THE RECALL

From the Standpoint of Kentucky Legal History.

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During the one hundred and twenty years of its existence the State of Kentucky has had four Constitutions. Each of those Constitutions has provided for the removal, by means other than impeachment, of officers from office before the expiration of the time for which they were appointed or elected. The wisdom of these provisions has been made manifest by the history of the state; and thoughtful Kentuckians in general have been convinced by the local history of their State of the truth of two propositions:

First, That there should be some method other than impeachment for the removal of officers—especially judges—from office before the end of the time for which they were appointed or elected.

Second, That a popular election is not a proper method for such removal.

It has been assumed by many advocates of the Recall that the very fact of providing for a removal is a species of Recall; but the history of Kentucky will show the wide difference between the orderly methods provided in its Constitutions and the method of a popular election.

The State of Kentucky had the good fortune to have its frame of government shaped by enterprising, thoughtful, energetic students of the principles of government, who had come from Virginia and other eastern states with a view of bettering their condition. It has been said that the Constitution of the United States is the wisest governmental instrument ever enacted for a federal republic; and that the second Constitution of Kentucky which was in force from 1800 to 1850 is the wisest instrument ever devised by the wit of man for the government of a republic which is not a federation. It has also been said that the statutory legislation of Kentucky from 1792 to 1842 is the wisest statutory legislation as a whole that the world ever had seen up to that time. While these encomiums may perhaps be to some extent exaggerations due to a pardonable state pride, these

encomiums would not have been uttered by thoughtful men unless the laws and Constitution of Kentucky had possessed great excellence.

In each of the four Constitutions it is expressly provided that the judges of the highest court may be removed from office by the Governor on the address of two-thirds of each branch of the legislature. In the two first Constitutions of Kentucky this same provision was made applicable to the judges of the inferior courts; in the third and the fourth Constitutions this provision is made applicable to the judges of the circuit courts; while a different provision is made for removal of county judges and justices of the peace.

It is apparent that a judge may become unfitted for the discharge of the duties of his office by physical or mental inability without his own fault or that he may prove a failure in the discharge of the duties of his office. His decisions may turn out to be hurtful and ruinous; and it is a matter of importance that the Commonwealth should possess the power to vacate the office in such an event.

The great conservative element in Kentucky, which in time of tumult and passion has prevented the wrongful removal of judges, is found in the Senate. Under the first and the second Constitutions he members of the House of Representatives were elected annually; under the third and the fourth Constitutions they have been elected biennially. Under the first Constitution, which lasted only eight years, the Senate was chosen for four years by an electoral college. Under the second, the third, and the fourth Constitutions one-half the Senate chosen at the time of the election of members of the House of Representatives; and the other half of the Senate hold over. In consequence it is impossible (no matter how great the popular majority at an election) to remove judges by address unless at least seven out of the nineteen hold-over senators concur in the address. This gives time to the people for sober second thought.

This machinery was fully tested in the days of the "Old Court and New Court" controversy extending from 1824 to 1826. I propose to give a sketch in this article of the history of that controversy as throwing light on the principles of Recall. Numerous sketches of the time are to be found in various books; but in some of them (at least) important facts are omitted, and in some of them there are inaccuracies.

In the two first Constitutions of Kentucky the only court ordained was the Supreme Court, called the Court of Appeals. All the other courts were statutory courts created by the legislature.

The district courts and courts of quarter session which had been created by statute were abolished by statute in 1802. It is generally believed that the reason for this change was dissatisfaction with some of the rulings of these courts and a desire to legislate the judges out of office by repealing the office itself. To guard against a repetition of such history, the third Constitution made the circuit courts, the county courts and the courts of justices of the peace constitutional courts; the legislature however had the power to create additional courts. The fourth Constitution which took effect in 1891 forbids the creation of *any* courts by the legislature. All the courts of Kentucky are constitutional courts. So jealous was the Constitution of the independence of courts, that the General Assembly cannot even create a board to determine election contests. (*Pratt v. Breckinridge,* 112 Ky., 1.)

