No. 357

INDIANS—FISH AND GAME—FIREARMS—BEAVER—LICENSES, courtesy—WARDENS, Fish and Game—FISH AND GAME

Held:

1. An allottee Indian who has obtained citizenship through being an allottee and has received patent in fee is subject to the civil and criminal laws of the state, but an allottee who has not obtained patent is still a ward of the Federal Government, although a citizen, and as such subject to the exclusive jurisdiction of the United States.
2. If an Indian is not an allottee but is a member of an Indian tribe who has not adopted the habit of civilized life and maintains tribal relations under the supervision of an Indian agent, he is a ward of the Government and subject to federal jurisdiction for acts committed by him within the reservation.
3. If an act is committed by an Indian who is a ward of the Federal Government, upon land to which the United States has relinquished title, the state has jurisdiction to punish him for committing a misdemeanor not embraced within the jurisdiction of the United States.
4. Where an Indian to whom full citizenship and patent have been granted commits an offense against the penal statutes of the state he may not defend against the power of the state to punish by asserting the offense was committed on land, title to which is in the United States.
5. A deer killed by an allottee Indian on an Indian reservation on land to which the government holds title is not considered as game protected by the laws of Montana, even though the same was killed within the geographical limits of Montana; said Indian's possession of said deer while off the reservation out of season in Montana does not violate any of the provisions of Montana's game laws.
6. All Indian lands, whether allotted or unallotted, held separately or jointly, and all land held for the use of the Indians, such as reservoir sites and similar lands, are subject to the exclusive jurisdiction of the United States government; all game fish, wild birds, game or fur-bearing animals, including beaver, killed, caught or captured thereon, are Indian property; said beaver are not protected by the laws of Montana; the Indian under tribal ordinances may kill or capture said beaver on the lands aforesaid; the Indian's possession would be legal and the State of Montana has no claim or ownership therein, nor

has the State jurisdiction over the same; beaver caught, killed or captured on any of the lands aforesaid is not considered as beaver coming from without the State, but considered to be within the geographical limits of Montana.

7. The Fish and Game Commission has no jurisdiction over the tagging of beaver caught, killed or captured on Indian lands hereinafter described.
8. The provisions of Sections 3722, 3730, 3731, 3732 and 3742, as amended by Chapter 22, Laws of 1941, are not applicable to beaver caught, killed or captured on the Indian lands aforesaid, save as to the possible exception of that part of Section 3722 noted in this opinion. Even under the provisions of Section 3722, as noted, the Fish and Game Warden should impose no greater restriction on the exportation of beaver caught, killed or captured on Indian lands within the reservation than would be imposed on beaver coming from without the state. If the skin or skins from beaver caught, killed or captured on Indian lands within an Indian reservation are properly tagged so as sufficiently to identify each said hide or hides, the Fish and Game Warden should grant an export or shipping permit to the shipper on his payment of the required fee, i. e., 50¢, for the permit of each shipment.
9. The Fish and Game Commission has no authority to issue courtesy hunting and fishing permits to Indians.
10. The Fish and Game Commission has no authority to employ an Indian or any other person as a deputy game warden to police Indian reservation land for state game law violations.
11. All Indians born within the territorial limits of the United States are citizens of the United States; an Indian may enjoy hunting and fishing privileges off an Indian reservation, equally with the white man, if he purchases the necessary Montana hunting and fishing license and pays the required fee therefor. It necessarily follows such licensed Indian may hunt his game with a firearm and not be required to compete with his white brother with his primitive weapon, the bow and arrow.

February 7, 1942.

Dr. J. S. McFarland
State Fish and Game Warden
Capitol Building
Helena, Montana

Dear Dr. McFarland:

You have submitted the following:

(A) An allottee Indian and a ward of the government killed a deer on the Flathead Indian reservation on land to which the United States Government holds title. He was found in possession of the deer on lands not within the Indian reservation during the closed season in Montana.
Query: Has the Indian violated the provisions of Section 3742 of the Revised Codes of Montana, 1935, as amended by Chapter 22 of the Laws of 1941? Was the deer killed by the Indian protected by the laws of the State of Montana? Did the deer come from without the State of Montana?

(B) What jurisdiction, if any, has the Montana Fish and Game Commission over the tagging of beaver skins which were caught on an Indian reservation of this state?

(C) Has the Fish and Game Commission authority to issue a certain number of courtesy hunting and fishing permits or licenses to

Indians of a certain Indian reservation which would allow them to hunt and fish on lands off the reservation and receive in return from the tribal council thereof a blanket license permitting Montana licensed hunters and/or fishermen to hunt and/or fish on said Indian reservation?

(D) Has the Fish and Game Commission Authority to employ an Indian as a deputy game warden to police Indian reservation land for state game law violations?

At the outset, many questions have arisen with reference to the Indian's rights, his privileges, and the ever perplexing question of jurisdiction. These questions encompass many subjects, among the most important of which are matters of taxation, old age pensions, public welfare, citizenship, crimes committed on and off the reservation and violations of the fish and game laws of our state, as well as school and educational questions. In view of the fact several of these matters are before the Attorney General for decision, it might bé well to settle some of these questions during the course of this opinion; and—while they may have no particular bearing upon the questions you have submitted—I have taken the liberty to include them herein as a matter of convenience and with the idea in mind of having questions pertaining to the Indian answered in one opinion.

