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Congested Dockets and Measures for Relief

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CONGESTED DOCKETS AND MEASURES FOR RELIEF

THE Third Report of the Judicial Council of Michigan, prepared by Professors Edson R. Sunderland and Edward O. Curran and issued in June, 1933, contains material of very great value upon the subject of delay in reviewing courts, the various measures taken for its elimination, and the results of such measures. The Bench and Bar of the Nation is deeply indebted to these gentlemen for their intelligent and painstaking research in this field of immediate and supreme importance. The survey covers 34 states of the Union, and, except in Michigan, is confined to appellate courts of review. If this Report shows that, in some states, the judicial machinery is so woefully inadequate, either from defective construction or incompetent operation or both, that justice is so long delayed as to be a mockery, the profession should be interested. If it reveals that certain expedients for the relief of congested dockets have been successfully employed, every lawyer worthy of the name should hail such information with delight; and every judge of an appellate reviewing court should give it his earnest consideration. And, if this Report discloses that much of the "law's delays" in this country results from judges being too deeply interested in politics or other distractions to properly attend to their judicial duties, the in-

formation might possibly lead to the election of other judges with a livelier sense of official duty. It will not be at all difficult for members of the bar in any state where unwarranted delay exists to put their finger upon the individual judges who are directly responsible for that delay. The bar cannot much longer evade its plain duty by piously parroting that "the law's delays are proverbial," and letting it go at that. Unfortunately, this Report does not point out individual judges who are culpable in this respect. It is not too much to hope that subsequent reports may perform that wholesome, though embarassing, duty. The tendency is to fix responsibility upon certain individuals. The Chicago Crime Commission has been doing that in regard to the local judges there. "There ought to be a law," or, better still, a rule that on the last day of each year every judge in the country should file a detailed report of his work for the year, with some proper authority so that the facts would be accessible to the press and the public. Credit could then be given where due, and withheld where it was not due. Moreover, the people could then vote upon the election of their judges with some degree of intelligence and incompetent, dilatory judges could be retired and separated from the pay-roll.

The writer's purpose in presenting this article is to consider the facts contained in this Report of Professors Sunderland and Curran, to offer such comments as he thinks may be of value, and to make certain quotations from the Report. The Report reveals the condition of the dockets in all of the trial courts of common law and equity jurisdiction in the state of Michigan, but only that condition as it existed in the year 1932 in Wayne County, Michigan, will be noticed here. It is sufficiently disquieting. Here it is:

In 1932, in the Circuit Court of Wayne county, the time elapsing from the date when a civil case was first noted for trial until its actual trial ranged from *about 16 months to*

about 22 months. To this should be added the time consumed in disposing of preliminary matters and getting the case at issue before it is noted for trial, which would make it about *two years* from the time when a case is actually begun until the time when it is actually tried. This is both startling and disconcerting. Also, it is a disgrace. Judging from the ascertained causes for a delay in the trial courts of other communities, it is a perfectly reasonable conjecture that the fault lies with the judges of the Circuit Courts of Wayne county. Added to this unwarranted delay in the trial courts is the delay in the Michigan Supreme Court which, it is understood, is not great but, at least, amounts to some further delay. All together, in any event, the prospective litigant faces a delay of near three years when he files his initial pleading seeking justice. Is it any wonder that the record shows a falling off of contested litigation in Wayne county? If he can possibly avoid it, what man in his senses is going to incur such a hazard?

In October, 1933, James A. Donohoe, the newly appointed Judge of the United States District Court for the Omaha District of Nebraska, held his first term of court in the city of Omaha and called the docket. As the cases were reached on the call, counsel would often make that well-worn request for "30 days in which to answer," but heard the stern order from the bench "48 *hours* to answer and be ready for trial then." And so the first session of court went on with similar expedition in the making of interlocutory orders. Press reports state that the corridors of the federal building were filled with the buzzing of lawyers over the "new deal." They soon got ready for trial or dismissed their cases if representing plaintiffs. Experience has demonstrated that whenever a judge of a trial court plainly manifests this disposition and policy, the members of the bar catch the step with astonishing celerity, and the evil of unwarranted delay is speedily eliminated.

During the summer of 1933, the trial judges of the city of Chicago put on a vigorous "drive against crime and criminals," and, in a period of about three months, there were about 300 convictions of felonies and many were sentenced to death and to terms in the penitentiary of "199 years." In one homicide case, the defendant was put upon his trial and convicted of murder in the first degree *nine days* after the homicide, and, within a couple of months, was electrocuted. Of course, incidentally it should be mentioned that the defendant had killed a policeman and was represented in court by the Public Defender. It would be gratifying to be able to record that any one of the "Big Shots" were treated in a similar way. However that may be, the judges of the trial courts of Chicago are clearly entitled to commendation for their work, albeit the facts show that they *can* do what they have hitherto *failed* to do. Press reports show that during this "drive" the time allowed for bringing defendants in criminal cases to actual trial was drastically limited by the judges. Instead of complacently granting the defendants 30 and 60 days in which "to prepare for trial," defendants' counsel were ordered to be ready for trial in four or five days or a week. This noteworthy change in judicial attitude toward defendants in criminal cases is highly encouraging and, at the same time, exposes the fiction of the necessity for granting absurdly long continuances, the menace to public order and security and the effective "first line of defense" to and for the criminal. The security of the citizens of Chicago and of every other large city rests with the judges of the trial courts. If they are lax in the performance of their official duties, that laxity chills the ardor of the police, and discourages prosecuting witnesses and attorneys. What we need is not so much more laws as a keener sense of official duty in the enforcement of those we have. And yet whenever there is an outbreak of atrocious or sensational crime, we hear misguided or uninformed legislators and publicists crying out for "more laws," or proposals

to increase the severity of sentences, thereby often increasing the difficulty of conviction.

From this brief detour into consideration of the matter of delay in the administration of justice in the trial courts, let us consider the matter of delay in appellate reviewing courts as shown by this Third Report of the Judicial Council of Michigan, the measures taken for its elimination and the results of such measures.

The Report treats this subject under ten heads, as follows: (1) Enlarging the membership of the court to increase its operating capacity; (2) Use of commissioners; (3) Temporary use of lower court judges; (4) Divisional organization of reviewing courts; (5) Providing the judges with trained assistants; (6) Use of intermediate appellate courts; (7) Restrictions upon the right of review; (8) Methods of dealing with the problem of written opinions; (9) More effective use of briefs and oral arguments; (10) Problem of rehearings. These will be taken up in their order.

1.

Enlarging the Membership of the Court to Increase Its Operating Capacity.

Under this head it is worth while to consider the number of judges in American courts of last resort as shown by this Report, and I quote from it verbatim, as follows:

"Adding to the number of judges as a means of increasing the working capacity of reviewing courts has been a method frequently resorted to in the history of the judiciary of this country. With the exception of New York and possibly of Maine, every one of the states studied has, at some period in its history, increased the membership of its highest appellate court as a remedy for overloaded dockets. . . . Increasing the number of judges was a perfectly obvious and feasible method of enabling appellate courts to carry a larger load of business in the early history of our state judiciary when these courts were small. And as a matter of fact, the device is still available in almost half the states today, since there are now twenty-three states whose

courts of last resort are composed of less than seven judges. There are still four of the states whose highest appellate court have a membership of three,—Arizona, Nevada, Texas and Wyoming. To these must also be added the District of Columbia. Sixteen states have final appellate courts consisting of five judges,—Connecticut, Delaware, Idaho, Indiana, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, and West Virginia.

"The membership of the Supreme Court in three states is six,—Florida, Georgia, and Mississippi.

"Eighteen states have seven judges in their court of last resort,—Alabama, Arkansas, California, Colorado, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Nebraska, New York, Ohio, Oregon, Pennsylvania, Virginia and Wisconsin.

"Michigan, Maine and Maryland have courts of last resort composed of eight judges.

"Nine judges compose the supreme courts of Iowa, Oklahoma and Washington.

"New Jersey has an anomalous system of appellate courts. Its court of last resort, the Court of Errors and Appeals, consists of sixteen judges,—the Chancellor, the nine Justices of the Supreme Court, and six judges specially appointed. This rather cumbersome tribunal is a heritage of Colonial times, the ancient prototype of which is the King in Council.

"Of the thirty-four states singled out for special study, twenty-eight either began with a highest appellate court of three judges or employed that number at some period."

The Report goes on to show what should be perfectly obvious,—that mere increase in the number of judges does not result in an appreciable increase in the output of opinions. Several factors contribute to this conclusion. If all the judges read the record and the briefs,—which is seldom the case,—there is a loss of time and effort; and, if all the judges listen to the oral arguments, there is an additional loss of time. No litigant in the ordinary case should have any right to occupy the time of more than three paid servants of the state to hear and decide his cause. But, he should have a fair hearing before and a careful consideration by these three. The conclusions of the authors of this Report

upon the efficacy of increase of the number of judges of courts of last resort are set forth in the following words:

"To sum up this discussion, where the service is an individual one a saving of time can be effected by increasing the number of judges, but where the service is collective no such gain is possible. . . . The conclusion that there is a diminishing rate of advantage in enlarging the personnel is fortified by what the judges themselves have said. Mr. Justice Williams of the Supreme Court of Missouri, speaking on the proposal to increase the Supreme Court of Missouri to twelve judges to sit in divisions, had this to say:

" 'Three men are in a division of the supreme court. They have to hear arguments enough to load the three. They have to read opinions of their associates, they have to go into consultation to pass upon them. You double that to six. It means in the hearing of argument twice the time is required of every man; it means in the reading of opinions twice the time is required of every man; it means in consultation twice the time is required of every man, and that is where you get lost motion.'

" 'One man opinions,' which are the bugaboo of the profession in this country, are undoubtedly promoted by a large membership."

The average layman doubtless has a feeling of satisfaction in the reflection that his cause has been carefully considered by the *entire membership* of a court of last resort consisting of seven, eight or nine judges. If he but knew that, except in cases of overshadowing importance, this notion is wholly mythical his satisfaction would turn to disgust. It is safe to say that, in many states of this Union, in most cases, the only carefully considered opinion that the litigant gets is a "one man opinion." This unhappy situation can be and, in many states, has been remedied by the simple, but effective, device of having the court of last resort sit and act *in divisions*.

2.

Use of Commissioners.

