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Possible Methods of Relieving the Supreme Court of Washington

Alfred J. Schweppe

University of Washington School of Law

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POSSIBLE METHODS OF RELIEVING THE SUPREME COURT OF THE STATE OF WASHINGTON

In the past several years there has been much discussion among the bench and bar of the state of Washington concerning ways and means for relieving the Supreme Court to some extent, at least, from the ever-increasing volume of judicial business, in order that the court may devote more time to important causes. Investigation reveals that the volume of opinion-writing required of each judge of the Supreme Court of this state greatly exceeds that imposed upon most of the appellate court judges in the United States. The individual judges of the Supreme Court of this state are each required to write, on the average, seventy-five or more opinions a year, which, counting out the holidays and days spent on the bench, means that but a short time is available for the study of the record in each case and the preparation of an opinion, especially since much time is also consumed by each judge in the study of approximately six hundred opinions prepared in the aggregate by the other eight judges during the same year. In view of these conditions, it is the purpose of this discussion, solely by way of exposition and not by way of advocacy, to present some possible methods of approaching a solution of the problem.

I.

CREATION OF ADDITIONAL DEPARTMENTS OF THE SUPREME COURT, OR INCREASE OF NUMBER OF JUDGES IN THE PRESENT DEPARTMENTS

The Constitution of the state of Washington¹ provides in part "The legislature may increase the number of judges from time to time, and may provide for separate departments of said court." The court is at present divided into two departments.²

¹ Art. IV sec. 2.

² Rem. Comp. Stat., sec. 8.

It seems quite plain from the reading of the foregoing constitutional provision that without any constitutional amendment the legislature may increase the number of judges and departments of the Supreme Court at will in order to dispatch the judicial business of the state.

There appears to be nothing in the constitution that would prevent the legislature from creating any number of departments and locating the departments either in Olympia or in various parts of the state, with a court *en banc* sitting at Olympia to hear cases and also to pass on departmental decisions on petition for hearing *en banc*. The constitution provides³ that "the sessions of the Supreme Court shall be held at the seat of the government *until otherwise provided by law.*" All departmental decisions would have the finality at present attaching to departmental decisions of the court, subject to review *en banc*.

One advantage of this plan over the creation of an intermediate appellate court appears to be that there would be no necessity of working out a division of jurisdiction between the Supreme Court and an intermediate court, each department would have all of the jurisdiction of the Supreme Court, subject to review *en banc*. This plan would appear to incorporate a number of the advantages of an intermediate court without the special creation of one. It would make for simplicity in that there would be but one appellate jurisdiction, without raising any of the troublesome questions that have arisen in states having intermediate courts with respect to what cases go to which court. It would also make for expedition inasmuch as petitions for hearing *en banc* could be acted on with almost the same facility as now. New briefs and some of the other formalities incident to a transfer from an intermediate appellate court to a higher court would not necessarily be required. This plan would appear to offer no greater problem in keeping the law of the state harmonious than exists in states having intermediate appellate courts. As a matter of fact, just as is now the case, greater weight would probably be given to departmental decisions than is usually given to the decisions of an intermediate court.

As the departments and personnel of the court and the volume of litigation increased, perhaps a permanent court *en banc* might be instituted devoting its time only to petitions for hearing *en banc* and hearings *en banc*, or it might be so constituted as to bring the case up for review before nine men who had not heard the case in

³ Art. IV sec. 3.

department. To give even greater finality to departmental decisions the court *en banc* might adopt the policy of according conclusiveness to departmental decisions on questions of fact (which is at present substantially the case) and of reviewing them only where there is an apparent conflict between departmental decisions, or between a departmental decision and a decision *en banc*, or where there is an important federal or state constitutional question involved, somewhat similar to the announced policy of the Supreme Court of the United States with respect to the granting writs of certiorari.⁴

At the present time, if another department of four judges were added by the legislature, the work of each individual member of the court would presumably be reduced very considerably. The same result could be achieved by adding two judges to each of the existing departments, without increasing the number of departments.

An argument in favor of either of the methods mentioned in the foregoing paragraph is that they could be carried into effect by ordinary legislation. Moreover, as opposed to an intermediate appellate court there would be a direct route from the trial court to the Supreme Court without some of the delay owing to the existence of an intermediate appellate court.

On the other hand, either of these methods would provide for a greater number of judges on the highest court of this state than on any other American court, although some famous English cases have been heard by as many, or more, judges sitting together.