Under the first and the second Constitutions the number of judges of the Court of Appeals was not fixed by the Constitution, but was left to be regulated by the legislature under the analogy of the provisions of the Constitution of the United States in regard to the Supreme Court. (Article III, §1.) Accordingly the Kentucky Court of Appeals originally consisted of three judges; in 1801 a fourth judge was provided for; in 1813 it was provided that whenever a vacancy should happen the court should consist of three judges only; in consequence, from 1813 until 1850 there were only three judges of the Court of Appeals at a time.

In 1824 the three judges were John Boyle, who had been appointed in 1810; William Owsley, who had been appointed in 1812, and Benjamin Mills, who had been appointed in 1820. This court—Boyle, Owsley and Mills—is popularly known in Kentucky as the great court. These are the three men whom it was sought to remove in 1824 by address; the attempt was unsuccessful.

Immediately after the close of the War of 1812 a spirit of speculation pervaded the entire state. A most exaggerated estimate was made of the unearned increment of real estate. Town lots on back streets of little towns brought prices on credit that would be esteemed fitting prices for well located property in a metropolis. Men's ideas of finance were thoroughly unsound. Paper

money was considered as money, and not as a representative of money. The legislature of 1817 chartered as many as forty independent banks of issue; their aggregate capital amounted to ten millions of dollars; and the right of paying the issue in notes of the Bank of Kentucky was given them by their charters. Still later a bank called the "Bank of the Commonwealth" was established; and by a legislative election of directors of the Bank of Kentucky that bank was so re-organized as to be pledged to receive the paper of the Bank of the Commonwealth in payment of all debts to it. The paper of the Bank of the Commonwealth was made receivable for public debts and taxes; practically the only security for the final redemption of this paper was certain lands owned by the State in the southwestern corner of the State of Kentucky, beyond the Tennessee River. Of course, the Bank of Kentucky speedily suspended specie payments; and the paper of the Bank of the Commonwealth depreciated to 50 per cent of its face value almost immediately after the bank was created in 1820. The condition of debtors was one of extreme distress; and the legislature attempted to give relief. The legislative session of 1820 was a relief session. It is doubtful whether any conservative legislation was passed at that session. The celebrated relief act passed at that session provided that unless a judgment creditor should endorse on the execution his willingness to accept paper of the Bank of the Commonwealth, or of the Bank of Kentucky in discharge of it, the defendant in the execution might replevy the debt for two years. The validity of this act necessarily came before the courts. The first circuit judge to pass upon the question was James Clark, judge of the Bourbon Circuit Court. He had been a judge of the Court of Appeals before he became a circuit judge. Long after the date of which we write he became Governor of Kentucky. He decided the act to be unconstitutional as to debts created before its enactment inasmuch as it impaired the obligation of contracts. In 1822 he was called before the legislature to answer for his decision and an attempt was made to address him out of office; but it was deemed best by a sufficient minority of the two houses to abandon the proceedings and to await the decision of the Court of Appeals. On October 4, 1823, and October 11, 1823, opinions were rendered by the Court of Appeals in *Blair v. Williams* and *Lapsley v. Brashears,* reported in 4 Litt., pages 35 and 47, which fully sustained the contention that the relief act was unconstitutional. The removal of

the judges of the Court of Appeals by address was the issue in the election in 1824; by a majority the relief party carried the election. Desha was elected governor; McAfee, lieutenant-governor; the overwhelming majority of the House of Representatives was elected by the relief party; and the relief party also elected a majority of the new members of the Senate.

Proceedings were at once instituted for the removal of Boyle, Owsley, and Mills by address; they were summoned before the two houses, and had a hearing. The proposed address received the votes of a majority of the members of the House of Representatives; but in the Senate the vote stood 23 against 12; as there were 38 members of the Senate, a vote of 26 would have been required to remove the judges.