A device frequently adopted to increase the capacity of appellate courts is the appointment of commissioners. The commission system has been used in nineteen states. New York first employed it, in 1870. Other states which have

employed this system at various times and for varying periods are the following: New York, Texas, Ohio, Indiana (in 1881), Missouri, California, Colorado, Kansas, Florida, Kentucky, Minnesota, Mississippi, Montana, South Dakota, Nebraska and Oklahoma. It is said that the system has been abandoned in some of these states, likely because the supreme courts had caught up with the docket. Of course, in most states if not all, tribunals composed of commissioners are extra-constitutional, and lawyers who are sticklers for constitutional symmetry oppose them on this ground. However, legislative acts creating supreme court commissions have been held invalid only by the Supreme Court of Indiana, in the case of *State v. Noble*.[1] In practical effect, the system has worked well in every state where it has been intelligently used. The report states that it has been "abandoned" in Nebraska, but it was only discontinued because it had enabled the Supreme Court to clear its docket. In that State a cause is heard and decided by its Supreme Court within three or four months after it has been filed there. The evidence shows that the best method of employing the commissioner system is to create commissions of three judges each and to have them sit separate from the court proper, hear arguments and write opinions to be submitted to the judges of the Supreme Court for approval or rejection. If approved by a "Per Curiam" adoption of the decision and opinion as its own, constitutional objections and cavilling are avoided. The writer was a member of the Nebraska Supreme Court Commission of three members in 1920-21 and found this plan to work satisfactorily to the bar. Later on the Nebraska Legislature created two supreme court commissions of three judges each and the docket was brought up to date. The commissioners should always be appointed by the supreme court to avoid encroachment upon the judicial branch of the state government. It goes almost

[1] 118 Ind. 350, 21 N. E. 244 (1889).

without saying that, in those states where the commissioners sit with the court proper, the result is an unwieldy tribunal. Always they should sit as a separate body, and in a group of only three. Reflection will be persuasive of the wisdom of this plan. As might be expected, the number of opinions written by the supreme court commissioners about equals the number written by the judges of the court itself. Actual count of the opinions of the Supreme Court of Minnesota for the year 1929 show that each commissioner wrote 57 and each judge of the Supreme Court 68, but the latter figure includes "per curiam" opinions. In Illinois, in 1931, the commissioners wrote 31 opinions each and the judges 40.

3.

Temporary Use of Lower Court Judges.

Another device for the relief of congested dockets in appellate courts has been the temporary appointment of judges of lower courts to assist them. This expedient in some form is authorized by the constitutions of the following states: Arizona, Arkansas, California, Florida, Georgia, Idaho, Minnesota, Montana, Nebraska, Nevada, New Mexico, South Carolina, New York (relating to intermediate appellate courts), South Dakota, Texas and Wyoming. By statute, it is authorized in these states: Connecticut, Oregon and Tennessee. This plan seems to have been put into actual operation in various ways and for varying periods of time in New York, Virginia, Idaho, Montana, Oklahoma, and to some extent in California. It is impossible to estimate the extent of the assistance such judges gave to the supreme courts for the reason that, necessarily, they would act in that capacity for limited periods of time. Perhaps, it is safe to assume that such lower court judges would write at the usual reasonable minimum rate of 55 opinions per judge per year. Of course, many judges of appellate courts write a greater number of opinions than 55 a year, and, on the other

hand, a few write a less number. After extended investigation and personal observation, the writer is definitely of the opinion that fifty-five opinions a year from each judge is a minimum that cannot reasonably be reduced. On the whole, the temporary use of judges of the lower courts to assist the supreme courts must be said to be unsatisfactory. Usually, such judges are accustomed to the trial of causes, not reviewing such trials, and it necessarily takes time for them to become accustomed to the double function. Then their use diminishes the prestige of the courts of last resort, results in increase of petitions for rehearings, and is unsatisfactory to the bar. When the Honorable Andrew M. Morrissey was Chief Justice of the Supreme Court of Nebraska, it was his opinion that this plan led to an increase of motions for rehearing. In Louisiana it was thought to decrease the prestige of the Supreme Court. Finally, while this plan for increased output of supreme court opinions is far from satisfactory, it is better than none at all. At least, it has the merit of entailing no additional expense except for the actual traveling and hotel expenses of the judges.

4.

Divisional Organization of Reviewing Courts.

The evidence seems to be almost conclusive that, either by constitutional or statutory provision or by rule of court, reviewing courts should sit in divisions of about three judges each. This unquestionably adds to the sense of judicial responsibility, to the serious consideration of each case and to the increase of judicial output. Of the courts of last resort in this country, twenty have sat or are now sitting in divisions; and six intermediate appellate courts use some method of divisional sitting. California was the first state to divide the court of last resort into sections. Its Constitution of 1879 authorized the Supreme Court to sit in two departments or en banc. Missouri has had the longest continuous

experience with a divisional court. From 1891 to the present time the Supreme Court of that State has sat in divisions. The courts of Iowa and Kentucky have also operated in divisions over a long period of time. In addition to the foregoing, the Supreme Court Commissions in California, Nebraska, Oklahoma and Texas have sat in divisions. Again, we quote from the Report from Michigan:

"Divisional sittings of the court of last resort has been a favored method of organization in the United States. At one time or another, twenty of the states have adopted some variation of the divisional system. Of the other states, twenty are in no position to utilize the divisional arrangement, since it is available only when the court is large enough to make up two divisions of at least three judges each. At the present time, of the twenty states which have tried the divisional system, four of them, California, Kansas, Louisiana and Oklahoma, still authorize it but do not use it; three of them, Illinois, New York, and Ohio, no longer authorize it; and thirteen. . . now employ it. In five other states, namely, Idaho, Indiana, North Carolina, Pennsylvania and Wisconsin, it has been proposed that the Supreme Court sit for the hearing and determination of cases in divisions. Massachusetts was unwilling to authorize a division of the Supreme Judicial Court. A constitutional amendment increasing the Supreme Court of Appeals of West Virginia to seven members and authorizing divisional sittings was defeated at the polls."

Table 12 of the Report shows the following facts in this connection, as to the length of time divisional sittings have been the rule in the different states: Alabama, from 1903 to date; Arkansas, 1925 to date; California, 1880-1922, 1928; Colorado, 1905 to date; Florida, 1902-1912, 1923 to date; Georgia, 1900 to date; Illinois (Court Order) dates uncertain; Iowa, 1894 to date; Kansas, 1901-1903; Kentucky, 1895 to date; Louisiana, 1922, 1923, 1924; Mississippi, 1916 to date; Missouri, 1891 to date; Nebraska, 1921 to date; New York, 1889-1892; Ohio, 1901-1912; Oklahoma, 1919-1920; Oregon, 1913 to date; Texas, 1931 to date; and Washington, 1909 to date.

Authority for the highest court to sit in divisions is conferred solely by constitution in the following states, namely,

California, Colorado, Florida, Kansas, Kentucky, Mississippi, and Missouri. This authority is conferred by statute in the following states: Alabama, Iowa, Oklahoma and Oregon. With the exception of Colorado, in all the states which have adopted the divisional system, the court sits in two divisions. The Colorado Constitution authorizes the Supreme Court to sit in two or more divisions, or en banc. At the present time, the seven judges of the Colorado Supreme Court sit in three departments as follows: the Chief Justice assigns two Associate Justices to each of the three departments and he himself sits with each of them. This gives three divisions of three judges each. At first, the Colorado court sat in two departments, but increase of judicial business required a change to the three-department system. Again it must be observed that a division of three judges is the ideal one, since that number increases the sense of judicial responsibility, the likelihood of more careful consideration, and greater expedition in the dispatch of judicial business. In practical effect, it amounts to a substitution of *several* appellate courts for a *single* court. In most states in which the supreme court sits in divisions, the Chief Justice sits with each division to insure uniformity of judicial opinion. Common sense alone would indicate this as the appropriate practice. The divisional system has been adopted in the intermediate appellate courts of California, Georgia, Indiana, Pennsylvania and Tennessee. Wherever politics or personal ambition has not interfered, the divisional system has worked well. I quote from the Report:

"Very few of the states which have used the divisional arrangement have found it unsatisfactory, although such was said to have been the experience in Illinois. But the mechanics of the system used in Illinois have not come down to us, so that we cannot pass an intelligent judgment upon the cause of the dissatisfaction. The separation of the Supreme Court of Colorado into three departments has been found to be satisfactory. And the English Court of Appeal is authorized to sit in three divisions when the amount of business be-

fore the court makes it advisable to add to the personnel of the court. This arrangement has been entirely satisfactory.

"It has been the experience of every state which has given the divisional arrangement a fair trial that it has not only enabled the court to keep abreast of its docket but it has made it possible for the court to handle a larger volume of cases while maintaining or even increasing the output per judge.

"The number of judges of the Supreme Court of Alabama was increased from five to seven in November, 1904, and the court was authorized to sit in divisions. Over a period of eleven years preceding the change, the average yearly load of each judge was ninety cases. The reports for fourteen years since 1903 have been counted. These show that each judge has disposed of an average of eighty-seven cases per year. Thus a seven-judge court sitting in two divisions maintained practically the same efficiency per judge as a five-judge court sitting en banc. . . . The Supreme Court of Georgia has sat in divisions since February, 1900. The court was increased to six judges on January 1, 1897. Thus the six-judge bench sat en banc for a period of three years. A count of the cases reported in the official reports from 1897 to 1903 inclusive shows that the *same judges* sitting in *divisions* disposed of *twenty per cent more* cases than they did when sitting *en banc.*

"The divisional arrangement has enabled the Mississippi Supreme Court to dispose of an accumulation of cases and keep abreast of the docket. In 1916, when the court began to sit in divisions, it was nearly three years behind in its work. Now, it practically clears the docket each year, according to Chief Justice Sydney Smith. . . .

"The divisional system has been found satisfactory in Missouri. It has helped the court to handle the great amount of business that has come to it. In fact the system has worked so well that it has been many times proposed that the court be increased to nine judges to sit in three divisions.

"The Supreme Court of Oklahoma sat in divisions for only one year. Thomas H. Owen, who was Chief Justice of the court when it sat in divisions, made the following statement regarding the effect of the divisional plan: 'I took the first year after they (the nine judges of the court) worked in divisions, the number of cases disposed of—and I compared that with the year's work preceding the time they began to sit in divisions, the same men, the same force, and I found that it *increased the output* of that court *almost forty per cent,* just lacking a little of being forty per cent. Where there had been three opinions the year before, there had been five that year working in divisions.' "

These undoubted results are nothing but what one would expect of the divisional system. Summing up the advantages to be derived from this system, the Report concludes:

"The plan of separating the court into divisions offers several distinct advantages. In the first place, where the number of judges need not be increased, no expense at all is involved in putting the arrangement into effect. This is a matter of importance at any time and particularly in this period of economic distress. If additional judges were needed, a slight increase in personnel might be sufficient to greatly increase the productive capacity of the court through the use of divisions.