II.

THE CREATION OF COURT COMMISSIONERS

In a number of states relief has been provided for the appellate court through the medium of court commissioners. Statutes providing court commissioners are now in force in Kentucky,⁵ Minnesota,⁶ Missouri,⁷ and South Dakota.⁸

There have also been court commissioner acts in California, Colorado, Kansas, Mississippi, Nebraska and some other states. These acts were repealed when additional judges were added to the respective supreme courts or intermediate appellate courts created.

The court commissioner plan has usually been employed in states

⁴ Rule 38 (275 U. S. 624).

⁵ Carrolls Kentucky Stat. (4) Sec. 962 (b) Laws Ky. 1924, Chap. 20.

⁶ MINN. CONST., Art. VI, sec. 2. Mason's Minn. Stat. 1927, sec. 135-137.

⁷ Rev. Stat. Mo. 1919, secs. 2398-2405.

⁸ Laws South Dakota, 1925, Chap. 289.

where the constitution, unlike that in Washington, limits the number of judges of the Supreme Court to a fixed number, usually five or seven. In the states mentioned the legislature has authorized the judges of the Supreme Court to appoint court commissioners who shall have the same qualifications and standing as judges of the Supreme Court, shall draw the same salary, and shall perform such functions as the court may designate.

The Supreme Court commissioner plan has manifested itself in two forms (1) a commission of usually three members who sit as a separate body, hearing cases, formulating opinions and then submitting them to the Supreme Court for vote and approval.⁹ (2) One or more commissioners who sit with the judges, write opinions, discuss the cases, but do not cast a vote. Their opinions are submitted to the regular members of the court for approval. Both plans have been held constitutional,¹⁰ but the latter is more prevalent at present, and is not open to the objection that has been made to the former, viz., that the court does not itself hear the arguments.

Supreme Court commissioner statutes have been almost uniformly held constitutional.¹¹ There appears to be nothing peculiar in the constitution of the state of Washington that would take such legislation without the purview of the cases upholding such laws.¹²

The validity of a Supreme Court commissioner act depends on the appointment of the commissioners by the Supreme Court, instead of by the governor or legislature, because the court must have the power to appoint and control its own assistants, whether masters in chancery, receivers, or commissioners.¹³

⁹ See *In re Supreme Court Commissioners*, 37 Neb. 655, 56 N. W. 298 (1893) *McKenzie v. Withers*, 109 Tex. 255, 206 S. W. 503 (1918)

¹⁰ See note 11.

¹¹ *People v. Hayne*, 83 Cal. 111, 23 Pac. 1, 17 A. S. R. 211, 7 L. R. A. 348 (1890) (leading case) *In re Supreme Court Commr's.*, 100 Neb. 426, 160 N. W. 737 (1916) *In re Supreme Court Commr's.*, Note 9, *supra*, *Jackson v. State* (Tex.) 280 S. W. 202 (1925) See also: *Butler v. Cage*, 138 U. S. 52, 34 L. ed. 869 (1891) *Bullock v. McGerr* 14 Colo. 577, 23 Pac. 980 (1890) See also cases cited in *San Antonio & A. P. Ry Co. v. Blair* (Tex. 1917) 196 S. W. 1153 at p. 1185.

¹² True, article IV sec. 23 provides that the judges of the superior court may appoint court commissioners. But any argument that the grant of the right to the superior judges, and the silence of the constitution as to any such power in the supreme court judges, must be construed as an implied denial of such power to the latter, does not seem to have much force. The identical provision existed in the California Constitution of 1879 at the time *People v. Hayne*, note 11, *supra*, was decided, although not adverted to in the decision.

¹³ *People v. Hayne*, note 11, *supra*, *In re Supreme Court Commr's.*, 100 Neb. 426, 160 N. W. 737 *supra*.

State v. Noble,¹⁴ which is apparently the only case that has passed adversely on the validity of a Supreme Court commissioner statute, does so primarily because the power of appointing the commissioners was vested in the legislature instead of the court. This distinction is ably pointed out in *People v. Hayne*.¹⁵

In *State v. Noble*,¹⁶ the court said.

