CHAPTER 23

SPECIAL LAWS RELATING TO OKLAHOMA

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The laws governing the Indians of Oklahoma are so voluminous that analysis of them would require a treatise in itself. In fact, two treatises have already been written on the subject,[1] and at least two more are in the course of preparation. No attempt, therefore, will be made in this volume to deal *in extenso* with this mass of legislation or with the thousands of state and federal cases in which that legislation is applied and construed. It must be recognized, however, that in many respects the statutes and legal principles discussed in other chapters of this work as generally applicable to Indians of the United States, also apply to Oklahoma Indians, while in other respects Oklahoma Indians, or certain groups thereof, are excluded from the scope of such statutes and legal principles. In order to clarify the scope of the laws, decisions, and rulings discussed in other chapters of this work, it is therefore deemed appropriate to survey the most important fields in which Oklahoma Indians have received distinctive treatment and which present distinctive legal problems.

These fields include enrollment, property laws affecting the Five Civilized Tribes, taxation, and, among the Osages, questions of head-rights, competency, wills, and leasing. In each field our effort will be to note how far principles generally applicable to Indians are applicable or inapplicable in Oklahoma, rather than to explore the distinctive problems of the various Oklahoma tribes, many of which are still unsettled by the courts.

Before proceeding to this survey, however, it is useful to pass over, in brief review, the historical background out of which the pecularities of Oklahoma Indian law emerge.

[1] Mills, Oklahoma Indian Land Laws (2d ed. 1924); Bledsoe, Indian Land Laws (2d ed. 1913).

SECTION 1. OKLAHOMA TRIBES

Reference is sometimes made to the Five Civilized Tribes (the Cherokees, Choctaws, Chickasaws, Creeks and Seminoles), and the Osages, as if they were the only tribes resident in the State of Oklahoma.[2] In fact, the Indian tribes residing in the state include also the Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo and Pottawatomi.[3]

Many general statutes are expressly made inapplicable to the Five Civilized Tribes[4] or the Osages[5] or to these nations and the Osages[6] or to all tribes in Oklahoma.[7] Congress has passed many special laws for Oklahoma tribes, especially for the Five Civilized Tribes and the Osages.[8]

[2] Former Commissioner of Indian Affairs Leupp cites a blunder by a Congressman who drafted an amendment which excepted from its operation "the Indians of the Indian Territory" out of which the State of Oklahoma was later carved, and of its passage by the House of Representatives in the belief that the Five Civilized Tribes were the only Indians in the Territory. Leupp, The Indian and His Problem (1910), p. 206.

[3] See Act of June 18, 1934, sec. 13, 48 Stat. 984, 986, which excluded from its provisions these tribes in the State of Oklahoma. The tribes in Oklahoma number not less than 100,000 members. (Hearings before the Comm. on Ind. Aff. on H. R. 6234, 74th Cong., 1st sess., 1935, p. 9.) There are 72,000 members of the Five Civilized Tribes, of whom about 28,000 are half to full-blood (*ibid.* p. 90). The Osages number over 3,300, of which about 650 are full-bloods (*ibid.* p. 113). The remaining Indians of Oklahoma number about 19,000, of which about 70 percent are of half or more Indian blood. (Hearings before the Comm. on Ind. Aff. on S. 2047, 74th Cong. 1st sess., 1935, p. 23.)

[4] Act of July 31, 1882, 22 Stat. 179, R. S. 2133, 25 U. S. C. 264; Act of January 6, 1883, 22 Stat. 400; Act of August 9, 1888, 25 Stat. 392, 25 U. S. C. 181.

[5] Act of June 24, 1938, sec. 1, 52 Stat 1037, 25 U. S. C. 162a.

[6] Act of June 25, 1910, sec. 33, 36 Stat. 855, 863, 25 U. S. C. 353; similarly, amendment by the Act of February 14, 1913, 37 Stat. 678, 679. Also see Act of June 30, 1919, sec. 1, 41 Stat. 3, 9, 25 U. S. C. 163, which is also inapplicable to the Chippewas of Minnesota and the Menominees of Wisconsin.

[7] Act of June 18, 1934, sec. 13, 48 Stat. 984, 988, 25 U. S. C. 473.

[8] See other sections of this chapter. On Five Civilized Tribes also see Act of March 1, 1907, 34 Stat. 1015, 1027, 25 U. S. C. 199; Act of May 24, 1922, 42 Stat. 552, 575, 25 U. S. C. 124. For an example of a special law applying to lesser known Oklahoma tribes see Act of June 30, 1919, sec. 17, 41 Stat. 3, 20, 25 U. S. C. 125 (Quapaw Agency).

SECTION 2. REMOVAL

Few of these tribes were indigenous to this part of the country. It was to Oklahoma, originally "Indian Territory," that Indians residing on lands desired for other purposes migrated or were moved by the United States Government.[9] Attorney General Daugherty [10] described the conditions under which the Five Civilized Tribes migrated to Oklahoma in the 1830's:

> When the southern portion of the United States, east of the Mississippi, was settled, the above-mentioned tribes [Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles] were occupying and claiming ownership of all that territory.
>
> By treaty and the use of a degree of force in instances, the tribes agreed to take up their abode farther west, out of the way of the white man, on the land that was afterward designated as Indian Territory. It was a part of the consideration for the removal that they should possess the said land unmolested forever as an independent people with their own forms of government and should not in all future time be embarrassed by having extended around them the lines of, or by having placed over them the jurisdiction of a Territory or State, or by being encroached upon by the extension in any way of the limits of an existing Territory or State.

The westward migration of these and other tribes has been considered elsewhere.[11]

[9] See Chapter 3, sec. 4. Tribes were moved to Oklahoma from the Atlantic seaboard, many portions of the Middle West, and even as far north as western New York. (Hearings before the Comm. on Ind. Aff., on H. R. 6234, 74th Cong., 1st sess., 1935, p. 9.) The Attorney General said:

> The Cherokees were among the most powerful of the aboriginal nations, and occupied the principal part of the country now comprising the States of North and South Carolina, Georgia, Alabama, and Tennessee. It was as the result of several treaties that they relinquished that great domain and were finally seated in comparatively limited territory now occupied by them, and which was accepted by them as an exchange for the territory they had abandoned and ceded to the United States.
>
> The territory thus accepted, the United States, by repeated treaties, pledges its faith shall be a "permanent home" (treaty 28 May, 1828, preamble, 7 Stat., 311) to the Cherokees, and "be and remain theirs forever" (*ibid*), and guaranties them "the quiet and peaceable possession of their country," and that it shall be conveyed to them by patent subject to the single condition that the lands ceded shall "revert to the United States" in case the Indian grantees shall become extinct or shall abandon them. (Treaty 12th April, 1834, 7 Stat. 414; act 28 May, 1830, sec. 3, 4 Stat., 411.) (Cited in 19 Op. A. G. 42, 43–44 (1887).)

[10] 34 Op. A. G. 275 (1924). On the history of the Cherokee removal see 5 Op. A. G. 320 (1851); *Holden v. Joy*, 17 Wall. 211 (1872). Kinney, A Continent Lost—A Civilization Won (1937), pp. 27–80, discusses the agitation for the removal of Indians. Schmeckebier, The Office of Indian Affairs, Its History, Activities and Organization (1927), pp. 99–142, discusses the history of the Five Civilized Tribes, Indian Territory and Oklahoma. On removal of Indians to Oklahoma, see also *ibid.*, pp. 28–38. And see Foreman, Indian Removal, The Emigration of the Five Civilized Tribes of Indians (1932); Lumpkin, Removal of the Cherokee Indians from Georgia (1907).

[11] Chapter 3, sec. 4E, and Chapter 15, sec. 6.

