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Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965)

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The standard of care laid out by the court in the instant case is of itself reasonable. The existence of a grade crossing should elicit caution from the motorist encountering it. The precautions of looking and listening, and even stopping when necessary are slight burdens on the traveler when compared to the consequences of meeting a train upon the crossing. The application of the standard to particular fact situations presents problems. If contributory negligence operates as a complete defense, the failure of courts to distinguish between the theories of intervening cause and contributory negligence will not affect the outcome of a particular case. Both theories would operate to deny recovery. However, if the comparative negligence doctrine is applicable, the distinction is important. If contributory negligence is treated as an intervening cause, it will still operate as a total bar to recovery. Properly viewed, the negligence of each of the parties should be treated as a proximate cause, with contributory negligence merely serving to mitigate damages.

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DECISION OF INDIAN TRIBAL COURT HELD REVIEWABLE THROUGH FEDERAL DISTRICT COURT HABEAS CORPUS PROCEEDING.—An Indian woman sought a writ of habeas corpus in federal district court claiming she was illegally detained by order of the Court of Indian Offenses, Ft. Belknap Jurisdiction, United States Indian Service. The district court held it had no jurisdiction to determine the legality of the decision. On appeal to federal circuit court, *Held:* Remanded to district court for a hearing on its merits. Although Indian tribal courts have been considered courts of independent sovereigns over which federal courts had no jurisdiction, the Indian court in question was in fact an arm of the federal government. The federal district court, in a habeas corpus proceeding had jurisdiction to inquire into the legality of the tribal court's decision. *Colliflower v. Garland,* 342 F.2d 369 (9th Cir. 1965).

Federal courts have consistently held that they have no jurisdiction over Indian tribal courts. The rationale for this is as follows:

> (1) An Indian tribe possessed, in the first instance, all the powers of any sovereign state. (2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but did not by itself terminate the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but save as thus expressly qualified, many powers of internal sovereignty have remained in Indian tribes and in their duly constituted organs of government.[1]

[1]DEP'T OF THE SOLICITOR, U.S. DEP'T OF INTERIOR, FEDERAL INDIAN LAW 398 (1958) (hereinafter cited as FEDERAL INDIAN LAW).

As a result of the sovereignty theory, except for acts which are considered federal crimes, Indian courts have had exclusive jurisdiction over members of Indian tribes for acts committed on Indian lands.[2]

Indian tribal courts are not courts of sovereign nations as they are purported to be. Rather, they are the creation of the executive branch of the United States government and are controlled by it for all practical purposes. The first courts were originated by Indian agents to maintain law and order on the various reservations.[3] Congress in turn recognized their existence by the appropriation of money for them,[4] and the courts sustained their legality on the basis that they were educational instrumentalities used by the Bureau of Indian Affairs in its role of guardian to the Indian.[5] Thus, Indian courts are organized by an executive branch of the government, are sustained with money appropriated for their use by Congress, and are legally approved by federal court decisions.[6] It is clear, then, that a federal agency, the Bureau of Indian Affairs, is the controlling force in Indian courts, rather than the sovereign Indian nation itself.

The Bureau of Indian Affairs controls all facets of life on the Indian reservation. In the early part of the nineteenth century Congress gave the Bureau the management of all Indian affairs and all matters arising out of Indian relations.[7] Since that time the Bureau has effectively controlled the Indians under its jurisdiction through the use of regulations which it promulgated. Although these regulations were not expressly authorized by Congress they were sustained by the courts because they were useful in "educating" the Indian.[8]

The Indian tribes are still largely controlled by the Bureau of Indian Affairs. For example, the Bureau's regulations provide jail sentences for such diverse offenses as misbranding,[9] carrying a concealed weapon,[10] or

[2]Crimes over which the federal courts have exclusive jurisdiction are murder, manslaughter, rape, assault with intent to kill, burglary, robbery, larceny, assault with a dangerous weapon, arson and incest. 18 U.S.C. § 1153 (1958). The Assimilative Crimes Act, 18 U.S.C. § 13 (1958), which adopted state criminal law for federal reservations within the states was held applicable to Indian crimes on tribal reservations in Williams v. United States, 327 U.S. 711 (1946). However, federal courts do not have exclusive jurisdiction over crimes of this type and if an Indian is tried in tribal court he may not be retried in federal court as this would be double jeopardy. United States v. La Plant, 156 F. Supp. 660 (D. Mont. 1957).