That the removal of the judges would have wrought incalculable harm is plain to us all to-day; but to the majority of the people of Kentucky of that date the three judges seemed to be judicial tyrants who were obstructing the popular will and were in favor of the creditor class against the debtor class. Indeed one of the toasts at the banquet given immediately after the inauguration of Desha and McAfee was "The Constitution of Kentucky—its interpretation is known to the people of Kentucky and is not to be found in the breasts of three judicial tyrants."

Upon the failure of the removal proceedings, the legislature passed a statute to repeal the law organizing the Court of Appeals and to re-organize the Court of Appeals. It provided for the appointment of four judges; the judges so selected were Barry, Haggin, Trimble and Davidge. It does not appear that the question which had been in issue as to the constitutionality of the relief act was ever passed on by the new court.

The judges of the old court—Boyle, Owsley and Mills—declared the act organizing a new court to be unconstitutional; they continued to meet for the purpose of trying cases. The new court organized and appointed a clerk and directed the clerk of the old court, Sneed, to deliver the records to the clerk, Blair, whom they had appointed. Upon his refusal the records and papers were seized and he was fined by the new court.

From December, 1824, to November, 1825, no cases were decided by the old court which appear in the reports; but the new court sat from April, 1825, to October 28, 1825; and its decisions are reported in 2 *T. B. Monroe.*

In the election of 1825 the old court party was successful. The legislature attempted to repeal the act creating the new court; but the attempt was defeated in the Senate, the hold-over senators being largely new court men. The Senate was composed of 38 members; the vote by which the repealing act was defeated stood 19 to 19 in the Senate; and the lieutenant-governor, McAfee, gave the casting vote against the repeal. In 1826 the old court party was again successful. The legislature then enacted a statute declaring the act of 1824 unconstitutional and void and repealing same; this act was vetoed by Governor Desha, but in Kentucky it requires only a majority of the members elected to each house to pass a statute over the Governor's veto; this statute was so passed; and from that time the decisions of the old court have been recognized as the only decisions of the Court of Appeals. The decisions rendered by the new court are reported in 2 *T. B. Monroe* as above stated. They have never been cited in Kentucky. Indeed in *Shepard's Annotations* appears this notice, which has no doubt puzzled many lawyers outside of Kentucky: "The 77 reported cases of 18 Kentucky (2 *T. B. Monroe*) have never been referred to by the judges of the Supreme Court."

When the legislature of Kentucky concluded to have the volumes of reports number as *Kentucky Reports,* they began the series with 78 Kentucky, which counts 2 *T. B. Monroe* a report. In this way the history of the troublesome time above mentioned is kept prominent in the minds of all Kentucky lawyers. For years in the digests of *Kentucky Reports* it was common to have the cases in 2 *T. B. Monroe* digested, and the style of the case and citation printed in *italics.* While these things happened a very long time ago, they have been kept fresh in the minds of Kentucky lawyers. Not only are the above facts a perpetual reminder; but there are men now in practice at the bar who studied law under men who had passed through the troublesome period above mentioned; and the facts relating to the "Old Court and New Court" controversy are among the earliest recollection of their lives as students. Within a week after the act of 1826 was enacted which declared unconstitutional the repealing act, Judge Boyle was appointed judge of the United States Court for the District of Kentucky; Governor Desha appointed in his stead George M. Bibb, one of the leaders of the relief party. This appointment of course was unacceptable to the old court men. The election of 1828 resulted in the choice of Metcalfe, an "old court" man, for

governor; but he ran ahead of his ticket and the lieutenant-governor and a majority of the members of the House of Representatives were "new court" men. In December, 1828, the three judges of the Court of Appeals resigned. The places of Owsley and Mills were filled respectively by the appointment of Robertson and Underwood; but the office of Chief Justice remained vacant for almost a year. Buckner was then appointed a judge of the Court of Appeals and Robertson became Chief Justice. This ended the famous controversy extending all the way from 1820 to 1830.

