50TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 153.

IN THE SENATE OF THE UNITED STATES.

JULY 9, 1888.—Presented by Mr. DAWES, referred to the Committee on the Judiciary, and ordered to be printed.

MEMORIAL OF C. BROWNELL, PRAYING FOR THE PASSAGE OF SENATE BILL NO. 2722, CREATING AND ESTABLISHING UNITED STATES COURTS IN THE INDIAN TERRITORY.

Brief and abstract of treaties with the five civilized tribes, supporting S. 2722 or H. R. 7050, which is in duplicate, and opposing intended proposed amendment to H. R. 1874, introduced in the Senate April 25, 1888.

WASHINGTON, D. C., *June*, 1888.

SIR: Referring to the subject of creating and establishing courts in the Indian Territory, and to S. 2722, introduced in the Senate by Mr. Dawes April 17, 1888, H. R. 7050, which is a duplicate introduced in the House by Mr. Allen, and to the "intended to be proposed amendment to H. R. 1874," introduced in the Senate April 27, 1888, by Mr. Jones, of Arkansas, the following is respectfully submitted:

This proposed intended amendment to H. R. 1874 is in direct violation of all the treaties with the five civilized tribes or Indian nations in the Indian Territory, where this subject is considered, from section 13 to section 21, inclusive, as these sections in this amendment are now worded and formulated, because these sections create and erect judicial districts out of certain designated counties in the State of Texas, and attach thereto and include portions of the Indian Territory, to wit, the Choctaw and Chickasaw Indian tribes or nations' lands.

The treaty made May 23, 1836, with the Cherokees, U. S. Stat., vol. 7, p. 478 (Rev. Ind. Ty., p. 60).

Article 5. The United States covenants and agrees that the lands ceded to the Cherokee Nation in the foregoing article (article 2 of this treaty, which is the land now occupied in the Indian Territory by the Cherokees) shall in no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory.

The treaty made with the Creek or Muscogee Indians April 4, 1832, U. S. Stat., vol. 7, p. 366 (Rev. Ind. Ty., p. 102):

Article 14. The Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians.

Treaty made with the Seminoles August 28, 1856, U. S. Stat., vol. 11, p. 699 (Rev. Ind. Ty., p. 105):

Article 4. The United States do hereby solemnly agree and bind themselves that no State or Territory shall ever pass laws for the government of the Creeks or Seminole tribes of Indians, and that no portion of either of the tracts of country defined in the

first and second articles of this agreement shall ever be embraced or included within or annexed to any Territory or State, nor shall either, or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same.

Treaty made with the Choctaw Indians September 27, 1830, U. S. Stat., vol. 7, p. 333:

Article I. Perpetual peace and friendship is pledged between the United States, the Mingoes, chiefs and warriors of the Choctaw Nation.

Article II. The United States, under a grant specially to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River in fee simple to them and their descendants, to inure to them while they exist as a nation and live on it; beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork, if in the limits of the United States, or to those limits, thence due south to Red River, and down Red River to the west boundary line of the Territory of Arkansas, thence north along that line to the beginning. * * *

The grant to be executed as soon as the present treaty shall be ratified.

Article III. In consideration of the provisions contained in the several articles of this treaty, the Choctaw Nation of Indians consent and hereby cede to the United States the entire country they own east of the Mississippi River, and agree to remove beyond the Mississippi River as early as practicable.

ART. IV. The Government and people of the United States are hereby obligated to secure 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 a 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 them 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 with the Constitution, treaties, and laws of the United States, and except such as may and which have been enacted by Congress to the extent that Congress under the Constitution is required to exercise a legislation over Indian affairs. But the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their nation and infringe any of their national regulations.

Patents were issued to these tribes in compliance with stipulations of these treaties: To the Cherokees, December 31, 1838; to the Choctaws, March 23, 1843; to the Creeks, August 11, 1852 (See Senate Ex. Doc. No. 124, Forty-sixth Congress, 2d session). The Chickasaws take under the grant made to the Choctaws.

It can not be for a moment held or urged that these treaties and articles above quoted are not compacts and contracts of the highest and most valuable consideration known to the laws which govern transactions of this kind and character; and that all the Indians composing the five civilized tribes in the Indian Territory with whom these treaties were made have fully and positively carried out their part of the stipulations, promises, agreements, covenants, and obligations embraced in these several treaties, and that they are relying on the United States Government to keep and perform, on its part, in good faith, these promises and obligations therein made.

It can not be said in reply that this measure, as formulated in these sections of this amendment to bill 1874, is only for judicial purposes, and therefore not within the definition of these articles. It is patent that the full force of the argument is against such a measure, and the plain construction of these treaties and the above quoted articles is that they, these Indian nations, should not be attached to or included in any district of a State for any purpose, and particularly for judicial and legislative purposes; and when it is noted that all these tribes, after taking possession and occupying these lands, as patented to them in the several and respective grants and patents for a period of thirty-five years, to wit, in 1866, assented by treaty provisions and stipulations to allow the United States Government to establish court or courts in

these several and respective tribes or nations in the Indian Territory, and that Congress should enact such laws as the President and Congress shall should deem wise and proper for their protection and the preservation of their advancing interests and increasing property, provided such laws did not affect their tribal organizations and national regulations under the provisions of these treaties.

