American Legal History – Russell

John Dean Caton, *EARLY BENCH AND BAR OF ILLINOIS* (Chicago: Chicago Legal News Company, 1893)

III.

THE JUDGES OF THE SUPREME COURT

Samuel D. Lockwood was the first judge whose acquaintance I made in the State of Illinois. When living, I revered him as a man and as a jurist, and I revere his memory since he has departed. I first met him the fifth of October, 1833, when he was holding the Circuit Court at Pekin in Tazewell county, where I arrived in the afternoon on horseback from Chicago. I first saw him on the bench, and after court adjourned for the day, I introduced myself to him, and explained that I was already practicing law in Chicago, but had not yet received a license, which I wished to procure from him should he, upon examination, find me qualified to commence the practice of the profession. He received me most kindly, and treated me with the utmost courtesy and consideration, introduced me to the members of the bar present, among whom I remember Stephen T. Logan, John T. Stewart, John J. Harden and Dan Stone, who were attending that court from abroad, all of whom I then first met. The judge then inquired of the place of my nativity, whence I came and when.

After supper he invited me to take a walk. It was a beautiful moonlit night; we strolled down to the bank of the river, he leading the conversation on various subjects, and when we arrived at a large oak stump, on either side of which we stood, he rather abruptly commenced the examination by inquiring with whom I had read law and how long, what books I had read, and then inquired of the different forms of action, and the objects of each, some questions about criminal law, and the law of the administration of estates, and especially of the provisions of our statutes on these subjects.

I was surprised and somewhat embarrassed to find myself so unexpectedly undergoing the examination, and bungled considerably at the first when he inquired about the different forms of action, but he kindly helped me out by

more specific questions, which directed my attention to the points about which he wished to test my knowledge, when I got along more satisfactorily.

I do not think that the examination occupied more than thirty minutes, but it had the effect of starting a pretty free perspiration. I think I would have got along much better had it commenced in a more formal way. However, at the close he said he would give me a license, although I had much to learn to make me a good lawyer, and said I had better adopt some other pursuit, unless I was determined to work hard, to read much and to think strongly of what I did read; that good strong thinking was as indispensable to success in the profession as industrious reading; but that both were absolutely important to enable a man to attain eminence as a lawyer, or even respectability.

I thanked him for his advice and assured him that I had no ambition in life except to qualify myself for a high position in the profession, and that I thought that ambition would enable me to follow his advice to its utmost extent, and that I believed I had firmness of character and of purpose enough to enable me to do so, though it might make take long years devoted to that single purpose to accomplish it; and I may now say that I faithfully lived up to the promise I then made to my venerable friend--for he seemed so to me--but he was then only in middle life, though his hair was almost as white as snow.

II.

PRACTICE IN EARLY DAYS--FOLLOWING THE CIRCUIT --ITINERANCY--INCIDENTS

In the olden time in Illinois, say prior to 1850, the circuit system of practice was in vogue in legal life, and presented incidents and peculiarities which are entirely wanting since the country has become more populous. With the growth of the cities and towns, resident lawyers of ability and learning are found in every county seat at least, who require no assistance in the conduct of the most important case. It was not so in the early days. Then the few local lawyers who had settled in the county towns were generally new comers without experience and self-confidence, and both they and their clients depended largely on the assistance from abroad, especially at the trials of causes. This state of thing necessitated a class of itinerant lawyers whose ability and experience had secured to them reputations co-extensive with their judicial circuits, and, in many cases, throughout the State. These were

few at first, but with the increase of population and business their numbers increased, while their theaters of action became more circumscribed.

At first they, with the judge, traveled on horseback in a cavalcade across the prairies from one county seat to another, over stretches from fifty to one hundred miles, swimming the streams when necessary. At night they would put up at log cabins in the borders of the groves, where they frequently made a jolly night of it. This was a perfect school for story telling, in which Mr. Lincoln became so proficient. It was, indeed, a jolly life on the border, the tendency of which was to soften the asperities and to quicken the sensibility of human nature. Here was unselfishness cultivated, and kindliness promoted, as in no other school of which I have knowledge.

This circuit practice required a quickness of thought and a rapidity of action nowhere else requisite in professional practice. The lawyer would, perhaps, scarcely alight from his horse when he would be surrounded by two or three clients requiring his services. Each would state his case in turn. One would require a bill in chancery to be drawn. Another an answer to be prepared. A third a string of special pleas, and for a fourth a demurrer must be interposed, and so on, and all of this must be done before the opening of the court the next morning. Then perhaps he would be called on to assist in or to conduct a trial of which he had never heard before, just as the jury was about to be called, when he must learn his case as the trial progressed. This requires one to think quickly and to make no mistakes, and to act promptly to take advantage of the mistakes of the adversary, who was probably similarly situated. It is surprising how rapidly such practice qualifies one to meet such emergencies.

Those early settlers had not much money to pay lawyers' fees, but they would generally pay something and give notes for the balance, or, perhaps, turn out a horse or a colt in payment. These would probably serve to pay tavern bills, and a horse or two might be led home or sold on the way. Fee notes formed a sort of currency at a county seat about court time and could frequently be sold to a merchant or the landlord at a moderate discount. A town lot or an eighty of land would sometimes be taken for a fee, especially when it had been a part of the subject-matter of the litigation.

