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Amos H. Eblen

*Judicial Council, Commonwealth of Kentucky*

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# An Intolerable Burden

BY AMOS H. EBLEN\*

The Court of Appeals has been burdened with a heavier docket than could be dispatched efficiently since its creation. It did not even have the benefit of a clean start since it inherited from its predecessor Court of Appeals and the Superior Court a number of pending cases, probably as many as four or five hundred.<sup>1</sup> In time, numerous measures designed to give relief have been adopted. Yet, with all these, and although this tribunal is now disposing of more than twice the load of the average state court of last resort,<sup>2</sup> it has been unable to keep abreast of filings during the past six years. Such a condition existing over a long period of time and in a department of state government that affects all the people in the most vital of their relations is worthy of examination and consideration. Certainly it is now time that the situation should be brought to the attention of the Bar of the State so that the members may give the matter thought and decide what changes, if any, should be made.

The story begins under the Constitution of 1850 which provided for a Court of Appeals consisting of four judges.<sup>3</sup> That Court, by 1882, had fallen so far behind that it had in excess of thirteen hundred cases pending on its docket.<sup>4</sup> In order to remedy that condition, the legislature in that same year created an intermediate court called the Superior Court, consisting of three judges.<sup>5</sup> The Superior Court was given appellate jurisdiction of all appeals except those involving the validity of statutes, the title to a freehold or right to a franchise, felony, or judgments for money or personal property where the value in controversy was greater than \$3,000, exclusive of interest and costs. These two courts, the Superior Court and the Court of Appeals, were able to dispose of a total of nine thousand and fifty-six cases in

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\* A.B., LL.B., University of Missouri, S.J.D., Harvard. Secretary, Judicial Council, State of Kentucky, Frankfort, Kentucky.

<sup>1</sup> Vol. III, Debates Constitutional Convention, 1890, p. 3153.

<sup>2</sup> Vol. 31, No. 4, Journal of the American Judicature Society (Dec. 1947).

<sup>3</sup> Art. IV Sec. 4, Constitution of 1850.

<sup>4</sup> Vol. II, Debates Const. Conv. 1890, p. 3011.

<sup>5</sup> Acts of 1881-82, Chap. 1324, Vol. 1, p. 111.

the next eight and one-half years.<sup>6</sup> Yet the framers of the present Constitution were persuaded that a single court composed of seven judges and sitting in two division could dispose of as many cases as a court of last resort of four judges and an intermediate court manned by three judges.<sup>7</sup> Moreover, they were convinced that a single appellate court was better suited to the needs of this State. Accordingly it was provided in the Constitution of 1890 that the Court of Appeals should consist of not less than five nor more than seven judges; that it should divide itself into sections for the transaction of business if it found that arrangement necessary; and that the Superior Court should only continue until the terms of the present judges of that court should expire.<sup>8</sup>

Effective January 1, 1895, the number of judges on the Court of Appeals was increased to seven,<sup>9</sup> and it began to operate under the two division plan. By statute it was given a broad review jurisdiction which extended to the final orders and judgments of all courts except (1) those for the recovery of money or personal property where the value in controversy was less than \$100 exclusive of interest and costs (2) a judgment granting a divorce or punishing a contempt (3) orders or judgments of county courts except in actions for the division of land and allotment of dower (4) orders or judgments or a quarterly, city, police, fiscal, or justice s court and (5) a bond having the force of a judgment.<sup>10</sup>

With such a broad appellate jurisdiction, it is not surprising that the court found itself unable to keep abreast of its docket. Just three years after it started operating with seven members, the General Assembly enacted the first of two laws designed to relieve this tribunal of some of its burden by a reduction in its appellate jurisdiction.<sup>11</sup> The \$100 minimum amount required to be involved in the recovery of money or personal property cases in order to have appellate review was raised to \$200. In 1914, just sixteen years later, this minimum was again raised, this time to \$500, but it also provided that in cases involving as much as \$200 and less than \$500 an appeal might be prayed, and the court should grant it when the ends of justice should require a reversal

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<sup>6</sup> Vol. III, Debates Const. Convention, 1890, p. 3150.

<sup>7</sup> Vol. II and III, Debates Const. Convention 1890, pp. 2994-3168. Secs. 113, 118, and 119, Constitution of Ky.

<sup>8</sup> Acts of 1891-92-93, Chap. 229.

<sup>9</sup> Acts of 1891-92-93, Chap. 221, sec. 2.

<sup>11</sup> Acts of 1898, Chap. 19.

or a question, involving the construction of a statute or section of the Constitution should be in issue.<sup>12</sup> Also, by this same statute, an appeal as of right in land cases was restricted to those directly involving the title to land, the right to an easement therein, or the right to enforce a statutory lien thereon.

