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THE WORK OF THE COURTS: A SYMPOSIUM*

I

Supreme Court Procedure in Michigan

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Indiana and Michigan have much in common. The territory constituting each state was for a century or more under the control of France. By treaty closing the French and Indian war, this territory was ceded to Great Britain. Under British rule each was, for a considerable time, Indian territory, outside the pale of civil government, which was theoretically extended here by the Quebec Act, bitterly denounced by resolutions of the Continental Congress and in the Declaration of Independence. When Captain Hamilton of Detroit surrendered Vincennes to George Rogers Clark, he surrendered at the same time Philip DeJean whom Moses Henry called the "Grand Judge of Detroit." Each was equally exposed to attacks by Indians employed by Great Britain, a practice which drew from Lord Chatham a scathing denunciation in the British parliament.

After Virginia ceded to Congress her rights, Indiana was governed after its enactment, by the Ordinance of 1787. Michigan was not under American control until 1796 due to the refusal of the British to surrender the northwestern posts. After 1796 both were governed by the Ordinance until they passed the territorial stage. When a legislative assembly of the Northwest Territory was called, representatives from both Detroit and Vincennes sat therein. When Ohio was admitted into the Union as a state, all of what is now Michigan was joined to Indiana territory. Judge Vanderberg of Vincennes held court in Detroit October 24, 1804. The records in the office of the clerk of the Supreme Court of Indiana show several suits in which residents of Detroit were parties during the time Michigan constituted a part of Indiana.

The Supreme Court of the State of Michigan as organized in 1836 consisted of three members. This system continued until 1838 when the number of justices was increased to four and so continued until 1848 when the number was increased to five. The court continued to have five justices until 1852 when the number was increased to eight, and so continued until 1858. The members of the supreme court during all this period, presided in the several circuit courts, and it was said met together four times a year and persisted in the errors made in the trial of cases in the circuit. There are no opinions by the supreme court of Michigan published prior to the January 1843 term. For a period of 15 years after that, that is, until January, 1858, there were but 426 opinions filed and published, a little over 28 opinions

* The papers constituting this symposium were addresses delivered to the Indiana State Bar Association at its Thirty-eighth Annual Meeting, Lake Wawasee, July 12 and 13.

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a year or 7 opinions a term. Effective January 1, 1858, the old court was abolished and an independent supreme court, consisting of four justices created. These justices did not preside in the circuit courts. During the first 16 years of the independent supreme court, that is, until January 1, 1874, it decided approximately 1,620 cases in which opinions were filed—an average of 107 opinions a year, or about 27 opinions per man a year. Less than 7 at a term. The business of the supreme court gradually increased.

The Michigan legislature of 1873 turned out more legislation than any other legislature in Michigan before or since that time. In 1874 the number of cases on the supreme court calendar increased to 322.

The population of the state in 1861 was in round numbers 750,000. The number of cases decided by the supreme court in that year was 44. The population in 1871 was approximately 1,200,000 and the number of cases decided that year was 97. The population in 1881 was 1,700,000 and the number of cases decided in the supreme court that year was 377. The population in 1891 was in round numbers, 2,200,000, and the number of cases brought to the supreme court that year, including motions was 829, and the number of cases decided by the supreme court was 469. In addition to these there were 28 opinions on motions, making a total of 497. The population of the state increased approximately 500,000 each decade.

The increase in population from 1861 to 1871 was 66½% and the increase in business in the supreme court was 97%. From 1871 to 1881 the increase in population was 41% and the increase in the business of the supreme court was 185%. From 1881 to 1891 the increase in population was 77% and the increase in the business of the supreme court was 129%.

The original argument in favor of four justices was that a majority constituted a larger percentage of the whole number than any other number, but on account of an equal division of opinion on the socalled State Tax cases in 1884 the number of justices was increased from four to five. This to some extent cut down the burden upon each judge but it did not satisfactorily take care of the constantly increasing business of the court.

