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Criminal Jurisdiction over Indians and Post-Conviction Remedies

Thomas F. Dowling

NOTES

CRIMINAL JURISDICTION OVER INDIANS AND POST-CONVICTION REMEDIES

The Indian nations were sovereign over their own territory before they were overwhelmed by white settlers. At first the United States Government dealt with the tribes as independent nations by entering into treaties with them,[1] yet it refused to recognize any power in the tribes to make treaties with foreign governments.[2] The powers lost by the Indians came to rest in the federal government.[3] Changing the concept of the tribes as nations, a federal statute in 1871 stated that thenceforward no Indian tribe would be recognized as an independent nation or power with whom the United States might contract by treaty.[4] The status of the Indian tribes had descended into a federal wardship, to be controlled by acts of Congress.

THE ESTABLISHMENT OF FEDERAL CRIMINAL JURISDICTION

It is said: "The principle that a state has no criminal jurisdiction over offenses involving Indians committed on an Indian reservation is too well established to require argument, attested as it is by a line of cases that reaches back to the earliest years of the republic."[5] This is not surprising in view of the special relationship between the federal government and the Indian tribes.

Except where the federal government has specifically allowed states to assume jurisdiction over Indians for crimes on Indian lands, none exists. It is also true that "jurisdiction of the federal courts must be based, in every instance upon some applicable statute, since there is no federal common law of crimes."[6] In 1875 the federal government enacted a statute providing that the federal courts have jurisdiction over *all* crimes committed in Indian country except crimes committed by one Indian against the person or property of another Indian.[7] This statute is still basically in effect.[8] Shortly thereafter, the now famous case of *Ex Parte Crow Dog* was decided.[9] Crow Dog was convicted in a federal district court of the Territory of Dakota of murdering another Indian on a reservation. On hearing his petition for writs of habeas corpus and certiorari, the United States Supreme Court determined that the express exception in the statute, noted above, included Crow Dog and that therefore he could not be tried in any court of the United States. Writs of habeas corpus and certiorari issued.

[1] COHEN, HANDBOOK OF FEDERAL INDIAN LAW 66 (1942).
[2] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
[3] *Ibid.*
[4] 16 Stat. 566 (1871), 25 U.S.C. § 71 (1958).
[5] COHEN, HANDBOOK OF FEDERAL INDIAN LAW 146 (1942).
[6] *Id.* at 358.
[7] 18 Stat. 318 (1875).
[8] 18 U.S.C. § 1152 (1958).
[9] 109 U.S. 556 (1883).

The *Crow Dog* case brought about widespread realization that since neither federal nor state courts had jurisdiction, crimes by one Indian against another, however serious, were amenable only to tribal control. In response Congress passed the Seven Major Crimes Act of 1885. This act gave federal courts jurisdiction when the crime of manslaughter, murder, rape, assault with intent to kill, burglary, robbery, or larceny was committed by an Indian on Indian land, whether or not the victim was an Indian. However, it should be borne in mind that the statute granted the federal courts jurisdiction over Indians committing a crime against another Indian on Indian land *only* when one of the enumerated crimes was involved. Further, the granting of jurisdiction to the federal courts extinguished tribal jurisdiction over these crimes,[10] but left to the tribes exclusive jurisdiction over all other offenses between Indians in keeping with the limitations expressed in *Ex Parte Crow Dog*. The constitutionality of the Major Crimes Act was immediately challenged. The United States Supreme Court upheld the Act in *United States v. Kagama*.[11]

In 1932 the Major Crimes Act was enlarged to cover the additional crimes of assault with a dangerous weapon, arson, and incest. It is now known as the Ten Major Crimes Act.[12] Under both of these acts federal jurisdiction is exclusive of state and tribal jurisdiction.[13]