"A second advantage of the division system lies in the fact that it would serve to diminish the aggregate number of hours devoted by the judges to the oral argument, without limiting the actual time allowed to counsel. Since fewer judges participate in the hearing of each case, the time required of each judge for this purpose is just one-half where the court sits in two divisions. This time may be spent in writing opinions or in disposing of ex parte matters or interlocutory motions. Or the time so saved could be devoted to more extended oral argument. The saving resultant upon the utilization of departmental sittings ranges from *twenty* to *sixty* per cent. Perhaps forty per cent is the usual gain in efficiency, although estimates rate it higher in individual cases. Mr. Justice Stevens of the Supreme Court of Iowa places the saving at fifty per cent, and Mr. Justice Parker of the Supreme Court of Washington at 66.7 per cent, according to information obtained from them.

"In the third place, the divisional arrangement has the merit of making possible a fuller and more effective consultation of the judges. More time could be devoted to this work with such an arrangement than is possible where the full bench sits, since two or more groups of judges can be engaged simultaneously on different cases or one group may be hearing arguments or writing opinions while another is in conference.

"A final advantage of the plan is that there are always three or more judges available every day that the court is in session for the hearing of interlocutory matters or other emergency motions."

The findings of fact appearing in the Report make these conclusions inescapable. The divisional system has been widely adopted as a means certain to result in the double benefit of expediting the dispatch of judicial business and insuring consideration of the cause by each member of each

division. Of course, in cases involving the constitutional validity of an act of the legislature, the court could and should sit en banc. It is shown by this Report that adoption of the divisional system is one of the effective remedies for relieving congestion of dockets in appellate courts. It goes without saying that, in the absence of constitutional or statutory requirements that the court sit in divisions, the court could do so on its own motion.

5.

Providing the Judges with Trained Assistants.

Providing the judges of appellate courts with trained assistants or law clerks has been another method employed to expedite dispatch of judicial business, and in several states, appropriations have been made for that purpose. Since 1919, Congress has appropriated sufficient funds to enable each Justice of the Supreme Court of the United States to employ a law clerk at a salary of $3,600 per year, and this assistance has been extended to the Circuit Courts of Appeal since 1930. In addition to this method in the federal courts, referendiaries, as they are sometimes called, have been used by the judges of the Supreme Courts of California, Illinois, Oklahoma and Pennsylvania, by the judges of the New York Court of Appeals and Supreme Judicial Court of Massachusetts, and by the Chancellor, Vice Chancellors, and justices of the Supreme Court of New Jersey. Also, it appears from inquiries made that each of the justices of the Supreme Courts of Idaho and Kansas were supplied with "a law clerk who is also a stenographer." These law clerks were used to check cases and authorities to see if they were germane. Other replies indicated that little or no research work was ever committed to secretaries or stenographers. It seems that the judges of some appellate courts employ law clerks at their own expense in order to increase the effectiveness of their work. It

also seems that the judges of the Supreme Court of the United States employed trained assistants long before appropriation therefor was authorized by Congress. Mr. Justice Butzel, since his elevation to the Supreme Court of Michigan, has personally employed a law clerk to assist him. Professor Kocourek, who seems to have first suggested this plan, describes the appropriate functions of such law clerks, which, as it may be supposed, includes the separation of the issues of fact from the issues of law, and examination of each case cited by counsel to see whether it is in point. The plan of providing trained assistants for the judges is open to obvious objection, but it must be said that it is better than no plan at all.

6.

Use of Intermediate Appellate Courts.

In the opinion of this writer, of all the devices for the expeditious dispatch of judicial business invented by the fatuous wit of man that of intermediate courts of appeal is easily the worst. The repeated experiences of many states over long periods of time sustains this conclusion to the point of demonstration. Theoretically and at first blush, the creation of a reviewing court midway between the trial court and the court of last resort would seem to be the ideal way for relieving the latter court of much of its work; but, actually, it increases its work by casting upon it the additional burden of deciding whether a defeated litigant in the intermediate court still has the right to be heard in the court of last resort. And there is no way of making this decision except to examine and consider the claim of such defeated litigant, and to do this properly requires almost as much of the time of the supreme court as would have been consumed in hearing and deciding the case in the first instance and on its merits. The fundamental defect in the idea of intermediate reviewing courts is that their judgments *lack finality*. Lawyers

fondly, but erroneously, think that, by legislative enactment, the decisions of such intermediate courts can be clothed with finality. And so they apparently can,—by the *words* of the statute. But the defeated litigant thinks otherwise and clamorously claims the right to be heard in the court of last resort. Obviously, there is no tribunal that can dispose of his claim,—no matter how fictitious it may be,—except that in which he claims the right to be heard. All this consumes time of the court of last resort.

A fine illustration of the difficulty, if not the impossibility, of insuring finality to the decisions of intermediate courts may be found in the state of Indiana where the weary road from the beginning to the end of a litigated case is from four to five years long. (This was true up to January 1, 1933, since which time no count has been made.)

Indiana, after much previous experimenting, now has an intermediate appellate court of six judges, and a supreme court of five judges. Legislative effort has been made to make the decisions of the Indiana Appellate Court final in many cases, but still at the present time, there is a possibility of a second review by the Supreme Court in the following classes of cases:

1. When, on submission to the full bench of six judges of the Appellate Court, four of them do not agree, the case is required to be transferred to the Supreme Court.

2. When two of the judges of either division of the Appellate Court are of opinion that a ruling precedent of the Supreme Court is erroneous, the case must be transferred to the Supreme Court.

3. When a petition for a rehearing is denied by the Appellate Court, the losing party may file in the Supreme Court an application to transfer to that court on the ground that the decision of the Appellate Court contravenes a ruling precedent of the Supreme Court, or that a new question of law is directly involved and was erroneously decided.

Under 1 and 2 above, the question of whether the "losing party" has the right to a second appeal is simplicity itself, but what about the petition for transfer under 3 above? Those who are actually acquainted with the practice of law know very well that most lawyers when defeated in the Appellate Court will file an application to transfer to the Supreme Court on the ground either that the decision of the Appellate Court "contravenes a ruling precedent of the Supreme Court," or that "a new question of law is directly involved and was erroneously decided." This application, of course comes before the Supreme Court for decision, and to decide it will often require as much time as would have been required to hear and decide the case on its merits. The Michigan Report shows that in one-third of the cases decided by the Indiana Appellate Court, the "losing party" files an application for transfer to the Supreme Court. The result is more expense and more delay with no compensating advantage. Any notion that the judges of the Supreme Court have greater ability than those of the Appellate Court is, of course, purely mythical.

Nor can this fundamental defect in the idea itself be corrected by legislative action. In the very nature of things, there can be but *one* "court of last resort,"—one court that is "supreme." And no lawyer of spirit and determination will count himself defeated until he has exhausted his remedies in an effort to obtain the decision of "the highest court." The late Chief Justice Taft was right when he declared that "there should be a *single* trial and a *single* review."

Fifty-six pages of the Sunderland-Curran Report are devoted to the results of investigation into this matter of the expedient of intermediate appellate courts. In addition to this possibility of "second appeals" and the great probability of applications therefor, other defects of the system pointed out in the Report are: (a) divergence of rules of law or

practice among regional appellate courts; (b) lessening of public confidence in the courts; and (c) great expense.

Notwithstanding the obvious and repeatedly proven defects in this system, the record of its adoption in many states is a long one, and dates from colonial times. Without going into the history of such courts in the United States, it will be profitable to consider in what states intermediate appellate courts exist today. At the present time, there are such courts in Alabama, California, Georgia, Indiana, Illinois, Louisiana, Missouri, New Jersey, New York, Ohio, Pennsylvania, Tennessee and Texas. None of these states, it appears, has conferred final appellate jurisdiction upon its intermediate court of review. The Courts of Appeal of Georgia and Missouri have been more nearly constituted courts of last resort in the particular cases assigned to their jurisdiction than those of any other state. But, even in these two states, although it is denied that their Courts of Appeal are intermediate courts of review, it is always possible to ask for and, in certain cases, to obtain a *second review*. The attempt of the Indiana Legislature to confer final appellate jurisdiction upon the Appellate Court was held to be unconstitutional in *Ex parte France* [2] and *Curlin v. Watson.*[3]

Alabama has a Court of Appeal composed of three judges who are elected for a term of six years. A constitutional provision limits the number of judges who may compose this court to five.

California has four District Courts of Appeal. Its constitution divides the state into three appellate districts with further provision that the legislature may create other districts. In September, 1929, the fourth District Court of Appeal was established by the legislature. The District Courts of Appeal of the first and second districts (San Francisco and Los Angeles) are each composed of six judges but they

2 176 Ind. 72, 95 N. E. 515 (1911).
3 180 Ind. 86, 102 N. E. 497 (1913).

sit in divisions of three judges each. The District Courts of Appeal in the third and fourth districts are composed of three judges each.

Georgia has had a Court of Appeal of six judges since 1916, who are *required* to sit in divisions of three judges each.

Indiana has an Appellate Court consisting of six judges who are "authorized" to sit in two divisions of three judges each. The Report shows that they have not acted under this authorization.

Illinois has four appellate districts in each of which there is an Appellate Court composed of three judges of the Circuit Courts who are assigned by the Supreme Court for terms of three years.

Louisiana, exclusive of the Parish of Orleans, is divided into two circuits in each of which there is a Court of Appeals, and there is, also, a Court of Appeals for the Parish of Orleans. Each Court of Appeal is composed of three judges who are elected for terms of twelve years. If the docket of any Court of Appeal becomes congested, the Supreme Court may, upon application of a particular Court of Appeal, assign three district judges to serve *pro tempore,* as an additional section of the Court of Appeal.

Missouri has three intermediate appellate courts. The St. Louis Court of Appeal, composed of three judges elected for terms of twelve years, was created by the constitution in 1875. This court has been assisted by commissioners since 1919, three being employed from 1919 to 1923, four from 1923 to 1925, and two since 1925. The Kansas City Court of Appeal, established by constitutional amendment in 1884, is also composed of three judges who have been assisted by commissioners since 1927. The Springfield Court of Appeal was created by the legislature in 1909 pursuant to the constitutional amendment of 1884. This court, like the others, is composed of three judges elected for terms of twelve years.

New Jersey has always had intermediate courts of appeal since colonial days, but the constitution of them is too complex to take space here.

New York is divided into four judicial departments in each of which there is an Appellate Division of the Supreme Court consisting of seven judges in the first and second departments, and five justices in the other departments. In each Appellate Division, four justices constitute a quorum and concurrence of three is necessary for a decision. No more than five justices are permitted to sit in any case. These justices are designated by the governor from among all the justices who are elected to the Supreme Court. There are other provisions not necessary to be stated here. (Of course it must be borne in mind that the Court of Appeals is the court of last resort in New York.)