[3]FEDERAL INDIAN LAW, *supra* note 1, at 570.

[4]42 STAT. 208 (1921), 25 U.S.C. § 13 (1958).

[5]Indian courts are legal and are "educational and disciplinary instruments by which the Government of the United States is endeavoring to improve and elevate the conditions of those dependent tribes to whom it sustains the relation of guardian." United States v. Clapox, 35 Fed. 575, 577 (D. Ore. 1888).

[6]Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, 231 F.2d 89 (8 Cir. 1956). This case contains an excellent history of the sovereignty theory.

[7]4 STAT. 564 (1832), 25 U.S.C. § 1, 2 (1958). Congress authorized appointment of a Commissioner who was to have direction and management of all Indian affairs.

[8]*United States v. Clapox, supra* note 5.

[9]25 C.F.R. § 11.46 (1958).

[10]25 C.F.R. § 11.40 (1958).

giving venereal diseases to another.[11] These regulations are more than directive. They have the dignity of the law of the tribe.[12]

In addition to making th "law," the Bureau provides the means of enforcement through the Indian police. The Indian police are directly under the command of the reservation superintendent[13] appointed by the Bureau of Indian Affairs. The Indian police are thus, in effect, under the control of the Bureau. The Indian police also serve as an arm of the Indian courts as part of their duties includes carrying out the orders of the Indian courts and preserving order while the courts are in session.

The final link in the chain binding the Indian to the Bureau of Indian Affairs is the Indian court. The "regulation" of the Bureau setting up these courts is as follows:

> The regulations in this part relative to Courts of Indian Offenses shall apply to all Indian reservations on which such courts are maintained. (b) It is the purpose of the regulations in this part to provide adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided under Federal or State law.[14]

The Bureau does more than establish Indian courts. For all practical purposes it is the court. A pertinent regulation provides: "Employees of the Bureau of Indian Affairs, particularly those who are engaged in social service, health and educational work, shall assist the court, upon its request, in the preparation and presentation of the facts in the case and in the proper treatment of individual offenders."[15] As the judge himself is a Bureau appointee[16] it is natural for him to make a request for assistance.[17] An opportunity is then presented for Bureau control of the judicial process from the gathering of evidence through sentencing.[18]

Congress attempted, through the Indian Reorganization Act of 1934,[19] to protect the Indian from exploitation and to stabilize tribal organization. Under this act those tribes who reorganized set up their own courts. It would seem that the Indian tribes who have reorganized under the act

[11] 25 C.F.R. § 11.63 (1958).

[12] 25 C.F.R. § 11.12 (1958). "*Copies of laws.* (a) each Court of Indian Offenses shall be provided with copies of all Federal and State laws and regulations of the Bureau of Indian Affairs applicable to the conduct of Indians within the reservation."

[13] "The superintendent of each Indian reservation shall be recognized as commander of the Indian police force and will be held responsible for the general efficiency and conduct of the members thereof." 25 C.F.R. § 11.301 (1958). The superintendant also has the authority to appoint the Indian police. 25 C.F.R. § 11.304 (1958).

[14] 25 C.F.R. § 11.1(a) (1958).

[15] 25 C.F.R. § 11.21(b) (1958).

[16] "Each judge shall be appointed by the Commissioner of Indian Affairs, subject to confirmation by a two-thirds vote of the tribal council." 25 C.F.R. 11.3(b) (1958).

[17] Although judge is used in the singular form, most Indian courts are presided over by three judges who also perform the jury function.

[18] 25 C.F.R. § 11.9 (1958) provided that professional attorneys were not to be allowed to appear before a Court of Indian Affairs. This was revoked by 26 Fed. Reg. 4361 (1961).