In 1825 the Assimilative Crimes Act[14] was enacted. This act adopts state criminal law for areas of federal jurisdiction within the boundaries of each state.[15] However, it was not until *Williams v. United States*[16] was decided in 1946 that the Assimilative Crimes Act was applied to Indian offenses. Why the act was not so applied until this time is hard to ascertain. One possible explanation is that in 1825 Indian lands were not considered to be under federal control, but rather to be the territory of an alien people. By 1946 this feeling evidently had changed, and the *Williams* case gave expression to this change. Another explanation could be that there was reluctance to apply the act due to dictum in *Elk v. Wilkins*[17] that federal statutes would not be applicable to Indians unless there was evidence of a clear intent to include them.[18] Even now a crime under state law will not be assimilated if there is an express prohibition of the same

[10]United States v. Whaley, 37 Fed. 145 (S.D. Cal. 1888).
[11]118 U.S. 375 (1885).
[12]18 U.S.C. § 1153 (1958).
[13]*Ex parte* Pero, 99 F.2d 28 (7th Cir. 1938); *In re* Carmen, 165 F. Supp. 942 (N.D. Cal. 1958); Yohyowan v. Luce, 291 Fed. 425 (E.D. Wash. 1923); *Ex parte* Van Moore, 221 Fed. 954 (D.S.D. 1915); State *ex rel.* Bokas v. District Court, 128 Mont. 37, 270 P.2d 396 (1954); State v. Big Sheep, 75 Mont. 219, 243 Pac. 1067 (1926).
[14]4 Stat. 115 (1825), 18 U.S.C. § 13 (1958).
[15]Discussed in Note, 70 HARV. L. REV. 685 (1957).
[16]327 U.S. 711 (1946).
[17]112 U.S. 94 (1884). However, *Elk v. Wilkins* dealt with a damage suit by an Indian who claimed to be deprived of his right to vote and therefore criminal cases were not discussed by the court. It seems that the result could also be based upon the decision of the *Crow Dog* case.
[18]In United States v. Rider, 282 F.2d 476 (9th Cir. 1960), an Indian defendant was charged with and convicted of the crime of statutory rape, a crime under the law of Montana. The court reversed the conviction, stating that under the provisions of 18 U.S.C. § 1153 Congress, in adopting state law defining the crime of rape, intended to include only common law rape, not statutory rape. *Accord*, United States v. Red Wolf, 172 F. Supp. 268 (D. Mont. 1959).

act in the federal codes.[19] The specific federal law will then override the general reference to the state law contained in the Assimlative Crimes Act. Under this act, federal jurisdiction is exclusive of state jurisdiction[20] though not of tribal jurisdiction. Since this act is now recognized as operative, the previous rule that tribes have exclusive jurisdiction of Indian—Indian crimes except for the ten major crimes, has been modified. Now, if the tribal courts take cognizance of the Indian-Indian offense and punish the offender he may not be tried for the same offense in a federal court, since 18 U.S.C. section 1152, enacted in 1875, provides that federal jurisdiction does not extend to such cases once the offender has been punished by the local law of the tribe. It has also been held that allowing such a prosecution would be double jeopardy.[21]

It would be well to recapitulate the law as it now stands generally. A state has no jurisdiction over Indians on Indian land unless such has been specifically granted by the federal government.[22] The federal government has exclusive jurisdiction to try an Indian for uniquely federal offenses and for the ten major crimes when committed on Indian land; it has concurrent jurisdiction with the tribe to try an Indian offender for a crime proscribed by state law if the crime is committed on Indian land.[23]

The most recent development in this field is the enactment in 1953 of 18 U.S.C. section 1162. This section permits certain enumerated states to assume full jurisdiction over crimes committed on Indian lands within their boundaries. These states are Alaska, California, Nebraska, and Wisconsin. Minnesota and Oregon are given the same jurisdiction with one Indian reservation excepted in each state. Another statute, 28 U.S.C. section 1360, provides that other states, including Montana, whose constitutions disclaim any jurisdiction over Indian lands, may amend their constitutions and take advantage of the provisions of 18 U.S.C. section 1162. The State of Oregon prosecuted an Indian under the new statute for murdering a fellow Indian on Indian land. The constitutionality of the section, as well as the conviction of the offender, was upheld in the state supreme court.[24] Also, on petition by the same offender for a writ of habeas corpus in federal district court, it was held that section 1162 superseded all previous laws on this subject and, therefore, petitioner was not entitled to a writ of habeas corpus to secure his release.[25] It is noteworthy that murder is one of the

