Kentucky's New Deal of the 1820's

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KENTUCKY'S NEW DEAL OF THE 1820's

Those who attacked the New Deal and President Roosevelt's Supreme Court proposal of February, 1937, as un-American, need to re-examine American history. Over a hundred years ago, the State of Kentucky was convulsed by a contest over the courts, which arose out of circumstances oddly analogous. Let us turn back the pages of history.

As with the President's Court plan, the Kentucky "reorganizing" Act of 1824[1] was the answer of a dominant group which controlled the executive and legislative branches, to decisions of the judiciary which threatened to obliterate comprehensive systems of legislation, originated in periods of distress. Curiously enough, the situation of the farmers and the debtor class in general, in Kentucky and other states west of the Alleghenies, in the early 1820's, was similar, in many ways, to the situation of those groups throughout the nation at the time President Roosevelt first took office. From 1812 to 1816 was a period of inflation on the Eastern seaboard. Though the states west of the Alleghenies had some silver and were free from serious financial disturbances, they, no more than the rest of the country, had been able to withstand the itch which seized people generally, to get rich quickly both during and after the War of 1812, and the Napoleonic Wars abroad.[2] * The panic of 1819, which followed an epidemic of unsound banking and land-speculation throughout the country generally, found the situation in Kentucky peculiarly desperate for a variety of reasons. According to one authority: "Droughts, hot spring weather, insects and cold summers in the years from 1816 to 1819 kept farmers from buying new goods or paying for what they had purchased."[3] Kentucky's only real bank—the Bank of Kentucky—had suspended specie payments some years before. In response to a demand for more banks, the legislature in 1818 had chartered forty-six new banks, which, to meet the pressure for paper money, were given

* See end of article for notes.

the privilege of issuing notes to an "amount equal to three times the amount of their capital stock, less indebtedness."[3] These notes, which were not redeemable in specie, but in notes of the Bank of Kentucky, which had meanwhile managed to resume specie payments, or in notes of the second United States Bank, had flooded the State. Incidentally, when in 1820 the legislature repealed the charters of these independent banks, which by this time had become hopelessly involved, the banks became popularly known as the "Forty Thieves" —evidential of a popular resentment towards banks and bankers not unlike that which swept the nation after the bank holiday of 1933.

In relating the trouble which arose in Kentucky to the main currents of American history, it is necessary to remember that the deflation which follows a wartime boom, marked as it invariably is by falling prices, bears hardest on rich speculators who are caught in an over-extended position, and on the farming and laboring classes, who as a rule are least capable of withstanding financial strain. In the 1820's the United States was a young country and various parts of the country recovered rapidly after the crisis of 1819. Hard times, however, persisted in some sections and among some groups as late as 1825. Thus, even in 1826, we find Thomas Jefferson, faced in the last year of his life with the threat of having to sell Monticello to pay his debts, writing to a friend that "Agricultural property is, at this time without a market" in Virginia.[4]

The situation in Kentucky, a state of greater soil and other natural advantages than Virginia, was aggravated after 1820 not only by the circumstances already mentioned, but also by factors which, coupled with a strongly individualistic trait, which even today continues a characteristic of the better type of Kentuckian, were calculated to heighten a distrust of fancied encroachments of the Federal government, and particularly of the Federal judiciary. Since the "reorganizing" Act of 1824, which purported to abolish the existing Court of Appeals and set up a new court in its place, grew out of the supposed subservience of the old court judges to the decisions of the United States Supreme Court, under Chief Justice Marshall, there was a states' rights angle to the controversy which cannot be overemphasized if we are to explain the reasons for the wave of radicalism in the State. When, in 1824, the judge-breaking law was passed, there were still active many of those who had voted for the famous Kentucky Resolutions of 1798, enunciating the doctrine of nullification. In this number were included Desha, who had been elected Governor by the Relief party.[5] When, therefore, in his annual message to the legislature in 1825, Governor Desha in defending the Court "reorganizing" bill and in attacking the United States Bank, appealed to the spirit of the 1798 Resolutions, he well knew that he was striking a popular chord. Throughout the long controversy, both sides quoted to their own ends the utterances of Patrick Henry, James Madison, Thomas Jefferson, and others of the Revolutionary fathers.

Students of the period have long realized that some of the decisions of John Marshall and his associates were major factors in the rise of Jacksonian Democracy. The struggle in Kentucky in the years under discussion afford convincing proof of this insufficiently appreciated fact.

The distrust of a strong central government by the farming interest dates from the early days of the Re-

public. After the close of the War of 1812, the general government, in 1816, aided business men and manufacturers by passing a protective tariff act and establishing the second United States bank. Mismanagement coupled with downright dishonesty in the Pennsylvania, Maryland, and Virginia branches brought the latter, within four or five years, to the verge of insolvency.[6] To it, in various parts of the country, was attributed the responsibility for the business distress and financial stringency in 1819, and the succeeding years. That this feeling was not without justification would appear from Channing's statement that "undoubtedly the attempt to bring about deflation in so short a time and by means of a national financial institution was most unwise * * * ; and also did something at least to bring about the hard times of the next few years."[7] Nowhere did feeling against the United States Bank become more intense than in Kentucky, and, it would appear, with good reason. An excellent monograph on the court struggle concludes: "Viewed from any standpoint, the United States Bank was an important factor in precipitating the problems with which Kentucky was struggling."[8] According to the author of this work:

"There is little doubt that these branch banks (in Lexington and Louisville) in their early history in Kentucky did help to hasten rather than to retard the impending ruin, and that they themselves were in a large measure to blame for the hatred heaped upon them during and after the financial and political crisis which soon struck the State. United States Bank notes were redeemable in specie, and Kentuckians exchanged large quantities of state bank paper for them at a great discount. This helped to reduce the value of the state bank notes and at the same time put the banks more heavily in debt to the Federal banks. As hard times began to appear in the East in the latter part of 1818, the Federal branch banks in Kentucky began to demand specie and to bring pressure to bear on the state banks, which in turn passed it to their debtors."[9]

In 1819 there was due to the Kentucky branch banks, $2,690,760, and to save themselves from disaster, calls began to come from them for payment in specie.[10] Doubt was expressed in the press whether all the specie and Federal and state paper money in the State would be sufficient to pay this debt and large sums due the Federal land office. In addition, there were large sums owing in specie to the Bank of Kentucky, the independent banks and from the merchants to eastern business.