[19] Wheeler-Howard Act, 48 STAT. 984 (1934), 25 U.S.C. §§ 461-79 (1958).

and established their own courts would be free of the Bureau's control. Factually, however, such is not the case. The Bureau retains the same effective control over those tribes which were organized under the Indian Reorganization Act as they do over other tribes. Most of the constitutions and by-laws of the organized tribes were prepared by the Bureau and are the same as the Bureau's own regulations.[20] Even if the Bureau does not prepare the constitution and by-laws it must approve any constitution before it becomes the law of the tribe,[21] and may at any time call for an election for amendment of the constitution.[22] In addition, the Bureau retains the right to set up a court of its own if law and order within the tribe deteriorate.[23] Finally, the Bureau's "regulations" regarding appointment of Indian judges and control of Indian police apply equally to those tribes organized under the Indian Reorganization Act.[24] It is apparent that the Bureau still retains the same control over reorganized tribes as they do over all Indian tribes.

The Bureau's control over the tribes and the individual Indian is possible only because the Bureau makes the tribal law and appoints both the police who enforce the law and the judges who administer the law. As was stated in the instant case:

> [I]t is pure fiction to say that the Indian Courts functioning in the Fort Belknap Indian community are not in part, at least, arms of the federal government. Originally they were created by the federal executive and imposed upon the Indian community, and to this day the federal government still maintains a partial control over them.[25]

The instant case recognized that the Indian court in question was an extension of the executive branch of the federal government, and as a result the federal courts should have supervisory control through a habeas corpus proceeding. Therefore it was not necessary to pass on the question of the constitutional rights of an Indian citizen who was also a citizen of a "sovereign" tribe.

[20]The instant case quoted the appellee's brief which stated, "with only a couple of differences not material here, the Belknap Law and Order Code was taken bodily from C.F.R. 11." See also, Oliver, *Legal Status of American Indian Tribes*, 38 ORE. L. REV. 193, 233 (1959), quoting from a letter written by B. W. Davis to the author: "at the time this Constitution was adopted there were not 25% of the Indians (Shoshone-Bannock Tribes) who could read and not more than 2% who could understand it, and if they could read it, there never was an election with the required number of adult Indians as required by the Federal Statute on the matter." He added that, "practically all of the resolutions that are adopted are either prepared or proposed by the Bureau. . . ."

[21]48 STAT. 987 (1934), 25 U.S.C. 476 (1958).

[22]48 STAT. 987 (1934), 25 U.S.C. 476 (1958).

[23]*Supra* note 14.

[24]25 C.F.R. § 11.1(d) (1958), states that the Bureau regulations applicable to Indian judges and Indian police shall continue in effect in those tribes organized under the Indian Reorganization Act as long as those Indian judges and Indian police are paid by appropriations made by the United States or until *otherwise directed.*

[25]Instant case at 878-79.

Although courts have recognized that the Indian has some constitutional protection,[26] tribal sovereignty has barred his receiving full Constitutional privileges and protections. For example, it has been held that first amendment guarantees were not applicable to a tribal ordinance which prohibited the use of peyote in religious ceremonies.[27] Federal courts have held that tribal sovereignty was a bar to the applicability of the due process clause of the fifth amendment in certain instances. They have refused to take jurisdiction upon a claim that an Indian tribe deprived one of its members of his tribal rights without due process.[28] It has also been held that indictment without a proper grand jury would not be in violation of the fifth amendment.[29] In addition, fourteenth amendment guarantees have been held not applicable to tribal action, as the fourteenth amendment was directed to only the *states*.[30] It would thus appear that the American Indian is in a constitutional no man's land, deprived of the protection of the fourteenth amendment because he is not under a state's jurisdiction, and deprived of the protection of many of the constitutional provisions applicable to the federal government because of his co-existing tribal citizenship.[31]

The no man's land in which the Indian finds himself is the result of an early decision which stated that Congress alone has power to control

[26]*In re Sah Quah*, 31 Fed. 327 (D. Alaska 1886), held that slaveholding within the tribe was unconstitutional.

[27]Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959). *Quaere*, would the court have come to the same conclusion if the ordinance had been directed toward a "conventional" religion?

[28]United States v. Senecca Nation of New York Indians, 274 Fed. 946 (W.D.N.Y. 1921) stated that federal courts had no power to set aside an action of an Indian tribe confiscating property of a tribal member. *C.f.* Martinez v. Southern Ute Tribe of Southern Ute Res., 249 F.2d 915 (10th Cir. 1957, *cert. denied*, 356 U.S. 960 (1958), *reh. denied*, 357 U.S. 924 (1958). In this case tribal rights were taken from a member of the tribe. The court held that although the tribe was organized under the Tribal Reorganization Act of 1934, it was still a soverign tribe. So far as it appears from the record the question seemed to be whether reorganization under a federal act would make the tribe ipso facto a federal agency. The question of government control per se was not brought out.