[19]Williams v. United States, 327 U.S. 711 (1946).
[20]United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950).
[21]United States v. La Plant, 156 F. Supp. 660 (D. Mont. 1957). At page 665 Judge Jameson said, "However, with respect to the latter [double jeopardy] it cannot be questioned that the judgment of a regularly established tribal court is valid for all purposes, and jeopardy must be assumed to have attached to the defendants by the judgment therein."
[22]Davis, *Criminal Jurisdiction Over Indian Country in Arizona*, 1 ARIZ. L. REV. 62, 64 (1959).
[23]Federal jurisdiction extends to crimes committed by Indians against whites in Indian country. This result can be reached under the provisions of both 18 U.S.C. § 1152 and the Assimilative Crimes Act. The federal courts had jurisdiction only for enumerated crimes under the Major Crimes Act if committed by and against Indians on Indian lands. The application of the Assimilative Crimes Act has filled the void left in regard to federal jurisdiction over Indians.
[24]Anderson v. Britton, 212 Ore. 1, 318 P.2d 291 (1957), *cert. denied*, 356 U.S. 962 (1958).
[25]Anderson v. Gladden, 188 F. Supp. 666 (D. Ore. 1960).

major crimes and formerly only the federal courts could try such an offender.[26]

Montana is presently unable to take advantage of 18 U.S.C. section 1162 because of an express disclaimer of jurisdiction over Indian lands in an ordinance appended to the state constitution[27] and in Montana's Enabling Act. This ordinance is irrevocable without the consent of the United States and the people of the State of Montana.[28] The consent of the United States has been given, but it remains for the people of Montana to amend their Constitutional Ordinance to acquire jurisdiction over Montana's Indians.

The 1961 session of the Montana Legislature had before it a bill to extend state jurisdiction to Indian offenses, with tribal consent. It is doubtful, however, that state acceptance of jurisdiction over the Indian reservations of Montana could be achieved simply by enacting such a statute. It might be argued that, the United States having now given consent, the people of Montana can give their consent through the legislature, but it appears likely that a constitutional amendment is necessary before Montana could assume jurisdiction. The language of the Enabling Act and the ordinance noted above seems to require one. This is also the opinion expressed in the report on H.R. 1063 by the House Committee on Interior and Insular Affairs[29] discussing the effect of 18 U.S.C. sections 1162 and 1360.[30]

JURISDICTIONAL DEFINITIONS

Since Montana has no jurisdiction over Indians who commit crimes on Indian lands within her borders, the question of who is an Indian and what is Indian land are of great import in determining the line between federal and state jurisdiction. These questions have been the subject of much litigation and the limits are fairly well defined.

Who Is An Indian

"[B]efore a person is considered an Indian for legal purposes one thing is certain: That person must have some Indian blood."[31] It has been held that an Indian by blood, even if emancipated to a great extent, is an Indian within the meaning of the statutes.[32] That court defined full emancipation as having severed tribal relations completely or being an allottee under the Dawes Act, which provides that after a period of 25 years that allottee is subject to the criminal jurisdiction of the state in which his land is situate. Persons of mixed blood[33] who maintain tribal relations are considered Indians if they live on the reservation, notwithstanding the fact

[26]For a criticism of this development and related matters see Cohen, *The Erosion of Indian Rights*, 1950-1953: *A Case Study in Bureaucracy*, 62 YALE L.J. 348 (1953).
[27]MONT. CONST. ORDINANCE No. I, § 2.
[28]*Id.* at § 6.
[29]2 U.S. CODE CONG. & AD. NEWS 2409, 2412 (1953).
[30]Similar legislation has been introduced in the United States House of Representatives by a Montana congressman, but, except for the fact that it requires consent of the Indians before a state can assume jurisdiction over them, it is submitted that such an act will have no force and effect in Montana until its constitution is amended.
[31]Note, 36 N.D. L. REV. 52 (1960).
[32]*In re* Carmen, 165 F. Supp. 942 (N.D. Cal. 1958).
[33]State v. Phelps, 98 Mont. 277, 19 P.2d 319 (1933).

