REMARKS

Speech given by Charles W. Joiner at the Annual Luncheon of the Michigan Supreme Court Historical Society on May 11, 1995.

I am honored to be here, to have been invited by your distinguished President, Wallace Riley, a dear friend of mine, to "present a vignette of Michigan judicial history." I have read the presentations of my distinguished predecessors. What they have said seem s to me to make my task even more daunting.

I am not a gifted teller of stories, as is my former associate, John Reed. Nor have I ever been a member of this distinguished body of men and women, as Tom Brennan or John Fitzgerald. Nor have I, for over 20 years, since I was president of the State Bar of Michigan, and since I became a federal judge, been very close to the court, except to read and sometimes study carefully its opinions as would any careful lawyer or judge.

However, there was a time, when I was younger and had more energy, that the court and its place in the system of the administration of justice in this state, was one of my central interests, and with your permission, I would like first to talk with you about that time, and then later to make a few random observations about this great institution.

The Supreme Court of Michigan first came to my attention when I was a young practicing lawyer in Des Moines, Iowa. Among other things, I was involved with the trial of workers' compensation matters in all of the courts of Iowa, including the Workers' Compensation Commission, the general trial court called the district court, and the Supreme Court of Iowa. At that time, Michigan and Iowa, along with only a few other states, defined the event for which workers' compensation was awarded as an "injury arising out of and in the course of employment." Most other states used the term "accident" instead of the term "injury." The law on this subject was less developed there than it was here. The opinions of the Michigan court on this subject were persuasive and were relied upon way out west in Iowa, and Justices Wiest, North, Butzell, Bushnell and Sharpe were known to me by their writings. Even today I can recall them when I have forgotten the names of the judges of the Iowa court before whom I argued dozens of cases.

The next recollection of the importance and impact of this court on me personally, was at the time I was asked to be a member of the faculty of the University of Michigan Law School in 1946. It was important to me at that time that the state that I was to adopt as my professional home for life have a sound judicial

system. My experience with, and knowledge of the Supreme Court of Michigan in this one narrow field, helped me make the rather large decision to leave the state of my birth and change the direction of my personal life.

I move forward to 1955. I had by that time, as a brash young "turk" at the University of Michigan Law School, concluded that regardless of what had been my great respect for Justices North, Bushnell, Sharp and Butzell, the process of beginning, trying and appealing cases in Michigan was cumbersome and difficult to follow. I learned that I was not alone in this feeling, and on my application, in a far reaching and formal decision, the members of the court agreed to participate in an effort to make the process of justice better. Although the court had been given rulemaking power by the constitution of 1908 and still retained it, it had virtually abdicated the function as procedural rulemaker in favor of legislative rules, which had become out of date and difficult to follow. I proposed that the court, the legislature, and the lawyers of the state form a joint committee to study the whole problem, and to make recommendations as to how justice could be better served. The court acted quickly to support this idea. I remember especially the support of Justices Carr, Dethmers, and Bushnell. The result was that this court appointed one-third of the members of the Joint Committee on Michigan Procedure Revision, and with the change in the membership of the court over the next ten years, fully supported the efforts to exercise fully the court's rulemaking power. In particular, I remember in addition to Justices Carr, Dethmers and Bushnell, the support of Justices Talbott Smith, Eugene Black, George Edwards, Thomas Matthew Kavanaugh, Theodore Souris, and Otis Smith.

During this time I had the opportunity to speak informally with most of the members of the court. My recollection of the story told by John Reed last year about one of the little tiffs that took place among the most distinguished members of the court is a little different than that reported by John Reed in his remarks last year. It was reported to me that Justice Carr, who as you all know was a giant of a man, said that one of the greatest mistakes he ever made in his life was to step between Justices Black and Edwards, who for some reason of other were about to have at each other.

I felt in the early 1960s when the court approved and adopted our proposed rules through the use of its rulemaking power it had taken a great leap ahead in the race to improve the administration of justice.

During this same period, I wrote and the Joint Committee on Michigan Procedure Revision published in 1959, the study entitled, "Judicial Administration at the Appellate Level — Michigan." This study described

the procedures used by the Supreme Court in attempting to handle its overwhelming docket. Justices Carr, Black and Dethmers particularly were helpful and candid in describing the internal operating procedures, including a detailed description of window matters, what they were and how they were handled. The conclusion reached was that the court was being overwhelmed with work. It was keeping up with this work, but at the expense of careful deliberation. We recommended that an intermediate court of appeals be created as it was badly needed in the state. This would permit the Supreme Court to take cases by discretion only, leaving for the court of appeals to decide matters of error between the contending parties. It would provide time for the court to assume its true role as top dog in our judicial system. At first, it seemed to me that our study had very little impact on anyone, and that it was just one more study to be done but forgotten. But I was wrong. Ted Souris, when he was running for the Supreme Court, became acquainted with it, and I remember he obtained extra copies of it from us and used it and our conclusions and the supporting data as a platform to elevate him to membership on the court. The people of Michigan should be forever grateful for his perception and energy in pushing this important idea on the people of the state, for he developed a broad support that bore fruit at the time of the Constitutional Convention.