It is a strong confirmation of the construction of the quoted articles of these treaties that the intention of the contracting parties was, at all times, to guard against and exclude an act which should in any manner attach any part of the Indian Territory, for any purpose whatever, to any State or Territory. And it is further submitted that if this proposed amendment should become an act, as now worded, a court would feel disinclined to take the jurisdiction intended to be conferred, and in the cases or causes of action enumerated in this intended amendment; and it is further submitted that all the acts heretofore passed by Congress attaching or including certain designated portions of the Indian Territory to the adjoining States for judicial purposes are invalid, and if there was a tribunal with appellate jurisdiction, to legally review this question, all the acts of jurisdiction given to these courts over the Indian Territory in the past by Congress would be set aside as a nullity.

The act of Congress creating the western district for the State of Arkansas includes the Territory as a whole and a descriptive part of the western district of Arkansas; it does not create a separate district out of counties of the State and attach portions of the Territory as an attached part (vol. 19, p. 320). The act dividing the Territory, giving a portion to the State of Texas and a portion to Kansas, attaches to the States for this purpose (vol. 20, p. 400). All these acts are clearly in violation of these treaties.

Any bill offered to Congress with this feature and plan, presents the same obstacle, and should be abnegated by Congress.

The only bills among the number yet presented for the consideration of the first session of the Fiftieth Congress on this subject, creating courts in the Indian Territory, are S. 2722 or H. R. 7050, a duplicate of S. 2722, introduced by Mr. Dawes April 17, 1888, and referred to the Committee on the Judiciary, which bill provides for the present pressing and growing wants of that Territory within a legally authorized jurisdiction and treaty-stipulated assents from the several Indian nations composing the five civilized tribes in the Indian Territory. This bill is composed of eighteen sections. The first section divides and establishes the Territory into three judicial circuits and three judicial districts in each circuit. The circuits are called the Northern, the Middle and the Southern. The districts are numbered first, second, and third in each circuit; the boundaries are made to give an equal division of the judicial and executive labor required to be done by the officers of these courts and give equal distance from place to place where the courts are located.

The second section provides for three judges, with a salary of $4,000 per annum; the first three judges created under this section shall cast lot for the long term of six years, the middle term, four years, and short term, two years. The judge drawing the short term, two years, shall be commissioned the chief-justice of the supreme court of the Indian Territory. Afterwards a judge shall be appointed every two years, and the judge holding the shortest unexpired commission shall be chief-justice. Provision is made for filling vacancies.

Section 3 provides for appointment of three prosecuting attorneys, one for each circuit, at a salary of $1,500 per annum, authorized to appoint each two deputies or assistants at $600 per year, all for four

years, the salaries given to pay for all services; no fees are given to these officers. Also three marshals, one for each circuit, for four years, at a salary of $2,000 per year in full for all their services, labor, and personal expenses. They are authorized to employ as many deputies and bailiffs as may be necessary, at the rate of $5 per day, if for a less time than one month; if over, at $75 per month, and the marshal can call on the Indian police to assist him or his deputies.

The marshals are compelled to reside in the circuits they are commissioned for, and to give a bond of $10,000. No fees or pay is allowed to these officers except the salary fixed.

Section 4 authorizes the judges to appoint clerks, stenographers, and type-writers at such salaries as the judges shall from time to time fix.

The clerks of the courts shall give bond for not less than $5,000, conditioned to perform all the duties of a clerk of a court and faithfully pay into the Treasury of the United States, quarterly, all moneys received and acquired for fees as directed by the Secretary of the Treasury.

Section 5 authorizes the judges to appoint district commissioners, not more than three in each circuit, who hold their office during good behavior. They may be removed by the judge of the circuit; these officers to receive a salary of $600 per annum, which is in full payment for all services performed by them, except taking depositions in civil cases. They are required to give bond of $2,000 for faithful performance of their duties and prompt and full payment of all moneys by them received for fees to the clerk of the court in the district they are located. Their jurisdiction is, as United States circuit court commissioners, as justices of the peace in the State of Arkansas, as probate judges in all probate matters, and in the estate of infants and incompetent persons as provided by the laws of the State of Arkansas, and call and impanel coroner juries, hold inquests over deceased persons in like manner as provided by the laws of the State of Arkansas.

They report all coroner proceedings to the marshal of the circuit in which the inquest is held.

Section 6 gives to the district courts original jurisdiction:

(1) Same as United States circuit and district courts have, under the United States laws in civil cases, where a citizen or citizens of the United States or a State, domiciled in the Indian Territory, or a citizen of the United States or a State living out of the limits of the Indian Territory, are party or parties to an action or suit.

(2) A citizen of the United States or a State living in the Territory, or beyond the limits of the Territory, and an Indian citizen or member of a tribe or nation of Indians in the Territory, are parties to a suit or action at law.

(3) All cases to recover a right to a franchise, a freehold, a right of way over to lands in the Territory, construction of a treaty between the United States and any tribe or nation of Indians in the Territory, or a treaty between two or more tribes or nations in the Territory, construction of a constitution or a statute or act of any nation or tribe or nations of Indians, and fix and determine boundary lines in the Territory.

(4) Criminal jurisdiction in all criminal cases, like as the jurisdiction of the United States district court for the western district of Arkansas, the United States circuit and district courts for the northern district of Texas, and the United States circuit or district court for the district of Kansas now have in the Territory, and such jurisdiction as provided by the laws of the United States in all criminal cases made and provided.

