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Relying upon his years of experience as a Judge of Ohio's highest court, Judge Herbert delineates the evolution of the supreme court's certification procedure and advocates the promulgation of guidelines to assist members of the bar in determining whether a case is one of "public or great general interest." The author demonstrates that such guidelines would also be beneficial to the court, because they would reduce the number of motions which do not merit certification but which must nevertheless be considered.

"WHY WAS MY MOTION to certify the record overruled by the supreme court?" Or, despairingly, "What is the meaning of 'public or great general interest'?"[1] Or "What do you have to do to get into the supreme court?" These and similar questions have been asked by thousands of lawyers since 1912 when the Fourth Constitutional Convention of Ohio drafted, and the people adopted, certain amendments to the Ohio Constitution.

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When the delegates to the Convention assembled, Ohio was in a period of transition from a predominately agricultural economy to an industrial era. The Convention realized that its ultimate task was the preparation and recommendation of amendments to the constitution to fashion a judicial structure which would be able to meet the challenge of changing times.

Prior to the Convention, litigants appealed from the old circuit court to the supreme court as a matter of right and without resorting

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[1] The Ohio Constitution provides, *inter alia*:

> [J]udgments of the courts of appeals shall be final in all cases, except cases involving questions arising under the constitution of the United States or of this state, cases of felony, cases of which it has original jurisdiction, and *cases of public or great general interest* in which the supreme court may direct any court of appeals to certify its record to the court. OHIO CONST. art. IV, § 6. (Emphasis added.)

to a motion to certify or for leave to appeal. Consequently, the court's docket was far in arrears, and the problem was growing steadily more serious.

Judge Peck[2] was the chairman of the Convention committee which drafted and presented pertinent amendments to the constitution. Speaking to the delegates of the Convention,[3] he defined the essential requirements of a motion to certify:

> The words "In cases of public or great general interest," have been partially construed, *and what the committee means is cases of "public interest" in which the public is interested — state, county or city, some public body* — or of "great general interest," cases which involve questions *affecting a good many people and that have aroused general interest.*[4]

Thus, two distinct classes of cases were recognized: (1) those of public interest, and (2) those of great general interest.

Webster's Third New International Dictionary recognizes the meaning of the word "public" as used by the delegates. The term is there defined as "relating to, or affecting the people as an organized community . . . [as used in the phrase, public] authority exists primarily to regulate . . . social and economic life . . . [or as] authorized or administered by or acting for the people as a political entity . . . ."[5] It follows without doubt that the Convention intended the word "public" to be confined solely to governmental bodies, boards, and commissions.

Judge Peck referred to the second class as "cases . . . of great general interest, cases which involve questions affecting *a good many people and that have aroused general interest.*"[6] However, he made a significant distinction between the procedure proposed in the amendment and the practice followed in the Supreme Court of the United States when he said to the Convention:

> The supreme court of the United States under the federal act has a right to direct *any case* that is pending in one of the lower courts to be certified up to it by a writ of certiorari, *but we do not open the doors so widely. We confine it to cases of public or great general interest.*[7]

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[2] Grandfather of the Honorable John W. Peck of the United States Circuit Court of Appeals, Sixth Judicial District.

[3] PROCEEDINGS AND DEBATES OF THE OHIO CONSTITUTIONAL CONVENTION (1912-13) (two volumes) [hereinafter cited as DEBATES].

[4] 1 DEBATES 1030. (Emphasis added.)

[5] WEBSTER, THIRD NEW INTERNATIONAL DICTIONARY (1961 ed.). (Emphasis added.)

[6] 1 DEBATES 1030. (Emphasis added.)

[7] *Ibid.*

The proceedings and debates of the Constitutional Convention make it clear that the delegates understood the meaning of the phrase "public or great general interest." The people apparently understood it when they adopted the amendment. Lawyers could and would make the amendment far more effective if the supreme court provided rules defining its meaning. With such rules lawyers would be in a position to advise their clients that a motion to certify in certain cases would be in vain and that in other cases it would probably be successful.

It is my opinion, based upon the experience of passing upon hundreds of such motions each year, that if the letter and spirit of the Ohio Constitution and the intent of its authors and adopters were expressed in clear-cut rules governing motions to certify, sixty to seventy percent of the motions to certify now being filed would never have been prepared.

In the circuit court (the immediate predecessor of our present court of appeals), a losing litigant was permitted to appeal as a matter of right to the supreme court without its leave being first obtained. This caused an appalling jam of cases on the court's docket, a condition which demanded relief. The old circuit court was abolished, and our present court of appeals was created. It was plain to observe that a procedure was required which would bring much of the litigation then burdening the supreme court to final disposition in the new court of appeals. The Convention concluded that "one trial, one review" was sufficient to satisfy the ordinary demands of justice.