In 1891 the legislature passed a bill authorizing the employment of stenographers or copyists by the justices of the supreme court, which bill was vetoed by the Governor because it provided for five new employees at $800 a year and for the appointment of the stenographers by the justices rather than by the Governor.

The Michigan State Bar Association was organized in 1891 and some local bar associations were organized soon afterward. At the second meeting of the Michigan State Bar Association in 1892 its president said:

"Within the last ten years the business of the supreme court has so far increased that it has been physically impossible to decide all the cases promptly and at the same time give them that consideration which should be given by a court of last resort in a great state and which the litigants have a right to expect."

Agitation among the members of the bar for relief of the supreme court had been going on for some time. Bar associations became an effective mouthpiece of the members of the profession. Various suggestions were made. It was proposed that we have three circuit judges to meet in judicial districts as an appellate court. A similar provision had been embodied in the proposed constitution of 1867 but had been decisively defeated. It was suggested that no appeals should be allowed as a matter of right in cases which did not involve $500. Abolition of the requirement of written opinions in every case, restriction in the use of mandamus to its common law function, the abolition of bills of exceptions, increase in the number of judges of the supreme court, requiring better briefs of counsel and better indexes to the record of the court, were all suggested as methods of relieving the court.

In 1893 the salary of the justices of the supreme court was raised from $5,000 to $7,000 a year and the justices were required to live in Lansing. This, it was suggested, would give them more time for the consideration of the cases before the court.

The Governor, in his message of January, 1895, called attention to the Act of 1893 which required the justices of the supreme court to reside in Lansing, saying, "At the time of the adjournment of the legislature there were upwards of one hundred cases ready for hearing but which could not be reached. In the eighteen months since that time the calendar has been cleared and the court feels that under the present condition of affairs they will be able to keep up with the work."

In his January, 1897, message, after referring to the numerous plans proposed by the legislature of 1893 for the relief of the Supreme Court and the one adopted, he added: "The great number of cases coming to this court is unmistakable evidence that some future measures of relief should be taken in the not distant future."

In 1899 a proposed constitutional amendment providing for the creation of an intermediate court was submitted to the people, but was defeated at the polls.

The Judicature Act of 1915 became effective January 1, 1916, and in 1917 the number of calendar cases in the supreme court reached the highest point between 1912 and 1931.

In 1917 it was provided by statute writs of error should be denied except on leave granted in cases where the amount involved did not exceed $500, notwithstanding the number of calendar cases had fallen in 1915 to 477, the lowest number since 1883. This act was denounced by the State Bar Association and repealed, but finally reenacted in 1923, at which time the number of calendar cases began to increase, reaching 611 in 1926.

The number of calendar cases from 1926 to 1931 remained about the same. New and revised rules of practice were adopted, effective January, 1931, and the number of calendar cases increased the next year to 731, the highest number for more than a quarter of a century.

The practice of law is frequently referred to as a noble profession, but to the trial lawyer it is something more. It is an art in which skilled craftsmanship is important. Most of the important trial business gravitates to the master craftsman of the profession. One of the reasons why extensive changes in practice by statute or rule increase the work of lawyers and courts is that the practice is made progressively more cumbersome, complicated and obscure; uncertainty is substituted for certainty and what has been learned by years of experience by the master craftsmen of the law, destroyed.

By statute in 1903 the number of justices of the supreme court was increased from five to eight, the right of oral argument granted in all calendar causes and upon all motions involving constitutional questions or personal liberty.

It was provided five justices should constitute a quorum. This system continued from 1905 until 1912, five judges usually sitting in every case. This divisional arrangement permitted five judges to sit and permitted the other three to write opinions. The personnel of the sitting members of the court was rotated so the same judges were not always sitting and hearing cases. The results were not satisfactory. Disagreement between the members of the court became more common. The statute provided if a dissenting opinion was filed in a case heard by a quorum of five judges the parties had a right to a rehearing as a matter of right before the entire bench. Rehearings were frequent. This method of handling the business of the court was likewise unsatisfactory to the profession who in a court of last resort desire to have a hearing before the court and not before a piece of it. As a practical matter

the system did not diminish the work of the supreme court but on the other hand tended to increase it, and consequently the whole plan was finally abandoned.

