View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by University of Kentucky

Kentucky Law Journal

Volume 6 | Issue 3 Article 3

1918

Old and New Court Controversy

B. J. Bethurum
28th Judicial District Circuit Court

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Legal History Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Bethurum, B. J. (1918) "Old and New Court Controversy," *Kentucky Law Journal*: Vol. 6 : Iss. 3 , Article 3.
Available at: https://uknowledge.uky.edu/klj/vol6/iss3/3

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

OLD AND NEW COURT CONTROVERSY*

By B. J. Bethurum.†

The subject of this address perhaps may not impress the judges as being wholly appropriate for discussion on an occasion of this sort. At first I doubted it, but after maturer consideration, all doubt was removed from my mind, and now I consider the stirring incidents connected with the "Old and New Court Controversy," which happened nearly 100 years ago, to be the most interesting as well as the most thrilling, of any past events connected with the history of the Commonwealth, with the possible exception of those immediately associated with the Civil War. It is, therefore, a theme that should appeal to everyone interested in court procedure, and the past history of the State.

In order that the cause of this most unfortunate judicial tangle may be fully understood, it will be necessary, before entering into the discussion proper, to review briefly the financial and political history of Kentucky prior to and at the time the controversy arose.

In the years of 1817-18, the people of the State found themselves face to face with grave financial embarrassment. In fact, the State itself was reeling and staggering under a heavy load of indebtedness, which it had unwisely assumed. These conditions resulted from an unfortunate inflation of the paper currency in use at that time, and from unwise banking legislation, all of which tended to force the withdrawal of the precious metals from circulation. This flurry in finances had a depressing effect upon business and commerce, and in a very short while the individual citizen found himself confronted with disaster. In order to obtain relief as quickly as possible, the people made an earnest appeal to the Legislature, which promptly responded by passing, at the 1819-20 session; laws extending the time for replevy of judgment debt from three to twelve months, and later, in obedience to greater pressure

*In response to requests from several of our readers, we are publishing this address delivered before the Circuit Judges' Association, in Louisville, December 28, 1917. The lawyers can thus preserve in readable form this account of this stirring episode of 100 years ago.

†Somerset, Ky., Circuit Judge, 28th Judicial District.

by a distressed people, extended the time for stay of collection by replevy from one to two years, and this applied to debts created both before and after the passage of the act.

The enactment of this law greatly displeased the creditor class of Kentucky, and very soon their opposition began to crystallize into definite form. They appealed to the courts for redress, and at the same time organized to create sentiment against the law among the masses of the people. The discussions in court and on the stump were both heated and acrimonious. The ordinary amenities among gentlemen were forgotten, and the State was soon lashed into a fury. Politics of the old school were, for the time, brushed aside, and a new alignment formed, composed of the Relief and Anti-Relief parties.

Legislation Attacked.

The Anti-Relief party attacked the new legislation upon the ground that the act violated that clause of the Tenth Section of the First Article of the Constitution of the United States, which declares: "That no State shall pass any law impairing the obligation of contracts." It was attacked in the celebrated case of Blair, etc., vs. Williams, in which Judge Boyle, Chief Justice of the Kentucky Court of Appeals, later rendered the opinion, which may be found in Fourth Littell, page 34. That opinion discloses that on the 12th day of November, 1819, Blair, Ingles and Barr executed their joint promissory note to Williams for debt, payable sixty days after date. The money not being paid when it came due, Williams, some time thereafter, brought suit upon the note in the Bourbon Circuit Court, and recovered judgment for the amount of the debt against Blair, Ingles and Barr, and, in accordance with the provisions of the act of the Legislature in question entered into a recognizance in the clerk's office for the payment of the money at the end of two years. This recognizance Williams moved the court to quash on the alleged grounds that the act under which it was taken was repugnant both to the Federal and State Constitutions. Judge Clark, the learned Circuit Judge, so held, and accordingly quashed the recognizance. It is a lamentable fact that for this judicial act this incorruptible judge was shamefully traduced.

The Relief party promptly appealed the case to the Court of Appeals. That court was then composed of three judges, all of whom were appointed by the Governor "by and with the consent of the Senate." Judge John Boyle, Chief Justice, was appointed to the bench April 1, 1809, and became Chief Justice March 10, 1810. Judge William Owsley and Judge Benjamin Mills, the other judges, were appointed to the bench April, 1812, and February, 1820, respectively. It now became the duty of these three eminent judges to settle this litigation; and the eyes of the whole State were focused upon them. All three judges were men of great ability, firmness and courage, and all this is amply attested by the manner in which they disposed of the legal controversy, and afterward fought for, and won, a vindication of their position before the people. It is useless to say that the Court of Appeals affirmed the lower court, and in an opinion, aflame with wisdom and logic, declared the act in question unconstitutional and void.

