"EARLY DAY COURTS AND LAWYERS"

I take it to mean that this refers to early day Oklahoma courts and lawyers, and I accept this as an appropriate assignment, given me, because of the pretty well known fact that I came to Guthrie, Oklahoma, on the opening day, on April 22, 1889, in the same seat with my life long friend, Judge John H. Cotteral, and, also, in the same car with another friend, Judge Frank Dale, who likewise have spent their lives with me, until the recent sad death of the latter, as a part of Oklahoma's courts and lawyers.

The first of Oklahoma's great judges, Chief Justice Edward B. Green, made himself famous in the early days with the use of two words "Sui Generis," and on one occasion an also historic Guthrie lawyer, Harry R. Thurston, said to be a nephew of one of Nebraska's great lawyers and senators, John M. Thurston, hearing this term used by Judge Green as a part of his reason for delay in an immediate decision of a case that Thurston very much wanted decided, and being asked by a party what these words meant, said: "I don't know just what the English is of those two Latin words, but I know the American interpretation for it means he is in a hell of a bad fix," and that really was characteristic of the early day situation in Oklahoma.

Oklahoma got its birth from a rider on the Indian Appropriation Act passed March 3, 1889, and which provided for opening the Oklahoma lands to settlement under the homestead law, and in an accompanying provision that before the opening a townsite might be reserved of not more than a half section, 320 acres, in any place, under Sections 2387 and 2388 of the Revised Statutes.

Congress was either oblivious of the fact, or had no time to remedy it—that there were no provisions for territorial laws or for local government in the country to be opened for settlement, and that this region was in the heart of the Indian Territory, which, although it had a court, presided over by Judge Shackelford, this was a court of limited jurisdiction, with no municipal laws or regulations to administer and no local governments or organizations provided for by law.

People in this situation swarmed into and over the country called "Oklahoma," opened to settlement at noon, April 22, 1889. They rode slow trains or fast horses, many entering before noon, but all before night of that eventful day, when every quarter section of land had on it from one to many settlers and single localities had twenty-thousand townsite lot claimants. In this unusual condition it was fortunate that all these people were Americans and American citizens. If they came too early, they were disqualified to take lands or lots. If they came too late, they were often kept from getting any by force of those who occupied the territory, but one and all they were people who had been used to good government, and so their Americanism prevailed, and their adaptability to order led them into what was termed "provisional governments", the organization of which began before the sun went down on the very beautiful and balmy day of April 22, 1889, and it is a memorable fact, to which courts and lawyers, early day and later day, have many times adverted, that in the period from April 22, 1889, to May 2nd, 1890, the date of the Organic Act, which gave us a complete local government, headed by these early day lawyers, soon to be administered over by these early day courts, there was less crime and less disturbance then than there has ever been at any period since. That was due, no doubt, to the innate capacity and the inherent ability of the American people for local self government, based on the true principle of government by the consent of the governed.

The early day courts, therefor, were early day provisional courts. The big courts of the first year, or for several years, were the United States Land Offices, two of which were established April 22, 1889, one at Guthrie and one at Kingfisher. The title to the lands to be opened to settlement was in the Federal Government, and it could only be gotten out thereof through application and entries made at these land offices, which were presided over by an early day court known as a Registrar and Receiver of the Land Office, and their decisions, and those made on appeal to the Commissioner of the General Land Office and Secretary of the Interior at Washington, were final, within exceedingly narrow bounds of correction.

All lawyers, therefore, having any practice at that time

were land office lawyers, and many made distinction and fortunes out of that practise, developing indeed, as they did, from that to lawyers of foremost rank. My former honored partners, Judge Frank Dale, second Chief Justice of the Oklahoma Supreme Court, who, with the sorrow of his friends, on the 10th day of Febuary, 1930, passed "to that undiscovered country from whose bourne no traveler ere returns," and my honored friend, Judge John H. Cotteral, present United States Judge of the Tenth Circuit, are shining examples of these early day land lawyers who attained the highest distinction at the bar and the highest distinction upon the bench, which they have so ably filled and where they have so ably served.

