as to obtain comparative data, is perfectly practicable and may be carried on in such a way as to impose no burden upon litigating parties.

In the circuit court in Detroit, the judges have been experimenting with a new system of handling mechanics' lien cases and have developed a very effective plan. The old method of litigating all the formal issues involved in such cases produced very unsatisfactory results. Therefore they tried having the litigants represented in court by attorneys without witnesses, who were required to state their respective positions. The stenographers take down these statements, on the basis of which the court determines and fixes the precise points in actual dispute. These are usually few and simple in lien cases. The case is then referred for the taking of depositions on the real issues so ascertained, and the evidence when prepared goes to the judge for decision. By this means many cases may proceed simultaneously under the direction of a single judge.

The presiding judge of the Detroit circuit court, being of an experimental frame of mind, has recently suggested to the bar of the city that if they desire it, he will assign a judge to handle other kinds of equity cases in the same way, in order to try out the feasibility of this system for dealing with general equity litigation.

I think a sympathetic judge can do a great deal in the way of encouraging very profitable experimentation, without any real hardship to parties.

The third sort of data available is the observation of the results of various methods employed under different conditions all over the world. This will require the co-ordination of many observers and necessitate the development of a comprehensive system of statistics. Legal statistics have never received adequate attention because they have never had a place in the traditional system that depended only on precedent.

If legal research could be successful in carrying on a systematic study of these various processes, methods, and experiments, in as thorough a way as studies are constantly carried on in medicine, and, in fact, everywhere outside of the law, I think it would go far towards restoring the prestige of the legal profession, and would give society what it is entitled to receive in the way of public service from the profession.

The Problems of Appellate Courts

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COURTS of review have now become highly specialized parts of our judicial system. This was not the case in the earlier history of state and federal judicial systems. During the greater part of the period between 1818 and 1848 the Supreme Court of Illinois was composed of judges who did trial work as well. When Connecticut, in 1806, separated judicial functions from those of the executive and legislative departments, provision was made that the judges of the superior court (the trial court) should constitute the Supreme Court of Errors.[1] During a long period under the federal system, justices of the United States Supreme Court went upon circuit.

Some vestiges still remain of the union of trial and appellate work. In Connec-

[1] See Reporter's preface to 1 Conn., at p. xxii.

ticut, judges of the Supreme Court of Errors are also judges of the superior court, but they have long ceased to act in the trial of cases. The chief justice and associate justices of the Supreme Court of New Jersey (who are also members of the Court of Errors and Appeals) are by law charged with general trial duties, but additional judges have been provided to hold circuit court in the absence of a justice of the Supreme Court. In Maine until recently the justices of the Supreme Court performed trial duties, but they were largely relieved of these duties by an act of 1929 enlarging the jurisdiction of the superior courts.[2]

Massachusetts presents perhaps the most interesting illustration of a gradual severance of trial and appellate jurisdiction. The Supreme Judicial Court of that state had and exercised, as late as fifty years ago, original jurisdiction in important actions at law, and had exclusive jurisdiction in equity suits. By transferring such jurisdiction to the superior court or by authorizing the Supreme Judicial Court to make such transfer, most of the trial work has been gradually shifted to other courts. Jury terms of the Supreme Judicial Court have ceased, and it has had the opportunity to concentrate more definitely upon problems of appellate review, although the judges of this court still perform numerous trial functions.[3]

Through processes such as have just been indicated, trial and appellate functions have largely been separated. In some cases, as in Connecticut, appellate tribunals have been given no original jurisdiction, but in others, certain cases may still be originated in the appellate tribunals. The original jurisdiction of the United States Supreme Court is limited to small scope by the Federal Constitution,[4] but in states where there is a wider scope of original jurisdiction, courts of review have in many cases found it necessary to protect themselves by advising parties to seek their remedies in the trial court, unless the issue sought to be presented is of great public importance.

In the growth of an appellate organization independent of that for the trial of cases, there has been a tendency to have different judges for the two sets of courts. This result has come about partly as a matter of policy and partly because of the pressure of appellate business. In Illinois, judges of the Appellate Court (the intermediate court of review) are designated from the circuit court, and are presumed to combine trial and appellate work, and in the less populous appellate districts they do this, although the mass of business in Chicago renders such a union of functions substantially impossible. In New York, justices of the Appellate Division are designated from among the justices of the Supreme Court (the trial court) but are constitutionally restricted in the exercise of trial functions.[5] Obviously, where the same judge performs both trial and appellate duties, it is necessary to adopt some rule by which he shall not, as an appellate judge, pass upon his actions as a trial judge. But embarrassment may arise where a number of members of the court of review have acted upon a case in its earlier stages. In New Jersey the Supreme Court ordinarily sits in three parts (of three judges each) [6] but recently the nine justices, by sitting in banc upon a case, prevented its review in the Court of Errors and Appeals, because nine of the sixteen members of that court had disqualified themselves by passing upon the case in the lower court.[7]

Normally, if a court of review is composed of five, seven, or nine members, no particular hardship is occasioned by the fact that one member disqualifies himself by action below, and the difficulty is not insuperable, even with a higher court of three, as is the case with the Illinois Appellate Court. Nor would such disquali-

[2] Laws of Maine, 1929, pp. 110–116.

