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# Thoughts on Ways of Expediting the Work of Our Supreme Court

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# THOUGHTS ON WAYS OF EXPEDITING THE WORK OF OUR SUPREME COURT

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Speaking in the House of Commons on November 11, 1947, Winston Churchill said:

> Many forms of government have been tried and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except for all those other forms that have been tried from time to time.[1]

In making that statement, Mr. Churchill recognized that the democratic system of government is not perfect, and as a result he spent his entire lifetime trying to improve it. Were he living today, he would still be working to improve it, as opposed to abandoning it as some of the militants today would have us do. Although our judicial system is not perfect, it is essential to the preservation of our democratic way of life. Accordingly, any improvements that can be made in it will help preserve our free way of life.

From a practical standpoint, improvements in our state judicial system could come about in two ways: the first, through changes in our laws; and the second, through changes in our Constitution. Since delay in the rendering of decisions has perhaps been the greatest criticism of our state judiciary and because perhaps such criticism has been more directed at the supreme court than at the trial court level, it is appropriate at this time to make some suggestions as to how the delay in rendering decisions on the supreme court level may be eliminated or at least reduced. This is not to say that our record for rendering decisions with reasonable promptness is not envied by some of the highest appellate courts

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1. *Never Give In! The Challenging Words of Winston Churchill,* Kansas City: Hallmark Cards, Inc., 1967.

of this country, who are suffering a backlog greater than ours, but it is to concede that there is room for improvement.

A June 1969 publication of the American Judicature Society, resulting from a survey of the judges of the highest appellate and intermediate appellate courts of this country, lists four ways of overcoming congestion and delay in our courts. These are:

> (1) The *addition of personnel,* including law clerks, court commissioners, special judges for particular purposes, etc.;
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> (2) *Procedural changes,* including increasing judicial time for the disposing of cases, reducing the length of written opinions, reducing the length of briefs, and limiting the number and type of appeals;
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> (3) The separation of the highest appellate court into *divisions;* and
>
> (4) The creation of an *intermediate appellate* court.[2]

Relative to the first method—*the addition of personnel*—the clerkship program should be placed high in priority. In 1963, the North Dakota Supreme Court had no clerkship program and there was very little interest in such a program by the members of that court. In 1964 there was a two-week appellate court conference at New York University, where twenty appellate court judges from the state and federal systems, as well as from Canada, were in attendance as students. Other judges and law professors were lecturers. Among the things brought out at that conference was that most of the judges there had at least one clerk (if not more) assigned to them full time.

As a result of this conference, this writer sent letters of inquiry to the chief justices of the highest appellate courts of the fifty states concerning their clerkship programs. On receiving a reply from all but one of the courts, a report was compiled which the American Judicature Society later supplemented by its report of January 1968 on the law clerk program in state appellate courts.

The following is a part of the summary of that 1968 report:

> Law clerks serve 90 per cent of the state supreme courts. The five states that do not employ clerks are Maine, Missouri, Nebraska, Vermont and Wyoming. There is a one-to-one ratio of judges to clerks in 27 state supreme courts. In seven states (Arizona, Connecticut, Indiana, Louisiana, New Jersey, Nevada and Oregon) the chief justices have two clerks and other justices one each. In California four law clerks are assigned to each justice, and there are two

2. American Judicature Society. "Congestion and Delay in the State Appellate Courts," Report No. 25. Chicago: American Judicature Society, (June, 1969) at 5.

> assigned to each justice in Illinois and New York (as well as a confidential clerk). In Pennsylvania the chief justice and two associate justices have two clerks while the others on the court have one. In seven states (Kansas, Kentucky, Mississippi, Montana, North Dakota, Ohio, South Carolina) the ratio of justices to law clerks is less than one to one. Of the 16 states with intermediate appellate courts, ten have law clerks: Arizona, California, Georgia, Illinois, Indiana, Louisiana, Michigan, New Jersey, New York and Pennsylvania. Those not served by law clerks are Alabama, Florida, Missouri, Ohio, Tennessee and Texas. The ratio of judges to clerks is one to one in all the intermediate appellate courts with the exception of Georgia's, where six clerks serve nine judges.[3]

It should be noted that the report does not include New Mexico, which now has an intermediate appellate court, and there may be other states which have created intermediate appellate courts since January of 1968.