that they are not enrolled as Indians.[34] Once an Indian severs his tribal relations and leaves the reservation, however, he is amendable to prosecution in the state courts.[35] A white person adopted by an Indian tribe is not an Indian,[36] even though he lives on the reservation as an Indian.

Therefore, an Indian is a person with some degree of Indian blood who has not severed his tribal relationship.[37]

What Is Indian Land

Indian country is defined in the federal codes thus:

> [T]he term "Indian Country," as used in this chapter, means (a) all the lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[38]

A "dependent community" is a group of Indians who look to the federal government for their subsistence and government. An allotment is a parcel of land given to the individual Indian, title to which is held in trust by the United States or subject to a restraint on alienation. A patent is a grant of land in fee to the individual from the government.

It has been held that Indian land is all that land to which the Indian title has not been extinguished within the limits of the United States, even though this land is not within the limits of a reservation,[39] and also Indian country includes lands within the exterior boundaries of a reservation to which the government has conveyed a patent to a non-Indian.[40] Easements

[34] *Ex parte* Pero, 99 F.2d 28 (7th Cir. 1938).

[35] State v. Phelps, 93 Mont. 277, 19 P.2d 319 (1933); State v. Big Sheep, 75 Mont. 219, 243 Pac. 1067 (1926); State v. Williams, 13 Wash. 335, 43 Pac. 15 (1895).

[36] Westmoreland v. United States, 155 U.S. 545 (1895); United States v. Rogers, 45 U.S. (4 How.) 566 (1846).

[37] There seems to be a different rule as to negroes. The son of a negro father and an Indian mother was held not an Indian even though he lived on the reservation as an Indian at the time of the commission of the offense for which he was tried. In United States v. Ward, 42 Fed. 320 (S.D. Cal. 1890), the court said that since both the father and mother were free persons, the rule governing their offspring was *partus sequitur patrem* which means that since the child's father was a negro and subject to the laws of the United States, his son was subject to the same laws regardless of the Indian blood in his veins. But the illigitimate child of an Indian and a negro woman who was a slave of the tribe was also held not Indian in Alberty v. United States, 162 U.S. 499 (1896). This result was explained by the court by the application of the rule *partus sequitur ventrem* which holds that the owner of a slave mother also owns her child. This might be relevant to the characterization as slave or free, but not as negro or Indian; Indians could also be slaves.

[38] 18 U.S.C. § 1151 (1958).

[39] *Ex part* Crow Dog, 109 U.S. 556 (1883). *But see*, State v. Big Sheep, 75 Mont. 219, 243 Pac. 1067 (1926), wherein it was held that lands to which the United States has parted title and over which it exercises no control, even if within the exterior boundaries of a reservation are not a part thereof, and therefore not "Indian Country."

[40] Application of Andy, 49 Wash. 2d 449, 302 P.2d 963 (1956), cited in Note, 33 WASH. L. REV. 289 (1958).

and rights-of-way granted for the use of a state for highway purposes are still Indian land.[41]

In the case of *Tooisgah v. United States*,[42] the defendant, a fullblood who had murdered another Indian on land which formerly had been on a reservation, was convicted of murder in a federal district court. The Indians had ceded this land to the United States subject to an allotment in severalty to the individual members of the tribe and every allottee was given the benefit of and made subject to the criminal laws of the state. The court of appeals held that this was not Indian land since the Indians had relinquished and surrendered all their claim thereto by its cession to the Government, and, therefore, the defendant could not be tried in federal district court.

