

REMARKS

Speech given by the Honorable Thomas E. Brennan at the Annual Luncheon of the Michigan Supreme Court Historical Society on March 19, 1992.

My good friend, Wallace D. Riley, has given me, over the past several weeks, a lesson in executive management and leadership that I will not soon forget.

Without my even being aware of it, he somehow deftly delegated to me the task of making a presentation here this afternoon. He achieved this goal by a combination of trickery, deceit, shameless flattery, and sheer presumption.

The words I am now speaking were written at 10:42 p.m. last evening. I was tired. Hungry. Had only the vaguest idea of what I would say to you today, and candidly, I had decided that the next time Wally Riley calls with a great idea, I am going to be very hard to find.

As a matter of fact, I may be as inaccessible as a certain witness in Kent County who was being sought by Dick Baxter, that renowned member of the Grand Rapids Bar, who called the man's home and heard the soft whisper of a very young boy's voice answer the telephone.

"Hello." "Is your father home?" asked Dick. "Yes." "Would you please ask him to come to the phone?" "He's busy." Undaunted, Dick asked, "Is your mother home?" "Yes." "Would you get her please?" "She's busy."

"Well," said Dick, smiling a little, "Is anyone else there?" "Yes. The police are here." "Would you ask one of the policemen to come to the phone?" "They're all busy."

"Isn't there someone else there?" "Yes. The firemen are here."

"Please, little boy, go get a fireman and let me talk to him." "They're all busy, too."

"There must be a lot of excitement at your home. What's everybody so busy about?"

"They're looking for me."

Frankly, I had no idea when Wally said he was looking for someone to talk about the history of the Michigan Supreme Court that he was looking for me.

I confess that the real burden of my assignment here this afternoon, is the fact that there is so much to say, so much to tell, and so much to learn about the history of our Court, that any attempt to call out 10 or

12 minutes is truly frustrating. So what I will say here is essentially an overview designed more to whet the appetite than satisfy anyone's hunger for history.

Twenty-eight years ago, when I was elected to the Supreme Court of Michigan, I was privileged to visit with that eminent jurist whom the vicissitudes of the judicial politics had called me to succeed on the bench, Otis M. Smith.

Otis received me with his customary grace. He spoke with candor of his affection for his colleagues and the satisfactions, frustrations and limitations of appellate decision-making.

And he said something to me that day which I shall never forget. Every Court, he said, has its own chemistry. The Michigan Supreme Court with Tom Brennan at the table, instead of Otis Smith, will not be changed by one-eighth, it will be changed completely, just as a chemical formula is changed when one ingredient is substituted for another.

I thought of Otis' comment many times through the years of my won service on the Court and since. And I'm sure he was right.

In fact, as we talked around the table at meetings of the Board of the Michigan Supreme Court Historical Society, the notion has evolved that some effort should be made to organize the study of the Court by the various combinations of personnel, which have sat together on that august bench.

Well, last night I made a small beginning in that direction. Poking through the flaky, old buckram volumes of the Michigan Reports in my office, I compiled an unofficial roster of the courts, with a small c, that have served the Court, with a capital C, in its 156-year history.

By my account, there have been 88 different Courts in that time. Eighty-eight different combinations of human beings, who for periods of time, some short, some long, shared the responsibility of declaring the jurisprudence of our state.

T. G. Kavanagh used to reflect often on the happenstance of life that brought us together on the bench. A kind of destiny over which none of us had any real control, but which demanded of us that we work together, reason together and find ways to agree upon the most important political, economic, and social issues which confront the people of our state.

Looking over the list, it seems to me that the history of the Court might well be divided into five general eras.

From 1836, when the Court was formed, to 1857, I would call the time of the circuit riders. Members of the Court rode circuit and sat as *nisi prius* judges in addition to hearing appeals.

Curious names like Epaphroditus Ransom and Alpheus Felch were mingled with solid sounding frontier names, Warner Wing, Sanford Green, Abner Pratt, Samuel Douglass, and Nathaniel Bacon. These judges engaged in the work of bringing the beginnings of justice to a rugged and rustic and rural populace. Their deliberations concerning the replevin of horses, the holding of court in a tavern, and the value of repairs to a boat, are intertwined with long forgotten common law forms of action, rigid rules of pleading and quaint legal nomenclature.