We proceed now to answer questions (A), (B), (C) and (D), pertaining to your department, in the order in which they are here presented.

STATUS PERTAINING TO QUESTION (A)

You have referred to this department the following provisions of our statute which you believe applicable to the determination of Question (A) presented here.

Chapter 22, Laws of 1941, which is an Act to amend Section 3742, Revised Codes of Montana, 1935, as amended by Chapter 115, Laws of 1939, relating to transportation, possession and disposal of game animals or parts thereof, insofar as pertinent here, provides:

> "Section 3742. **Unlawful to Transport, Possess or Dispose of Animals, or Parts of Animals Except Under Permit—Exceptions—Penalty.** It is hereby made unlawful for any person to purchase, sell, offer for sale, possess, ship, or transport within or out of the state any game fish, wild bird, game or fur-bearing animal or part thereof, protected by the laws of this State, or coming from without the State whether belonging to the same or different species from that native to the State of Montana, except as specifically permitted by this act . . ."

Section 3756, Revised Codes of Montana, 1935, insofar as pertinent here, provides:

> "Section 3756. **Duty of grand juries, district judges, sheriffs, etc., respecting infractions of law** . . . And it is further provided that in construing this act, the provisions and penalties hereinbefore made and prescribed shall be deemed to include all Indians and half-breed Indians, when outside the Indian reservation. . . ."

Before proceeding further, I think it would be appropriate to trace briefly the history of the policy of the government with respect to the numerous and once powerful tribes which occupied this soil before the advent of the white man. The framers of the Federal Constitution were sensible of problems ahead with respect to the Indian. How they regarded the status of the tribes is not clear, in view of the clauses which gave Congress power to regulate commerce with foreign nations and among the several states, and with the Indian tribes.

In State v. Big Sheep, 75 Mont. 219, 243 Pac. 1067, in a very able discourse by the then Chief Justice Callaway, the Montana Supreme Court said:

"The status of the tribes came before the United States supreme court in the great case of Cherokee Nations vs. George, 5 Pet. 1, 8 L. Ed. 25, in which Chief Justice Marshall said they might be denominated domestic dependent nations. 'Their relation to the United States resembles that of a ward to his guardian.' This became an established doctrine, which is still, to same extent at least, in full force and vigor. (United States vs. Kagama, 118 U. S. 375, 30 L. Ed. 228, 6 Sup. St. Rep. 1109 (See also, Rose's U. S. Notes Supp.); United States vs. Nice, 241 U. S. 591, 60 L. Ed. 1192, 36 Sup. St. Rep. 696; Cramer vs. United States, 261 U. S. 219, 67 L. Ed. 622, 42 Sup. Ct. Rep. 342.)

"The United States has always maintained its primary sovereignty over the soil. And while asserting sovereignty over the Indians themselves, the government for nearly 100 years entered into treaties with the various tribes. In 1871 this time-honored policy was changed by congress which then asserted the right to legislate for and concerning the Indians directly.

" 'No Indian nation or tribe within the Territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired.' (16 Stat. at Large, 566; 5 Comp. Stats, sec. 4034.)

"As early as 1862, if not before, Congress initiated the policy of alloting lands in severalty to certain Indians who were qualified and desired to receive such, with the promise that patents and citizenship eventually should follow. (13 Stat. 623; XIX Opinions of Attorney General 255.) This policy was afterwards described by Mr. Justice Brewer as one 'which looks to the breaking up of tribal relations, the establishing of the separate Indians into individual homes, free from national guardianship, and charged with all the rights and obligations of citizens of the United States.' (In the Matter of Heff, 197 U. S. 488, 49 L. Ed. 848, 25 Sup. Ct. Rep. 506.)

"The territory of Montana was organized by an Act of Congress approved May 26, 1864 (13 Stat. 85). In 1868 the Crow Indian Reservation, based upon a treaty with that tribe, was created, composed of land constituted wholly within the geographic boundaries of Montana. (15 Stat. 649.)" (For treaty with the Flatheads, see 12 Stat. 975.)

In 1855, the Flathead Reservation, based upon a treaty with the Indians, was created, composed of land constituted wholly within the geographic boundaries of Montana. By the terms of the treaty the Flatheads relinquished to the United States large portions of land. Citizenship was never mentioned in the treaty. (12 Stat. 975). The Flathead tribe still lives upon its reservation, receives bounty from the government, and is under the superintendency of a governmental agency located at Dixon.

Citizenship, so far as the Flatheads are concerned, came to them under the Dawes Act: "An act to provide for the allottment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes." (24 Stat. 388.) Section 6 of the act provides in part that, upon the completion of the allottments and the patenting of the lands to the allottees, "each and every member of the respective bands or tribes of Indians to whom allottments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; . . . And every Indian born within the territorial limits of the United States to whom allottments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States to whom allottments shall have been made under the provisions of this

act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

"There was controvery for a time over the limitations of the trust period fixed in the Act and as to when the allottee became a citizen, but it was set at rest by the Act of May 8, 1906, which amended the law so as distinctly to postpone to the expiration of the trust period the subjection of allottees under the Act to state laws. The first part of this section as amended is: 'That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefits of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.' . . . 'That until the issuance of fee simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States.' (24 Stat. 390, 34 Stat. 182, now Sec. 4203 U. S. Comp. Stat.) Commenting upon these laws of the United States Supreme Court, speaking through Mr. Justice Hughes, in United States vs. Pelican, said: 'We deem it to be clear that Congress had the power thus to continue the guardianship of the government.' (232 U. S. 442, 58 L. Ed. 676, 34 Supp. Ct. Rep. 396 (See also, Rose's U. S. Notes).)