When the Bank of Kentucky, with its thirteen branches, which as already mentioned had resumed specie payments, was for a second time forced to cease such payments, accompanied at about the same time by similar suspensions on the part of the "Forty Thieves," the control of the whole banking business of the State fell to the two branches of the United States Bank.

This, then, was the financial situation of the State when the full effect of the decision of the Supreme Court in *McCulloch* v. *Maryland*,[11] upholding the constitutionality of the United States Bank and placing it beyond the reach of State taxation, came to be fully realized. Hostility in Kentucky to this decision was heightened when the State Court of Appeals, later to be attacked for yielding to the Supreme Court, refused to accept its reasoning. Though Chief Justice Marshall handed down his opinion on March 6, 1819, the State Court of Ap-

peals, in a decision not rendered until December of that year, unanimously decided that the United States Bank was unconstitutional, although two of the three judges advocated yielding out of respect to the Supreme Court.[12]

Less than three weeks before the decision in the McCulloch case, the decision rendered by Marshall in *Sturges* v. *Crowninshield*,[13] holding that a state bankrupt law was invalid as impairing the obligation of contract, in so far as it attempted to discharge a contract or debt entered into prior to the passage of the law, created great uneasiness in Kentucky and in other states among debtors who, due to the times, had taken advantage in large numbers of state insolvency laws to obtain discharge of their debts. It should be remembered that years were to pass before Congress was to enact a National Bankruptcy Act. The alarm caused by this decision was in part due to the fact that, generally, throughout the Union, debtors could still be thrown into prison for failure to pay their debts.

Still another grievance of Kentucky against the Federal judiciary was in relation to its land laws. Uncertainty of land titles had, from the earliest days, been the peculiar curse of the State. Much of the trouble was due to the lack of system in the legislation with reference thereto, while Kentucky was still a part of Virginia. Unfortunately for Kentucky, it had been settled at a time when the Virginia government, due to Revolutionary War conditions, was unable to enact orderly land laws. Unlike the states north of the Ohio, where a different principle of surveying and registration was adopted, these early acts had made possible a multiplicity of overlapping and conflicting claims. The influx of settlers to Kentucky in the early days, is accounted for in part by the fact that the laws permitted the location of large tracts. According to one writer, in some cases the holders of patents in Virginia, "sent their slaves and overseers ahead to clear the fields and build the homesteads."[14] Though the utter lack of system in the land laws stimulated early settlement, it had other effects upon the development of the State. At a time when property was mostly in land, there was no state in the Union where landed property was more insecure than in Kentucky, due to the truly extraordinary state of Kentucky land titles in the early years of the eighteenth century. While "Kentucky became a lawyers' paradise, attracting many men of talent, who might otherwise have remained east of the mountains,"[15] many of the pioneers, along with Daniel Boone and Simon Kenton, either found themselves actually dispossessed, or else moved to other states for fear of losing their possessions. For the latter reason, for example, rather than for any dislike of slavery (for of that institution they saw little in Hardin County) did the parents of Abraham Lincoln move over to Indiana, as did the parents of Jefferson Davis to Mississippi.[16] To mitigate the situation, the Kentucky legislature, as early as 1797, had passed a so-called "occupying-claimant" law, designed to protect actual settlers on the land from claims of non-resident owners. Again in 1812, the clamor of the occupants had been quieted by a further enactment, so as to restrict the award of possession to the actual holder of the legal rights, unless and until he should compensate the occupier for all improvements. It was further provided that, in default thereof, the title should rest in the occupier upon paying the value of the land without improvements. Though doubt had been long expressed

whether these acts did not violate the compact with Virginia, entered into at the time of the separation of Kentucky from the mother state, wherein it was agreed "that all private rights and interests of land within the said district, derived from the laws of Virginia, prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state," the acts had been part of the settled law of Kentucky for nearly a generation. They had never been attacked by the other party to the compact, the State of Virginia. When, therefore, in a suit brought in the Federal courts involving the title to some 6,000 acres of land in Bourbon and Fayette counties, the constitutionality of the occupying-claimants laws was challenged on the ground that they constituted a violation of the obligation of the compact with Virginia, the hard-pressed Kentuckians again saw themselves thrown upon the mercy of the United States Supreme Court. Though the first decision in the case, *Green* v. *Biddle*,[17] holding the Kentucky laws invalid, was not handed down until March, 1821, after the Relief party had swept the State, the issue served to fan the flames of resentment against the Federal judiciary and became a factor in the subsequent effort to overturn the State Court of Appeals, particularly when, in 1823, upon rehearing, the Supreme Court reaffirmed its decision with a single dissent by Justice Johnson, who argued that it was incompatible with the American system for a state to be rendered helpless in its most vital powers. "I cannot admit that it was ever the intention of the framers of this constitution, or of the parties to the compact, that Kentucky should be forever chained down to a state of helpless imbecility—embarrassed with a thousand minute discriminations drawn from the common law, refinements on mesne profits, set-offs, etc., appropriate to a state of society and a state of property, having no analogy to the actual state of things in Kentucky—and yet, no power on earth existing to repeal or to alter, or to effect those accommodations to the ever-varying state of human things, which the necessities or improvements of society may require."[18] The antagonism excited by the prevailing opinion was intensified by the manner in which it was understood to have been decided. Marshall had disqualified himself from participating by the interest of near relatives in the result. Two other justices were absent because of illness, so that the court's decision, upsetting the Kentucky laws, was handed down by a minority of the court, three justices out of a total of seven which then comprised the whole court.[19] It was on this ground that the Kentucky Court of Appeals, in subsequent cases,[20] refused to follow the decision, so that it was enforceable only in the Federal courts. It was on this ground, also, that the Kentucky legislature protested against "the erroneous, injurious, and degrading doctrines of the opinion," and in a remonstrance to Congress, adopted in 1824, asked for a reorganization of the Supreme Court. If the Court's construction of the compact with Virginia was sound, it was asked, "Most respectfully, if the fact will not turn out to be, that Virginia has smuggled Kentucky into the Union in the character of an independent state, while, in reality, she retains her as a colony." It was not reasonable that one state should allow its land system to be dominated by another state. "No state that possessed the power of legislation over its soil could or ought to submit long to tenures of it, unassociated with culti-