Other Considerations

The Montana Supreme Court has held that a conviction in a state district court for a crime over which the federal courts have exclusive jurisdiction is a *nullity*.[43] Also in *United States v. Barnaby*,[44] a case arising in the federal court in Montana, it was held that a state law making assault with intent to commit murder a crime could not be applied to a Flathead Indian being tried in federal court. The court said that an assault with intent to commit murder was not the same as an assault with intent to kill, one of the major crimes, and therefore, since no federal statute made any other assault a crime, it could not be prosecuted in the federal court. Of course, under the present application of the Assimilative Crimes Act, this result would not be reached.

The foregoing discussion sufficiently indicates the guiding lines of federal jurisdiction over Indians. During the course of years, however, whites have entered and now live on Indian lands and vice versa. This has given rise to conflicting claims of jurisdiction when these persons commit crimes while either on or off the reservation, but again the lines are fairly clearly drawn as to where jurisdiction lies in these cases.

Despite 18 U.S.C. section 1152, providing that the general laws of the United States extend to Indian country, a crime committed by a non-Indian against a person of similar status on Indian land is triable in the state courts, not federal courts.[45] Even when the crime committed is one of the major crimes state courts have jurisdiction when non-Indians are involved.[46] This is explained by the interpretation of 18 U.S.C. section 1152 by the United States Supreme Court holding that this statute was not intended to deprive the states of the power to punish non-Indian offenders for offenses committed on Indian lands. Also, it has been held that the jurisdiction of the state courts over offenses committed by and against persons other than Indians on a reservation is not affected by a provision in the state Enabling

[41]Williams v. Lee, 358 U.S. 217 (1959).
[42]186 F.2d 93 (10th Cir. 1950).
[43]State v. Pepion, 125 Mont. 13, 230 P.2d 961 (1951).
[44]51 Fed. 20 (C.C. Mont. 1892).
[45]New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1882).
[46]Draper v. United States, 164 U.S. 240 (1896); State v. Monroe, 83 Mont. 556, 563, 274 Pac. 840, 841 (1929) (dictum).

Act that such land should remain within the absolute jurisdiction of Congress.[47] A state has criminal jurisdiction over persons other than Indians throughout the whole of the territory within its limits including reservations. There have been some convictions of non-Indians in federal courts for crimes committed on Indian lands but they have been set aside.[48]

Offenses committed by a non-Indian against an Indian on Indian land, generally speaking, are subject to federal jurisdiction unless a treaty with the Indians has provided otherwise.[49] The Indian is the ward of the government and therefore federal jurisdiction extends to such cases to allow the government to protect its wards. When not on Indian land, an Indian who commits a crime is subject to the jurisdiction of the locale, regardless of the status of the victim or the nature of the crime.[50]

Thus it can be seen that "states have no jurisdiction over crimes committed by a tribesman on a reservation in the absence of an affirmative act of Congress."[51] But indirectly, through the operation of the Assimilative Crimes Act, the state does extend its influence into this area.

TRIBAL COURT STRUCTURE

The power of the Indian tribe to deal with crimes, so long as the complete and independent sovereignty of the tribe was recognized, was that of any sovereign power. "It might punish its subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. Similarly, it might punish aliens within its jurisdiction according to its own laws and customs. Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government."[52] Thus, unless the federal government has withdrawn the power, a tribal court may be set up by the different tribes according to their own customs and caprice.

The Code of Federal Regulations, title 25, also provides for a Court of Indian Offenses.[53] Such a court has jurisdiction only over certain enumerated offenses committed by Indians within the reservation for which the court is established, all of which are misdemeanors.[54] A tribal Court of Indian Offenses is not a federal court, nor do such courts have jurisdiction to try offenses covered by the Assimilative Crimes Act,[55] but their jurisdiction is conferred upon them by the federal government. These Courts of Indian Offenses were provided for under the provisions of the Wheeler-Howard Act, the Indian Reorganization Act of 1934.[56]