"By Act approved June 2, 1924 (U. S. Comp. Stat. Supp. 1925, sec. 3951aa), Congress declared: 'That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, that the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian tribal or other property.' What, if any, effect has this enactment upon the problem before us?

"In United States vs. Waller, 243 U. S. 452, 61 L. Ed. 843, 37 Sup. Ct. Rep. 430 (See also, Rose's U. S. Notes Supp.) the Court said: 'The tribal Indians are wards of the government, and as such under its guardianship. It rests with Congress to determine the time and extent of emancipation. Conferring citizenship is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens the relation of guardian and ward for some purposes may continue. On the other hand, Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with the full rights and responsibilities concerning their property or give them a partial emancipation if it thinks that course better for their protection. (United States vs. Nice, 241 U. S. 591, 598, 60 L. Ed. 1192, 36 Sup. Ct. Rep. 696 (See, also, Rose's U. S. Notes Supp.), and cases cited.)'

"This doctrine the Federal Courts have maintained consistently. (See Cramer vs. United States, supra; Brown vs. United States (C. C. A.), 8 Fed. (2nd) 433.)

"On the other hand it is clear that an Indian who has obtained patent in fee to his allottment not only is a citizen of the United States, but has all the rights, privileges and immunities of citizens of the United States, and is subject to the civil and criminal laws of the state of Montana. He is no longer a ward of the government. His allottment is free from governmental restraint and control.

"But has this state any criminal jurisdiction over an Indian, though a citizen, who still retains tribal relations within the Crow Reservation

and who commits an act within the reservation, which, if done within the jurisdiction of this state, would be criminal under its laws?

"As they are required to do by the Enabling Act, the people of Montana annexed an ordinance to our Constitution (Ordinance No. 1, division 2d), in which it was declared: 'That the people inhabiting the said proposed state of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction, and control of the Congress of the United States . . .' So it is plain that Congress always had and still has absolute jurisdiction and control over all lands within the Crow Reservation to which title has not been extinguished by the United States.

"By reason of its guardianship over Indians maintaining tribal relations—its 'dependent people' (United States vs. Kagama, supra; Hallowell vs. United States, 221 U. S. 317, 55 L. Ed. 750, 31 Sup. Ct. Rep. 587 (See, also, Rose's U. S. Notes), the United States has always asserted its own, and has denied the power of the states, over them. Quickly following the decision in Cherokee Nations vs. Georgia the supreme court in Worcester vs. Georgia, 6 Pet. 515, 8 L. Ed. 483, declared that 'Though the Indians had by treaty sold their land within that state, and agreed to move away, which they had failed to do, the state could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the state and the process of its courts. The same thing was decided in the case of Fellow vs. Blacksmith & others, 19 How, 366, 15 L. Ed. 684 (See, also, Rose's U. S. Notes).'

"The foregoing quotation is taken from the opinion of Mr. Justice Miller, in United States vs. Kagama, supra, in which the foregoing doctrine is emphasized. In that case the court was considering the effect of an Act of Congress giving jurisdiction to the courts of the territories of the crimes of murder, manslaughter, rape, assault with intent to kill. arson, burglary, and larceny, committed by Indians within the territories, and in like cases to the courts of the United States for the same crimes committed by an Indian against the property or person of another Indian or other person within the limits of a state, but on an Indian reservation. (23 Stat. 362, sec. 9, now U. S. Comp. Stats., sec. 10502.)

"Prior to that enactment the United States had not undertaken to punish Indians for crimes committed between themselves (note the abortive attempt in Ex Parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030, 3 Sup. Ct. Rep. 396 (See, also, Rose's U. S. Notes), which gave rise to the Act above mentioned); the Indians living under their tribal laws were permitted to regulate their own affairs. The Act did not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people or other than Indians found there. Its effect was 'confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.' (United States vs. Kagma, supra; Draper vs. United States, 164 U. S. 240, 41 L. Ed. 419, 17 Sup. Ct. Rep. 107.) Furthermore, by that Act Congress enumerated all crimes committed by Indians against Indians which in its judgment should be recognizable by the territorial and United States courts. (State vs. Campbell. 53 Minn. 354, 21 L. R. A. 169, 55 N. W. 553.)

"The United States did not attempt, nor has it ever attempted, to punish its wards for crimes committed within the limits of a state

but outside a reservation. Even before he became a citizen, if an Indian committed a crime within this state, and without his reservation, he was held amenable to our laws, and subject to the jurisdiction of our courts. (State vs. Spotted Hawk, supra; State vs. Little Whirlwind, 22 Mont. 425, 56 Pac. 820; and see Pablo vs. People, 23 Colo. 134, 37 L. R. A. 636; Ex Parte Moore, 28 S. D. 339, Ann. Cas. 1914B, 648, 133 N. W. 817; State vs. Buckaroo Jack, 30 Nev. 325, 96 Pac. 497.)"

State v. Big Sheep, 75 Mont. 219, 243 Pac. 1067.