The State had been in a condition of unrest while the higher court considered this case. The great popular majority at that time favored the so-called relief laws, and denied the power of the courts the right to interfere after the people, through their representatives, had said what they desired. So intense was the bitterness prevailing at the time that there were open threats of violence in the event the dicision should be adverse to the popular will. The opinion of the court in Blair, etc., vs. Williams was delivered on the 8th day of October, 1823, and the other cases involving the same question were decided October 11, three days later.

Bedlam In Kentucky.

As soon as the higher court passed upon the question bedlam broke loose in Kentucky. The adherents of the Relief party were thrown into a violent rage and with the tongue of slander they denounced the judges as tyrants, who had wickedly substituted their own will for the will of the people, and denied the majority the right to rule. The judges were publicly denounced from the stump and through the press, and while this was being done, Judge Bibb, who represented the Relief side of the Blair vs. Williams case, filed a petition for rehearing. But the fact that no rehearing was

granted and the judgment allowed to stand is a silent memorial to the courage, the honesty and the high purposes of the men who graced that great tribunal in this important period of our judicial and political history.

But before the petition for rehearing was passed upon, and while it was yet pending, the legislative session of the fall of 1823 convened, and this question was taken up. Inflammatory resolutions were introduced in the Legislature, in which, after twenty-six pages of caustic preamble, the Legislature most solemnly protested against the principles set forth in the opinion of the court. But it is refreshing to know that the great court, in spite of the fact that the sword of Damocles was suspended a threatening menace over its head in the form of political speeches and printed resolutions of the Legislature, on the 4th day of December, 1823, overruled the petition for rehearing.

There followed the introduction of this foolish and highly inappropriate resolution a spirited and earnest discussion, participated in by the Hon. George Robertson, the Speaker of the House, who delivered a wonderful speech, which covered twenty-four closely printed pages of matter from which he discarded all unnecessary ornament, restrained with careful guard all tendency to flights of rhetoric, in clear and pellucid language, plain and unadorned, he laid bare the very nerve of his thought, appealing to his fellow members to return to reason and preserve the good name of the State. In spite of this earnest and patriotic appeal, on the 10th day of December the House of Representatives passed the resolution.

The next in order was the campaign for the Governorship and the control of the Legislature. This was fought out in the year of 1824. Of course, the fight was between the Relief and the Anti-Relief parties, and the issue was the removal of the judges of the Court of Appeals by address. The people were exceedingly angry over the decision of the Court of Appeals, and they had been led to believe that the courts had acted corruptly in passing on the question, so they indignantly rejected every appeal that was made to them by the leaders of the Anti-Relief party.

The Relief party named for Governor Joseph Desha, and for Lieutenant Governor Robert McAfee, while the Anti-Relief party

put forward for Governor Christopher Tompkins, and for Lieutenant Governor W. B. Blackburn. The contest was a memorable one, the Relief party winning by a large majority, and the control of both houses of the Legislature passed to them, thus assuring the Relief party absolute and undisputed mastery of the State government with the exception of the Court of Appeals.

Before Bar of Senate.

When the new law-makers met they summoned the judges of the Court of Appeals before the bar of the Legislature to show cause why they should not be removed from office. Of course, these distinguished jurists declined to respond in person, but submitted a courteous, but dignified, response in writing, in which they elaborated the grounds of their decision. On the 20th day of December bitter resolutions were offered in the House in which the Legislature sought to "address" the judges out of office. This effort failed for lack of a two-thirds vote, which the Constitution required. The resolutions passed the House by a vote of 61 to 39. The Senate, foreseeing the defeat of the resolutions in the House, approached the subject from another angle, and on December 9 passed an act repealing all laws establishing the Court of Appeals and undertook to create a new Court of Appeals. When the measure reached the House that body consumed three days in its discussion.