[47] *Ex parte* Crosby, 38 Nev. 389, 149 Pac. 989 (1915).
[48] Hilderbrand v. United States, 261 F.2d 354 (9th Cir. 1958).
[49] COHEN, HANDBOOK OF FEDERAL INDIAN LAW 364 (1942).
[50] State v. Youpee, 103 Mont. 86, 61 P.2d 832 (1936); State v. Little Whirlwind, 22 Mont. 425, 56 Pac. 820 (1899).
[51] Oliver, *The Legal Status of American Indian Tribes*, 38 ORE. L. REV. 193, 222 (1959).
[52] COHEN, HANDBOOK OF FEDERAL INDIAN LAW 146 (1942).
[53] 25 C.F.R. Part 11 (1958).
[54] 25 C.F.R. §§ 11.38-.87 NH (1958).
[55] Application of Denetclaw, 89 Ariz. 299, 320 P.2d 697 (1958); Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950).
[56] 48 Stat. 984 (1934), 25 U.S.C. §§ 461-479 (1958).

These courts consist of one or more chief judges and two or more associates, all of whom must be members of the tribe. Professional attorneys may neither represent nor prosecute offenders before such a court. In cases raising one or more substantial questions of fact the defendant may demand a jury trial. The jury consists of six Indians who are residents of the vicinity in which the trial is held. Provision is also made for a probation and parole system. A six-month sentence is the maximum penalty the court may impose.

The Code of Federal Regulations provides that if the tribe enacts ordinances proscribing crimes the enumeration of misdemeanors in part 11 of title 25 will no longer apply if inconsistent with the ordinances.[57] On the average, the number of cases tried per month in Indian courts is approximately 50, ranging from 10 to 15 on the smaller reservations to a docket of around 90 per month on the larger ones.[58] Jurisdiction of the court is concurrent with lawful state and federal jurisdiction over offenses enumerated in the Code of Federal Regulations.[59]

As in the case of strictly tribal courts the question of jeopardy once again arises. However, it would seem that once an Indian is convicted by a Court of Indian Offenses, he is not liable to trial in federal court due to the operation of 18 U.S.C. section 1152.[60]

POST CONVICTION REMEDIES FOR CONVICTION WITHOUT JURISDICTION

Until Indians in Montana are treated the same as other citizens and are amenable to state law, conflicting claims of jurisdiction in this area will cause problems. Indian defendants wrongly tried in the state courts must have a right of redress. The question remains, how to secure redress and release from confinement if an Indian is convicted in the wrong court?

The Montana Supreme Court has recognized that jurisdiction is in the federal courts exclusively if an Indian commits an offense in Indian country. It has gone so far as to say that a conviction in a state court is a nullity.[61] Yet Montana's courts are continually faced with the attempt on the part of Indians to set aside a conviction and sentence, imposed by a state court on a plea of guilty, in which the question of jurisdiction was not raised. Of course, no problem exists if the lack of jurisdiction in the state court is raised at trial; however, it is common for an Indian to plead guilty to a charge without the aid of counsel.

Habeas Corpus

In re Shaffer,[62] decided in 1924, involved an attempt by an Indian to set aside his conviction by means of habeas corpus. Shaffer was accused in the state court of committing the crime of rape. He was convicted of the

[57] 25 C.F.R. § 11.1(e) (1958).
[58] Information supplied by Mr. Walter Willett, Area Special Officer, Bureau of Indian Affairs, Billings, Montana.
[59] 25 C.F.R. § 11.2(b) (1958).
[60] *Supra* note 21.
[61] State v. Pepion, 125 Mont. 13, 230 P.2d 961 (1951).
[62] 70 Mont. 609, 227 Pac. 37 (1924).

crime after having waived his right to counsel and having pleaded guilty to the charge. The Montana Supreme Court issued a writ of habeas corpus directed to the warden of the state prison to determine whether or not the detention was legal. A writ of review (certiorari) was later issued in aid of habeas corpus. At the hearing Shaffer claimed to be an Indian and alleged that the crime was committed on an Indian reservation. He contended that exclusive jurisdiction in this case was in the federal courts and that therefore his sentence and confinement were illegal. The Montana court ruled that no evidence *dehors* the record would be considered to contradict the record. Thus, since the facts showing a lack of jurisdiction did not appear on the face of the record, the court discharged the writ and returned Shaffer to prison. An Oklahoma case, *Ex parte Wallace,*[63] arrived at the same conclusion in 1945. The reasoning behind these decisions is that a writ of habeas corpus will not issue unless the judgment and sentence is void when judged by the record on its face.