[29]A murder conviction in a tribal court was upheld in Talton v. Mayes, 163 U.S. 376 (1896). The Court recognized the procedure under which the defendant was convicted would have been unconstitutional under the sixth amendment if trial would have been held in a federal court, but said that it was a matter of due process rather than a specific Constitutional guarantee. The Court then determined it had no jurisdiction as the due process clause was part of the fifth amendment, and theh fifth amendment guarantees did not apply to tribal action.

[30]United States v. Kagama, 118 U.S. 375 (1886). There is a rather tenuous line of reasoning which could make the fourteenth amendment applicable to tribal courts as well as to the states. It is based on the assumption that the purpose of this amendment was to protect United States citizens who were living within the continental United States and were also co-citizens of another jurisdiction. The fourteenth amendment was passed in 1868. It was not until 1871, that Congress determined that Indian tribes were not to be considered as foreign nations, and not until 1924 that Congress gave citizenship to all Indians. It would follow that the dual citizenship of Indians was not in general existance at the time the fourteenth amendment was passed. Therefore the fundamental concept of the fourteenth should apply to Indian tribes as soon as they became sovereign political bodies comprised of United States citizens living within the continental United States.

[31]"The provisions of the Federal Constitution protecting personal liberty or property rights do not apply to tribal action." *Native American Church v. Navajo Tribal Council, supra* note 27, at 134. The court was quoting from one of the most respected authorities in this field; COHEN, FEDERAL INDIAN LAW 181 (1942).

the Indian tribes. Since the congressional power is plenary neither courts or states have control over the Indian tribes until authorized by Congress.[32] However, in 1953 Congress passed legislation which gave the states jurisdiction over certain Indian tribes and land, and provided that the states could, at their option, assume jurisdiction over the tribes in their geographical area.[33] It would thus seem that Congress has in effect stated that it no longer has plenary control over the Indian tribes, and consequently that Indian courts and the Bureau of Indian Affairs should no longer be able to ignore constitutional guarantees.

The control imposed by the Bureau of Indian Affairs is for the avowed purpose of helping the Indian gain self determination.[34] However every time there is a change in the national administration, the concept of how this goal should be reached changes.[35] Acts encouraged by one Commissioner may be made illegal by the next. When this vacillating policy is added to the Bureau's control, the Indian has no permanent standard on which he can rely as a guide. This must of necessity hinder his growth toward self determination.

Submitted: That the Indian citizen must have the protection of constitutional standards before he can gain self determination. In the past these protections have been denied through the two concepts of tribal sovereignty and the plenary power of Congress over the tribes. It is hoped that the instant case is the beginning of a new concept of the Indian as a citizen, a citizen who is entitled to same constitutional rights, as all citizens, with these rights guaranteed by the federal courts.

The process of correction and supervision of Indian courts through the federal courts will place an additional burden on the federal judiciary. It will be difficult and time consuming to correct procedures in Indian courts whose judges for the most part know nothing of due process, where trial by jury is the exception rather than the rule, and where the use of professional lawyers is discouraged. Yet, in the absence of state jurisdiction, it appears the only way the Indian will receive constitutional guarantees of due process of law in Indian courts is under the supervision of the federal courts.

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[32]*United States v. Kagama, supra* note 30, stated that the power of Congress was plenary over the tribes and that neither the individual states nor the courts could have jurisdiction until granted by Congress.

[33]18 U.S.C. 1162 (1958), 28 U.S.C. 1360 (1958).

[34]One policy of the Bureau of Indian Affairs is said to be the "termination of Federal supervision of affairs of Indian tribes desiring such termination, to the extent practicable and as soon as termination is feasible." FEDERAL INDIAN LAW, *supra* note 1, at 501, quoting from the 1954 SEC'Y INT. ANN. REP. 227.

[35]See, Abbot, *The American Indian, Federal and State Citizen*, 20 FED. B.J. 248, 250-51 (1960), where the author describes Indian affairs as a political football changing with every federal administration.