Ohio has nine Courts of Appeal consisting of three judges each who are elected for terms of six years. The law requires each court to hold at least one term each year in each county seat of the respective districts. (It should be three terms.) In actual practice, however, the Courts of Appeal do not sit in every county of the state but sit in the more populous centers. Provision is made for the transfer of judges from one district to another.

Pennsylvania has an intermediate appellate court called the Superior Court which was established in 1895. It is composed of seven judges elected for terms of ten years. Terms of this court are held in Philadelphia, Scranton, Harrisburg and Pittsburgh. Jurisdiction of this court is too involved for consideration here.

Tennessee has had an intermediate appellate court since 1895. A court of Chancery Appeals was created in 1895 which was required to go on circuit holding at least one session each year in the cities of Nashville, Knoxville and Jackson respectively. This court, of course, heard only equity cases. In 1907, an act was passed changing the court into a

Court of Civil Appeals, increasing the number of judges to five and enlarging the appellate jurisdiction of the court to all civil cases. In 1925, the present system was established, and the court is now known as the Court of Appeals. It consists of nine judges, who sit in divisions of three judges each at the cities last named. These judges are elected for terms of eight years.

Texas has much the same system of intermediate courts of review as Ohio. In Texas, there are eleven Courts of Civil Appeal, consisting of three judges each elected for terms of six years. Each of these courts has appellate jurisdiction over the lower courts in a geographical region fixed by statute. One sits in Galveston and the others sit in Fort Worth, Austin, San Antonio, Dallas, Texarkana, Amarillo, El Paso, Beaumont, Waco, and Eastland. In addition to these, Texas has a Supreme Court of three judges, and a Court of Criminal Appeals of five judges. Also, it has a Commission of Appeals sitting in two divisions of three judges each, to assist the Supreme Court. Theoretically, the judicial establishment of Texas seems ample for the expeditious dispatch of business. No statement is made in this Report as to the extent of delay in the courts of Texas, but, about twenty years ago when that State had nine intermediate appellate courts, the reports of the Texas State Bar Association were filled with the wails of lawyers over the length of time required to obtain final decision, it being charged that this time was five and even six years from the date of the commencement of the action. It would be cause for rejoicing if that unhappy condition has been improved. This completes the list of states, thirteen in all, which now have intermediate reviewing courts.

About twenty years ago, this writer investigated the causes of delay in fourteen states of the Union west of the Ohio river and found that in every state in which there were intermediate reviewing courts the length of time from the be-

ginning of litigation to the end was much longer than in other states which had no such courts. He, also, found that in states in which the courts of last resort sat in divisions, delay was greatly minimized.

This Report makes this statement:

"The courts of *last resort in* Alabama, New York, Ohio, and Pennsylvania dispose of *all cases during the current terms of court.* There is likewise no unnecessary delay in the *highest* courts in Georgia, Illinois, Tennessee and Texas. The Supreme Courts of Illinois and Texas, however, have the assistance of commissioners to aid in clearing up the docket. The result in Texas since 1930 has been satisfactory. . . . Some of the above named courts were formerly troubled with the problem of congestion. The average time in the Supreme Court of Georgia between the filing of the appeal to the decision was one year. The docket of the Supreme Court of Illinois was also in arrears before the appointment of commissioners in 1927. The Supreme Court of Louisiana was from two to three years in arrears of its docket and had no rule for advancing cases. From 1896 to 1921, two years or longer elapsed between the filing of the return in an ordinary non-preferred cause in the New York Court of Appeals and its final determination. The Supreme Court of Ohio at one time was five years behind in the disposition of cases. By 1912, the delay had been reduced to less than two years. The Supreme Court of Texas was about four or five years behind with its cause docket in 1918 when the Commission of Appeals was created. There *still exists* much delay in the disposition of causes by the courts of last resort of California, Indiana, Missouri and New Jersey. In 1931, the Supreme Court of California was about two years behind in its work. At an earlier period, from 1904 to 1918, the delay was even greater. The Supreme Court of Indiana is *over* two years in arrears of its docket. . . . At the present time, it takes anywhere from eight months to two years to obtain a decision in the New Jersey Court of Errors and Appeals."

Of course, to this delay of from two to five years in the supreme courts of these states having intermediate courts of review must be added a delay of a year or more before decision is made in the *trial* courts. *The litigant faces the dismal prospect of spending something like one-sixth of his active life in having his case finally decided.*

Continuing, the Sunderland-Curran Report states:

"The problem of *finality of decision* is probably the most vital and difficult one involved in the system of intermediate appellate courts. The constant aim in the development of intermediate appellate courts has been to curtail, so far as possible, the right of *double appeal,* and to give finality to the judgments of the intermediate courts of review, in an ever-increasing class of cases. The attempts of the various States to combat the recognized evils of a double appeal, which involve a mounting expense and added delay in the administration of justice, will be treated in detail."

The Report then goes on to consider the results of these attempts at curtailment which present a bewildering mass of statutes, and rules of court and show the attempts to have been usually abortive. We, also, find this language in the Report:

"One of the elements which enhances the burden of litigation to the parties is the time spent on the appeal. If the judgment is for money, one party is deprived of the use of the money during the time in which the appeal is undisposed of; if the judgment transfers title to property, one of the parties is deprived of the use of the property by the appeal. Where successive appeals are permitted in the same case the time element becomes doubly important. Certain imponderables must then be taken into consideration. Does the time involved in a second appeal induce the successful litigant in the intermediate court of review (or even in the trial court) to settle at a lower figure than the judgment allows, merely in order to avoid the delays incident to successive appeals? Does the possibility of a second appeal, with consequent delay and expense, deter the person with a legitimate grievance from any resort to the courts whatever? These questions cannot be given a definite answer."

To these questions might well be added another,—Does the inevitable delay incident to "double appeals" increase the prestige of the courts, and the degree of public respect in which they are held? Does such delay tend to make the people more "law-abiding"? Answers to these questions are not hard to find. The Committee on Law Reform of the Oklahoma State Bar Association, according to this Report, spoke the consensus of opinion on this when it said:

"Intermediate courts have rarely been found satisfactory in the States where they have been tried; that conflict in opinion among the several divisions is unavoidable; and that the expense and delay incident to a second appeal,—renders the plan impracticable."

7.

Restrictions Upon the Right of Review.

One of the favorite devices for relieving congestion in reviewing courts is to restrict the right of appeal thereto in various ways. These methods fall into about four divisions, —limitation of the time within which an appeal may be taken; pecuniary restrictions; restrictions as to the class of cases that may be reviewed; discretionary control of the right of appeal.

Since a single trial satisfies the due process clause of the Federal Constitution, all appeals are matters of legislative grace, or constitutional right under state constitutions. It follows, of course, that, except in those few states in which the right of a litigant to be heard in the court of last resort of the state is provided in the state constitution, the legislature can impose many restrictions upon the right of appeal. It, likewise, follows that statutes providing for appeals must be strictly complied with or the right is lost, and the appellate court does not acquire jurisdiction.

The time within which an appeal must be sought varies greatly in the different states. Absurdly enough, this time varies from three days in Iowa where a proposed constitutional amendment is challenged, to six years in Maine and Massachusetts for a writ of error. Fortunately, the general tendency is to shorten the period for perfecting appeals. We give the limitation fixed in a few of the states:

All appeals from the judgments of the Court of Appeals of Alabama must be taken to the Supreme Court within fifteen days, whether by writ of error or certiorari. All appeals to the Supreme Court and Appellate Courts of Illinois

must be prayed for and allowed not more than twenty days after the date of the entry of the judgment, order or decree appealed from. This provision is applicable to certificates of importance from the Appellate Courts to the Supreme Court. Appeals in equity must be taken within the same time in Massachusetts. In Michigan the time is twenty days in all cases, unless within eighteen months the time is especially extended by the court or by agreement of the parties. The clause providing for extension is, of course, susceptible to gross abuse and so the time can be said to be eighteen months.

Thirty days is the period prescribed for filing applications for certiorari from the Supreme Court of Georgia. The same period is limited for appeals to the Appellate Division of the Supreme Court of New York. In Minnesota and Wisconsin, appeals from orders in civil cases must be taken within thirty days from the date of service by either party upon the other of a copy of the order. (The Report leaves it in doubt as to when this copy must be served.)

Pennsylvania requires that appeals in criminal cases must be taken within forty-five days from the entry of the sentence or order. Appeals from the Superior Court to the Supreme Court must also be taken and perfected within the same time. Certiorari from the Supreme Court of Tennessee to the Court of Appeals must also be filed within forty-five days after the entry of the judgment of the Court of Appeals complained of.

Sixty days is the period during which appeals must be taken in a number of states,—Alabama (appeals from decrees of divorce), Arkansas (criminal cases), Idaho (orders in criminal cases and certain interlocutory judgments in civil cases), Iowa (criminal cases), Montana (same as Idaho), New York (appeals to Court of Appeals), Oklahoma (misdemeanors, may be extended sixty days on good cause

shown), Oregon (civil and criminal cases), South Dakota (orders), and Tennessee (appeals in equity cases).

No proceedings in error may be commenced in the Court of Appeals or Supreme Court of Ohio unless within seventy days after the entry of the final judgment or order, unless the party complaining is under a disability in which event the period is seventy days exclusive of the time of disability.

Final judgments in civil and criminal cases can only be appealed from within ninety days after the rendition of the judgment in Idaho. The same period obtains in Washington in civil and criminal cases. The period is set at three months in civil cases in both Nebraska and Pennsylvania.

Many states have selected six months as a reasonable period during which appeals may be taken in certain cases: Alabama (all appeals except divorce cases and special statutory proceedings), Arkansas (civil cases), Florida (civil cases), Indiana (all cases), Kansas (civil cases except divorce), Minnesota (judgments in civil and criminal cases), Mississippi (all appeals to Supreme Court), Montana (final judgments in civil cases), Oklahoma (felonies and civil cases), Texas (civil cases), Virginia (all appeals to Supreme Court of Appeals), and Wisconsin (divorce cases).

West Virginia provides that no petition for any appeal or writ of error shall be presented to the Supreme Court of Appeals unless within eight months after the judgment or order complained of has been rendered.

Several of the states have established a period of limitation of one year upon appeals. These are: Colorado (all cases on writ of error to Supreme Court), Louisiana (civil cases), Michigan (writs of error,—may be extended six months upon showing good cause), Missouri (civil and criminal cases upon writs of error), Montana (criminal cases), South Dakota (all final judgments), Tennessee (writ of error coram nobis), and Wisconsin (civil cases).

Illinois (writs of error), Kansas (criminal cases), Kentucky and Tennessee (writs of error) have provided a period of two years.

