WHEN KENTUCKY HAD TWO COURTS OF APPEALS

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"It is not more absurd to attempt to impel faith in the heart of an unbeliever by fire and faggot or to whip love into your mistress with a cowskin than to force value or credit into your money by penal laws."

So wrote the economist of the American Revolution on December 13, 1780. The struggling Confederation was still in the era of inconvertible paper money. The effort to put value into that money by penal statute had failed. Fifty years later, the series of events which resulted in our having in Kentucky two Courts of Appeals each claiming to be the Supreme Court of the State resulted from a similar effort to put value into paper money by penal statute. That effort likewise failed.

The Battle of the Courts as the series of events has come to be called is, I believe, unique in American history. Sixty or seventy years ago the story of our two courts was widely known. It is referred to in William Graham Sumner's *Andrew Jackson* and his *History of American Currency;* in General Duke's *History of the Bank of Kentucky;* in Collins' *History of Kentucky;* and in Robert M. McElroy's *Kentucky in the Nation's History.* John Mason Brown gave a paper on the subject before the Kentucky Bar Association, and in 1892 Colonel R. T. Durrett read before this Club a paper on "Early Banking in Kentucky" with interesting information on the Battle of the Courts. John C. Doolan, a member of The Filson Club, published an article on the subject in the *Green Bag,* the Harvard Law School magazine, in about 1890.

The most complete work on the subject is *The Critical Court Struggle in Kentucky, 1819-1829,* by Professor Arndt M. Stickles, Ph.D., Western Kentucky Teachers College, and published in 1929. This book is an outstanding piece of research. It is excellent and I have used it so freely in the preparation of this paper that my talk should really be called a review of this book.

Why all this interest in a series of events which took place in the 1820's? The answer is simple.

The two-court situation arose out of money — printed money in the form of bank notes. These notes were redeemable in currency only

for a very short period after their issuance. I would remind you that we are in another period of irredeemable currency. The history of earlier periods becomes interesting to us all.

The Battle of the Courts was an attempt to force creditors to take their bank notes at face value when these notes were passing from hand to hand at a substantial discount.

This attempt was greatly intensified when a depression of first magnitude hit the United States as a whole and Kentucky in particular. The subject became an issue in politics. Two parties arose — the Relief Party interested in helping distressed debtors at the expense of creditors and the Anti Relief Party opposing action which was bankrupting many of those creditors.

Before getting into the Battle of the Two Courts I want to tell you a little about the average Kentuckian of those days, about our early banking experiences and the issues of paper money.

What had a Kentuckian of 1820, 50 years of age, seen in his lifetime? We think we of our time have seen a lot, but think about that 50-year-old man in 1820.

As a child he had lived through the American Revolution. He had seen the adoption of the Constitution, the election of George Washington, the admission of Kentucky as a state, the effort to make the group of States into a Nation and the opposition to it resulting in the Kentucky-Virginia Resolutions, the Burr Conspiracy. He had lived through the War of 1812. He had probably fought at Lundy's Lane or New Orleans. He had seen the Purchase of Louisiana, had lived through the French Revolution. He had heard about the Burning of Moscow and the Battle of Waterloo. Possibly he had lost a brother or his father at Blue Licks.

This Kentuckian was an ardent Democrat in the French sense. He believed not in state rights but in actual sovereignty of the state — its complete right to do "what it chuses to do" as Tom Paine said. He believed in the doctrine that the majority of the people in his state controlled. He had very little use for the rights of the minority.

He hated the rich, especially the rich planters of the Blue Grass who rode around in carriages costing $1,000 and wore clothes made in London. He lived in a state of 564,000 population including a slave population of 130,000, where that slave population had increased 57% in the decade and slaves were rapidly making it hard for the poor man to find work.

There were two other deep causes of interest.

First. An inherited bitterness toward the National Government because it had done so little to help Frontiersmen fight the Indians and had done so little to prevent Spain from closing the Mississippi

to their trade. Even the purchase of Louisiana had done little to erase this hatred. Possibly this very Kentuckian of 50 had lent a sympathetic ear to the talk of separation from the Eastern States about the time of the Burr Conspiracy.