Now then, what is the meaning of all that which has been hereinbefore written in this opinion concerning the question of jurisdiction and what application thereof can be made to Section 3756, supra, which insofar as pertinent here provides:

". . . and it is further provided that in construing this act, the provisions and penalties hereinbefore made and prescribed shall be deemed to include all Indians and half-breed Indians when outside the Indian reservation . . ."

To simplify and clarify the issue we come quickly to the point and therefore hold, as does State v. Big Sheep, supra, that:

1. An Indian allottee who has obtained citizenship though being an allottee and has received patent in fee is subject to the civil and criminal laws of the state, but an allottee who has not obtained patent is still a ward of the Federal Government, although a citizen, and as such subject to the exclusive jurisdiction of the United States.

2. If an Indian is not an allottee but is a member of an Indian tribe who has not adopted the habits of civilized life and maintains tribal relations under the supervision of an Indian agent, he is a ward of the government and subject to federal jurisdiction for acts committed by him within the reservation.

3. If an act is committed by an Indian who is a ward of the Federal Government, upon land to which the United States has relinquished title, the state has jurisdiction to punish him for committing a misdemeanor not embraced within the jurisdiction of the United States.

4. Where an Indian to whom full citizenship and patent have been granted commits an offense against the penal statutes of the state, he may not defend against the power of the state to punish by asserting the offense was committed on land, title to which is in the United States.

Question (A) arose out of an alleged violation of the fish and game laws of Montana by one Shakale Finley, an allottee Indian and a ward of the Government. Finley killed a deer on the Flathead Indian reservation on land to which the Government holds title. He was found in possession of the deer on land not within the reservation during the closed season in Montana.

Query:

Has Finley violated the provisions of Section 3742 of the Revised Codes of Montana, 1935, as amended by Chapter 22 of the laws of 1941?

Was the deer killed by Finley protected by Montana law?

Did the deer killed by Finley come from without the State of Montana?

It might be well to give a short resume of the history of Section 3742, supra. The Section was first enacted as Section 63, Chapter 173, Laws of 1917; amended as Section 1, Chapter 142, Laws of 1919; re-enacted as Section 3742, Revised Codes of Montana, 1921; amended as Section 23, Chapter 77, Laws of 1923; amended as Section 28, Chapter 59, Laws of 1927; and finally amended as Section 2, Chapter 22, Laws of 1941. When

the section was first enacted it had to do with the selling of fish and game, and it was not until 1923 its scope was enlarged to include "possession." In 1927, the legislature amended said section again to read, insofar as pertinent here, as follows:

> "It is hereby made unlawful for any person to purchase, sell, offer to sell, possess, ship, or transport within or out of the State any game fish, wild bird, game or fur-bearing animal or part thereof, protected by the laws of this State, or coming from without the State whether belonging to the same or different species from that native to the State of Montana, except as specifically permitted by this Act. . . ."

In 1941, when the Section was amended again, the particular phrasing hereinabove set out was not changed and its wording has been the same since 1927.

In view of the fact we are interested in but the two questions—Was the deer killed by Finley protected by Montana law? Did the deer killed by Finley come from without the State of Montana?—it might be well to strip the section of surplus matter and quote it thus:

> "It is hereby made unlawful for any person to possess any game fish, wild bird, game or fur-bearing animal or part thereof, **protected by the laws of this state,** or **coming from without the state,** whether belonging to the same or different species from that native to the State of Montana, except as specifically permitted by this act. . . ."

I am of the opinion Section 3742, supra, was enacted by the Legislature for the express purpose of protecting Montana's fish and game, which is as it should be. But was the deer which Finley killed and had in his possession protected by the laws of the State of Montana? What jurisdiction has the fish and game commission over game killed on allotted lands of an Indian reservation? Did the deer come from without the State of Montana?

My answer to these questions is favorable to the Indian. Finley killed the deer on the Flathead Indian reservation on land to which the United States government holds title. The reservation is within the geographical boundaries of the State of Montana. The deer was Indian property. Finley had a legal and lawful right to kill it, and therefore his possession was legal either on or off the Indian reservation. The State of Montana has no jurisdiction over fish and game killed or captured on land of an allottee Indian within an Indian reservation. The state has no rightful claim or ownership therein. The deer killed by Finley and which he had in his possession was not protected by the laws of the State of Montana.

At one time the white man felt he could use the Indian's land and hunting grounds as a matter of right. See State v. Campbell, 53 Minn. 354, 55 N. W. 553, wherein the Court said:

> "The late Justice Miller, speaking for the court, after pointing out that the right of congress to legislate for Indians in territories could be maintained merely upon the ownership and exclusive sovereignty of the United States in and over the country, then proceeds to consider the second clause of the statute, which legislates with reference to Indians within a state. After conceding, what is almost self-evident, that the clause in the constitution giving congress the power to regulate commerce with Indians would not give it power to enact a system of criminal laws for Indians having no relation to trade and intercourse with them, and suggesting that the statute does not interfere with the operation of state laws upon white people found within an Indian reservation, and that its effect is confined to acts of tribal Indians committed within the limits of the reservation, he holds that this legislation is within the competency of congress, not because the right to enact it has been reserved by some treaty, or by the act admitting a state into the Union, but upon the broad ground that

