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Kentucky Court of Appeals

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By Judge Earl T. Osborne*

It has been my experience in a lifetime that spans a half century that social, economic and governmental problems come and go much like styles of music or dress. They become popular and burn with a white heat for a period of time; then they fade and die. Once gone, few remember whether they were good, bad or indifferent, or whether or not they were actually solved. The important thing is that they dimmed and died.

Today, the public has two burning problems which it is determined to solve within the next six months—cleaning up the country, including the air we breathe (ecology) and reordering public education (with or without busing). Running a close third behind these two is court reform. Having spent a good part of my life in the judiciary I have of late become a little curious concerning the court reform question. In my research I find that in 1906 Dean Roscoe Pound delivered a paper on the subject to the American Bar Association in which he analyzed step by step the ills of the judiciary at that time, along with suggested remedies.[1] A reading of Dean Pound's speech will clearly demonstrate that the ills of 1906 are the ills of 1972. Not much has changed in the past 66 years. With this history of accomplishments behind us our projection of the future can only be that the ills decried by Chief Justice Burger in his 1970 annual report to the American Bar Association at St. Louis will remain with us for some time to come.

I will not deal at length with the problems inherent in the federal judiciary. Not being a part of that system, I do not feel competent to deal with its problems. However, in passing, there are two areas of difficulty that I think should be recognized. First, the federal judiciary, along with Congress, has expanded federal jurisdiction the past twenty-five years so as to bring a flood of litigation into the federal courts that may really have no business

* Judge, Kentucky Court of Appeals; LL.B. University of Kentucky, 1950.

[1] For those who would like to read this report in full *see* 56 A.B.A.J. 348 (Apr. 1971).

there.[2] Second, while the appointment of federal judges with life tenure and no adequate means available to discipline or remove them has on the one hand accomplished a good result by creating a largely competent independent judiciary, it has also placed within the system some men who should not be occupying the bench and are now frozen there to the chagrin of all responsible jurists.

We in Kentucky are presently operating under a judicial system created by the Constitution of 1891. It provides rigidly for three levels of courts. The lower courts are courts of limited jurisdiction; these county, quarterly and magistrate courts are presided over by men who need not be trained in the legal profession. In the circuit courts, which have general jurisdiction, the judges must be qualified by legal training and eight years legal experience and be at least thirty-five years old. There is one appellate court, the judges of which must have the same qualifications as circuit judges. All judicial officers are elected on a partisan basis, with cross-filing permitted for circuit and appellate judges.

We follow the common law jury plan of twelve jurors, though this number may be reduced to six for the trial of minor offenses in the county, quarterly and magistrate courts. Our jury verdicts are required to be unanimous only in criminal cases.

On the surface this does not appear to be a bad system. In order to realize its deficiences one must have considerable knowledge of its internal operations. I will proceed to point out what I believe to be the major deficiences in Kentucky's present system:

1. There are available sufficient people trained in the law that we should have no courts presided over by judges without legal training. The magistrate, county and quarterly court system which was designed to meet the needs of 1891 should now be abolished and this function placed in the hands of the circuit courts.
2. The circuit court system should be expanded so as to provide competent personnel in the form of judges (who would have authority to appoint hearing commissioners)

[2] For a history of how this came about see United States *ex rel.* Elliott v. Hendricks, 213 F.2d 922 (3d Cir. 1954). The Attorneys General of 40 states filed briefs in an attempt to thwart this expansion of federal power. The Supreme Court avoided meeting the issue by denying certiorari. *See also* 28 U.S.C.A. § 2251 (1964).

to preside over the trial of cases that now fall within the jurisdiction of magistrate, county and quarterly courts. This would embrace what might be called a small claims court. People should be permitted to appear without counsel and without pleading, insofar as this is possible, and receive competent judicial treatment of minor disputes and problems. The cost of these proceedings should be practically nil.

3. Juries for multi-county districts should be selected from the entire district rather than from a single county. Every practicing lawyer is aware of the dangers of provincialism in Kentucky juries.
4. The Court of Appeals should be expanded in order to take care of the tremendous work load coming to it; as an alternative, there should be instituted an intermediate court system between the circuit court level and the Court of Appeals.
5. The selection of judges, both circuit and appellate, should be removed from the partisan elective system. Here I would suggest what is commonly referred to as the Missouri plan or some modification thereof. In this modern day the selection of competent people to fill a judiciary should be based on something other than a partisan political popularity contest.[3]

The two tests that any judicial system must meet are those of quality and quantity. The quantity factor merely means that the system should dispose of the litigation which is placed before it within a reasonable length of time. The quality factor means that the personnel operating the system should be the best qualified personnel available within the Bar. As the matter now stands, our system, quantity-wise, is holding up fairly well with the exception of the Court of Appeals, which is overloaded, and some of the circuit courts in the larger metropolitan areas.[4] Quality-wise, we are not bringing the better men to the bench

[3] The suggested changes which are herein stated have been basically incorporated into two proposed constitutional amendments, one drafted and submitted to the 1972 General Assembly by the Kentucky State Bar Association, the other by the Kentucky Crime Commission. There has been no legislative action on the proposals.

[4] In 1961 there were 666 cases docketed in the Court of Appeals; by 1970 this number had increased to 1311.

for two reasons: First, many highly qualified men do not wish to be involved in the partisan election system and second, judicial salaries have not kept pace with pay of comparable members of the Bar. Also, the fact that the judges of some of our courts need not have legal training adds to the problem.

The reforms that I have outlined above can only be obtained through an amendment to our Constitution. For this reason they may be slow in coming. In any event, the subject of judicial reform in this jurisdiction cannot now be considered a passing fad. The needs are too great and the time too short. If something is not done within the next decade, the system will in some areas become so inefficient that it will be regarded as practically inoperative.

It is regrettable that much of the current literature on the subject of judicial reform is so imprecise that there has not jelled in the minds of the public any concrete idea as to what is really being proposed. I am sure that the man on the street has vague visions of the entire system being demolished and replaced by panels of sociologists and the like. It is also regrettable that much of the material concerning reform can be interpreted as self-serving in that it seems designed to improve the system for those who must work in it, *viz.*, better working conditions and higher salaries for judges, commissioners, administrators, and clerks. If we are to succeed with meaningful reform our first objective should be to explain to the public that court reform is for the benefit of the public who must be served by the system. The citizen stands to gain because his case in court will be heard by an independent, competent judge. If tried before a jury, the jury will be selected from a broad base so that it will not have built within it prejudices for or against him based on where he lives, where he goes to church, or the political party of which he might be a member. His case will be heard within a reasonable period of time and the expense will not be prohibitive. Once these goals are explained to the public the task of obtaining reform should be much easier.