upon a trust allotment, the court held that trust allotments retain, during the trust period, a distinctive Indian character, being devoted to "Indian occupancy under the limitations imposed by Federal legislation," and that they were embraced within the term "Indian country."

Thereafter in ***United States v. Ramsey****[71] Indian country was held to include a restricted allotment as well, the court saying:

> The sole question for our determination, therefore, is whether the place of the crime is Indian country within the meaning of § 2145. The place is a tract of land constituting an Indian allotment, carved out of the Osage Indian reservation and conveyed in fee to the allottee named in the indictment, subject to a restriction against alienation for a period of 25 years. That period **has not** elapsed, nor has the allottee ever received a certificate of competency authorizing her to. sell. (P. 470.)
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> * * * * * * * it would be quite unreasonable to attribute. to Congress an intention to extend the protection of the criminal law to an Indian upon a trust allotment and withhold it from one upon a restricted allotment ; and we find nothing in the nature of the subject matter or in the words of the statute which would justify us in apply the term Indian country to one and not to the other. (Pp. 471472.)

Thus, the application of Federal criminal law is extended to cover lands to which the tribal title has been extinguished and title has been vested in an individual.

The last important step in the application of Federal criminal law to lands in tribal tenure has been to extend it to lands, wherever situated, which have been purchased by the Federal Government and set apart for Indian occupancy.

In this connection it is well to note the illuminating opinion of Mr. Justice Black in the case of ***United States v.*** **McGowan**[73] holding that Indian country comprises lands wherever situated: which have been validly set apart for the use and occupancy of Indians. The Court declared:

> The Reno Indian Colony is cornposed of several hundred Indians residing on ,a tract of 28.38 acres of land owned by the United States and purchased out of funds appropriated by Congress **in** 1917 and in 1926. The purpose of Congress in creating this colony was to provide lands for needy Indians scattered over the State of Nevada, and to equip and supervise these Indians in establishing a permanent settlement.
>
> The words "Indian country" have appeared in the statutes relating to Indians for more than a century. We must consider, "the changes which have taken place in our situation, with a view of determining from time to time what must be regarded.as Indian country where it is spoken of in the statutes." Also, due regard must be given to the fact that from an early period of our history, the Government has prescribed severe penalties to enforce laws regulating the sale of liquor on lands occupied by Indians under government supervision. Indians of the Reno Colony have been established in **homes** under the supervision and guardianship of the United States. The policy of Congress, uniformly enforced through the decisions of this Court, has been to regulate the liquor traffic with Indians occupying such a settlement. This protection is extended by the United States "over all ***dependent Indian communities within its borders,*** whether within its original territory or territory subsequently acquired; and ***whether within or without the limits of a State."***
>
> The fundamental consideration of both' Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people. Indians .in this colony have been afforded ***the*** same protection by the government as that given Indians in other settlements known as "reservations." Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a settlement as a "reservation" or "colony."
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> * * * * *
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> The Reno Colony has been validly set apart for the use of the Indians. It is under the superintendence of the Government. The Government retains title to the lands which it permits the Indians to occupy. * * *
>
> When we view the facts of this case in the light of the relationship which has long existed between the Government and the Indians-and which continues to date-it is not reasonably possible to draw any distinction between this Indian "colony" and "Indian country." We conclude that § 247 of Title 25, .supra, does apply to the Reno Colony. (Pp. 537-539.)"

The foregoing decisions leave open the question of whether an allotment within the exterior boundaries of an Indian reservation which is held by the allottee in fee simple may be subject to :he application of federal criminal law and tribal law, or whether such land is subject to the exclusive jurisdiction of the state."

Whether land acquired **by** the United States and used for Indian purposes which do not involve Indian occupancy right, e.g. school, hospital, or agency sites not within a reservation, are "Indian country" is a queston which has not been definitely settled by any court. decision. Administrative practices and rulings, however, indicate that such lands are not considered 'Indian country."

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[71] 232 U. S. 442 (1914). ***Cf. United States*** v. ***Sutton.*** **215 U. S. 291 (1909) ;** ***Hallowell*** **v.** ***United States,*** **221 U. S. 317 (1911) ;** ***Ed Parte Van*** **Moore, 221 Fed. 954 (D. C. S. D. 1915).**

[72] **271 U. S. 467 (1926).**

[73] **302 U. S. 635** (1938).

[74] **It** has been indicated **that in the light of the *McGowan* case lands purchased** under the Indian Reorganization Act (Act of June 18, 1934, 48 **Stat.** 984) **not** yet proclaimed a reservation or added **to an existing reservation,** are purchased for **the purpose of being** Indian reservations **and that therefore the Federal Government has law and order jurisdiction over the Indians on such pucehased lands pending the formal declaration of their reservation status. Memo. Sol. I. D., February 17, 1939.**

[75] **See Chapter 18.**

[76] **The Solicitor for the Interior Department, after analyzing the *McGowan* case, commented :**

> **A legal situation similar to. that presented by tbe Reno Indian colony has occurred in the ease of some' of the abandoned military reservations which were turned over to this Depactment for Indian school Bicposes under the act of July 31, 1882 (22 Stat. 181 25 U. S. C. A. sec. 276), and which have been accepted as Indian reservations. In these instances title to the land was held by the United States without any formal trust designation. but the land was occupied by Indians whose occupancy rights came to be recognized by Congress and by the Department. Examples ace the Fort Bidwell and Fort Mohave reservations. in dealing with which Congress expressly referred to the rights of the Indians in the reservations. (See act of January 27, 1913, 37 Stat. 662. and act of June 25, 1910, 36 Stat. 855, 858.) Another example is the Fort Totten Reservation which was recognized in the act of A cil 27, 1904 (33 Stat. 319) as part of the Devils Lake Indian Aeservation and belonging to the Indians residing on the reservation. In the case of *LaDuke v. Mevin,* 46 N. D. 349, 177 N. W. 673. the court reviewed the history of this military reservation devoted to Indian school purposes and acknowledged the fact that it might be considered an "Indian resecvat ion."**
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> **These examples demonstrate that lands held by the United States without a declaration of trust and used for school or other institutional purposes may be consideccd Indian reservations where Indian communities have occupancy rights in the laud. They point the distinction between this type of land and lands held exclusively bv the United States for institutional purposes where there are no Indian residents nor Indian occupancy rights. The latter class of lands is best illustrated by the nonreservation schools and hospitals which the Department has itself not classified as Indian reservations. (Cf Handbook of October 15, 1929. "General Data concerning Indian Reservations.").**
>
> **Another way of demonstrating this conclusion is by reference to the general proposition that Indian country is couutcy where not only Federal laws but also Indian laws and customs apply. It is apparent that Indian laws apply only in areas occupied by Indian groups and. communities and not to lands held for Federal institutions in Pierre, Phoenix, or any other non-Indian community.**
>
> **In brief, my conclusion is that lands held by the United States and purchased for the purpose of establishing Federal institutions for Indian welfare are not Indian country nor Indian reservations unless an Indian tribe or group has occupancy rights in the land. Such lands may be "reservations of the United Staten" as. for example, that term is used in right-of-way statutes (Memo. Solicitor. I. D.. July 1, 1938), but they would not be "Indian reservations."**
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> **Memo. Sol. I. D.. July 9, 1940.**