[3] First Report of the Judicial Council of Massachusetts 1925, pp. 10-14; Third Report, 1927, p. 47. Mass. Statutes, 1883, ch. 223. For the development of the equity jurisdiction of the Supreme Judicial Court before 1883, see Edwin H. Woodruff, Chancery in Massachusetts, 5 Law Quarterly Review, 370 (1889).

[4] Marbury v. Madison, 1 Cranch. 137 (1803).

[5] New York Constitution, art. VI, sec. 2.

[6] Rule 150 in 2 N. J. Misc. R. 1256.

[7] In re Hudson County, 144 Atl. 169 (1928). The Court of Errors and Appeals is composed of sixteen members, the chancellor, the chief justice and eight justices of the supreme court, and six specially appointed judges who need not be lawyers.

fication occasion difficulty where other judges may be brought in to replace the disqualified member. But the establishment of courts of review with separate organization and separate personnel has been little influenced in this country by the fear that prejudice may exist because a member of the court has already committed himself by presiding at the trial of a case. The development of specialized courts of review has been primarily occasioned by the constant and increasing pressure of judicial business.

It has not been possible to meet the pressure of increasing judicial business merely by separating the trial and appellate functions. The Illinois experience illustrates some of the other devices employed. In 1848, a Supreme Court was constituted whose members, three in number, were freed from all trial duties. The membership of this court was increased to seven, and intermediate Appellate Courts were authorized in 1870. The intermediate courts were created in 1877, and have presented the continuing problem of adjusting the division of appellate business between the Appellate and Supreme Courts. Four Appellate Courts were originally provided, of three judges each, but for the Chicago district this intermediate court now sits in three divisions and requires substantially all the time of nine judges. The continuing pressure of business upon the Supreme Court made it necessary in 1927 to provide for two Supreme Court commissioners to aid in the work of that court. Each device has in its turn temporarily relieved the situation, but soon a new device must be found.

By constitutional change or by statute, an effort has been made to handle increasing appellate business in the several states by (1) increasing the number of judges of the highest state courts; (2) by authorizing such courts to sit in sections or divisions; (3) by creating intermediate Appellate Courts.[8] The membership of the highest state court is in many cases limited by constitutional provision, and where constitutional amendment is difficult, or temporary relief alone is sought, Supreme Court commissioners have often been provided to aid in the work of the court. In a number of states the highest courts are now authorized to sit in sections or divisions.

In some states efforts have been made by constitutional and statutory provisions to meet the increasing burden of appeals by providing for temporary additional judges, or for additional courts to be temporarily created. In New York the Constitution provides that "whenever and as often as a majority of the judges of the Court of Appeals shall certify to the governor that the said court is unable by reason of the accumulation of cases pending therein to hear and dispose of same with reasonable speed, the governor shall designate not more than four justices of the Supreme Court to serve as associate judges of the Court of Appeals." In Virginia constitutional provision is made for a special Court of Appeals in such cases. The Ohio Constitution provides for the appointment of a commission of five members, upon the application of the court, to aid it in catching up with its work. An increased use of personnel, without increasing the number of judges, is permitted in the superior court of Pennsylvania, which may "designate two of their members to write opinions during the sessions of said court, and, when this is done, these members shall not be required to sit at the hearings and take part in the examination and decision of any appeal being heard during that time." [9]

The problem of increased complexity of appellate organization is not peculiar to the more populous states of New York, Illinois, Pennsylvania and Ohio. Tennessee's Court of Appeals presents the same problems of jurisdictional relationship as do the Appellate Courts of Illinois. Georgia and Alabama have intermediate appellate courts. Louisiana has such a court, and has experimented with the plan of having its Supreme Court sit in divisions. The Supreme Courts of Florida and Mississippi each sit in two divisions, and in Mississippi the circuit court acts to some extent as an intermediate court of review.

[8] For details as to use of these methods before 1920, see Illinois Constitutional Convention Bulletin No. 10 on The Judicial Department, pp. 806, 807.

[9] Pennsylvania Statute Law, 1920, § 20,262.

In Virginia for several years there has been a special Court of Appeals, and the Supreme Court of Appeals in 1928 adopted a rule under which "the court will sit either in bank or in two divisions." [10]

Nor does a single state limit itself to only one of the methods indicated above. Missouri has three Courts of Appeal; its Supreme Court sits in divisions; the Supreme Court and two of the Courts of Appeal are aided by commissioners. Texas presents perhaps the most striking illustration of appellate organization. It has a Supreme Court of three members; a Commission of Appeals of six members; a Court of Criminal Appeals of three members; a Commission of Criminal Appeals of two members; and eleven Courts of Civil Appeals, of three members each. The state appellate organizations have grown in a purely haphazard manner, without specific plan as to the work to be done or as to the organization to do the work. The same statement applies to the earlier development which largely separated appellate jurisdiction from that for the trial of cases.

It is easy to say, and it is true, that a greater emphasis on efficiency in the trial courts should materially lessen the number of appealed cases, and permit a simplification of appellate organization, and that steps should properly be taken to discourage unnecessary and dilatory appeals. But we shall not accomplish any results by such statements, and we shall not overnight change the conditions which we now face. After all, our people are litigious, and do not desire to admit defeat until the final appeal has been disposed of. Moreover, the constant increase in regulatory legislation brings a steady stream of new problems that must finally be solved by the highest court.