“Neither the executive nor the legislative can select persons to assist the courts in the performance of their judicial duties. Grant—and this cannot be granted, save for mere argument’s sake—that it is true that the act before us contemplated that the commissioners shall be mere assistants of the court, occupying, as is so earnestly and at so much length insisted, positions analagous to those of master commissioners or masters in chancery, and it must follow that such assistants shall be selected by the court, and that neither the governor nor the legislature can choose them for the court. From this conclusion there is no escape, save by a denial of the independence of the judiciary and the overthrow of the fundamental principle that the whole judicial power of the commonwealth is in the courts. A department without the power to select those to whom it must intrust part of its essential duties cannot be independent.”

And *In re Supreme Court Commr’s*,¹⁷ the court said

“The work of the commission has justified the selection made. That portion of the act which attempts to confine the right to appoint to nominees of the governor is clearly void. Neither the legislature nor the governor has the right to dictate whom the court shall appoint as its referees or assistants. The court might as well assume to appoint the chief clerk or sergeant-at-arms of each house of the legislature. The court, the legislature, and the executive are coordinate branches of the state government, and under the constitution neither can exercise powers conferred by the people upon the other.”

The function of commissioners and the status of their opinions have frequently received judicial consideration.¹⁸ In general, the

¹⁴ 118 Ind. 350, 21 N. E. 244 (1889).

¹⁵ See note 11, *supra*.

¹⁶ See note 14, *supra*.

¹⁷ See note 11, *supra*.

¹⁸ *Heydrick v. Dickey*, 155 Ky. 222, 159 S. W. 666 (1913) *Young’s Executor v. Toliver’s adm’r.* (Ky.) 284 S. W. 389 (1926) *Lancaster Co. v. McDonald*, 73 Neb. 453, 103 N. W. 78 (1905) *Randall v. Minneapolis Nat.*

effect of the decisions is to place commissioners and their opinions on a parity with judges and their opinions, excepting only that commissioners do not cast a vote.

III.

THE CREATION OF AN INTERMEDIATE APPELLATE COURT

The creation of an intermediate appellate court has been the plan most widely employed to relieve the pressure on the highest appellate court and to enable it to devote its time largely to important cases. The wide favor of this plan is shown by its use in the following jurisdictions. England,¹⁹ United States,²⁰ Alabama,²¹ California,²² Colorado,²³ Georgia,²⁴ Illinois,²⁵ Indiana,²⁶ Kansas,²⁷ Louis-

Bldg., etc., Union, 43 Neb. 876, 62 N. W. 252 (1895) *Williams v. Miles*, 68 Neb. 463, 96 N. W. 151 (1903) *Modern Woodmen v. Coleman*, 68 Neb. 660, 96 N. W. 154 (1903) *State ex rel. Reynolds v. Jost*, 265 Mo. 51, 175 S. W. 591 (1915) *McKenzie v. Withers*, Note 9, *supra*, *United North & South Oil Co. v. Meredith*, (Tex. Civ. App.) 258 S. W. 550 (1923) *Texas Employers Ass'n. v. Jimeneg*, (Tex. Civ. App.), 267 S. W. 752 (1924) *City of Tyler v. Texas Employer's Ins. Ass'n* (Tex. Com. of App.), 294 S. W. 195 (1927) *Hager v. Stokes*, (Tex.) 294 S. W. 835 (1927)

¹⁹ Court of Appeal of nine judges, usually sitting in divisions of three each, (to which additional judges may be called from the trial divisions at the request of the Lord Chancellor), inferior to the House of Lords, 36 and 37 Vict. (1873) Chap. 66, 38 and 39 Vict. (1875) Chap. 77 Court of Criminal Appeal of nine judges, inferior to the House of Lords, 7 Edw 7, (1907) Chap. 23.

²⁰ Nine circuit courts of appeal with three judges each, inferior to the Supreme Court of the United States with nine judges. U. S. CONST. Art. III, sec. 1. Circuit Court of Appeals, U. S. Code, Title 28, sec. 211.

²¹ One court of appeals with three judges, inferior to a supreme court of seven judges, CONST. Art. VI. sec. 1, Act of March 9, 1911, p. 95, Code of Alabama 1923, sec. 7308.

²² Three district courts of appeal, with a total of five divisions of three judges each, inferior to a supreme court of seven judges, CONSTITUTION, Art. VI, sec. 1, Amendment adopted Nov. 3, 1904, Amendment adopted Nov. 15, 1913, Amendment adopted Nov. 4, 1924, Art. VI, sec. 4, Amendment adopted Nov. 6, 1928, printed in California Session Laws of 1921 at p. 2386.