(5) Appellate jurisdiction in all cases tried before the district commissioners, and to hear and determine applications for partition for real estate and personal property within the judicial circuits; this provision begins at line 42 on page 9 of this bill, after the word "Provided," and extends to line 252 on page 18 of the bill, detailing the procedure in full, and provides for the system of registering in the district courts deeds and all transfers of real and personal property transactions between individuals and private corporations; the fees are put into the Treasury of the United States. But to more fully demonstrate the effect this provision has on the tenure of these lands the following is submitted:

Persons applying to the courts, created by this bill, to have lands of the Cherokee, Choctaw, or Chickasaw nations segregated, and allotted to them in severalty under the formulated provision of this bill, would be required to affirmatively show, in their petition, that they have exhausted all remedies provided for by the treaties in such cases made and provided, before these courts would take cognizance of their action. The jurisdiction and extended procedure here conferred to these courts is in the nature, and in application, of inforcing specific performance, which requires complainants to set up and maintain that they are without an adequate remedy, and that they will suffer irreparable loss of their property and rights unless they can have the aid of the courts to protect their rights and secure to them their property under the provision of this bill.

The revertive claim which the United States Government has by force of the revertible clauses in the patents or grants to all the lands of the five civilized tribes or nations in the Indian Territory, the position and relation the Government sustains as the guardian and trustee of all the Indians' property and interests, will require the petitioners to make the Government, and perhaps the Indian nation, or tribe, party defendants to their action. But the long-established rule of law that the United States Government, nor a sovereign State, can not be made party defendant to a suit or action at law without assent first had and obtained makes it essential this section of the bill should express this assent in plain terms and words.

The plan formulated in this bill, to segregate and allot these lands individually to these Indians, is worthy of more than a passing consideration.

These lands, by force of the treaties and grants in the patents to these nations or tribes of Indians, are excluded from the provisions of a general Indian allotment and land-in-severalty act, and, except the local Indian national councils provide for allotment in severalty, as authorized by the treaties and approved by the Interior Department, which time has shown is improbable and may be said to be impossible, those Indians who are progressive, who are worthy, and desire to secure their rightful share of these lands held in common by these patents in the Indian Territory, are powerless to aid themselves or be relieved or aided by Congress, except in the manner provided in this bill.

The Government, by the passage of this bill with this plan, or an independent bill containing like plan and provision, expresses an assent to a change of tenure and title from the present, which is held to be "a base, qualified, or determinable fee in the tribe or nation," to an individual tenure and title in fee-simple in the owner, who must be a person belonging to and composing the tribe or nation, inuring the grant to the succeeding owner and heirs, restricted or limited alienation, descending in compliance with the laws or testamentary directions

of deceased owners in such cases provided. To a question which naturally arises, Is this plan in compliance with treaty stipulations and provisions with these nations or tribes of Indians? the answer is in the affirmative. The Government is bound by the treaties to protect these nations or tribes "against domestic feuds and insurrections; against hostilities of other tribes; and also against interruptions and intrusions from unauthorized citizens of the United States."

I assume you are informed and know the true situation and recent acts of hostile strife and contention officially reported to the Interior Department, which warrants the assertion that all the five civilized tribes or nations in the Indian Territory are in a state of subdued insurrection and rebellion, caused by individual and party feuds, growing out of the continual agitation and the unsettled question of sectionizing and allotting in severalty these lands, and which threatens to disintegrate their present governmental existence in the near future, subvert their present tribal or national organizations, which in effect will cause a dissolution of the community of ownership of these lands and tribal or national funds or moneys. That the present laws and procedures are of little or no avail to protect and care for the property and interests of these tribes or nations is apparent, from the fact that in all cases when the Government has been called upon to interfere and interpose to effect a settlement of difficulties and differences and make compositions of these internal strifes and feuds, too frequent with these nations, resorts have to be made to necessity, "which knows no law," and expediency, which depends on the presence and force of the military arm of the Government, or the threats and imprecations of the civil executive officers of the Departments to enforce their orders for the observance and maintenance of order and restore peace, and for the continual protection of the substantial rights and the property of these people. It is a local political issue in all these nations or tribes. One party, favoring and advocating allotment and lands in severalty, raises the standard of the progressive party; the other party, opposing this, is called the full-blood or national party.

The better class, and law-abiding residents of the Territory who are not Indian citizens, favor and give their support to the progressive party, as they would like to see the country sectionized, allotted, and settled up, the productive lands in possession of a class who would cultivate the soil annually for the emblements. The large and wealthy land-holders, who have thousands of acres fenced and under control for the benefit and profit of the pasturage, barring out annual cultivation and homestead occupancy and improvements, joined with the lawless and desperado class—and such are numerous—aid and support the "full-blood" or non progressive party. But be assured, if this country was lawfully allotted in severalty—and laws enacted to protect and secure the rights of the progressive party, such as provided in this bill, his desperado lawless class would soon seek other pastures and hiding-places.

These contests occur at each and every election held in these respective nations or tribes and increase each time in hostility, and which now has grown to such a magnitude that these tribes or nations are not capable or able to peaceably dispose of the difficulties in a lawful manner and amicably settle their national or tribal contentions; and this state of affairs will not decrease or be permanently disposed of until the Government provides the plan and course assuring legal protection and remedies to all entitled who choose to avail themselves of the benefits of a homestead out of the common tribal or national lands

of the nation or tribe which they naturally, rightfully, and legally belong to, for themselves and their posterity. To permit the agitation of this question and important issue to be carried beyond the control of their tribal laws and governments, creating hostile, factious parties and frequent disturbances, increasing crime and setting at defiance all the laws as to repeatedly require the interference and interposing of the Interior Department officers or presence of the force of the military, raises the question of the forfeiture of the present tenure and title to these lands, as provided and stipulated in the treaties and tribal patents; for it is evident the definition of the term or word "nation," therein expressed, means something more than a mob, or a disorderly, dependent community of Indians.