The makeup and power of the Supreme Court and the structure of the judicial system of Michigan was a pressing problem in the 1961 Constitutional Convention of Michigan. Major changes were made by the Convention. Some of them were accepted by most of the delegates, but others were hotly debated and adopted by close votes. The very form and power of the court seemed to be seriously challenged. The outcome was at times in doubt. As a result of the work of the Michigan Procedure Revision Committee and the paper on judicial administration at the appellate level and Justice Souris's campaign, there was little objection to including an intermediate appellate court in the judicial system of Michigan. But on the question of continuing the Supreme Court's "superintending control" over lower courts and integrating all of the courts into "one court of justice," the debate in the convention was long and very pointed.

Delegate Lawrence, defending the proposals, stated: "Now the difficulty has been that there hasn't been enough supervision rather than too much supervision … It is only if you do have an integrated court system … that you can make full use of manpower."

Delegate McAllister argued, however, "the Supreme Court has always been considered an appellate court … the province of the Supreme Court was to correct errors in … other courts … in accordance with

law … There is a trend by a group in this convention … to centralize everything more and more. In other words, they want a head here in Lansing that just will run the whole state, and that is the premise and the only premise on which this uniform circuit court system can be sustained … if the district judges throughout the state are going to be continually under control of the Supreme Court … and continually harassed … we are not going to be a better state but a poorer one. Our judiciary is going to be, if not destroyed … considerably weakened … The Supreme Court will be judge, jury and prosecutor." On the issue of retaining the power to superintend, the vote was close, only a difference of 15 in the whole convention.

As a result of the close vote on this issue, the proposed constitution continued and strengthened the role of the Supreme Court in supervising the judicial system in Michigan.

The argument on this and other close issues was dominated by the lawyer in the convention. During the discussion about all of this, one delegate rose on a matter of personal privilege, "I propose that we lock up all the lawyers tonight in this convention hall until they can decide what they want, and if they cannot decide, I would like to see them all locked out until the lay people can decide."

The Judiciary Committee recommended that Supreme Court judges be elected from single-member districts. The convention defeated this committee proposal by a close vote, only eleven differences the first time, and on second reading, only by a difference of two. They debated a number of different ways to select judges including just about every way judges have been selected in this country since its beginning, and the votes were close.

The size of the Supreme Court was approved at different times by the convention as, first eight, and then nine, and then seven. The latter only in the final stages of the convention's deliberations when the convention was readying its report.

Overall, the convention took three solid weeks to work through a report by the Judiciary Committee on first reading. On second reading, which took two full days, the convention continued to dispute and make amendments, not the least of which was a change of the proposed Supreme Court from nine to seven.

The record made at the Constitutional Convention concerning the Supreme Court and the judiciary, leaves the impression (1) that delegates were conscientiously trying to improve the system; (2) that delegates were extraordinarily divided on dozens of issues. Even the committee report made under the strong leadership of committee chairman Danhof, suggests that the ranks of the committee were deeply divided; (3)

whenever a critical visible important part of government is up for grabs at a convention, we run the risk of advertent or inadvertent changes that will do harm; and (4) the convention as a whole created a sound and effective judicial system, leaving the Supreme Court with full power to lead and supervise.

Although I was in close contact with the Supreme Court again in 1970-71, when I was president of the State Bar, as to the form and structure of the integrated Bar and the procedure regarding lawyer discipline, this really ends my testimony of an historical vignette from personal knowledge.

I do have an additional observation, however, relating to the history of the court. We are living in an era that is putting greater stress on the relationships between the federal government and the state governments. Politicians and it seems the public, as a result of the recent election, are arguing for emphasizing and underlining returning power to the state, redefining federal-state obligations, encouraging states to assume greater and greater burdens involving many aspects of government. At the same time, people continue to press Congress to deal at the federal level with perceived problems. Courts are caught in the middle. Both federal and state courts are attempting to grapple with these problems. In this state, there has been a healthy enrichment of the judiciary in the cross-over of judges, not just from federal to state and state to federal, but from the Supreme Court of this state to the federal system and visa versa.

In the past 50 years, the federal system has been enriched by five Supreme Court justices. These are: Thomas McAllister, Raymond Starr, Talbott Smith, George Edwards, and James Ryan. The federal bench has been enriched by state judges from the circuit courts too numerous to mention at this time. Surely, decisions in the federal courts involving federal/state relations are better because of this crossover. At the same time, persons who have been federal judges and others involved in operating federal government have become Supreme Court judges - Patricia Boyle and Robert Griffin to name two. This great court benefits from what they bring from their federal experience and it must be that there is a greater ability to see both sides of this problem as a result of the infusion of their expertise in the decision-making of the court.

In conclusion, I think what I have said is that I am an admirer of the Supreme Court of Michigan; that its judges have wisely included former federal judges and federal officials, while at the same time its former judges, as federal judges, have helped the federal courts be better; that the court has done much good over the years in not only deciding cases wisely, but also in exercising its constitutional powers of superintending control and rulemaking; and perhaps most importantly, over the years the court has developed a repute so

that when, as an institution, it was studied critically and in depth by a body with power to change its form and substance (a constitutional convention), it has emerged intact with its position strengthened. I was a part of that convention as the only lawyer director of research. As such, I acted in much of the way general counsel acts. It was frightening to see and hear the animosity against the court and to see how close were the votes to emasculate the court as an effective body. It was heartening to find the understanding and support by a majority of the delegates for proposals to improve and strengthen the court, based on the court's own behavior and action over the years. At that point in time, its good repute helped delegates write a good judicial article.

It has been an honor to be here and be able to develop publicly these "vignettes of history relating to the court."