²³ Colorado Court of Appeals abolished 1905, and reestablished in 1911 for a period of four years as method of temporary relief.

²⁴ A court of appeals, with two divisions of three judges each, inferior to a supreme court of six judges, CONSTITUTION, Art. VI, Sec. 1, and Sec. 2, paragraph 9. Georgia Code, 1926, sec. 6506, 6218-1.

²⁵ An appellate court with six divisions of three judges each, inferior to a supreme court of seven judges. CONSTITUTION, Art. VI, Sec. 11, L. 1877, p. 69 Cahill's R. S. of Ill. 1925, Chap. 37, par. 33, L. 1879, p. 222 Cahill's R. S. of Ill. 1925, Chap. 110, par. 113.

²⁶ An appellate court with two divisions of three judges each, inferior to a supreme court of five judges. CONSTITUTION, Art. 7, Sec. 1, Acts 1901, p. 565, Burns Ann. Statutes of Ind. 1926, sec. 1343-73

²⁷ Kansas Court of Appeals abolished 1901.

iana,²⁸ Missouri,²⁹ New York,³⁰ Ohio,³¹ Oklahoma,³² Tennessee,³³ Texas.³⁴

Generally speaking, intermediate appellate courts may be said to fall into four classes. (1) those in which the jurisdiction of the court depends, in civil matters, upon the amount involved, and, in criminal matters, upon the amount of punishment for the offense, all other litigation being routed direct to the highest appellate court, (2) those in which the jurisdiction of the intermediate appellate court depends upon the subject matter involved, all other litigation concerning other subject matter being routed direct to the highest appellate court, (3) those in which all, or substantially all litigation, regardless of the amount or subject matter, is absorbed by the intermediate appellate court, with some prescribed method of reviewing its decisions by the highest appellate court, and (4) those in which, as in England, Oklahoma and Texas, a separate court of appeal is provided for criminal cases. Virtually all intermediate court provisions allow some kind of review by the highest appellate court, usually discretionary review.

In a number of jurisdictions where intermediate appellate courts exist, they have been expressly created by constitutional provision, in others by statute under constitutional provisions which have au-

²⁸ A court of appeals with three divisions of three judges each, inferior to a supreme court of seven judges. CONSTITUTION 1898, secs. 84 and 98, et seq.

²⁹ Court of appeals with three divisions of three judges each and a total of four courts of Appeals Commissioners, inferior to a supreme court of seven judges and six supreme court commissioners. CONSTITUTION, (1875) Art. VI, Sec. 1 and Amendment of 1884, Revised Statutes Missouri 1919, Section 2418.

³⁰ Appellate division of the supreme court, with four departments of seven judges each, inferior to a court of appeals of seven judges. CONSTITUTION, Art. VI, Sec. 2, 9, Cahill's Consolidated Laws of New York 1923, Chapter 31, Sec. 70.

³¹ Court of Appeals with nine divisions of three judges each, inferior to a supreme court of seven judges. CONSTITUTION 1851, Article VI, Sec. 6 as amended September 3, 1912; Throckmorton's Ohio Gen. Code 1926, Sec. 12223 et seq.

³² Court of Criminal Appeals of three judges with exclusive and final jurisdiction in criminal cases, and a supreme court of nine judges. Oklahoma CONSTITUTION, Article VII, Sec. 2. Compiled Oklahoma Statutes, 1921, Sec. 3037, et seq.

³³ Court of Appeals with three divisions of three judges each, inferior to a supreme court of five judges. CONSTITUTION, Article VI, Sec. 1, Shannon's Annotated Code of Tennessee (1918) Sec. 6321.

³⁴ Court of Civil Appeals with eleven divisions of three judges each, a court of criminal appeals of five judges, inferior to a supreme court of three judges assisted by a commission of appeals of six judges. CONSTITUTION, Article V Section 1. Rev. Civil Stats. of Texas 1925, p. 506.

thorized, or been construed to authorize the creation of such inferior appellate courts by ordinary legislation.³⁵

IV

RAISING THE JURISDICTIONAL AMOUNT

Actually raising the jurisdictional amount as it is written into the state constitution,³⁶ would, it seems plain, require a constitutional amendment.

