Some Phases of Washington's Life of Particular Interest to Lawyers

Sumner Kenner
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February 22, 1932, was the two hundredth anniversary of the birth of George Washington, who is associated in all our minds with the Act of Congress declaring him to have been “First in war, first in peace, and first in the hearts of his countrymen.”

Washington was not a lawyer. His education consisted of only the common schools; but although not university trained nor college bred, he was a reading man, who reflected and deliberated on his reading. Thus he grew intellectually as well as in every other way. He early acquired the habit of seeking all available information upon the subject of the moment. Lord Fairfax said of him,

“His education might have been bettered, but he is a man who will go to school all his life and profit thereby.”

Washington was denied the opportunity of supplementing his limited schooling by finishing his education in England as his two step-brothers and their father before them had done. He was also not able to attend William and Mary College, where many sons of well-to-do Virginians received their diplomas. The lad George Washington was fortunate in having a cultured father who had a keen desire to see his children educated, and the education of the boy George at a tender age was begun at Epseuasson (Mount Vernon) where his father had moved the family when George was three years old. Some idea of the scope of the early schools may be gathered from Rev. Jonathan Boucher, an English clergyman who came to America in 1759 and who was later a tutor of John Parke Curtis. He wrote of George Washington,

“George, like most people thereabouts at the time, had no other education than reading, writing and accounts, which he was taught by a convict servant whom his father bought for a schoolmaster.”

To have given his son a convict for a teacher was no reflection on Augustine Washington, as many of the transported exiles were educated gentlemen.

Much has been written relative to Washington’s greatness as a statesman, warrior and patriot, but little has been said and

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few people know that Washington served his state as a justice of the peace and a member of the county Court of Fairfax County, Virginia.

Due to the loss of colonial records, it is not possible to determine the precise date when Washington’s judicial career started. It appears from the available records, however, that he served on the court from 1770 to 1774. It is probable, however, that his service began prior to 1770 as his diary of April, 1768, makes reference to attending court in twenty or more entries.

In Washington’s time, the county court was the most important tribunal in Virginia. Many of the justices were laymen, which was not unusual at that time. In fact, in early Indiana the associate justices of the early circuit courts were laymen and not chosen from the legal profession.

While Washington was serving on the county court in Virginia, it had unlimited jurisdiction of civil cases, law and chancery, of probate matters, and of a large class of criminal cases. It had wide administrative powers touching the fiscal affairs of the county, the construction of public buildings, the laying out and construction of highways, building bridges, providing and operating ferries, the care of orphan children, the licensing of innkeepers and the fixing of their charges.

Judges for a county were appointed by the governor, not fewer than eight and often more, there being no restriction as to the number. Without the presence of four, no court could be held. The justices, though not lawyers, were nearly always the most prominent and reliable citizens of their county. They received no compensation whatever. They were thought sufficiently compensated by the honor of holding an office regarded as of outstanding importance and dignity, with the opportunity of contributing to the common good by attending to the settlement of small controversies out of court, and in court by taking part in the performance of duties which affected the property and liberty of persons and the general welfare of the public.

Chief Justice Marshall, speaking of the early Virginia County Courts, said:

“It was the truth that no state in the union had hitherto more internal quiet than Virginia. There is no part of America where less discord, less ill feelings between man and man is to be found than in this commonwealth, and he firmly believed that that state of things was mainly to be ascribed to the practical operation of our county courts. The magistrates who composed these courts consisted in general of the best men in their respective counties. It was mainly due to their influence that so much harmony existed in the state.”
It must be remembered that both Jefferson and Madison were justices; that Monroe, after his terms in the presidency, accepted an appointment and served as a justice in his county and many other prominent men besides Washington honored the bench with their presence.