In the course of the debates, Judge Peck said that "the essential thing in this bill is the proposition to make what is now the circuit court *a court of last resort* for the great bulk of litigation. *That is the important point.* That is the reform which I regard as essential and of great importance to the people of this state."[8] Another delegate predicted that the proposition would "give you as many supreme courts or courts of last resort as you have courts of appeals in the state."[9] It might be well to observe that under the proposed reforms the provision for certification of conflicting decisions among

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[8] 2 *id.* at 1125. (Emphasis added.)

[9] *Id.* at 1124. Another delegate observed:

> I believe that this proposal that Judge Peck and this committee have considered and now present to this body will be the means . . . of bringing the supreme court down to the people's door, and then the people will have their rights adjudicated at home and in that way the rights of the people will be subserved better than they are now subserved. *Id.* at 1105.

the courts of appeals would, in time, bring about a uniformity of opinion among those courts.

The Convention devised a definite plan of procedure which it followed. The delegates understood the meaning, purpose, and intent of the amendments proposed to the people and the relation of each to the whole. The transcript of the "Proceedings and Debates" of the Convention provides voluminous source records. The people were provided with a printed "explanation" of each amendment prior to the election, and a vigorous campaign between proponents and opponents of the various issues furnished further information to the electorate. The "Proceedings and Debates" of the Convention also furnish excellent material for use in applying the principles of constitutional interpretation as laid down in the first paragraph of the syllabus in *Castleberry v. Evatt*,[10] where the supreme court stated that "in the interpretation of an amendment to the Constitution the object of the people in adopting it should be given effect; *the polestar* in the construction of constitutional as well as legislative, provisions is the intention of the makers and adopters thereof."[11]

The recent report of the Committee of the Ohio State Bar Association on Judicial Administration and Legal Reform[12] contains the following excellent statement of the theory of the Convention:

> The theory adopted was that the Supreme Court should hear, not more, but fewer cases. The court was to sit not primarily to decide controversies between parties, *but to devote its attention to the general supervision of the development of a coherent, uniform and consistent system of law.*[13]

Article IV, section 2 of the Ohio Constitution, adopted September 3, 1912, defined the structure, jurisdiction, and duties of the supreme court. This section was again amended in 1944. In this later amendment, the jurisdiction of the supreme court to review judgments of the courts of appeals was subjected to a specific limitation by language identical to that found in the 1912 amendment: "In cases of public or great general interest the supreme court *may* . . . direct any court of appeals to certify its record to the supreme court . . . and may review, and affirm, modify or reverse the judgment of the court of appeals."[14]

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[10] 147 Ohio St. 30, 67 N.E.2d 861 (1946).

[11] *Ibid.* (Emphasis added.)

[12] The report was issued February 24, 1964.

[13] *Id.* at 5. (Emphasis added.)

[14] OHIO CONST. art. IV, § 2. (Emphasis added.)

The supreme court has failed to provide any rules or guidelines to assist the lawyer in determining whether his case merits certification. However, in a per curiam opinion the court in *Williamson v. Rubich*[15] did observe that "whether the question or questions argued are in fact ones of public or great general interest rests within the discretion of the court."[16] Perhaps a lawyer should gaze into a crystal ball to devise a method to secure four votes in the court that reflect discretion favorable to him. Presently he cannot, with any degree of certainty, intelligently advise his client whether to seek a review of his case by the supreme court, with all of the attendant expense and effort, or to accept the judgment of the court of appeals as final.

In 1962, there were filed 437 motions to certify the record and for leave to appeal; in 1963, 468 such motions; in 1964, 480; in 1965, 472; and in the current year there will be approximately 500 such filings. The court allows from fifteen to twenty percent of these motions, or from 85 to 100; 400 to 415 are overruled. Substantial sums of clients' money and countless hours of time, energy, and effort are expended in vain by lawyers upon motions that are denied. The growing burden upon the court is becoming an ominous challenge to the administration of justice, and the fashioning of a more logical method for the disposition of these motions is imperative.

Mr. Fred J. Heim, of the Youngstown Bar, became so disturbed by the confusion arising from the disposition of motions to certify that he published an article,[17] in which he wrote:

> There is no reported case, and no sentence in any reported decision, which even attempts to define these words, or indicate their scope or their limitations. I have not only read these decisions, but I have attempted to determine from an examination of the cases thus reviewed what the rule is. I must confess that as far as I am able to determine, there is none. One case will be reviewed and another case with apparently similar questions will not. I have also inquired from other lawyers what their opinion is as to what cases will be certified for review, and I have found no one who pretends to know more about that subject than I do, and I have always admitted that I knew absolutely nothing about it. The consensus of opinion seems to be, as far as I have been able to determine, that the Supreme Court simply reviews those cases which it desires to and refuses to review all others. I do not say that this

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[15] 171 Ohio St. 253, 168 N.E.2d 876 (1960).

[16] *Id.* at 254, 168 N.E.2d at 877.

[17] *When Does the Supreme Court Require the Courts of Appeals To Certify Their Records for Review?*, 16 OHIO L. REP. 405 (1918).