Courts of review are a necessary part of the judicial system. From 1776 to 1846 no court of review existed in Georgia, and each trial judge was the final authority in the cases brought before him. But this led to such difficulties with respect to the uniform application of the law throughout the state that the trial judges themselves met together at intervals for the purpose of "advising with each other, and discussing freely and fully all questions of a doubtful and complex character which might arise before each in their respective circuits, and thereby to enable each judge to decide such question in the law of the united wisdom of the whole Georgia bench." [11] Moreover there are dangers in a judicial system which imposes no restraint upon the trial court, as England discovered before the passage of the Criminal Appeal Act [12] of 1907.

Assuming that some system of appellate review is necessary, what results are to be accomplished by such review? A court of review performs several functions: (1) It passes upon errors claimed to have been committed in the trial of cases, to the prejudice of litigants; (2) in acting upon such cases, it determines the standards of trial courts, and keeps the procedural and substantive rules they apply within certain limits which it regards as proper; (3) it determines, if it is the final court of review, what is the law of the jurisdiction. The emphasis placed upon these several purposes may to some extent determine both the procedure and the organization of appellate courts.

The case of Jones v. Smith presents itself to the court of review in the guise of a specific contest as to private interests. Often it is merely this. In criminal cases there is always an interest in rendering justice to the accused, and this is the basis for an automatic review under the law in South Africa,[13] in criminal cases in which the defendant does not appeal. Through the acquisition of the Virgin Islands, a similar automatic appeal in death cases has come into the law administered by federal courts.[14] Yet courts of review do more than decide the rights of the parties in particular cases. Under our theory of law the issue between parties is the essential

[10] 150 Va. p. iv.

[11] For an account of the Georgia experience, see Justice Joseph R. Lamar in American Bar Association Journal, X, 513 (1924).

[12] Holdsworth, History of English Law, 3d Ed., vol. I, p. 217. In Louisiana there was no appeal in criminal cases from 1812 to 1843.

[13] F. G. Gardiner, The South African System of Automatic Review in Criminal Cases, 44 Law Quarterly Review, 78 (1928).

[14] Braffith v. People of Virgin Islands, 26 Fed. (2d) 646 (1928).

matter. The parties furnish the arena, the issues, and the weapons with which the battle is fought, but the result may be and often is of great consequence to society as well. Cases must not be collusive, but they may be made, and frequently they are merely the means of settling important questions of public policy and of private law.

In The Business of the Supreme Court, Professors Frankfurter and Landis properly say of the United States Supreme Court:

"The Supreme Court is the final authority in adjusting the relationships of the individual to the separate states, of the individual to the United States, of the forty-eight states to one another, and of the states to the United States. It mediates between the individual and government; it marks the boundaries between state and national action." [15]

The highest state court in each state also mediates between the individual and the government in many matters of public policy, and is the most influential factor in determining and applying the private law within the state. The adequate performance of appellate duties requires the prompt and satisfactory determination of private controversies, but it requires more. The appellate function of controlling and making uniform the application of law throughout the territorial limits of the state may perhaps be regarded as merely an incident to the determination of issues between private parties, but it involves more than this. Uniformity in the administration of the law was the primary reason for conferences of the trial judges in Georgia before the creation of a court of review in that state.

The several functions of courts of review present different problems, although the performance of the several functions may be involved in the disposition of the same case. Promptness, freed from undue technicality, is of the essence in settling the private rights of individuals involved in the particular case. For this purpose it is desirable to have the point of view of the trial court, and it is of value for those who sit in review to have some continuous experience with the actual trial of cases—an experience which has been largely lost with the creation of separate courts and the assignment of separate judges to appellate work. Because of their seclusion from trial experience, appellate judges often tend to become overtechnical in their judgment upon the work of trial courts.

In determining where the line is to be drawn between prejudicial and harmless error, consideration must be given to the difference in character between trial and appellate proceedings. The trial court hears the witnesses, and in many criminal and common-law civil cases acts with a jury. The trial court must act promptly and must rule in the excitement of a trial, without an opportunity to study printed abstracts of all evidence or printed briefs on the legal issues involved in the case. In criminal cases the judge must often beware of systematic efforts to trap him into reversible error. Errors of one kind or another are certain to occur in any long and hotly-contested case, no matter how competent the judge; to insist upon a rule of perfection defeats justice and promotes technicality and delay.

A court of review passes upon the trial court's action free from the excitement of the trial, with a printed transcript or abstract of the record before it, and with printed briefs presented for its consideration. Counsel for appellant or plaintiff in error regards it as his duty to go through the record of the trial court with a fine-tooth comb, and to magnify errors or alleged errors. The court of review may have the complete record before it, but it rarely goes behind the printed abstract where there is one, and is in fact oftentimes not trying the case below, but a summary of the record of what happened below. Under these circumstances it may at times become too technical, and fail to consider the limited bearing of what may have been an error in the trial court.

Some courts of review have unfortunately adopted the Exchequer rule, under which errors below are presumed to be prejudicial.[16] Such a rule is improper. It delays justice between the parties, and

[15] Frankfurter and Landis, The Business of the Supreme Court, p. 308.