V

CHANGING THE MODE OF REVIEW WITHOUT RAISING THE JURISDICTIONAL AMOUNT

But it does not follow that simply because a constitutional amendment is required to change the jurisdictional amount as such, considerable relief may not be obtained with respect to the amount involved, under the present constitutional provision, by changing the manner in which the appellate jurisdiction is exercised.

It has long since been held that the constitutional provision conferring "appellate jurisdiction" is not self-executing.³⁷

In *Western American Co. v. St. Ann Co.*,³⁸ the court said

"It belongs clearly to that class of powers, of which there are many in the constitution, which are dormant and inoperative until vitality and vigor are imparted to them by action of the legislative department of the government. "It is our opinion that, at least in the absence of a prescribed method of appeal, designated either by the

³⁵ An individual examination has been made of the constitutions and laws of each of the American jurisdictions that now have, or have had, intermediate appellate courts to ascertain the exact manner in which the intermediate court was created, whether by constitutional provision, or ordinary statute, and a separate brief on that subject has been filed with the Judicial Council of the State of Washington with a view to furnishing material for determining whether an intermediate appellate court can be created in the State of Washington by ordinary legislation. Although a not unfavorable argument for the legislative creation of an intermediate appellate court results from that study the Judicial Council has determined that it is more expedient at this time to recommend a constitutional amendment creating an intermediate appellate court. Second Report of Judicial Council of the State of Washington, January, 1929, p. 11. Should the occasion and necessity arise, the Washington Law Review will at some later time print the argument in favor of the legislative creation of an intermediate appellate court in the State of Washington.

³⁶ Art. IV sec. 4.

³⁷ *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158 (1900)

³⁸ See note 37, *supra*.

legislature or by the rules of this court, an appeal cannot be entertained. The wisdom or unwisdom of not providing for an appeal in cases of this character is a matter which is submitted to the discretion of the legislature."³⁹

And in *Cornell University v. Denny Hotel Co.*,⁴⁰ the court said.

"No attempt has been made to comply with this statute, and we are not at liberty to disregard its requirements. Cases can be brought to this court only in the manner pointed out by the statute, and the method of procedure there provided is to the exclusion of all others."

And in *Munson v. Mudgett*,⁴¹ the court said (pp. 663-664)

"We think we are without jurisdiction to entertain the case. The statute does not authorize superior courts to certify questions to this court for decision. The territorial statute permitted it, and *Murry v. Fay*, 2 Wash. 552 (26 Pac. 533), decided April 29, 1891, came to this court so certified, but the act of March 8, 1893, prescribed the manner in which cases may be brought to this court for review, and sec. 38 of that act (Laws 1893, p. 135) declared that the mode so provided 'shall be exclusive and shall supersede all other methods heretofore provided.' It follows that the order of the court below certifying the questions to this court for decision is ineffectual for the purpose of conferring jurisdiction."

It is plain from the foregoing authorities that the manner in which the appellate jurisdiction of the Supreme Court shall be exercised may be changed at will by the legislature, at least so long as the *power* to review is not interfered with.

That the words "appellate jurisdiction" are used in American constitutions merely in opposition to the words "original jurisdiction," and include more than the mere remedy by what is technically known as an "appeal" is well settled by authority "Appellate jurisdiction" includes all modes of review of the decisions of inferior tribunals, whether by appeal, writ of error, certiorari, or other form of review.

In *Marbury vs. Madison*,⁴² Chief Justice Marshall said.

"It has been stated at the bar that the appellate juris-

³⁹ 22 Wash. 158, 162, 164.

⁴⁰ 15 Wash. 433, 438, 46 Pac. 647 (1896).

⁴¹ 14 Wash. 662, 45 Pac. 306 (1896). And see *State ex rel Young v. Superior Court*, 43 Wash. 34, 85 Pac. 989 (1906)

⁴² 1 Crauch 137, 175, 2 L. ed. 60 (1803).

diction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. *This is true.* ”

In *In re Burnette*,⁴³ the court said

“Appellate jurisdiction is the power to take cognizance of and review proceedings had in an inferior court, irrespective of the manner in which they are brought up, whether by appeal or by writ of error. The constitution confers on circuit courts appellate jurisdiction, and it is confined to the limits there defined. Whether exercised by a writ of error, certiorari, or appeal, as may be provided by statute, it is still appellate, and its office is to review the proceedings of the inferior tribunal and to decide the law of the case as presented by the record legitimately brought up by the appeal.”

