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Richard Priest Dietzman
Kentucky Court of Appeals

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THE FOUR CONSTITUTIONS OF KENTUCKY*

The first Constitution of Kentucky was the work of a Convention which began its labors in the early part of April, 1792, and completed them before the month had ended. In the agitation looking to a statehood separate from that of Virginia which went on for many years preceding the admission of Kentucky into the Union, nine conventions had been held to effect that end, but to no purpose. During this period there was a wide debate and discussion on the fundamental principles of organic law, especially in such clubs as the Danville Political Club, and the people were singularly well informed about these matters. Due to the manner of its settlement, its economic environment, its more or less isolation from the Atlantic seaboard and the character of its immigration, the thought of the people was dominated by the theories of liberty, equality and democracy. In such a state of mind, it was as easy for the demagogue in these remote settlements as it was for him in France at this same period to raise the cry of aristocracy, and though the community was yet young, agitators had attempted to stir up a class hatred which made up in clamor what it lacked in vigor. It was against this background that the Convention did its work. This Convention was composed of the best thought of the electorate and its work is a singular combination of pure democracy and of checks upon it. As in all of our Constitutions and according to the prevailing political thought of that time which has persisted to the present day, although now subject to the assault of politico-philosophical thinkers, the powers of government were divided into three distinct departments—the legislative, the executive and the judicial. With regard to the legislative, the pre-convention debate has a very modern ring to it. The argument as to whether there should be one or two houses of the legislature had been quite acrimonious. The champions of the one house were very vigorous in the presentation of their views. Does the provision in the City Government Bill recently adopted

*The writer acknowledges his indebtedness in the preparation of this article to the address of Mr. John C. Doolan on "The Constitution and Constitutional Conventions of 1792 and 1799," appearing in the 1917 proceedings of the Kentucky State Bar Association; to the History of Kentucky, by W. E. Connelley and E. M. Coulter, of which Judge Chas. Kerr was editor; and to Judge John D. Carroll's Kentucky Statutes.

by the legislature for the City of Louisville, wherein the unicameral system is adopted, presage a trend toward the views of these earlier thinkers? The Convention of 1792, however, rejected their contentions and adopted the bi-cameral system which prevails to this day. In providing for elections to the legislature, however, the Convention showed both its predilection for democracy and its fears of it unrestrained. The house was to be elected by the people and its membership was apportioned among the counties according to population rather than according to the Virginia method of apportioning the number among the counties regardless of the population. The number of the representatives was to be not less than 40 nor more than 100, and provision was made for taking the census of the population to regulate the apportionment. While the house was thus responsive directly to the people, the Convention adopted a curious plan following somewhat that of the electoral college of the Federal Constitution for the election of senators and governors. The people were authorized to vote for as many members of an electoral college as they were entitled to vote for representatives. The electoral college thus selected, elected the governor and the senators and the Constitution enjoined upon it to elect "men of the most wisdom, experience and virtue." The number of representatives being forty, that of the senators was fixed at eleven, with the provision that there should be one new senator for every increase of four in the house of representatives and until each county had at least one senator. The term of office of the members of the House was one year, that of the senators four years, one-fourth of that body being elected each year. The Constitution provided that no minister should be eligible for membership in either body and this provision remained in our Constitutions until the present one. The legislature was to meet in annual session and there was no limit set upon the length of such sessions. In the pre-convention agitation the militia companies of Bourbon county had adopted a resolution urging the legislature that "no code or laws of England or other nations be adopted, but a simple, concise code of laws be framed adapted to the weakest capacity which we humbly conceive will happily supersede the necessity of attorneys pleading in our state."

The Governor was to be elected for a term of four years, but there was no provision for a lieutenant governor, the Consti-

tution providing that the speaker of the senate who was elected by that body should in case of a vacancy of the office of Governor exercise the duties of that office "until another shall be duly qualified." This peculiar phrase "until another shall be duly qualified," was carried over to our second Constitution, and, as we shall see, caused grave trouble when Governor Slaughter succeeded to the governorship on the death of Governor Madison. The Governor had the power of appointing an Attorney General and Secretary of State.