Up to 1880 these nations or tribes of Indians were the most civilized, progressive, and happy class of Indians of any west of the Missouri River. Their condition and marked progression was pointed to with pride and satisfaction by all who were interested and employed in solving the Indian question in the United States. Now they are, in their civil and political condition, directly the opposite, and as a people or a community the most contentious, disorganized, rebellious, refractory, and factious of any and all people inhabiting the United States. Their civilization and progression is obstructed with the internal feuds, jealousies, bickerings, and clamoring for something, which they know not what; envious of the possessions, peace, and comfort of other tribes or nations of Indians which are located in their midst; captious, selfish, and unjust in their dealings with and in carrying out their conventions, agreements, or treaties with each other, or with other tribes or nations of Indians; often partial and oppressive in the interpretation and execution of their own laws. This change can only be attributed to the United States Government delaying, neglecting, yes, refusing to enact proper laws suited to their growth, condition, and wants, to reliably secure to them their property, their guarantied rights, and the remedies for their wrongs, which laws should be promulgated, enforced, and executed by courts and officers located in their countries and in their midst, teaching them that the laws is a protection and a remedy, not a burden to them and a persecution and a farce to all, without an exhibition of an impartial trial for justice; and no provisions for an appeal to support and carry out the idea or deffinition of justice brought in the reach of every man, as is taught in the English jurisprudence and which is the boast of the American people.

The next question presented is, can these nations or tribes of Indians, through their legislative councils and executive officers, provide for and carry out a plan and procedure to sectionize and justly allot their lands in severalty? The answer is in the negative. It is settled beyond a question that these nations or tribes are not clothed with and do not possess any of the attributes of a sovereign state, nation, or power. They are all dependent on the Government of the United States for national or tribal existence and their continuing political identity. They are bound to obey the laws of Congress, possessing not so much as the right of eminent domain or the power to acquire or dispose of their public domain (see case of *Cherokee Nation* v. *Southern Arkansas Railroad Company*, decided in the United States district court for the western district of Arkansas, February term, 1888).

Then it naturally follows, until Congress erect these nations or tribes into a Territorial form of government, or a sovereign State, which, under the provisions and expressed stipulations of treaties with all these nations or tribes, requires a convention and consent from them ex-

pressed in the manner prescribed, these nations or tribes are without the power to lawfully sectionize and equitably allot in severalty their lands, establish and enforce the registry and record system, confer and protect the right of a freehold in the individual, which will be required when these lands are segregated and allotted in severalty. The plan and provision set forth in this bill is free from all the obstacles here pointed out, as it is assented to and provided for by treaties with all these nations or tribes, not only in the clauses of the articles consenting to the establishing courts in the Territory, but also in articles stipulating and assenting to such laws as the President and Congress shall deem wise and proper for the projection of their rights and property and the advancement of their interests and welfare; provided such laws do not interfere with their local tribal government, which is plain to be seen this plan does not do, but, on the contrary, aims to secure, extend, and protect them in their substantial and guarantied rights without enforcing any change in their present local governments. In other words, there is presented and provided an option to the individual to secure a homestead, if disposed or inclined, out of the common tribal lands, and be protected by law in the possession, improvement, and enjoyment of the home, secure to him or themselves and his or their heirs.

This section further authorizes a seal for the district courts and changes of venue in the commissioners' courts and district courts.

The jurisdiction here conferred is intended to exhaust all the jurisdiction authorized by Congress, to give to these courts, as original and appellate.

The constitutional provisions and prohibitions are kept in view, and all the articles, provisions, and stipulations of the treaties with the five civilized tribes in the Indian Territory are observed and all the rights of the Indians carefully guarded. The courts are organized and established for the better protection of these Indians' interests, and an option is given for them to use the courts by original or appellate procedure, if they assent, but if they do not, their status or tribal national interests are not changed or disturbed. If made defendant, their interests are carefully and securely guarded and defended by the United States Government officers, to the same extent as they are now.

Section 7 authorizes and adopts the code of civil laws of the State of Arkansas, so far as applicable to the Indian Territory, in civil transactions.

Section 8 provides for the definite time for holding courts in the several and respective circuits and districts.

Section 9 authorizes all cases pending outside of the Territory at the passage of this bill to be transmitted to these courts. All cases commenced as civil cases in the district courts by summons, running in the name of the chief justice of the supreme court of the Territory, sealed, served by the marshal or deputy, prohibiting the summoning defendants in civil cases from one district into another, unless the defendant is served with process in the district where the suit is begun, conferring power to subpœna witnesses to attend any court, and to take depositions; corporations doing business in the Territory or using the right of way are held to be persons and citizens of the United States domiciled in the Territory, and can sue and be sued; and also any tribe or Indian government in the Territory. In criminal cases the process is the form prescribed by the statutes of the United States, the marshal having full power to serve and arrest and summon witnesses in any part of the Territory. The chief justice is given power in extradition of persons hcarged with a crime and a fugitive from justice in the Territory.

Section 10 provides for the jurisdiction of the commissioners and the serving of process from their courts, amount of fees to be charged and collected, and to be paid over to the clerk of the district court, except such money as he may pay out for services to jurymen in coroner or inquest cases.

Section 11 provides for the payment to the clerk by the plaintiff in beginning all civil suits the sum of $10 and the defendant $5.

It is submitted that this is the only feasible plan upon which a civil court can be managed in the matter of fees in the Territory, as the present holding of lands and tenure of the lands exclude and exempt the attachment of real estate or a creating a lien on real estate for court costs or fees or judgments. Nothing will be liable or affected but personal property and interests, and then, not until a fieri facias is issued and in the marshal's hands for service. The most part of the personal property is a movable kind, live-stock, so easily moved the marshal could not secure the property until actual levy is made and property in possession and custody of the officer, which would increase the costs so much as to absorb the amount of the fees levied for, thus throwing the loss on the courts. It is thought to be the wisest plan to fix the amount of the fees and require the prepayment in the manner set forth.