Hon. R. W. Moore, a former Virginia congressman, thus describes the workings of the early county court:

"Far less is known than could be desired of the proceedings of the Fairfax court during Washington's service. The court papers have long since disappeared and about the only source of information are the two order books (from 1770 to 1775). Looking at the one of them, which runs from April, 1770, to January, 1772, containing three hundred thirty pages, it appears that Washington attended over half of the monthly terms, which was more regular than the attendance of a majority of his colleagues, Mason not excepted. In the period to which the book pertains, hundreds of civil cases were brought and in great variety—actions of debt, trespass, trespass on the case, trover and conversion, detinue, replevin and ejectment. There was constant resort to attachment. There were suits in chancery and injunctions were issued to restrain the collection of judgments and prevent irremediable injury. The names of the plaintiffs and defendants are always given and often the names of the lawyers. * * * The cases were tried by juries unless the defendant failed to appear or waived a trial in that manner, and verdict and judgments were made payable in tobacco or currency and sometimes partly in each. Now and then the jurors disagreed after lengthy deliberation and in one instance a juror was withdrawn and the case continued for 'reasons exciting as well the said Justices as the said parties', but the reasons for the excitement are not set out. There were now and then exceptions to the refusal of the court to set aside verdicts, and in a certain case not otherwise notable, the bill of exceptions was signed by Washington and sealed with his seal. Delinquent debtors were ordered to be imprisoned and were released after twenty days confinement upon proof of insolvency.

Lawyers were admitted to practice, wills were admitted to probate, letters of administration granted, guardians appointed, and the accounts of fiduciaries passed on. Poor children were directed to be bound out as apprentices and taught trades. There was much done in supervising and enforcing the collection of taxes and making expenditures for local purposes. * * * The court was required to see to the construction, when ineeded, and to the upkeep of the court house and jail and warehouses for the storage of tobacco turned in for taxes. In obedience to the statute it had the duty of providing a 'pillory', 'whipping-post and stocks'.

Notwithstanding the criminal jurisdiction of the court embraced all offenses except those punishable by death, loss of limb or outlawry, the order book refers to very few serious offenses. But the court was called on to deal with a great deal of the same comparatively unimportant kind of criminal business which now crowds the dockets of the United States District Courts."

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1 See 18 Am. B. Assoc. J. 151, 155 (1932); 7 Ind. L. J. 277 (1932).
It is certain that the experience obtained by Washington while serving on the county court, and as a justice of the peace, made a lasting impression upon his character. He necessarily became saturated with a good deal of the knowledge and acquired to some extent the habits of mind now assumed to be confined to those who have been equipped for judicial work by long study and then by some experience at the bar.

At the close of the Revolution, brought to its successful termination by the military genius of Washington, the great commander hoped to realize his cherished ambition to live the life of a country gentleman. But this was not to be. Deplorable, indeed, was the condition of the country at the close of the revolution. The outburst of national feeling at the opening of the revolution, born of necessity, and of the spirit of rebellion, against England, had now subsided, while the feeling of state pride, which had its roots in the far past, was again in the ascendancy.

The Articles of Confederation had been adopted a year before the war came to an end. However, under the Articles, the United States lacked the vital essentials of sovereignty. They could not tax their citizens; could not enforce their laws or regulate their commerce. At the close of the war followed one of the least known chapters of American history. It has been described as a period of pregnancy, out of which the constitution of the United States and the present American nation was born. The spirit of Bolshevism was abroad. It even permeated the officers of the army. In March, 1783, an anonymous communication was sent to Washington's officers to meet in secret conference to take some action, possibly to overthrow the government. The story goes that a copy fell into Washington's hands, and he unexpectedly appeared at the meeting, and, being no speaker, he had reduced his appeal to writing. As he adjusted his glasses to read it, he pathetically said "I have not only grown gray, but blind in your service." He then made a touching appeal to them not to increase by example the spreading spirit of revolt. The very sight of their old commander turned the hearts of the revolting element and the officers remained loyal to their leader.

