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THE STATE JUDICIARY*

John D. Carroll.

Formerly Chief Justice of the Court of Appeals of Kentucky.

I esteem it an unusual honor and privilege to speak to the Circuit Judges and Commonwealth Attorneys of the state, meeting in joint assembly, together with this fine gathering of lawyers from all parts of the state, and I have selected as the subject of my remarks the State Judiciary, believing that some observation concerning this branch of the government would be appropriate to the occasion.

Although I am not unaware of the fact that in these days people are little concerned about old things, however important the place they had in the early history of the state, I thought it might not be without some interest to briefly trace the origin and development of our judiciary system, especially as it relates to the Court of Appeals and courts that may be said to have preceded the present circuit court system.

In the first Constitution of the state, adopted in 1792, provision was made for a Supreme Court, without designating the number of judges, to be styled the "Court of Appeals," and such inferior courts as the legislature might establish, the judges of these courts to be appointed by the Governor, and hold office "during good behavior."

In this Constitution the Court of Appeals was given not only appellate jurisdiction, but "original and final" jurisdiction in all cases respecting the title to land, but this original jurisdiction had become so burdensome to the court that it was taken away by the legislature in 1875, pursuant to power to do this.

And as illustrating how profoundly the people at that time were concerned about land titles it was declared in the Constitution that the opinions of the court in this class of cases should be in writing, and delivered in open court, and if a judge dissented the reasons for his dissent should be given in writing. The parties to

*Delivered at a meeting of the Circuit Judges and Commonwealth Attorneys of Kentucky at Louisville, Dec., 1920.
these cases also had the right to demand in the Court of Appeals a jury trial.

In the second Constitution, promulgated in August, 1799, like provision was made for the appointment by the Governor of all appellate and inferior judges who should hold office "during good behavior," but in this and subsequent Constitutions the Court of Appeals was only given such appellate jurisdiction as might be provided by the legislature.

The third Constitution was adopted in June, 1850, and in this Constitution the first change was made from an appointed to an elective judiciary, and the terms of appellate judges, four in number, fixed at eight years, and circuit judges at six years. The number of circuit districts created was eleven; now we have thirty-six. How many of these are unnecessary I shall not, on this occasion, undertake to say, but may be permitted to observe in passing that the present districts are very unequal in population and business, and there is urgent public need for the redistricting of the state and the reduction of the number of districts. In this Constitution there is found the first constitutional mention of circuit judges, and they were given then, as in the present Constitution, such jurisdiction as the legislature might confer.

The present Constitution, adopted in 1891, continued the elective system, and the terms of office and jurisdiction of appellate and circuit courts as it was in the Constitution of 1850, except that the Court of Appeals was given authority to issue such original writs as would enable it to exercise a general control over inferior courts.

The first Court of Appeals, consisting of three judges, was established by an act of June, 1792, and held its first sessions at Lexington, but in 1796 provision was made for its location at Frankfort, where it has since remained. In this act it was given the original jurisdiction provided for in the first Constitution, and further provided that all cases pending on appeal in the Supreme Court for the District of Kentucky while the now state of Kentucky was a part of Virginia, and all cases pending in the Virginia Court of Ap-
peals, that had been appealed from the Supreme Court for the District of Kentucky to that court should be removed to the Court of Appeals. Provision was also made for appeal from the Court of Quarter Sessions.

The first and second Constitutions did not prescribe the number of judges, but the legislature, in 1792, fixed the number at three and court was so constituted until 1801, when the number of judges was increased to four, but in 1813 the number was again reduced to three, and so continued until the Constitution of 1850, in which the number was fixed at four, and the court continued to consist of four judges from 1850 until the present Constitution, in which the number was fixed at not less than five nor more than seven, and pursuant to this authority, the legislature, in 1893, fixed the number at seven.

In this connection it may be noticed that the Court of Appeals had no jurisdiction of appeals in criminal or penal cases until after the Constitution of 1850. In this Constitution the nature of its jurisdiction was left to the legislature, and in 1854, when the first criminal code was adopted, provision was made for appeals in misdemeanor cases substantially as now allowed, but in felony cases an appeal on behalf of the defendant would not lie unless allowed by one of the judges of the Court of Appeals after an examination of the record. This restriction on the right of appeal by the defendant in felony cases was continued until the code of 1873 was adopted, in which the defendant for the first time was given an appeal as a matter of right.

Coming now to the inferior courts: By an act of 1792, passed a few months after the adoption of the first Constitution, provision was made for justices' courts, and a county court in each county, to be held by not less than three justices, and in this act the Courts of Quarter Sessions and Oyer and Terminer were created.

The Court of Quarter Sessions was composed of three justices of the peace, two of whom might act, and was given jurisdiction in all civil cases except minor ones, and of criminal cases in which the judgment did not involve "loss of life or member."
This act also made provision for the short lived Court of Oyer and Terminus, to be composed of three judges sitting in Lexington, two of whom might hold a court. This court had jurisdiction only of criminal and penal cases and was abolished in 1795.

