OKLAHOMA HISTORY EMBEDDED IN THE LAW

*By C. Ross Hume**

INTRODUCTION

At an early meeting of the 15th Judicial district association at Medicine Park, the writer was appointed Chairman of its History Committee; and on July 8, 1932 at Duncan a report was made which was later published in the *Oklahoma State Bar Journal.* At that time he suggested that there were many leading cases affecting this state, and this report will tell of some of them.

In April, 1939, Oklahoma celebrated its semi-centennial of the first opening and the state is being explored for every source of history, and that is an additional excuse for this effort.

Research has impressed the writer that much valuable historical matter is embedded in the law; that Acts of Congress and Territorial and State statutes should be studied, that Federal, territorial and state decisions of the courts furnish much materials, and that the regulations, reports, and opinions of national and local administrative officers should not be overlooked by students of government, history and law. Here is a wealth of subjects that are called to the attention of citizens of the commonwealth.

In history we record facts and resulting consequences; in legal controversies, often we relate facts of great historical value. In this article the writer tries to disclose the history which is found in our libraries.

History is defined as that branch of knowledge that records and explains past events as steps in human progress. The Supreme Court of Texas says, "History consists largely, if not wholly, of the records, narratives and statements of others, purely hearsay."[1]

The law has been defined as a rule of action prescribed by a superior, which an inferior is bound to obey. In this article it will include legislative enactments, administrative regulations, and judicial interpretations.

For convenience as in the former report to the association we begin at the Louisiana Purchase and come to the present through five periods:

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[1] A. T. & S. F. vs. Madden, 103 S. W. 1193.

1. First Period (1803-1834)—Exploration and Migration.
2. Second Period (1834-1861)—Settlement and Organization, Five Civilized Tribes.
3. Third Period (1861-1889)—Reconstruction and Plains Indians Established on Reservations.
4. Fourth Period (1889-1907)—Twin Territorial Development.
5. Fifth Period (1907-1938)—Statehood Growth.
6. Conclusion.

FIRST PERIOD (1803-1834)—EXPLORATION AND MIGRATION

When the Louisiana Purchase was completed by delivery of possession to Governor Claiborne at New Orleans, the Congress organized the area by the creation of two territories by Act of March 26, 1804: (1) the land south of Mississippi Territory and east of Mississippi River and south of the 33rd degree west of the river was called Territory of Orleans; (2) that part west of the Mississippi River north of the 33rd Parallel was called Louisiana.[2]

The act also included the following provision (a) established trading houses with the Indian Tribes; (b) made provisions relative to rations for the Indians and their visits to the seat of Government; (c) extended the laws of the United States in full force over the territories created.[3]

The following year the District of Louisiana came under the control of the Governor of Indiana Territory, and remained thus until Louisiana was made a state in 1811, when it became a part of Missouri Territory. In 1820 when Missouri became a state, the lands within this area were included in Arkansas Territory. Here it remained until the Act of June 30, 1834, known as Indian Intercourse Act, wherein it is set apart and defined as "The Indian Country." And in Section 24 the lands were annexed to Arkansas Territory for judicial purposes.[4]

Article VI of Louisiana Purchase Treaty and sections of each of the above organic laws provided for the rights of resident Indians, and the removal of other Indians to these lands.

When this vast country was secured the colonists of the south agitated the removal of all Indians and the establishment here of a

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[2] U. S. vs. Lynde's Heirs, 20 Law Ed. 231, U. S. Sup. *Reports*. 11 Wall. 632-640; Robert L. Williams, "Oklahoma and Indian Territory as Embraced Within the Territory of Louisiana, Over which the Laws of the United States were Established," *The Chronicles of Oklahoma*, Vol. XXI, No. 3 (September, 1943), pp. 250-59.

[3] Thorpe, *American Charters*, Vol. III, Sec. 15, p. 1370.

[4] *Ibid.*, p. 1097; Williams, "Oklahoma and Indian Territory as embraced within the Territory of Louisiana," *op. cit.*, pp. 250, 259.

government solely for them. The Five Civilized Tribes were located in the southeastern states and territories, and through the two leading cases of *Cherokee Nation v. State of Georgia,* and *Worcester vs. Georgia,* we may trace the history of the Cherokee Nation;[5] the status of Indian tribes and their land tenure from early colonial times, as stated by Chief Justice Marshall; and causes that led to their ultimate removal to Indian Territory about 1838. The decisions were rendered in 1832 and 1833, and in the first the Indian Nation sought to enjoin certain acts of the state legislature from enforcement, which was refused. Worcester a missionary confined in prison for violation of a state law brought his case before this court. As a result feeling against the Indians became so bitter that in a short time they removed to the territory.

