1922

Methods for Relieving Courts of Last Resort From the Growing Burden of Appeals

Edson R. Sunderland
University of Michigan Law School

METHODS FOR RELIEVING COURTS OF LAST RESORT FROM THE GROWING BURDEN OF APPEALS

REPORT OF THE COMMITTEE ON LEGISLATION AND LAW REFORM—PRESENTED BY EDSON R. SUNDERLAND, AT THE MEETING OF THE MICHIGAN STATE BAR ASSOCIATION, AT FLINT, JUNE 3 AND 4, 1921

The Committee—

William W. Potter, of Lansing, Chairman
Edson R. Sunderland, of Ann Arbor
Walter S. Foster, of Lansing
Myron J. Sherwood, of Marquette
Hal H. Smith, of Detroit

At the last meeting of the Michigan State Bar Association, held in Detroit in June, 1920, the question of employing an intermediate appellate court in this state, as a means for relieving the Supreme Court and expediting the disposal of appeals, was discussed at some length, and it was thereupon moved and carried that the whole subject be referred to the Committee on Legislation and Law Reform to be investigated, and that the Committee report upon the matter at the next meeting of the Association.

Pursuant to this action your Committee has taken up the subject referred to, and herewith submits the results of its investigations.

From the discussion which took place in regard to the motion above mentioned, the Committee understood that the interest manifested in an intermediate appellate court was primarily due to a feeling that something ought to be done to provide some relief to the Supreme Court and facilitate the disposal of cases which are now too long delayed because of congested dockets. Our report will therefore deal with the various methods which seem to be available for securing the prompt and satisfactory disposal of appeals.

The problem is one which has become a source of anxiety in many States, and a large number of solutions have been tried with varying degrees of success. At least 23 American States have by constitutional amendment or by statute undertaken to provide a

remedy for overloaded Supreme Court dockets. These remedies fall into five general classes.

1. Restrictions placed upon the right to appeal.

2. Creation of inferior appellate courts to take care of a portion of the appeals.

3. Appointment of commissioners to aid the Supreme Court in clearing up its docket.

4. Increase in the number of judges in the Supreme Court.

5. Organization of the Supreme Court into Divisions.

These have all been employed, singly or in combination, and the results of at least half a century of experimentation are available as a guide to those who are interested in the problem.

I

Restrictions Placed Upon the Right to Appeal

This is a very common method, and within narrow limits it is satisfactory enough. But it is very clear that no substantial or permanent solution for the general problem of appeals can be reached by recourse to this method. It was tried in this State in 1917 by Chapter 172 of the Public Acts of that year, by a provision that writs of error might issue of course out of the Supreme Court upon judgments exceeding in amount $500, but should be discretionary with the Supreme Court in other cases. This restriction proved so generally unsatisfactory that it was removed by the next legislature, and writs of error were authorized as of course upon all final judgments. P. A. 1919, No. 14.

As a general means of relieving congestion in the Supreme Court it is inherently defective. It assumes that the present capacity and equipment of a public office is the test of the amount of service which the public has a right to enjoy. It wholly ignores the constant growth of our population and the increasing complexity of our institutions. It would be no more absurd to permanently limit the number of school children by reference to the present teaching staff of the public schools, or to limit the persons entitled to medical care in accordance with the present number of practicing physicians. A state which cannot increase its facilities for rendering public service as the need for such service grows has lost its vitality.

The present capacity of the Supreme Court to dispose of appeals has nothing to do with the question of what appeals should be allowed. The allowance of appeals should be considered on its merits, and means should then be provided to take care of all that are brought.

II

Creation of Inferior Appellate Courts to Take Care of a Portion of the Appeals

This method of relieving the Supreme Court and facilitating the hearing of appeals has been tried in at least 16 States within recent years.