Washington looked with dismay upon the drifting of the people toward anarchy. In October, 1785, he wrote James Warren of Massachusetts,
"The war, as you have very justly observed, has terminated most advantageously for America, and a fair field is presented to our view; but I confess to you freely, my dear sir, that I do not think we possess wisdom or justice enough to cultivate it properly. Illiberality, jealousy, and local policy mix too much in all our public councils for good government of the union. In a word, the Confederation appears to me to be little more than a shadow without the substance, and Congress a powerless body, their ordinances being little attended to."

Again in 1786, he writes,

"I think often of our situation, and view it with concern. From the high ground we stood upon, from the plain path which invited our footsteps, to be so fallen, so lost, is mortifying; but everything of virtue has, in a degree taken its departure from our land."

It was, however, the darkest hour before the dawn and again it was Washington who became his country's savior. The constitutional convention was held, and Washington said to a group of delegates,

"It is too probable that no plan that we propose will be adopted. Perhaps another dreadful conflict is to be sustained. If, to please the people, we offer what we ourselves disapprove, how can we afterwards defend our work? Let us raise a standard to which the wise and just can repair. The event is in the hands of God."

The convention followed. We cannot follow the proceedings, but it is sufficient to say that the debates were heated and extensive, and on several occasions only the diplomacy of Washington and the wit and philosophy of Franklin kept the meeting together and averted an adjournment of the convention, and on September 17th, 1787, the great work was completed and that great document, the Federal Constitution, came into being which has been described as the greatest “ever struck off at a given time by the brain and purpose of man.”

Upon becoming president, Washington’s legal training, such as it was, and knowledge of the courts became useful when it became his duty to organize the first Supreme Court of the United States.

The constitution provided that “the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.” It did not prescribe the number of the justices, and while it defined in a general way the limits of the jurisdiction of the Federal Courts, the first Congress had the important task of settling the composition of the Supreme Court, of organ-
izing inferior Federal Courts, of forming modes of procedure, and most important of all, of establishing the extent of the Supreme Court's appellate jurisdiction, both with reference to state and inferior federal courts. That was done by the Judiciary Act of 1787, which was approved by President Washington September 24th, of that year. That act was probably the most important and most satisfactory act ever passed by Congress, and the wisdom and forethought with which it was drawn has won the admiration of succeeding generations. It provided that the Supreme Court should consist of a chief justice and five associate justices, any four of whom should be a quorum. In an act approved the previous day, the salaries were fixed at amounts not disproportionate to their present compensation, having regard to the difference in purchasing power of the dollar then and now. It also provided for the organization of the lower Federal Courts and defined the appellate jurisdiction of the Supreme Court. During the six months between the date the first Congress met and the passage of this act, the nation was without a Federal Supreme Court or any inferior Federal Courts. Washington, in anticipation of this legislation, had been considering appointments to the Supreme Bench and on the very day on which he approved the Judiciary Act, he sent to the Senate the nominations for chief justice and five associate justices. He was the only president who ever had, or ever will have, the task of filling at one time every place in the court. For chief justice, he chose John Jay, of New York, then secretary of foreign affairs. Associate justices were John Rutledge, a judge of the Court of Chancery of South Carolina; William Cushing, first chief justice of Massachusetts; James Wilson of Pennsylvania; John Blain, judge of the Court of Appeals of Virginia; and later James Iredell of North Carolina.

Washington's convictions as to the important part which the Supreme Court was to take in the new government, and the grave responsibilities resting upon a president in selecting its members, is disclosed by his writings at the time. In a letter to his future attorney general, Edmund Randolph, he said,

"Impressed with a conviction that the true administration of justice is the firmest pillar in good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political system. Hence, the selection of the fittest characters to expound the laws and dispense justice has been an invariable subject of my anxious concern."
In writing to his nominee for chief justice, he said:

"In nominating you for the important station which you now fill, I not only acted in conformity to my best judgment, but I trust I did a grateful thing to the good citizens of the United States; and I have full confidence that the love which you bear to our country, and a desire to promote the general happiness, will not suffer you to hesitate a moment to bring into action the talents, knowledge and integrity which are so necessary to be exercised at the head of that department which must be considered as the keystone of our political fabric."