SECOND PERIOD (1834-1861)—TRIBAL SETTLEMENT AND ORGANIZATION

The Congress in 1834 had established and defined Indian Country; the Caddo Indians in 1835 had ceded their reservation near Shreveport; the Comanche and Wichitas made their first treaty with the Government in 1835; soon thereafter the Choctaws sold one-fourth of their lands to the Chickasaws; the exodus of the five tribes was being carried out, and each was establishing its national and local governments in the new homes. A quarter century brings us to the location of the Wichitas and Reserve Indians of Texas in the Leased District. Soon the Civil War started and the Federal troops all withdrew to Kansas, followed shortly by refugee civilized and plains Indians. The area passed under control of the Confederacy and later the Federal forces returned to the eastern part, and Indians divided.

On March 3, 1817, jurisdiction to try offenses committed on lands belonging to Indians was given to the United States Courts. The Act of June 30, 1834 annexed Indian Country, bounded east by Arkansas and Missouri, west by Mexico, north by the Osage Country, and south by Red River to the Territory of Arkansas. By Act of Congress, of June 17, 1844, the Act of May 26, 1824, relative to land titles in Missouri was extended to Arkansas and Louisiana, granting district courts jurisdiction over land claims originating with either French, Spanish or British authority, authorized any person claiming land by any grant protected by treaty of April 30, 1803 to have the claim adjudicated in the United States District court.[6]

In June, 1836, Arkansas became a state and a United States Court was established with powers of United States District and Circuit Court of Kentucky; and in 1837 the district court of Arkansas was extended over this area, and the 9th Circuit Court established including Arkansas. In 1851 the United States District Court for

[5] 5 Pet. 1, 8 Law Ed. 1; and 6 Pet. 515, 8 Law Ed. 483.
[6] U. S. vs. Lynde's, 20 Law Ed. 223, 11 Wall. 632-648.

Western District of Arkansas was established and Indian Territory attached to it.

A number of Supreme Court decisions are of interest during this period. Wm. S. Rogers, a white man who became a member of Cherokee Nation was indicted for murder committed in Cherokee Nation; in Circuit Court of Arkansas.[7] It was held that Indian Territory was not in any state, and an adopted white man was amenable to the laws of the United States in that court. In March 1851, Congress created nine western counties of Arkansas and Indian Territory into Western District of Arkansas with certain jurisdiction. Dawson, a white man was indicted for killing another white man in the Creek Nation.[8] [9] It was held that Congress had the right to declare where crime was triable in Western District of Arkansas.

The history of the Five Civilized Tribes shows that each maintained a government of Indians for Indians, with three departments and districts for local units.

For the white man there was the United States District Court of Arkansas, Indian agencies, and military control exercised from Forts Gibson, Smith, Towson, Washita, Arbuckle, and after its establishment, Fort Cobb.

Third Period (1860-1889)—Reconstruction and Location of Plains Indians on Reservations

During the Civil War, Oklahoma was under Confederate control and martial law. The Five Civilized Tribes were slave-holding Indians, and all joined in the South. Later the Cherokees, Creeks, Chickasaws, and Seminoles divided, and some had gone north. In September, 1865, a presidential commission came to Fort Smith and proposed the terms under which the Indians could return to their former status. Treaties were made with these Indians the next year, and part of their lands ceded to the Government for location of the "wild tribes."

The policy of establishing Indians on reservations in the western part of Indian Territory was started in 1867, and treaties made with the Cheyenne, Arapaho, Kiowa, Comanche, Apache, and with the Wichita and their affiliates established the locations of these reservations. On March 3, 1871, Congress enacted that no treaties would be made, but that Indians would be governed by Congress directly. In 1887, the general allotment act was passed. Fourteen different locations were made, and Indians passed under control of Agents, policed by Indians and the military established at Fort Reno and Fort Sill.

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[7] U. S. vs. Rogers (1846) 4 How. 367, 11 Law Ed. 1103.

[8] U. S. vs. Dawson (1853), 14 Law Ed. 775, 15 Howard 466.

