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Marion County Superior Court

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RE-ARRANGING THE INDIANA JUDICIARY¹

THEOPHILUS J. MOLL²

A court is a public agency for dispensing justice. Society is its principal. The question of rearranging the Indiana judiciary is therefore one in which the public is more concerned than are the litigants, attorneys, jurors, and judges.

Each constitution in the United States in varying phraseology has declared, or does declare that justice shall be administered speedily and without delay, freely and without price. To meet these requirements Congress and the Legislatures of the several states have enacted multitudinous laws concerning courts. Indiana is no exception. Here the result has been to create a jumble of courts and jurisdictions. Changes are made at each session to meet new conditions. The purpose of this paper is to ascertain whether these matters may be systematized, and if so, how.

We are so accustomed to think of a republican form of government as consisting of the legislative, executive, and judicial departments, that we fail to realize that the beginning of Indiana recognized no such departments as separate, distinct institutions. This may account for the initiation of our complex judiciary, but it does not justify its continuance.³ The Ordinance of 1787, as originally proposed by Congress contemplated a separate general assembly, and also a court of three judges who

¹ This article, by Judge Moll, will be continued in the January issue of the Journal. Our readers will want to know that, while the first of the article deals largely with the historical development of judicial organization in Indiana, the later part of the article contains a discussion of our court organization as it is today and gives suggestions for legislative changes. These suggestions will appear in the part of the article that will be printed next month. They are predicated upon a careful analysis of experience with the different forms of court organization as partly outlined in this installment.

² See biographical sketch, p. 256.

³ The important French settlements in Indiana at the beginning of the French-British struggle for northwestern supremacy, in 1746, were Vincennes and LaFayette. George Rogers Clark seized Vincennes in 1778 as a basis for attacks on the French at Detroit, and kept the British out until the Revolution ended, and aided the acquisition of the so-called Northwest Territory for the United States by the Peace Treaty of 1783. The policy was adopted and maintained of developing it for the whole country and not for the individual states which laid claim to it. Vincennes had been incorporated into the Virginia County of Illinois in 1778, which expired in 1782, and thence was without legal government, approaching

with the Governor should adopt and publish suitable laws until the General Assembly was formed and met. As modified and adopted in the final Ordinance of 1788 this feature was continued except that when the United States Constitution was adopted in 1789, the President instead of the Governor, was to appoint the judges of the territorial court, the Governor still appointing the local judges. This judicial-executive legislature was still limited to adopting laws of the original thirteen states, and could not adopt new ones, or (up to 1792) repeal old ones.⁴ The Ordinance of 1787 provided for trial by jury and for judicial proceedings according to the course of the common law. It organized the Territory as one district, subject to be divided into two districts. It provided for the appointment of a court of three judges, any two of whom should form a court with common law jurisdiction, each of whom must own 400 acres while exercising office. Magistrates were to be appointed by the Governor when there were 5000 free males of full age in the district; only those owning 200 acres were eligible. It provided for from three to five states, the middle one to be bounded by a line drawn north to Canada and south to the Ohio through Post Vincents, then up to the Ohio to the Great Miami, then north to Canada subject to Congressional lateration.

Chapter 2, Acts of 1788, established "General Courts of Quarter Sessions of the Peace (and therein of the powers of single justices) and county courts of common pleas (and therein of the powers of single judges) to hear and determine upon small debts and contracts." Each county had a general session each quarter, and from three to five justices, one being a quorum, to bind over to "superior judicatory" and to hear petit crimes where the fine was not over three dollars. County courts were given pretty full civil jurisdiction "according to the constitution and laws of the territory." A single judge could try cases involving up to five dollars. This act was the pebble that

anarchy. Jefferson drafted the Ordinance of 1784, designating boundaries of proposed states, but naught came of it. New England and New York speculators proposed buying the land, and as an incident thereof the Ordinance of 1787 was adopted. Kettleboro, pp. 22-23.