Second. The deep bitterness toward Virginia and the National Government because of the Land Laws and the decisions of the Supreme Court depriving many settlers of the very land they had cleared and the cabins they had built. I wish I had time to discuss these laws and the decisions of the United States Supreme Court upholding the rights of some far away claimant against the claims of the occupant. Arndt Stickles says that because of these decisions on land claims the power of the Supreme Court itself came to be questioned.

What did these early Kentuckians use as money? Probably the first "money" that originated in Kentucky was that issued by a chap named Sanders. In high water Sanders tied his flatboat to a tree at what is now 3rd and River, in Louisville. When the Ohio went down he propped up the flatboat and started a store. He issued receipts for pelts left with him for sale and these receipts for furs in "Sanders Keep," as the store came to be called, passed from hand to hand as money.

There was no chartered bank in Kentucky for almost 20 years after the close of the Revolution. In 1802 the Legislature chartered the Kentucky Insurance Company with a clause slipped in the charter which gave the company power to issue notes payable to bearer. These notes subsequently furnished a large part of the currency used in the state. The notes went to a discount and the company ultimately failed.

The Bank of Kentucky — the Old Bank as it is called — was chartered in 1806 and its issue of paper currency resulted in a Statute passed by the Legislature after the War of 1812 had forced the bank to suspend specie payments. The paper money of the Bank of Kentucky fell to a substantial discount. That Statute took from creditors certain rights unless those creditors agreed to accept at par this paper currency in payment of debts.

In that Statute lies the root of the Battle of the Courts — the attempt to put value in depreciated currency by statute. It failed as it has done in hundreds of cases.

After the War of 1812 there was a wild boom all over the country. The United States demand for more currency was widespread. The issuance of bank notes used as currency increased from $45,000,000 to $100,000,000. In 1818 Kentucky chartered the Forty Independent Banks — the Forty Thieves as they came to be called.

As all Booms do, this Boom broke and left a trail of debt whose weight was heavy, when a man's property would bring one-fifth or

one-sixth of what it would have brought a few months before. The demand for some form of relief became widespread and insistent. It promptly got into politics.

Then came the Relief Party. The Relief Party won the election of 1819, and came into power. There was still the cry for more money. The Old Bank of Kentucky had suspended in 1818, so the Legislature promptly chartered the Bank of the Commonwealth, famous because it was supposed to have capital of $2,000,000, while actually it had appropriated for it the sum of $7,000, all of which apparently went for printing presses to print more paper money. Of course, this paper promptly went to a discount. That would not be objectionable to debtors if creditors could be made to accept these notes at par in payment of debts. Within two years the Bank of the Commonwealth had issued more than $2,300,000 of these notes. It had in its vaults at the time the magnificent sum of $2,633.25 in specie. Of course the notes went to a discount.

But the question still existed as to how to deprive creditors of some of their contractual rights and it was this question which led to the abolition of the existing Court of Appeals and the organization of the New Court.

The Legislature had already, in 1820, taken away some of these rights. Now, in December 1821, the Legislature provided that unless the creditor agreed to accept depreciated notes of the Bank of Kentucky or the Bank of the Commonwealth, the land securing the debt could not be sold for less than three-fourths of its value *as appraised by a jury of neighbors.*

You know what such a jury would do. Practically every small landowner was in debt and sympathetic with his neighbor. Probably that neighbor on the jury was himself defendant in a similar suit. In Franklin County in two days 275 different suits for the collection of debts were filed.

That Jury of Neighbors would probably put such an appraisal that no one would pay three-fourths of it. This Replevin Act of 1821 marks the supreme effort of Kentucky Legislatures in trying to aid the debtor class. Now came the Court decisions and their reception.

It must be remembered that the depression in Kentucky was still terrible. Governor Adair estimated that the large amount of property, mostly land securing small debts, would not bring one-tenth of its real value. But failure to collect anything from these borrowers was forcing lenders into bankruptcy. A creditor class badly hurt by relief legislation commenced to fight back.

In August 1821 came the famous *Williams* vs. *Blair* case in Bourbon County. Williams was given judgment against Blair for the sum of

$219.67½. Williams, by the stop collection act referred to above, had replevined the debt and postponed payment for two years. Judge James Clark of Clark County, before whom the case was argued, reserved his decision until May 1822. He then declared the Replevin Law regulating endorsements and deferred payments *Null and Void.*

He cited Section X of Article 1 of the United States Constitution which forbade the passing of an *ex post facto* law or a law impairing the obligation of contracts. He showed that Section XVIII of Article 10 of the Kentucky Constitution was in agreement. Another case was similarly decided — the Lapsley Brashear case in Fayette County.