Even with the help these statutes were supposed to render, the Court still found itself far behind in its docket. In 1906, the General Assembly authorized the appointment of a commissioner,<sup>13</sup> and in that act there was a legislative recital of emergency based upon a declaration that the Court was considerably behind its docket, and that there was a steady increase of its business. Three additional commissioners, the offices of all to terminate in 1928, were provided for in a 1924 act.<sup>14</sup> This statute also makes reference to the large number of cases then pending before the Court. In 1928, the terms of the four commissioners were extended two years,<sup>15</sup> and in 1930 the present law authorizing four commissioners without specifying any termination date was enacted.<sup>16</sup>

With all the assistance of this legislation the Court of Appeals has continued to operate behind its docket except for a short time during the past war. For the six years beginning with 1945, it disposed of about two hundred and forty less appeals than were filed during the same time. As of January 1, 1951, there were some five hundred and fifty cases pending, the equivalent of about one year's work, and this discouraging process has persisted and will continue although, as previously stated, our Court of Appeals disposes of more than twice the average load of all the state courts of last resort.

For that six year period, 1945 to 1950 inclusive, the Court of Appeals disposed of an average of six hundred and one cases per year and handed down an average of five hundred and twelve written opinions per year. That isn't all. During that same time, it passed on an average of one hundred and twenty petitions for rehearing per year and was further burdened by an average of five hundred and fifty-two miscellaneous motions per year. All

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<sup>12</sup> Acts of 1914, Chap. 23.

<sup>13</sup> Acts of 1906, Chap. 6.

<sup>14</sup> Acts of 1924, Chap. 20.

<sup>15</sup> Acts of 1928, Chap. 21.

<sup>16</sup> Acts of 1930, Chap. 16.

this was in addition to a number of other duties which our Court performs and all of which take considerable time.

It is obvious that this is a remarkable achievement in quantity of business dispatched. However, it has and only can be made at a sacrifice in quality. I say this with all respect for the judges and commissioners, for they have been and are able jurists possessing rare courage and devotion to duty in the face of such a monumental task. I marvel that they have not been so discouraged by the pressure of the load as to adopt a defeatist attitude.

No court of last resort can dispose of six hundred cases per year on the merits and give to each the thorough research, careful analysis, and considered judgment that it deserves. If you think that is a rash statement, just contemplate the preparation of from one and one-half to two briefs per week for a period of nearly forty weeks each year and see how the quality of your work would suffer. Just as certainly no court of last resort can hand down an average of five hundred and twelve opinions per year and give to each the thoughtful preparation that an opinion should have. The time available will not permit the distribution and consideration of these opinions by all the members of the Court. As a consequence, loose language, gratuitous dictum, faulty reasoning, inadequate statements — these and many defects cannot be avoided. The net result of all this is a condition which, in itself, breeds more litigation and so adds to the burden.

It is no tribute to our State that this condition has been permitted to endure over such a long period of time. Chief Justice Arthur T. Vanderbilt, of the New Jersey Supreme Court, when informed of this situation expressed surprise that the Bar should permit the Court to operate under such an intolerable burden. More responsible than the Bar, in my opinion, has been the Court for its failure to give a matter of this kind the publicity it should have. I believe that, when properly presented, the Bar will be ready and willing and even anxious to sponsor remedial measures.

Before stating and making some comments on suggested courses to pursue, I wish to point out that at the present time criminal appeals only constitute about one-sixth of the total load and, for the most part, present few troublesome questions. Although it might be desirable to make some changes in this

phase of the appellate jurisdiction of the Court, the real and serious problem is with relation to the civil appeals.

The first possible course is the creation of one or more intermediate appellate courts. Of course, this would require a constitutional amendment.<sup>17</sup> It has certain definite advantages such as retaining appellate review to the present full extent. Some members of the Bar feel that this is desirable and even essential. Under this suggested plan, the Court of Appeals could be given more of a certiorari jurisdiction with a limited number of appeals as of right, and it could then devote adequate time to the more important cases. One disadvantage would be the additional time and expense required in taking to the Court of Appeals such cases as could be gotten there only through the intermediate court.

Our Bar is accustomed to a single appellate court and would probably be reluctant to make any change. Further, distasteful experience with the Superior Court in the eighties, although there are not many living who practiced before it, would have some effect. The act creating that court provided that the Court of Appeals should have appellate jurisdiction of all the final orders and judgments of the Superior Court except (1) those for fines or the recovery of money or personal property where the amount of the fine or value in controversy was less than \$1000 exclusive of interest and costs (2) those where the judgment of the lower court was affirmed without a dissenting vote; however, if in any case coming within the above exceptions any two of the judges of the Superior Court should certify that in their opinion the question involved was novel, and one of such importance, the party against whom the decision was rendered should be entitled to take the same by appeal to the Court of Appeals as in other cases.<sup>18</sup> The principal criticism of the Superior Court was that it would never certify that an action was novel or important. Although the proponents of an intermediate court in the Convention of 1890 proposed to correct this by having the Court of Appeals rather than the Superior Court make this determination,<sup>19</sup> it failed to save the day. Maybe enough time has now

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<sup>17</sup> Sec. 135 of the Constitution of Ky declares that "No courts, save those provided for in this Constitution, shall be established."

<sup>18</sup> Acts of 1881-82, Chap. 1324, Sec. 5, Vol. 1, p. 113.

<sup>19</sup> Vol. II, Debates Const. Conv. 1890, p. 3011.

passed so that the Bar would approve an intermediate tribunal. There are many who feel that it offers the only ideal solution.