In 1965, our court appeared before the Legislature requesting appropriation for five clerks; but, perhaps because of the newness of the program, the Legislature decided to start on a more modest basis and thus gave us two clerks. We have had appropriations for two clerks ever since. It is this writer's personal view that the work of the court could be greatly expedited if the Legislature would provide each interested judge with a clerk. In other words, the clerkship program would be much more successful if it were on a basis of one to one, rather than two to five.

Also under this *personnel* category, the position of secretary to the judge should be highly rated. At the present time budget permits the judge's secretary to be paid a maximum of $6,534 per year. This author has lost the services of a very competent and experienced secretary, who because of economic considerations, left the service of the Supreme Court to become a district court reporter. The salary of a district court reporter is $10,500.00 a year, which does not include fees which may be earned for transcripts. If we are going to be able to retain our secretaries in the future, we are going to have to pay them at least the salary of a district court reporter.

The *second way* suggested for overcoming congestion and delay involves *procedural changes.* The legislative action which would bring about the greatest procedural change would be that of eliminating Section 28-27-32, North Dakota Century Code, (1960), which is popularly known as our trial *de novo* statue. Under that statute, if the appellant demands a retrial of the entire case, the Supreme Court is forced to try anew the questions of fact. Under those cir-

3. American Judicature Society. "Law Clerks in State Appellate Courts," Report No. 16. Chicago: American Judicature Society, (January 1968) at 1.

cumstances, our court gives the trial court's findings of fact appreciable weight, but it nevertheless must determine the facts rather than rely on the facts as determined by the trial court. This requirement is very time-consuming and frustrating. Although statistical information is not available which would indicate the number of other states which require such a determination of the facts by an appellate court, it is my belief that very few other states have such a statute, and as a result their appellate courts are saved considerable time.

In recent Supreme Court decisions, the effect of the trial *de novo* statute has been modified by our holding that it does not apply to administrative practice cases. Section 28-32-19 of the North Dakota Century Code, (1960), provides for the scope of review on appeal from an administrative agency. In *Haggart v. North Dakota Workmen's Compensation Bureau,*[4] it was said that our determination of the facts should be limited to determining whether there is substantial evidence to support the administrative agency's findings of fact.[5] We applied a similar rule in *Soo Line Railway Company v. The City of Wilton,*[6] to the findings made by a special assessment commission which were confirmed by the city commission. In the *Matter of the Appeal of Sander Johnson From the Decision of the Board of County Commissioners of Grand Forks County,*[7] we applied the substantial evidence rule to an abatement proceeding.

Some have suggested the *addition of judges* to the court of last resort as another means of handling congestion. This should not be recommended as a method of solving our problems.

What Chief Justice John R. Dethmers of Michigan has to say on this is pertinent:

> The time-saving advantage of increasing court membership is that it reduces the number of opinions each judge must write. It does not lessen the work of each judge necessary for the study of records and briefs, legal research, and examination of opinions in cases in which the other members write. This he must do, of course, in order to decide whether he agrees and will sign such opinions or write dissents. Enlarging a court does not decrease the amount of time required for listening to oral arguments of counsel and for conference, consultation, and discussion by the judges. In fact, increase of numbers increases the man-hours thus consumed and, perhaps, the number of court hours as well,

4. Haggart v. North Dakota Workmen's Compensation Bureau, 171 N.W.2d 104, 111 (N.D. 1969).
5. For the most recent statement and application of the substantial evidence rule in a Public Service Commission case, *see* Cass County Electric Co-op v. Otter Tail Power Company, 169 N.W.2d 415 (N.D. 1969).
6. Soo Line Railway v. The City of Wilton, 172 N.W.2d 74 (N.D. 1969).
7. Appeal of Johnson, 173 N.W.2d 475 (N.D. 1970).

> because of resultant increase in number of questions addressed to counsel from the bench and more arguments and discussion by the larger number of judges in conference. Enlargement of court membership is, therefore, not necessarily 100 per cent gain.[8]

The *third way* suggested by the report for eliminating congestion and delay is by *divisional sitting of the appellate court.* Dividing the court into three-member panels would increase the number of applications for rehearing and would present the definite possibility of conflicting decisions by the different divisions.