[16] For an effective criticism of this rule, see Wigmore on Evidence, 2d Ed., § 21.

breeds unnecessary litigation. Interest in a prompt and satisfactory settlement of litigation should prompt a disregard of all technicalities. But a disregard of all errors not actually prejudicial in particular cases may result at times in a failure of the court of review to perform its function of preserving substantial uniformity in judicial administration. Occasionally a trial court will violate express and clearly established statutory rights of a party; and a court of review, although feeling that the error was not actually prejudicial in the particular case, may regard a reversal as necessary in order to enforce compliance with the law. Mr. Justice Kalisch based a dissent in a recent New Jersey case on the ground (in part) that the giving of admittedly improper charges in murder cases "evinces a marked tendency to perpetrate error, notwithstanding the court's pronouncement in the matter, and, unless checked, will ultimately lead to flagrant miscarriages of justice." [17]

Frequency of reversal may result (1) from too severe a standard in courts of review, or (2) too lax a conduct in the trial court. An impartial critic has called attention to the fact that in one recent advance sheet of the North Eastern Reporter fifteen criminal cases were passed upon by the Supreme Court of Illinois, of which eleven were reversed and remanded; and adds that "the instant group of cases demonstrates clearly that the main responsibility cannot be laid at the door of the Supreme Court. Not a single one of the eleven reversals can fairly be called technical. The most striking feature of these cases is the lawless conduct of prosecutors and judges, and the ignorance or perversity which their rulings or instructions portray." [18] In view of such facts the court's duty in preserving an adequate administration of justice will sometimes conflict with its duty to dispose of cases promptly and without technicality. But this possible conflict has little bearing upon the problem of appellate organization.

A more important problem presents itself, however, when we consider that appellate courts are not only (1) deciding individual cases, but also (2) through opinions in such cases, determining the principles of law applicable to future cases. For the first, promptness is essential, for the second, deliberation is necessary. The decisions of higher courts are generally supported by reasoned opinions, which are published and cited as establishing principles for the solution of future judicial contests. Cases are presenting themselves in such numbers that in most jurisdictions it is now impossible for a single court with a small number of members to prepare adequate opinions in support of its decisions. For this reason we have courts sitting in divisions, and intermediate appellate courts. With these and other devices, however, we appear to be primarily increasing the bulk and reducing the quality of printed opinions.[19]

Naturally, the opinions of intermediate appellate courts do not have the same weight as opinions of the highest court, and in some cases statutes have expressly provided that opinions of such courts should have no weight in proceedings other than those in which they are filed.[20] But, nevertheless, the opinions of intermediate courts are reported and are relied upon in the argument of subsequent cases. Some states have tried the experiment of having a court designate its less important opinions as not to be published, but such opinions do not escape the all-observing eye of the West Publishing Company, and also find their way into independent series of so-called unreported cases. The only way to avoid the publication of an opinion is not to write one.

The bulk of labor involved in appellate review revolves in large part around the written opinion. The adequacy with which the court determines the law of its jurisdiction through written opinions varies inversely with the number of opinions to be written. However much a court may deliberate, the actual preparation of an opinion is almost necessarily the work of one judge. The extent to which an opinion so prepared becomes in

[17] State v. Martin, 102 N. J. Law, 388, 399–400 (1925).

[18] 42 Harvard Law Review, 566, 568 (1929).

[19] The Louisiana Constitution of 1913, replaced in 1921, provided that "concurring and dissenting opinions shall not be published."

[20] Such a provision exists for the Appellate Courts of Illinois.

reality that of the whole court depends upon the opportunity for conference among the judges, before, during, and after the preparation of the opinion. If the members of the court meet only at stated terms, and then go home to write their opinions, as is the case in Connecticut, Illinois, and some other states, individual conference is necessarily restricted, and correspondence among the judges is not an effective means of promoting unity of thought. Where each member of the court is burdened with the necessity of constant labor in order to prepare opinions in cases assigned to him, there is little time left to consider opinions written by his fellows, and their opinions are likely to be concurred in unless strongly opposed. We may thus get opinions expressing or implying views not concurred in by all members of the court, and sometimes we have two opposing opinions approved by the same court at the same time. Such a situation unsettles the law of the jurisdiction.

What may be termed "one-man opinions" have been encouraged by changes in methods of presenting cases to courts of review. In earlier days an oral argument before the court, without limitation of time, was a matter of course in the presentation of a case. McCulloch v. Maryland was argued in the United States Supreme Court for nine days. That court in 1849 with some apparent reluctance provided that "no counsel will be permitted to speak * * * more than two hours, without the special leave of court, granted before the argument begins." It now limits each side to one hour. The Pennsylvania Supreme Court allows thirty minutes to each side, as does the Supreme Court of California.[21] In earlier procedure, printed records and briefs were largely unknown. To-day they are generally required. Formal printed arguments have largely replaced the oral argument, and the printed brief forms the primary basis for the written opinion. The judge to whom the case is assigned can take the papers in the case home with him. Printed presentation does not in and of itself discourage conference, but at least it makes possible the preparation of opinions without conference among the judges. Under present conditions a lengthy oral argument is likely to defeat its purpose and give little aid to the court. But oral argument is now almost the only method of presenting the essentials of a case to all members of an appellate court, and most oral arguments are not effective for this purpose. Moreover, the judges who listen will usually not have read the briefs, and will not be well equipped to follow an oral argument when adequately made. For this reason the practice has developed in some states of submitting most cases without oral argument.