vation. The desolating effects of the numerous titles of that sort in Kentucky have greatly retarded its agricultural advancement, and would, but for the benign effect of its occupying claimant laws, have thrown behind its just destinies at least twenty years. The state could not have got along without them." The point of the remonstrance was the suggestion that Congress should either pass a law requiring the concurrence of at least two-thirds of all the members of the Supreme Court in any case involving the validity of a state law, or else increase the number of the judges so as to multiply the chances "of this state to escape from its present thraldom, by exciting the exercise of more deliberation and an increased volume of intellect upon all such questions."[21] A bill to require concurrence of five of the seven Judges in any opinion involving the validity of state statutes or Acts of Congress was actually reported from the Senate Committee on Judiciary by Martin Van Buren,[22] then a Senator from New York—one of a series of not less than seven different proposals which were made in Congress during the 1820's for a requirement of more than a majority of the Supreme Court to hold a State statute unconstitutional; none of which, however, succeeded in commanding sufficient support for passage by either House, except a proposal of this kind which in 1826 passed the Senate.[23]

Money and banking, the plight of debtors, security in the possession of homes they had builded and fields they had cleared from the wilderness with their own hands—on these issues—characteristic of a new country—the common man in Kentucky in the early 1820's was demanding a new deal. The response to that demand was no less emphatic than in the 1930's when the issues, though essentially similar were those of an industrialized civilization, dominated by finance-capitalism.

In Kentucky, the relief of debtors was an initial concern of the so-called "Relief Party." Since the admission of Kentucky to the Union, and before that, the Virginia legislature had, from time to time, enacted various "stay" laws, under which debtors, who gave bond with security to their creditors, were protected from levy by the sheriff upon execution of judgment. After the first suspension of specie payments by the Bank of Kentucky in 1814, this legislation had been supplemented by a further law providing for a "stay" of twelve months, if the creditor did not endorse on his execution his willingness to accept in payment of his judgment note, notes on the Bank of Kentucky or its branches, or the notes of any other incorporated bank of the State, or notes on the Treasury of the United States.[24] The principle was pushed still further by an Act of 1820 which extended the power of replevying judgments from 3 to 12 months; if the plaintiff should refuse notes of the Bank of Kentucky in discharge of the debt, the defendant could replevy for two years.[25] Being promptly challenged in the Federal Circuit Court, then composed of Justice Todd of the United States Supreme Court, and Judge Trimble, who was later to succeed him on that tribunal, the lower Federal Court upheld the constitutionality of the act in question, not, however, without misgivings and the following warning:

"If the act required the plaintiff to endorse that he would receive notes on the Bank of Kentucky or its branches, we would not hesitate to consider it an inhibited tender law, and pronounce is so far void. But the provision in relation to the endorsement is

not mandatory, but permissive; he may take it as his election; * * * If the plaintiff does not elect to make endorsement, the law substantially gives the defendant a right to replevy for two years. Whatever might have been our impressions as to the constitutionality of replevin laws, if it were a matter of first impression, it is too late, after the states have been in the practice of passing them ever since the adoption of the Constitution, without objection, now to pronounce them void upon constitutional grounds, unless it were a very clear case."[26]

It was in the same year that the legislature repealed the charters of the independent banks, previously referred to as the "Forty Thieves," leaving under the control of the State only the suspended Bank of Kentucky.

In the election of 1820, which followed these events, the Relief party for the first time gained control, by substantial majorities, of both the executive and legislative departments of the State government. Thereupon a more comprehensive program of relief was enacted. One act abolished all imprisonment for debt (Kentucky thus being the first[27] state in the Union to do away with the old and barbarous method of imprisoning insolvent debtors). A second act authorized the county courts to purchase lands and to erect poor-houses for destitute old persons. A third act incorporated the Bank of the Commonwealth, with branches in each judicial district, to be wholly owned by the State, and with a president and directors chosen by the legislature. The charter of this institution, anticipating the R. F. C., provided that its loans were to be made only to those who needed them "for the purpose of paying his, her, or their just debts, or to purchase the products of the country for exportation."[28] In addition, the bank was empowered to issue its notes, which were not required to be redeemable in specie. A fourth act provided that real estate of a debtor should not be sold on execution for less than three-fourths of its appraised value. Still another act allowed judgments to be stayed for two years, if the creditor did not endorse on his execution his willingness to accept notes of the Bank of Kentucky, or of the new Bank of the Commonwealth. If he was willing to accept notes of the Bank of Kentucky only, then he was forced to wait twelve months for his payment; but if he should endorse his willingness to accept the notes of the new Bank of the Commonwealth, he should have to wait only three months. One Kentucky historian explains this discrimination between the two banks as "a bold effort to force the notes of the latter in preference to the former. The Bank of Kentucky had long been under the ban of the radical Relief party. To them it was a monster which sought to kill the effects of the relief measures at every step. It was in fact managed by conservative men who sought to confine its activities to sound banking principles. It had been bitterly attacked in the campaign before the establishment of the Bank of the Commonwealth. The Relief men claimed that it would execute loans only to certain privileged persons and that it was a dangerous influence in politics."[29] A democracy, when aroused, can hit hard, and not always wisely. In 1822, the legislature repealed the charter of the Bank of Kentucky, giving it seven years to wind up its affairs. At the time, it was the only sound bank within the control of the State, but the people, with the recent record in mind of the so-called "Forty Thieves," had lost confidence in the integrity and

ability of banks run by private individuals.[30]