The problems here involved are three:

a. Selection of Judges,
b. Jurisdiction,
c. Finality of Decision.

a. Selection of Judges

As to selection of judges, all the States which now maintain inferior appellate courts, except Illinois and New York, specially elect or appoint judges to these courts. In Illinois circuit court judges are assigned by the Supreme Court to sit on the Appellate Courts for terms of three years (Laws of 1877, p. 75), and in New York judges of the Supreme Court are designated by the Governor to sit on the Appellate Division for terms of five years (Const., Art. VI, Sec. 2). There is some complaint of this system in Illinois on the ground that judges are taken from some circuits for appellate work who are needed to look after the local circuit court business (Constitutional Convention Bulletins, Ill., 1920, p. 770). In New York the system appears to work well, perhaps because the trial courts are better organized and administered.

Practically all of these inferior appellate courts operate as small courts or in small divisions. The intermediate court in Alabama has 3 judges (L. 1911, No. 121); California has 3 such courts with 3 judges each (Const., Art. 6, Sec. 4); in Georgia there are 2 courts with 3 judges each (L. 1916, p. 56); in Illinois 6 courts with 3 judges each (see 216 Ill. App.); in Indiana 2 divisions of 3 judges each (Acts 1901, Ch. 247); in Louisiana 6 courts of 3 judges each

(L. 1906, No. 137); in Missouri 3 courts of 3 judges each (Const. Art. 6, Sec. 12); in Ohio there are 8 districts, each with a court of 3 judges (see 12 Ohio App.); in Oklahoma there is a single court of Criminal Appeals with 3 judges (L. 1909, Ch. 14, Art. 2); in Texas there are 9 civil courts of 3 judges each (Stat. 1920, p. 303) and 1 criminal court with 3 judges (id. Crim. Pro. Sec. 86). Four States have larger appellate courts, New Jersey having a court of 10 members (Const., Art. 6, Sec. 2); New York, 4 courts, 1 of 7 members and 3 of 5 each (Const., Art. 6, Sec. 2); Pennsylvania, a court of 7 members (L. 1895, No. 128), and Tennessee, a court of 5 members (Acts 1907, Ch. 82). It will be seen that out of an aggregate of 49 such courts, 42 have only three members, which indicates a strongly prevailing opinion that a small court of that size is a satisfactory and efficient agency for disposing of appeals.

b. Jurisdiction

There is the utmost diversity and confusion in the distribution of appeals between the intermediate and highest courts, indicating a complete lack of any sound basis for such a division of jurisdiction. It can fairly be said that there is not a single question or field of the law and not a single case which would not fall within the jurisdiction of an inferior appellate court in some States and of the highest court in others. Some States, like Alabama, Colorado, and Georgia, send some felonies to the inferior court; some, like Illinois, Indiana, and Missouri, send no felonies at all, and some, like Oklahoma and Texas, send all felonies to the inferior court. Some States, like Alabama and Georgia, exclude appeals affecting title or possession of land from the lower appellate court, while many others do not. Some exclude from such courts all appeals relating to public offices, others deny them jurisdiction over franchises or freeholds. In other States habeas corpus, divorce and alimony, ordinances, construction of wills, equity cases, revenue matters, probate matters, injunctions, are to be found among the subjects which must go straight to the highest court, though there are more States which allow than which refuse appeals to the intermediate court on each of them. Even appeals involving the validity of statutes and the interpretation of constitutional provisions are as often assigned to the lower as to the higher court.

And not only is there no principle upon which a workable division of appellate business can be made, but the very lack of such a principle fosters perpetual amendments of the provisions regulating appeals. In 1906 Georgia, by a constitutional amendment, provided for a distribution of appeals between the Supreme Court and the Court of Appeals, and in 1916 it again amended the constitution, completely changing the basis for the distribution. Illinois has never had any rest on this subject, and after establishing a system in 1877 (L., p. 75), remodeled it in 1879 (L., p. 169), again in 1887 (L., p. 156), again in 1907 (L., p. 467), and again in 1909 (L., p. 304). Indiana has enacted no less than six complete and different schedules for appeals to the two courts, in 1891 (Acts, Ch. 37), 1893 (Acts, p. 29), 1901 (Acts, Ch. 247), 1907 (Acts, Ch. 148), 1911 (Acts, Ch. 117), and 1915 (Acts, Ch. 76), besides minor changes. No State has succeeded in finding a plan for distributing appeals which seems to remain in operation very long. And this will doubtless continue to be so, because every system of apportionment is only an arbitrary and capricious arrangement without any principle of logic or convenience to support and sustain it.

c. Finality of Decision

This is probably the most difficult phase of the problem of the intermediate appellate court. There is every conceivable degree of finality or lack of finality, in these intermediate appeals, found among the American States which employ such courts.