Under the present pressure of appellate work, it would be substantially impossible for each member of the court to read the records and briefs in all cases presented to the court. What appears as the opinion of the court thus of necessity represents in most cases only the opinion of one member. It is true that the theory of many states is that no opinion shall be written until the court as a whole has arrived at a decision, but the facts are otherwise. Some fifteen years ago the failure of the whole court to consider the cases presented to it attracted the active attention of the Bar Associations of Alabama and Louisiana, and the Louisiana Constitution of 1921 requires that "at least two justices shall read each record, and the conclusions of the court shall be reached in consultation before the case is assigned for writing the opinion." [22] Earlier than this the Supreme Court of California stated the practice it then followed in the decision of cases:

"During the service upon this bench of every member of it, and as we are informed, ever since the organization of the court, the uniform practice has been as follows: The chief justice assigns to the justices in regular order the causes pending in bank. Each justice to whom a case is assigned prepares his opinion with or without consultation with other justices as he elects. Having prepared and signed his opinion, it is passed on to his associates for consideration. If in due course it is signed by three or more of his associates,

[21] Pennsylvania, Rule 72; California, Rule xix.

[22] 78 Central Law Journal, 238 (1914); 18 Law Notes, 63 (1914). Louisiana Constitution of 1921, art. VII, § 6.

it then expresses the opinion and judgment of a majority of the court, and when finally handed to the secretary and by him transmitted to and filed with the clerk of the court, it becomes the opinion and judgment of the court.

"The court never convenes as a court, nor in chambers, in consultation, to approve opinions so signed previous to their filing. When they bear a sufficient number of signatures and all the justices have examined the same and have had an opportunity to express their assent or dissent, they are filed, usually at the instance of the author." [23]

And recently it was seriously contended in the United States Circuit Court of Appeals for the Eighth circuit that due process of law was denied by a decision of the Supreme Court of Oklahoma, in which there was a record of approximately 3,000 pages, and in which the petitioner averred that four judges concurring with an opinion by another judge had not "read a word of the testimony as set out in the case-made, or as contained in the briefs, and knew absolutely nothing about the law or the facts which should have determined the decision of that case, and were therefore unable to concur in any judgment in the case, and their purported concurrence, as shown by the record, is a fraud on your petitioner." [24]

In view of the increasing mass of cases, the appellate courts are faced with a very practical problem. How are they to determine all cases submitted, and to maintain a leadership in the development of the law? Another answer suggests itself, and that is to surrender any attempt at leadership, and to have opinions express, not the judgment of the court as a whole, but only the views of the individual judge. Ohio has openly taken a step in this direction, and other states have less openly reached the same result. In the Ohio Supreme Court the judge assigned to prepare the opinion of the court prepares a syllabus which is submitted to the other judges before publication.[25] "When the syllabus is finally approved, the decision is announced, unless one of the judges desires to present a dissenting opinion." [26] In Ohio the syllabus, and not the opinion, is the law of the case. On the whole, the major interest in Ohio and elsewhere has been that of keeping up with the docket, and little attention has been paid to the effect of judicial utterances upon the development of the law.

Mere mechanical devices, such as increasing the number of judges, do not solve the problem, and in a single court successful conference becomes difficult with a membership of more than nine.[27] But mechanical devices may, and, if properly used, can aid in the solution of the problem. Having a court sit in divisions means more judges in the same court; the multiplication of intermediate courts of review means more judges engaged in appellate work, though sitting in separate courts. The use of these mechanisms must be adapted not merely to the mass of cases to be disposed of, but also to the type of work to be done.

No effort will be made in this paper to discuss the relative merits of intermediate appellate courts and of a single appellate court sitting in divisions. The two methods are not mutually exclusive. Missouri has a Supreme Court sitting in divisions and intermediate appellate courts as well. Professor Sunderland has said that the two chief defects of intermediate courts are "uncertainty of jurisdiction and double appeals." [28] But the jurisdictional problems may readily be exaggerated, even though we may at once agree that there are no purely logical grounds upon which jurisdiction may be divided. And from the standpoint of adequate consideration

[23] People v. Ruef, 14 Cal. App. 576, 621, 622 (1910).

[24] Owens v. Battenfield, 33 Fed. (2d) 753 (1929).

[25] 113 Ohio State Reports, p. lxxii; 94 Ohio State Reports, p. ix. The Ohio practice appears to be traceable as far back as 1857.

[26] Address of Judge Thomas A. Jones, 24 Ohio Law Bulletin and Reporter, N. S. 324, 333, 338 (1926).

[27] The New Jersey Court of Errors and Appeals has sixteen members. The New York court for the trial of impeachments and corrections of errors, which existed until 1846, was still larger, consisting as it did of the president of the senate (who was lieutenant governor), the senators (32 in 1821), the chancellor, and the justices of the Supreme Court.

[28] E. R. Sunderland, The Problem of Appellate Review, 5 Texas Law Review, 126, 138 (1927).

of important issues of law, the court sitting in divisions presents difficulties, in that there is little more of a logical ground for determining when cases shall go from a division to the full court for consideration.[29] Moreover, under the divisional plan, there is often no single authoritative determination of the law,[30] and counsel are apt to maneuver their cases into the division likely to be most favorable. In addition, if a case goes from one division to a full court, there is likely to be no clear new judgment of the full court, because some of its members have already definitely committed themselves. A single court sitting in divisions may be the more effective agency for the disposition of cases, but it is not likely to establish or maintain a leadership in legal development within the jurisdiction. Moreover, a single court sitting in divisions is, for practical and geographical reasons, out of the question in the federal system.