The debate was spirited and exciting, and was participated in by such men as the great Ben Hardin and the matchless Robert Wickliff, who championed the cause of the Old Court, and whose speeches against the constitutionality of the measure were masterpieces of eloquence and logic. There was great confusion in the House during the delivery of these speeches, and these gems of literature fell upon ears deaf to reason. But the friends of the measure became alarmed lest such great arguments should turn the tide against the bill, and to the utter disgust of all, the Governor of the State was seen upon the floor of the House urging the passage of the bill. So unusual was the fight for the passage of this bill that the late Chief Justice George Robertson was moved to remark that "The scene resembled a camp meeting in confusion and clamor,

but lacked its holy impulses." At midnight, December 23, after the most strenuous battle in the annals of the legislation of this State, the House concurred in the Senate bill, and it immediately found approval at the hands of the Governor.

The Court of Appeals having been supposedly legislated out of office, the Governor proceeded to appoint a new court. He named William T. Barry as Chief Justice and as Associate Justices James Haggin, John Trimble and Benjamin Patton. Upon the death of the latter, which occurred soon after his appointment, Rezin H. Divage was appointed as his successor. Chief Justice Barry was regarded as a distinguished criminal lawyer, but is reported to have labored under great disadvantages as a judge. Haggin was a prominent member of the Lexington bar, where he enjoyed a large and lucrative practice; but violent assaults were made upon his private character. Trimble was the brother of Robert Trimble, who died a Justice of the Supreme Court of the United States, and in the heat of controversy his ability was questioned. Nothing is known of Divage beyond the fact that he was appointed to succeed Patton.

Appeal to the People.

As soon as the Legislature passed this bill creating the new court and abolishing the old, the minority of that body issued a fervent appeal to the people of the State, in which it set forth with much warmth the cause of the old court, and denounced in withering terms the revolutionary proceedings of the majority. Judge Boyle and his associates of the old court questioned the constitutionality of the act creating the new court and refused to vacate the office. The new court assembled and appointed Francis P. Blair, clerk, but the clerk of the old court, Acilles Speed, refused to surrender the records of the office. Upon his refusal, the new clerk took forcible possession thereof, which precipitated such bitterness that bloodshed was narrowly averted. The grand jury of Franklin county indicted the judges and officers of the new court for this act of violence, but nothing more was ever done toward the prosecution of the officials. The people throughout the State were aroused to such an extent that the grand juries of a number of the counties

indicted members of the Legislature for having voted for the act creating the new court. The courts of Woodford county denied Madison C. Johnson, a talented lawyer, the right to practice law in that county because his law license was signed by Owsley and Mills, of the old court. He was finally permitted to practice by Circuit Judge Bledsoe waiving the alleged irregularity of his admission to the bar.

The fall election of 1825 at which the members of the lower house and one-third of the Senate were elected, was the occasion for unrestrained personal abuse. It is doubtful if the State ever witnessed anything that approached it in point of personal hostility and the use of violent utterance. Both Barry and Haggin, of the new court, were the victims of attack on their personal integrity. Mills, of the old court, was charged with having acted as Appellate Judge in a case in which he had appeared as counsel before his elevation to the bench. It was charged that Barry, after his appointment, but before he took the oath of office, defended the son of Governor Desha on a charge of highway robbery and murder. All these charges and many others were made during the campaign, and I refer to them for the purpose of showing the nature of the campaign through which the people passed at the first election held after the passage of the New Court Act, which election was to be a test of the sentiment of the State on the question of the abolition of the old court.

Happily, the result of the election showed an overwhelming victory for the Old Court party, but, while the Old Court had a majority in the House, the Senate was equally divided, due to the fact that only one-third of the Senators were elected that year. The Lieutenant Governor had the casting vote, and unfortunately he belonged to the New Court, or Relief party, and while the election showed plainly that the people of the State were strongly in favor the repeal of this unwise legislation, yet it looked rather gloomy for any legislation along this line at that time. Although its repeal was not accomplished at the first session of the Legislature, following the election, the returns from the election gave it such a staggering blow that it was thereafter rendered lifeless, and so discouraged was the New Court that no more decisions were rendered by it

after October of that year, though its sittings were continued for some time thereafter. The new Legislature met in regular session, but nothing was accomplished owing to the fact that the Senate was tied, but before final adjournment the majority in the House issued an address to the "People of Kentucky," which, after referring in detail to the Old and New Court controversy, closed with this significant language:

"On you hangs the fate of the Constitution. Having done all that we could, we submit the issue to God and the people."

Final Blow Administered.