To another he wrote:

"Considering the judicial system as the chief pillar upon which our National government must rest, I have thought it my duty to nominate for the high offices in that department, such men as I conceived would give dignity and luster to our National Character."

It is also interesting to note that in 1793, President Washington sought to obtain from the chief justice and his associates advice upon certain legal questions, and submitted to them twenty-nine interrogatories carefully framed. To these the justices declined to reply, asserting the principle, later well recognized, that they are not constitutionally empowered to give advisory opinions to the president, and may only deliver opinions in actual cases or controversies between litigants brought before them as a court for decision.

Lawyers are interested in the last will of George Washington, consisting of more than twenty large pages, wholly in his own handwriting, and prepared as he modestly says therein without consulting any professional character, and it is fair to conclude that the training received as a county judge and justice of the peace enabled him to draft this admirable document. The document is too lengthy to permit of a careful analysis, and the contents are fairly well known to the profession; however, some of the important items will be briefly considered. Washington's will is what is known as a holographic will, or one written entirely in the hand of the testator. It was not attested, but, generally speaking, such wills require no attestation, the only requirement being that the instrument be in the handwriting of the testator and signed by him in the manner required by law. Washington's will would not have been a valid will under the laws of Indiana, as it was not attested, and we have no statute authorizing the probate of holographic wills not attested. Washington provided for the freeing of all of his slaves at the termination of the life estate given to his wife. He also ex-
pressly forbid the sale or transportation out of the state of any slave of which he died possessed. It is evident from reading these items of the will concerning his slaves that the great patriot had at that time made up his mind concerning slavery. To his mulatto man William he gave his immediate freedom, or, if he preferred, he might remain as he was, all this in reward for faithful services in the Revolutionary War.

In his will, Washington made provision for schools, colleges and universities. The first was a fund for the free education of orphaned and poor children at the Alexandria academy. A substantial gift was made to Liberty Hall Academy, now Washington and Lee University. In a letter to the trustees of the academy, Washington said:

"To promote literature in this rising empire, and to encourage the arts, have ever been among the warmest wishes of my heart."

Another item in the will has to do with one of the chief objects of his interest in public education, and that was the establishment of a national university in Washington, D. C. In his will, Washington uses the following language:

"That as it has always been a source of serious regret with me to see the youth of these United States sent to foreign countries for the purpose of education, often before their minds were formed, or they had imbibed any adequate ideas of the happiness of their own; contracting too frequently, not only habits of dissipation and extravagance, but principles unfriendly to republican government, and to the true and genuine liberties of mankind; which, thereafter are rarely overcome. For these reasons, it has been my ardent wish to see a plan devised on a liberal scale which would have a tendency to spread systematic ideas through all parts of this rising empire, thereby to do away local attachments and state prejudices, as far as the nature of things would, or indeed ought to admit, from our National Councils. Looking anxiously forward to the accomplishment of so desirable an object as this is (in my estimation) my mind has not been able to contemplate any plan more likely to effect the measure than the establishment of a university in a central part of the United States, to which the youths of fortune and talents from all parts thereof might be sent for the completion of their education in all branches of polite literature, in arts and sciences, in acquiring knowledge in the principles of politics and good government, and (as a matter of infinite importance in my judgment) by associating with each other and forming friendships in juvenile years, be enabled to free themselves in a proper degree from those local prejudices and habitual jealousies which have just been mentioned; and which, when carried to excess, are never failing sources of disquietude to the public mind, and pregnant of mischievous consequences to this country."
During his presidency, Washington persistently urged Congress to heed his suggestions of the need of such an institution. Hopeful to the last, he left for the university a bequest which he considered worth five thousand pound sterling, believing that this sum would induce the Federal government sooner or later to find the means to carry out his plan. This bequest was in the form of fifty shares in the Potomac Company, which he had accepted as a gift from the State of Virginia only on the condition that he would apply it to public purposes. Congress did nothing to take over the bequest and the company failed, so that Washington's design was doubly nullified. But the idea that Washington so fondly cherished still persists and patriotic men and women continue to foster the hope that in some form it may be nobly embodied, a fitting tribute and an added monument to "The Father of His Country."