In 1795 District Courts were established and the state was divided into districts, with six judges for each district, two of whom might hold the court in any county, and these judges meeting in general session at Frankfort assigned the judges that should hold the courts in the various counties which were then few in number. This court had general jurisdiction of all criminal and civil cases except those that the court of Quarter Sessions, still in existence, retained jurisdiction of. In 1796 provision was made for holding two annual sessions of the District Court at Frankfort, and in 1799 the district court to be held at Frankfort was styled the General Court, and appeals to it in land cases were allowed from the district courts.

In 1802 the Quarter Sessions, District and General Courts were abolished and the state divided into circuit districts and courts styled Circuit Courts, established in place of the other named courts. This act also made provision for the appointment in each county of two “fit persons” to act as associate circuit judges, and any two of these judges might hold court. The office of associate judge was abolished in 1816. A general court was re-established, to be composed of all the circuit judges, and it was provided that not less than five of them should constitute the court, which should hold two terms each year in Frankfort. This general court, which was really created for the purpose of deciding controversies concerning land, had appellate jurisdiction of land cases tried in the circuit courts, and original jurisdiction of this class of cases when the parties consented thereto, and limited jurisdiction in other civil cases.

It was given authority to assign the judges to the districts in which they should hold court, so that the first circuit judges of the state might be assigned to hold the circuit court at any place in the state. It continued in existence until 1851, when it was abolished, and all the cases pending before it transferred to the Franklin Circuit Court.
In connection with these various courts which I have mentioned, it is worthy of notice that in neither of the two first Constitutions or in the legislative acts creating them, were any qualifications for the judges who were appointed by the Governor prescribed, except that the associate judges must, in the quaint phraseology of the act creating them, be "fit persons." As these associate judges were not required to be lawyers it may be presumed that a "fit person" was a man of integrity, good common sense and high character.

With this too brief account of the origin and the history of our appellate and circuit judiciary, I want now to spend a little time in considering the importance of the circuit court, which in my judgment, has a more useful place in the scheme of government than does the Court of Appeals. We might do without the Court of Appeals, but widespread confusion, disorder and violence would surely follow the abolition of our circuit courts, unless some other court with like jurisdiction and power were appointed to take its place.

I said in the opening of my remarks that I esteemed it an honor and privilege to be permitted to address this gathering of judges and lawyers, and if it were composed of the circuit judges alone I would further add that I was speaking to the forty-three most powerful men in the entire state, because, in my opinion, there cannot be found in the borders of the Commonwealth any body or set of men who exercise such large powers as do circuit judges in everything that concerns the social, domestic, business and orderly life of the people or who have as much influence in fostering a wholesome, moral and law-observing sentiment.

The circuit judges deal face to face with the people of the state, and hear and determine all of their troubles and misfortunes, whether arising in the home, the factory, the office, the store, the mine or the field. There come to them every color, age and condition found in Kentucky, and they hear the frailties, the weaknesses, the vices and the wickedness of all classes. Although there are many officers, such as policemen, sheriffs and the like, who are charged with the duty of maintaining peace and order, the circuit judges have at last more power in the prevention of crime, the preservation of order, the pro-
tection of life and the security of property, aside from other large authority in the settlement of disputes that involve domestic tranquility than any other set of men in the state. They preside over courts having a general common law, equity and criminal jurisdiction, and take cognizance of all character of cases, both civil and criminal, unless the amount involved is trivial or the offense trifling. Their decrees they have the power to enforce, and back of their orders and judgments stands the Commonwealth of Kentucky with all its men and all its means.

No more striking illustration of the supreme confidence that the people have in one of their fellow citizens can be described than to say they have chosen him for the office of judge in a high court and put in his keeping the great powers that belong to such a place, and more than two millions of people in the state have confided to forty-three men the right to hear and decide every dispute involving property, personal and civil rights, that may arise, and bring to the bar of justice every person who violates the penal and criminal laws of the state so that the punishment denounced may be inflicted.

It is a high compliment indeed that so small a body of men should be selected by the people of the state and invested with authority to pronounce judgment in every case that may arise respecting their lives, liberty and property. And I am happy to be able to say that in the entire history of the state the examples are exceedingly rare in which circuit judges have betrayed the confidence reposed in them, or failed to discharge with integrity, character and ability, the duties of the high office.

Of course, circuit judges, like all other judges, make mistakes, and it sometimes happens that in circuit courts there is such a gross miscarriage of justice due to the findings of juries that the conscience of all those acquainted with it are startled and shocked by the result. But instances of this character are few and beyond the power of the judge to control; and I may safely say that upon the whole, the manner in which the law is administered and justice dispensed in circuit courts is satisfactory to the great body of the people, who have an
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abiding and well deserved confidence in the honesty of the men who preside in these courts.