SECTION 3. SELF-GOVERNMENT [12]

Various guarantees of tribal self-government and of territorial integrity were made to induce the Indians to sign "removal" treaties. The Supreme Court in the case of *Atlantic and Pacific Railroad Company* v. *Mingus* [13] described some of the guarantees:

> * * * a reference to some of the treaties, under which it [the Indian Territory] is held by the Indians, indicates that it stands in an entirely different relation to the United States from other Territories, and that for most purposes it is to be considered as an independent country. Thus in the treaty of December 29, 1835, 7 Stat. 478, with the Cherokees, whereby the United States granted and conveyed by patent to the Cherokees a portion of this territory, the United States, in article 5, convenanted and agreed that the land ceded to the Cherokees should "in no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory"; and by further treaty of August 16, 1846, 9 Stat. 871, provided (Art. 1) "that the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit, and a patent shall be issued for the same." So, too, by treaty with the Choctaws of September 27, 1830, 7 Stat. 333, granting a portion of the Indian Territory to them, the United States (Art. 4) secured to the "Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have the right to pass laws for the government of the Choctaw Nation of Red People and their descendants, and that no part of the land granted shall ever be embraced in any Territory or State; but the United States shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own national councils, not inconsistent," etc. And in a treaty of March 24, 1832, 7 Stat. 366, with the Creeks (Art. 14), the Creek country west of the Mississippi was solemnly guaranteed to these Indians, "nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them."
>
> Under the guaranties of these and other similar treaties the Indians have proceeded to establish and carry on independent governments of their own, enacting and executing their own laws, punishing their own criminals, appointing their own officers, raising and expending their own revenues. Their position, as early as 1855, is indicated by the following extract from the opinion of this court in *Mackey* v. *Cox*, 18 How. 100, 103:
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> > "A question has been suggested whether the Cherokee people should be considered or treated as a foreign state or territory. The fact that they are under the Constitution of the Union, and subject to acts of Congress regulating trade, is a sufficient answer to the suggestion. They are not only within our jurisdiction, but the faith of the nation is pledged for their protection. In some respects they bear the same relation to the Federal Government as a Territory did in its second grade of Government under the ordinance of 1787. Such Territory passed its own laws, subject to the approval of Congress, and its inhabitants were subject to the Constitution and acts of Congress. The principal difference consists in the fact that the Cherokees enact their own laws, under the restriction stated, appoint their own officers, and pay their own expenses. This, however, is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other Territories in the Union. It is not a foreign, but a domestic territory—a Territory which orignated under our Constitution and laws."
>
> Similar language is used with reference to these Indians in *Holden* v. *Joy*, 17 Wall. 211, 242. * * * (Pp. 435–437)

[12] See Chapter 7, and Chapter 9, sec. 5A and B.

[13] 165 U. S. 413 (1897).

Practically all of the Oklahoma tribes were well organized when they moved to the Indian Territory, and in the new land.

> * * * They maintained complete governments; particularly in the East, five tribe areas; they had their own schools, their own legislative assemblies, their own courts. And they did the job well. Under all the conditions they made a record which would have been creditable to any municipality or State in this country.[14]

Certain of the Five Civilized Tribes adopted the political forms of the white world,[15] and administrative rulings and opinions have frequently upheld their power of self-government.[16]

[14] Hearings before the Comm. on Ind. Aff., on S. 2047, 74th Cong., 1st sess., 1935, p. 10. With the exception of the Seminoles, all the Five Civilized Tribes had written and printed constitutions and laws. Schmeckebier, The Office of Indian Affairs, Its History, Activities and Organization (1927), p. 127. But see Leupp, The Indian and His Problem (1910), p. 332.

[15] J. Collier, 4 Indians at Work No. 21 (June 15, 1937), p. 1.

[16] A few opinions exemplify this view.

The Attorney General in advising the Secretary of the Treasury that a national bank cannot lawfully be established at Muscogee, a town in the territory of the Creek Nations, said:

> The right of the Creek Nation to govern itself, so carefully guarded and protected by these treaties, is a right founded on a consideration of great value, moving directly from the Creek Nation to the United States, and the faith of the latter is pledged for the protection of the Creeks in all the rights secured to them by the treaties mentioned. (19 Op. A. G. 342, 344 (1889).)

The Supreme Court in *Turner* v. *United States*, 248 U. S. 354 (1919), said:

> The Creek or Muskogee Nation or Tribe of Indians had, in 1890, a population of 15,000. Subject to the control of Congress, they then exercised within a defined territory the powers of a sovereign people; having a tribal organization, their own system of laws, and a government with the usual branches, executive, legislative, and judicial. The territory was divided into six districts; and each district was provided with a judge. (Pp. 354–355.)

The Supreme Court in the case of *Marlin* v. *Lewallen*, 276 U. S. 58, 60–61 (1928), said:

> For many years the Creeks maintained a government of their own, with executive legislative and judicial branches. They were located in the Indian Territory and occupied a large district which belonged to the tribe as a community, not to the members severally or as tenants in common. The situation was the same with the Cherokees, Choctaws, Chickashaws and Seminoles, who with the Creeks were known as the five civilized tribes. All were under the guardianship of the United States and within territory over which it had plenary jurisdiction, thus enabling it to exercise full control over them and their districts whenever it perceived a need therefor. [*Stephens* v. *Cherokee Nation*, 174 U. S. 445, 483, et seq.; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 305, et seq.] In the beginning and for a long period, during which the districts were widely separated from white communities, the United States refrained in the main from exerting its power of control and left much to the tribal governments. Accordingly the tribes framed and put in force various laws which they regarded as adapted to their situations, including laws purporting to regulate descent and distribution [Bledsoe's Indian Land Laws, 2d ed., pp. 640–643] and to exclude persons who were not members from sharing in tribal lands or funds. [Perryman's Creek Laws 1890, c. 7; McKellop's Creek Laws 1893, c. 22; Cherokee Intermarriage Cases, 203 U. S. 76.]

The Supreme Court in the case of *Morris* v. *Hitchcock*, 194 U. S. 384, 388–389 (1904), *per* Mr. Justice White, said:

> While it is unquestioned that by the Constitution of the United States Congress is vested with paramount power to regulate commerce with the Indian tribes, yet it is also undoubted that in treaties entered into with the Chickasaw Nation, the right of that tribe to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders has been sanctioned, and the duty of the United States to protect the Indians "from aggression by other Indians and white persons, not subject to their jurisdiction and laws," has also been recognized. Arts. 7 and 14, Treaty June 22, 1855, 11 Stat. 611; Art. 8, Treaty April 28, 1866, 14 Stat. 769. And it is not disputed that under the authority of these treaties the Chickasaw Nation has exercised the power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory.

Also see brief submitted by Commissioner of Indian Affairs relating to power of Congress over Indians—Hearings before the Comm. on Ind. Aff., United States Senate, 73d Congress, 2d sess., on S. 2755 and S. 3645, pt. 2 (1934), pp. 268, 269–270; 18 Op. A. G. 34 (1884); Treaty of June 14, 1866, Art. X, 14 Stat. 785, 788; Reports of the Comm. of Ind. Aff. (1888), pp. 113, 114; (1889), p. 202; (1890), pp. 89, 90; (1891), vol. I, pp. 240–241.

Excerpts from the constitution of the Cherokees, are contained in *Cherokee Nation* v. *Journeycake*, 155 U. S. 196 (1894). For a decision holding that certain lands were "occupied" by the Cherokee Nation for the purpose of criminal and taxing jurisdiction see *United States* v. *Rogers*, 23 Fed. 658 (D. C. W. D. Ark., 1885). In executing treaties, the view of the United States, and not of the Cherokee council governs federal action. 16 Op. A. G. 404 (1879).