At the following August election, the people administered the final blow to the New Court. Both houses of the Legislature then elected were overwhelmingly Anti-Relief, and they proceeded with great dispatch and unyielding determination on Decmber 30, 1826, to "remove the unconstitutional obstructions which have been thrown in the way of the Court of Appeals." Governor Desha, with his veto, endeavored to kill the bill, but the Legislature, fresh from the people, was more potent than he, and promptly passed the bill over his veto, thus terminating the most fiercely and vigorously contested piece of litigation known to the history of this State. Mr. Blair, the New Court clerk, surrendered to the Old Court all the records pertaining to that office, and the New Court passed out of existence after a stormy career, "unwept, unhonored and unsung." In all it rendered seventy-two opinions, which are preserved as curios in 3rd Ben Monroe, but until recently have not been cited as authority by the bar of this State.

Although it is sorely regretted that the State was compelled to pass through such a bitter ordeal as this, in which the very life of the courts was threatened, yet out of all the evil some good resulted in the fact that it was abundantly established that Kentucky, even then, was blessed with a great judiciary, unquestioned for ability and unafraid of the clamor of the mob.

These great patriots, who faced this critical situation, and bore themselves with such marvelous fortitude throughout the trouble, not only immortalized their own names, but by their distinguished services impressed their exalted personal and offcial worth

upon all future generations. They were men who did not look upon the Constitution as a frail and tottering edifice that afforded no shelter in times of storm. They regarded it as the bulwark of our liberty; as the great fortress of our common safety in times of extreme peril—a stately memorial of the chivalrous deeds of the heroic dead.

Listen to the golden words of Judge Clark, of the Bourbon Circuit Court, the first court to pass on this question. His decision was adverse to the constitutionality of the measure, and having been summoned to appear before the Legislature and show cause why he should not be removed by address, responded in the following language:

"In pronouncing void a law that is incompatible with the Constitution, the judiciary does not assume a superiority over the Legislature. It announces only that the will of the people as expressed in their Constitution is above the will of any of the servants of the people. The decision was given after the most mature deliberation, which I was able to bestow, and from a firm conviction of the principles there mentioned, and I must have been not only faithless to my conscience, but to the Constitution of the United States and the dignity of the judicial office had I expressed any other opinion."

Men of Towering Ability.

It was fortunate indeed for the State that in these times when the State government itself was imperiled, the Court of Appeals was in the hands of men of such towering ability. There was the great Chief Justice Boyle, who, among the others, stood like Mount Blanc above the lesser Alps. He had desired for some time to retire from the bench of the State, but his keen sense of duty impelled him to remain at his post as long as there was the least danger, and he stood like a Greek warrior until the last battle was finished. The people had great confidence in his personal integrity, and this, more than anything else, accounts for the sweeping victory that finally crowned the efforts of the Anti-Relief party at the August election, 1826. This duty finished the great Chief Justice resigned

to become Federal Judge for the District of Kentucky, which position he filed with ability until his death, January 25, 1835.

In view of the fact that Judge Boyle was Chief Justice during this assault upon the judiciary, and stood with Spartan devotion to the cause through that memorable struggle, I feel that I cannot conclude this paper with anything more appropriate than the splendid and deserved eulogy which Judge George Robertson, himself an august and serene personality, once paid to Judge Boyle:

"As a lawyer, he was candid, consciencious and faithful; as a statesman, honest, disinterested and patriotic; as a judge, pure, impartial and enlightened; as a citizen, upright, just and faultless; as a neighbor, kind, affable and condescending; as a man, chaste, modest and benignant; as a husband, most constant, affectionate and devoted."

REFORMATION OF THE JURY SYSTEM

By Lewis McQuown.*

In an able and interesting address† on "Reform in Criminal Procedure," delivered by Judge Kerr before the Kentucky Circuit Judges' Association, he urges that the law be changed so that in trials, in criminal cases, the juries shall only be required to pass upon the guilt of the accused, and that the judges be authorized to fix the punishment. He illustrates and enforces this contention by reference to numerous trials, where manifest injustice resulted from verdicts in which the punishment, fixed by the jury, was either excessive or inadequate. A system which provided these inequalities, he urges, should be changed.

Judge Kerr, at the close of his address, correctly and forcibly points out the cause of the inequalities in these verdicts:

"The great trouble with most juries is that the individual members, who compose it, resolve themselves into a law unto them-

---

*Glasgow, Ky.
†Kentucky Law Journal, Vol. VI, No. 2, p. 107.