The southern part of this State was first settled, and so legal tribunals were there first established. The first settlers were mostly immigrants from Kentucky and Tennessee, with some from Virginia and the Carolinas, though many were from the Eastern States. The lawyers from the Southern States

were in the majority, while the Eastern States furnished many able lawyers as well. Among the former I may mention S. T. Logan, Judge Young, Arche Williams, O. H. Browning, Thomas Ford, J. T. Stewart, J. J. Harding, Col. Snyder, and many others; while among those from the East I may name Lockwood, Breese, Baker, Mills, Kane and others. All of these men would have ranked high at any bar, and were thoroughly read in the fundamental principles of the law. Later came Lincoln, Davis, Treat, Douglas and Trumbull, all able men. It may be remembered that all were young men then and fond of amusements and pastimes and practical jokes, and after the pressure of the first few days of the court was over, they spent their evenings, and I may say nights, in hilarity, which was at times, no doubt, boisterous. For instance, Benedict, who had a fog-horn of a voice, which he used most recklessly when excited, and who had been roaring to a jury at an evening session, was met when he came to the tavern, by the sheriff, with a bench warrant, on an indictment "for making loud and unusual noises in the night time," and soon a court was organized and he was put upon his trial, and before midnight he was convicted and sentenced to repeat the offense in arguing a motion for a new trial, or to pay a heavy fine, upon the ground that two affirmatives would make a negative, or that the hair of the same dog would cure the bite. It was said that he fairly outdid himself in that effort, so that he aroused the whole town from their slumbers, and he came near being fined for overdoing it.

Judge Young was a good performer on the fiddle and thus contributed much to the hilarity of circuit life. As the settlements extended into the northern part of the State, this circuit system of practice came with them, and for a time prevailed in all of its pristine beauty, except in Chicago alone, where the visits from foreign lawyers were only made upon special retainers and in important cases. I saw Mr. Lincoln here several times engaged in important cases.

Under the old circuit system, when the State was divided into five circuits, and a circuit judge was elected for each, John York Sawyer was judge of the Vandalia circuit. He was not a tall, nor a very stout man, but carried in front about the largest bay window for his size I ever saw. He presided in a very suave way, but with a fixed determination to do ample justice and without a very scrupulous regard to forms, especially if those forms did not suit him at the time. It was related to me that on one occasion Hubbard, who had a considerable practice, argued some question before him at great length and with great confidence, and concluded with an air of assurance which declared that he knew he could not be beaten this time. The judge in his decision

praised Hubbard's argument and followed it all the way through, especially emphasizing the weakest parts of it, as if he was greatly impressed with them, and then decided against him without stating a single reason for the decision. This enraged Hubbard terribly, and he could hardly wait till court adjourned and the judge had retired before he gave vent to his indignation to the members of the bar and other by-standers, in terms forcible if not elegant, and in conclusion he said: "I tell you, gentlemen, what I am going to do about it, and so you may prepare yourselves with smelling bottles or cover these streets with quick lime; I am going right now to hunt up that offensive mass of bloated humanity, and I will relieve his corpus of a peck of tadpoles the first slash." But he did not do it, and I was told that the facetious judge, when told of it, laughed heartily at Hubbard's rage, regarding it as an excellent joke.

Another circuit scene, in which we may see how Judge Sawyer administered the law, may be given as it was told to me by Judge Ford, soon after I made his acquaintance, in 1834.

At the time of which he spoke, horse thieves were punished at the whipping post, and Ford always insisted that it was the most deterent punishment ever inflicted for the punishment of crime. He said he had often seen criminals receive a sentence of ten years or more in the penitentiary with apparent indifference, but he had never seen a man sentenced to be whipped who did not perceptibly wince, and that the most hardened would turn pale and shudder.

A man who had been indicted for horse stealing, had retained General Turney to defend him. The general struggled hard for his client, but the proof was so clear that the task was hopeless, and the jury, after a short absence, returned a verdict of guilty. The general immediately entered a motion for a new trial and was about to proceed to argue it, when the dinner bell at the tavern hard by, where they all boarded, was heard loudly calling all to dinner. Judge Sawyer, as I have said, was a man with a very protrudent stomach, and he especially prized his dinner. The judge interrupted the counsel, saying: "General Turney, I hear the dinner bell now ring, so the court will adjourn till one o'clock, when I shall take pleasure to hear you on your motion for a new trial." So the court was adjourned till one o'clock, but before the judge left the bench he motioned the sheriff up to him, and in a determined whisper, said: "While I am gone to dinner take that rascal out behind the court house and give him forty lashes,

and mind you lay them on well, and tell him if he is ever caught in this county again you will give him twice as much."

After the whipping the culprit was turned loose and was taken charge of by some of his friends, who washed him off and bathed his lacerated back with whiskey, and dressed him and when he had taken some dinner he hobbled down the street, and as he passed the court house he heard the general's loud voice and crossed over, and soon discovered he was earnestly pleading for a new trial in his case. This horrified him, and he rushed into the house and cried out, "For God's sake don't get a new trial. If they try me again they will convict me again, and then they will whip me to death."

The general stood aghast for a moment and said, "What does all this mean?" With the utmost composure the judge replied: "Well, General Turney, I thought we would make sure of what we had got, so I ordered the sheriff to whip that rascal while we were at dinner, and I trust he has done so. But go on, general, with your argument, for I am inclined to be with you. I think another whipping would do him good."