SECTION 4. GOVERNMENT OF INDIAN TERRITORY

As a result of the adherence of the Five Civilized Tribes to the Confederacy during the Civil War, the President of the United States was empowered to abrogate existing treaties with these Indians.[17] Accordingly during 1866 new treaties were negotiated with each of the tribes.[18] For the purpose of forming a federated Indian government of the tribes, certain identical provisions were inserted in each treaty.[19] Though the plan failed to materialize,[20] the territory intended to be thus organized became known as the Indian Territory.[21]

Soon it was apparent that the seclusion and isolation which the Indians sought was to be disturbed. Land-hungry whites overflowed into the Indian Territory and reached about a quarter of a million at the beginning of the last decade of the nineteenth century.[22] Despite treaty obligations, many whites strongly desired to substitute their own methods of government for those of the tribes. In part this was due to the fact that Indian laws and courts had no jurisdiction over the white settlers[23] and the Indian Territory became the refuge for criminals from neighboring states. By the Act of May 2, 1890,[24] a portion of the Indian Territory was created into the Territory of Oklahoma. This act provided that until after the adjournment of the first territorial assembly the provisions of the compiled laws of Nebraska with respect to probate courts and decedents, so far as locally applicable and consistent with the laws of the United States and that act, should be in force in the Territory of Oklahoma. The act also provided that as to the portion of the former Indian Territory comprising the lands of the Five Civilized Tribes, and lands occupied by other tribes and certain other lands described in the act, the laws of Arkansas, as published in Mansfield's Digest for 1884, including descent and distribution, should be operative therein until Congress should otherwise provide, insofar as those laws were not locally in

[17] Act of July 5, 1862, 12 Stat. 512, 528.

[18] For further details, see Chapter 3, sec. 4; Chapter 8, sec. 11; provisions in some of the treaties for the removal by the United States Government of freedmen from the Indian Territory were not fulfilled (The Chickasaw Freedmen, 193 U. S. 115, 126 (1904)); and provisions for the granting of tribal membership and other rights to freedmen were often not complied with by the tribe or completed after a long delay. See Wardwell, A Political History of the Cherokee Nation (1938), p. 331. The history of the litigation and legislation regarding the freedmen of the Cherokee Nation is discussed in *Choctaw and Chickasaw Nations* v. *United States*, 81 C. Cls. 63 (1935), which cites many leading cases. Also see *Keetoowah Society* v. *Lane*, 41 App. D. C. 319 (1914).

[19] See Mills, *op. cit.*, pp. 2–3.

[20] *Ibid.*, p. 3.

[21] *Ibid.* The reduced Indian Territory after the separation of Oklahoma Territory was described by metes and bounds in the Act of May 2, 1890, sec. 29, 26 Stat. 81, 93. Also see Chapter 1, sec. 3.

[22] 34 Op. A. G. 275 (1924).

[23] See *Leak Glove Manuf'g. Co.* v. *Needles* 69 Fed. 68 (C. C. A. 8, 1895).

[24] 26 Stat. 81. For a discussion of the provisions of this law relating to courts, see Chapter 18, sec. 4 and Chapter 19, secs. 2B and 6.

applicable nor in conflict with any law of Congress or the provisions of the act.

Under the provisions of this act, the legislature of the Territory of Oklahoma during its first session, which expired on December 24, 1890, passed laws of descent or succession, which became effective on that date. Concerning the laws of that portion of the Indian Territory which continued to be so designated, Assistant Attorney General for the Interior Department, later Associate Justice of the Supreme Court of the United States, Van Devanter, in an opinion dated October 15, 1898, after pointing out that the laws of descent and distribution of Arkansas were in conflict with the provisions of the General Allotment Act referred to above, held that such laws, under the 1890 Act were "inapplicable" to the estates of Indian allottees in the Indian Territory and therefore that the laws of Kansas, as provided in the General Allotment Act did not apply to the Quapaw tribe. The Arkansas law, under the Act of 1890 applied to the Indians of that tribe. After this preliminary legislation, in 1893 Congress inaugurated a policy of terminating the tribal existence and government of the Five Civilized Tribes and allotting their lands in severalty.[25] Agreements were negotiated by the Dawes Commission with each of the tribes in order to carry out these objectives.[26] The Supreme Court has described this condition and the resulting legislation in the case of *Marlin* v. *Lewallen*:[27]

> In time the tribes came, through advancing settlements, to be surrounded by a large and increasing white population, many of the whites entering their districts and living there—some as tenant farmers, stock growers and merchants, and others as mere adventurers. The United States then perceived a need for making a larger use of its powers. [*Heckman* v. *United States*, 224 U. S. 413, 431–435; *Sizemore* v. *Brady*, 235 U. S. 441, 446.] What it did in that regard has a bearing on the questions before stated. (P. 61)
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> By an act of March 1, 1889, c. 333, 25 Stat. 783, a special court was established for the Indian Territory and given jurisdiction of many offenses against the United States and of certain civil cases where not wholly between persons of Indian blood. By an act of May 2, 1890, c. 182, §§ 29–31, 26 Stat. 93, that jurisdiction was enlarged and several general statutes of the State of Arkansas, published in Mansfield's Digest, were put in force in the Territory so far as not locally inapplicable or in conflict with laws of Congress; but these provisions were restricted by others to the effect that the courts of each tribe should retain exclusive jurisdiction of all cases wholly between members of the tribe, and that the adopted Arkansas statutes should not apply to such cases. By an act of March 3, 1893, c. 209, § 16, 27 Stat. 645, a commission to the five civilized tribes was created and specially authorized to conduct negotiations with each of the tribes looking to the allotment of a part of its lands among its members, to some appropriate disposal of the remaining lands and to further adjustments preparatory to the dissolution of the tribe. By an act of June 7, 1897, c. 3, 30 Stat. 83–84, the special court was given exclusive jurisdiction of all future cases, civil and criminal, and the laws of the United States and the State of Arkansas in force in the Territory were made applicable to "all persons therein, irrespective of race," but with the qualification that any agreement negotiated by the commission with any of the five civilized tribes, when ratified, should supersede as to such tribe any conflicting provision in the act. By an act of June 28, 1898, c. 517, §§ 26 and 28, 30 Stat. 495, the enforcement of tribal laws in the special court was forbidden and the tribal courts were abolished.
>
> Thus the congressional enactments gradually came to the point where they displaced the tribal laws and put in force in the Territory a body of laws adopted from the statutes of Arkansas and intended to reach Indians as well as white persons, except as they might be inapplicable in particular situations or might be superseded as to any of the five civilized tribes by future agreements. (Pp. 61–62.)

By the Act of April 28, 1904,[28] it was provided that:

> All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said Territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise. * * *

[25] Act of March 3, 1893, sec. 16, 27 Stat. 612, 645.

[26] See *Ex parte Webb*, 225 U. S. 663 (1912).

[27] 276 U. S. 58 (1928). The court established in 1889 had jurisdiction of all offenses committed in the Indian Territory against any of the laws of the United States, not punishable with death or imprisonment at hard labor. On the offenses covered, see *In re Mills*, 135 U. S. 263 (1890); *In re Mayfield, Petitioner*, 141 U. S. 107, 114 (1891). The court also possessed jurisdiction over all civil controversies where the amount involved was $100 or more, except where both parties were members of Indian tribes.

As to what constitutes a marriage under the laws or tribal customs of any Indian nation within the meaning of the Act of May 2, 1890, c. 182, sec. 38, 26 Stat. 81, 98, see *Carney* v. *Chapman*, 247 U. S. 102 (1918). In *Leak Glove Manufacturing Co.* v. *Needles*, 69 Fed. 68 (C. C. A. 8, 1895), the Circuit Court of Appeals, in interpreting the Act of May 2, 1890, sec. 29, 26 Stat. 81, 93, said:

> * * * Section 3061 of Mansfield's Digest is the law of the Indian Territory, just as much as if it had been enacted by congress in haec verba. It is a mistake to suppose that chapter 60, containing the section in question, is to be treated in the Indian Territory as an Arkansas statute, as would be the case if a question should arise under it in the circuit court of the United States for the district of Arkansas. * * * The act of congress adopting an entire code of laws for the Indian Territory is not to receive the limited and restricted construction placed upon the process acts (section 914, Rev. St.), which merely required the circuit courts to conform the practice and pleadings in those courts to the practice and pleadings in the state courts "as near as may be." * * * (Pp. 69-70.)

Also see *Adkins* v. *Arnold*, 235 U. S. 417 (1914); *Joines* v. *Patterson*, 274 U. S. 544 (1927); *Sanger* v. *Flow*, 48 Fed. 152 (C. C. A. 8, 1891); *Blaylock* v. *Incorporated Town of Muskogee*, 117 Fed. 125 (C. C. A. 8, 1902).

For a detailed account of the history of the courts see *Ansley* v. *Ainsworth*, 180 U. S. 253 (1901).