The principal contentions in favor of the court of last resort of any state sitting in divisions are that the judges have to spend less hours listening to oral arguments which is only another way of saying a part of the judges do not hear all the arguments; and that this system gives more time to the justices for consultation. On the other hand, it is contended, that there are conflicting opinions rendered by different divisions of the court resulting in an increase in the number of re-hearings applied for and granted, and the whole system is unsatisfactory to litigants who sometimes have a choice as to which justices they might desire to have their case presented to and who in the last analysis want to have their case heard before the full bench.

Michigan has, at one time or another considered many suggested panaceas to obviate the laws' delays. Many schemes for the relief of courts of last resort have been considered by other states. Necessarily much depends upon the organization of the court to be relieved and more than all else upon the personality of its members.

In four states the highest appellate court consists of three judges, viz, Arizona, Nevada, Texas and Wyoming. In sixteen states the court of last resort has five judges, in three states six; in eighteen states seven, in three states, including Michigan, the court of last resort has eight members. In three states, namely Iowa, Oklahoma and Washington, nine judges compose the court of last resort while in New Jersey the court of errors and appeals consists of sixteen judges (the chancellor, nine justices of the supreme court, and six judges specially appointed).

Among the schemes of relief to state courts of last resort, a few will be mentioned.

In California, Florida, Idaho, Illinois, Minnesota, Missouri, Montana, South Dakota and Texas, commissioners are appointed by the supreme court to assist in the preparation of opinions. In Colorado, Kansas, Mississippi, Nebraska and Ohio these commissioners are appointed by the Governor by and with the advice and consent of the senate. In Nebraska they are appointed by the Governor with the approval of the supreme court. In Oklahoma by the Governor by and with the advice and consent of seven judges of the supreme court. This system of relief to courts of last resort is said to work fairly well.

New York first employed a Commission of Appeals of five members in 1870. This commission continued for five years. A Commission of Appeals was established in Texas in 1879 to which cases pending before the supreme court and cases pending in the court of appeals could be transferred upon agreement of the parties. The system proved unsatisfactory and was continued only for two years. Ohio, by constitutional amendment in 1875 provided for a commission of five members to be appointed by the Governor for a term of three years. This system continued until 1879. Indiana and Texas experimented with commissions in 1881 and Ohio reestablished a commission the same year. Missouri provided for a commission in 1883, California in 1885, Colorado and Kansas in 1887. A special committee of the American Bar Association on delays in judicial administration recommended in 1885 and 1886 that temporary commissions should not be resorted to in courts of last resort. These reports were signed by David Dudley Field, John F. Dillon, George G. Wright and Seymour D. Thompson, and commissions already established were soon abandoned in Indiana, California, Colorado, Ohio and Kansas.

Idaho, Montana, and Oklahoma have used lower court judges as commissioners to assist the supreme court. Florida once authorized lower court

judges to be employed to assist the supreme court, and Texas did the same. Virginia was the pioneer in the use of lower court judges to assist the appellate courts doing so as early as 1789. Lower court judges were utilized when a majority of the members of the court of appeals were disqualified from sitting in a particular case. New York has made use of lower court judges to assist the court of appeals, the constitution providing no justice shall serve as associate judge of the court of appeals except while holding office as justice of the supreme court, and no more than seven judges shall sit in any case. Hon. William D. Guthrie said:

"This system of designating Supreme Court Justices has proved to be eminently satisfactory, and has enabled the court, for the benefit of the community, to test the qualifications of Supreme Court justices for the difficult and arduous labors of the highest appellate tribunal of the state."

He contended the system served two practical purposes. It enabled the court to more promptly dispose of appeals and enabled the state to apply the safest and most reliable of all tests of qualification for high judicial office, namely that of actual service in the court before nomination or election thereto as permanent judges. Louisiana and Nebraska have also utilized in the court of last resort the judges of lower courts.