There is another compliment that should be given to the characteristic sovereignity of the early day provisional governments, so called because they were recognized by no law except the power of the people to govern themselves, and this was exhibited in two characteristic instances:

First

These provisional governments provided, without any authority of law whatever, for arbitration boards, which sat and heard disputes over priority of settlement by town lot claimants, and under these regulations these boards issued Certificates of Settlement and Occupancy, which gave first right to the holder thereof. Those certificates were strictly enforced, and the rights under them made effective by the orders and decrees of these boards, and when Congress passed the Townsite Act of May 14, 1890, it recognized these provisional Townsite Board Certificates, and made them full proof of compliance of townsite law when there was no adverse right shown and presumptive evidence where there was an adverse claim, and,

Second

As to municipal rights and obligations, the early day courts held that these provisional municipal organizations had no legal existence whatever, but, notwithstanding, that where legal municipalities were formed as successors to these municipal governments after the Organic Act, under authority of the Legislature to ratify these provisional contracts and authorize payments thereof, and these legal municipalities did ratify those provisional city contracts, these contracts

were legalized and the certificates enforcible. *(See Mayor, etc., of City of Guthrie v. Territory, 1 Okla. 188).*

In the course of events, however, we passed from the earliest day period, extending from April 22, 1889, to May 2, 1890, when we were early day lawyers without early day courts to practise in, properly and legally speaking, to a condition of legalized existence under the Organic Act for the Territory of Oklahoma, and it was then that we came strictly into this condition of "Sui Generis". We not only had, indeed, the anomalous condition which Congress created in March, 1889, but we had the anomalous condition which followed up to May 2, 1890, and we then were met with another anomalous condition, which was that when Congress provided for early day courts in Oklahoma, the President of the United States gave us early day Judges who had not been in Oklahoma. It would be a reflection upon the many, many, many fine lawyers who came to Oklahoma in 1889 to say that they were not qualified to be Judges, because they were, as many of these same early day lawyers have subsequently proven, but, notwithstanding this fact, the President gave us an able man in Honorable Edward B. Green, of Illinois, as Chief Justice, another fine and able man, Honorable John G. Clark, of Wisconsin, as Associate Justice, and another fine and able man, Honorable Abraham J. Seay, of Missouri, and these three constituted the first Supreme Court of Oklahoma, and served for the salary of $3,000.00 per year, and then was when the condition of "Sui Generis" became apparent, and one cannot blame Judge Green for so characterizing the situation when he observes that into that court was carried questions of either original or fundamental importance of original character, arising thus far only in Oklahoma

This condition "of its own kind" is illustrated by the early decisions of the Supreme Court of Oklahoma, which first began the settlement of questions of jurisdiction and practise, and early went to subsequent questions of controversies growing out of the original title to these Oklahoma lands.

The first decision of the court was in the case of *Allison v. Berger,* handed down June 24, 1890, and that case involved and decided the question of the jurisdiction of the County

Court over a suit of the most ordinary nature to recover $310.00.

The second opinion, filed the same day, was *Ex parte Haly,* which decided that the United States Commissioner had jurisdiction to issue a warrant to the United States Marshal for the arrest of a citizen on the charge of assault and battery, and the *third case,* that of *Adams v. Couch,* was the first case to come before the court relating to the original land titles in Oklahoma, and held that the law did not authorize recovery in ejectment under a register and receiver's duplicate certificate of entry of public lands under the homestead laws as applicable to Oklahoma.

Following that case, no doubt, the next one of importance, and it was, indeed, of the highest importance, was the case of *Smith v. Townsend,* where the court decided the first great question relating to Oklahoma public lands, and that was that a party within the Territory on the right of way of a railroad, at noon, April 22, 1889, was not qualified to enter public lands open to settlement on that day and hour.

These instances mentioned I give only to show that Judge Green was right when he said that the conditions in Oklahoma in that early day were "Sui Generis", that is, "Of its own kind", and, indeed, these historic words were emphasized by the third and last Chief Justice of our early day territorial courts, the Honorable John H. Burford, also deceased, in his famous, somewhat dissenting but called concurring, opinion in the famous case of *Autry v. France,* which memorable and momentous case decided the great question of the right and power of our splendid constitutional convention to submit a constitution to the people of Oklahoma in 1907, under such terms and with such provisions as pleased the constitutional convention, although it was strenously urged at that time these provisions did not please the court. Looking back over this history of early day courts and lawyers, it may seem to us strange that such a question would ever have been raised, and it is stranger to us now to contemplate and remember that that most vital of all decisions, which enabled us to go ahead with the State government and leave our infancy of territorial government, was concurred in fully by only three of the Justices who participated therein, was squarely dissented with by two of the Justices, Justices Irwin

and Burwell, was only concurringly approved by one other, Chief Justice Burford, and that the decision itself was the reversal of the square judgment enjoining the prescribed officers of the constitutional convention from holding an election under the constitution at all, such final decree so reversed being made by one of the co-ordinate Justices of that high court.