For other cases interpreting this law see *United States* v. *Pridgeon*, 153 U. S. 48 (1894); *Alberty* v. *United States*, 162 U. S. 499 (1896); *Raymond* v. *Raymond*, 83 Fed. 721 (C. C. A. 8, 1897); *McCullough* v. *Smith*, 243 Fed. 823 (C. C. A. 8, 1917). The statute did not empower the court to entertain an action against the Choctaw Nation. *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372 (C. C. A. 8, 1895); nor repeal the Act of February 18, 1888 (25 Stat. 35). *Gowen* v. *Harley*, 56 Fed. 973 (C. C. A. 8, 1899). For an analysis of what cases might be considered in exclusive jurisdiction of the tribal court, see *Crabtree* v. *Madden*, 54 Fed. 426 (C. C. A. 8, 1893).

[28] 33 Stat. 573, sec. 2.

SECTION 5. STATEHOOD

The virtual dissolution of the tribal governments in the Indian Territory cleared the way for the creation of another state. Accordingly on June 16, 1906,[29] an act was passed making possible the admission into the Union of both Indian Territory and Oklahoma Territory as the State of Oklahoma. This so-called enabling act has been well summarized by the Supreme Court in *Jefferson* v. *Fink*:[30]

> By the enabling act of June 16, 1906, c. 3335, 34 Stat. 267, provision was made for admitting into the Union

[29] Act of June 16, 1906, 34 Stat. 267.

[30] 247 U. S. 288, 292 (1918).

At the time of the enabling act there was a large population of Indians in the Indian Territory, but a much larger population of whites.

both the Territory of Oklahoma and the Indian Territory as the State of Oklahoma. Each Territory had a distinct body of local laws. Those in the Indian Territory, as we have seen, had been put in force there by Congress. Those in the Territory of Oklahoma had been enacted by the territorial legislature. Deeming it better that the new State should come into the Union with a body of laws applying with practical uniformity throughout the State, Congress provided in the enabling act (§ 13) that "the laws in force in the *Territory of Oklahoma*, as far as applicable, shall *extend over and apply to said State* until changed by the legislature thereof," and also (§ 21) that "all laws in force in the *Territory of Oklahoma* at the time of the admission of said State into the Union shall be in force *throughout said State*, except as modified or changed by this act or by the constitution of the State." The people of the State, taking the same view, provided in their constitution (Art. 25, § 2) that "all laws in force in the *Territory of Oklahoma* at the time of the admission of the State into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be *extended to and remain in force in the State of Oklahoma* until they expire by their own limitation or are altered or repealed by law." (Pp. 292–293.)

It should be noted that the act expressly provides that federal authority over the Indians should in no way be impaired; nor should the property rights of the Indians be limited.[31]

On November 16, 1907, the Territory of Oklahoma and the Indian Territory were admitted into the Union as the State of Oklahoma under the enabling act passed by Congress on June 16, 1906,[32] as amended by the Act of March 4, 1907.[33] The enabling act and the constitution of the new state united in declaring that, with certain exceptions, not material here, "the laws in force in the Territory of Oklahoma" at the time of the state's admission should be in force throughout the state and that the "courts of original jurisdiction of such State" should be the successors of "all courts of original jurisdiction of said Territories." The laws of the Territory of Oklahoma which were thus put in force "throughout" the new state included comprehensive provisions for the administration of estates of decedents, the appointment of guardians of minors and incompetents, and the management and sale of their property. In the territory of Oklahoma this jurisdiction was vested in probate courts and by the constitution of the new state that jurisdiction was committed to the county courts.[34]

The general condition existing in the State of Oklahoma at the time of its admission to the Union has been described as follows:[35]

> Oklahoma, with 1,500,000 population, became a State on November 16, 1907, upon a pledge contained in her constitution that she would never question the jurisdiction of the Federal Government over the Indians and their lands or its power to legislate by law or regulation concerning their rights or property. Immediately she had a delegation in Congress and at once began a determined campaign for further repeal of the laws enacted for the protection of the Indians. The main argument employed was that the Indians were competent to care for their property and needed no legislative protection against improvidence; that the State could be trusted to afford them all the protection they required and that Federal guardianship and supervision should cease, as an interference with the personal privileges and rights of citizens of Oklahoma. * * *
>
> This fight * * * resulted in the enactment of a law on May 27, 1908, effective July 27, 1908, repealing the restrictions on the sale of a large class of land, including all homesteads of freedmen and of mixed bloods of less than half blood, freeing from restrictions all told over 9,720,000 acres. It provided also that all homesteads, as well as all lands from which restrictions against sale were removed, should become taxable the same as lands of white people, whether sold by the allottee or not. This late act violated the terms of the agreement made with the Indians under which the homesteads of the Creeks and the allotments, or parts thereof, of the Choctaw and other tribes were exempted from taxation for a given period. (The American Indian, by Warren K. Moorehead, the Andover Press, Andover, Mass., p. 142.)

Joplin Mercantile Co. v. *United States*, 236 U. S. 531, 544–545 (1915). Under section 14 of the Curtis Act of June 28, 1898, 30 Stat. 495, 499, towns had been organized and were growing rapidly, and much of the land had been allotted.

> The requirement by Congress and the acceptance by the State that "every member of any Indian nation or tribe located within the State should be permitted to participate in the organization and conduct of the government of the state" conferred upon all such Indians citizenship in the state and in the United States.
>
> Allotments to the members of the various Indian tribes in Oklahoma had been substantially completed at the time of the admission of Oklahoma to statehood. * * * (Bledsoe, Indian Land Laws, (2d ed., 1913), p. 37.)

[31] Under secs. 16 and 20 of the Oklahoma Enabling Act the state took the place of the United States in regard to a prosecution for adultery, commenced in Indian Territory in one of the temporary courts of the United States, and all essential parts of the prosecution passed to the state. *Southern Surety Co.* v. *Okla.*, 241 U. S. 582 (1916).

[32] 34 Stat. 267.

[33] 34 Stat. 1286.

[34] See *Stewart* v. *Keyes*, 295 U. S. 403 (1935), pet. for rehearing den., 296 U. S. 661 (1935).

[35] Quoted from Hearings before the Comm. on Ind. Aff., House of Representatives, 74th Cong., 1st sess., on H. R. 6234 (1935), pp. 71–72.

SECTION 6. TERMINATION OF TRIBAL GOVERNMENT—FIVE CIVILIZED TRIBES

The Commission to the Five Civilized Tribes, first known as the Dawes Commission, prepared the groundwork for the termination of the tribes by procuring agreements with the several nations relative to the allotment of their lands.[36] Commissioner Collier has said:[37]

> * * * the time came when the pressure of white population made inevitable a break-up of the Indian territory, a break-up of the Indian ownership of that vast domain. That break-up was sought through allotting the land in severalty. In addition the tribal governments were practically abolished by statute. And the tribal treasures were amalgamated with the United States Treasury, but the fundamental technique was allotting the lands in severalty and that was done and at various times restrictions were lifted and methods were applied in various parts of the State different from those applied to the tribes in the West. And there grew up roughly two bodies of Indian law, one affecting the five tribes and largely the Osages, the other affecting the tribes of the West, and who had mostly come from the plains area.

The termination of the tribal governments is described by Ex-Commissioner of Indian Affairs Leupp:[38]

> * * * by successive acts of Congress the Five Civilized Tribes were shorn of their governmental functions; their courts were abolished and United States courts established; their chief executive officers were made subject to removal by the President, who was authorized to fill

[36] See sec. 8. The work of this commission is described in 34 Op. A. G. 275 (1924), and in *Woodward* v. *DeGraffenried*, 238 U. S. 284 (1915).

[37] Hearings before the Sen. Comm. on Ind. Aff., United States Senate, 74th Cong., 1st sess., on S. 2047, 1935, pp. 10–11. Also see secs. 4–5.

[38] The Indian and His Problem (1910). It should be noted that the termination of tribal government was finally effectuated by agreements with the interested tribes. See secs. 8A–8D.