The intensity of popular feeling is hard to describe. The judges of both courts were afraid of assassination. During the interval between the last reported decision of the new court and the first opinion of the old court thereafter reported, an event occurred which added bitterness to the controversy. Solomon P. Sharp, one of the leaders of the new court party, was assassinated at his residence in Frankfort; and while it afterward turned out that the assassination was in consequence of a private grudge which had nothing whatever to do with politics, the death of Sharp intensified the bitterness of the controversy. The new court ordered its clerk to guard his records with military force to prevent any seizure of the same by the officers of the old court.

I have given this history in detail; because it illustrates the danger of a recall by popular election. Had such a recall been possible in Kentucky, the judges would have been removed in 1824; indeed the removal of the judges was the issue in the election of that year. On the contrary the election of 1825 showed a complete change in feeling; and the matters went on until the election of 1826 finally disposed of the controversy.

Attempts were made to induce the circuit courts to pass upon the question which of these two bodies was the Court of Appeals. Madison C. Johnson, who afterwards became one of the leaders of the bar, but who was then a young man, obtained license from the old court to practice law. When he applied to the Woodford Circuit Court to be sworn in as a member of that bar, objection was made and the validity of the act repealing the old court was discussed before the Woodford Circuit Court by Rowan and Sharp on the one side and by Crittenden, Wickliffe, and Robertson on the other. The judges of the new court were present at the argument and advised with counsel who opposed the motion to admit Johnson to the bar. Judge Kelly, judge of the Wood-

ford Circuit Court declined to pass upon the question; but as a matter of courtesy admitted Johnson to practice at his bar.

Of course the final decision was by the people at the polls; but by the slow deliberate process which involved at least two elections. This history seems a warning against the removal of a judge by a single popular election. A few weeks after the passage of the act declaring the repeal of the court unconstitutional the legislature passed an act giving further time to sue out writs of error; this was for the purpose of allowing cases to be filed on appeal which had been delayed by reason of the controversy between the two courts. Many of the cases decided by the new court were decided again by the old court; and the principles were laid down which are now elementary constitutional law with the people of Kentucky that while there may be a *de facto* judge, there can be no *de facto* court; and while there may be a *de facto* officer, there can be no *de facto* office.

The only instance of the removal of a judge in Kentucky by address was the removal of Joshua F. Bullitt, Chief Justice of the Court of Appeals. Under threat of arrest by military authorities he left the State of Kentucky and removed to Canada. The legislature thereupon removed him by address on the third day of June, 1865.

The mode of removing inferior officers is prescribed in paragraph 227 of the present Constitution:

"Judges of the County Court, justices of the peace, sheriffs, coroners, surveyors, jailers, assessors, county attorneys and constables shall be subject to indictment or prosecution for misfeasance or malfeasance in office, or willful neglect in discharge of official duties, in such mode as may be prescribed by law; and upon conviction his office shall become vacant; but such officer shall have the right to appeal to the Court of Appeals."

It will be observed that the right of appeal to the Court of Appeals of Kentucky involves the power of that body to settle the questions of law involved as to what constitutes misfeasance or malfeasance in office.

In the convention of 1849 it was seriously urged that there would be no further need of power of removal by address, but that the power of impeachment was sufficient; because the Constitution adopted by that convention changed the tenure of judges from good behavior to terms. It was thought that the shortness of the terms would obviate the necessity of the power of removal

by address; but the convention and the people of Kentucky thought otherwise.

In cases of inability of a judge from sickness to discharge the duties of his office, even where that sickness has been protracted through months or years no removal has ever been found necessary in Kentucky. In 1906 when one of the judges of the Court of Appeals was ill with a protracted illness, the legislature passed a statute authorizing the appointment of a commissioner of appeals to discharge such duties as might be assigned him by the court. This office has been continued ever since irrespective of any question of illness of any of the judges.

As above stated the circuit courts were made constitutional courts by both the third and the fourth Constitution. Each of these instruments, however, provided that the General Assembly shall provide by law for holding circuit courts when from any cause the judge shall fail to attend or if in attendance cannot properly preside. By virtue of this section of the Constitution the legislature has from time to time passed statutes providing for special judges of circuit courts; and in some instances where a circuit judge has been disabled by illness for years the business of his court has been carried on through the medium of special judges.

