Nebraska's New Supreme Court Commission

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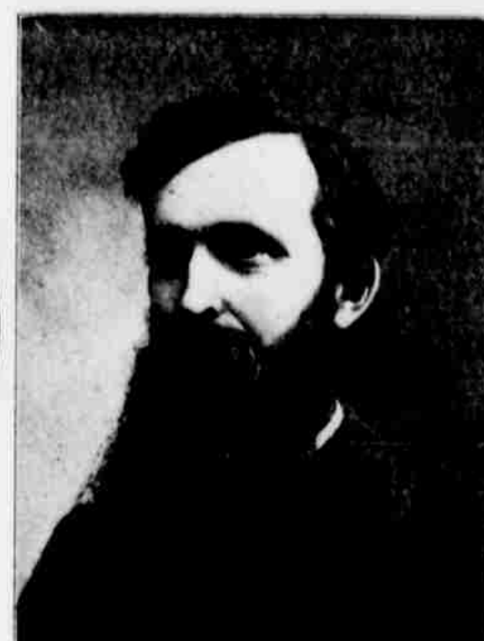
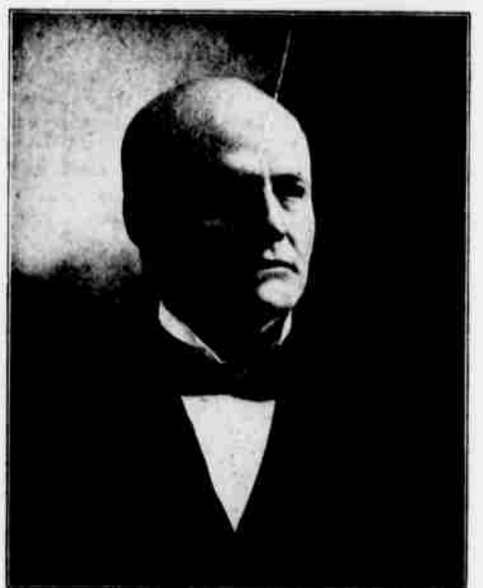


W. G. HASTINGS.

J. S. KIRKPATRICK.

GEORGE A. DAY.



S. H. SEDGWICK.

THE constitution of Nebraska, adopted in 1875, made provision for the government of a state of something over 100,000 inhabitants. Its framers did not foresee that within twenty-five years it would be in operation in a commonwealth having over 1,500,000 inhabitants, among whom a marvelous expansion in commerce, industry and transportation, would add greatly to the multiplicities of business transactions and the litigation growing out of them. Among its other short-sighted provisions in creating the supreme court it limited the number of its justices to three and gave no power to the legislature to increase the number. Moreover, by another clause of the constitution, the supreme court was compelled to take jurisdiction over every trival dispute which litigaions thought fit to carry there from the lower courts. Inferior courts might be established, but they could not lessen the burden of the supreme court, since every case, after being disposed of in the lower courts, could find its way to the docket of the supreme court. To add to the embarrassment the method of amending the constitution was so cumbersome that various attempts to enlarge the capacity of the supreme court by constitutional amendments had failed through mere inertia.

For the first fifteen years of the supreme court its members were able to dispose of the business upon its docket. But about 1890 the rapid increase in the population of the state during the preceding ten years, coupled with the number of cases growing out of the period of inflation, so increased the business of the court that its capacity was overtaxed and it fell so far behind with its work that in the beginning of the year 1893, while it was apparently not over two and a half or three years in arrears, yet in reality it had nearly five years of work accumulated, for the reason that the court had followed the practice of hearing the argument of cases and having them submitted as fast as they were placed upon the docket, although the actual consideration of the case might thereafter be delayed for several years until the prior cases under submission were disposed of.

Commission to Relieve Congestion.

To meet this condition of things and until such time as constitutional revision could take place the legislature in 1893 provided for the appointment of three commissioners to serve for a term of three years.

Under this law the supreme court appointed Judge Frank Irvine of Omaha, then serving a term on the district bench; John M. Ragan, a practicing attorney in Hastings, and Robert Ryan of the Lincoln bar, who entered upon the discharge of their duties for the three-year term provided by law. But after they had served two years, it became apparent that the accumulated work of the court would not be disposed of at the end of the three-year term, and accordingly the legislature in 1895 amended the law creating the commission, whereby the court was authorized to appoint commissioners to serve for a further term of three years on the expiration of the first term. Under this amendment the court in 1896 reappointed the members of the first commission for a term ending in March 1899. At the end of their second term, although great progress had been made with the work of the court, yet it was apparent that the services of the commission would be required for another term at least. Accordingly efforts were made by the bar in 1899 to have the legislature of that year provide for the continuance of the commission. Through the clashing of political interests, these efforts failed, and the commission came to an end.