> by appointment the vacancies thus created; provision was made for the supersession of their tribal schools by a public school system maintained by general taxation; their tribal taxes were abolished; the sale of their public buildings and lands was ordered; their legislatures were forbidden to remain in session more than thirty days in any one year; and every legislative act, ordinance and resolution was declared invalid unless it received the approval of the President. The only present shadow or fiction of the survival of the tribes as tribes is their grudging recognition till all their property, or the proceeds thereof, can be distributed among the individual members. As one of the federal judges has summed it up, this is "a continuance of the tribes in mere legal effect, just as in many States corporations are continued as legal entities after they have ceased to do business and are practically dissolved, for the purpose of winding up their affairs." (Pp. 336–337.)

The Act of June 28, 1898,[39] commonly known as the Curtis Act, abolished tribal courts[40] and declared Indian law unenforceable in federal courts.[41] The Supreme Court in the case of *Morris* v. *Hitchcock*[42] explained the purpose of the Curtis Act in regard to one of the Five Civilized Tribes:

> Viewing the Curtis Act in the light of the previous decisions of this court and the dealings between the Chickasaws and the United States, we are of opinion that one of the objects occasioning the adoption of that act by Congress, having in view the peace and welfare of the Chickasaws, was to permit the continued exercise, by the legislative body of the tribe, of such a power as is here complained of, subject to a veto power in the President over such legislation as a preventive of arbitrary and injudicious action. (P. 393.)

By agreement,[43] or statute,[44] provisions were made for the termination of the tribal governments by March 4, 1906, at the latest. It was thought that by that time the tribal land would be allotted. However, the necessity for the continuance of the tribes became apparent before the date set for their demise and the Joint Resolution of March 2, 1906,[45] provided for the continuance of tribal existence and government of these tribes until the distribution of the tribal property "unless hereafter otherwise provided by law." The next month a comprehensive law was passed covering all the tribes.

The Act of April 26, 1906,[46] provided for the final disposition of the affairs of the Five Civilized Tribes. It provided for the completion by the Secretary of the Interior of the enrollments of the tribal members, one set comprising the freedmen and the second the remaining members. It empowered the President of the United States to remove the principal chief of the Choctaw, Cherokee, Creek, or Seminole tribe, or the governor of the Chickasaw tribe for failure to perform his duties, and to "fill any vacancy arising from removal, disability or death of the incumbent, by appointment of a citizen by blood of the tribe." The Secretary of the Interior was granted considerable power in regard to tribal affairs including control of tribal schools,[47] the collection of tribal revenues,[48] and funds,[49] sale of certain tribal lands, buildings and other property of the tribes,[50] and the per capita distribution of tribal funds.[51] Section 27 provided that the lands of the Five Civilized Tribes upon their dissolution "shall be held in trust by the United States for the use and benefit of the Indians" of each of the tribes "and their heirs" as shown by the final rolls.

Section 28 provided for the continuance of tribal existence and the present tribal governments with limited powers. Their actions were made subject to the approval of the President of the United States.[52]

Mr. Justice Van Devanter in the case of *Southern Surety Company* v. *Oklahoma*[53] described the formation of the State of Oklahoma and contrasted it with the previous government of the Territory by Congress:

> By reason of the conditions arising out of the presence of the Five Civilized Tribes no organized territorial government was ever established in the Indian Territory. Up to the time it became a part of the State of Oklahoma it was governed under the immediate direction of Congress, which legislated for it in respect of many matters of local or domestic concern which in a State are regulated by the state legislature, and also applied to it many laws dealing with subjects which under the Constitution are within Federal rather than state control. In what was done Congress did not contemplate that this situation should be of long duration, but on the contrary that the Territory should be prepared for early inclusion in a State. Courts designated as "United States courts" were temporarily established and invested with a considerable measure of civil and criminal jurisdiction, and there was also provision for beginning public prosecutions before subordinate magistrates. There being no organized local government, such prosecutions, regardless of their nature, were commenced and conducted in the name of the United States, and in taking bail bonds it was named as the obligee.
>
> The Enabling Act, June 16, 1906, c. 3335, 34 Stat. 267; March 4, 1907, c. 2911, *ibid.* 1286, provided that the new State should embrace the Indian Territory as well as the Territory of Oklahoma. It contemplated that the State, by its constitution, would establish a system of courts of its own, and provided for dividing the State into two districts and creating therein United States courts like those in other States. The temporary courts were to go out of existence and this made it necessary to provide for the disposition of the business pending before them in various stages. (Pp. 584–585.)

[39] 30 Stat. 495. The constitutionality of this act was upheld in *Stephens* v. *Cherokee Nation*, 174 U. S. 445 (1899); *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294 (1902).

[40] Sec. 28.

[41] Sec. 26.

[42] 194 U. S. 384 (1904).

[43] Choctaw-Chickasaw Agreement in the Act of June 28, 1898, 30 Stat. 495, 512; Creek Agreement of March 1, 1901, par. 46, 31 Stat. 861, 872; Cherokee Agreement in the Act of July 1, 1902, sec. 63, 32 Stat. 716, 725.

[44] Act of March 3, 1903, sec. 8 (Seminole), 32 Stat. 982, 1008.

[45] 34 Stat. 822.

[46] 34 Stat. 137.

[47] Sec. 10.

[48] Sec. 11.

[49] Sec. 18.

[50] Secs. 12 and 15.

[51] Sec. 17.

[52] For examples see statement of D. H. Johnston, Governor of the Chickasaw Nation, relating to tribal affairs, Pt. 14, Survey of Indians in the United States (1931), pp. 5352–5365, and of Ben Dwight, Chief of the Choctaws, *ibid.*, pp. 5371–5389.

[53] 241 U. S. 582 (1916).

SECTION 7. ENROLLMENT—FIVE CIVILIZED TRIBES

The general policy of the Federal Government for a number of years had been to bring about the allotment in severalty of tribal property with certain restrictions upon alienation, and to confer citizenship, state and national, upon allottees.[54] The Dawes Commission, appointed by virtue of the Act of March 3, 1893,[55] had undertaken to negotiate with the Five Civilized Tribes for just such a purpose. However, after three years of attempt-

[54] See Chapter 3, sec. 4G; Chapter 4, sec. 11; Chapter 11, sec. 1.

[55] Act of March 3, 1893, 27 Stat. 612, 645, supplemented by Act of March 2, 1895, 28 Stat. 910, 939.

ing to reach agreements with the Indians which would provide for allotment in severalty, Congress despaired of receiving voluntary action and directed the Commission, in the following paragraphs of the Act of June 10, 1896,[56] to prepare rolls of the tribes:

> That said commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled: *Provided, however*, That such application shall be made to such Commissioners within three months after the passage of this Act. The said commission shall decide all such applications within ninety days after the same shall be made. That in determining all such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes: *And provided further*, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this Act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.
>
> In the performance of such duties said commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: *Provided*, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this Act, it or he may appeal from such decision to the United States district court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final.
>
> That the said commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this Act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribe, subject, however, to the determination of the United States courts, as provided herein.
>
> The commission is hereby required to file the lists of members as they finally approve them with the Commissioner of Indian Affairs to remain there for use as the final judgment of the duly constituted authorities. And said commission shall also make a roll of freedmen entitled to citizenship in said tribes and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs. And said commission is further authorized and directed to make a full report to Congress of leases, tribal and individual, with the area, amount and value of the property leased and the amount received therefor, and by whom and from whom said property is leased, and is further directed to make a full and detailed report as to the excessive holdings of members of said tribes and others.
>
> It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory and afford needful protection to the lives and property of all citizens and residents thereof.

The following further provisions regarding enrollment were made the next year in the Act of June 7, 1897:[57]

> That said commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this Act if in conflict therewith as to said nation: *Provided*, That the words "rolls of citizenship," as used in the Act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the commission under the Act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such commission for a period of six months after the passage of this Act. And any name appearing on such rolls and not confirmed by the Act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such commission where the party affected shall have ten days previous notice that said commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation: *Provided, also*, That any one whose name shall be stricken from the roll by such commission shall have the right of appeal, as provided in the Act of June tenth, eighteen hundred and ninety-six.