Of course the right of the legislature to abolish offices which the legislature has created gives it the power in the case of all such offices to remove obnoxious officers by simply abolishing the office. It has been held that a statute creating a city office may authorize the removal of the city officer by the city council without cause before his time expires. (*London v. City of Franklin,* 118 Ky., 105.) Where the legislature has the power to prescribe duties of officers, it may change those duties during the term of office. The two most conspicuous instances of this in Kentucky will be found in the case of *Commissioners of Sinking Fund v. George,* 104 Ky., 260, and *Purnell v. Mann,* 105 Ky., 87. In the first of these cases the Court of Appeals sustained a statute taking out of the hands of the Commissioners of the Sinking Fund the management of the penitentiary and providing for the election of a board of penitentiary commissioners by the legislature itself. In the other case the Court of Appeals sustained a statute taking away from the judge of the county court, the clerk and the sheriff the duty of examining the returns of elections and from the judge of the county court and the two justices of the peace the duty of

determining contested elections of county officers; and from the Governor, Lieutenant-Governor, Treasurer, Auditor, and Secretary of State the duty of acting as a board for determining certain kinds of contested elections. The statute provided for the election by the legislature of three commissioners ("the State Board of Election Commissioners") and the appointment by them in each county of a county board of commissioners which should appoint the county officers of elections and which should itself constitute the canvassing board for the county and the contesting board for the county.

There is an interesting reminder of the struggle between the old court and the new court (showing the attitude of Kentucky toward the referendum) found in the provision of paragraph 60 of the Constitution, as follows:

"No law, except such as relates to the sale, loan or gift of vinous, spirituous or malt liquors, bridges, turnpikes or other public roads, public buildings or improvements, fencing, running at large of stock, matters pertaining to common schools, paupers, and the regulation by counties, cities, towns or other municipalities of their local affairs, shall be enacted to take effect upon the approval of any other authority than the General Assembly, unless otherwise expressly provided in this Constitution."

It is evident that this forbidding of a referendum except in the classes of cases mentioned was brought about by recollection (on the part of the draftsman of that section) of the ancient struggle between the old court and the new court. The section evinces a determination that *the legislature* shall have *the* legislative authority of the state. Paragraph 60 stands as above cited; but it simply recognizes the right of the General Assembly in cases of the kind mentioned to provide for a referendum and does not make it *the duty* of the legislature so to provide.

It will thus be seen that all through the history of Kentucky it has been the policy of that state to confer on a central authority the right of removing officers. In the case of judges that authority consists of two-thirds of each house of the legislature. In the case of inferior officers above named a decision of the circuit court removing an officer is subject to appeal to the Court of Appeals.

The political machinery of the state in this respect three-quarters of a century ago stood the severe strain of the "Old Court and New Court" controversy; forty years later it stood the strain

of the Civil War; within the last few years it has stood an intense strain growing out of (what are believed to be) local and temporary conditions. Whatever may be the case in other states, it seems plain that the people of Kentucky are subject to violent and sudden fluctuations of opinion and that a majority vote at a popular election is by no means a reasonable method (in Kentucky at least) for the removal of any officers. It seems further plain that the authority to remove ought not to be the electors who choose, but a representative of the central power of the state,—a body which can (if it chooses) hear argument and evidence and which can exchange opinions by deliberation. It seems further plain that this body should have in it elements of stability and should not be subject to sudden and rapid change. The Court of Appeals which undergoes a complete change only once in eight years, and the legislature which undergoes a complete change only once in four years, have in them elements of stability; while a requirement of a two-thirds vote to address judges out of office tends to prevent any hasty and inconsiderate act.

While of course these general considerations have been pretty fully discussed, it is possible that this review of the history of Kentucky giving in detail the facts of political conflicts may show that the possibility of such violent changes is not a mere matter of theory, and that in the case of one great commonwealth vast injury would have been wrought had the right of Recall been entrusted to a body less stable than the body to which that power was entrusted by the Constitution.

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