The system of using the judges of lower courts as members of the court of last resort in case of emergency has been advocated in many states because it is a simple inexpensive method enabling the court of last resort to have a flexible number of members in addition to the justices regularly selected. On the other hand, this system has been opposed because it takes the members of the trial court, who sit in the court of last resort, away from the tribunal in which they are supposed to preside, increases the number of applications for rehearing, paves the way for conflicting opinions and, in the opinion of some, detracts from the prestige of the court of last resort.

The supreme court of Michigan as constituted at the present time, consists of four ex-circuit judges and four justices who, prior to their service on the supreme bench, had never held judicial positions.

The Constitution of Michigan provides that decisions of the Supreme Court, including all cases of mandamus, quo warranto and certiorari shall be in writing with a concise statement of the facts and reasons for the decisions, and shall be signed by the justices concurring therein. Any justice dissenting from a decision shall give the reason for such dissent in writing under his signature. All such opinions shall be filed in the office of the clerk of the supreme court.

This constitutional provision is in effect the same as that of Indiana which provides: "The supreme court shall upon the decision of every case give a statement in writing of each question arising in the record of such case and the decision of the court thereon."

In 1931 the supreme court of Michigan filed 549 written opinions. In 1932 it filed 671 written opinions and in 1933 it filed 618 written opinions, making a total of 1,838 written opinions filed in three years—an average of 612⅔ opinions a year or 76½ opinions for each justice. These opinions are prepared in four terms, making approximately 19.1 opinions per justice per term. In addition to this work there are applications for appeal, interlocutory motions and other miscellaneous matters to the number of about 500. These interlocutory matters are investigated by the justice to whom they are assigned, but brought before a quorum of the members of the court for disposition. In case dissenting opinions are prepared, as they are quite frequently, the number of dissenting opinions is in addition to the figures already given.

The work of the supreme court of Michigan is handled substantially as follows:

The appealing party prepares the record on appeal which is settled and signed by the trial judge. This is indexed and printed and 24 copies of the record are filed with the clerk of the supreme court. The appealing party files a brief, and a like number of copies, in which he is required by rule to make a concise statement of the points involved, a statement of facts separate from the argument showing how the legal questions arise upon the pleadings and proofs, the argument of counsel and the relief asked. Then 15 days after the service of appellant's brief, the appellee is required to file his brief which must comply substantially with the rules above indicated. Cases are noticed for hearing, a calendar of those cases on the docket ready for hearing is made up by the clerk and furnished to counsel having cases on the calendar for hearing. Upon the day prior to the convening of the supreme court, the clerk thereof makes up a call for the first day of the term. The records and briefs in the cases on call for the first day of the term are assigned by the Chief Justice in accordance with the call, in rotation, among the justices. No justice knows in advance what case will fall to him. The justice to whom a case is assigned is, prior to nine o'clock the next morning, supposed to read the records and briefs or so much thereof as will enable him at nine o'clock the next morning to take up in conference the salient facts and the questions of law presented. One hour is spent each morning in conference on the cases to be heard that day. Court convenes at ten o'clock in the morning and the cases are called in order. Parties have one hour a side for argument. Many of the cases are not orally argued but submitted on briefs. The court recesses 1½ hours at noon and adjourns at 3:30 o'clock P. M. so the time it actually sits and listens to argument is four hours a day. When the court adjourns at 3:30 the judges repair to the conference room where the cases on call for the next day are assigned and the justices then take up and discuss for an hour, and sometimes for a longer time, the cases which have been that day submitted, seeking to arrive at a conclusion as to the disposition of each case. This practice continues throughout the term until the call of all the cases on the calendar is completed. At the conclusion of the term the justice to whom a case has been assigned prepares an opinion, causes ten copies besides the original to be made, one for each of the seven other justices upon the court, one for the reporter, one for Callaghan & Company, publishers of the Michigan reports and one for West Publishing Company for publication in the northwestern reporter. The original the justice writing the opinion is supposed to sign and hold for presentation at conference. During the time between terms of court, the justices read the opinions of the other justices and usually if satisfied therewith O. K. them. At fixed times between terms, the justices meet in conference and sign the opinions with which they are satisfied. It frequently happens that errors are discovered in the copies of opinions served and usually if of a trivial character they are called to the attention of the justice who prepared the opinion, for correction; but if there is disagreement as to the conclusion reached by the justice to whom the case was assigned and who has written the opinion, or the reasoning in support of the conclusion reached, any justice is at liberty to write an opinion in the case and if he does so, the opinion is quite generally prepared as are other independent opinions and is presented for consideration at the conference when opinions are being signed. Sometimes these opinions are adopted by a majority of the justices and become the opinion of the court, in which case the original opinion may become a dissenting opinion. Sometimes the original opinion is withdrawn, sometimes the proposed opinion is withdrawn, and sometimes the proposed opinion is filed as a dissenting opinion.