The judicial power of the government was vested in the Court of Appeals and such inferior courts as the legislature might from time to time establish. No qualifications for the office of a judge appeared in either the first or second Constitutions. It was not until the judiciary became elective that it was felt necessary to prescribe qualifications that the people might not be misled. Original jurisdiction was given to the Court of Appeals in land suits, a matter which soon caused trouble, as we shall see. In the matter of elections, the Constitution showed the advanced position in democracy which Kentucky had then reached.

The Constitution provided for universal male suffrage, no property qualification, and for a secret ballot. It also provided that there should be no religious test for office holding. It further provided that elections might extend over a period of as much as three days. This in time caused great scandal, as it offered opportunity for much bribery and corruption.

Article IX was the famous article on slavery. There had been a vigorous fight led by the ministers, who were a part of this Convention, for an article prohibiting slavery. The slave owners, however, won, but the article on slavery was an advanced provision for that day and time. Emancipation, although guarded, was possible, and the legislature was vested with the right to prohibit the domestic as well as the foreign slave trade. This article also enjoined the exercise of humanity towards these unfortunates.

The Constitution had a provision for universal military service so needed in those times of Indian warfare. There was had a bill of rights in which those fundamental rights vested in freemen so familiar to us all and which have come down to us from Magna Charta were set forth.

Section 27 of article I provided that each senator, representative and sheriff should, before taking office, take an oath that he had not directly or indirectly given or promised any bribery or treat to procure his election to the said office. This section also provided that every person should be disqualified from holding any such office for the term for which he might have been elected who should be convicted "of having given or offered any bribe or treat, or canvassed for the said office." This is the earliest corrupt practice act that has come to our notice and we call particular attention to the stringent provision prohibiting a canvass for office.

It was not long after this Constitution was put into effect that troubles under it arose and the troubles affected each department of the government. The first clash came with reference to the Court of Appeals. In the case of *McConnell v. Kenton*,¹ the court had before it a land case of the character of which it had original jurisdiction. It was decided in 1792; Judges Muter and Sebastian voting for the prevailing opinion and Judge Wallace dissenting. It was thought that this decision ran counter to the principles on which land titles then rested and a storm of disapproval arose in the state. A rehearing was ordered in 1795 at which Judge Muter changed his mind and voted with Judge Wallace. Another rehearing was then called for. The legislature did its best to get these judges removed from office and thus opened the prologue to the drama of the struggle between the legislature and the judiciary which was to have its culmination in the old and new court controversy of 1826, when this state behold two Courts of Appeals, each claiming to be the only valid one exercising judicial functions. But as Kipling says: "That is another story." The legislature was unable to secure the necessary constitutional majority to remove these judges from office, but they did, as they had a right to do, take away from the Court of Appeals its original jurisdiction in land suits.

The second clash under the Constitution came with reference to the legislature. The salaries of the judges of the Court of Appeals had been fixed at six hundred sixty-six dollars and two-thirds cents a year, and that of the other judges at one hundred dollars a year. With commendable self-denial the legislature had fixed their own salaries at one dollar a day. Then, as in the

¹ Hughes 257, 322.

recent attempt to amend section 246 of the present Constitution, it was argued that the salaries were not attracting or, if attracting, not holding the best men for the offices involved. Particularly was this so with reference to the judges of the courts inferior to the Court of Appeals, where the salary was only one hundred dollars a year. In 1796 the legislature took courage and raised these various salaries, including that of its own, which it changed from one dollar to one dollar and fifty cents a day. The members were denounced on every stump in the state for thus adding to the burdens of taxation, and it was gravely debated whether or not under the then Constitution they were eligible for re-election to a body, the salaries of the members of which they had raised.