> Indians, while preserving their tribal relations, residing on a reservation set apart for them by the United States, are the wards of the general government, and under its protection, and as such are the subject of federal authority, over which congress has the same power to legislate within the states as over any other subject of federal jurisdiction. And, if they are thus under the control of Congress, that control must be exclusive; for, as suggested in the case of the Kansas Indians, 5 Wall 737, 'from necessity there can be no divided authority.' It would never do to have both the United States and the state legislating on the same subject. By the act of 1885, presumably, congress has enumerated all the acts which, in their judgment, ought to be made crimes when committed by Indians in view of their imperfect civilization. For the state to be allowed to supplement this by making every act a crime on their part which would be such if committed by a member of our more highly civilized society would be not only inappropriate, but also practically to arrogate the guardianship over those Indians, which is exclusively vested in the general government. Moreover, it is very evident that the state never intended to attempt to extend its criminal laws over tribal Indians for acts committed within a reservation. See Gen. St. 1878, c. 25, S. 1, and Pen. Code, S. 539. The exception among the decisions of the state courts on the subject to which we have heretofore alluded is the very exhaustive and able opinion in State vs. Doxtater, 47 Wisc. 278, 2 N. W. 439. But with all due deference to that eminent court, it seems to us that they have not given due weight to the fact that the jurisdiction of the federal government over these Indian tribes rests, not upon the ownership of and sovereignty over the country in which they reside, but upon the fact, as the wards of the general government, they are the subjects of federal authority within the states as well as within the territories—a doctrine which the supreme court of the United States has developed and announced in the case of U. S. vs. Kagama, supra, much more distinctly than in any deliverance extant when State vs. Doxtater was under consideration, some 14 years ago."

I feel confident it never was the intent and purpose of the Montana Legislature to deprive the Indian of his right to hunt and fish on his reservation nor to compel the Indian to eat every mouthful of the fish and game killed by him, bones and all, before leaving the reservation. Every wild bird and animal of every kind and description on reservation land is Indian property not under the protection of the laws of Montana. The Indian reservation is within the geographical boundaries of this state and, therefore, Section 3742, supra, has no application insofar as Finley's deer is concerned.

It is well to note here the Flathead Indian reservation is open to hunting and fishing to the white man, the Indian making no charge therefor, giving the white man the privilege to kill the Indian's game, not as a matter of right, but as a personal concession which the Indian can revoke at will. Of this, there can be no doubt. It has been held Indians, who have elected to take advantage of the provisions of the Federal laws, may require white people to pay fishing and hunting license to hunt and fish on their lands.

Under the Act of Congress passed June 18, 1934, commonly known as the Wheeler-Howard Act, the same being Public Law No. 383, passed by the Seventy-third Congress, 48 Stat. 984, being an act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes, Congress extended the period of trust placed upon Indian lands, and any restriction on alienation was extended until otherwise directed by Congress. Section 16 of said act authorized any Indian tribe to have the right to organize

for its common welfare, and to adopt an appropriate constitution and by-laws. This Act of Congress gave the Indian tribes, in addition to all powers theretofore invested in them, the following rights:

> "To employ legal counsel . . . to prevent the sale, disposition, lease, or encumberance to their tribal lands;
> "to regulate the use and disposition of tribal property, to protect and preserve the tribal property, wildlife and natural resources of the Confederated Tribes, to cultivate Indian arts, crafts, and culture, to administer charity; to protect the health, security, and general welfare of the Confederated Tribes."

The Constitution and By-Laws of the Confederated Salish and Kootenai Tribes of the Flathead Reservation were adopted and have been approved by the Secretary of the Interior as of October 28, 1935.

Under this Act of Congress, it would appear the Indian tribal council, having elected to be subject to the provisions of said act, and their by-laws so permitting it, and said Indians having jurisdiction over their own lands, may regulate the right of hunting and fishing upon the same, and so regulating may require non-members of the tribe to pay a license fee to them independently of the State Fish and Game Commission or the State of Montana.

It would appear the Indian councils have the right to require payment to their tribes of these license fees upon all lands held jointly by the tribes or lands held by the United States government for the tribes, or on all unallotted lands, as well as allotted lands.

The Court said in the case of United States v. Pelican, 232 U. S. 442, 342 Ct. 396, 58 L. Ed. 676.

> "In the present case, the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the Government. . . . The same considerations, in substance, apply to the allotted lands which, when the reservation was diminished, were excepted from the portion restored to public domain. . . . But, meanwhile, the lands remain Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the Government retaining control."

Under the above authority, it would appear all Indian lands, whether allotted or unallotted, held separately or jointly, and all lands held for the use of the Indians, such as reservoir sites and similar lands, are subject to the exclusive jurisdiction of the United States government, and as the United States government, under the Wheeler-Howard Act, has authorized the tribal councils to adopt a Constitution and By-Laws, and has given them certain powers of regulation in reference to their property rights, it follows the tribal council, having elected to come under the provisions of the Wheeler-Howard Act, is authorized to require a license from whites to fish and hunt upon said lands. However, if said lands have been patented, and if there are no restrictions in said patent, then such patented Indian lands are execpted herefrom, and the tribal council cannot require a special license permit to fish and hunt. (Vol. 17, Attorney General's Opinions, p. 115.)