[9] James Henry Gardner, "The Lost Captain, J. L. Dawson of Old Fort Gibson," *The Chronicles of Oklahoma*, Vol. XXI, No. 3 (September, 1943), pp. 217-49.

The United States District Court of Western Arkansas had jurisdiction in the entire area.[10] One court with a single judge exercised all jurisdiction over crimes, now committed to all state district and three Federal courts. During twenty-one years, over 13,000 criminal cases were filed; 9,000 were convicted including 344 capital cases with 151 sentenced and 83 executed.[11]

The Report of the Commissioner of Indian Affairs for 1877 (p. 108) stated:

"Would not the establishment of a UNITED STATES COURT IN THE INDIAN TERRITORY be practicable? The benefits of such a court to the Indians, located in our midst, would be of incalculable value, in that it would secure more speedy and more certain punishment. * * * *

"As it is now, with the United States Court at Ft. Smith, Arkansas, a distance of from one to three hundred miles from the places where crimes are committed, and with no facilities for public travel,—Very many guilty ones go unpunished for no other reason that the injured parties and witnesses are unwilling to subject themselves to tediousness of a trip, and delay of waiting until cases are called.

At p. 89 of same Agent Haworth of Kiowa Agency says:

"Several important captures of thieves have been made who have been sent to Fort Smith for trial. The great distance to that point and cost of going, as well as time required in making the trip and attending court make it difficult to get witnesses to go.— A United States Court should be established in the Territory at some point nearer and more easy of access to the southwestern agencies than it is now."

The movement of large herds of cattle across Oklahoma to eastern markets brought the cattle rustler and murderer in its wake. In Statutes of Kansas (1879), Section 5736-5753 provided for quarantine against Texas fever from March 1 to November 1; and prevented driving cattle into Kansas. Section 5754-55 provided certain territory where cattle might be held during part of the year. (Wm. Nicholson, Superintendent to J. M. Haworth, Agent, April 16, 1877.) Section 2117 Revised Laws of Kansas established a "dead line" near Fort Dodge about the 100th Meridian. The trail was west of Camp Supply, and probably west of the Kiowa reservation. The penalty of $1.00 per head could be collected only when animals were driven on reservation to graze and not in transit. Even though they ate in passing, this was incidental.

The railroads authorized by Congress brought a horde of whites who settled in the towns and rented Indian lands. Indian courts had no jurisdiction over these people, and Indian laws and customs were ignored. It became a sanctuary where the red man's law was inoperative, and the white man's law was not enforced.

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[10] Williams, "Oklahoma and Indian Territory as Embraced within the Territory of Louisiana," *op. cit.*, pp. 250-59.

[11] 20 Law Ed., 227.

Agitation for homestead entry on the public lands and the allotment of Indian lands, and sale of surplus lands were part of this and the next period.

United States vs. Payne (1881), by Judge Parker of Circuit Court of Arkansas,[12] held that David L. Payne was in Indian Territory contrary to law, and he was removed by military forces. The defense was that it was not Indian Territory but part of the public domain subject to preemption. Payne was charged with a second intrusion into Indian country, and subject to penalty. He claimed the lands invaded were bought from the Seminoles in 1866, and subject to homestead entry. It was part of the Louisiana Purchase set apart as Indian country in 1830, later conveyed to the Five Civilized Tribes. This land had been set over to the Creek Nation in 1833, then to the Seminole in 1856, and back to the United States in 1866 and reserved. The tract in question invaded by Payne (namely, the central portion of the Indian Territory which was finally purchased by the Government from the Creek Nation) was referred to in official acts as the "Unassigned Lands." After 1866, the Pottawatomi-Shawnee and the Cheyenne and Arapaho reservations were located in lands formerly owned by the Creek Nation; also, the Kiowa and Comanche reservation and others were located on lands claimed by the Choctaw Nation under its patent from the Government in Southwestern Oklahoma. Lands held reserved from homestead entry and Government action made such lands Indian country, and Payne was held liable to a penalty.

In *United States vs. Reese,* by Judge Parker,[13] the defendant was charged with cutting timber in the Cherokee Nation. Was the timber cut on lands of the United States? The decision held that the Cherokee Nation had a grant from the United States, the lands to revert to the United States; all estate was in the Cherokee Nation and there was no crime against the United States.

The case *Ex Parte Crow Dog*[14] and Section 1 of the Act of June 30, 1834,[15] may be referred to in determining Indian country, which is all country in the United States to which Indian title is not extinguished. The Act of January 6, 1883, attached part of Indian Territory to Kansas, and part to the Northern District of Texas.