After providing in his will for his widow and kinsmen, Washington made numerous special bequests which are of interest and the sentiments expressed in making these bequests show the great heart and character of the maker.

Washington received many gifts while president, many from abroad. A most interesting gift was sent to him by the Earl of Buchan of Scotland. It consisted of a box made from an oak tree that sheltered the great Sir William Wallace, at the battle of Falkirk, with the request to pass it to the man in the United States who should appear to merit it best. With characteristic modesty, Washington, in his will, ordered this gift returned to the original owner, saying:

"Whether easy or not to select the man who might comport with his Lordship's opinion in this respect, it is not for me to say; but, conceiving that no disposition of this valuable curiosity can be more eligible than the recommitment of it to his own cabinet, agreeably to the original designer of the Goldsmith's Company, of Edinburg, who presented it to him, and, at his request, consented that it should be transferred to me, I do give and bequeath the same to his Lordship; and, in case of his decease, to his heir, with my grateful thanks for the distinguished honor of presenting it to me, and in especial for the favorable sentiments with which he accompanied it."

Washington in his will gave his golden-headed cane left him by Benjamin Franklin to his brother Charles Washington. To General De la Fayette, he gave a pair of "finely wrought steel pistols, taken from the enemy in the Revolutionary War."
To each of his nephews, Washington gave one of his swords with the following statement accompanying the gift "not to unsheath them for the purpose of shedding blood, except it be for self-defense, or in defense of their country, and its rights; and in the latter case, to keep them unsheathed, and prefer falling with them in their hands to the relinquishment thereof."

After providing for his burial at Mt. Vernon in a "private manner, without parade or funeral oration," he made arrangements for the carrying out of his will by appointing his wife, his nephews and his ward, seven in number, as his executrix and executors, and provided that in the construction of which, if any disputes might arise, it shall "be decided by three impartial and intelligent men, known for their probity and good understanding —two to be chosen by the disputants, each having the choice of one, and the third by those two—which three men thus chosen shall, unfettered by law or legal construction, declare their sense of the testator's intentions; and such decision is, to all intents and purposes, to be as binding on the parties as if it had been given in the Supreme Court of the United States."

Some lawyers have questioned the validity of this clause, but there seems to be respectful authority supporting its validity. The rule is thus expressed:

"It is not unusual for a testator to provide in his will that all questions relative to the construction thereof are to be submitted to a certain designated person or persons, such as his executors, who shall act as umpire or arbitrator, and whose decisions, if fairly and honestly made, will be final and binding on all parties interested. * * * Where, however, such umpire renders a decision involving a clear abuse of his power, or where he commits a gross mistake or error of judgment evincing partiality, corruption or prejudice, the court will interfere and decide whether the construction adopted by the umpire is correct."²

In concluding this brief review of some of the phases of Washington's life, it seems just to conclude that as one who considered the judiciary as the "keystone of our political fabric," his life is most interesting as a study for lawyers and all lovers of good government.

² See the following citations bearing on the question of the validity of this clause:

40 CYC, page 1423;
Pray v. Belt, 1 Pet (US) 670, 7 L. ed. 309;
Am. Foreign Mission Comrs. v. Ferry, 15 Fed. 696;
Greene v. Huntington, 73 Conn. 106; 46 Atl. 883;
Neal v. Hodges, (Tex) 48 S. W. 263;
Grant v. Stephens, et al, (Tex) 200 S. W. 893;
Thompson on Wills, Sec. 432;
Talladega College, et al v. Callaman, (Iowa) 197 N. W. 635;
Couts v. Hollard, (Tex) 107 S. W. 913.
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