We have passed that day and that situation by more than twenty-two years, and the progress of the State has been so remarkable, the work of the succeeding courts has been so able and so generally satisfactory, that it is hard for us to think and hard for us to realize the very close margin by which we escaped being prevented from ever emerging from our youthful, judicial status of early day courts and lawyers into the full manhood of subsequent State courts and sovereign government.

Going back again to an early day in early day Oklahoma Courts and Judges, there are some additional interesting bits of history. We remember that our first Oklahoma Courts of general jurisdiction were presided over by three Judges, who were named Chief and Associate Justices of the Supreme Court of Oklahoma. This situation extended from May, 1890, to December, 1894, when Congress passed the act for two additional Judges. During this first period the Judges were three in number. The first were Edward B. Green, Chief Justice, Abraham J. Seay, John G. Clark and John H. Burford, Associate Justices. John H. Burford succeeded Abraham J. Seay when he became Governor of the Territory. Then came the fifth, Frank Dale, who first succeeded John G. Clark as Associate Justice, and then in turn Judge Dale became the Second Chief Justice, succeeding Judge Green. All of those five have passed to the great beyond. The sixth was Honorable Henry W. Scott, now, as I understand, engaged in a more lucrative profession than practising law. Myself, A. G. C. Bierer, became the seventh of these Judges in January, 1894, and with the passing of my associate upon the bench and partner in the law practise, Judge Frank Dale, the two covering a period of thirty-two years, and with Judge Scott's absence from the State, I am the oldest in commission and point of service of these early day Judges and lawyers, and the oldest one alive engaged in practice within the State.

Next came Judge John L. McAtee, the eighth judge in number, he and I being appointed under the act of Congress of December 21, 1893, increasing the number of these Justices from three to five. Then came John C. Tarsney, number nine, who, with Judge McAtee, are both deceased, Judge Tarnsney succeeding John H. Burford. Then came my long time most esteemed friend and your honored President of the Board of Governors of the present State Bar of Oklahoma, Judge James R. Keaton, whom I am proud to mention here and in this connection, because of our happy and harmonious acquaintance as early day lawyers, early day judges, and subsequent and present members of the Bar of our great State. He came on the bench as the tenth of these judges

Then the Honorable John H. Burford came back on the bench, and resumed service as the third and last Chief Justice of this early day court, and with him upon the bench came my successor as the eleventh in name of the judges, Bayard T. Hainer, who for several years has been ill at his residence in Oklahoma City. Following him came the Honorable Benj. F. Burwell, the twelfth, Clinton F. Irwin, the thirteenth, and Frank E. Gillett, the fourteenth of the Judges, these three having since deceased. The fifteenth judge was Honorable John L. Pancoast, still living, and Honorable James K. Beauchamp the sixteenth of these judges, since deceased, and the seventeenth and last to be appointed was Honorable Milton C. Garber, now the honored member of Congress from the eighth Oklahoma district. That list comprises the early day lawyers who each filled the position of Judge in these early day courts in Oklahoma, there being three from 1890 to 1894, five from 1894 to 1902, and seven from 1902 to the close of the existence of this early day court at high noon on November 16, 1907, when that court was succeeded by the election of three of its honored citizens, who had been members of the Constitutional Convention, which fashioned and formed this great fundamental instrument of our State government, and became associated with two other honored and well known lawyers, these five being honorables Robert L. Williams, Mathew J Kane, Samuel W. Hayes, who were each members of the Constitutional Convention, and the honorables Jesse J. Dunn and John B. Turner.

John H. Cotteral, of Guthrie, and Ralph E. Campbell,

of Muskogee, at that time were appointed by the President and became Judges of the United States District Courts, respectively, of the Western and Eastern Oklahoma Districts.

I end the personnel of these early day courts and lawyers with this enumeration, because to carry it further would get away from the early day subject of this address.

In making this limitation I am, however, not unmindful of the fact that there were many, many brilliant men in the Territory of Oklahoma who were as worthy and capable of occupying these high and most responsible judicial positions as those of us who did occupy them, and who would, no doubt, have filled these positions with equal ability and equal credit if the partiality of selection therefor had fallen upon them to occupy such positions instead of upon us, upon whose shoulders was imposed this responsibility. The record of the Territory and State of Oklahoma is ample proof of the fact that there are just as good lawyers off of the bench as on. I say this with no undue credit to these busy lawyers who have helped the courts to maintain the proper construction of our constitution and laws and to administer justice, as is the highest purpose of the establishment of these tribunals.

This early day judicial and legal history of Oklahoma emphasizes forcibly another truth, and that is the great ease with which the pendulum of events and difficulties swing from one extreme to another.