Double appeals are an economic waste and a menace to public confidence in the courts. Reversals of one appellate court by another appellate court tend to discredit the whole judicial establishment in popular esteem. This is a serious thing under present conditions. The cost and the uncertainty of litigation have always been the two chief complaints against the administration of justice, and double appeals certainly increase the first and emphasize the second. They often result in a final decision by a minority of all the judges who have passed upon the case. In the famous case of *Allen* v. *Flood* (1898), A. C. 1, which involved a double appeal, out of 21 judges who participated in the decisions, 13 were for the plaintiff, but the defendant won. A close majority decision for reversal on a second appeal will usually mean a decision by a

minority of the judges involved. This constantly occurs in all States which have intermediate courts.

The recognized evil of double appeals has undoubtedly had a great influence in shaping the jurisdictional provisions of appellate court statutes, but the varying degrees of success with which they have met the problem are very striking. Many devices have been employed. Some are relatively efficient, others are not. There is probably no State where any civil action may not, under some circumstances, be carried through the intermediate court for a second appeal, so that no litigant can be sure in advance that he may not have to fight his case through two appellate courts.

Very few States have attempted to make the decisions of the lower appellate court absolutely final, for the reason, no doubt, that the highest court would thereby lose the supervisory power over the decisions of inferior courts which the constitution gives it or which it seems desirable that it should have.

To fully retain such supervisory power the Supreme Court should have authority to bring up any case from the inferior appellate court which it believes merits its attention, and most states recognize this practice either through express constitutional or statutory provisions or by implication from the constitutional nature of the court of last resort. Thus, in *Ex parte Louisville & Nashville R. R. Co.* (1912), 176 Ala. 631, it was held that while the constitution gave *final* appellate power in many cases to the Court of Appeals, it yet vested general superintendence and control in the Supreme Court, and it was therefore competent for the Supreme Court to use *certiorari* to compel the Court of Appeals to follow the rules of law laid down by it. See also *In re Court of Appeals,* 15 Colo. 578; *State ex rel.* v. *Reynolds,* 257 Mo. 19. But the more common practice is to expressly authorize the Supreme Court to order up cases from the lower appellate court for review, either by the writ of *certiorari* or by a mere order for transfer,—California (Const., Art. 6, Sec. 4), Georgia (Const., Art. 6, Sec. 2), Illinois (L. 1909, p. 304), Kansas (L. 1895, Ch. 96), Missouri (Const., Art. 6, Amend. of 1884, Sec. 8), Ohio (Const., Art. 4, Sec. 2), New Jersey (Comp. St. 1910, p. 2208), New York (Const., Art. 6, Sec. 9), Pennsylvania (L. 1895, No. 128), Tennessee (Acts 1907, Ch. 82), Texas (L. 1913, Ch. 55).

Another method of maintaining the final authority of the Supreme Court, which is less direct and obviously less effective, is by authorizing the inferior appellate court to certify cases or questions to the Supreme Court for decision. This method is frequently used in connection with the proceedings by *certiorari,* so that a case may be sent up by the inferior court or called up by the higher court, as either court may be induced or required. The conditions under which the intermediate appellate court may or must certify a case are quite varied. In some States the certification is in accordance with the order of a majority of the judges,—Illinois (L. 1909, p. 304), Indiana (Acts 1911, Ch. 117, Sec. 4), Pennsylvania (L. 1895, No. 128), Tennessee (Acts 1907, Ch. 82); in some the dissent or recommendation of one judge calls for a certification,—Alabama (L. 1911, No. 121), Missouri (Const., Art. 6, Amend. of 1884, Sec. 6); in other States certain classes of cases are required to be certified, such as those involving constitutional or statutory construction,—Alabama (L. 1911, No. 121), or cases in which the decision is in conflict with decisions of other coördinate courts,—Ohio (Const., Art. 4, Sec. 6); and in other States only questions of law are to be certified,—Georgia (Const., Art. 6, Sec. 2), New York (Const., Art. 6, Sec. 9).