The act last mentioned was designed indirectly to support the value of paper money of the wholly Government-owned Bank of the Commonwealth, but no legislation could effect this purpose. The paper notes got a bad start, selling for only 70 cents on the dollar in specie in the very beginning. A year later they had dropped to 50 cents.[31] Even the Relief party, through its more responsible leaders, now took alarm. In his message to the legislature in October, 1822, the Governor of the State advocated the gradual retirement of the notes. This policy was made effective and Frankfort, the State capital, was lighted by a succession of bonfires of the "rag" money. More than half of the notes of the Bank of the Commonwealth were thus retired, so that in time they approached par.[32] The stay and replevin laws, like the depreciated currency, also proved of short duration. In January, 1824, these laws were replaced by a more innocuous enactment.[33]

Not, however, before the Relief party had become involved in a head-on collision with the courts. Even a frontier community, through sad experience, could learn the principles of sound finance; but it was to prove harder for it to learn the constraints imposed by the American Constitution upon the working of the democratic will. As already explained, the primary concern of the Relief party, when it came into control of the State government, was the relief of the debtor interest. The legislative session of 1820-1821 had hardly completed its work, when an attack thereon by creditor interests was begun in both the Federal and State courts. In the Federal court, in the case of *Bank of the United States* v. *Halstead*, the constitutionality of the valuation law was assailed; in *Bank of the United States* v. *Southard*, that of the stay and replevin laws; and in *Bank of the United States* v. *January*, an attack was made upon the law abolishing imprisonment for debt. In all three cases, the Federal Circuit Court divided, Justice Todd of the United States Supreme Court holding the State laws were valid, but Judge Trimble, who had joined in the opinion of the year before already quoted, now dissented from his associate.[34] It was not until March, 1825, that a decision in the three cases was handed down by the United States Supreme Court.[35] That court sidestepped the whole issue by holding that the Federal courts had power to regulate their own processes by their own Rules of Court; that, as no state had power to regulate the processes of the Federal courts, the State laws relative to executions, replevy of property sold to satisfy judgment, imprisonment for debt, etc., were not binding upon such courts; and, therefore, "if the laws do not apply to the Federal Courts, no question concerning their constitutionality can arise in those Courts". At the time, Kentucky was in turmoil over its own courts. While thus cleverly the United States Supreme Court avoided passing on the constitutionality of the obnoxious laws, its decision sanctioned the anomaly that a Federal corporation, such as the Bank of the United States, and non-resident creditors in other states could escape the restrictions of the State laws by suing in the Federal court, and thus the State laws, which had been largely aimed at the bank and at non-resident creditors, were rendered of no avail. No such sidestepping of the issue was open to the State courts, and in a suit between two citizens of Kentucky, arising in

the Bourbon County Circuit Court, to force the payment of $219.67½ immediately instead of waiting the two years allowed by the stay and replevin law, Judge James Clark held the stay and replevin law invalid.[36] This and a similar decision from the Fayette County Circuit Court came before the Kentucky Court of Appeals in October, 1823. This latter Court's decisions,[37] sustaining the two lower courts, and holding that the two-year replevin law, in so far as it purported to operate retroactively on contracts made before its enactment, offended against both the Federal and State constitutions, were in reliance upon the law as laid down by the United States Supreme Court, through Chief Justice Marshall, four years before in *Sturges* v. *Crowninshield.* It was the same year in which, previously, the latter Court had handed down its second decision in *Green* v. *Biddle,* finally concluding the invalidity of Kentucky land laws which had been passed years before to protect occupying claimants.

"No popular controversy, waged without bloodshed," said years afterward George Robertson, one of Kentucky's great lawyers, "was ever more absorbing or acrimonious than that which raged like a hurricane, over Kentucky for about three years,"[38] succeeding the promulgation of these decisions with regard to the validity of the stay and occupying-claimant laws. The people had sincerely believed both sets of laws constitutional. It was charged by the New Court party that many of the Old Court leaders, including some of the State's most distinguished lawyers, had at one time or the other voted for the principle of one or other of the sets of laws, without challenging its constitutionality. It would even appear that two of the three judges of the old Court of Appeals, Mills and Owsley, had voted, while members of the legislature, for replevin laws.[39] The truth would seem to be that, after the issue was narrowed to the question of the independence of the courts, there was a considerable shifting of sides on the part of both the Relief and anti-Relief forces.

From an examination of contemporary documents it is difficult to say whether, after the decisions in question, the Federal courts or the State Court of Appeals, was in greater popular disfavor. The former, at any rate, were beyond the reach of an angry and alarmed mass movement. It was not so with the latter.

It was believed that if a state constitutional convention could be had, the state constitution could be changed to make the judges of the Court of Appeals elective instead of appointive for life. A proposal for the call of such a convention passed the House at the next session of the legislature, but failed by a close vote in the Senate. In the election of 1824, the Relief party, besides electing Desha, its candidate for Governor (who, however, in his canvass, appears to have taken an obscure position on the constitutional issue[40]) increased its representation in both houses of the legislature. An attempt was then made to address the judges of the Court of Appeals out of office, but this move failed for lack of a constitutional two-thirds vote in both Houses. But the Governor and the Relief party leaders, considering that they had a mandate from the people to get the judges out of office, were not to be balked. In this exigency, all other methods having failed, they turned to a more drastic, and more questionable, measure. At a "midnight" session on December 24, 1824, the legislature passed by simple ma-

jorities in both houses, and the Governor hurriedly signed, an act legislating the judges of the Court of Appeals out of office. This enactment, styled an act to reorganize the Court of Appeals, provided for the repeal of all legislation relating to organization of the Court of Appeals, and then for the setting up in place of the existing court of a "new supreme court, styled the court of appeals," with four judges to administer it. The Act is believed to have been the work of George M. Bibb, not a member of the legislature at the time, though a former Chief Justice of the State and a distinguished lawyer. While we cannot here discuss the various ingenious, if unconvincing, arguments used by the Relief party leaders in support of the constitutionality of this Act, it will suffice to say that, in the checkered history of the relations of the Kentucky legislature with the State courts since statehood, there was not lacking a semblance of precedent for the judge-breaking move. Four years after the Court of Appeals was first established in 1792, the legislature of the State in amending its jurisdiction, had carelessly styled the act an "act establishing the Court of Appeals" and provided therein for the oath of the judges, and that they should appoint a clerk who should take oath and give bond, etc. Likewise, on different occasions the legislature had exercised, without question, its power to increase the size of the court; and, when there was a vacancy, of reducing the places on the court to the original number.