> is the rule which the Supreme Court follows, but I must say that as far as I am able to determine, it seems to be. . . .
>
> This, in my judgment, is a deplorable situation.[18]

Manifestly with some feeling, he continued:

> The Supreme Court has had hundreds of cases before it where this very question was involved and in which it had an opportunity of indicating the proper scope and meaning of these words. It is safe to say that if the rules governing the court in these many cases had been declared and reported, *the bar of the state could now determine for itself, in at least a great majority of cases from such rules alone, whether or not a given case could be thus reviewed.* As matters now stand, however, neither the bar nor the people of the state have learned a solitary thing upon this subject since the amendment was adopted.[19]

Another approach was revealed in an address by the late Chief Justice Carrington T. Marshall, whose subject was "How to Get Into the Supreme Court."[20] Intentionally or otherwise, the late Chief Justice did not comment upon the meaning of the phrase "public or great general interest" in his address. However, at the conclusion of his remarks he stated that he would be very glad to answer any questions that he could. The first question posed was as follows:

> Q. Mr. Chairman, what is a question of public and great general interest?
>
> A. I will have to answer that in this way. The Supreme Court of Ohio, like supreme courts of, I think, twelve other states which have similar provisions, and like the Supreme Court of the United States, has never placed any limitations on that.[21]

Continuing his answer, he said:

> I don't know whether all the members of our court would agree to what I am about to say, but I believe most of them would, that if there is a case of real error, a legal proposition which, if not disturbed, where we think the Court of Appeals has probably rendered an erroneous ruling, *whether it is very important or not*, I think the court would correct it by letting in the case. I think you are always tolerably safe, if you can convince the court there is error, that you will get your motion allowed.[22]

The supreme court, in *City of Akron v. Roth*,[23] accorded some

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[18] *Id.* at 406-07.

[19] *Id.* at 407-08. (Emphasis added.)

[20] Marshall, *How To Get Into the Supreme Court and What To Do When You Get There* (pts. 1-2), J. Cleve. B. Ass'n, Feb. 1929, p. 10; March 1929, p. 11.

[21] *Id.* at March 1929, p. 13.

[22] *Id.* at 13-14. (Emphasis added.)

[23] 88 Ohio St. 456, 103 N.E. 465 (1913).

support to this statement in the third paragraph of the syllabus, where it was required that the motion to certify must show: "(a) that the case is of public or great general interest, and (b) that error has probably intervened . . . ."[24] However, in *Williamson v. Rubich*,[25] the court in its opinion said that "it follows, of course, that *the sole issue for determination at the hearing upon such motion* is whether the cause presents a *question or questions of public or great general interest* as distinguished from questions of interest primarily to the parties."[26]

The present Chief Justice of our court, Kingsley A. Taft, in the early days of his service as a judge of the court, wrote an article upon the subject of certification,[27] in which he said:

> Usually, the problem of getting your case into the Supreme Court will involve convincing the court that your case is "of public or great general interest."
>
> This raises the question as to what is a case of public or great general interest. Certainly, the opinions and decisions of the Supreme Court of Ohio *have not even hinted at an answer to that question.*
>
> Frankly, I am almost as much in the dark as to the answer to the question as before I became a member of the court.[28]

The solution to the problem of how best to eliminate the waste of money and time of both the supreme court and the lawyers before it in disposing of futile motions to certify lies in the promulgation of rules defining questions of "public or great general interest," as well as guidelines clearly setting out the purpose and meaning of the phrase "judgments of the courts of appeals shall be final in all cases except" as stated in article IV, section 6, of the Ohio Constitution.

Guidelines or rules of practice spelling out the function, scope, and purpose of motions to certify are essential if the intent of the

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[24] *Id.* at 457, 103 N.E. at 465.

[25] 171 Ohio St. 253, 168 N.E.2d 876 (1960).

[26] *Id.* at 254, 168 N.E.2d at 877. (Emphasis added.) The late Chief Justice of the Supreme Court of the United States, William Howard Taft, speaking for the Court in a unanimous opinion said:

> If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is *that it is very important that we be consistent in not granting the writ of certiorari except in causes involving principles the settlement of which is of importance to the public as distinguished from that of the parties* . . . . Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). (Emphasis added.)

[27] Taft, *How To Get Into the Supreme Court*, 26 OHIO B. 847 (1953).

[28] *Id.* at 848. (Emphasis added.)

makers and adopters of the amendments to the constitution is to be realized. If the appellate procedure provided in the constitution is conscientiously followed, the courts of appeals will rightfully assume a vastly more important responsibility than had been conferred upon the circuit courts prior to the Convention of 1912. More time and opportunity will be available to the members of the supreme court to direct their efforts to the solution of questions of vital importance affecting the welfare of the state and the people and to the creation of "a coherent, uniform and consistent system of law"[29] which will meet the challenge of an ever-expanding society.

[29] JUDICIAL ADMINISTRATION AND LEGAL REFORM COMMITTEE OF THE OHIO STATE BAR ASSOCIATION, MOTION TO CERTIFY PRACTICE 5 (Feb. 24, 1964).