⁴ The Government of the Territory was vested in a governor, a secretary, and three judges, appointed by Congress, a majority of whom were to legislate by adopting and publishing necessary civil and criminal laws, to be reported by Congress and effective unless disapproved. The Governor might call an election of a lower house, which in turn could nominate ten members of a council, five of whom should be chosen by Congress, to constitute a Senate. The two bodies were to legislate without restraint, subject only to ordinance and to the Governor's veto. But one such legislature met. *Id.* pp. 28-29.

started the avalanche and its attendant chaos. It was the forerunner of the Municipal Court of Indianapolis or Marion County, as the case may be. Chapter 3 established a probate court for the Territory with one judge in each county, but to render a definite sentence or final decree he had to call in two judges of the common pleas court; appeal lay to the general court. If the probate judge failed to perform certain prescribed duties he might have to pay treble damages. The idea of split authority embodied in this act is indicative of the frequent later attempts to split up judicial jurisdiction into definite parts and to assign these to special courts. The result has been duplication, confusion, convicts, added expense, prolonged delays. Chapter 4 fixed the terms of the General Court of the Territory, going from county to county, holding not over one term annually in any county; not a bad idea in principle, but as we shall see it does not work.

Chapter 14 fixed the terms of the General Courts definitely as to counties, the term in Knox County beginning the first Tuesday in May. Courts may come, and courts may go, but changing dates for holding terms is going on forever, apparently. One author says that from time to time "it became necessary (under the 1787 ordinance) to determine the personnel, define the jurisdiction and fix the sessions of the territorial courts," and "to prescribe the residential qualifications of territory judges." The habit thus begun, did not end with that ordinance. Moreover, Chapter 15 augmented the terms of the common pleas court from two to four years (as the 1925 Legislature extended many terms one month and a few 23 months), increased the number of judges (at the Governor's discretion) to from three to seven per county, and the number of justices to not over nine per county. Allen County is now entitled to forty. Chapter 16 required the quarter sessions courts to divide their counties into appropriate townships, and to appoint constables accordingly, thus brewing more trouble and annoying nuisances. At an early session, an act for the easy and speedy recovery of small debts was passed. Exclusive and final jurisdiction was given justices if the debt was less than five dollars; if from five to twelve dollars, justices and common pleas courts had jurisdiction with right of appeal from justices to common pleas. This approximates to an appeal from a municipal court judge on South Alabama to another municipal court judge serving pro tem in the Criminal Court. It is all strangely familiar. While the law is not so exact as mathematics or chemistry, it is nearly enough exact to warrant a workable system to quit experimenting. Another act was passed to "Prevent unnecessary delays in

causes, after issue joined," by allowing non-suits on motion of defendants after notice to plaintiff. Each June and December approximately one hundred cases are dismissed for want of prosecution in Room 5, Superior Court, and there are those who complain.

In 1792 the Secretary, Judge Symmes, and Rufus Putnam, a New England millwright, composed the legislature. The 1787 Ordinance had been amended in 1789 and again in 1792, giving the Governor and judges power to repeal all laws. Somewhat similar to a later Governor's attempt to amend the Constitution, the Governor in 1790 had assumed to legislate by proclamation, but Washington had warned him against such excess. The ordinance had been further amended so that any one of the Supreme or Superior Judges—in the absence of the other Judges (were), authorized to hold a court.⁵ Chapter 3 of this session made the Court of General Quarter Sessions a sort of State Tax Board and the Common Pleas judges local taxing officers. This act seems to mark the now prevalent notion of boards and commissions or quasi-courts. Chapter 5 directed the building and establishing of a court house, county jail, pillory, whipping post and stocks in each county. Now we have clubhouses to entertain our convicted citizens, and pardon boards to abbreviate their stay.

No further laws were passed until 1795 when about forty laws were enacted based mainly on statutes of other states. No appeals ran from territorial courts. Provision was made for the territory or county to pay the traveling expenses of judges on circuit. Recent assemblies did the same. An orphan's court patterned after Pennsylvania was also established similar to our present probate courts; also one for the settlement of inter-states' estates, and one for probating written and nuncupative wills.⁶ This was another attempt to divide the law into definite parts and to provide a court for each such part. No law became effective without the governor's signature. If he disapproved any proposed law, he did not veto it, but simply kept it in his office and it was not published. Terms of court had grown so irregular and seldom in the Northwest Territory, that in 1800 it was divided into two separate and distinct governments. In the West half criminal court had been held but once in five years. The territorial assembly met again at Chillicothe late in 1800. Acts passed authorized judges of the General Court to appoint Commissioners to take special bail and to administer oaths,

⁵ Kettleboro, pp. 37-38. Chapter 9 empowered justices to perform marriages, which is still a lucrative privilege.