The next clash came with reference to the executive branch of the government. In 1796 in the gubernatorial election of that year Benjamin Logan received 21 votes in the electoral college; James Garrard 17 votes; Thomas Todd 14 and John Brown 1. The Constitution was silent as to whether the successful candidate must receive a plurality of the votes or a majority. The electoral college denied that the successful candidate should receive a majority and thereupon they dropped the two lowest men and proceeded to take another vote on Logan and Garrard. On the second ballot Garrard was declared elected. Logan did not submit tamely, and for a while things looked squally. Garrard prevailed, however, and was in time duly inaugurated as our second Governor. But the great mass of the people which had never looked with friendly eyes on this electoral device felt that Logan had been cheated out of the office to which he had been legally elected, and the old cry of aristocracy again went up.

The Constitution of 1792 made it very difficult to call a new constitutional convention. In the agitation against those called aristocrats, the conservative elements of the state took fright. They were especially in fear of an effort to emancipate the slaves and a warfare of handbills pro and con on the question of calling a new constitutional convention arose.

But the people were not to be denied and after the necessary majority in the necessary elections had been obtained our second constitutional convention met on July 22, 1799, and twenty-seven days later adopted our second Constitution. The text of

this second Constitution in the main followed that of the first. The minimum number of representatives was raised to fifty-eight, the maximum remaining the same. They were to be elected annually and hold office for one year. The electoral college was abolished and the senators and the Governor were elected directly by the people. The senators were elected for four years, the term of one-fourth of the membership of that body expiring each year. The minimum number of senators was fixed at twenty-four with one new senator for every three additional representatives.

The Governor was made ineligible to succeed himself for seven years, and a provision was inserted for a lieutenant governor. The provision with reference to courts was pretty much the same as that in the first Constitution except that the Court of Appeals had no original jurisdiction. The Constitution provided that the compensation of the judges should be "adequate compensation fixed by law." But the additional requirement of the first Constitution to the effect that such compensation should not be diminished during their term of office was omitted and when the great controversy over the old and new court came up an effort was made to get the old judges out of office by diminishing their compensation to the zero point which was not successful. Had it been, the question would have arisen whether or not such compensation was an adequate compensation. A host of minor offices such as sheriffs, county attorneys, jailers, coroners and others were made appointive. There also appeared a provision authorizing the settling of cases for arbitration out of court. Our forefathers were very suspicious and jealous of lawyers and were anxious in every way possible to get rid of them and to dispense with their services. It may be said, however, that section 250 of our present Constitution is quite similar to this section 10 of article VI of the second Constitution. Universal male suffrage was retained in the second Constitution, but voting was changed from the secret ballot to *viva voce*, which remained the method until our present Constitution was adopted. Article VII on slaves was almost identical to article IX of the old Constitution. In this second Constitution appears the first educational requirement for office ever exacted by an American state. Section 10 of article IV provided that the clerks of the courts must take an examination before the judges of the Court of Ap.

peals to demonstrate their qualifications for the office they sought.

This second Constitution by its provisions for amendments and calling a new constitutional convention made it almost impossible to bring about that result, and it was not until over fifty years later that a third Constitution was adopted, although the people very early began to demand amendments and a new Constitution.

In 1816 Governor Madison died and Lieutenant Governor Slaughter succeeded to the governorship. It was about the time of the beginning of the end of the Federalist party and Governor Slaughter's attitude, especially in connection with the resignation of his secretary of state Todd, gave the impression that he was inclined toward the Federalists. A great debate arose as to the meaning of the words "until another be duly qualified" to which reference has heretofore been made. Those opposed to Slaughter argued that they implied that another election should be called to fill the vacancy. Slaughter's friends argued that they meant a regular election in due course. Slaughter filled out the term until the election of 1820, but the seeds of the controversy were still there and the matter was never settled until the Constitution of 1850. In 1837 the legislature passed a bill looking towards the calling of a constitutional convention. The Whigs opposed the bill as they thought it was an effort on the part of their opponents, the Democrats, to grab and retain power. The emancipators took up the fight for a convention, which cooled the ardor of the Democrats, and the vote taken under the bill failed to authorize the calling of the convention. The great cause of dissatisfaction with the second Constitution was the host of appointive offices. Nepotism prevailed to a great extent. It was claimed that there was an oligarchy of office holders among which the offices circulated. It was even charged that the selling of offices was prevalent. The people thought that they ought to have the right to elect their sheriffs, their jailers, their coroners and county attorneys. The new and old court controversy was still fresh in the minds of the voters, and it was thought that a judiciary responsive to the people would be less tyrannical than one appointed by the Governor. The educational system was in a sad state, although many beautiful plans had been laid out on paper. The mass of the people were still in ignorance. The funds set