Intermediate courts now exist, and will continue to exist.[31] Assuming their existence, how can they best be used? The problem of double appeals is a serious one. Such appeals make for added delay and added expense. But the use of an intermediate court does permit of an organization by which the more important cases may come to the final court of review for deliberate consideration. A more deliberate consideration by the highest court requires that fewer cases come to that court, and means that double appeals shall be limited and a greater degree of finality attached to the determinations of the intermediate court or courts. An effort to accomplish this result was made by constitutional amendment in Ohio in 1912. By the Illinois certiorari act of 1909, and by federal legislation culminating in 1925, steps were taken in this direction, although by constitutional provision the Illinois Supreme Court has a wide range of compulsory jurisdiction, and by statute a lesser similar jurisdiction is exercised by the United States Supreme Court. California has recently taken a step similar to that in the federal system.[32] New York has gone still farther. Speaking of the provisions of the New York Constitution of 1894, Mr. Justice Martin said for the Court of Appeals:[33]

"The constitutional convention clearly entertained the opinion that the continued existence of the Court of Appeals was justified only by the necessity that some tribunal should exist with supreme power to authoritatively declare and settle the law uniformly throughout the state. That court was continued, not that individual suitors might secure their rights, but that the law should be uniformly settled, to the end that the people might understand the principles which regulated their dealings and conduct and thus, if possible, avoid litigation. It was that necessity alone which induced the adoption of the provisions for a second appeal, and the continuance of a single court to finally determine such principles."

And Judge Cardozo has said that the New York Court of Appeals exists, "not for the individual litigant, but for the indefinite body of litigants, whose causes are potentially involved in the specific cause at issue. The wrongs of aggrieved suitors are only the algebraic symbols from which the court is to work out the

[29] For an interesting plan for transfer of cases to the full court, see California Constitution, art. VI, § 2.

[30] New York and Louisiana appear not to have been satisfied with the experiment of having the highest court sit in divisions. For New York, see Frank H. Hiscock, The Court of Appeals of New York; Some Features of its Organization and Work, 14 Cornell Law Quarterly, 131, 133 (1929); and Charles Z. Lincoln, Constitutional History of New York, vol. II, pp. 585–586. For an interesting debate on the divisional plan, see Report of Louisiana Bar Association 1923, pp. 14–100. For the operation of the Washington court in two divisions, see Journal of the American Judicature Society, vol. 6, p. 177.

[31] Difficulties of an administrative character with intermediate courts multiply with the number of such courts. In Pennsylvania, where there it but one such court, the problems are quite different from those of Ohio with nine, and Texas with eleven.

[32] Rule XXX, § 6, effective September 1, 1928. Chief Justice William H. Waste, Giving Finality to the Decisions of the District Courts of Appeal, Proceedings of the First Annual Meeting of the State Bar of California, p. 92 (1928). For recent comments on appellate organization in other states see Second Report of the Judicial Council of California, pp. 55–64 (1929).

[33] Reed v. McCord, 160 N. Y. 330, 335 (1899). The Judicial article of the New York Constitution was substantially revised in 1925, but not in a manner to alter the application of this language.

formula of justice." [34] The New York Constitution of 1894 also sought to limit double appeals, and to reduce the work of the Court of Appeals by providing that the jurisdiction of that court, "except where the judgment is of death, shall be limited to the review of questions of law," and that "no unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact on a verdict not directed by the court, shall be reviewed by the Court of Appeals." But in 1925 the review of facts was extended to cases "where the Appellate Division, on reversing or modifying a final judgment in an action or a final order in a special proceeding, makes new findings of fact and renders a final judgment or a final order thereon." [35] Even the highest courts of review must bear in mind that issues of law do not present themselves independently of the facts.

New York has deliberately made its Court of Appeals the final body for the authoritative declaration of the law, and has planned its appellate organization so as to enable the court to perform this function. Under this plan, cases must usually come to the Court of Appeals through the Appellate Division, and the Court of Appeals ordinarily has the aid of an opinion of the intermediate court. A result somewhat similar in character is sought by federal legislation of 1925.[36]

Under a system of intermediate courts of appeal, there is, therefore, some possibility of specialization by the highest court upon the more important cases involving the uniformity and the development of the law. But how effectively can the selection be made, and is it possible to protect the highest court so that it may give adequate attention to such issues? Judge Cardozo has said: [37]

"Of the cases that come before the court in which I sit, a majority I think, could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain. Such cases are predestined, so to speak, to affirmance without opinion. In another and considerable percentage, the rule of law is certain, and the application alone doubtful. A complicated record must be dissected, the narratives of witnesses, more or less incoherent and unintelligible, must be analyzed, to determine whether a given situation comes within one district or another upon the chart of rights and wrongs. * * * Often these cases and others like them provoke difference of opinion among judges. Jurisprudence remains untouched, however, regardless of the outcome. Finally there remains a percentage, not large indeed, and yet not so small as to be negligible, where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power."