But unfortunately it cannot be overlooked that there are a few large, thoroughly organized and widely distributed bodies of men in this country whose leaders for purposes of their own are disposed to treat with contempt the authority of the courts and to endeavor to bring into disrepute the law as administered by those judges whose decisions do not meet with their approval. The representatives of one of those bodies have defiantly declared that they will not give obedience to such orders and judgments as do not suit their pleasure, and the spokesmen of another have boldly announced that they will have those judges impeached who do not decide cases to suit their wishes.

But I do not believe the men who give utterance to sentiments like these, although professing to speak with authority for the organizations they represent, are voicing the feelings of any more than a small minority, and their lawless and reckless statements deliberately formulated and publicly proclaimed deserve the severest reprobation. I do not, of course, mean to imply that courts and judges should be immune from fair criticism and reasonable censure, because they are not, nor should they be, but there is a wide difference between fair criticism and reasonable censure and destructive attacks such as these.

Men in high places who wilfully undertake to impair or destroy, by the weight of their influence and the numbers they assumed to speak for, the authority, freedom and independence of the judiciary are striking at that department of the government that at all times has shown itself fearless and vigilant in protecting the personal and civil rights of the people, and it is the duty and should be the pleasure of the sensible and good men who compose an overwhelming majority of our citizenship to stand by their courts and judges, and defend them against all assaults having a tendency to lessen their dignity, weaken their influence or impair their independence and stability, because there comes a time in the life of almost every person when in some way or for some cause he must turn to the courts for advice, protection or relief.
It is appropriate that I should put here the weighty words of that great statesman and jurist, Judge Story, who said in his commentaries on the Constitution, nearly 100 years ago, in speaking of the judiciary, that "When there is no judicial department to interpret, pronounce and execute the law, decide controversies, and to enforce rights, the government must either perish by its own imbecility, or the other departments of government must usurp powers, for the purpose of commanding obedience, to the destruction of liberty. The will of those who govern will become, under such circumstances, absolute and despotic, and it is wholly immaterial whether power is vested in a single tyrant or in assembly of tyrants... And it is no less true, that personal security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice.

"If that government can be truly said to be despotic and intolerable in which the law is vague and uncertain, it cannot but be rendered still more oppressive and more mischievous, when the actual administration of justice is dependent upon caprice, or favor, upon the will of rulers, or the influence of popularity. When power becomes right, it is of little consequence whether decisions rest upon corruption, or weakness, upon the accidents of chance, or upon deliberate wrong. In every well organized government, therefore, with reference to the security both of public rights and private rights, it is indispensable that there should be a judicial department to ascertain and decide rights, to punish crimes, to administer justice, and to protect the innocent from injury and usurpation. To the people at large, therefore, such an institution is peculiarly valuable and it ought to be eminently cherished by them. On its firm and independent structure they may repose with safety, while they perceive in it a faculty which is only set in motion when applied to; but which, when thus brought into action, must proceed with competent power, if required to correct the error or subdue the oppression of the other branches of the government.

"This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of
these ill rumors which the arts of designing men or the influence of particular conjectures sometimes disseminate among the people themselves; and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."

Laws are enacted and courts established for the purposes declared in the Constitution of so regulating and controlling human affairs that the inherent and inalienable rights of persons to pursue their safety and happiness; to acquire and protect property; to defend their lives and liberties; to freely communicate their thoughts and opinions; and to worship according to the dictates of their consciences may be forever preserved, but, notwithstanding the security afforded by these laws, and the efforts of the courts to protect the citizen in the enjoyment of these guaranteed rights there are times when men in large bodies attempt to take into their own hands redress of real or imaginary wrongs and visit upon the objects of their enmity destruction of life and property.

When conditions like these arise which cannot, except in rare cases, be attributed to either the state of the law or the manner of its administration, the courts, however energetic and vigilant in the performance of their duties, may find that for the moment they are unable to control the situation, but the judges of circuit courts, having, as I said, all the forces of the Commonwealth behind them, have no higher duty to perform than to exert the great powers of their office to suppress these outbursts of crime and bring to punishment the offenders.

It should never be forgotten that the supremacy of the law and preservation of order are just as indispensable to the happiness of one class of our decent citizenship as another. The laboring man who earns a support for his family by the sweat of his brow and the capitalist who lives on his income, are equally and alike entitled to feel that his home and his property, whether they be big or little, are secure from intrusion and violence and his person safe from attack. There is no distinction to be made in this respect between any person or class of persons.
In conclusion permit me to express the hope that these meetings, so auspiciously begun a few years ago, may be continued at short intervals, to the end that the judges and lawyers of the state may have the opportunity that would not otherwise be afforded to become better acquainted, and to renew in free and genial intercourse that fine spirit of fraternal relationship that in full measure has always existed between the bench and the bar.