Maine and Massachusetts allow a writ of error to be brought at any time within six years after the entry of the judgment complained of. Writs of error in criminal cases in Massachusetts may be brought *at any time*. If there is a corresponding absurdity in regard to admitting to bail pending proceedings in error, it would not matter much to a defendant in a criminal case whether he was convicted or not; but, of course, that cannot be so.

Except where it is otherwise provided by statute, the time within which an appeal may be taken is *jurisdictional,* and may not be extended by the court. Any provision for an extension of the time fixed by the statute within which appeals must be taken is open to grave abuse. The wisest course is to fix the time absolutely. In criminal cases, where the discovery of new evidence showing the innocence of the convict, application could be made for executive clemency. The unmistakable tendency of legislation is to reduce the period during which appeals may be taken. In Nebraska, for example, three years was the original period of limitation. It was reduced to one year in 1877, to six months in 1901, and finally to three months in 1925, which has proved to be more than ample for any party complaining in good faith. And all courts should be operated for those who are in good faith. In those far off days when there were no stenographers or typewriters, and an ox team journey to the capitol occupied perhaps thirty days, there was some semblance of excuse for fixing the limitation at one to three years. Now there is no excuse, and *sixty days is more than sufficient.*

Sixteen states have imposed some pecuniary restriction upon appeals to the court of last resort. Eight of these, however, have intermediate appellate courts, so that the litigant whose case is barred from the highest court by the operation

of the money limitation is not necessarily deprived of all access to a court of review. The most frequent objection to a pecuniary limitation upon the right of review is its alleged unfairness in discriminating against the poor suitor. The reverse is likely the truth, for speedy trial and final judgment certainly operate to the distinct advantage of the poor man in the saving of time and expense and in permitting him to reap the fruits of the litigation. The absence of such a pecuniary restriction makes it possible for the richer party to wear out the poorer by continued litigation, something that is done with reprehensible frequency.

Fourteen of the states studied have jurisdictional minimum amounts requisite for review in the court of last resort. These states and the amounts are: Indiana $50; Iowa, Kansas, Texas and West Virginia $100; Kentucky and Washington $200; Oregon $250; Virginia $300; Colorado $500; Alabama $1,000; Illinois $1,500; Louisiana $2,000; and Missouri $7,500. In seven of these states, the pecuniary restrictions noted have been in existence without change from the beginning. These are Alabama, Indiana, Iowa, Oregon, Texas, Washington and West Virginia. The other states which retain pecuniary restriction have made changes at one time or another, and in some, which formerly employed them, they have now been abolished. The history of these states is given in the Report. If there is to be any pecuniary restriction, likely $300 is nearer right than any other. It goes almost without saying that when the constitutional validity of a statute is directly involved and is decisive of the case, there should be no pecuniary restriction, whatever. It, also, is obvious that such restrictions will greatly reduce the number of appeals. Just how the *amount* of the pecuniary restriction is to be ascertained may present a problem of great difficulty,—whether the amount *claimed,* or the amount claimed in good faith, or the amount in actual controversy is decisive.

It is said that submitting the question of whether a party has the right of appeal to the discretion of the court of last resort works well in Virginia. The trouble is that this discretion may be exercised arbitrarily or upon whim or caprice of the court of last resort. There seems to have been no complaint on this score in Virginia. Permissive appeals have existed in West Virginia since 1872. This practice derived from Virginia was abandoned in the first code enacted after the separation of West Virginia. However, the appeal by permission was speedily restored. At the present time, the Code provides that any *person* wishing to obtain a writ of error, appeal or supersedeas in the cases named in a previous section, "may present a petition therefor to the Supreme Court of Appeals, or to a judge thereof in vacation." Oral arguments are not allowed on such petitions, but the petitioner may file what is called a "note of argument" with his petition; and the petition must be accompanied by a certificate of some attorney duly qualified to practice in the court that, in his opinion, the decree or judgment complained of ought to be reviewed. It is said that the discretionary appeal has enabled the five judges of the West Virginia Supreme Court of Appeals to keep up fairly well with the docket by refusing to grant appeals and writs of error in doubtful cases, and, by so doing, to limit the number of opinions which must be written. It is, also, said in the Report that the effectiveness of the discretionary review is evidenced by the fact that five judges are now handling and disposing of fifty-five per cent more cases than the five members of the court did in 1910. There are also in Michigan, Massachusetts and Maine somewhat similar provisions for discretionary appeal. Since no written opinion is required in cases where the right of appeal is denied, it leaves room for the unpleasant conjecture, common in all cases where no written opinion is filed, that the court did not seriously consider the application. The "rubber stamp" is a labor saving implement. This thought leads to the problem of written opinions.

8.

The Problem of Written Opinions.

Some judges of appellate courts seem to entertain the notion that requirement of a "hearing" in a cause before them should be taken literally, and that, therefore, when they sit and listen to oral argument, the requirement has been fully complied with. They seem to think that a "hearing" does not necessarily *include* the element of *consideration.* And this vicious pretense can be maintained throughout IF written opinions are not required. But, if written opinions are required, the lack of consideration becomes glaringly manifest. It may surprise the uninitiated to be informed that there is a certain court of last resort of which it is credibly reported that it has decided case after case *upon the oral argument alone,* no member of the court reading either briefs or record; and that this performance is followed by a formal certificate reciting that "the court has carefully examined the briefs and the record and, finding no reversible error, hereby affirms the decision of the lower court." There is one supreme court which disposed of forty-three appeals in just that way in a single batch; but, at the next annual meeting of the Bar Association in that state, such emphatic criticism of this method was expressed that the court promised to mend its ways. A bill was introduced in the legislature requiring the supreme court to write opinions in every case and its passage was defeated only by the promise of the members of the court to comply with its provisions without legislative force. After a lawyer for an appellant has painstakingly prepared a brief and argument designed to secure a reversal of the judgment, it is somewhat disconcerting to have to read a memorandum which shows on its face that the court did *not* give his appeal fair consideration at all. Nor does such a practice tend to inspire confidence in the court by the litigant. If the appeal is really

frivolous, as many of them are, it would not take much time or effort on the part of the court to state the grounds of affirmance.

With a few exceptions, full written opinions in all cases are filed in the courts of last resort of Arkansas, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Oklahoma, South Dakota, Virginia, Washington and West Virginia.

Two methods have been employed by various appellate courts to reduce the labor incident to the writing of opinions. These are: (1) The use of a mere order with a very brief memorandum of the principle upon which it is based; and (2) The use of a mere order without any indication of the reason supporting it. It seems that, on account of constitutional or statutory requirements, these methods are not fully available in Arizona, California, Idaho, Illinois (but only with reference to the Supreme Court), Indiana (applies to both Supreme Court and Appellate Court), Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

There has been much just criticism of the inordinate length of judicial opinions. It is said that prolixity and verbosity have been and still are the faults of many judges of appellate courts. This evil has been ascribed to three general causes: (1) Reliance upon stenographers; (2) The temptation to indulge a sense of humor or a taste for general literature; and (3) Ignorance of the law. And it is said that these might be reduced to a single cause, namely, faulty analysis or the lack of any analysis at all. It is much easier for a judge to dictate than it is to think. Too many of them assuage the pain of thinking with clouds of words, also thereby hoping to give the impression of great industry and profound learning. Not many are deceived by the verbal display.

The Supreme Court of Georgia disposes of something over forty per cent of its cases by what are known as "headnote decisions." The Civil Code of that state provides that "no decision shall be delivered ore tenus; but the same shall be announced by a written synopsis of the points decided." These "headnote decisions" are but syllabi of the points decided in the case.

There are other states in which the court of last resort disposes of appeals by what are called "memoranda decisions," but they contain a brief statement of the facts and of the applicable legal principles, and not merely the arbitrary disposition of the case by the making of an order of affirmance with no accompanying statement of the facts and no reference to any legal principle. There are several other states in which the court of last resort disposes of many appeals by a mere order without written opinion of any kind. This is the practice in California, Mississippi, Missouri, and Tennessee. The Report contains the following language with reference to Nebraska:

"Before 1915, the Supreme Court of Nebraska was required to render written opinions upon all matters brought before the court. But in that year legislation was passed authorizing the court to report only those decisions which reversed or modified the judgments of the District Courts, or which modified or determined unsettled or new and important questions of law, or which construed a constitutional or statutory provision not before construed, or such as were deemed by the court to be of interest and importance. The court, under authority of this legislation, began to affirm cases without opinions. The practice continued until 1930, in which year it was abandoned because of criticism of members of the bar. During the fifteen years that the court affirmed cases without opinions, twenty-two and four tenths per cent of the cases disposed of by the court were affirmances without opinion. That the court wrote 3619 opinions, and affirmed 1056 cases without opinions. Since 1930, the court has written short per curiam opinions in approximately one-fourth of its cases.

"Before the Supreme Court of Ohio was charged with the constitutional duty of writing opinions in all cases rendered, that court disposed of more than three-fourths of its cases by decisions without opinions. This condition existed from 1894 to 1912. There was general

dissatisfaction among the members of the bar with this method of disposing of cases. The court was memorialized on the matter, and respectfully requested to write opinions in all cases if only a memorandum in cases of affirmance.

"In Pennsylvania, legislation provides that the judges of the Supreme Court need only write opinions in case of reversal and in such other cases as the majority of the judges deem of sufficient importance to write an opinion. In practice, however, written opinions, including per curiams, are rendered in all cases."

The Report exhibits the facts in this regard as they exist in other states, and only enough is given here to show that this labor-saving device of deciding with little or no evidence of consideration meets with the just resentment of the bar. There is no office in a state which involves more hard work than that of judge of an appellate court, no official duties which require a greater expenditure of energy; still it is a consolation to know that any judge who finds the work too hard may exercise his legal right to resign his office. Incidentally, it may be observed that we hear of few resignations, though, occasionally, we learn of some judge who finds it impossible to separate himself from the pay-roll even after he has ceased to perform the duties of his judicial office.

9.

More Effective Use of Briefs and Oral Arguments.