Obviously there is no automatic means of selecting the important cases. And groups of cases important in one period may become much less so in another. Freehold cases in Illinois were sufficiently important in 1870 to justify a constitutional provision that they could be taken to the highest state court, but they are not sufficiently important to-day. In many states workmen's compensation cases were properly sent to the highest state court for direct review, when the cases involved novel issues of law, but such review may no longer be necessary when the legal issues have largely been settled, and the

[34] Van Bergh, The Jurisdiction of the Court of Appeals of the State of New York, p. 19 (1928).

[35] Compare art. VI, § 9, of the Constitution of 1894, with art. VI, § 7, as amended in 1925. The scope of review has a good deal of bearing upon the amount of work of an appellate court. In Louisiana the Supreme Court reviews both the law and the facts. In Connecticut, the Supreme Court of Errors limits itself to "the determination of principles of law" and will not pass upon "pure questions of fact." Styles v. Tyler, 64 Conn. 432. Between these two extremes variations occur in the several states; but in all states the courts must in a great number of cases examine the evidence, even though they limit, or profess to limit, themselves to issues of law.

[36] From the standpoint of review by the United States Supreme Court, the highest state courts are in effect intermediate courts of appeal. In the federal system itself direct review from the district courts is more widely permitted than is direct review from trial courts under the New York system.

[37] The Nature of the Judicial Process, 164, 165 (1921).

cases primarily involve disputed issues of fact.

In the adjustment of work between the final court of review and intermediate courts, perhaps the best device has been that of permitting the higher court itself to determine the cases in which it will take jurisdiction. Such a plan is usually united with some power in the intermediate court to certify cases or issues of law to the higher court. We have been moving toward a reduction of the higher court's compulsory jurisdiction and an increase of its optional jurisdiction. Illustrations of such a development are found in the Illinois certiorari act of 1909, the federal acts of 1916 and 1925, and in the California rules of 1928. Of course we must not forget that such a plan devolves upon the higher court the task of making the choice.[38] This is a burdensome task, but its performance requires neither oral arguments nor written opinions, and the burden is one that can be borne, if direct compulsory jurisdiction is substantially reduced. New York presents an illustration of such reduction of direct compulsory jurisdiction, but a similar result has not been obtained in Illinois and in the federal system.

With a system of intermediate courts, a reduction of the compulsory direct jurisdiction exercised by the highest court may accomplish much to restore such a court to leadership in the legal development within its jurisdiction. More time will be afforded for conference among the judges; and there is less likelihood that a court will unanimously declare a statute invalid, and then on rehearing unanimously, through the same judge, declare the statute valid.[39] We shall be able to reduce the growing evil of rehearings.[40]

No court of final review, even though it has the option of taking cases, can ever restrict its selection to cases that are of distinct importance. Many cases will present themselves in which a formal written opinion is unnecessary, except as a tribute to the lawyers who have presented the case. The desire of the counsel that reasons be fully stated in their own particular cases does not sufficiently justify the burdening of a court with the preparation of unnecessary opinions, and this is particularly true in either important or unimportant cases where a satisfactory opinion has been written in the intermediate court. The Ohio Supreme Court makes a good deal of use of memorandum opinions, which apparently meet the constitutional requirement that decisions "be reported, together with the reasons therefor." The plan of optional jurisdiction through certiorari is employed in the supreme courts of the United States and of Illinois to decline to entertain cases, without the necessity for a written opinion. And in cases that are taken for consideration on the merits, the United States Supreme Court and the Court of Appeals of New York properly make an extensive use of memorandum opinions.

What has just been said should not be understood to disparage the importance of written opinions. The preparation of a written opinion and deliberate conference thereon promote more careful work upon the part of any court. My present remarks are limited to a final appeal in which there has already been a determination by an intermediate court, with the reasons ordinarily set forth in an opinion by that court.

Nor should what is said here be construed as minimizing the importance of intermediate appellate courts. For the final determination of the law there must be a single, unified command, and that command must be exercised by the highest court of review. Such command, exercised through an optional jurisdiction, increases the importance of an intermediate court. It is true that a refusal to take jurisdiction does not approve the reasoning of an intermediate court's opinion,[41]

[38] There is also the further question as to whether the court as a whole makes the choice. Petitions for certiorari may not actually be read by all the members of the United States Supreme Court or of the Supreme Court of Illinois, but it is probable that few if any important cases are overlooked.

[39] Halsell v. Merchants Union Insurance Co., 105 Miss. 268 (1913).

[40] Wayne G. Cook, The Rehearing Evil, 14 Iowa Law Review, 36 (1928).

[41] For the situation in a single jurisdiction, see Soden v. Claney, 269 Ill. 98; People v. Grant, 208 Ill. App. 235; People v. Grant, 283 Ill. 391, 397.

but merely leaves its decision undisturbed. But the opinion in reality obtains greater weight by virtue of the fact that it supports a final determination, undisturbed by the higher court. And where, as is often the case in New York, the Court of Appeals affirms the judgment of the intermediate court on the basis of that court's opinion, the intermediate court acquires an added dignity. Because of such reliance upon their opinions by the higher court, the Appellate Divisions in New York occupy a higher position than do the Appellate Courts of Illinois, whose opinions are never approved or adopted in toto by the Supreme Court of the state or cited in its opinions.