Section 12 provides for the jury system. First, all male United States citizens before residents of a State or Territory twenty-one years old or over; second, all persons claiming Indian blood who formerly lived in a State after they were twenty-one years old; third, all Indians who may take their land in severalty who are twenty-one years old and understand the English language and have resided in the district sixty days are liable for jury service. Persons above described who have resided sixty days in any district after the passage of this act must cause their names to be registered with the clerk of the district court; failure to do so subjects them to a fine of $5 in the first instance and $10 in the second, and the marshal may expel all such and their families from the Territories. Exemptions are authorized as provided by the code of Arkansas.

The clerks of the district courts and the commissioners are made jury commissioners to select juries from this list.

A good deal of thought, time, and careful study has been expended on this section and this subject, and after carefully studying all the requirements of the constitutions and laws in force in the United States, the procedure of the Federal courts and State courts, this plan is adopted, as it serves a dual purpose: First, as an authorized and reliable jury list; second, keeping in official view all reputable and deserving persons in the Indian Territory, distinguishing such from the "tramps" or lawless class so numerous in the Territory; and which class are referred and pointed to as giving character to all United States citizens in the Territory, and the assertion is made by the opposers of this bill and plan, that from this lawless class, all juries would be composed, hence, they say it is not safe nor practicable, nor good policy to locate courts in this Territory. This plan is commended for consideration, believing that these objections are fully answered in this plan.

Section 13 creates a supreme court, to hold one term in the year by the three judges. The chief-justice of the Indian Territory is the presiding officer. Two of these judges may do business. After the first term the chief-justice may invite two of the chief-justices of the Indian Nation's supreme courts to sit in hearing of cases, but without additional pay from the United States. This court is empowered to retry all cases without a jury, appealed from the district courts, as provided by the

Arkansas code governing appeals to the supreme court of that State, and all cases as provided by the statutes of the United States. The decisions of this court shall be final, except in civil cases involving the sum of $5,000 or over, a franchise, a freehold, construction of a treaty, constitution or a statute of any Indian nation, and fixing boundary-lines, and in all criminal cases, except where the punishment and sentence is death; in those cases an appeal may be taken to the Supreme Court of the United States.

Section 14 provides that the clerk of the northern circuit shall be *ex officio* clerk of the supreme court, and the marshal of the northern circuit shall attend this court. No extra compensation is provided for these extra services by any officers of this court, and the fees derived all go into the Treasury of the United States.

Section 15 provides at the second term of the supreme court the judges shall examine the code of laws here provided for the Territory, and may receive suggestions from delegations of the Indian nations, and report to the President such required changes or amendments, and provides for receiving appeals from Indian courts, if authorized by the laws of their national councils.

Section 16 provides the method and procedure of entering and disposing of judgments entered against any Indian tribe or nation, in compliance with the Constitution of the United States, protecting the Indians' funds, only to be paid out on a judgment, except by appropriation made by Congress; and also provides for the attachment of the public strip, or "No Man's Land," to the northern circuit for judicial purposes.

I further call your attention to the provision in this bill attaching, for judicial purposes only, "No Man's Land," or the public strip lands, which is found on page 32 of the bill, after the word "provided," in line 21, and extending through to line 55, inclusive, on page 33 of the bill. I assume you are fully informed of the confusion and lawless condition of the people living on this land, and the great and urgent necessity for immediate Congressional action and provisions of law to protect these people, and I suggest that the plan here set forth is superior to any plan yet recommended to this Congress, as it does not require the assent of the State, if attached to a State, to make it feasible and operative, and does not require the expense of erecting new or separate Territorial divisions or subdivisions, or extra additional expense for an independent set of judicial and executive officers to carry into immediate operation and effect the laws for the protection and government of these people, and which in the future may bear good fruit and satisfactory results.

Section 17 provides for temporary buildings; appropriates the sum of $20,050; authorizes the Secretary of the Interior to provide books, statutes, blanks, and stationery necessary to carry out the provisions of the act.

Section 18 is a repealing section, and authorizes the detention of prisoners at places provided until the court is organized and ready to try and dispose of the cases.

Treaty of July, 1866, with the Cherokees (U. S. Stat., vol. 14, p. 799):

Article 13. The Cherokees also agree that a court or courts may be established by the United States in said Territory, with jurisdiction and organized in such a manner as may be prescribed by law: *Provided*, The judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country, in which the members by nativity or adoption shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty.

The exceptions here alluded to refer to articles 4, 5, 6, and 7, creating the Canadian district by the Cherokee freedmen. They never took the benefit of the privilege of these articles by organizing as here provided. Treaty with the Creeks, July 21, 1866 (U. S. Stat., vol. 14, p. 787), the seventh provision and stipulation in article 10 is as follows:

The Creeks also agree that a court or courts may be established in said Territory, with such jurisdiction and organized in such a manner as Congress may by law provide.

Treaty with the Seminoles, made March, 1866 (U. S. Stat., vol. 14, p. 755):

Article 7. The Seminoles agree to such legislation as Congress and the President may deem necessary for the better administration of the rights of person and property within the Indian Territory. * * * Seventh. The Seminoles also agree that a court or courts may be established in said Territory, with such jurisdiction and organized in such a manner as Congress may by law provide."

Treaty made with the Choctaws and Chickasaws, July 2, 1866 (U. S. Stat., vol. 14, p. 769):

Article 8. The Choctaws and Chickasaws also agree that a court or courts may be established in said Territory, with such jurisdiction and organization as Congress may provide: *Provided*, That the same shall not interfere with the local judiciary of either of said nations.