⁶ The Massachusetts Divorce State was substantially adopted.

somewhat like Federal Court Commissioners today; amended the act as to admission of attorneys; provided for circuit courts, Wayne County constituting a district with court to be holden at Detroit, none being provided for Vincennes separately; appeals lay from the common pleas court in cases involving title to real estate or over \$50.00; judges of the general Court were empowered to adopt rules for governing the General and Circuit Courts; justices were made courts of small causes not over \$20.00. The shifting changes had become an established habit with increasing momentum.

Indiana territory was created before the time for another session. Up to this time no county in the territory had a sufficient jail, and the governor had to warn the judges against using military guard houses as jails and penitentiaries. Volstead cannot be blamed for this condition. Chapter 41 of the U. S. Sixth Congress passed May 7, 1800, had created Indiana Territory with its seat of government at Saint Vincennes on the Wabash and with a government in all respects similar to the Ordinance of 1787. It is said that because many litigants "had to go 600 miles to a judicial court," the Territory of Indiana was carved out of the Northwest Territory. Chapter 5 of the U. S. Eighth Congress passed January 11, 1805, divided Indiana Territory into Michigan Territory, with Detroit as its seat of government, and a new Indiana Territory. Because of "unreasonable delays and difficulties which must necessarily exist in the administration of justice," Michigan Territory is said to have been created. Chapter 13 of the U. S. Tenth Congress passed February 3, 1809, divided Indiana Territory into Illinois Territory with Kaskaskia on the Mississippi as its capitol, and a newer Indiana Territory. Because "the inhabitants of two large and populous counties are subject to be called '(100 to 130 miles)' through a wilderness to attend General Court at Vincennes" is given as a main reason why Illinois Territory was carved out of Indiana Territory. We thus discover what mighty influence the administration of justice and the formation of courts had on the development of Indiana and her adjoining States.⁷ The first session of the Governor and Judges of Indiana Territory met at St. Vincennes, January 12, 1801. Ten laws were passed, three relating to courts. One law provided all demurrers should be special. The English Statute of Joe-fails of 1752 was adopted but was repealed in 1803. Laws relating to Quarter sessions, justices, appeals, and circuit courts were adopted.⁸

⁷ Kettleboro, pp. 44, 49-53.

⁸ They repealed the Admission Act, so far as residence was concerned;

The next two sessions met at St. Vincennes in January 1802, and February 1803. William Clarke did not attend the third session. At the fourth, Governor Harrison and Judges Vanderburgh and Thomas T. Davis were present. They passed a supplemental act regulating appellate procedure.⁹ Attorneys' fees were fixed at \$10.00 for a land suit, \$7.00 for other suits, and \$3.50 for advice without suit. Bigamous marriages knowingly entered into were made capital crimes. A resolution was adopted that a circuit court be held in Clarke, Dearborn, and Wayne counties and a general court judge was directed to go there each year and hold trials. This session marked the end of the executive-judicial legislature, but not of the mischief it created as to constant changes regarding courts.

The first session of the Territorial General Assembly met in Vincennes, July, 1805. Its first Act prohibited selling intoxicants to Indians, and its second established small cause courts by giving justices jurisdiction throughout the county. A court of chancery was established and given full equity powers, consisting of one judge to sit twice each year at Vincennes and elsewhere as he was appointed. The rules of the High Court of Chancery of England were to govern where applicable unless modified. A commission form of a city government was tried by incorporating Vincennes as a Borough, August 24, 1805, with a chairman and nine assistants. On the same day an act passed organizing "inferior courts" vesting all the powers of the common pleas, general quarter sessions of the peace, probate and orphans' courts in the Court of Common Pleas to consist of three judges appointed by the Governor to hold six sessions per year, to meet in Dearborn, Clarke, Knox, Randolph and St. Clair

adopted a law regulating appeals, etc.; provided that appeal lay only from final judgments of \$50.00 and over, or relating to a franchise or free hold. Appeals today, especially to the Supreme Court, are similarly governed in principle.