Before any argument is made in court, the justices thereof are fairly familiar, from preliminary conference, with the facts and the questions of law involved. Immediately after argument the cases are discussed by the justices in the light of the briefs and argument. The justice preparing the opinion has an opportunity for research during the time between terms, prior to preparing his opinion. Every justice has a copy of the proposed opinion of the court prior to the conference held for signing opinions. Every justice has a copy of the records and briefs in every case in his office and a chance to examine the records and prepare a concurring or dissenting opinion in case he so desires, and of course no opinion becomes the law of the case until it is approved and signed by a majority of the members of the court.

Frequently cases are held up in conference and go over to the next conference, but on January 1, 1934, when two new justices came upon the bench, opinions in all cases submitted had been prepared and there were but six undisposed of cases. All the members of the court work. If any justice is sick, disabled, or disqualified, the cases assigned to him are redistributed to the other members of the court who prepare opinions therein. Most of the justices, in term time, and between terms, except during the summer vacation, put in long hours. Frequently they are in their office before seven o'clock in the morning and quite often do not leave their office, except at meal time, until nine or ten o'clock in the evening. It is a "shirt sleeve" court. The members of the court do not belong to one political party, but political party affiliations have never shaded the opinions of the court. There has been a splendid spirit of fellowship among the justices of the Michigan Supreme Court—of frankness in expressing opinions, critical and otherwise, in conference and in personal consultation at chambers. All its members seek to cooperate to the fullest extent to obtain results, to keep the work of the court up, promptly dispose of cases submitted and uphold, so far as possible, a high standard of excellence of its opinions.

After a more or less desultory study of the operation of courts of last resort, my conclusions are about these.

The members of the bar in Michigan have never favored the idea of an intermediate appellate court. They believe it would prolong litigation, breed a feeling of uncertainty as to what the law is, and be expensive and unsatisfactory to clients, and, on every occasion when the creation of an intermediate court between the circuit courts and the supreme court has been submitted to the people, it has been decisively defeated.

Every time we have had a spasm of law reform in Michigan, and we have had several in the last one hundred years, its effect temporarily has been to increase expense and complicate rather than simplify procedure.

For many years prior to 1931, Michigan, though generally called a common law state, had the most simple and inexpensive practice in the supreme court of any state I know of. A practice which was rendered complex, uncertain and archaic by recent rules which are a reversion to ancient ideas and practices tried and discarded, which complicated rather than simplified the practice, and which greatly increased the size of records and the work of the members of the court. For more than forty-five years the state of Michigan furnished the justices of the supreme court no stenographic or other clerical help but for about 40 years such assistance has been made available. There is much complaint at times that the members of the court are overworked, but there is no constitutional or statutory prohibition against resignation in case the members of the court do not want to act.

It may not be brought about, but the system I am in favor of is not to create in Michigan an intermediate court, though in 1899 I sponsored in the Michigan State Senate a proposed constitutional amendment providing

therefor, not to call in circuit judges or commissioners to assist the court and not to sit and hear cases in divisions. If each justice had the right to employ a research man in addition to a stenographer, he could do more and better work and do it easier. Finally, any system will give good results if those who administer it work conscientiously to maintain the high ideals which should be the standard of the bench and bar, thus giving satisfaction to themselves, to the bar, and to the people of the state.