When we landed on those first days in Oklahoma we were wont to say we were a country of its own kind, without laws. This was not strictly true, but it was true that we had a dearth of local and municipal enactments of local courts of county, township, city and of territorial organizations, and it may not have been strange that the plea for organized legal government resulted in a plethora of legislation when we once got a chance to enact it, and from no legislation at all we proceeded in the short space of three years to obtain in turn three different and distinct codes of civil procedure, with two separate and distinct general revisions of our laws.

Congress by the Organic Act placed the Nebraska civil and criminal code in force with all of the Nebraska statutes that were deemed applicable to this Territory. Less than a year later the first Legislature of the Territory proceeded to repeal the Nebraska code, with many chapters of its statutes,

and placed in force the Indiana code of civil procedure, with many chapters of the Dakota General Statutes. This confusion, however, was apparently thought not to be sufficient to immortalize this condition of "Sui Generis", and the third Legislature, called in session but two years after the second code had been enacted, proceeded to again change our codes of civil procedure, terminated the Indiana code, and enacted in lieu thereof the Kansas code of civil procedure, which has remained in force, with a few amendments, ever since that time, and there is one fact in this history of our early day courts and lawyers which again emphasizes our difficulties and additional labors, and that is that while we proceeded in these few years to confuse our legislation and our practice, and increase the burdens of the lawyers and the courts with these rapid changes, we apparently too quickly got tired of that practice, and although the Legislature of Kansas six years after we adopted its code proceeded to make radical amendments thereto, which most essentially lessened the labors of both courts and lawyers in their review of cases on appeal to the Supreme Court, by reducing the record and the expense to the minimum, we have spent our time in criticising the courts for long records, for long opinions and for the consequently necessary delays, although the mother State of Kansas has shown us such an easy way to avoid all of these burdens by the short record and, consequently and very naturally, more abbreviated arguments that attend the opinions on the cases disposed of. Personally, at least, I would very much like to see, not a reform in our judiciary that would again upset our courts and do damage to legal determinations and legal procedures, but an adoption of the reformed Kansas appellate procedure, which would minimize labor, minimize delays and greatly lessen the volumes of the reports of these decisions.

There is one additional fact with reference to our early day courts and lawyers that I think is of interest. Those of us who were here remember that we used to complain that our appeals from the District Courts were from the Judge who had tried the case and rendered the decision complained of, to a court composed one-third of the same Judges. In other words, the judge who sat on the trial bench sat also on the appellate bench, and this seemed to many of us unfair,

so when Congress passed the act of December 21, 1893, increasing the court from three to five judges, Congress was induced to place therein a provision disqualifying the judge who tried the case from sitting on the Supreme Court on appeal. We thought we would remedy that anomalous condition and get more independence of action, but I take it that a comparison of results before and after that change, and an analysis of the cases disposed of, redounded to the credit and impartiality of the judges who sat in the cases under the original system. There were thirty-four cases appealed from the decisions of the Supreme Court judges who sat on the trial of the cases on the Supreme Court bench and themselves sat in the case on appeal, and it is a remarkable and, no doubt, interesting fact that of those thirty-four cases exactly seventeen of them were affirmed, and seventeen of them reversed. This is certainly the best proof that our early day courts, in the anomalous condition in which they were placed, exercised their powers and judgment with that independence and impartiality which should always characterize the actions of courts which are sitting in judgment upon the rights and differences of their fellow men.

I have taken this as an auspicious time and place to refer to some of the incidents and difficulties of "Oklahoma's Early Day Courts and Lawyers."

Our status and our purpose here to-day, nearly forty years after this civic and judicial history began, is but illustrative of the scenes and situation then. The State Bar of Oklahoma is passing from its long standing status of a Voluntary Bar Association, held together and directed only by the rules which we have voluntarily and lightly placed upon ourselves as judges and lawyers, to the legal and thus more powerful status placed upon us and given to us by the sovereign will of the State, not only for our good and our guidance, but in order that the courts and the lawyers of the State may better in the future than in the past promote and insure not only good, but the best of good government, for our great State and our great nation.

And as those of the "Early Day Oklahoma Courts and Lawyers" pass the sceptre of power to the bright and honorable generation of young lawyers whom we have nurtured, taught and trained, I trust and believe they will receive it

with the benediction that in what we have done we have been true and faithful in administering the arduous responsibilities thrust upon us in those early days of Oklahoma.

I think, too, that we can in doing so soliloquize with France's greatest Minister and Cardinal in saying:

"In silence and at night the conscience feels that
Life should soar to greater ends than power"

and adjure them to exercise the power thus established and preserved through these trying years for one and only one purpose—the good and the glory of Oklahoma

—A. G. C. BIERER