We cannot here relate in detail the dramatic struggle which followed the passage of the midnight law. As in the Supreme Court battle which paralyzed the final term of the regular session of Congress in 1937, all three departments of the government were involved, the executive, the legislative, and the judicial. It will assist in understanding the course of events in Kentucky if we remember that, at that time, the Kentucky constitution, as the Federal constitution always has, provided that the judges of the highest court should be appointed for life. Under both constitutions it was provided that the judicial power should be vested in *one* Supreme Court. In neither, however, were the number of judges that should compose that court specified. In both, this important detail was left to legislative determination.

Two factors militated against the success of the New Court party. One was the belief that, whatever its antecedents, the Reorganization Act was subversive of the State constitution, and if it prevailed, would destroy the independence of the State judiciary, rendering it subservient to a legislative majority. A second was undoubtedly gradually improving business conditions.

Two elections were, however, necessary to settle the contest. Then, as now, there were elections of some sort in Kentucky every year. However, then, all the members of the lower House and one-fourth of the State Senate came up for re-election each August. The Reorganization Act was hardly passed before both parties began to address their arguments to the ultimate verdict of the people. As judges of the New Court, the Governor appointed Wm. T. Barry, John Trimble (a brother of the Federal judge) and two others, all known to be of the Relief party; but, contrary to expectation, the Old Court judges refused to yield. Though forcibly deprived of their records and the furniture for a court room, they met in a church on the capitol square and published a long

address attacking the Reorganization Act and defending their course. By force of circumstances, being unable to do otherwise, they decided to do no business until after the August election. However, from the 4th to the 12th of April, two of the three judges ventured to conduct court.[41] Meanwhile, the New Court which had organized for business decided such cases as were brought before it and published its opinions in the regular way. With two courts, both claiming to be the rightful Court of Appeals, the lawyers of the State and the lower courts were left in doubt which to recognize. Most of the lawyers rallied to the defense of the Old Court, as did the greater number of the lower courts, recognizing its mandates alone. Others however, looked to the New Court.

This situation was not relieved by the election in August, 1825, for, while the Old Court party carried the election,[42] it failed narrowly of a majority in the State Senate, because three-quarters of the latter held over their membership from previous years; and an attempt to repeal the Reorganization Act accordingly failed in that body, with the Lieutenant-Governor, its presiding officer, casting the deciding vote for the New Court party. The House, which was in the control of the Old Court party, did pass resolutions ordering the retaking from Francis P. Blair, the clerk of the New Court, of the court records. An attempt to do so was abandoned only when cooler heads foresaw that it would result in bloodshed.[43] The excitement throughout the State, and the fear of civil conflict breaking out, had been heightened by the assassination just before the opening of the legislature of the New Court leader in the House.[44] It was in the midst of this alarming condition of affairs that the Governor, in a message to the legislature, made a plea for compromise and offered, if the legislature would authorize the appointment of an entirely new set of judges, to select them equally from both parties. Various plans for the recognition of the Old Court, conditioned upon the resignation of the old judges or increasing the size of the court, came to naught because the leaders of the Old Court party, encouraged by the belief that they now had the greatest measure of popular support, considered anything less than repeal or concession of the invalidity of the midnight law setting up the New Court, a sacrifice of principle. The leaders of the Old Court party did, however, put through in the House a proposal, seriously made, that the judges of both the Old Court and the New Court, and all state officers, including the Governor, the Lieutenant-Governor, and the members of the legislature, resign, in order that a special election might be held to determine the issue, and to name successors to the elective offices.[45]

For a short while, at any rate, the two courts sat simultaneously. In the fall of 1825, the New Court, its popular prestige being considerably impaired at the preceding election, ceased deciding cases, though it continued to claim its prerogatives until the end of the contest. A lasting monument of its work is the apocryphal volume known to Kentucky lawyers as 2 T. B. Monroe's *Kentucky Reports,* containing its published opinions in seventy-eight cases, for years not regarded as binding precedents in the Kentucky courts.

With the adjournment of the legislature without a conclusive result being reached, the contest was again taken to the people with even more determination and vigor of denunciation than before. The New Court

party was greatly handicapped by the scarcity of newspapers on its side.[46] Its leaders honestly believed that in the 1825 election the people had been misled as to the merits of the case by propagandist appeals to save the constitution. The adherence to the Old Court party of most of the business interests and of all but about fifty of the five hundred and eighty lawyers of the State,[47] gave the fight the appearance of a class cleavage.