APPENDIX

Load of Cases Per Judge in the Supreme Court of Indiana.

Year	No. of Judges	No. of Written Opinions	Load of Cases per Judge
1901	5	221	44.2
1902	5	223	44.6
1903	5	225	45
1904	5	230	46
1905	5	199	39.8
1906	5	167	32.4
1907	5	159	31.8
1908	5	152	30.4
1909	5	177	35.4
1910	5	173	34.6
1911	5	179	35.8
1912	5	174	34.8
1913	5	164	32.8
1914	5	201	40.2
1915	5	173	34.6
1916	5	192	38.4
1917	5	146	29.2
1918	5	115	23
1919	5	103	20.6
1920	5	101	20.2
1921	5	148	29.6
1922	5	119	23.8
1923	5	134	26.8
1924	5	185	37
1925	5	177	35.4
1926	5	211	42.2
1927	5	80	16
1928	5	104	20.8
1929	5	105	21
1930	5	86	17.2

II

Load of Cases Per Judge in the Appellate Court of Indiana.

Year	No. of Judges	No. of Cases Disposed of	Load of Cases per Judge
1901	6	367	61.2
1902	6	280	46.7
1903	6	240	40
1904	6	281	46.8
1905	6	339	56.5
1906	6	283	46.2

Load of Cases Per Judge in the Appellate Court of Indiana—Continued.

Year	No. of Judges	No. of Cases Disposed of	Load of Cases per Judge
1907	6	190	31.7
1908	6	266	44.3
1909	6	298	49.7
1910	6	260	43.3
1911	6	238	39.6
1912	6	284	46.3
1913	6	325	54.2
1914	6	244	40.7
1915	6	265	44.2
1916	6	269	44.8
1917	6	247	41.2
1918	6	220	36.6
1919	6	314	52.3
1920	6	356	59.3
1921	6	378	63
1922	6	278	46.3
1923	6	248	41.3
1924	6	224	35.7
1925	6	266	44
1926	6	256	42.7
1927	6	275	45.8
1928	6	257	42.8
1929	6	432	72
1930	6	231	38.5

III

Cases Disposed of by the Supreme Court of Michigan by Written Opinions.

Year	No. of Judges	No. of Written Opinions	Opinion Load per Judge
1878	4	431	107.7
1879	4	474	118.5
1880	4	439	109.7
1881	4	387	96.7
1882	4	472	118
1883	4	439	109.7
1884	4	419	104.7
1885	4	421	105.2
1886	4	535	133.7
1887	4	441	110.2
1888	5	491	98.2
1889	5	591	118.2
1890	5	551	110.2
1891	5	494	98.8
1892	5	574	114.8
1893	5	524	104.8
1894	5	631	126.2
1895	5	613	122.6
1896	5	526	105.2
1897	5	636	127.2
1898	5	542	108.2
1899	5	519	103.8

Cases Disposed of by the Supreme Court of Michigan by Written Opinions—Continued.

Year	No. of Judges	No. of Written Opinions	Opinion Load per Judge
1900	5	451	90.2
1901	5	537	107.4
1902	5	438	87.6
1903	5	458	91.6
1904	5	502	100.4
1905	8	508	63.5
1906	8	569	71.1
1907	8	481	60.1
1908	8	546	68.2
1909	8	546	68.2
1910	8	560	70
1911	8	435	54.4
1912	8	526	65.7
1913	8	423	52.8
1914	8	480	60
1915	8	561	70.1
1916	8	461	57.6
1917	8	530	66.2
1918	8	441	57.1
1919	8	373	46.6
1920	8	371	46.4
1921	8	420	52.5
1922	8	520	65
1923	8	497	62.1
1924	8	475	59.4
1925	8	459	57.4
1926	8	464	58
1927	8	506	63.2
1928	8	557	69.6
1929	8	510	63.7
1930	8	528	66
1931	8	547	68.4
1932	8	676	84.5
1933	8	618	77.25