Now it is obvious that if the final authority of the Supreme Court is to be fully protected, an intermediate appellate court necessarily implies either a second appeal or an application for a second appeal as a possible incident in every case. This is burdensome alike to the parties and to the courts, and the mere right to *apply* for a second appeal produces substantially the same burden upon both court and parties as the unrestricted right to appeal.

The weight of this burden was strikingly brought out by Chief Justice Hiscock, of the New York Court of Appeals, in discussing means for relieving that Court, at the meeting of the New York State Bar Association in 1919. He said:

"During the last year, out of practically 400 contested motions submitted to the Court, 215 or 216 were applications for leave to appeal. Of those applications, 40, or about 20 per cent, were granted. I think very likely that some members of the Bar feel that they are being denied their proper and just rights by this limitation upon the right to appeal. My judgment is that between 90 and 99 per

cent—I won't try to specify the exact per centum—are getting through the application to the Court for leave to appeal precisely the same consideration and the same result that they would get if at the end of two years their appeal was regularly considered on the calendar. *Every application for leave to appeal takes precisely the same course as a regular appeal.* It is assigned in regular order to a member of the Court; it is considered by all the members of the Court, and it is brought up in consultation and is there disposed of." Report of the New York State Bar Association, 1919, pp. 408-9.

Denials of applications for *certiorari* or orders allowing an appeal are usually not published, but there is some data available in other States. Thus, in Illinois, where double appeals had become such an intolerable burden that an act was passed in 1909, commonly called the Certiorari Act, absolutely prohibiting appeals from the appellate court to the Supreme Court unless the lower court certified the case up or the Supreme Court itself brought up the case for further review, the persistence of counsel in seeking leave to appeal has gone far to nullify the act. In Volume 216 of the Reports of the Illinois Appellate Courts, pp. xii-li, there is a list of all the cases from the Appellate Courts reviewed by the Supreme Court during a period of a little less than three years, from 1917 to 1920, together with applications for *certiorari* which were denied by the Supreme Court. There are about 329 cases in this list, and just one half of them were denials of petitions for *certiorari*. If Chief Justice Hiscock's statement of the work involved in considering such applications holds good for Illinois, and it very likely does, there was as much work put on the Supreme Court in denying these applications as in hearing all the appeals which were regularly decided and reported.

The use of intermediate appellate courts has accordingly been attended with many drawbacks, if we are to judge from the experience of those States which have tried them. Two States, Colorado and Kansas, totally abandoned their use after trying them. Such a court was established in Colorado in 1891, and was abolished in 1905. Then in 1911 a new Court of Appeals was created for a period of four years, for the sole purpose of clearing up the Supreme Court docket, thereby making it practically a temporary

division of the Supreme Court, and in 1915 it finished its work and ceased to exist. The Kansas Courts of Appeals were established in 1895, to continue four years. Their jurisdiction was similar to that of other such courts. At the end of the four-year period there was not enough interest in them to continue their life and they expired by limitation, after publishing ten volumes of reports.

III

Appointment of Commissioners to Aid the Supreme Court in Clearing Up Its Docket

This has been commonly resorted to in a considerable number of States, but it has always been considered a make-shift to be employed to meet a temporary emergency.

California created a Supreme Court commission of 3 members in 1885, to continue 4 years. In 1889 it was continued for 4 years with 5 members, and in 1893 for another 4-year term. In 1897 it was continued for 2 years, and in 1901 for another period of 2 years. That was the end of it.