Dignity of the Position.

Although the expedient of a supreme court commission was not strictly within the terms of the constitution and could be justified only as a necessity to meet an embarrassing emergency, yet the criticisms upon the manner in which the commission worked out the problem, were technical rather than practical. To all intents and purposes the members of the commission were members of the court. While it was true that in case of an actual division the votes of the judges counted everything, and those of the commissioners not at all, yet it must be borne in mind that in only a comparatively small percentage of cases is there a difference of opinion in courts of last resort. The vast majority of decisions receive the unanimous approval of the members of the court.

These commissioners took turns at sitting in the court room, hearing the argument of cases, granting motions, disposing of routine business of the court; and it is well known to the bar that in the consultation room they took equal parts in the argument and were treated by the justices of the court with the same deference accorded to each other, and their opinions were published in the official reports as the work of the commissioner who prepared them. Where a commissioner differed from the decision of the court he was permitted to file a dissenting opinion. The high character of the members of the first commission was such that, in the view of many members of the bar, their opinions ranked equal with those of the members of the court, and have become as permanently a part of the case law of this state, as the opinions prepared by the judges themselves. This was in accordance with the view of the judges of the court who appointed the commission, it being deemed by them that the commissioners could best perform the work assigned to them if they were treated in all essential respects as co-equal members of the court instead of mere secretaries.

In the six years during which the commission held office they had reduced the delay from an uncertain period of four or five years to a point where cases were pending less than two years before being reached for disposition. Had the former commission been extended and been in office during the last two years it is the opinion of well-informed lawyers that they would have brought the work up to within a year of the filing of cases.

Condition of Chaos Restored.

But the ending of the commission plunged the administration of justice in Nebraska into a deplorable condition through Yet it was not with the intent and spirit the crude working of the constitution of 1875. of that instrument to deny redress to litigants. The bill of rights provides "all courts shall be open and every person for any injury done him in his lands, goods, person or reputation shall have a remedy by due course of law, and justice administered without denial or delay," and yet through its failure to provide means for enlarging the supreme court the entrance of that court was not in any sense open; justice was not only delayed, but in many cases the delay meant an actual denial. Conditions were much worse than if there had been no reviewing tribunal and the decisions of the district court were final, for the processes of the supreme court and its long delay and crowded dockets were used by desperate or dishonest debtors to deny redress to the creditors, whilst wealthy litigants were able in many cases to tire out the poorer claimant and either enforce a disastrous settlement or fritter away his rights through changes in business conditions pending the delayed appeal in the supreme court. Thus whilst the state of Nebraska was appropriating large sums of money to the generous support of charitable institutions, whilst it maintained with princely endowment universities and schools and even held out a helping hand to industries, fairs, expositions and many other purposes, beneficial no doubt to the public, but all of them capable if necessary of being carried on by private enterprise or private beneficence, yet the one primary function of a state which no private effort can supply—that of compelling justice among its citizens—was being neglected. The effects of this evil were not confined to the few who might appear as parties in pending litigation. A denial of justice extends its consequences in every direction and strikes remotely many persons other than those immediately concerned. Undoubtedly this condition of things affected general business and was one of the prime causes why the revival of commerce and industry was slower in Nebraska communities than in other western cities.

In recognition of these evils, the legislature of 1901 provided for a commission of nine members to be appointed for a term of two years by the unanimous action of three judges of the court. Upon the taking effect of the act, the court appointed nine members of the Nebraska bar and arranged them in three departments, designating the following as members of each department: Department No. 1, Judge William G. Hastings, John S. Kirkpatrick and George A. Day; Department No. 2, Judge S. H. Sedgwick, W. D. Oldham and Roscoe Pound; Department No. 3, Judge E. R. Duffie, John H. Ames and Judge I. L. Albert.