The determination of Congress to proceed with allotment without the consent of the tribes found expression in the Act of June 28, 1898,[58] commonly called the Curtis Act.[59] This act contained elaborate stipulations regarding enrollment, providing for two rolls for each of the Civilized Tribes, one tracing rights through former slaves, called the Freedmen roll; the other tracing such rights through Indian blood, called the Indian roll,[60] for making the rolls descriptive of the persons thereon[61] and for making them "alone constitute the several tribes which they represent."[62]

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[56] 29 Stat. 321, 339–340. Also see Act of July 1, 1898, 30 Stat. 571, 591; Act of March 3, 1901, 31 Stat. 1058, 1077.

[57] Act of June 7, 1897, 30 Stat. 62, 84.

[58] 30 Stat. 495.

[59] The tribes bitterly opposed this act, which was strongly advocated by the Commission to the Five Civilized Tribes. Mills, *op. cit.* p. 8.

[60] Act of April 21, 1904, sec. 1, 33 Stat. 189, 204. On status of freedmen, see Schmeckebier, The Office of Indian Affairs (1927), p. 134; *Tiger* v. *Fewell*, 22 F. 2d 786 (C. C. A. 8, 1927). Act of May 27, 1908, sec. 3, 35 Stat. 312, provided that the rolls of Freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence of the quantum of Indian blood of any enrolled freedmen of said tribe and the enrollment records of the Commissioner, conclusive evidence of their age. After being entered on rolls made and approved by the Secretary of the Interior, in accordance with a statute, a freedman acquired rights, which could not be divested without notice of hearing essential to due process of law. *Garfield* v. *Goldsby*, 211 U. S. 249 (1908). Notice to an attorney of such freedman is insufficient if given a few hours before a hearing of a motion to strike out his name on the ground that his enrollment was procured by perjury. *United States* v. *Fisher*, 222 U. S. 204 (1911).

[61] Sec. 21. See *United States* v. *Mid-Continent Petroleum Corp.*, 67 F. 2d 37, 43–44 (C. C. A. 10, 1933). Also see Chapter 5, sec. 13.

[62] Sec. 21. See *Kemohah* v. *Shaffer Oil & Refining Co.*, 38 F. 2d 665 (D. C. N. D. Okla., 1930).

The effect of the enrollment statutes has been considered from time to time. In the case of *United States* v. *Atkins*,[63] the Supreme Court said:

> In *United States* v. *Wildcat*, 244 U. S. 111, 118, 119, it was insisted that the Indian died prior to April 1, 1899, and that his enrollment as of that date was beyond the jurisdiction of the Dawes Commission and void within the doctrine of *Scott* v. *McNeal*, 154 U. S. 34. Much consideration was given to the statutes creating and defining the powers of the Commission and the effect of an enrollment. This Court said:
>
> "There was thus constituted a *quasi*-judicial tribunal whose judgments within the limits of its jurisdiction were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable. Congress by this legislation evidenced an intention to put an end to controversy by providing a tribunal before which those interested could be heard and the rolls authoritatively made up of those who were entitled to participate in the partition of the tribal lands. It was to the interest of all concerned that the beneficiaries of this division should be ascertained. To this end the Commission was established and endowed with authority to hear and determine the matter * * *.
>
> "When the Commission proceeded in good faith to determine the matter and to act upon information before it, not arbitrarily, but according to its best judgment, we think it was the intention of the act that the matter, upon the approval of the Secretary, should be finally concluded and the rights of the parties forever settled, subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake.
>
> "We cannot agree that the case is within the principles decided in *Scott* v. *McNeal*, 154 U. S. 34, and kindred cases, in which it has been held that in the absence of a subject-matter of jurisdiction an adjudication that there was such is not conclusive, and that a judgment based upon action without its proper subject being in existence is void * * *. We think the decision of such tribunal, when not impeached for fraud or mistake, conclusive of the question of membership in the tribe, when followed, as was the case here, by the action of the Interior Department confirming the allotment and ordering the patents conveying the lands, which were in fact issued."
>
> It must be accepted now as finally settled that the enrollment of a member of an Indian tribe by the Dawes Commission, when duly approved, amounts to a judgment in an adversary proceeding determining the existence of the individual and his right to membership subject, of course, to impeachment under the well established rules where such judgments are involved. (Pp. 224–226.)

Shortly after the passage of the Curtis Act, Congress, by Act of July 1, 1898,[64] adopted the agreement concluded with the Seminoles on December 16, 1897. Convinced now of the futility of resistance, other tribes followed suit, until by the end of 1902 all of the Five Civilized Tribes had become parties to agreements with the United States providing for allotment to land in severalty.[65] Most of these agreements[66] contained provisions concerning enrollment. Sections 25 to 31 of the Cherokee Agreement[67] are perhaps typical:

> SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.
>
> SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.
>
> SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the Act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).
>
> SEC. 28. No person whose name appears upon the roll made by the Dawes Commission as a citizen or freedman of any other tribe shall be enrolled as a citizen of the Cherokee Nation.
>
> SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.
>
> SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.
>
> SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this Act: *Provided*, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of anyone on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall

[63] 260 U. S. 220 (1922).

[64] 30 Stat. 567, supp. by Act of June 2, 1900, 31 Stat. 250.

[65] Act of June 28, 1898, 30 Stat. 495 (Choctaw-Chickasaw); Act of March 1, 1901, 31 Stat. 861, supp. by Act of June 30, 1902, 32 Stat. 500 (Creek); Act of July 1, 1902, 32 Stat. 716 (Cherokee).

[66] Act of June 2, 1900, 31 Stat. 250 (Seminole); Act of March 1, 1901, 31 Stat. 861 (Creek); Act of June 30, 1902, 32 Stat. 500 (Creek); Act of July 1, 1902, 32 Stat. 641 (Choctaw-Chickasaw); Act of July 1, 1902, 32 Stat. 716 (Cherokee).

Sec. 30 of the Act of July 1, 1902, 32 Stat. 641, was considered by the court in *Garfield* v. *Goldsby*, 211 U. S. 249 (1908).

[67] Act of July 1, 1902, 32 Stat. 716.

be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forefeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.

The Choctaw-Chickasaw Agreement[68] contained an unusual enrollment device. A quasi-judicial body was established in sections 31–33, which has been described as follows:[69]

> It appears that the agreement in these paragraphs provides for the establishment of the Choctaw and Chickasaw Citizenship Court, and gives it jurisdiction of a test suit to annul and vacate the decisions of the United States courts in the Indian Territory admitting persons to citizenship and enrollment as citizens of the Choctaw and Chickasaw nations, respectively, on the ground of want of notice to both of said nations and because the United States courts tried such cases *de novo*, with a right, in the event such judgments should be annulled because of either or both of the irregularities mentioned on the part of any party thus deprived of a favorable judgment to remove his case to the Citizenship court, where such further proceedings were to be had therein "as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and if no judgment or decision had been rendered therein;" and also "appellate jurisdiction over all judgments of the courts in Indian Territory, rendered under said act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment in either of said nations." In the exercise of such appellate jurisdiction the citizenship court was "authorized to consider, review, and revise all such judgments, both as to findings of fact and conclusions of law, and may, whenever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy."
>
> It will be noted that the agreement further provides (paragraph 33) that "the judgment of the citizenship court in *any or all* of the suits or proceedings so committed to its jurisdiction *shall be final*." (P. 141.)

Congress was now anxious to bring to a close the work of enrollment, and in 1904, 1905, and 1906 legislative steps were taken to bring this about. These have been summarized by the Attorney General:[70]

> By the act of April 21, 1904 (33 Stat. 189, 204), it was provided that the Commisison to the Five Civilized Tribes should conclude its work and terminate on or before July 1, 1905, and cease to exist on that date, the powers theretofore conferred upon it being continued.
>
> By the act of March 3, 1905 (33 Stat. 1048, 1060), it was provided "that the work of completing the unfinished business, if any, of the Commission to the Five Civilized Tribes shall devolve upon the Secretary of the Interior, and that all the powers heretofore granted to the said Commission to the Five Civilized Tribes are hereby conferred upon the said Secretary on and after the first of July, nineteen hundred and five."
>
> By the act of April 26, 1906 (34 Stat. 137), it was provided:
>
> > "That after the approval of this act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes, shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order or decision sought to be reconsidered except as to decisions made prior to the passage of this act, in which cases such motion shall be made within sixty days after the passage of this act."
>
> By that act the rolls of citizenship of the several tribes were required to be completed by March 4, 1907. (Pp. 142–143.)