Although intermediate courts may be employed, not only to dispose of cases, but also to aid in a better consideration of legal issues, mechanical devices alone cannot produce a better legal product. Cases must be adequately presented to the court, and must receive adequate consideration. Speaking of the increased importance of economic and social problems in the constitutional issues before the United States Supreme Court, Professors Frankfurter and Landis have said:

"If the bar is to fulfill its duties in this most important domain of law, it must realize the nature of issues raised by constitutional controversies and be capable of assisting courts in their solution." [42]

But adequate presentation of cases is needed, not only in constitutional issues before the United States Supreme Court, but also in intermediate courts and in the highest state courts as well. Some opportunity to examine briefs and to listen to oral arguments convinces me that the court would in a large proportion of the cases be better off without either. Something toward the improvement of briefs may be accomplished by rules of court, and results seem to have been thus achieved in Pennsylvania,[43] but rules in Texas [44] and Illinois similar to that of Pennsylvania appear to have accomplished little. Briefs, like opinions, have acquired added prolixity with the invention of the typewriter and the wider use of the stenographer. The court has some remedy in its hands, and the United States Supreme Court ordered the reargument of several important cases at its last term. The Supreme Court of Illinois some years ago struck several briefs from the files,[45] but an undue tenderness for counsel restrains the frequent employment of discipline of this character, and where such action is taken, the penalty is in fact more upon the client than upon the lawyer. The lawyer as well as the judge owes some duty in the development of the law.

In the adaptation of intermediate appellate courts, New York and Illinois present a striking contrast. In Illinois the Supreme Court produces some 3,000 pages per annum of written opinions. In New York the written product is not more than one-half as great. Perhaps no great difference presents itself in the standard of presentation of cases by counsel. The New York court receives a greater proportion of its cases from the intermediate appellate courts, and makes an extensive use of memorandum opinions. The Illinois court makes no use of memorandum opinions, and writes a second opinion even though it fully concurs in the results reached by the intermediate court. The New York court is in more continuous session and has a permanent chief justice, whereas the Illinois judges are together only for specified terms of court, and the chief justice changes each year. The New York court is the master of its task, whereas the Illinois court is so overwhelmed with the detail of specific cases that there is little time for adequate consideration of the broader problems presented to it. A system of intermediate courts in the one accomplishes a result quite different from that in the other.[46]

[42] The Business of the Supreme Court, 315.

[43] Chief Justice Robert Von Moschzisker in 34 Yale Law Journal, 387 (1925).

[44] 5 Texas Law Review, 56 (1926).

[45] See Dodd and Edmunds, Appellate Jurisdiction and Practice in Illinois, p. 820 (1929).

[46] In Illinois, cases are automatically assigned in order to the several judges, and the same practice is employed in New York. In Louisiana and in the Supreme Court of the United States, and in a number of other courts of review cases are assigned by the chief justice. The automatic assignment is perhaps a natural development of the plan of annual chief justices in Illinois. Unlike the courts of Massachusetts, Connecticut and some other states, the Illinois court has since 1897 held all of its terms at the

There is little likelihood of a decrease in appellate work, either in the federal or in the state courts. Our judicial system is topheavy, and places too much emphasis on appeal. Something to correct this may be accomplished by reducing technicalities and penalizing unnecessary appeals. But whatever is accomplished, we must provide machinery to dispose of a growing mass of appellate cases. Little will be accomplished by temporary devices to aid in the clearing of congested dockets. We must face the issue of a more effective appellate organization as a permanent one. And in solving the problem of appellate organization, we must bear in mind that keeping up with its docket, important as it is, is not the only function of a court of review. Under our system of law, courts are vested with the final construction of constitutions and statutes, and with the final determination of rules of common law. They are charged with a leadership in the law which they cannot surrender, and which they are not now organized to exercise.

state capital. Upon details as to appellate work see Journal of the American Judicature Society, vol. 8, p. 165; vol. 9, pp. 20, 49, 115, 152; vol. 10, p. 57.

Intermediate Appellate Courts

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A right of appeal involves the existence of a hierarchy of courts, and a hierarchy of courts presupposes a somewhat highly developed political system. Hence in early times the court of first instance, as the immediate delegate of the judicial power of the government, heard and disposed of cases with absolute finality. Such was the situation in Rome in the simple days of the republic, and it was only with the more elaborate organization of the empire that a system of judicial appeals came into existence (Hunter on Roman Law (4th Ed.) 1044). The same situation was repeated in England. In the twelfth century there was no appeal from inferior courts to the king's court, but there were methods of removing cases before judgment. The ecclesiastical courts, however, deriving their organization from Roman sources, became a model which finally brought into existence a civil system of judicial review (2 Pollock and Maitland: Hist. of English Law (2d Ed.) 664, 666).

The great number of appeals which result from modern litigation has made it necessary in many jurisdictions to increase the number of appellate judges, and this has in turn raised the question as to the most efficient manner in which an appellate bench can be organized.

Inferior court appeals have usually been carried to the superior courts of general jurisdiction, which have taken care of such appellate business in addition to their work as courts of first instance. Such appeals involve small values, require prompt decision, and cannot carry a heavy expense to the parties, and the commonly employed system of a local rehearing before a judge of higher grade seems to meet the situation well enough.

The chief difficulty arises in appeals from superior courts. Should appellate jurisdiction be divided, some cases going to one court and some to another, with a possible second appeal? The federal judiciary is so organized, and many states have adopted the same plan. It is a logi-