The federal courts have taken a different approach. *In re Carmen*[64] is such a situation. Carmen was tried and convicted of a crime under circumstances similar to the *Shaffer* case. He applied to the California courts for a writ of habeas corpus alleging facts similar to those in *In re Shaffer*. His application was denied.[65] On application to the federal courts he was granted a writ of habeas corpus and released. In granting the writ the court said that even though the allegations in such petitions are not very definite, the federal practice is not to dismiss an application for the writ simply because it failed to comply with the precise niceties of technical procedure required in the state courts.[66] Further, in federal courts evidence *dehors* the record will be considered on application for a writ of habeas corpus to determine whether the convicting court has jurisdiction or not.[67]

Since the imprisoned Indian may eventually secure his release by application to the federal courts the holding in *In re Shaffer* seems unrealistic. To hold to the strict view and require an Indian to seek his remedy in such a circuitous manner does not seem just or sensible.

A result contrary to that reached in Montana but similar to the federal decisions has been arrived at by the Washington court.[68] The Washington court, however, has the benefit of a statute which it has interpreted as allowing consideration of evidence *dehors* the record on application for a writ of habeas corpus where special circumstances exist.[69]

In another recent decision[70] the Montana Supreme Court granted a writ of habeas corpus to an Indian who alleged he had been convicted of

[63]81 Okla. Crim. 176, 162 P.2d 205 (1945).
[64]165 F. Supp. 942 (N.D. Cal. 1958).
[65]Application of Carmen, 48 Cal. 2d 851, 313 P.2d 817 (1957).
[66]Rice v. Olson, 324 U.S. 786 (1945).
[67]*Ibid.*
[68]Wesley v. Schneckloth, 55 Wash. 2d 90, 346 P.2d 658 (1959); Application of Andy, 49 Wash. 2d 449, 302 P.2d 963 (1956).
[69]REV. CODES WASH. 7.36. 140 (1956). This statute provides that if a federal question is presented it is the duty of the supreme court to determine whether the petitioner has been deprived of a right guaranteed by the United States Constitution. REV. CODES WASH. 7. 36.130 (1956) provides that the legality of a judgment may be inquired into.
[70]*In re* Yellowrobe, 135 Mont. 598, 340 P.2d 548 (1959).

a crime over which the state courts had no jurisdiction. Subsequently this petitioner was released. From the report of the petition it is impossible to state whether the facts showing a lack of jurisdiction appear on the face of the record. If the lack of jurisdiction did not appear on the record, release of the petitioner would be inconsistent with the *Shaffer* case.

Coram Nobis

In *State ex rel. Irvine v. District Court*,[71] an Indian had pleaded guilty to burglary in a Montana district court. While incarcerated he applied to the Montana Supreme Court for the writ of error coram nobis, alleging the exclusive jurisdiction of the federal courts over the crime charged against him. The supreme court transferred the case to the district court in which he was convicted and sentenced, and while the district court found his allegations to be true, they denied his petition. On appeal the Montana Supreme Court reversed on the ground of exclusive jurisdiction in the federal courts.

In 1951, prior to the *Irvine* case the Montana Supreme Court had for the first time recognized the availability of coram nobis in Montana.[72] This recognition seems to have occurred largely as a result of United States Supreme Court decisions enlarging the grounds upon which a defendant can attack the constitutionality of his detention in prison.[73] Called the "Wild Ass of the Law,"[74] the writ saw its naissance in the sixteenth century.[75] It has as its purpose bringing errors of fact to the attention of the trial court. It must be shown that these facts, had they been known, would have led the trial court to a different result. A further limitation is that the writ will not lie where at the time of trial the party seeking it knew the facts set forth in the petition for the writ, or might have known them with exercise of reasonable diligence.[76] Further, coram nobis is used as a post-conviction remedy even though there are other remedies, *e.g.*, appeal or motion for a new trial, in the event the time for such remedy has expired.[77]

Under this analysis the writ should not have been available to Irvine. He knew at the time of trial that he was an Indian and that the crime was committed on Indian land.