The Act of May 27, 1908,[71] made conclusive the enrollment records[72] of the Commissioner to the Five Civilized Tribes as to the age of the citizens and freedmen. At the request of Mr. Bledsoe,[73] the Commissioner prepared the following statement of what constituted the enrollment records in his office:

> The enrollment records, in the matter of the enrollment of any person as a citizen or freedman of the Five Civilized Tribes, consist of the application made for their enrollment, together with all of the records, evidence and other papers filed in connection therewith prior to the rendition of the decision granting the application.
>
> In the early days of enrollment in the Five Civilized Tribes appointments were made by the Commission at various places in the different nations at which the Indians and freedmen appeared to make application for enrollment. At that time the applicants were duly sworn before a notary public, but their testimony was only taken orally and placed upon a card, with the exception of Cherokees. Written testimony was taken in all Cherokee cases. In a great majority of the early enrollments, except Cherokee cases, the only records shown are the statements that were thus taken from the applicants personally and placed on the cards, which constitute the enrollment record, together with any other evidence that may have been obtained. In a great many instances, at that time, where there was doubt as to the rights of the applicants to enrollment, and they could not then be identified from the tribal rolls, the written testimony of the applicants was taken and made a part of the record. Additional testimony was also taken at later dates.
>
> As the work proceeded, and the enrollment of all citizens by blood or intermarriage, and freedmen, who were clearly identified upon the tribal rolls was completed, written testimony was taken in all doubtful cases. Written testimony was also taken in all applications made for the identification of Mississippi Choctaws and in practically all other cases as the work neared completion.
>
> The tribal rolls of the various nations came into the possession of the Commissioner to the Five Civilized Tribes, and were used for identification and as a basis for enrollment.
>
> As enrollments were completed, the names of all persons whom the Commission had decided were entitled to enrollment were placed on the rolls. These rolls show the name, age, sex, degree of blood and the number of the census card, which is generally known as the "enrollment card," on which each citizen was enrolled, and a number was placed opposite each name appearing on this roll, beginning at 1 and running down until the final number was completed. This roll was made out in quintipulicate and forwarded to the Secretary of the Interior for his approval, who approved same if he found no objections thereto and returned three copies for the files of this office. The roll thus approved is known as the "approval roll," and is the basis on which allotments were made, except in the cases of a large number of Creeks, to whom allotments were made before the approval of their enrollment, which allotments were subsequently confirmed by Congress.
>
> The Secretary of the Interior holds, for the purposes of the government, that the date of the application for enrollment shall be construed as the date of the anni-

[68] Act of July 1, 1902, 32 Stat. 641 (Choctaw-Chickasaw).
[69] 26 Op. A. G. 128 (1907).
[70] 26 Op. A. G. 127 (1907).
[71] 35 Stat. 312, sec. 3.
[72] Of the applicants, 101,228 were enrolled. Of these, 2,506 were intermarried persons; 23,382, freedmen; 50,671, mixed bloods, and 24,669, full bloods. Rept. Comm. Ind. Aff., 1907, p. 112.
[73] Bledsoe, *op. cit.*, p. 160.

versary of the birth of the applicant, unless the records show otherwise.

The Act of Congress makes the *enrollment records* of the Commissioner to the Five Civilized Tribes conclusive evidence in determining the ages of allottees of the Five Civilized Tribes. The enrollment records consist of:

First, what is known as the "census card"; that is, the card on which the applicant was listed for enrollment. Sometimes in the early enrollment some persons were listed on what is known as a "doubtful card," and later on the names appearing on the doubtful cards were transferred to a regular census card, when the Commission rendered its decision holding that they were entitled to enrollment. It has been discovered, in looking over the enrollment records in many cases, that sometimes the date shown on the lower right-hand corner is the date on which they were transferred from the doubtful card, and not the date on which application was made for their enrollment. In such cases, in the absence of any other testimony or evidence, the date shown on the doubtful card is the date on which application was made for enrollment;

Second, all testimony taken in the matter of the application at various times prior to rendition of the decision granting the application;

Third, birth affidavits, affidavits of death, and other evidence and papers filed in connection with the application made for enrollment; and

Fourth, the enrollment as shown on the approved roll.

Persons seeking information as to the ages of allottees should ask to be furnished with a certified copy of the *enrollment records* pertaining thereto. Scarcely any testimony was taken in the enrollment of Seminoles, save orally, which is shown on the census cards. No date was placed on these cards at the time of enrollment; consequently they are not of much value in determining the ages of the persons whose names appear thereon. A certificate appears on the approved Seminole roll, showing the dates the enrollments were made, which dates will probably govern in determining their ages, in the absence of any other testimony or evidence in the enrollment records to the contrary. (Pp. 160–163.)

SECTION 8. ALIENATION AND TAXATION OF ALLOTTED LANDS OF FIVE TRIBES

Basic statutes controlling the alienability and taxability of the lands of individual members of the Five Civilized Tribes may be divided into two groups: Those dealing with specific tribes and those applicable to all of the Five Civilized Tribes.[74] The first group is earliest in point of time, including treaties or agreements entered into with the various tribes providing