When one takes into consideration the fact approximately every foot of soil in our country and every foot of soil in the State of Montana was at one time Indian land, owned and controlled by the Indian—when one takes into consideration the fact this very same land, with all its vast resources, is worth billions upon billions of dollars—and when one contemplates what the white man paid for it—we cannot pass unnoticed the able opinion written by Judge Bourquin, wherein he said:

"Some of 'history' and of 'policy' to which the parties appeal are material, and all, interesting—parts of the humiliating record of our oppression, expropriation, dispersion, and destruction of the Indian nations which formerly exercised dominion over all this broad land. To recall no more than necessary, however, for time immemorial and in 1855, the Flathead and other Indians, many, many thousands, free, content, and happy, were natural owners, occupants, and overlords of all the vast domain west of the Continental Divide and within what is now Montana. Rich and lovely as that region was and is, as always, it excited white avarice and intrigue to oust the red; as always, the alibi, uplift, and civilization. Thereupon was invoked the established policy, 'buy when you can—cheap, fight when you must,' and in behalf of the United States Isaac Stevens negotiated a 'treaty' with some eighteen Indians styled 'chiefs, headmen, and delegates of the Confederated tribes.' 12 Stat. 975.

"To promote a favorable atmosphere, Stevens gave to the few Indians assembled a small quantity of brilliant beads, gaudy calicoes, and other geygaws of the 'trade goods' of the time, and to insure the chiefs' complacency promised each of them $500 yearly for 20 years, house, furniture, and garden. And for the Indian thousands were to be expended, $120,000 apportioned over a series of years.

"In consideration thereof the delegates, like another Esau, assumed to convey to the United States all this extensive empire, their tribal birthright, save about one-eighth reserved for continued use by the Indians, cribbed, cabined and confined. Natural advantages and intrinsic values taken into account, the deal cast into the shade Manhattan's famous bargain. This treaty and reservation had many counterparts the country over, and even as Ahab the vineyard of Naboth, the whites exceedingly coveted these fragments of Indian empire. Their appetite grew by what it fed upon. Accordingly, and as always, the indefatigable lobby besieged Congress, which as often capitulated, with sequelae as follows: Our Indian policy had so far attained its objective by 1871, that it was enacted (16 Stat. 566) that the independence of Indian nations would no longer be recognized, and their right to treaty was repudiated.

"The Act of February 8, 1887 (24 Stat. 388), authorized the President to compulsorily allot limited acreage of reservations to individual Indians, to whom, after a trust period, would issue patent in fee 'free of all charge or incumbrance whatsoever,' (Section 5 (25 USCA S. 348)), and to negotiate the purchase of the excess lands; and likewise the Secretary of the Interior to prescribe rules for just distribution to Indians of water for irrigation. The care-free rovers of forests and plains were perforce to be transformed into toiling agriculturists, and yielding to the inevitable these unfortunate people sought to accommodate themselves to bureaucratic fashioning. Even prior to the Act of 1887 as well as thereafter, the Indians constructed ditches and applied water to the land, on this reservation as on others."

Scheer v. Moody, et al., 48 Fed. (2nd) 327, 328.

STATUS PERTAINING TO QUESTION (B)

In the light of what has already been said by way of citations, quotations and comment, it can readily be seen the status of the beaver would be in the same category as the Finley deer. Again we hold all Indian lands, other than patent in fee lands, whether allotted or unallotted, held separately or jointly, and all lands held for the use of the Indians, such as reservoir sites and similar lands, are subject to the exclusive jurisdiction of the United States government; all game fish, wild bird, game or fur-bearing animals, including beaver, killed, caught or captured thereon are Indian property; said beaver are not **protected by the laws of Montana.** The Indian has the right, under tribal regulations, to kill or capture beaver on the lands aforesaid. The Indian's possession would be legal and the

State of Montana has no claim or ownership therein, nor has the State jurisdiction over the same. Beaver caught, killed or captured on the lands aforesaid is not considered as beaver coming from without the state, but considered to be within the geographical limits of Montana.

Accompanying your letter of recent date, concerning the tagging of beaver, was a proposed ordinance which the tribal council of the Flathead Indian tribe wished to adopt; you are no doubt familiar with the proposed ordinance and know the contents thereof. It is a strict ordinance and—if properly enforced by the tribal council—it would appear to me all beaver could be properly identified. The State of Montana has no ownership in or claim to any beaver caught, killed or captured on the lands aforesaid and, outside the question of identification, should have no interest therein.

Section 3722 of the Revised Codes of Montana, 1935, insofar as pertinent here, provides:

> ". . . but no beaver skin or skins may be exported in any manner from the state without the shipper first obtaining an export or shipping permit from the state fish and game warden, which may be issued upon application showing the kind and number of the metal tags on said skins and the payment of a fee of fifty (50¢) for the permit of each shipment . . ."

The provisions of Section 3722, Revised Codes of Montana, 1935, Section 3730, 3731, and 3732, Revised Codes of Montana, 1935, and Section 3742, supra, are not applicable to beaver caught, killed or captured on the Indian lands aforesaid, save as to the possible exception of that part of Section 3722 hereinbefore quoted. Even under this provision the Fish and Game Warden should impose no greater restriction on the exportation of beaver coming from the reservation than that which would come from without the state.

Giving all these statutes a liberal construction in favor of the Indian, beaver coming from the Indian reservation lands, described as aforesaid, to be subsequently exported from the State of Montana should be properly tagged for the purpose of identification by the tribal council before leaving the reservation—and the shipper should obtain from the State Fish and Game Warden an export or shipping permit which may be issued on payment of the required fee therefor, i. e., 50¢, for the permit for each shipment.

By a long line of authorities, the supreme court of the United States has held statutes and treaties relating to Indian rights and Indian property are given a liberal construction by the courts in favor of the Indian.