The uproar in the Relief Party and the Legislature was prompt and violent. It must be remembered that Kentucky was still in the throes of terrific depression. The Relief Party claimed that it had saved thousands of small debtors. The Legislature was outspoken in its claim that the Legislative Department of the State was not inferior to the Judicial Department. Steps were taken at once to remove Judge Clark from the bench by action of two-thirds of each house.

The Relief Leaders failed in this effort. Judge Clark was safe, but the Court fight was on in earnest. These decisions were in the circuit courts of the State. The Court of Appeals had not yet spoken. Its decision was rendered October 8, 1823. It is not necessary here to go into the details of this decision. It simply meant that the Court of Appeals upheld the lower courts in pronouncing the Replevin Acts of the Legislature null and void insofar as they impaired contracts which had been made previously.

Leaders of the Relief Party charged the judges with arrogating supremacy over the popular will. Their authority to declare void any act of the Legislature was denied. Courts were denounced as usurpers and kings.

In the meantime — in the spring of 1823 — the United States Supreme Court in the case of *Green* vs. *Biddle* declared certain acts of the Kentucky Legislature in 1797 and 1812 null and void. This in effect upheld the land claimant against the land occupant and dispossessed many small landowners. The cup of bitterness was full. Down with the Courts!

The Legislature met in the fall of 1823. There was condemnation of the Supreme Court. There was a long resolution prepared by John Rowan which ended with the statement that the Replevin Acts if ever repealed should be repealed by the Legislature and not by the Courts. Passions ran high in the conflict between Legislature and the Courts. As in the case of Judge Clark there was a demand on the Governor to remove the judges of the Court of Appeals. This likewise failed to get a two-thirds majority.

The election of 1824 came with the dominant issues local rather than National. The contest was between the Relief and Anti Relief Parties. The Relief Party won both houses. Campaign speeches clearly indicated that the Court of Appeals would be under attack. There was already talk of abolishing the Court. When it was indicated that an effort to remove the judges by "address" would fail to get the necessary two-thirds majority of each house of the general assembly, the leaders of the Relief Party in the Senate proposed and succeeded in having passed a bill on December 19, 1824, abolishing the existing Court of Appeals and organizing a New Court.

This bill became known as the Reorganization Act. It passed the House 54-43. It was signed by the Governor and became law on December 24, 1824.

Professor Stickles has made an excellent summary of some of the arguments on both sides. Some of them seem to me closer to the French Revolution and Tom Paine than to our Constitution and Thomas Jefferson. One of these was that the people had the right to make any form of government they desired and to change it at will by the Legislature. The majority could not err and a minority had few if any rights.

Such was the atmosphere at the birth of the New Court. Governor Desha immediately appointed William Taylor Barry Chief Justice and James Haggin, John Trimble, and Benjamin Patton as associate justices. All were representative citizens. But Stickles says they did not compare favorably with the Old Court.

The Old Court met January 28, and announced that no business would be transacted until the Autumn Term. It gave no indication that it thought itself abolished.

The New Court met in February 1825 and promptly took the Old Court's furniture to the Senate Chamber and started business.

Both the old and the New Courts went to the public with protests and arguments.

The New Court made a demand on the clerk of the Old Court for its records. The demand was as promptly refused and Francis P. Blair, the clerk of the New Court with the sergeant of the court, broke into the chambers of the Old Court through a window and seized all the records he found. He did not get all the Old Court records because some had been hidden supposedly in the vaults of the Bank of Kentucky and some had been taken home by the three judges. The New Court did not have quite the temerity to try to seize these.

Achilles Snead, clerk of the Old Court, was held in contempt by the New Court, but refused to release these records. The Old Court held

Blair in contempt for seizing the records. Feeling ran high all over the State. Meetings were held in every county seat and in many other towns, either endorsing or condemning the legislature. Supposedly at the instigation of friends of the Old Court, grand juries indicted the members of the New Court and the legislators who voted for the Reorganization Act. All of this was in preparation for the next election. Promptly the New Court men got into the game and grand juries indicted the judges of the Old Court. Families were divided, friendships broken. One of the New Court judges openly stated that he wore a brace of pistols even when he went to prayer meeting.