[74] A few statutes applied in part to the Five Civilized Tribes and in part to one of the tribes. The most notable example of this type of statute is the Curtis Act of June 28, 1898, 30 Stat. 495. The latter part (pp. 505–515) comprised the Atoka Agreement with the Choctaws and Chickasaws, which is discussed in sec. 8B of this chapter. The early portion of the Curtis Act supplemented the Act of March 1, 1889, 25 Stat. 783, sec. 15; Act of May 2, 1890, 26 Stat. 81, 95; Act of March 3, 1893, 27 Stat. 612, 641; Act of June 10, 1896, 29 Stat. 321, 329. It was supplemented by the Act of March 3, 1899, 30 Stat. 1074; Act of March 3, 1899, 30 Stat. 1214; Act of June 2, 1900, 31 Stat. 250; Act of March 1, 1901, 31 Stat. 848; Act of March 1, 1901, 31 Stat. 861; Act of July 1, 1902, 32 Stat. 716; Act of January 21, 1903, 32 Stat. 774; and was cited in Cabell, J. V., Descent and Distribution of Indian Lands (1932) 3 Okla. S. B. J. 208; Krieger, Heinrich, Principles of the Indian Law and the Act of June 18, 1934 (1935), 3 Geo. Wash. L. Rev. 279; 23 Op. A. G. 528 (1901); 25 Op. A. G. 163 (1904); 25 Op. A. G. 168 (1904); 26 Op. A. G. 171 (1907); 26 Op. A. G. 340 (1907); Memo. Sol. I. D., December 11, 1918; Op. Sol. I. D., M.7316, April 5, 1922; Op. Sol. I. D., M.7316, May 28, 1924; Op. Sol. I. D., M.18772, December 24, 1926; Op. Sol. I. D., M.27759, January 22, 1935; Memo. Sol. I. D., March 18, 1936; 54 I. D. 109 (1932); 54 I. D. 297 (1933); *Adams* v. *Murphy*, 165 Fed. 304 (C. C. A. 8, 1908); *Armstrong* v. *Wood*, 195 Fed. 137 (C. C. E. D. Okla., 1911); *Bartlett* v. *Okla. Oil Co.*, 218 Fed. 380 (D. C. E. D. Okla., 1914); *Boudinot* v. *Boudinot*, 2 Ind. T. 107, 48 S. W. 1019 (1899); *Brought* v. *Cherokee Nation*, 129 Fed. 192 (C. C. A. 8, 1904); *Brown* v. *United States*, 44 C. Cls. 283 (1907), revd. sub nom. *Brown and Gritts* v. *United States*, 219 U. S. 346 (1911); *Browning* v. *United States*, 6 F. 2d 801 (C. C. A. 8, 1925), cert. den. 269 U. S. 568 (1925); *Buster* v. *Wright*, 135 Fed. 947 (C. C. A. 8, 1905), app. dism. 203 U. S. 599; *Campbell* v. *Wadsworth*, 248 U. S. 169 (1918); *Cherokee Intermarriage Cases*, 203 U. S. 76 (1906); *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294 (1902); *Cherokee Nation* v. *United States*, 85 C. Cls. 76 (1937); *Cherokee Nation* v. *Whitmire*, 223 U. S. 108 (1912); *Choate* v. *Trapp*, 224 U. S. 665 (1912); *Creek Nation* v. *United States*, 78 C. Cls. 474 (1933); *Daniels* v. *Miller*, 4 Ind. T. 426, 69 S. W. 925 (1902); *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127 (1904); *Denton* v. *Capital Townsite Co.*, 5 Ind. T. 396, 82 S. W. 852 (1904); *Dick* v. *Ross*, 6 Ind. T. 85, 89 S. W. 664 (1905); *Donohoo* v. *Howard*, 4 Ind. T. 433, 69 S. W. 927 (1902); *English* v. *Richardson*, *Treasurer of Tulsa County, Okla.*, 224 U. S. 680 (1912); *Evans* v. *Victor*, 204 Fed. 361 (C. C. A. 8, 1913); *Ex parte Webb*, 225 U. S. 663 (1912); *Fink* v. *County Commissioners*, 248 U. S. 399 (1919); *Fish* v. *Wise*, 52 F. 2d 544 (C. C. A. 10, 1931), cert. den. 282 U. S. 903 (1931), 284 U. S. 688 (1932); *Ford* v. *United States*, 260 Fed. 657 (C. C. A. 8, 1919); *Garfield* v. *United States ex rel. Allison*, 211 U. S. 264 (1908); *George* v. *Robb*, 4 Ind. T. 61, 64 S. W. 615 (1901); *German-American Ins. Co.* v. *Paul*, 5 Ind. T. 703 (1904), 53 S. W. 442 (1899); *Hargrove* v. *Cherokee Nation*, 3 Ind. T. 478, 58 S. W. 667 (1900); *Hargrove* v. *Cherokee Nation*, 129 Fed. 186 (C. C. A. 8, 1904); *Harnage* v. *Martin*, 242 U. S. 386 (1917); *Harris* v. *Hardridge*, 7 Ind. T. 532, 104 S. W. 826 (1907); *Harris* v. *Hardridge*, 166 Fed. 109 (C. C. A. 8, 1908); *Heckman* v. *United States*, 224 U. S. 413 (1912); *Henry Gas Co.* v. *United States*, 191 Fed. 132 (C. C. A. 8, 1911); *Hockett* v. *Alston*, 110 Fed. 910 (C. C. A. 6, 1901); *Hubbard* v. *Chism*, 5 Ind. T. 95, 82 S. W. 686 (1904); *In re Grayson*, 3 Ind. T. 497, 61 S. W. 984 (1901); *In re Lands of Five Civilized Tribes*, 199 Fed. 811 (D. C. E. D. Okla., 1912); *Iowa Land & Trust Co.* v. *United States*, 217 Fed. 11 (C. C. A. 8, 1914); *Jefferson* v. *Fink*, 247 U. S. 288 (1918); *Jonah* v. *Armstrong*, 52 F. 2d 343 (C. C. A. 10, 1931); *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531 (1915); *Kansas or Kaw Indians* v. *United States*, 80 C. Cls. 264 (1934), cert. den. 296 U. S. 577; *Kemohah* v. *Shaffer Oil & Refining Co.*, 38 F. 2d 665 (D. C. N. D. Okla., 1930); *Lowe* v. *Fisher*, 223 U. S. 95 (1912); *McAllaster* v. *Edgerton*, 3 Ind. T. 704, 64 S. W. 583 (1901); *McCullough* v. *Smith*, 243 Fed. 893 (C. C. A. 8, 1917); *Malone* v. *Alderdice*, 212 Fed. 668 (C. C. A. 8, 1914); *Mandler* v. *United States*, 49 F. 2d 201 (C. C. A. 10, 1931), rehearing den. 52 F. 2d 713 (C. C. A. 10, 1931); *Marlin* v. *Lewallen*, 276 U. S. 58 (1928); *Matter of Heff*, 197 U. S. 488 (1905), overruled, 241 U. S. 591; *Maxey* v. *Wright*, 3 Ind. T. 243, 54 S. W. 807 (1900); *Moore* v. *Carter Oil Co.*, 43 F. 2d 322 (C. C. A. 10, 1930), cert. den. 282 U. S. 903; *Morris* v. *Hitchcock*, 194 U. S. 384 (1904); *Morrison* v. *United States*, 6 F. 2d 811 (C. C. A. 8, 1925); *Mullen* v. *United States*, 224 U. S. 448 (1912); *Nivens* v. *Nivens*, 4 Ind. T. 574, 76 S. W. 114 (1903); *Nunn* v. *Hazelrigg*, 216 Fed. 330 (C. C. A. 8, 1914); *Owens* v. *Eaton*, 5 Ind. T. 275, 82 S. W. 746 (1904); *Persons Claiming Rights in Cherokee Nation*, 40 C. Cls. 411 (1905); *Price* v. *Cherokee Nation*, 5 Ind. T. 518, 82 S. W. 893 (1904); *Quigley* v. *Stephens*, 3 Ind. T. 265, 54 S. W. 814 (1900); *Ross* v. *Stewart*, 227 U. S. 530 (1913); *St. Louis & S. F. Ry. Co.* v. *Pfennighausen*, 7 Ind. T. 685, 104 S. W. 880 (1907); *Sayer* v. *Brown*, 7 Ind. T. 675, 104 S. W. 877 (1907); *Schellenbarger* v. *Fewell*, 236 U. S. 68 (1915); *Seminole Nation* v. *United States*, 78 C. Cls. 455 (1933); *Stephens* v. *Cherokee Nation*, 174 U. S. 445 (1899); *Thomason* v. *McLaughlin*, 7 Ind. T. 1, 103 S. W. 595 (1907); *Tiger* v. *Slinker*, 4 F. 2d 714 (D. C. E. D. Okla., 1925); *Tuttle* v. *Moore*, 3 Ind. T. 712, 64 S. W. 585 (1901); *United States* v. *Atkins*, 260 U. S. 220 (1922); *United States* v. *Board of Comrs. of McIntosh Cty.*, 284 Fed. 103 (C. C. A. 8, 1922), app. dism. 263 U. S. 691; *United States* v. *Ferguson*, 247 U. S. 175 (1918); *United States* v. *Hayes*, 20 F. 2d 873 (C. C. A. 8, 1927), cert. den. 275 U. S. 555; *United States* v. *Lewis*, 5 Ind. T. 1, 76 S. W. 299 (1903); *United States* v. *Mid Continent Pet. Corp.*, 67 F. 2d 37 (C. C. A. 10, 1933), cert. den. 290 U. S. 702; *United States* v. *Rea-Read Mill & Elevator Co.*, 171 Fed. 501 (C. C. E. D. Okla., 1909); *United States* v. *Seminole Nation*, 299 U. S. 417 (1937); *United States* v. *Smith*, 266 Fed. 740 (D. C. E. D. Okla., 1920); *United States* v. *Western Inv. Co.*, 226 Fed. 726 (C. C. A. 8, 1915); *United States* v. *Wildcat*, 244 U. S. 111 (1917); *United States* v. *Wright*, 53 F. 2d 300 (C. C. A. 4, 1931), cert. den. 285 U. S. 539; *Vinson* v. *Graham*, 44 F. 2d 772 (C. C. A. 10, 1930), cert. den. 283 U. S. 819; *W. O. Whitney Lumber & Grain Co.* v. *Crabtree*, 166 Fed. 738 (C. C. A. 8, 1908); *Washington* v. *Miller*, 235 U. S. 422 (1914); *Welty* v. *Reed*, 231 Fed. 930 (C. C. A. 8, 1916); *Woodward* v. *De Graffenried*, 238 U. S. 284 (1915).