State vs. Monroe, 83 Mont. 556, 274 Pac. 840;

Choate vs. Trapp, 224 U. S. 665, 56 L. Ed. 941, 32 Sup. Ct. Rep. 565;

Kansas Indians, 5 Wall 737, 760, 18 L. Ed. 667;

Jones vs. Meehan, 44 L. Ed. 49, Sup. Ct. Rep. 1;

Morrow vs. U. S., 243 Fed. 854, 157 C. C. A. 366;

Chase vs. United States, 222 Fed. 593, 138 C. C. A. 117.

STATUS PERTAINING TO QUESTION (C)

I am unable to find any statute of Montana law which would authorize the Fish and Game Commission to issue courtesy licenses or permits to the Indians as outlined under Question (C).

It is therefore my opinion the same is illegal.

STATUS PERTAINING TO QUESTION (D)

It is my opinion the Fish and Game Commission has no authority to employ an Indian or any other person as a deputy game warden to police an Indian reservation for state game law violations. As hereinbefore explained, the State of Montana has no jurisdiction over the fish and game on an Indian reservation. A state deputy game warden would have no

authority to make arrests of Indians violating tribal council ordinances pertaining to fish and game violations.

We come now to the following question:

Is an Indian prohibited from carrying firearms while off an Indian reservation?

Section 11314, Revised Codes of Montana, 1935, insofar as pertinent here, provides:

"Any Indian who while off, or away from, any Indian reservation carries or bears, or causes to be carried or borne by any member of any party with which he may travel or stop, any pistol, revolver, rifle, or other firearm, or any ammunition for any firearm, shall be guilty of a misdemeanor . . ."

This section was enacted as Section 1, Chapter 84, Laws of 1903, reenacted as Section 8590, Revised Codes of Montana, 1907, and again reenacted as Section 11314, Revised Codes of Montana, 1921.

The constitutionality of this section prior to June 2, 1924, is not pertinent here. However, we are concerned as to what effect, if any, Part 3, Section 601, 8, U. S. C. A., has upon the problem before us, which provides:

"All Indians born within the territorial limits of the United States are declared to be citizens of the United States. The granting of citizenship to Indians shall not in any manner affect the right of an Indian to tribal or other property. Every American Indian, who served in the military or naval establishments of the United States during the war against the Imperial German government, and who has received or may receive an honorable discharge, if not a citizen on November 6, 1919, and if he so desires, shall, on proof of such discharge and after proper identification before a court of competent jurisdiction, and without other examination, except as prescribed by said court, be granted full citizenship with all the privileges pertaining thereto, without in any manner impairing or otherwise affecting the property rights, individual or tribal, of such Indian, or his interest in tribal or other Indian property."

Section 13, Article III of the Constitution of Montana, provides:

"The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed firearms."

Section 11303, Revised Codes of Montana, 1935, provides:

"Every person who, without the limits of any city or town, carries or bears concealed upon his person a dirk, dagger, pistol, revolver, slingshot, swordcane, billy, knuckles made of any metal or hard substance, knife having a blade four inches or longer, razor, not including a safety razor not capable of being used as an ordinary razor, or other deadly weapon, shall be punished by imprisonment in the county jail for a term not less than six-months nor more than one year, or by a fine not less than twenty-five dollars nor more than three hundred dollars, or by both such fine and imprisonment."

The constitutional provision as well as this section was cited and applied in State vs. Hodge, 84 Mont. 24, 273 Pac. 1049, wherein the Court said among other things:

"A man has a right to bear a deadly weapon upon the open road if he conceal it not, and he has a right to bear it upon his own premises even if he conceal it."

The second amendment to the Constitution of the United States provides:

> "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

In re Brickey, 8 Idaho 597, 70 Pac. 609, the petitioner therein applied for a writ of habeas corpus, and in his petition set forth he was unlawfully imprisoned, confined and retrained of his liberty by A. W. Kroutinger, Sheriff of Nez Perce County, in the county jail in the County of Nez Perce and State of Idaho; that he was so imprisoned under a commitment in a criminal action wherein he was convicted upon the charge of carrying a deadly weapon within the limits and confines of the City of Lewiston, contrary to the provisions of the Idaho statute. From the petition and return, it appeared the only offense charged against the petitioner was that he carried a deadly weapon within the limits of the City of Lewiston in contravention of the Idaho Act. Quoting from this case, we find the following language:

> "'A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.'
>
> "The language of section 11, Art. 1, Const. Idaho, is as follows:
>
> "'The people have the right to bear arms for their security and defense, but the legislature shall regulate the exercise of this right by law.'
>
> "Under these constitutional provisions, the legislature has no power to prohibit a citizen from bearing arms in any portion of the state of Idaho whether within or without the corporate limits of cities, towns and villages. The legislature may as expressly provided in our state constitution, regulate the exercise of this right, but may not prohibit it. A statute prohibiting the carrying of concealed weapons would be a proper exercise of the police power of the state. But the statute in question does not prohibit the carrying of weapons concealed which is of itself a pernicious practice, but prohibits the carrying of them in any manner in cities, towns and villages. We are compelled to hold this statute void."