What the New Court party lacked, due to the opposition of the press, and the vast majority of the professional and business interests, was made up in part by the exceptional talents of its leaders. Included in these were several of the ablest lawyers of the State, as well as some of its cleverest and most resourceful politicians. Kentucky historians have generally agreed that, in point of ability, character, and patriotism there was little to choose between the leaders of the two parties.[48] There being no radio in those days, the leaders of the New Court party sought to convince the electorate of the justice of their cause with handbills and pamphlets. Among the ablest writers on the New Court side were Francis P. Blair and Amos Kendall. The latter's newspaper, *The Argus*, was a principal reliance of the party for the presentation of its case to the people.[49] In preparation for the August, 1826 election the New Court party now started, with the assistance of Kendall, a weekly journal called *The Patriot*. With appointed agents in the various counties, a wide circulation throughout the State was obtained. In this paper the Old Court party was variously portrayed as the old Federalist influence, as a confederacy of the great, the powerful, and the rich,[50] and as being led by "the lawyer faction."[51] Not to be outdone, the Old Court party started the publication of a rival journal, *The Spirit of '76*, to which, under the pseudonym of "Cincinnatus," the chief contributor was Humphrey Marshall, a first cousin of the Chief Justice and his brother-in-law by marriage. Gifted with "a blistering tongue and a cutting pen,"[52] Humphrey Marshall was the equal of Blair and Kendall in invective, if not in dialectic. Weekly, until the election was held, these and lesser controversialists renewed the battle from every angle, and with a vigor and animosity hardly paralleled since the days of Freneau and Fenno. Argument was embittered by personal recrimination. Accusations were made which sound strangely like some of those against the New Deal. It was charged by the opponents of the Relief party that, during the eight years that party had been in power, it had been extravagant with the finances of the State. In answer, Kendall, in *The Patriot*, stressed the purposes for which the increased expenditures had been utilized: "An University regenerated and preserved, a Lunatic Asylum created, a Hospital for the sick and friendless erected, an Asylum for the Deaf and Dumb called into existence, learning patronized, and a foundation laid for a system of Common Schools."[53] Again, the charge was made that Governor Desha, in disregard of his oath to support the Constitution, was seeking to become dictator of the State government.[54] "With Constitution," retorted Kendall, "inscribed on their banner, they (the lawyer faction) march over its most sacred provisions to enslave the People who formed it. It is not in a discussion of principles that they look for victory; but in heartless, false, and persevering attacks upon men and a misrepresentation of their measures."[55] In *The Patriot* the New Court party affected to be known as the country

party, and articles by anonymous writers were signed variously "Corn-Dumpling," "Hog and Hominy," etc. On the other hand, in the *Spirit of '76* and other Old Court publications, it was charged that some of the principal leaders on the New Court side, as well as a majority of the judges of the New Court itself, were "rich bankrupts,"[56] whose chief interest in the stay-laws was in the hope of the rehabilitation of their own speculative fortunes. "Let them forsake their 'dream of minced pies, ice creams, and splendid carriages' for association with an aristocracy of honest men who pay their debts," said *The Spirit of '76*."

It must not be forgotten that in Kentucky in the 1820's all men were Republicans by name; the old Federalist party, which had never been very strong, had completely ceased to exist. In earlier days, Humphrey Marshall had been elected to the United States Senate as a Federalist and, though Republican in name, still represented the Federalist influence. *The Patriot* now turned to advantage a slip Marshall had made as an author in his *History of Kentucky*. Utterly tactless, he had publicly exhibited his contempt of the masses by referring to the Democrats as comprising "the nether end of society." In a sister state, the serenity of the old age of the sage of Monticello had been broken in upon by appeals from both sides, who endeavored to draw him into the controversy; but Thomas Jefferson refused to be drawn in. "You wish me," wrote he to one of his Kentucky friends, "to give an opinion on the question which at present agonizes Kentucky. no my dear sir, at the age of eighty-two I have no inclination to volunteer myself into a question which convulses a nation. quiet is my wish, with the peace and good will of the world. with its contentions I have nothing to do."[58] Perhaps, similarly, Jefferson, were he alive, might write today!

When the votes were counted in the election of August, 1826, it was found that the Old Court party had increased its majority in the legislature sufficiently to be in control of both houses. Speedily, upon the convening of the legislature, a bill was introduced declaring the Reorganization Act null and void, and passed over the Governor's veto. Thus the long tumult ended. In a case some years later,[59] it was held by the then judges of the Old Court, its authority having in the meantime, as above indicated, been rendered unquestioned, that the New Court had never been a court *de jure* or *de facto* and that all of its acts, as well as those of its pretended clerk, were null and void.

Students of constitutional history are keenly aware that our constitutional crisis of 1937 was long in the making. While ostensibly precipitated by the decisions in the *Schechter* and *Butler* cases, and the fear on the part of the New Dealers that the attitude of the Court as evidenced in these cases imperiled the fabric of the New Deal itself, the whole trouble had roots at least a generation older. Had the majority of the Court appreciated earlier the dissenting voices, through two decades, of their wiser colleagues, the Court would not have found itself, upon the advent of the New Deal, committed to a Procrustean view of the boundaries of due process, and of the scope of interstate commerce as a basis of national power. To the legal historian and philosopher, it would seem that had the Kentucky judges possessed in greater degree a full awareness of what the Germans call "die normative Kraft des Foktischen"—the normative force of facts—the revolt

which threatened for a time to destroy the fabric of constitutional government in Kentucky, might have been avoided. From time immemorial, stay-laws have been employed by legislatures as a make-shift whereby, in times of catastrophic stress, the State has sought to protect, from too violent strain, the economic structure of society. The standstill moratorium among Germany's creditors, which President Hoover sought to effect in 1931, is a recent international application of the principle. Without here passing on the merits of the crude law adopted in Kentucky so many years ago, it is worth noting similar statutes, more skillfully devised, but hardly less burdensome on creditors, have successfully run the gauntlet of some American courts.[60]

Like the Court bill of 1937, the Kentucky Court Reorganization Act was ill-considered and ill-fated. Like the more conservative wing of the United States Supreme Court in recent years, it is clear that the judges of the Old Court were singularly honest and upright men. The most distinguished, John Boyle, the Chief Justice, is reputed twice to have refused to allow himself to be considered for appointment to the United States Supreme Court because he "distrusted his qualifications for a place so high."[61] Both he and George Robertson (leader of the Old Court party in the House, and for many years Chief Justice of Kentucky after the end of the court struggle) were what would be called today self-made men, who from modest circumstances achieved eminence by their own efforts alone, through habits of industry and self-denial.[62] Though conservatives,[63] both were men of highest character and integrity. In his *Scrapbook of Law, Politics, Men, and Times,* Robertson himself indicates the only objection that could properly have been made to Boyle as a judge—an objection which, through no fault of his own, was undoubtedly due to the deficiencies of his early training—" * * * in the opinion of some jurists he adhered rather more rigidly to the ancient precedents and technicalities of the common law than was perfectly consistent with its progressive improvements and its inadaptabilities, in some respect, to the genius of American institutions."[64] Yet Boyle was a man of scrupulous honor and childlike candor. "Doctor, I am dying! I have lived for my country!"[65] he exclaimed as he expired at the end of a career successively as Congressman, chief justice of the Old Court, and later a judge of the Federal District Court.