Twenty-two years have passed since the making of these last treaties, and yet no courts have been created under the provisions of these sections; at that time the five civilized tribes owned all the lands by virtue of the grants and patents from the United States and occupied the same, as Indian nations or tribes, in the Indian Territory. The area was then 63,253 square miles, or 40,481,600 acres. The area in square miles has not decreased since that time; it is greater than the States of Pennsylvania, Virginia, Ohio, Indiana, Kentucky, or Illinois, respectively, and as large as any two of the New England States. At the time these treaties were made these tribes, in consideration of the stipulation in the several articles, as a whole, retroceded to the United States, for the special purpose of settling freedmen and other Indians thereon, the entire west half of this domain, and the following tribes, bands, and nations of Indians have been settled thereon, and are now occupying lands set apart for them, as follows:

(1) The Cheyenne and Arapaho have 6,715 square miles, 4,297,771 acres, under the executive order August 10, 1869, unratified agreement with the Wichita, Caddo, and others October 19, 1872, on the western portion of the Creek and Seminole retroceded lands. (Pub. Dom., p. 730; Coms. Ind. Afrs. Anl. Rept. 1872, p. 101.)

(2) Kansas, or Kaw, 156½ square miles, 100,137 acres, under act of Congress June 5, 1872, vol. 17, p. 228, northeast portion of the Cherokee retroceded lands west of 96° in the southeast corner of the Osage Reservation. (See Pub. Dom., 730.)

(3) Kiowa and Comanche, 4,639 square miles, 2,968,893 acres; treaty of October 21, 1867, vol. 15, pp. 581 and 589 (Rev. Ind. Ty., p. 323.) Article 11, in the sixth enumerated stipulation of said article, page 324, same volume, says:

They withdraw all pretense of opposition to the construction of the railroad now being built along the Platte River and westward to the Pacific Ocean; and they will not in the future object to the construction of railroads, wagon roads, mail stations, or other works of utility or necessity, which may be ordered or permitted by the laws of the United States.

This reservation is the western portion of the Choctaw and Chickasaw retroceded lands. (See Pub. Dom., p. 730.)

Since the time these Indians were located on this reservation the State of Texas has set up a claim to the southwest portion of this land. It is called "Greer County," and is disputed territory; it is attached to Wheeler County, Tex., for judicial purposes; it is settled mostly by United States citizens and citizens of Texas. (See Senate Ex. Doc. No. 50, Forty-eighth Congress, second session, pp. 28 to 37, inclusive.)

(4) Modoc, 6 square miles, 4,040 acres, agreement with Eastern Shawnees June 23, 1874, confirmed in Indian appropriation act March 3, 1875, vol. 18, p. 477 (Pub. Dom., p. 730.) This reservation is in the northeast portion of the Cherokee lands next to the Missouri State line.

(5) Joseph's band of Nez Percés, 142 square miles, 90,711 acres, act of Congress May 27, 1878, vol. 20, p. 74. This reservation is in the Cherokee retroceded lands west of 96° west of the Poncas. (See Pub. Dom., p. 730.) In May, 1885, Joseph's band vacated this reservation, and was moved back to Idaho Territory in June, 1885. The Interior Department located on this reservation a tribe of Tonkawa Indians, numbering about 96 persons; they are non-treaty Indians, and are settled there now. (See Coms. Ind. Afrs. Anl. Rept., 1885, p. 96.)

(6) Osage, 2,297 square miles, 1,470,059 acres; article 16, treaty July 19, 1866, vol. 14, p. 804 (Rev. Ind. Ty., p. 589), order of Secretary of the Interior March 27, 1871, act of Congress June 5, 1872, vol. 14, p. 228. (See Pub. Dom., p. 731.)

(7) Otoe, 202 square miles, 129,113 acres; acts of Congress March 3, 1881, vol. 21, p. 381, order of Secretary of the Interior June 25, 1881. (Pub. Dom., p. 731.)

(8) Ottawa, 23 square miles, 14,860 acres; treaty of February 23, 1867, vol. 15, p. 513, Rev. Ind. Ty., p. 845, articles 16 and 17. (Pub. Dom., p. 731.)

(9) Pawnee, 442 square miles, 283,020 acres; act of Congress April 10, 1876, vol. 19, p. 29; of this 230,014 are Cherokee and 53,006 are Creek lands. (Pub. Dom., p. 731.)

(10) Peoria, 78½ square miles, 50,301 acres; treaty of February 23, 1867, vol. 15, p. 513, Rev. Ind. Ty., p. 847. (Pub. Dom., p. 731.)

(11) Ponca, 159 square miles, 101,894 acres; acts of Congress August 15, 1876, vol. 19, p. 192; March 3, 1877, vol. 19, p. 287; May 27, 1878, vol. 20, p. 76; March 3, 1881, vol. 21, p. 422. (Pub. Dom., p. 731.)

(12) Pottawatomie, 900 square miles, 575,877 acres, treaty February 27, 1867, vol. 15, p. 531; Rev. Ind. Ty., p. 691; act of Congress May 23, 1872, vol. 17, p. 159. (Pub. Dom., p. 731.) Part Creek, part Seminole lands.

(13) Quapaws, 88½ square miles, 56,685 acres, treaties of May 13, 1833, vol. 7, p. 424, and of February 23, 1867, vol. 15, p. 513; Rev. Ind. Ty., pp. 720 and 839–843. Cherokee lands. (Pub. Dom., p. 731.)

(14) Sac and Fox, 750 square miles, 479,667 acres, treaty of February 18, 1867, vol. 15, p. 469; Rev. Ind. Ty., p. 767. Creek lands. (Pub. Dom., p. 731.)