The Idaho statute is similar to the provisions of our Section 11303, Revised Codes of Montana, 1935. In the light of the Brickey case, supra, and what was said in State v. Hodge, supra, as well as the constitutional provisions cited here, we hold Section 11314, supra, is void; that all Indians born within the territorial limits of the United States are citizens of the United States and that an Indian, while off the reservation, is accorded all the rights and privileges of any other citizen and therefore may exercise his right to bear a firearm if he conceal it not. But this privilege must not be misconstrued or taken to mean an Indian or any other person living within the confines of this state can carry a **concealed weapon**, because this privilege can only be granted by a district judge, in accordance with the provisions of Section 11306, Revised Codes of Montana, 1935, which provides:

> "Any judge of a district court of this state may grant permission to carry or bear concealed or otherwise a pistol or revolver for a term not exceeding one year. All applications for such permission must be made by petition filed with the clerk of the district court, for the filing of which petition no charge shall be made. The applicant shall, if personally unknown to the Judge, furnish proof by a credible witness of his good moral character and peaceable disposition. No such permission shall be granted any person who is not a citizen of the United States and who has not been an actual bona fide resident of the state of Montana for six months immediately next preceding the date of such application. A record of permission granted

shall be kept by the clerk of the court, which record shall state the date of the application, the date of the permission, the name of the judge granting the permission, the name of the person, if any, by whom good moral character and peaceable disposition are proved, and which record must be signed by person who is granted such permission. The clerk shall thereupon issue under his hand and the seal of the court a certificate, in a convenient card form so that the same may be carried in the pocket. . . ."

All Indians born within the territorial limits of the United States are citizens of the United States. The Indian may enjoy hunting and fishing privileges off an Indian reservation equally with the white man, if he purchases the necessary Montana hunting and fishing license and pays the required fee therefor. It necessarily follows such licensed Indian may hunt his game with a firearm and not be required to compete with his white brother with his primitive weapon, the bow and arrow.

I therefore hold all Indians born within the territorial limits of the United States are citizens of the United States; that such an Indian while off an Indian reservation is accorded all the rights and privileges of any other citizen and therefore, may exercise his right to bear a firearm **if he conceal it not.**

Therefore, it is my opinion:

1. An allottee Indian who has obtained citizenship through being an allottee and has received patent in fee is subject to the civil and criminal laws of the state, but an allottee who has not obtained patent is still a ward of the Federal Government, although a citizen, and as such subject to the exclusive jurisdiction of the United States within the reservation.

2. If an Indian is not an allottee but is a member of an Indian tribe who has not adopted the habits of civilized life and maintains tribal relations under the supervision of an Indian agent, he is a ward of the Government and subject to federal jurisdiction for acts committed by him within the reservation.

3. If an act is committed by an Indian who is a ward of the Federal Government, upon land to which the United States has relinquished title, the state has jurisdiction to punish him for committing a misdemeanor not embraced within the jurisdiction of the United States.

4. Where an Indian to whom full citizenship and patent have been granted commits an offense against the penal statutes of the state, he may not defend against the power of the state to punish by asserting the offense was committed on land, title to which is in the United States.

5. A deer killed by an allottee Indian on an Indian reservation on land to which the government holds title is not considered as game protected by the laws of Montana, even though the same was killed within the geographical limits of Montana; said Indian's possession of said deer while off the reservation out of season in Montana does not violate any of the provisions of Montana's game laws.

6. All Indian lands, whether allotted or unallotted, held separately or jointly, and all land held for the use of the Indians, such as reservoir sites and similar lands, are subject to the exclusive jurisdiction of the United States government; all game fish, wild birds, game or fur-bearing animals, including beaver, killed, caught or captured thereon are Indian property; said beaver are not protected by the laws of Montana; the Indian under tribal ordinances may kill or capture said beaver on the lands aforesaid; the Indian's possession would be legal and the State of Montana has no claim or ownership therein, nor has the State jurisdiction over the same; beaver caught, killed or captured on any of the lands aforesaid is not considered as beaver

coming from without the state but considered to be within the geographical limits of Montana.

7. The Fish and Game Commission has no jurisdiction over the tagging of beaver caught, killed or captured on Indian lands hereinabove described.

8. The provisions of Sections 3722, 3730, 3731, 3732 and 3742, as amended by Chapter 22, Laws of 1941, are not applicable to beaver caught, killed or captured on the Indian lands aforesaid, save as to the possible exception of that part of Section 3722 noted in this opinion. Even under the provisions of Section 3722, as noted, the Fish and Game Warden should impose no greater restriction on the exportation of beaver caught, killed or captured on Indian lands within the reservation than would be imposed on beaver coming from without the state. If the skin or skins from beaver caught, killed or captured on Indian lands within an Indian reservation are properly tagged so as sufficiently to identify each said hide or hides, the Fish and Game Warden should grant an export or shipping permit to the shipper on his payment of the required fee, i. e., 50¢, for the permit of each shipment.

9. The Fish and Game Commission has no authority to issue courtesy hunting and fishing permits to Indians.

10. The Fish and Game Commission has no authority to employ an Indian or any other person as a deputy game warden to police Indian reservation land for state game law violations.

11. All Indians born within the territorial limits of the United States are citizens of the United States; an Indian may enjoy hunting and fishing privileges off an Indian reservation, equally with the white man, if he purchases the necessary Montana hunting and fishing license and pays the required fee therefor. It necessarily follows such licensed Indian may hunt his game with a firearm and not be required to compete with his white brother with his primitive weapon, the bow and arrow.

Sincerely yours,

JOHN W. BONNER
Attorney General