In *Ex parte Evans*,⁴⁴ it is said

“Judge Story, in his Commentaries on the Constitution (Vol. 3, p. 626) says. ‘The essential of appellate jurisdiction is that it reviews and corrects the proceedings in a case already instituted, and does not create that cause in reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been instituted in and acted upon by some other court whose judgment or proceedings are to be reviewed. *This appellate jurisdiction may be exercised in a variety of forms, and, indeed, in any form which the legislature may choose to prescribe.* ”

In *Tierney v. Dodge*,⁴⁵ it was held that a statute denying the right of appeal, so long as it does not deny review by certiorari, is not in conflict with the constitutional provision giving the Supreme Court “appellate jurisdiction.”⁴⁶

The Supreme Court of the United States issues writs of certiorari as a means of exercising “appellate jurisdiction.”

And this view that a writ of certiorari is merely one method of exercising the “appellate jurisdiction” granted by the constitution, has been accepted by the Supreme Court of the state of Washington.

⁴³ 73 Kan. 609, 85 Pac. 575, 579 (1906)

⁴⁴ 72 S. C. 547, 52 S. E. 419, 420 (1905).

⁴⁵ 9 Minn. 166 (Gil. 153) (1864).

⁴⁶ For many similar definitions of the word “appellate jurisdiction” see Words and Phrases, “Appellate Jurisdiction”

In *State ex rel Simpson v. Smith*,⁴⁷ this court said.

“It is an independent proceeding and, since the amount involved does not exceed \$200, this court is without jurisdiction to review the order in virtue of the limitation contained in sec. 4, art. 4, of the constitution. It is no answer to say that the limitation in the constitution is upon the appellate jurisdiction of the court, while this is an application for a writ of review. *In cases of this sort, a writ of review is only another form of appeal, and a limitation upon the one is equally a limitation upon the other*” [Citing cases.]

That this interpretation is correct is emphasized by the constitution itself which grants the Supreme Court “power to issue writs of review and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction.”⁴⁸ The issuance of a writ of certiorari is simply a part of the “complete” exercise of “appellate and revisory jurisdiction.”

Since “jurisdiction” is merely the *power* to hear and determine and not the duty to hear and determine,⁴⁹ any method which preserves to the Supreme Court its *power* to review without imposing the *duty* to review is entirely consistent with Article IV, sec. 4 of the constitution giving the Supreme Court “appellate jurisdiction” in all cases where the amount in controversy exceeds the sum of two hundred dollars.

This conclusion is likewise supported by the cases upholding the legislative creation of intermediate appellate courts on the theory that the “appellate jurisdiction” of the Supreme Court is not interfered with if some kind of appellate review over all the decisions of an intermediate appellate court is preserved to the Supreme Court.⁵⁰

These premises having been established, viz. (1) that the constitutional provision granting “appellate jurisdiction” is not self-

⁴⁷ 102 Wash. 574, 577, 173 Pac. 428 (1918).

⁴⁸ Art. IV, Sec. 4.

⁴⁹ *Bayer v. Bayer*, 83 Wash. 430, 436, 145 Pac. 433 (1915) *State ex rel. Otteson v. Claisen*, 124 Wash. 389, 214 Pac. 635 (1923) *State ex rel. Goodwin v. Savidge*, 133 Wash. 532, 245 Pac. 1 (1925).

⁵⁰ *Memphis St. Ry. Co. v. Byrne*, 119 Tenn. 278, 104 S. W. 460 (1907) *McElwee v. McElwee*, 97 Tenn. 649, 37 S. W. 560 (1896) *In re Court of Appeals*, 15 Colo. 578, 26 Pac. 214 (1891) *People v. Richmond*, 16 Colo. 274, 26 Pac. 929 (1891) *People v. Scott*, 52 Colo. 59, 120 Pac. 126 (1911) *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98 (1892) *Ex parte France*, 176 Ind. 72, 95 N. E. 515 (1911) *Curless v. Watson*, 180 Ind. 86, 102 N. E. 497 (1913).