apart for educational purposes had not always been devoted to those ends, but in times of need had been diverted to the other needs of the state. The three days of elections had given rise to corruption and fraud. The sessions of the legislature had been extended to unusual lengths and its time was taken up with passing special laws. A quaint complaint is made with regard to one of the later sessions of the legislature about devoting its time to passing special laws for divorce and changing the names of the people. It was said that at one session there were forty-four acts granting divorces, one of these acts being an omnibus act divorcing twenty-six people at one time. There was also a number of acts changing the names of the people. The complainants said: "If this state of things is allowed to progress, people will hardly know in a few years their nearest acquaintance by name or who is or is not married." We wonder what this same author would say today on picking up a newspaper and counting the number of divorces granted weekly by our chancery courts. Cassius Marcellus Clay in his Memoirs, claims that the agitation carried on by him and others against slavery at this time was the impelling cause for the calling of the third constitutional convention. He says in this book that he had pointed out the possibility and feasibility of emancipation under the second Constitution and in fear of this, the slave holders were anxious to get another Constitution wherein this possibility would be made so remote as to be practically nonexistent. It must be admitted that article X of the third Constitution, which replaced article VII of the second Constitution, these being the slavery articles, went far towards accomplishing that purpose. The constitutional convention of 1850 was finally called and the third Constitution adopted. The new legislature was to be elected bi-annually, the representatives and one-half of the senate every two years. The representatives held office for two years and the senators four years. The number of representatives was fixed at one hundred and that of the senate at thirty-eight. These numbers prevail to this day. The legislature was prohibited to a large extent from passing special laws, especially with regard to divorce and changing of names. The sinking fund was protected and provisions were inserted for the education of the masses and the protection of the school fund. Clay says this was done to placate the non-slave holding whites. Reminiscent

of the hard times which caused the old and new court controversy a provision for homestead exemption was inserted in the Constitution. In the great rush for internal improvements that took place in the 30's the state had become much indebted and so there appeared in this third Constitution in section 35 of article II a restriction on the right of the legislature to contract debts in excess of \$500,000, which provision was carried over into section 49 of our fourth Constitution. Due to judicial construction its salutary tendency has almost been destroyed, and we now have a floating debt of almost \$5,000,000, when had this section been strictly construed the legislature would never have been able to contract such a debt without at the same time providing the means of paying it. The Governor was to be elected for four years and the gubernational succession was cleared up by a provision that if a vacancy occurred before two years of the term had expired a new election must be held. The sessions of the legislature were limited to sixty days unless two-thirds majority of both houses extended the same. As this majority was always obtainable this limitation never amounted to much. Also for the first time there appeared the provision that a bill should relate to but one subject and that should be expressed in the title. Although there has been much debate as to the wisdom of such a provision, it was carried over into our fourth Constitution and experience has demonstrated its worth.

This third Constitution provided for an elective judiciary. Clay says this was also done to reconcile the poor whites to slavery. It provided for a Court of Appeals, the courts established by that Constitution, among which were the circuit court and the county court, and such other courts as the legislature might from time to time establish. The host of minor offices theretofore appointive were made elective.

There appeared in this Constitution of 1850 as a sort of challenge to the radicals of that day, that famous clause carried over into the fourth Constitution reading: "The absolute arbitrary power over the lives, liberty and property of freemen exists nowhere in a Republic, not even in the largest majority." A great philosophical truth, but whether or not it should ever be called in question by such a majority it will prevail is a highly debatable point. The Constitution provided also for revision of the laws and for a committee to draft codes of civil and criminal

practice, which latter injunction being carried out has given us those splendid codes which with their amendments govern us to this day. The provisions for amendment made that purpose almost impossible of accomplishment.