Missouri appointed a commission of 4 members in 1911, to serve for 4 years, extending its life in 1915 for 4 more years, and in 1919 increasing its membership to 6 and providing for its expiration in 4 years. That commission is now in office.

Nebraska began to use a commission in 1901, creating the first one for a term of 2 years, with 9 members. Its life was extended several times and it finally expired, but was revived again in 1915 with a diminished membership, and has been continued to the present time by acts of successive legislatures for 2-year terms.

Mississippi provided for 2 commissioners in 1910, to be appointed for terms of 6 and 9 years, but the act was repealed at the next session of the legislature (L. 1912, Ch. 259).

The constitution of Ohio authorizes the legislature to create commissions from time to time, but never for a longer term than 2 years and not oftener than once in 10 years. (Const., Art. 5, Sec. 21.)

Oklahoma has had commissions of 6 to 9 members for 2-year terms since 1911, and Texas created one in 1918 with 6 members, and by later acts has extended its life through June, 1921.

These commissions are all substantially alike. The members are usually required to have the same qualifications as judges of the Supreme Court, often receive the same salary as such judges, and are charged with the duty of aiding the Supreme Court to dispose of its cases in such manner as the Supreme Court may determine. They usually hear cases assigned to them by the court, prepare opinions, and these opinions, if and when satisfactory to the court, are approved and printed.

The use of such commissions is at best a palliative, not a cure. It is a confession of weakness in the judicial establishment. It admits that the appellate system has broken down and merely postpones the inevitable day when a real solution must be found.

IV

Increasing the Number of Judges in the Supreme Court

This is a perfectly obvious method of increasing the working capacity of the Supreme Court, but there is a point beyond which an undivided court becomes unwieldly.

Seven American States still have courts of last resort of 3 members,—Arizona, District of Columbia, Idaho, Nevada, New Mexico, Texas and Wyoming. Most of them are small States.

One State—Tennessee—has 4 judges.

Seventeen States have courts of 5 members—Arkansas, Connecticut, Florida, Indiana, Louisiana, Minnesota, Montana, New Hampshire, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Utah, Vermont, and West Virginia.

Georgia and Mississippi have courts of 6 judges.

Thirteen States have 7 judges,—Alabama, California, Colorado, Illinois, Iowa, Kansas, Kentucky, Nebraska, Ohio, Oregon, Pennsylvania, New York, and Wisconsin.

Michigan has 8 judges, and Maine, Maryland, and Missouri have the same number.

Two States have 9,—Oklahoma and Washington, and New Jersey has 16.

It thus appears that there are only three States which have more judges than Michigan, which would seem to indicate that we are

approaching the limit of practicable increase in size as a solution of the appeal problem.

In a few States a slight flexibility in the number of judges on the highest court is provided for, as a means of varying the size of the court in accordance with the demands made upon it from time to time. This is done in New York, where, upon certification from the Court of Appeals that it is unable to dispose of its business with reasonable speed, the governor is required to designate not more than four judges of the Supreme Court to serve as judges of the Court of Appeals until the cases undisposed of are reduced to 200. (Const., Art. 6, Sec. 7.) In Kentucky the court is authorized to appoint a Commissioner of Appeals to hold office at the pleasure of the court, and this has enabled the court to practically add another judge to the bench when needed (Acts 1906, Ch. 6). In California temporary vacancies in the Supreme Court may be filled by that court from the judges of the District Courts of Appeal (Const., Art. 6, Sec. 4). In Minnesota the Supreme Court has the power to appoint two commissioners who are practically extra judges and sit with the court, as in Kentucky (L. 1913, Ch. 62). But it is evident that nothing of substantial importance has yet been done by any State toward making the number of judges on the highest court vary in accordance with the demands placed upon the court.

A mere increase in numbers is an inefficient method of increasing output. If all cases are to be considered by the whole court, the larger the court the less it can do. A gain will doubtless occur in writing opinions, but if a court grows larger as business increases, there is an inevitable tendency, which the court is unable to prevent, for a larger and larger share of the work on a case to be done by the judge to which it is principally assigned. The very object of the appeal, which is the submission of a case on the record to the full consideration of a group of judges, thus tends to become frustrated.