From 1858 to 1888, the Michigan Supreme Court enjoyed its glory days. It was a truly remarkable period in the history of our state, indeed, of our nation. During those 30 years, ten men sitting in seven different combinations shaped the jurisprudence of our state in a way which won for the Michigan Supreme Court the respect and admiration of lawyers, judges and legal scholars throughout America.

The most famous of these was the so-called Big Four: Cooley, Campbell, Christiancy and Graves, who sat together from 1868 to 1875.

Of that Court it was written at the time in the *American Law Review*, that all were great lawyers and great judges. "These four men," said the *Review*, "raised the fame of the Supreme Court of Michigan throughout the Union. They placed it in the very first rank of American state courts. They made the reports of its decisions everywhere sought after."

When we read such assessments and look at the imposing solemnity of the faces of those judges portrayed in oil paintings on the walls of our Court, it is difficult to imagine them being as beset by human foibles as those of us who are privileged to come after. But they were.

For example, Thomas Cooley, speaking for publication in volume 88 of the reports, says that his former colleague, Isaac Marston's character was above reproach, but privately, Cooley wrote in his diary, "As Judge Marston is no longer a member of this bench, we can more freely admit to ourselves than we were willing to before that he has very little sense of propriety and almost none at all of personal dignity."

"Marston was," said Cooley at another time, "a regular Irishman in his element in the rough and tumble at the bar and perfectly happy."

I don't know how you feel about it, but for myself I must say that that bit of gossip about Isaac Marston

gives me renewed respect and affection for his opinions.

After the glory days came the five-member Courts which spanned the last decade of the 19th century and continued until the first eight-member court under the 1908 Constitution was seated. The eight-man Courts brought us into the modern era. Names like Butzel, Bushnell, North, Sharp, Wiest, Boyle, Fead, Carr and Chandler are familiar to every lawyer who has practiced in our state any length of time.

I was privileged to serve on five different Courts with 12 different colleagues from 1967 to 1973. Those were some landmark times for the Court, marking the end of the eight-man Courts and the beginning of the seven-member Courts under the Constitution of 1963.

During that time, the Court moved out of the state capitol to its quarters in the law building.

We welcomed the first woman justice to the Court, Mary Coleman, whose arrival signaled the 72nd Supreme Court of Michigan.

I was the Chief Justice of the 70th Supreme Court to sit in Michigan. Of my six colleagues, only T.G. Kavanagh is still living.

I remember them all, now, ally and foe, alike, with a fondness born of appreciation for our shared responsibilities. I can still see Harry Kelly puffing his incessant cigarettes and doggedly making a jury argument for his position in a case; Paul Adams, with his meticulous statement of the facts; John Dethmers, with his pity summary of the case; Gene Black, full of fire, spewing adverbs at his adversaries; T.G. Kavanagh, with his heartfelt homilies, and T.M. Kavanagh with his thundering pontification. Thomas the good and Thomas the mighty. Only their names were the same.

The task of presiding over the jurisprudence of a common law jurisdiction is a daunting one. It demands the best efforts of those fortunate few men and women who are called by the people or the Governor to sit on the Supreme Court.

Happily, each person who dons the robe of our highest judicial office has the benefit of the thinking and the work of six judicial colleagues. From the cauldron of candid vigorous debate, the purest essence of justice can be distilled.

And even more happy is the fact that each new Justice who takes the oath of office is linked to a 156-year-old continuum of the most serious and solemn human endeavor to render justice to the citizens of Michigan.

The proud tradition of our Court buoys up the work of every new Justice, and confirms the effort of every new Court.

It is the hope and determination of the Michigan Supreme Court Historical Society to illuminate that tradition, to help all lawyers, indeed, all the citizens of Michigan, to a grateful understanding of the contributions which this great institution of public service has made the welfare and happiness of the inhabitants of these beautiful peninsulas.