Ten years after the adoption of this Constitution came the great struggle for the preservation of the Union, and with its passage and the reconstruction days which followed, coupled with the 13th, 14th and 15th amendments to the Federal Constitution, a great deal of our third Constitution, especially with reference to slavery, became obsolete. But the inertia against calling a fourth convention was hard to overcome and it was not until 1890 that this end was accomplished.

The fourth Constitution is about twice the length of the third, and its main characteristic is the embodiment therein of much that should have been left to legislative action. The greatest criticism of this instrument is that the framers of it went far beyond the province of a Constitution and embodied therein too much of a legislative program. For instance, section 243 provides for a child labor law; section 244 that wage earners are to be paid in lawful money; section 247 that public printing is to be let to the lowest responsible bidder; section 252 that houses of reform are to be established; section 253 that convicts must not be worked outside the prison walls except in certain instances, and many other provisions of like import, of undoubted merit, but legislative in character, rather than constitutional. In the new Constitution the secret ballot was restored, the sessions of the legislature were limited to sixty days, its power to pass special laws was curtailed in twenty-nine instances; all reference to slavery was omitted, and there was much new matter added with reference to municipalities, revenue, taxation, education, corporations, railroads and commerce. Especially stringent were the constitutional provisions against corporations which is reminiscent of the political and economic thought of that time. Although the Constitution of 1850 had put restrictions on the state getting itself in debt, the counties and cities had not likewise been so restricted and in the era of railroad construction following the war cities and towns had much encumbered themselves with debts to pay for such construction. In many instances this construction had not followed the grants of aid and bitter controversy arose such as the Taylor, Muhlen-

berg and Green county bond cases. The new Constitution wisely placed limitations on the power of these subordinate governmental agencies to create debts. The provisions with reference to taxation reflected the economic thought of that time and it was found later necessary to amend these sections to conform to the great principles underlying the economic laws of taxation. The power of the legislature to establish courts other than those established by the Constitution was taken away and only those courts created by that instrument were allowed. The clerk of the court was made ineligible to succeed himself, a very curious and cumbersome provision and one totally indefensible. Such may also be said of a like provision relating to the office of superintendent of public instruction, attorney general, and to other offices where the experience of a term if worthily filled should dictate the reasonableness of returning such incumbent to office.

Although neither the law nor the acts calling the constitutional convention provided for a submission to the voters of the labors of that body, it was done. The necessary majority for the instrument having been acquired, the convention reassembled and made some changes in the instrument as thus approved by the people. Some argued that these changes were material—others that they were simply changes of verbiage. In the case of *Miller v. Johnson*² the question came before the Court of Appeals as to whether or not the convention had a right to thus reassemble and make these changes. The court in an opinion by Chief Justice Holt, to which a vigorous dissenting opinion by Judge Bennett was filed, declined to go into the matter and held that whether or not the new Constitution in its final form was the organic law of the state was a political question and not a judicial one, and as it had been recognized by the political powers as the legally adopted Constitution, the judicial power would accept it as such. And this is the Constitution with its amendments which we enjoy today.

As stated, many of its provisions no longer are in accord with the political and economic thought of this day. Its many provisions of a legislative character have at times proved embarrassing to forward movements in the state. Many of its restrictions not of a constitutional nature have proved embarrassing to

² 92 Ky. 589.

the various departments of government—such as the inability of the legislature under section 249 to employ such help as it needs to discharge its functions. The time will undoubtedly come when the people in their sovereign capacity will reassemble for the purpose of adopting a new instrument. May we be guided in the light of our experience under the fourth Constitution to adopt a new one that will be responsive from time to time to the needs of the people and guarantee them in the enjoyment of those great ends to which all constitutional government should be dedicated—the right of life, liberty and the pursuit of happiness.

RICHARD PRIEST DIETZMAN.
Justice of the Court of Appeals.

Louisville, Kentucky.