Many courts of last resort have sought to minimize the time required for the disposition of cases by adopting rules governing the form of briefs. For example, the Supreme Court of Pennsylvania has succeeded in bringing its work up to date largely by the use of two rules of court, one limiting the oral argument to a half hour on each side, and the other requiring counsel to set forth, on the first page of the brief, a concise statement of the questions involved. The latter rule, which is Rule 50, requires that "the statement of the question involved must set forth each question separately, in the briefest and most general terms, without

names, dates, amounts, or particulars of any kind, and, whenever possible, each question must be followed immediately by an answer stating simply whether it was affirmed, negatived, qualified or not answered by the court below. . . . The questions and answers in their entirety should not ordinarily exceed twenty lines, must never exceed one page, and must always be printed in type at least as large as point 10, on the first page of the brief, without any other matter appearing thereon." The rule is in the highest degree mandatory, and is rigidly enforced, a violation of the rule leading to a dismissal of the appeal even in murder cases. This rule has been adopted elsewhere, and the same or similar phraseology has been followed in California, Florida, Kentucky, Michigan, North Carolina, and South Carolina. And the rule has been adopted by the United States Circuit Court of Appeals for the Third Circuit. And it is said that reviewing courts have other means of protection against briefs which are needlessly prolix or inadequate. It is within their power to order reargument of the case or strike the briefs from the files of the court. The Supreme Court of the United States has on occasion ordered the reargument of cases, accompanied by a severe criticism of counsel for failure to comply with the rules of the court. The Supreme Court of Illinois has gone to the length of striking briefs from the files.

As to oral argument in courts of last resort, the rules vary in different states both as to the right and the time of such argument. Many courts require that written request for oral argument be made at the time of filing of the briefs, and provide that, in the absence of such request, oral argument will be deemed to have been waived. Then, too, the tendency has been to reduce the time for oral argument. In Rhode Island alone there is no limitation of time. Connecticut, Delaware, New Jersey and Wisconsin, with certain exceptions, allow two hour's argument on each side. Mary-

land, New Hampshire, and Wyoming allow ninety minutes on each side. Eighty minutes to the appellant and sixty to the appellee is allowed in Arizona, while the courts of last resort in New York and Wisconsin (except in felony cases and in cases where less than one thousand dollars is involved) allow the appellant only seventy-five minutes. A time limit of one hour on a side is used more commonly than any other by courts of last resort. In this group are Alabama, Arkansas, Georgia, Indiana, Maine, Massachusetts, Nevada, New Mexico, Ohio, Oklahoma (Criminal Court of Appeals), Tennessee, Vermont and Virginia. The same limit of time prevails in the Court of Errors and Appeals of New Jersey when only one counsel is heard on a side; in the Supreme Court of Michigan, except in cases involving five hundred dollars or less, and in cases where but one side is represented at the argument; and in the Supreme Court of Minnesota, except in cases where the amount of the matter in controversy does not exceed one thousand dollars.

Counsel on each side are permitted one hour of oral argument in cases on the regular docket of the Supreme Court of the United States.

Two hour's time is allotted for the oral argument of cases in the Supreme Courts of Missouri and South Dakota, but in the former seventy minutes is given to appellant and fifty to appellee, while in the latter the appellant is given seventy-five minutes and the respondent forty-five minutes. The Supreme Courts of Illinois and North Dakota restrict the appellant to one hour and the respondent to forty-five minutes. Forty-five minutes on each side is the time fixed by the courts of last resort in Iowa and Kentucky. Other states allot the same time but it is differently divided.

The courts of last resort of many states restrict each side to thirty minutes. These are California, Colorado, Florida, Illinois, (if only one side argues), Kansas, Michigan, (if only one side argues or less than five hundred dollars is in-

volved), Minnesota (where less than one thousand dollars is involved), Nebraska, Oklahoma, Oregon, Pennsylvania, Washington, Wisconsin (where less than one thousand dollars is involved). Besides the time restrictions there are other restrictions in other states where more than one counsel on each side argues. It is likely that a half hour on each side is ample in the ordinary case. If the case is of unusual importance to the jurisprudence of the state, the court may easily extend the time. It is manifest that the importance of the oral argument decreases if a long period of time elapses between the argument and the decision. If this period is too long, the effect of the oral argument is largely, if not wholly, lost. Decision should follow fast upon the heels of the oral argument to get the best results. Here again, delay is the thing to be avoided.

10.

The Problem of Rehearings.

In efforts to avoid error and injustice, in most states there is provision that the defeated party in the court of last resort may file a motion or a petition for a rehearing of the case, under certain restrictions. Consideration of these applications for rehearing consume much time of the court where they are really given consideration. Professor Cook, in his comparative study of the rehearing evil, came to the conclusion that the excessive number of applications for rehearings is due in most part to the traditional attitude of the bar, which erroneously supposes that it is a part of a lawyer's duty to his client to leave no stone unturned, in his efforts to secure a favorable adjudication. There is much truth in this assertion, but it is probable that the courts themselves, in many states, are as much to blame as counsel for the prevalence of applications for rehearing. Particularly, it is said, is this true in those states where, in the consideration of cases, the *court depends on one judge* for the

statement of facts as obtained from the record. As a member of the Illinois bar expressed it: "If the members of the bar were convinced that each member of the court had carefully examined the abstracts, briefs, arguments and authorities cited when the case was originally presented, and after a conference the case decided, in my opinion there would not be half as many petitions for rehearing. Generally it is because they believe that it is the only way to get the case examined by the full court that the petition for rehearing is presented." And how much truer is that observation when the court simply renders an order of affirmance, which, on its face, shows that the case was *not* considered! Efforts to escape the work of serious consideration provoke these excessive applications for rehearings. If an appellate court, in written opinions, would take up the several points presented by the appeal and consider and dispose of them, in such a way as to indicate that the court has given them real study and consideration, both the necessity and practice of filing applications for rehearings would largely disappear. Too great satisfaction with the job and too little attention to its duties produces much of the evils both of unreasonable delay and of excessive applications for rehearing.

How Many Opinions Should an Appellate Judge Write in One Year?

In view of the evil of delay in appellate courts which in some states has grown to be monstrous, it becomes important to know approximately how many full written opinions may be reasonably expected of each judge of such courts in the course of a year. When investigating this question some years ago, the writer encountered a strange reticence on the part of clerks of appellate courts in giving information about it. Instead of that information being readily accessible to the public which pays the bills, there was an attitude that resented investigation as though the amount of the

work done by the judges was their own private concern. And this unavoidable inference was confirmed when resort to making an actual count of the cases decided had to be made. Fairness to the profession and to the public would seem to indicate that, at the close of each year, each judge should make a public report of his stewardship. Such a report would aid the electorate in deciding whether the judge should be continued in office. There is ample evidence that those who are acquainted with the true state of affairs in regard to delay in the administration of justice have experienced a feeling of profound disgust with its widespread existence. California has a constitutional provision that no justice of the Supreme Court may draw or receive his monthly salary if a cause remains pending and undetermined in his court for a period longer than ninety days after it has been submitted for decision. Passing the question of whether this provision of the constitution is enforced, it may at least be taken as strong evidence that the public demands expedition in its courts. But what is the record of the *number* of full written opinions that *each judge wrote per annum?*

From 1893 to 1903 inclusive, the Supreme Court of Alabama sat *en banc* during which time each judge averaged 85 full written opinions each year. From 1904 to 1931, the court sat in divisions and each judge wrote about the same number of opinions, eight-five, each year.

From 1892 to 1905, the Supreme Court of Colorado consisted of three judges sitting *en banc* during which time the opinion load of each judge per year ranged from 25 as a minimum to 47 as a maximum with about 35 as a fair average. From 1904 to 1931, when the membership was seven judges who sat in divisions the gross output was greatly increased with an average for each judge of about 30 opinions a year.

From 1860 to 1893, the Supreme Court of Iowa sat *en banc* and the number of opinions written by each judge each year ranged from 58 in 1863, when the Civil War was in progress, as a minimum to a maximum of 139 for each judge in 1887. About 90 opinions for each judge per annum seems a conservative estimate. From 1894 to 1931 when the court sat in divisions, the average for each judge was about the same.

Tables appear in the Report showing the total number of cases disposed of by the appellate courts, the total number disposed of by full written opinions and the number written by each judge per annum. The periods covered in these tables range from 10 to 50 years, and it is most difficult to reach an exact average, but a study of them gives approximately the following results in nine states: Alabama, 90 opinions for each judge per annum; California, 53 for each judge; Colorado, 30; Florida, 65; Georgia, including "headnote decisions" before mentioned, 140; Iowa, 90; Missouri, 40; Oregon, where the court is only two months behind, 34; Washington, 57. Averaging the rough results of the computation made for these nine states, we get *66* written opinions for each judge per annum.

Table Twenty-seven of the Report gives the record made by the Supreme Court, and, also, the Appellate Court of Indiana from 1901 to 1930, both inclusive, a period of 30 years. With the exception of the years 1914 and 1926, the record shows an increasing decline in the number of opinions written by each judge of the Indiana Supreme Court, from about 44 in 1901 to *only 16 in 1927 and 17.2 in 1930.* (The usual excuse for this deplorable record will be discussed later on in this article.) However, the Indiana Appellate Court has a much better record ranging from 61.2 in 1901 to 63 per judge in 1921 as maximum figures and dwindling to 38.5 in 1930 as a minimum. In 1930, the Supreme Court of Indiana made a total output of 86 written opinions which gave

an average of 17.2 for each of the five judges. In the same year, the Indiana Appellate Court made a total output of 231 written opinions giving an average of only 38.5 for each of the six judges. This painful lack of activity sheds much light on the question of *why* the Appellate Courts of Indiana are so far behind with their work. If each judge of the Supreme Court would write the average of 66 opinions as estimated above, instead of only a little over 17, much of the unwarranted delay would be eliminated. Whatever is said in this article about the Appellate Courts of Indiana reaches only to January 1, 1933, since which time no figures are yet available. Many members of the bar think they have substantial reason to hope for better things since the last named date. The investigation which will surely be made will tell the story.

Table Twenty-nine of the Report shows the situation in Ohio, but fails to reveal the actual number of written opinions. It, however, does show the total number of cases "disposed of" by the Ohio Supreme Court, and also by the nine Courts of Appeal of three judges each of the state, from the year 1916 to the year 1931. In 1916, the Ohio Supreme Court of seven judges disposed of a total of 148 cases on the general docket which gave an average to each judge of 21.1; in 1920, the total number was only 118 which gave 16.9 to each judge; in 1922 the total number of "cases disposed of" was the largest, being 296, giving 42.3 to each judge; in 1931, the total was 261, giving 37.3 to each judge. We are not informed whether the Ohio Supreme Court is behind with its work. The nine Courts of Appeal of Ohio on the record of cases merely "disposed of" has a much better record. In 1916, the nine Courts of Appeal disposed of a total of 2,017 cases, being an average of 74.8 per judge. The lowest number was in 1920 when the total was 1,658 which gave an average of 61.4 for each judge. The maximum gross number disposed of in one year was in 1926 when it reached

3,092, with an average of 114.6 to each judge. The table does not show the number of written opinions at all.