The case *Cook vs. United States*[16] and the Indian treaties of 1853, 1865 and 1867 show the Public Land Strip, Cherokee Outlet, had some connection with Indians west of the Mississippi. It was not open to settlement and could have been used for any purpose the Government had in view.

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[12] 2 McCrory, 289, 21 Fed. Reporter 222.
[13] 5 Dillon 405, 21 Myers, p. 231.
[14] 109 U. S. 556, 27 Law Ed. 1030.
[15] Chap. CLXI, Stat. 1, 4 U. S. at L., p. 729.
[16] 138 U. S., 157.

In the case of *United States vs. Rogers*,[17] prior to Act of January 6, 1886, the Cherokee Outlet was in jurisdiction of United States Court for Western District of Arkansas. That act did not put it in jurisdiction of United States Court of Kansas, as it was Indian country occupied by Cherokees.

FOURTH PERIOD (1889-1907)—TWIN TERRITORIAL DEVELOPMENT

By Act of March 1, 1889 the U. S. Court for Indian Territory was established at Muskogee. In 1895 it was divided into three districts and given the jurisdiction formerly in District of Kansas at Ft. Scott, District of Arkansas at Ft. Smith and Eastern District of Texas at Paris. After September 1, 1896 the three were established as a Court of Appeals and two judges appointed in each of them. The districts were separated into 26 recording districts comprising areas approximating that of counties. By Act of May 2, 1890 certain statutes of Arkansas were adopted for Indian Territory. From the beginning until statehood as far as the white man was concerned the government of old Indian Territory was exercised largely through Federal courts; administrative government was by Indian Agency employees, policed largely by the national War Department.

On April 22, 1889 original Oklahoma was opened to homestead entry, and the following year the Organic Act provided for suit to determine the right to Greer County. By successive openings of the Cherokee Outlet and Indian reservations, Oklahoma Territory grew to the area at time of statehood. Before the opening in 1901, the Wichita Reservation (also, Kiowa-Comanche Reservation) was attached to Canadian County about 1890 with a resident United States Commissioner and a Tribal Indian court of three men.

In *United States vs. Texas* (1896),[18] this litigation arose over what was the correct Red River to determine whether the North Fork as claimed by Texas or Prairie Dog Town Fork as claimed by United States was correct. The Treaty with Spain in 1819 divided the domain of Spain from the United States, with the south boundary of Red River extending to 100th Meridian, thence crossing the river north to the Arkansas. The Supreme Court determined that the south fork (Prairie Dog Town Fork) was the boundary, and made Greer County a part of Oklahoma Territory. There is much history found in that decision.[19]

In *Stephens vs. Cherokee Nation* (1898),[20] this case gives the history of the Dawes Commission in 1893, their powers and duties; shows the area, census, and organization of United States Court for

[17] *Supra*, fn. 7.
[18] 162 U. S. 1.
[19] See Board of County Commissioners of Greer County *vs.* Clark & courts 70 Pac. 206.
[20] 174 U. S. 445, 43 Law Ed. 1041.

Western District of Arkansas, Eastern District of Texas, and District of Kansas; the establishment of the Court of Indian Territory, the obligation of the United States to the Indians and whites living there, the provisions for development of townsites, building the railways, citizenship and other tribal legislation, and continuation and closing of tribal affairs; and has many other matters discussed therein.

United States vs. Choctaw Nation[21] is a case in which the rights of the Wichita and these Indians to the Wichita Reservation and wherein it was held that the Leased District was ceded in 1866. There is much history in these two opinions.

Lone Wolf vs. Hitchcock,[22] was a case in which the power of Congress in relation to treaties with the Kiowas and Comanches was considered, and it is held that plenary power of Congress cannot be limited by treaty with Indians.

In the case of Frank Franz et al vs. G. E. Autry, et al,[23] decided June 25, 1907, the Territorial Supreme Court held that courts could not restrain an election called by the Constitutional Convention of Oklahoma, relative to the divisions of Woods and Woodward Counties, as organized in Oklahoma Territory; and directed a new election held September 17, 1907, and with Proclamation for Statehood on November 16, 1907.

Fifth Period (1907-1938)—Statehood Growth

The experiment of erecting a state from two territories operating under different systems; founding new institutions, to offset those organized, making the laws uniform throughout the state, establishing a capitol, has brought many new and novel questions before the courts.