Of the Old Court leaders none achieved greater eminence in the national scene than Robert J. Breckinridge and John J. Crittenden. The intensity of party feeling which the court struggle had aroused, changed the course of the latter's career, for when, in 1828, he was appointed justice of the Supreme Court, upon the death of Justice Trimble, his identification with the conservative side of the question was one of the contributing reasons for the failure of the Senate, which had become democratic and hostile to Adams, to confirm the nomination.[66]

Considered nationally, the most notable effect of the court fight in Kentucky was the influence upon the development of Jacksonian Democracy, which came to be exercised by the leaders of the ill-fated revolt against the lawful court. George M. Bibb, the reputed author of the Reorganization Act, after serving for a second time as Chief Justice of the State and as United States Senator, opposed Jackson on the bank question, and closed his public career as

Secretary of the Treasury under President Tyler. Defeated in the cause for which they had fought in Kentucky, Barry, Kendall, and Blair became ardent Jackson men; and Barry was appointed by Jackson Postmaster-General. As the master mind of the famous Kitchen Cabinet,[67] Kendall became one of the most powerful and hated men in the Jackson administration. It was he and Barry who brought Francis P. Blair[68] to Washington to become the editor of the *Globe,* the administration organ. Blair's arrival in Washington was, in the words of Claude G. Bowers, "an historical event, not appreciated at the time, and scarcely properly appraised to this day."[69] For, gifted with political genius, Kendall and Blair were aware, as were few of the old-fashioned conventional statesmen of the times, that within the preceding decade a great body of voters had been added to the electorate through the removal of property qualifications.[70] Their training in the bitter feud in Kentucky had taught them skill in the arts of reaching through small country newspapers these newly enfranchised masses—even though, as in the campaign of 1936, the overwhelming majority of the city newspapers were hostile. Due to their journalistic ability, they were able to dramatize the issues of the Jackson administration in a way that could appeal both to the common man and the intellectual. In the words of Bowers, they, and their associates in the Kitchen Cabinet "were the first of America's great practical politicians;" and "the publicity work of Blair, and Kendall, more than any other one thing, contributed to the solidarity of the party and the general popularity of Jackson and his measures."[71] In the formulation of these, Kendall, and Blair became, in due course, driving forces. Here, in the development of Jackson's policies, may be traced the influence of issues which had stirred men's passions in Kentucky—the immediate aftermath in the nation of the court struggle. Before his election to the presidency, back in Tennessee Old Hickory had been considered "sound" on the question of the National Bank, and part of the time the friends of the Bank had been his political consorts.[72] Similarly, on the question of relief, which became an issue in Tennessee at about the same time that it did in Kentucky, but which there subsided sooner, Jackson had been on the conservative side.[73] Kendall and Blair, who, during the course of the court struggle, had cast their lot with Jackson in Kentucky, brought with them to Washington a bitter New Court prejudice against the Bank. The circumstances which led to Jackson's attack on the Bank are too well-known for repetition here, as is the acknowledged fact that Kendall had a hand in the composition of Jackson's famous veto of the bill renewing the Bank's charter.[74] In the transfer from the Bank of the Government deposits, Kendall's influence with the president was a determinative factor.[75]

In Kentucky the consequences of the Old-Court-New-Court struggle are visible even today. Though the Old Court party won out, the continued dissatisfaction of the people with a judiciary appointed for life was one of the principal causes for the adoption of a new State constitution in 1850.[76] In the State constitution of that year, as in the present one, the judges were made elective and the number of judges that should compose the highest court specified. While President Roosevelt's 1937 Court Bill failed of passage, it is a safe prediction that the struggle over

it, and the "reconstruction in the membership"[77] of the Supreme Court which has since been effected by judicial appointment, will leave a hardly less indelible impress upon the development of our organic Federal law.

NOTES

1. See A. M. Stickles, *The Critical Court Struggle in Kentucky 1819-1829*, pp. 6-7, pub. under auspices Grad. Council, Ind. Univ. (1929).
2. *Id.*, p. 6, quoting Edward Channing, *History of the United States* (New York, 1921), V, p. 314.
3. Samuel M. Wilson, *History of Kentucky*, II, p. 121, S. J. Clarke Pub. Co. (1928).
4. Letter to Dr. T. J. Ward, dated Mar. 13, 1826, pub. by Mo. Historical Society, III, Nos. 4-6, p. 133 (1936).
5. See Message of Gov. Desha, of Dec. 14, 1825, reprinted in *The Patriot*, p. 98, Frankfort, Kentucky (1826).
6. Charles Warren, *The Supreme Court in United States History* (1928 ed.), I, p. 506.
7. Channing, *supra*, V, 313, quoted by Stickles, *supra*, at pp. 11-12.
8. Stickles, p. 13, *supra*, note 1.
9. *Id.*, p. 12.
10. *Id.*, pp. 16-17.
11. 4 Wheat. 316 (1819).
12. *Commonwealth* v. *Morrison.*
13. 4 Wheat. 122 (1819).
14. T. D. Clark, *A History of Kentucky*, p. 275, Prentice-Hall, Inc. (1937).
15. Judge Charles Kerr, *History of Kentucky*, II, p. 656, Amer. Hist. Soc. (1922).
16. *Id.*, p. 656.
17. 8 Wheat. 1 (1821).
18. 8 Wheat. 19, 104 (1823).
19. Works of Henry Clay (1897), IV, letter of Clay to Francis Brooke, Mar. 9, 1823.
20. See *Bodley v. Gaither*, 3 T. B. Monroe, 57 (1825); *Gaines v. Buford*, 1 Dana 481 (1833); *Shepherd v. McIntire*, 5 Dana 574 (1837).
21. "Remonstrance to Congress," *House Doc.* No. 69, 18th Cong., 1 Sess. 42, 44.
22. Warren, I, p. 664, *supra*, note 6.
23. See *Id.*, I, pp. 657-685.
24. *Acts of Kentucky*, 1814, p. 391, referred to in Governor's Message, *The Patriot*, p. 150, *supra*, note 5.
25. Act of February 11, 1820, Kerr, II, 608, *supra*, note 15.
26. Quoted in Governor's Message, p. 55, *supra*, note 5.
27. Warren, I, p. 644, *supra*, note 6.
28. Wilson, I, p. 123, *supra*, note 3.
29. Kerr, II, 613, *supra*, note 15.
30. *Id.*, II, 613.
31. *Id.*, II, 615.
32. *Id.*, II, 618.
33. *Id.*, II, 622.
34. See Governor's Message, *The Patriot*, p. 55, *supra*, note 5.
35. 10 Wheat. 1 (1825).
36. The decision in this case, *Williams v. Blair*, may be found in Niles, *Register*, Vol. 23, Supp. pp. 153-155.
37. *Blair v. Williams, Lapsley v. Brashears*, 4 Littell, 34, 46, 64 (1823).
38. George Robertson, *Scrap Book*, 49-50, Lexington, Ky. (1855).
39. See Cincinnatus (H. Marshall) in *The Spirit of '76*, p. 53, Frankfort, Ky. (1825).
40. *The Spirit of '76*, p. 346, Frankfort, Ky. (1826); see also Robertson, 78, *supra*, note 38.
41. See *The Patriot* at p. 322, *supra*, note 5. This contemporary evidence appears not to have come to the notice of Dr. Stickles, who questions (p. 78) the statement found in many histories of Kentucky that both courts sat simultaneously.
42. When the new legislature met, the House, on November 14, 1825, voted 58 to 37 to repeal the Reorganization Act. This should be compared with the 54 to 43 vote by which it had passed the House in the preceding year. In the August, 1825 election, many of the New Court men who had voted for the Reorganization Act failed of re-election. This was the case with Joseph H. Holt, Will T. Buckner, and James N. Clarkson, who had represented Bourbon, the author's native county, in the 1824 legislature.
43. Credit appears to be largely due to George Robertson of the Old Court