Each of these departments constitutes for all practical purposes in the argument and submission of cases, an independent branch of the supreme court. So far as the details of the plan have at present been worked out, the method is to have the three justices of the supreme court preside over the docket, hear and dispose of motions, call and assign the causes. Cases for oral argument are assigned in turn to the different departments, and are there heard and presented to the commissioners constituting that department, without the presence of any of the justices of the court. It appears to be the purpose of the court that each department of commissioners will dispose of its share of the consideration of the case, and if it is unanimous, will submit its opinion to the court proper for consideration. The members of the court will of course review the work of the commission, and if the opinion is found satisfactory it will be filed as the opinion of the court, but doubtless the commissioner who prepares it will be named as its writer. Where the members of a commissioners' department differ, they will present their different views to the members of the court. It is not likely that the different departments will formally confer with each other concerning any particular case, although there may be an informal exchange of views on questions of a general nature, and an effort will be made to avoid diverse opinions emanating from the different departments. But the fact that the opinions will have the revision of the court itself, will be sufficient to prevent any variance.

Has Plenty of Work Ahead.

When the commission entered upon the discharge of its duties, April 16, 1901, there were about 1,800 pending cases. It is a fair assumption, based on the past experience of the court and former commissions, that about 1,200 cases will be heard and decided in each year. Probably 100 or 200 more will drop out of the call as they are reached. In 1900 686 new cases were filed, but during the first three months of 1901 new cases were filed at a rate of about 550 per annum. Assuming that 600 new cases are filed each year, the court has before it during the two years when the commission will be in office about 3,000 cases. It is probably a correct deduction from these figures that at the end of two years there will not be over 300 to 500 cases pending, or about one year's work for the three justices of the court. But it must be remembered that the number of cases filed in the supreme court is growing less, the liquidation caused by the panic of 1893 will be fully concluded when the cases now pending are disposed of. In prosperous times, while some branches of litigation may be more important, the number of cases is certain to be much less. It is not unreasonable to expect that within two years all pending business will be disposed of and the work of the commission accomplished. But the further problem of providing for a permanent supreme court, which will dispatch the business of the court as it arises, is still before the people of Nebraska, and together with numerous other problems in its government will finally be disposed of only by a constitutional convention.

It is a modest statement of the case to say that the bar of Nebraska, as well as the general public, has been highly gratified, both by the personality of the commissioners selected by the court to carry out the provisions of the law, as well as by the manner in which the various departments have been arranged for the handling of the business of the court. The three members of the commission who preside over the departments have had long service as judges of the district court, another of them has served for a short time, two other members of the commission have been prominent in the history of the state and were among its leading lawyers, and the three remaining members fitly represent the younger element of the profession.

The lawyers of Nebraska expect much from this commission. It is believed that not only will they by their number dispose of the accumulated work of the court, but that their opinions will be of a character which will make their labors a permanent portion of the law of the state.

Proper Method for Relief.

It is well to say that this is not the proper method of providing for a court of last resort and that the day should be hastened when the jurists who deliberate on our highest tribunal shall be commissioned directly by the constitution itself. But while this is granted it remains to be added that no one but an extreme theorist can object to the practical necessity of disposing of the problem now before us, by means of a supreme court commission, numerous enough to transact the business of that court without further delay. In the gradual development of our political institutions many useful purposes have been served by offices and officials whose status was not strictly legal, but was justified by necessity and given ample sanction by the general consent and acquiescence of the public. The de facto officers have quite frequently served the public as well as their de jure brethren. It is probable that the extra-legal electoral commission in 1876 saved the nation from civil disturbance. The good sense of the people is often shown by their acquiescence in a practical status and the avoidance of theoretic niceties. From that point of view the supreme court of Nebraska now contains twelve judges, who will grant to our people what they have not had for twelve years, "justice administered without denial or delay."

FRANCIS A. BROGAN.

W. D. OLDHAM.

E. R. DUFFIE.

A Bachelor's Reflections

New York Press: A wicked man is as bound to get thin as a successful actress is to get fat.

Some women dress just as much to worry the men as they do to please them.

Half the time when a girl flirts with a man it is only to make another man mad that has been flirting with her.

Before a man is allowed to ask for a woman's hand he ought to be made to look at it for fifteen minutes through a telescope.

The woman who will tie a light pink satin ribbon around the neck of a bow-legged, cross-eyed, hang-lip bulldog, ought to be sent to a sanitarium.

The Pace

Detroit Journal: With a heavy heart the Roue observed that the lines of his face deepened day by day.

"Oh, Time!" he cried, "thou art indeed unkind!"

"You can't expect favors after all you've done to kill me!" retorted Time, curtly, chancing to be at the moment personified.

This fable teaches that the pace cannot be gone without certain footprints, vitiorum vestigia, resulting.