A survey of the laws shows that there has been much litigation in both Federal and State Courts which furnish history for us. Congress provided that probate cases in the five tribes and Osage Nation should be tried in the County Courts, and appeals from these furnish much material. Kappler's Indian Laws and Treaties show how many times the Government dealt with the one-third of Indian population within our borders.

After the discovery of oil in the bed of Red River a number of suits were filed and disposed of in the Supreme Court between Oklahoma and Texas to determine the boundary east of Greer County. The Kiowa Reservation had been established to the middle of Red River, and both states claimed the south half of the bed of the stream. The Treaty of 1819 established the south bank as the

[21] 34 Court of Claims and 179 U. S., 496.
[22] 187 U. S. 553, 47 Law Ed. 299.
[23] 91 Pac. 193.

boundary between Spain and the United States, and this later became the national boundary between Mexico and later Texas and the United States.[24] Another dispute arose as to the true 100th Meridian and the parallel of 36 degrees 30 minutes as boundaries of the Panhandle of Oklahoma.[25] Another recent case of interest is the Civic Center,[26] in which the title to abandoned right of way of the Rock Island Railroad through part of Oklahoma City and the former rights of Creeks and Seminoles are involved.[27]

Conclusion

We have shown that there is much history hidden in our law books. Judge Stevens of Kansas made the following statement in 1878:

> "The complicated machinery of what constitutes a nation are the only means by which is assured to the people the certainty of peaceful disposition of every question affecting the life, liberty and welfare of every citizen. The statutes of a state are a fair index of the civilization and advancement of its people. Go to the written laws of any nation, and a little discrimination will tell what the nation's rank is in the family of nations."

The executive and legislative branches of a representative government study the social, economic, and moral problems of its people, and enact such legislation as will better conditions. The citizens, natural and corporate, seek protection of their rights and redress of wrongs under these laws; and this we find when they seek assistance from the courts. In our dual government with one-third of the Indians of the nation in our state of Oklahoma, we come into frequent contact with Federal laws and officials. The United States courts have been such a vital factor in the development of this state that special study should be given to this feature of work. In the succession of governmental agencies in each period the judicial has been active and furnished protection to life and property to the white and red man. Through earlier periods before the establishment of the territories, the executive branch acted through Interior and War Department officials.

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[24] There is a series of cases on different phases of boundary line history in 60 Law Ed. 771; 67 Law Ed. 428; 68 Law Ed. 1118; and 69 Law Ed. 937.

[25] 71 Law Ed. 145.

[26] 80 Law Ed. 816.

[27] Among State decisions in which we find history is Coyle vs. State, 113 Pac. 121, 55 Law E. 853, the Capital Removal case; Armstrong v. State, 116 Pac. 770, the Swanson County case affecting Comanche County; Savage v. Gotham, 219 Pac. 327, Walton County case; The Grandfather Clause case sustained in State Court and reversed in the U. S. Supreme Court.

If interested further turn to Oklahoma or Federal Digests under the following titles: Boundaries, Counties, Constitutional Law, Cities, Congress, Historical Facts, Historical Writings, Indians and various tribes, Public Lands, States, Suffrage, Statutes, Territories, and perhaps many other. See, also, Impeachments, Initiative and Referendum.

The tendency of our age is to secure Federal participation in highways, social security, agriculture, labor and all manner of public works, and this leads to the centralization of power in Washington. The conflict between state's rights and such Federal domination merits close study by the lawyers throughout the nation.

Historical investigators are dependent upon certain classes of material, among which are laws and documents from which governmental facts may be ascertained. Their purpose is to teach the origin, growth and principles upon which the nation is established. With the law as your vocation, if you want a hobby let me suggest that Oklahoma history is fascinating and a matter of which you are a part each day that you live.[28]

[28] As local attorney for the Caddoes on a claim against the United States for lands in Oklahoma and Texas, the writer has collected material at Washington, D. C., Austin, Texas, and Oklahoma City and Norman. In a brief filed by him before the court of Claims, he has advanced the following propositions: (1) that by Treaty with France in 1803, President Jefferson, Madison and others consistently claimed the Rio Grande as the southern border; (2) that the United States was under treaty obligations with France not to transfer any part of that territory to any other government, and the citizens of the ceded territory should be admitted to the rights of citizens of the United States, and this included the Indians.