It is a mistake to think that the debtor class, the backwoods men, and the poor generally were on the New Court side. If they were, it was for a very short time. The elections of 1825 and 1826 were favorable to the Old Court Party. The great majority of landowners, business men, and professional men was undoubtedly on the Old Court side. All the lawyers were on the Old Court side and that side was called the "lawyers party." The New Court Party made much political capital out of this because lawyers were surely unpopular in those days. Between debt collecting and helping claimants other than settlers get titles to land, lawyers had become the most hated group in the State.

The bitterness of the controversy did not help the economic conditions in the State. By 1824, economic conditions in the United States as a whole were improving, but Kentucky lagged far behind. Commonwealth Bank notes were worth only 50¢ in specie. Debts were uncollectable and creditors actually ran away or hid from debtors so that they would not receive offers of payment in Commonwealth Bank notes.

Law enforcement practically ceased. Respect for all courts was shattered and a wave of crime resulted. Men took the law into their own hands — a habit which beset Kentucky for a hundred years. About this time the phrase Linch Law began to be used. It was spelt *linch* whereas Webster spells it lynch and says it originated when a man named Lynch in Virginia took the law into his own hands. Lawyers representing creditors tried to get their cases into the Old Court. Those representing debtors tried to get their cases into the New Court. In magistrate and circuit courts there was much dispute as to which court should be recognized. Some of the circuit judges recognized the New Court, some the Old Court; but most circuit judges sat on the fence and sent appeals to both New and Old Courts. There is a question as to what each court did in the period between December 1824 and October 1825. Apparently each court considered itself to be in existence but the Old Court rendered but one

decision and that on October 15, 1825. After October 15, 1825, the Old Court handed down decisions regularly from November 10 to November 23, 1825. The New Court seems to have decided no cases after October 28, 1825. Stickles' opinion is that the two courts could not have been deciding cases simultaneously.

The campaign preceding the election of August 1825 was bitter in every respect including the secret introduction of Emetic of Tartar into the barrels of whiskey at a Lexington rally which made over 500 people violently nauseated. The Old Court Party won enough new members in the House to pass a repeal bill but the New Court Party was able to block it in the Senate. Supported by a resolution of the House, the Old Court tried to recover the records seized by Clerk Blair of the New Court. Blair promptly armed his office and announced that any one trying to seize these records would be fired upon.

All sorts of proposals were made to settle the controversy but with no results. The Legislature spent many days investigating Blair's armed force which was supposed to be about to try to disperse the House of Representatives itself. The capitol had been burned in November 1824, and the Legislature of 1825 had been sitting in a church. Now the church was burned and after six weeks of doing nothing the Legislature adjourned.

Evidently the election of August 1825 had had its effect on the New Court. In April 1826 the New Court announced that it would not enter on any business except as might be absolutely necessary. The Old Court continued to perform its duties. In May there were 726 cases on its docket.

After another bitter campaign the Old Court Party won the election of August 1826. Promptly, when the Legislature convened in December, a bill to repeal the court reorganization law was passed. It was vetoed by Governor Desha, and repassed over that veto. The two-year Court Fight itself was over.

It is especially interesting to note that the end of the Battle of the Courts came from a change in sentiment on the part of the people in the State and not as a result of any court decision.

I sometimes think we have come a long way since the days of the Two Courts. Then I wonder. We now recognize that Constitutions exist and exist for the purpose of protecting minorities but occasionally the Executive branch of government has no hesitation in trying to control the judicial branch by packing the court. We do recognize that the judicial branch can declare an act of the legislative branch unconstitutional and thus nullify it. But we protest violently sometimes.

It is easy to find parallels in history. We are again in a period of irredeemable currency. Like the bank notes of the 1820's, our currency

— notes of the United States itself — is selling at a discount when measured in a sounder currency such as Canada's.

A change in sentiment brought about a great change in 1825. A change in sentiment now, demanding of our Government a sounder currency, might be the greatest blessing our beloved country can have.