The *fourth way* suggested for avoiding congestion and delay is in the creation of an *intermediate appellate court.* This should be recommended for study now so that it might, if feasible, become a reality later. Mr. Byron W. Daynes, the research assistant for the American Judicature Society, who prepared the June 1969 report on congestion and delay in the state appellate courts, concluded from his study of the survey of the appellate court judges that:

> The extent to which intermediate courts can relieve the caseload burden on the highest court depends on the extent of its final jurisdiction and the scope of the certiorari, writ of error and certification policy. Unless the intermediate court has some final jurisdiction, adding it to the judicial system would only promote added litigation in the form of double appeals.[9]

Mr. Daynes' futher conclusion relative to the intermediate appellate court was that the judges of the highest appellate court serving in states that have intermediate appellate courts seem to be well satisfied with the intermediate appellate courts' accomplishments. It was his thought that the most significant and interesting response to the questionnaire came from the highest appellate judges in states without intermediate appellate courts and that their attitude toward instigation of such a system was more favorable than not. He stated that nearly 46 per cent of those judges who had an opinion for or against the system would favor the adoption of an intermediate appellate court in their state, hoping that this system would aid in reducing the number of appeals to the high court and provide a more efficient method of handling case backlog.[10]

Oregon, which had under consideration a bill in the 1969 session of its legislature to establish an intermediate appellate court, made an extensive study, through its judicial council, of the need for and

8. John R. Dethmers, "Delay in State Appelate Courts of Last Resort," *The Annals of the American Academy of Political and Social Science,* March 1960, at 161 quoted in American Judicature Society Report No 25 (June, 1969) at 8.
9. *Id.* at 20.
10. *Id.*

the benefit that might be derived from an intermediate appellate court. In its report of December 2, 1968, the council made these recommendations:

> A court of appeals should be established which would have jurisdiction over certain types of cases and would relieve the press of cases now in the supreme court.
>
> A seven-man supreme court, coupled with a five-man court of appeals, could handle the present appellate load. The court of appeals could sit in departments of three, with the chief judge sitting in both. This court of appeals could relieve the supreme court of forty to forty-five per cent of its current workload.
>
> The jurisdiction of the court of appeals is of great importance. Cases heard in this court should be of clear, specific classes, to avoid jurisdictional quarrels. Therefore, only cases which fit easily into distinct classes should be included. The supreme court should have authority to determine all jurisdictional disputes in a summary manner without formal briefs, oral argument, or written opinion. Ninety to ninety-five per cent of all cases would be final after disposition by the court of appeals. Double appeals are to be avoided. This court would be worthless if all petitions to the supreme court were granted—it would gain nothing. A losing party in the court of appeals could petition the supreme court to rehear his case, but petitions seldom would be granted. Petitions would be granted and appeals would be heard where the supreme court felt that an important policy decision may have been decided erroneously or a conflict in decisions is seen between the departments of the court of appeals. Statistics in states having courts of appeals show only seven or eight per cent of the petitions are allowed. As large a percentage as possible of cases in this court should be those where the law is settled and not changing rapidly because this would cut down on the number of petitions to the supreme court.
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> Exclusive appellate jurisdiction in the following types of cases would be vested in the court of appeals:
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> 1. Criminal, post-conviction, and habeas corpus.
> 2. Probate, including guardianships.
> 3. Domestic relations, adoptions, and juvenile matters.
> 4. Appeals from the decisions of state agencies (excluding the tax court, where a record for direct appeal is made).[11]

*Two provisions of our state Constitution also add to the work of our court and thus contribute to delay.* They are:

11. *Second Biennial Report,* "Judicial Council of Oregon," (Dec. 2, 1968).

> Section 101. When a judgment or decree is reversed or confirmed by the supreme court *every point fairly arising upon the record of the case shall be considered and decided, and the reasons therefore shall be concisely stated in writing*, signed by the judges concurring, filed in the office of the clerk of the supreme court and preserved with a record of the case. Any judge dissenting therefrom may give the reason for his dissent in writing over his signature. (emphasis added).
>
> Section 102. It shall be the duty of the court to prepare a *syllabus* of the points adjudicated in each case, which shall be concurred in by a majority of the the judges thereof, and it shall be prefixed to the published reports of the case. (emphasis added).

Both sections contribute to maximizing the issues we must decide. This results in lengthening the opinions we must write and the time we must spend in reaching sufficient agreement so that an opinion may be rendered. Those sections should be studied in light of the need for more current decisions which would consider the major issues and permit a determination of matters of the greatest importance in the least amount of time.

In conclusion, in speaking about some of the practical problems with which our appellate court is faced and in suggesting some ways in which these problems may be alleviated, I would like to emphasize that these thoughts are offered only as a beginning point, not as an ending point, in a field where much study is needed and where if expended should be very productive.