party, then Speaker of the House of Representatives, who met and stopped the party on their way to retake the court records. See Robertson, 95, *supra*, note 38.

44. Col. Solomon P. Sharp, whose assassination by Jereboam O. Beauchamp, on November 7, 1825, is one of Kentucky's most famous tragedies. See W. R. Jillson, *The Beauchamp-Sharp Tragedy in American Literature*, Ky. State Hist. Reg. Vol. 36, No. 114, pp. 54-60 (Jan., 1938).

45. Stickles, p. 93, *supra*, note 1.

46. See *Kentucky Gazette* for June 23, 1825, where it is stated that "There are now in Kentucky at least three newspapers that advocate the anti-Relief or Old Court side * * *, for one on the opposite side * * *." Quoted by Stickles, p. 72, *supra*, note 1.

47. Stickles, p. 71, *supra*, note 1.

48. Kerr, II, p. 622, *supra*, note 15; Samuel M. Wilson, *The Old Court and New Court Controversy in Kentucky*, Proceedings Kentucky State Bar Assn., 1915, p. 54.

49. Stickles, p. 72, *supra*, note 1.

50. *The Patriot*, pp. 199-201, 215-216.

51. *Id.*, pp. 1-6, 156-158, 175-176, 184-187, 205-207, 234-238, 302-304, etc.

52. Dict. of Amer. Biography, XII, p. 309.

53. *The Patriot*, p. 315.

54. *The Spirit of '76*, pp. 238, 250-252, 289-290, 344-348, etc.

55. *The Patriot*, pp. 314-315.

56. *The Spirit of '76*, pp. 54-58. Charges of this sort are set out in great detail over the signature of Achilles Sneed in a pamphlet entitled *To the People of Kentucky* (1825).

57. *Id.*, p. 41-46.

58. Letter to George Thompson, dated June 22, 1825; pub. by Mo. Historical Society III, Nos. 4-6, p. 131 (1936).

59. *Hildreth's Heirs v. McIntire's Devisee*, 1 J. J. Marshall 206 (1829).

60. See article by A. H. Feller, *Moratory Legislation; A Comparative Study*, 46 Harvard Law Review, 1061-1085 (1933).

61. Robertson, p. 224 *supra*, note 38. See also Warren, I, pp. 301, 700, *supra*, note 6.

62. Robertson, pp. 218, 336, *supra*, note 38. Robertson states (p. 218) that Boyle in 1798 built a small log house in Lancaster (Ky.), with only two rooms, in which he and three other gentlemen "who successively followed him as a national representative, and one of them also succeeded him in the Chief Justiceship of Kentucky, began the sober business of conjugal life." Robertson, himself, was orphaned as a small boy, and married at 19, commencing the business of life "without a dollar on earth" (p. 336).

63. Robertson's definite Federalist leanings are shown in an address to his law class at Transylvania University at Lexington, Ky., in 1852, in which he recommended, among other things, for careful consideration of the class (which, incidentally, included John M. Harlan, later justice of the United States Supreme Court) "the judicial expositions of the constitution while John Marshall was Chief Justice"; Robertson, p. 245, *supra*, note 38.

64. Robertson, p. 219, *supra*, note 38.

65. *Id.*, p. 224.

66. Stickles, p. 112, *supra*, note 1. See also Warren, I. pp. 701-702, *supra*, note 6.

67. Claude G. Bowers, *The Party Battles of the Jackson Period*, p. 144, Houghton Mifflin Company (1922).

68. *Id.*, p. 161.

69. *Id.*, p. 161.

70. *Id.*, pp. 228, 242.

71. *Id.*, pp. 169-170.

72. Marquis James, *Andrew Jackson, Portrait of a President*, p. 51, Bobbs-Merrill Company (1937).

73. *Id.*, p. 145.

74. Bowers, p. 218, *supra*, note 67.

75. Bowers, pp. 296-297; James, 341, 349, 352.

76. Wilson, p. 53, *supra*, note 48.

77. Mr. Justice Frankfurter, concurring in *Graves v. New York*, 306 U. S. 487 (March, 1939).