(15) Shawnees, 21 square miles, 13,048 acres, treaties of July 20, 1831, vol. 7, p. 35; December 29, 1832, vol. 7, p. 411; February 23, 1867, vol. 15, p. 513; Rev. Ind. Ty., p. 839–842.

Agreement with Modocs June 23, 1874; (Annual Report of Com. Ind. Affrs., 1882, p. 271), confirmed by Congress in the Indian appropriation act March 3, 1875, vol. 18, p. 447. (Pub. Dom., p. 731.) Cherokee lands.

(16) Wichita, 1,162 square miles, 743,610 acres, treaty of July 4, 1866, with Delawares. (Art. 4, vol. 14, p. 794.)

Unratified agreement October 19, 1872. (See Annual Report Com. Ind. Affrs., 1872, p. 101.) Choctaw and Chickasaw lands. (Pub. Dom., p. 731.)

(17) Wyandotte, 33½ square miles, 21,406 acres, treaty of February 23, 1867, vol. 15, p. 513; Rev. Ind. Ty., p. 839.

Articles 13, 14, and 15, p. 844, Cherokee lands. (Pub. Dom., p. 731.)

(18) The Iowa and such other Indians as the Secretary of the Interior may see fit to locate thereon, by Executive order dated August 15, 1883, 228,152 acres of the Creek retroceded lands.

(19) The Kickapoo, by Executive order dated August 15, 1883, 204,466 acres. Creek retroceded lands. (See Senate Ex. Doc. No. 50, Forty-eighth Congress, second session, p. 18.)

(20) On the 8th day of May, 1867, the Delaware and Cherokee Nation made a treaty or agreement whereby the Delawares, for a consideration of a sum of money, were adopted into the Cherokee Nation and settled on Cherokee lands east of 96°. (See Laws of the Cherokee Nation, 1881, p. 340.)

(21) A similar agreement made between the Cherokees and the Shawnees June 7, 1869, approved by the President June 9, 1869. (See Cherokee Laws 1881, p. 345.)

In all the treaties, acts of Congress, and orders of the Executive Departments locating Indians in the Indian Territory on the lands retroceded by the treaties made in 1866 with the five civilized tribes, the articles of said treaties, assenting to court and courts to be created and established by Congress, are not in any way abrogated or annulled, and it is submitted that all of the tribes and bands of Indians taking and occupying these retroceded lands, in the absence of an expressed stipulation to the contrary, are bound by these articles of the several treaties, made in July, 1866, with the five civilized tribes, and that their assent is there inferred, if not expressed, in favor of such court or courts. At an international council of Indians, held in June, 1887, at Eufaula, Ind. Ter., eighteen tribes and bands from all portions of the Indian Territory were present, by representation, and after a harmonious session of four days adjourned, to meet at Fort Gibson in May, 1888; and among other things that were before this council was the formulating and adopting a resolution asking that the Indian have the right extended to him to test his rights in the judicial tribunals of the United States. Quoting from the report, it says:

> The Indian has learned by long and sad experience not to place his trust in princes, nor at all times in Congress, and hence they ask they may be allowed to have the right of testing before the judicial tribunals of the United States Government itself, all enactments involving their rights of soil, or others of a vested character. (See full report in the archives of the Indian Bureau.)

Referring to the granting clauses, the habendum clauses, and the reversion clauses in the several patents from the United States to the respective five civilized tribes and the judicial definition and construction, see the case of the *United States* vs. *Rees*, 5 Dillon, p. 405, that—

> The Cherokees hold their land by a title different from the Indian title by occupation; they derive it by grant from the United States.
>
> It is a base, qualified, or determinable fee without the right of reversion, but only a possibility of reversion, in the United States.
>
> This, in effect, puts all the estate in the Cherokee Nation. (See *United States* vs. *Rogers*, Senate Report 1278, part 2, Forty-ninth Congress, first session, Appendix, pp. 1 to 6, inclusive.)

This definition and construction applies to all the patents issued to the five civilized tribes for lands in the Indian Territory, as the wording in the clauses submitted, defined and construed, are all similar; and

it is apparent the court defines the word "nation" or clause "nation become extinct or abandon the same" to mean an organized body or community with an organized national form of government, in the manner as stipulated for by the several articles of the treaties with these tribes, capable of exercising and enforcing the jurisdiction and authority delegated for the purposes enumerated in a lawful manner.

It is known to all familiar with the procedure and jurisdiction of United States courts, State courts, and Territorial courts that there are no courts clothed with civil-law jurisdiction in the Indian Territory over citizens of the United States or Indians; that up to January 6, 1883, the United States district court for the western district of Arkansas, court at Fort Smith, Ark., had limited criminal jurisdiction. All persons charged with committing a crime in the Indian Territory, witnesses for United States, and defendants were compelled to attend court at a great distance and enormous expense to the Government and themselves. On the 6th of January, 1883 (vol. 22, 400), an act was passed and approved for holding a term of the district court of the United States at Wichita, Kans., and for other purposes.

Section 2 prescribes:

All that part of the Indian Territory lying north of the Canadian River, east of Texas and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes shall, from and after the passage of this act, be annexed to and constitute a part of the United States judicial district of Kansas. And the United States district courts of Wichita and Fort Scott, in the district of Kansas, shall have exclusive original jurisdiction of all offenses committed within the limits of the territory hereby annexed to said district of Kansas against any of the laws of the United States now, or that hereafter may be, operative therein.