A second possibility would be further restriction of the jurisdiction of the Court. This can be accomplished by legislation. However, the restriction will have to be rather drastic to afford anything like the necessary relief. The reduction in the number of appeals resulting from the 1898 and 1914 acts have been more than offset by the appeals given as of right in special statutes, the most numerous of which are those involving a review of the orders and decisions of administrative agencies such as the Department of Motor Transportation, Alcoholic Control Board, State Tax Commission, Public Service Commission, and many others. More concretely, what might be done under this suggested plan is something along the following line: (1) Raise the present \$200 minimum to \$500 or more. (2) Raise the present \$500 figure to \$2500 or more. (3) Place land title, easement and statutory lien cases on the same footing with all other cases. This would leave appeal as of right only in those cases involving \$2500 or more. Where the amount involved should be as much as \$500 and less than \$2500, if these are the figures taken, an appeal might be prayed just as it now is where the amount involved is as much as \$200 and less than \$500. It would immediately be urged that such a plan makes our Court of Appeals a tribunal for the exclusive benefit of the rich. I say that because that same argument seemed to carry much weight in the 1890 convention, but people don't always accept answers to this type of argument. The answer is that you would have a review of the record in the case where you should pray an appeal, but there would only be a written opinion when the Court should reverse or conclude that a question of importance was involved. Consequently, the only saving of time to the court would be in not having to write an opinion where the judgment was affirmed and no important question was involved. This is why it is necessary to raise the two mentioned figures substantially in order to render any worthwhile aid to the Court. Probably along with this, should this plan be adopted, there should be a study of appeals of right where provided for in all special statutes with a view to determining if any possible means may be found for lessening their toll on the Court's time.

Closely allied to the second suggested plan is a third, that of making more extensive use of the memorandum or per curiam opinion. In a large number of cases in which the judgment of the lower court is affirmed, no new or different question is involved. In such cases, the process is largely one of application of well-established principles to a situation in which the facts vary but slightly and only with reference to meaningless details. If the Court in such a case could affirm the judgment without taking the time and trouble to write an opinion there would be a substantial saving of time. Also, it would keep out of our reports opinions that really add nothing to our judge-made law other than confusion and uncertainty where loose language may have been used. Judges, as a whole, are prone to write too much, particularly where there is nothing new to be said.

Unfortunately, our Bar has been spoiled by a written opinion in each case except where an appeal is denied where the amount involved is as much as \$200 and less than \$500. There might be a loud complaint from attorneys if any change in this practice should be made and probably the Court would be reluctant to try it without the support of the Bar. It might be effected over a period of time and with less pain if the opinions in the cases mentioned should be gradually shortened. One advantage of this course is that it would require no amendment to the Constitution, and only the repeal of one section of the Code.<sup>20</sup> It seems to me to be a better solution than that proposed under the second plan just mentioned.

A fourth possible course is a return to the two division system. It has been used extensively by our Court of Appeals, and there is no doubt but that it results in the output of a much greater volume. Under this system, each division consists of the chief justice, three judges, and two commissioners, and these alone participate in the conference, and the four judges alone in the decision of a case. Where a question is of sufficient importance, the full Court will pass upon it, but you can't have many full court sessions without destroying the division system. Consequently, when one division is considering a case you do not have the benefit of the discussion and opinion of three judges and two commissioners composing the other division. Moreover, the chief

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<sup>20</sup> Sec. 765 of the Civil Code requires that the Court of Appeals deliver written opinions in all cases.



justice alone knows what is being decided in each division at the same time and, of necessity, you have conflicting and even contrary decisions. No one man can supervise two separate divisions of a court so as to keep them going in the same direction at all times. That is difficult enough even when they all sit together as one court.

A fifth possibility is an increase in the number of commissioners to assist the court. This is of doubtful value. The bottleneck at present is in getting the cases decided and additional commissioners would not help to alleviate this condition. More commissioners would probably reduce the number of written opinions required of each member of the Court, but even this might be more than offset by a loss of time in conference. The more persons participating in a conference, the more time required to reach a decision. Thus it would seem better to use any additional judges or commissioners at the intermediate court level.

There are other measures that would be of some help but which would not by themselves or taken together furnish a solution. I will mention one of them — an increase in the number of law clerks so that each judge and commissioner might have the exclusive assistance of one. These young men have been and are now rendering a valuable service and one that has a definite tendency toward the improvement of the quality of the work of the Court.

I don't know how much longer our Court can continue to operate as well as it does under such a work load. I fear that our luck may soon run out and that such capable men as we have and have had on this bench will cease to be available. The strain and pressure coupled with such moderate compensation is not calculated to attract the best talent. As lawyers, we should want to create, insofar as we can, those conditions which will permit and encourage our judges to do their best work. They certainly can't do anything like their best work when they are buried under such a heavy case load. While the work of the Court of Appeals is a matter of concern to all the people, it addresses itself directly to the Bar. Those of you who are prospective members of the Bar have much more at stake than the older practitioners. The next few years may well fix the pattern for appellate review for a generation or more. In that, you have a vital interest.



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