Chief Justice Smith, of the Supreme Court of Mississippi, for 13 years a member and for 8 years Chief Justice of that court, in an address before the Bar Association of that State in 1915, said:

"The number of judges who can participate in the review of each case and dispatch the business of the court expeditiously is necessarily limited; for three judges working together in such manner

as to carry out the theory of an appellate court just outlined can dispatch more business than five, and five can dispatch more business than seven. In other words, any increase in the number of judges of an appellate court will result in less business being dispatched by it, provided it continues thereafter to work along traditional lines."

After showing that they have been forced by the increased pressure of cases to abandon the traditional system of full participation in each appeal by the full bench, he describes as follows the expedient most commonly employed to save themselves from being utterly overwhelmed by the mass of cases brought before them:

"Each judge is assigned a list of cases which he must investigate and decide what judgments shall be rendered therein, without assistance from the other judges. When he reaches a conclusion in a case he writes an opinion upon it which, after being approved by the other judges, or a majority thereof, goes out as the opinion of the court. These opinions, before being made public, are either considered and voted on at a formal conference of the judges, or are submitted to each of the judges individually, no formal conference being held unless specially requested by one or more of the judges. The result is that judgments so rendered and opinions so written represent the mature judgment of but one member of the court. If each judge carefully considered the opinions of his associates in connection with the records and briefs of counsel the system would not be without merit, but if this should be done by each judge in each case the object sought to be accomplished by the adoption of the system would thereby be defeated." Miss. Bar Assn. Report, 1915, pp. 61-62.

V

Organization of the Supreme Court into Divisions

This method is available only when the Supreme Court gets large enough to make up at least 2 divisions of 3 judges each, for no one would seriously advocate an appellate tribunal of less than 3 judges. The plan is practicable therefore, at the present time, in only 22 States, and it is actually in force in 12 out of these 22.

The States which have authorized this system of organization for their courts of last resort, and the dates of the adoption of the

system, are as follows: California, 1879 (Const., Art. 6, Sec. 2), Missouri, 1890 (Const., Art. 6, Amend. of 1890), Georgia, 1896 (Const., Art. 6, Sec. 2; L. 1896, No. 51), Kansas, 1900 (Const., Art. 3, Sec. 2), Florida, 1902 (Const., Art. 5, Sec. 2), Alabama, 1903 (Code of 1907, Sec. 5949), Colorado, 1904 (Const., Art. 6, Sec. 5), Washington, 1909 (Const., Art. 4, Sec. 2; L. 1909, Ch. 24), Oregon, 1913 (Gen. L. of 1920, Sec. 3045), Iowa, 1913 (35 Gen. A., Ch. 22), Mississippi, 1914 (L. 1916, Ch. 152), Oklahoma, 1919 (L. 1919, Ch. 127).

The principle employed is the same, however, whether used in an intermediate or final court, and among all the States which use or have used an intermediate court large enough to divide into departments, every one except New Jersey has employed the divisional arrangement. It may therefore be said to have enjoyed the substantially universal approval of American opinion in intermediate appellate courts and the approval of a majority of the States which up to the present time have been in a position to use it with their Supreme Courts.

There is in every one of these constitutional or legislative enactments suitable provision for bringing such cases before the entire court as should receive their attention. Some provide that if there is a dissent in any division the case shall go to the whole court; others authorize the Chief Justice or a specified number of associate justices to make such an order; some require all constitutional questions to go to the full court, and others prohibit any former adjudication to be overruled or modified except by the full court; some leave it to the court itself to decide how cases shall be assigned or referred to the full court or to divisions.

This system is the true counterpart and corrective of the method of merely increasing the number of members of the court. By combining the divisional plan with a flexible scheme for enlarging and diminishing the number of judges as the business of the court fluctuates, a means seems to be available for meeting the essential difficulty in administering appellate jurisdiction.