There are two recent per curiam decisions of note in this area.[78] In both of these cases Indians convicted of crimes in Montana district courts and sentenced therein wrote letters to the Montana Supreme Court. They alleged that the crimes were committed on Indian lands and brought the prisoner under the rule in *State ex rel. Bokas v. District Court*.[79] That case

[71]125 Mont. 398, 239 P.2d 272 (1951).
[72]State v. Hales, 124 Mont. 614, 230 P.2d 960 (1951).
[73]Rochin v. California, 342 U.S. 165 (1952) ; Palko v. Connecticut, 302 U.S. 319 (1937).
[74]Judge Sims, dissenting in Anderson v. Buchanan, 292 Ky. 810, 823, 168 S.W.2d 48, 55 (1943), cited in Note, 38 ORE. L. REV. 158 (1959).
[75]FRANK, CORAM NOBIS § 1.02 (1953).
[76]*In re* Dyer, 85 Cal. App. 2d 394, 193, P.2d 69 (1948) ; Casper v. Lee, 362 Mo. 927, 245 S.W.2d 132 (1952) ; Wooten v. Friedberg, 335 Mo. 756, 198 S.W.2d 1 (1946).
[77]Mooney v. Holohan, 294 U.S. 103 (1935).
[78]State v. Wilson, 135 Mont. 597, 337 P.2d 372 (1959) ; State v. Dumont, 135 Mont. 596, 337 P.2d 372 (1959).
[79]128 Mont. 37, 270 P.2d 396 (1954).

held that a writ of *prohibition* will lie to prevent prosecution in state courts of an Indian who passed a bad check on Indian land. However, neither per curiam decision mentions the *Irvine* case. The court held in both cases that the letters were in the nature of a petition for a writ of error coram nobis. Both petitions were forwarded to clerks of the district courts and the attention of the presiding judge called thereto.

CONCLUSION

The time has come to treat Montana's Indians as first-class citizens. It is the opinion of this writer that the application of the Assimilative Crimes Act to Indian criminal jurisdiction and the enactment of statutes allowing direct assumption of jurisdiction over Indians by certain states whose organic law expressly permits is an enlightened approach to this thorny question. In this way not only will Indian offenders be punished for their offenses, but, more important by far, the rights and property of Indians will be more adequately protected from criminal acts. It is urged that Montana amend its constitution to allow state assumption of criminal jurisdiction over Indians within the state.

If the above proposition is accepted and properly acted upon, the problems special to Indians posed by the *Shaffer* and *Irvine* cases will disappear. There will remain, however, the more general questions regarding coram nobis and the scope of hearing on habeas corpus. The Montana court has recognized a need for adequate post-conviction remedies. But instead of adopting the federal method of handling this situation, *i.e.*, enlarging the scope of habeas corpus, Montana has seen fit to revive the writ of error coram nobis. One writer has said, "It is submitted that merely to enlarge the historical function of the venerable writ [habeas corpus] a bit, is to be preferred to either the revival of an old common law remedy [coram nobis] . . . or to the creation of a new type of original process. . . ."[80]

Because of the possibilities of confusion inherent in the multiplication of post-conviction remedies, it is preferable to discontinue use of coram nobis and to permit consideration of evidence *dehors* the record upon a habeas corpus hearing.

THOMAS F. DOWLING

[80]Briggs, *"Coram Nobis"—Is It Either an Available or the Most Satisfactory Post-Conviction Remedy to Test Constitutionality in Criminal Proceedings?*, 17 MONT. L. REV. 160, 169 (1956).