Section 3:

That all that portion of the Indian Territory not annexed to the district of Kansas by this act, and not set apart and occupied by the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Indian tribes shall, from and after the passage of this act, be annexed to and constitute a part of the United States judicial district known as the northern dirtrict of Texas. And the United States district court at Graham, in said northern district of Texas, shall have exclusive original jurisdiction of all offenses committed within the limits of the territory hereby annexed to said northern district of Texas against any of the laws of the United States now, or that may hereafter be, operative therein.

Section 3 of the act limits and prescribes the jurisdiction of these courts at Wichita and Fort Scott, Kans., and Graham, Tex., like as the jurisdiction exercised and extended over the Indian Territory by the western district of Arkansas at the passage of the act.

For a judicial construction of this act see case of *United States* vs. *Rogers*, printed in Senate Report No. 1278, Forty-ninth Congress, first session, Part 2, Appendix, pp. 1 to 6, inclusive.

This act does not relieve the five civilized tribes or the inhabitants living in their country. All are yet compelled to attend court at Fort Smith, Ark.

It was suggested that temporary or partial relief could be afforded if a commissioner was appointed and located in the Indian Territory with jurisdiction to make preliminary examinations, take bail, and secure witnesses' attendance.

In August, 1885, Hon. John Q. Tufts, formerly a member of Congress from Iowa, and United States Indian agent at Union Agency, Muskogee, Indian Territory, was, by the Hon. Judge I. C. Parker, the judge of the district court for the western district of Arkansas, appointed, commissioned, and located at Muskogee, as the district commissioner for the United States district court for the western district of Arkansas, and held his office until the 30th of June, 1887, at which time he

was compelled to cease to act because of the rulings of the First Comptroller, on June 22, 1883, which is as follows:

TREASURY DEPARTMENT, FIRST COMPTROLLER'S OFFICE,
Washington, D. C., June 22, 1887.

C. BROWNELL, Esq.,
1904 *Eleventh street N. W., Washington, D. C.:*

SIR: I am in receipt of your letter of the 20th instant, asking my opinion as to the appointment of Mr. Tufts as United States commissioner in the Indian Territory.

I have examined the question as to the appointment of Mr. Tufts as commissioner, and I fail to find that he has been legally appointed. My information is that he was appointed by the district judge, who, in the absence of the circuit judge, has certain powers conferred upon him by statute, but certainly not the appointment of United States commissioner, which can only be made by the circuit court.

I am of opinion, however, that the acts of Commissioner Tufts in issuing of warrants and the trial of cases are binding where objection has not been made by the parties to his jurisdiction; and I shall allow the accounts which he has presented for services rendered, where the same have been performed in good faith, and are found to be correct, according to the law governing such services. But after the commencement of the next fiscal year such fees will not be allowed, of which I shall cause Mr. Tufts to be advised.

I have no doubt that it is a matter of economy, and perhaps justice for those people living in the Indian Territory to have a United States commissioner appointed to hear and determine preliminary causes in that country; and it occurs to me that it should be authorized by Congress or that some action should be taken by which a commissioner could be legally appointed and qualified to act in that Territory.

Very respectfully,

M. J. DURHAM,
Comptroller.

In 1886 it was estimated there were living on the territory of the five civilized tribes United States citizens, as follows:

The whites lawfully in the country as licensed traders, railroad, Government, and local mining company employés and their families	8,000
Farm laborers and other workmen and their families under permit of Indian authorities (probably)	17,000
Emigrants, visitors, and pleasure seekers	1,500
Claimants to citizenship, denied by the Indian people (probably)	5,000
Willful intruders holding cattle, farming land, gambling, loafing, etc. (probably)	5,000
Total	36,500

(See Commissioner Indian Affairs Annual Report, 1886, p. 147.)

In addition, there are now nearly 1,000 miles of railroad constructed and in operation within the territorial boundary, and numbers of incorporated companies located and doing business in the Territory. They are mining, insurance, lumbering, stock raising, and grazing companies, with no law to control their acts or to furnish a remedy or redress a wrong in any civil transaction growing out of the prosecution and progress of their business, or protect the Indians against infringement of their rights, intruding upon their lands, and promote the full enjoyment and employment of their property.

The estimated expense of running these courts, under the plan formulated in this bill, is about $50,000 per annum; it is fair to estimate the income from the civil business, in aggregate, after the first year, will be $75,000 per annum, with the extended jurisdiction given in this bill. There are in the Territory at least 5,000 cases of doubtful citizenship claims pending for final and permanent disposal in the Territory which would be first considered; other business would increase and accrue in proportion, which would give a surplus revenue to the Government of $20,000 or $25,000 towards defraying the expenses of the

criminal business, which would in a few years bring the appropriation down to a minimum standard for supporting these courts.

It must be kept in view that the plan in this bill puts all moneys received by the clerks of the courts for fees, except witness fees in civil cases, into the Treasury of the United States, and all officers are salaried.

But if a single court, with limited criminal jurisdiction and original civil jurisdiction is placed in this Territory, with only one judge and one set of officers to run the same, the criminal business will absorb all the time and patience of the court, the officers, and suitors, and the plan will fall into disrepute and hatred, and be despised, and finally Congress will be charged with failure to provide for the increasing wants and urgent necessities of this people.

On page 28 of the bill, section 13, in line 2, the words "Eufaula," "Creek" should be stricken out and the words "Vinita," "Cherokee" inserted instead; it is an error of the types. Vinita is a better place to locate the supreme court, as it is a railroad center; it is high and dry in location and healthful in climate, and the inhabitants there and in the vicinity will appreciate the location of this court at their village, and give it such moral support, countenance, and dignity of respect as becomes an enlightened people to such an institution.

Respectfully submitted.

C. BROWNELL.

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