executing and that therefore the legislature has complete control over the methods of review, and (2) that any method of review, mandatory or discretionary, which preserves to the Supreme Court the "power" to decide is consistent with the constitution, the conclusion seems close at hand, namely, that there is nothing in the constitution to prevent the legislature from destroying a technical "appeal" as a matter of right *in all civil cases*, and substituting therefor *discretionary review*. The Congress of the United States has done this in virtually all cases falling within the jurisdiction of the Supreme Court of the United States under a constitutional provision using the words "appellate jurisdiction" just like ours. So long as the *power* to review is preserved, the constitution is satisfied. Except in criminal cases, in which the state constitution⁵¹ grants "the right to appeal in all cases," it is not necessary that the *litigant* have the opportunity to appeal *as a matter of right*, it is merely necessary that the *court* have the *power to review* as a matter of right, if it chooses to exercise it. The constitution grants to the court the absolute power to review, but not to the litigant the absolute right of appeal, except in criminal cases.

It is, of course, well settled that a right of appeal is not essential to due process of law at all. It is purely a matter of grace, and exists for the litigant as a matter of right only when it is given as a matter of right.⁵²

If it is true that Article IV, sec. 4 of the state constitution would be satisfied if the legislature chose to make *all review* in civil cases discretionary with the court, it must follow that the legislature can give the litigant an appeal as a matter of right in some cases, and can make review discretionary with the court in other cases. As a matter of fact, thus it has already done in the certiorari statute⁵³ in allowing certiorari where there is no appeal or the remedy by appeal is not adequate.

Hence, while raising the jurisdictional amount of which the Supreme Court has "appellate jurisdiction" would require a constitutional amendment, there appears to be nothing in the constitution to prevent the legislature from destroying the absolute right of appeal in civil cases at law, let us say, involving less than two thousand dollars (\$2,000.00) and providing that in cases between

⁵¹ Art. I, Sec. 22.

⁵² *Reetz v. Michigan*. 188 U. S. 505, 47 L. ed. 563 (1903) *Luckenbach S. Co. v. U. S.*, 272 U. S. 533, 71 L. ed. 394 (1926), *Standard Oil Co. v. Missouri*. 224 U. S. 270, 56 L. ed. 760 (1912)

⁵³ Rem. Comp. Stat. sec. 1002.

two hundred and two thousand dollars the litigant shall not have an appeal as a matter of right, but should be required to petition the Supreme Court for review upon a showing of merit, and let that court decide whether it is a case in which justice requires that it exercise its "appellate jurisdiction." The same might be done with certain classes of equity cases, such as chattel mortgage or mechanics' lien foreclosures, where the amount is small, the law quite well settled, and the controversy from a public point of view relatively unimportant. If the court decided that the application for review is without merit, it could deny the application with a mere memorandum as does the United States Supreme Court. If the court decided to review the case it could grant the application and decide it with full opinion as upon technical appeals.

In this connection it is submitted that only in the event the court concludes to take jurisdiction of the case and grant the application would a full written opinion be necessary under Article IV, sec. 2 of the state constitution, because it is only where the court concludes to *hear and decide* the case that it is engaged "in the determination of causes." In passing on an application for review it is not "determining the cause"—it is merely determining whether it shall exercise "appellate jurisdiction" for the purpose of *thereafter* "determining the cause."⁵⁴

So far it has been assumed, since Article IV, sec. 4 as to "appellate jurisdiction" is not self-executing, that the power to regulate the manner in which the appellate jurisdiction of the Supreme Court may be invoked is within the control of the legislature. This court has so held, although in the absence of legislation it has suggested that it might perhaps be done by "rules of court."⁵⁵ But the legislature by the rule-making act,⁵⁶ which is valid,⁵⁷ has given to the Supreme Court "the power generally to regulate and prescribe by rule the forms for and the kind and character of the entire practice and procedure to be used in all appeals and proceedings of whatever nature by the Supreme Court. "

⁵⁴ See *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251, 60 L. ed. 629 (1916) *United States v. Carver* 260 U. S. 482, 67 L. ed. 361 (1923). These cases hold that the denial of an application for *certiorari* is not an affirmance of the judgment or an expression as to the merits of the case.

⁵⁵ See note 37, *supra*.

⁵⁶ Laws of 1925 Ex. Sess. Chap., 118.

⁵⁷ *Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1, 267 Pac. 770 (1928).

Accordingly it would seem that there is now nothing to prevent the Supreme Court in the exercise of its rule-making power to destroy appeals as a matter of right in all or certain classes of civil cases and to substitute therefor a discretionary form of review.

ALFRED J SCHWEPPE*

*Dean of the Law School, University of Washington.