The apparent objections which readily suggest themselves do not seem to be meritorious. One is the possibility of inconsistencies between the different divisions. But this cannot be greater than the possibility of inconsistencies between an intermediate and a

supreme court, or between different divisions of an intermediate court, and it is apparent that unless the physical endurance of an undivided court is to measure the rights of the people of the State to secure a review of the decisions of trial judges, we must eventually have either two appellate courts or a single appellate court sitting in divisions. But the added danger of inconsistencies is very small, in any event, for the judges cannot personally remember prior decisions of the court and must rely upon their own study of the reports and the diligence of counsel, and it will make very little difference whether the prior decisions happen to be made by an undivided or a divisional court.

The objection that the appeal will be heard by a small number of judges is not a practical objection. A full consideration by three or four judges is better than a full consideration by one judge followed by a more or less hasty review and approval by the other members of a large court. Furthermore, all of our courts of last resort were originally small, and it has never been thought that the decisions and opinions of those days were less valuable than the decisions and opinions of the larger courts which succeeded them. For half a century the highest courts of New York and Massachusetts had five judges or less. Our own Supreme Court had only four judges from 1858 to 1886, and only five until 1904. More than half the courts of last resort in America today have five judges or less. The Court of Appeal of England, with 9 judges, sits in 2 or 3 divisions at the same time. (9 Halsbury, Laws of England, "Courts.")

The capacity of the court for disposing of appeals may be enlarged by increasing the number of cases heard in divisions, and conversely, when the business before the court temporarily drops off, the full court will be able to dispose of a larger percentage of the appeals. In this way a certain flexibility may be enjoyed. But this is an insufficient device. More scope is necessary to furnish a permanently satisfactory means for varying the productive capacity of appellate courts, and this should consist of power, vested in the court or in some State agency, to call in additional judges for temporary service in hearing appeals. The New York system of designating judges of the lower court to sit upon the Court of Appeals indicates the method which is probably most promising

as a permanent solution. The same system is used in England, though in England the High Court and the Court of Appeal are merely two divisions or branches of the same Supreme Court of Judicature.

A really complete handling of the problem of appeals will, therefore, carry us into the larger field of organizing the judicial power of the State upon efficient lines throughout its entire range. The whole court system of the State is rigid and unsuited to the conditions under which we now live. A unified court for the entire State, properly administered, with such divisions as will meet current demands, is the real need of the State. The judicial system should be unified in accordance with the same principles which the legislature, under the Governor's leadership, has been applying to other departments and agencies of the State Government.

The idea of a really efficient, unified court is not a new one. In 1909 a Special Committee of the American Bar Association made a report on the Prevention of Delay and Unnecessary Cost in Litigation, in which they said:

"The first principle which the committee desire to submit is that of unification of the judicial system.

"The whole judicial power of each state, at least for civil causes, should be vested in one great court, of which all tribunals should be branches, departments or divisions. The business as well as the judicial administration of this court should be thoroughly organized so as to prevent not merely waste of judicial power, but all needless clerical work, duplication of papers and records, and the like, thus obviating expense to litigants and cost to the public.

"While the whole judicial power should be concentrated in one court, the court should be constituted in three chief branches: (1) county courts (including municipal courts) having exclusive jurisdiction of all petty causes, * * * (2) a superior court of first instance (to be called by some appropriate name) having a defined original, exclusive and general jurisdiction at law, in equity, in probate and administration, in guardianship and kindred matters, and in divorce, * * * this court to be divided into at least two and probably three divisions * * * (3) The third branch would be a single ultimate court of appeal. All judges should be judges of the whole court. They should be assigned in some appropriate way to the

branch or division thereof, or the locality in which they are to sit, but should be eligible and liable to sit in any other branch, or division, or locality when called upon to do so.

"Supervision of the business administration of the whole court should be committed to some one high official of the court who would be responsible for failure to utilize the judicial power of the state effectively." Am. Bar Assn. Reports, 1909, p. 589.