Table Thirty-one gives the comparative load of cases disposed of per judge in the Supreme Court and the Superior courts of Pennsylvania from 1897 to 1931, but, unfortunately, does not show the number of written opinions. This table shows that the total number of cases disposed of by the Supreme Court of Pennsylvania in 1897 was 495, giving an average of 70.7 for each of its seven judges. The minimum was a total of 334 in 1928 or 47.7 for each judge. It is reported that the Supreme Court of Pennsylvania keeps abreast of its docket. The Superior Court of this state disposed of a minimum total of 323 cases in 1927, making an average of 46.1 for each of its seven judges. The maximum was 489 in 1913, or 69.8 for each judge.

A table shows that during the years 1928 to 1931 inclusive the Supreme Court of Illinois consisting of seven judges aided by two commissioners wrote an average of 48 opinions per judge in each of those years. From all the data available, the Supreme Court of Indiana is clearly entitled to the palm of victor in the *least* work done by any of the courts studied and reported,—setting a record of 16 for each judge in 1927. It is to be hoped that this record of judicial lethargy will never be surpassed, or again equalled.

Of course, there is a vast difference between the time required merely to "dispose of" an appeal, and the time required to write an opinion showing that the points raised by the appeal have received careful consideration. In the most vicious form of "memorandum opinions" where neither facts nor reasons are given, appeals may be "disposed of" as rapidly as the stenographer can type the form. In such case, it is a nauseating misnomer to call the proceeding in the reviewing court a "hearing"; and yet, by elaborate rules for filing briefs and a liberal time for oral argument, the whole thing has the *appearance* of reality, and the client

pays for it as if it were real. In a few states, full written opinions are required by law, or the custom of the court, in all or practically all, cases. Such states are Illinois, Massachusetts and Michigan; and, in estimating the number of full opinions a judge of a reviewing court should write in one year, it is fair to take the records of those three states each of which has a large population and, nearly always, a court of outstanding ability. The legal questions involved in litigation in those states cover a great variety of subjects, and the opinions of its courts of last resort enjoy the respect of the legal profession of the country. They rarely render ill-considered, or only partially considered opinions. We can, therefore, take the output of judicial opinions in Illinois, Massachusetts and Michigan as a safe standard. Fortunately, too, the records in those states are quite complete over long periods of time. Here they are:

Illinois: Table Forty-two of the Report gives the record of the Supreme Court of Illinois from the year 1865 to the year 1931, both inclusive, except for 22 years in the 70's, 80's and 90's. From the year 1900, the record is complete. From 1865 to 1870, the Illinois Supreme Court consisted of three judges; from 1870 to 1927 of seven judges; from 1927 to 1931 of nine judges, assisted by two commissioners. From 1865 to 1870, the three judges rendered a maximum of 449 and a minimum of 286 opinions per year. For each judge, this was an average of 95.3 as a minimum and 149.6 as a maximum. When the membership of the court was inincreased to seven in 1870, there was a substantial decrease in annual output of opinions per judge, running from a maximum of 96.2 to a minimum of 33.8 in 1880. There are reports for 35 of the years from 1870 to 1927, which show the annual output of opinions of the Supreme Court of Illinois consisting of seven judges, and, discarding the fraction, this made an average of *63* opinions per annum for each judge. The average annual number of written opinions per judge,

from 1910 to 1927, both inclusive, was *58*. For the four years from 1928 to 1931, when the court consisted of nine judges, the yearly average per judge fell to 41.1. Again, taking an average of the three periods indicated, we have *54* opinions for each judge per year. The Report, also, contains this language: "Seven judges of the Supreme Court of Illinois, of late years have disposed of approximately four hundred cases a year *by written opinions*." (That makes 57 per judge per year.) "Another hundred cases were probably dismissed upon motion or transferred to the Appellate Court."

Why there was a startling falling off in the output of opinions after the membership of the court was enlarged to nine in 1928 does not appear. Conceivably, it may have been because the court had caught up with its docket,—a conjecture which, likely, will cause Illinois lawyers to smile. We understand, however, that one or two of the judges were practically incapacitated for work by illness. On the whole record, it seems fair to set down the number of written opinions per annum for each judge of the Illinois Supreme Court at *fifty-four*. And that is how we will reckon it in in this computation.

Massachusetts: Table Forty-three of the Report gives the record of the Supreme Judicial Court of Massachusetts from 1875 to 1932, both inclusive. During all this period, this court consisted of but seven judges and there is a notable uniformity in the yearly output of decisions. Also there is a substantial increase in most years since 1914. And, during this long period of 58 years, the written opinions per judge each year ranged from a minimum of 41.8, in 1882, to a maximum of 73.6, in 1927. From 1875 to 1903, the average per judge was 51.6 per year; from 1904 to 1932, the average was 61. Striking the average of the two 29 year periods, we get an average of *fifty-six* per judge per annum.

Michigan: Table Thirty-six gives the record of the Supreme Court of Michigan from 1878 to 1932 both inclusive, a period of 55 years. From 1878 to 1887, inclusive, the Supreme Court of Michigan consisted of four judges; from 1888 to 1904 of five judges; and from 1905 to 1932 of eight judges. Like the two preceding states, the record shows only those cases disposed of by written opinions. During the ten years when four judges composed this court, there was a maximum of 133.7 opinions per judge in 1886, and a minimum of 96.7 in 1881, which gives an average of 115 per judge for that period. During the 17 years when the court consisted of five judges the record shows a maximum of 126.2 opinions for each judge in 1894, and a minimum of 87.6 per judge in 1902. The average per judge per year for the seventeen year period is 106. During the 28 year period from 1905 to 1932, when the court consisted of eight judges, the average number of written opinions per judge per annum was 63. Again taking the average of the three periods, we have an average of *ninety-five* opinions for each judge per annum.

We thus have an average of 56 written opinions per judge per year in Illinois; 54 in Massachusetts; and 95 for Michigan. And the average of the three states is SIXTY-EIGHT. And, answering the question appearing at the head of this subdivision on the evidence of the record, we say that *each judge of a reviewing court should write not less than FIFTY-FIVE opinions per year.* That is a *conservative* figure based upon the record of the cold facts, and it should be an irreducible minimum. It is, to put it mildly, quite interesting to compare that figure with Colorado with an average of 30 opinions a year, and Indiana with a maximum of 44 in 1902 to a minimum of 16 in 1927, making a general average of only 32 for the thirty year period shown on Table Twenty-seven before referred to. (We repeat that the record for Indiana ends with December 31, 1932.) The excuse

usually urged for this poor showing for the Indiana Supreme Court is that its time is largely occupied in considering petitions for transfer from the Indiana Appellate Court. The validity of this excuse will be considered in detail in a later part of this article. Right here, however, it may be said that the average number of such petitions for transfer is only about 11 per judge per year, and that all the actual work it involves is a reading of the opinions of the Indiana Appellate Court to ascertain whether it contravenes a ruling precedent established by the Supreme Court, or raises a question new to Indiana, the solution of which is necessary to decision,—much less labor than consideration of the whole case would require. In a word, consideration of these petitions for transfer should consume no more time than do motions for interlocutory orders.

How About the Indiana Courts of Review?

Before me, lies an authentic and comprehensive report upon the volume of work done by the Indiana Supreme Court and the Indiana Appellate Court which has never before been published. It was prepared over one year ago by eminent lawyers of long, varied and successful practice in the courts of Indiana. The reason for its non-publication up to this time is another story, not necessary to be told here. I have the express permission of its chief author for its publication at the present time, and it will be given almost verbatim.

But, before going into this report and statement, it seems very appropriate to estimate the frequency with which citizens of the Hoosier State resort to their reviewing courts for the solution of their differences. In other words, what proportion of the litigating inhabitants of Indiana put in motion their judicial *reviewing* machinery? In still other words, *what proportion of such inhabitants manifest the courage or folly of braving the certain delay of three years*

for the doubtful compensating benefit of obtaining a decision of their court of last resort? What effect upon the attitude of the people toward their judicial reviewing establishment has this inexcusable delay? The answer follows:

Table Thirty-two of the Report deals with this question. It properly excludes from consideration appeals from courts of petty jurisdiction to courts of general common law and equity jurisdiction which exercise also a limited reviewing jurisdiction over lower courts, especially justice and municipal courts. The table shows the number of appeal cases per 100,000 population of 31 states including the state of Indiana. I give the figures, omitting fractions. In New York, the figure is 62, that is to say that 62 out of every one hundred thousand of population of the State of New York appeal from their trial courts of general common law and equity jurisdiction to some reviewing court. In Florida, the figure is 61; in Oklahoma, 57; Louisiana, 56; Ohio, 51; Alabama, 49; Texas, 46; *and Indiana, 7.5.* This means, of course, that, for some reason or other, people of Indiana rarely brave the hazard and expense before referred to, rarely invoke the jurisdiction of their two higher reviewing courts. I think that the reason of this shying away from these courts sufficiently appears in this article up to this point coupled with the report of the committee which is published here for the first time. In a single word, the cause is DELAY,—delay which corrodes the machinery of the reviewing courts to such an extent as to partially paralyze its functions, and both discouraging and disgusting to the people of Indiana. Coincidently with the steady and progressive decline in the output of decisions of these courts, there is a corresponding decline in the occasions of resort to them. Employing the language of everyday business, the people, in effect, say: "Your machine for grinding out judicial decisions is so slow-moving, so inadequate that it is only the part of wisdom and self-preservation that we avoid patronizing

it. Rather than bring upon ourselves the unending delay, we prefer to arbitrate, to compromise, to surrender our known legal rights, to yield, to lose. We simply will not endure the painful process of weary, watchful waiting for three or four years."