A general Quarter Session of the Peace Court was created to sit in Knox, Randolph and St. Clair counties each year; the justices were appointed and commissioned by the Governor and might hold special sessions as required; recognizances were to the Quarter Session terms, or to the General Court, depending on the crime; appeals lay to the General Court, depending on the crime; appeals lay to the General Court which met at St. Vincennes in March and September. The judges held court as a circuit court each year to try causes pending in the various counties. A competent number of justices of the common pleas was commissioned to hold court quarterly. The divorce law of 1795 was repealed, but redeclared in 1803, "until the end of the first session of the General Assembly."

⁹ Negroes, mulattoes and Indians were disqualified to testify except against their own color, where any such color alone were parties. All negroes and mulattoes coming into Indiana Territory under a contract of service were compelled to perform such contract.

counties, the judges receiving \$2.50 per day actually served. This was really an effort to systematize the nisi prius court, but it was too good to last long. John Johnson and John Rice Jones were appointed to codify the laws. The result of their efforts you heard recently in an interesting paper by Mr. Lee Burns. The second session met at Vincennes Boro', 1806. The "small cause" law was amended to give magistrates jurisdiction as to personal property up to eighteen dollars. No common pleas judge could act as a justice for trying small causes. The time for holding common pleas courts was altered as to Knox, Dearborn and Clarke counties, and the idea of the system was encroached upon. An act was passed "relative to the General Court and the better to promote the impartial administration of justice."

The Johnson-Jones Revision of 1807 was submitted at the next session, amended and accepted. The first three chapters related to justices, common pleas and the general courts. A superior court judge sat as a circuit judge in the respective counties and decided causes unless he certified them to the general court for action. Another chapter provided that the common pleas courts should divide their counties into townships, another sought to prevent unnecessary delays in causes after issue joined. Chapter 59 organized a court of chancery. This session altered the fall term of the Clarke Common Pleas Court; adjourned the ensuing term of the General Court, and altered the time for holding the circuit court in St. Clair and Randolph counties. At the 1808 session various court changes were wrought. By Federal Act in 1812, district and territorial judges of the U. S. were required to live within their respective districts and territories and were prohibited from practicing law.

The first legislature divorce was granted by Chapter I of the General Assembly which met at Vincennes, 1811; the grounds were horse thievery and desertion. Another woman of the same surname and from the same county fared likewise. Salisbury was named as the seat of Wayne County. The usual court modifications occurred, as also happened in the first session of the fourth assembly at Vincennes in 1813. One law provided a means to help and speed poor persons in their suits by waiving costs and assigning counsel; another directed the mode of changing the venue; another fixed the seats of justice in all new counties thereafter to be laid off, by means of non-residing commissioners; the capitol was removed from Vincennes to Corydon and directed the General Court to meet there.¹⁰ This session granted no divorces.

¹⁰ Gibson and Warrick were created out of Knox; court was to be held

The next session met at Corydon, December, 1813. It authorized common pleas judges to hold special courts for trying criminal cases. An act was passed to render the practice in courts more easy and plain. Another was one for reorganizing the courts of justice; it abolished common pleas courts, and vested authority in three new circuit courts; one General Court Judge presided over the first circuit; the other two judges alternated in presiding over the other two circuits; each county had three associate judges, appointed by the Governor during good behavior; appeals lay from justices to the proper circuit, and from the circuit to the general court; terms of both circuit and general court were specifically fixed.¹¹ This excellent law sought to cure the existing confusion and if allowed to continue and develop would have saved much confusion, delay, expense and injustice.

in private homes specified; the general and circuit courts were empowered to decree divorces; the time was fixed for holding common pleas courts in the nine counties, and for the General Court to sit as circuit courts in such counties.

¹¹ Practicing physicians were ineligible as judges under penalty of \$500.00.

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