This plan for a unified court has been repeatedly endorsed by lawyers and judges. In 1918 Justice Carter, of the Supreme Court of Illinois, who has participated in writing the last 75 volumes of the decisions of that court, said before the New York State Bar Association:

"I strongly favor unified court organization similar to that which has been recommended more than once by the American Bar Association * * * One of the greatest weaknesses of our form of government is that it lacks efficiency; and it lacks this largely because it fails to place authority and responsibility upon special individuals. This criticism is especially true as to the organization of our courts. There ought to be unified organization in such a way as to place responsibility on some individual or some few individuals."

Chief Justice Smith, of Mississippi, in the address already referred to, made a strong plea for a unified court for that State, quoting with approval the recommendation of the American Bar Association, and referring to the demonstrated success of such a system as administered in England for many years.

A joint committee of the Wisconsin legislature, of which the eminent Chief Justice Winslow was chairman, made a report in 1915 upon the organization of courts in that State, and while it refrained from recommending a reorganization because it was convinced that its authority extended no further than a proposal of changes in the existing system, it nevertheless expressed the opinion that it could be maintained "upon very persuasive reasoning, that the judicial power of the state should be vested in one great court of which all, or substantially all, judicial tribunals in the State should be branches or divisions. Nor is this idea merely academic or theoretical. In substance it has been tested out with eminently satisfactory results in England and in some of her colonies, among which latter may be specially mentioned our neighboring province

of Ontario. * * * Under this plan all judges become judges of this single court; the court is vested with plenary power to make rules of practice and procedure; an executive committee of the bench arranges the work, assigns the same to the various judges as occasion requires or as special fitness may indicate, thus making the whole body of the judiciary a flexible body, capable of being utilized at any point where necessity demands and making it possible to bring the entire judicial power of the state into action as one body instead of as number of separate courts, each circumscribed by hard and fast limitations which it cannot pass." Report of Joint Committee, 1915, pp. 3-4.

Appellate courts and trial courts are so closely connected in their operations, and efficiency in one is so intimately bound up with efficiency in the other, both constituting in fact but different aspects of the one question of judicial administration, that it would seem advisable to deal with both together, rather than attempt a fragmentary and unbalanced revision of the organization of the appellate branch alone. Either one will probably require a constitutional amendment, and if the matter is to go before the people, a provision might well be submitted which would make possible an adequate and modernized court organization, embracing both trial and appellate branches, capable of meeting the growing needs of a rapidly developing commonwealth. Instead of the four independent constitutional courts now in operation, and the other separate courts which have been established by law pursuant to the authority conferred by the constitution, Article VII, might provide for the consolidation of all existing courts into one General Court of Judicature, consisting of three permanent divisions, to be known as the Supreme Court, the Circuit Court, and the County Court, with such subdivisions or branches, each for the more effective dispatch of business, as may be established by law, the general superintendence, administration and control of the entire court being vested in the Supreme Court to be exercised according to such rules and regulations as may be established by law, or, in default thereof, as the Supreme Court may from time to time promulgate by general or special orders. At the same time it would probably be advisable to incorporate in the Amendment of Article VII an authorization of declaratory judgments. This useful form of remedial action was

unfortunately held to be unavailable under the present constitutional limitations of this State, and an adequate revision of the Judiciary Article should remove any restriction upon its use. It is of interest to note in this connection that the Michigan Declaratory Judgment Act has been adopted substantially *in haec verba* by the State of Kansas within the last three months, and the Massachusetts Judicature Commission has just recommended the adoption of a declaratory judgment act in that State. (Mass. Law. Quar., Jan., 1921, p. 113.) Michigan, which enacted the first unrestricted declaratory judgment law, ought not to be obliged to see her sister States enjoy the benefit of so useful a remedy while unable to employ it herself.

If, as has been recently suggested, a constitutional convention is to be called in the near future, the entire subject of the organization and power of the State judiciary may well be left to that body, with such recommendations from the Bar Association as it may feel called upon to offer.