Now for this hitherto unpublished report and statement:

"THAT WHEREAS, The Board of Managers of the Indiana State Bar Association has on a number of occasions considered the condition of congestion of business in the Supreme Court of this State and the effect which it is having upon the business interests of the State, the enforcement and observance of law, and the well-being and prosperity of the legal profession; and whereas, a statement of the facts as revealed by the official reports should be made in connection with this presentation. A study of written official reports discloses the following facts:

"The last two official published reports of the decisions of the Supreme Court of this State are Nos. 201 and 202, and they cover the period of the Court's work from April 3, 1929, to October 29, 1931. The full Court consists of five judges, but during said period there were seven different judges who sat upon the court, three for the full period. An examination of these two volumes of reports discloses that in two years, five months and twenty-six days, one Judge wrote 31 opinions, an average of 12 3/5 per year, another wrote 17 opinions, an average of 7 per year, another wrote 57, an average of 22 4/5 per year; and in one year and nine months, one Judge wrote 32 opinions, an average of 18 per year, and another in the same time wrote 26 opinions, an average of 15 per year; that 202nd volume of official reports shows that still another Judge in nine months wrote 5 opinions and another wrote 4 opinions. The opinions referred to were rendered in cases originally appealed to the Supreme Court and also in those transferred to the Supreme Court. The members of the Supreme Court are also required to give

considerable work in considering petitions to transfer cases from the Appellate Court to the Supreme Court and a statement of the work done by members of the Supreme Court in that respect should be made. An examination of official Appellate Reports Nos. 89, 90, 91 and 92, covering the period from March 12, 1929, to July 17, 1931, shows that during this period the Appellate Court decided 642 cases, an average of 46 per year for each Judge of the Appellate Court. There were rehearings asked for in 279 of these cases. The Appellate Court decided 279 petitions for rehearing and in so doing was required to review the entire case. This was an average of 20 denials of rehearings per Judge each year; 130 petitions to transfer were filed in these 642 cases and the Supreme Court was required to determine only one question,—whether the opinion of the Appellate Court upon its face erroneously decided a new question of law or contravened a ruling precedent. In denying these 130 *petitions to transfer,* the *average was 11 per year per Judge.*

"A further examination of Volumes 89, 90, 91 and 92 of the Appellate Court reports and Volume 177 of the Northeastern Reports shows that while the Supreme Court from April 3rd, 1929, to October 29, 1931, gave opinions in 195 cases, an average of *15* per Judge each year, the Appellate Court in the same time decided 690 cases, an average of *46* per Judge each year, and in the same period the Appellate Court was reviewing on petitions for rehearing *more than twice the number of cases that the Supreme Court was reviewing on petitions to transfer.*

"A further examination of the same Appellate Court Reports shows that there were 18 cases where the petitions to transfer *were not acted on by the Supreme Court for two years after the opinion was filed in the Appellate Court, there were six cases where three years elapsed, and twelve cases where four years elapsed from the time the opinions were filed until the petitions for transfer were denied by*

the Supreme Court. The last printed docket of the two Courts of Appeal shows a case pending on transfer that was decided by the Appellate Court on March 12, 1925, almost *eight years ago.* It is almost *thirteen years* since the alleged wrong was committed, and still there is no decision as to whether it shall be entitled to redress. There are other cases either transferred or pending on transfer in which the Appellate Court rendered a decision *six and seven years ago.*

"Report 89 of the Appellate Court shows fourteen cases in which both motions for rehearing and petitions to transfer were filed. The average time of the Appellate Court in acting upon the 14 motions for rehearing (including the 60 days which the losing party had for preparing and filing the same) was *four months;* the average time of the Supreme Court in acting upon the petitions to transfer (including the 30 days which the petitioner had for preparing and filing same) was *twenty-one months.*

"An examination of the Northeastern Reports, beginning with Volume 50, dated April, 1898, and down to the 175th Report, dated April, 1931, discloses that prior to February, 1916, a period of 15 years, the average number of reported decisions of the Supreme Court in each volume was 54, and of the Appellate Court 63, disclosing that the six-member Appellate Court worked in almost exact ratio to the five member Supreme Court; it also discloses that, subsequent to February, 1916, the ratio of reported opinions of the Supreme Court to those of the Appellate Court was 23 to 70. During the period studied, the law as to the right of transfer was exactly the same as it is now, with the exception of the period prior to 1901. It may also be added that, in the last decade, many of the decisions rendered by the Supreme Court were appeals in liquor cases where many of the questions involved were exactly the same, and in which the question having been once definitely settled and decided, the matter of writing an opinion became largely one of form.

Thirty-one petitions to transfer involved the same question and were disposed of in one opinion by the Supreme Court (202 Ind. 365.)

"The entire Bar of Indiana and many laymen have known of this judicial log-jam in our Supreme Court for many years and it has had many results, paralyzing and destroying the administration of justice in the State of Indiana; among them are these: (1) It has encouraged criminal appeals with the purpose in the appellant's mind of avoiding the penalty of the law as long as possible; (2) Long delays in the courts always encourage disobedience to and violation of the law, and this condition in the Supreme Court has increased the amount of crime in the State; (3) It has discouraged the presentation of legitimate causes and complaints of business men and business interests to the courts for judicial determination; when business men are informed that it may take from 4 to 10 years to obtain a judicial determination of their controversies, they avoid the courts, the lawyer's office and every part of the judicial machinery of the State; they compromise, sacrifice and even forego their rights; (4) This condition has led business to create, at the expense of the State, many separate boards, bureaus and commissions to determine various questions and thus to avoid the processes of the Courts. Most of these questions were formerly determined by the courts and jurisdiction over them should still be in the courts. All this change has taken place at tremendous cost to the State and in sacrifice to the rights of the people.

"We believe that this condition in the Supreme Court has resulted from the following *causes:* The failure of the members of the Court to cooperate in every way with each other in the decisions of the cases and in ruling upon petitions to transfer. That there has been a lack of system and coordination in functioning, all of which has resulted in the failure of the Court as a group to make and arrive at decisions.

"One of the main reasons ascribed for this condition in the Supreme Court is the amount of work which the Court is required to do in considering petitions to transfer and in reviewing the opinions of the Appellate Court. Since speed in the determination of legal controversies is the most necessary element therein, we believe that the members of the Bar Association of this State and the people thereof should join in asking the General Assembly of 1933 to repeal that provision of our statute which gives us the right to transfer from the Appellate Court to the Supreme Court, so that the decisions of the Appellate Court may be made final.

"We recognize that the surrender of this right is one that many members of the Bar will deprecate and that there will be some losses therefrom, but since it is impossible for the people of the State to take upon themselves additional costs of government in creating additional Appellate Court machinery, we believe that the repeal of the statute as to transfer of causes will go a long way to cutting down the work of the Supreme Court.

"Therefore, we respectfully recommend to the mid-winter meeting of the Indiana State Bar Association that this resolution be adopted, with the recommendation that the legislative committee of this Association shall prepare and submit to the next General Assembly a bill to effect the repeal above referred to and that copies of this resolution be submitted to all members of the House and Senate Committees to which such bill may be referred."

This ends the report and resolution. It was not formally brought to the attention of the Association.

Significant facts revealed by this report and resolution are these: (1) That the Indiana Supreme Court is three or four years behind its docket; (2) That each of its Judges has been writing an average of only 7 to 22 opinions a year, while each of the Judges of the Indiana Appellate Court

were writing an average of 46 opinions a year, and, in addition, have been examining and denying an average of 20 motions for rehearing a year; (3) That the work of the Judges of the Supreme Court of deciding upon petitions to transfer simmers down to an average of only 11 a year for each Judge, thereby nullifying that as an excuse for its excessively limited output of decisions. The time and labor required for deciding these petitions to transfer, as is clearly pointed out, is very much less than that required for deciding an appeal on its merits; (4) That the certainty of grossly unreasonable delay in the reviewing courts of Indiana necessarily deters people from resorting to the courts for the settlement of their differences. As heretofore shown from the Sunderland-Curran report, each of the Judges of the courts of last resort of Illinois, Massachusetts and Michigan is writing *three times as many opinions* as the Judges of the Supreme Court of Indiana. It, likewise, abundantly appears that there is neither justification nor valid excuse for this frightful difference. The *names* of the individual Judges with the number of opinions written by each have not been published,—*yet.*

We repeat that nothing said in this article relates to any work done, or omitted to be done, in any court during any part of the year 1933. No investigation of conditions in the year 1933 has been made,—yet.

Conclusions.

The evidence assembled in this article seems to justify the following *conclusions:*

1. That all reviewing courts should sit in *divisions of three judges each,* thereby insuring not only a much greater output of decisions, but, also, actual consideration of appeals by three judges instead of by only a single judge.

2. That the Commission System, each commission consisting of three judges and sitting separate from the Supreme

Court, has been repeatedly proved to be a success in every way, and one which will always aid the court in clearing its docket. Always the members of such commissions should be appointed by the court of last resort.

3. The principle of a "single trial and a single review," the review to be before three judges, should be rigidly adhered to.

4. All intermediate appellate courts should be abolished, and, in their place, commissions should be created to assist the Supreme Court, such commissions always to consist of three judges each and sitting separate from the court proper.

5. The time allowed for oral argument in all reviewing courts should be limited to a half hour on each side. Just what aid will accrue to a court from an oral argument made three years before decision it is difficult to estimate sufficiently small. If any lawyer lays the flattering unction to his soul that the court will remember his hour or two of oral argument for three years, a few moments honest reflection will dissipate the delusion. It is too great a tax on credulity to believe that even a Supreme Court Judge can unwind the mummy cloths from a three year old argument and recognize it. The time of the judges consumed in listening to oral argument could be spent to much greater advantage in the examination of records and briefs and in writing opinions.

6. Every judge of every reviewing court should write an average of *fifty-five opinions each year, as a minimum.* It should be generally known and expected that each judge could and would do that amount of work every year. The supreme bench should not be regarded as a comfortable haven of rest at public expense for a lawyer after long service at the bar. If he desires to "retire," let it be at his own expense. If a lawyer having been elected to be a judge of a reviewing court finds the writing of fifty-five opinions on the merits each year beyond either his taste or his capacity, he can find consolation in the thought that he has the in-

alienable right to resign, and none will challenge that right. In some cases, many will not regret its exercise.

In addition to the foregoing conclusions based largely upon the evidence contained in the reports referred to, the writer ventures to suggest the following as being well adapted to the expedition of judicial business:

(a) That the periods of time within which interlocutory acts are to be done should be drastically shortened, not only to speed the particular case, but, also, to establish a *custom of expedition.* In trial courts, for example, the time allowed for filing, argument and decision of dilatory pleas should be greatly minimized. Upon trial, it will be found that all substantial rights can be as well preserved by allowing *two* days, instead of *thirty,* for filing amended pleadings. In this connection, the time within which an appeal must be perfected from a trial court of general common law and equity jurisdiction to the court of last resort should never be more than sixty days, and there should be no provision, whatever, for any extension, which will nearly always be sought and granted.

(b) Reviewing courts should make a more frequent application of the "Error without prejudice" rule, which, long ago, was approved by the American Bar Association, and has been formally adopted by the legislatures of many states.

(c) A reasonable objective to be attained, in the matter of expedition, is that no greater period of time than *one year* should elapse from the date when a lawsuit is begun to the date when it is finally decided by the court of last resort in the state. The time for the litigation of a cause has been thus reduced in some states, notably in the State of Washington; and it is possible in all states. The notorious English case of *Jarndyce v. Jarndyce* is said to have afforded comfortable support for two generations of lawyers, but Dickens' report of that case was made several years before

the English Judicature Act of 1873, since which time no such disgrace is possible in England.

It is the sole purpose of the author of this article to contribute something to the making of a Judicial Establishment that will invite instead of repel, that will be a beneficent, not a calamitous means for the settlement of human differences. It is in that spirit that this is submitted, with the hope that it will bear fruit.

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