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SHOULD RECORD IN A COURT OF LAST RESORT CONSIST ONLY OF THE OPINION IN THE INTERMEDIATE APPELLATE COURT?

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IT is believed that there may be some value in drawing distinctions on principle between the functions of trial courts, intermediate appellate courts, and courts of last resort. It may be suggested that it is the function of the trial court to find the facts, the function of the intermediate appellate court to apply the law to the facts, and the function of the court of last resort to develop the jurisprudence of the jurisdiction.

These distinctions, if their validity be established, offer an aid in the solution of the problem of delay in the administration of justice, in so far as it relates to appellate courts. They also indicate that a judicial system should include courts of the three categories. For convenience the intermediate appellate court will be referred to as the Appellate

Court, and the court of last resort as the Supreme Court.

It has been said that it is the function of the trial court to find the facts. It is obvious that evidence is introduced, and verdicts received, only in the trial court. While the legal questions involved are disposed of to the best of the ability of the trial judge, the primary function of the trial court is to ascertain the facts. One of the chief reasons for the existence of appellate courts is the impossibility of making adequate application of legal principles under the conditions inevitably inherent in trial court practice. It is the sole function of the Appellate Court to apply the law to the facts, doing this only after careful examination of briefs and transcript. From the present standpoint the overlap-

ping which occurs is incidental, and it is believed that it does not affect the validity of the distinction suggested.

However, the distinction with which the present discussion is primarily concerned is that suggested between the Appellate and Supreme courts. It is submitted that the responsibility of the Appellate Court in applying legal principles to the facts for the benefit of individual litigants should be final, and that the Supreme Court should devote itself exclusively to the public interests involved. These are represented by the effects of the litigation upon the jurisprudence of the future. If such is to be the function of the Supreme Court, the only portion of the proceedings in the lower courts with which it is concerned is that which constitutes the materials of the jurisprudence of the future, the published opinions. It therefore seems reasonable to conclude that the record in the Supreme Court should consist only of the opinion below, and it is believed that if such were to be the case important and beneficial results would follow.

The principle upon which this suggestion is based has already been recognized, in so far as public policy has been taken into account in granting writs of error, etc., or in determining, by legislative enactment, the classes of cases in which appeals are to be allowed. Mr. Chief Justice Taft has said:

"The theory is that where there is a trial court and one appellate court, the litigants, so far as doing justice is concerned, should be satisfied with the decision of the appellate court, and, that that decision should be brought to the Supreme Court only when the principle to be settled by the Supreme Court will be useful to the public in settling general laws."

Mr. Justice Cardozo has said that the Court of Appeals of New York exists, "not for the individual litigants, but for the great mass 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 formula of justice."²

A responsibility can be effectively discharged only once. If an attempt be made to repeat it, only the second act is effective. The scientific way to organize a judicial system is to have each function performed once, and only once, and that once as well as possible. The Supreme Court should be limited to a function different from that of the Appellate Court.

It is true that the litigant does not like to admit defeat until the last appeal has been decided. He likes to feel that he is carrying every point in the case to higher and still higher tribunals. But these circumstances should not be permitted to govern the nature of the organization of the judicial system. A keen observer has declared that at present "our judicial system is topheavy, and places too much emphasis upon appeals."³ Litigants are also citizens and taxpayers, and in the end all members of the community are best served by the development of a great, well co-ordinated, carefully thought out system of jurisprudence. It can hardly be said that in passing upon the desirability of the

present proposal it is necessary to make a balancing of interests, as the individual litigant has no legitimate interest which will not be adequately protected.

The saving of effort upon the part of members of the Supreme Court, if the record before them is to consist only of an opinion, is manifest. Mr. Justice Cardozo has noted the contrast between the volume of the cases in which the controversy involves only the application of the law to the facts, and the importance of those which are to influence the jurisprudence of the future.⁴ He has related how differences of opinion in regard to the facts develop among the members of the court, and occupy their time.⁵

It has been suggested that in a judicial system promptness is essential in the disposition of individual cases, whereas deliberation is necessary in the determination of principles which are to be applicable to future cases.⁶ In these regards the present suggestion achieves the desirable result of blowing hot and cold at the same time. Its effect in expediting the decision of individual cases is obvious. The energies released from the examination of facts will find an outlet in the more careful consideration of the legal principles enunciated.

It will also be possible for the Supreme Court properly to handle a much larger number of cases. As any published opinion may affect the jurisprudence of the future, it is desirable that every opinion be passed upon by the Supreme Court if possible. Under the proposed plan this will be feasible, at least in nearly all jurisdictions. The expedient of excluding cases from consideration by the Supreme Court has been resorted to only because of physical limitations.⁷

It has been said that the two chief defects of appellate courts are uncertainty of jurisdiction and double appeals.⁸ It would seem that the first defect could be eliminated entirely, in connection with the present suggestion, by making all cases appealable to both higher courts. The objectionable features of the second would be removed by the nature of the proposed appeal to the Supreme Court, fulfilling a function different from that of the Appellate Court. Under the suggested plan divisions of the Supreme Court would not be necessary.⁹ "One man opinions" should disappear. Longer oral arguments would be possible, if desired in important cases. *McCulloch v. Maryland* was argued in the United States Supreme Court for nine days.

The utmost simplicity of procedure in the Supreme Court would be possible. Appeals could well be made automatic.¹⁰ Under such a system, the Appellate Court would refer its opinion to the Su-

4. "The Nature of the Judicial Process" (1921), 163.

5. *Ibid.* 165.

6. Walter F. Dodd, "The Problems of Appellate Courts" (1930), 6 *Amer. Law School Rev.* 681, 686.

7. "The history of latter-day Judiciary Acts is largely the story of restricting the right of appeal to the Supreme Court." Felix Frankfurter, "The Business of the Supreme Court of the United States" (1926), 39 *Harv. L. Rev.* 325, 341; also see 358.

8. Edson R. Sunderland, "Intermediate Appellate Courts" (1930), 14 *J. Amer. Jud. Soc.* 54, 56.

9. For a discussion of the objections to divisions, see Walter F. Dodd, "The Problems of Appellate Courts" (1930), 6 *Amer. Law School Rev.* 681, 689.

10. "The Military Code contains three provisions which place it far ahead of any state code, in point of justice to the accused. First, every felony-judgment (general court-martial, in technical terms) goes automatically for review on appeal to a superior law authority." John H. Wigmore, "The Mitchell Court-Martial" (1926), 20 *Ill. Rev.* 427, 433; to the same effect, John H. Wigmore, "Demagogic Abuse of Courts-Martial: The Mitchell Trial" (1926), 20 *Ill. L. Rev.* 742.

1. Statement quoted (1931), Third Report, Judicial Council of California, 45. A similar statement by Mr. Chief Justice Taft is to be found in an article written by him, "The Jurisdiction of the Supreme Court Under the Act of Feb. 13, 1925" (1925), 35 *Yale L. J.* 1, 2.

2. Statement quoted, Walter F. Dodd, "The Problems of Appellate Courts" (1930) 6 *Amer. Law School Rev.* 681, 689, citing Van Bergh, "The Jurisdiction of the Court of Appeals of New York" (1923), 19.

3. Walter F. Dodd, "The Problems of Appellate Courts" (1930), 6 *Amer. Law School Rev.* 681, 693.

preme Court prior to publication, except to counsel, and before entry of judgment. As the reference to the Supreme Court would occur before entry of judgment in the Appellate Court, there would seem to be no doubt as to the possibility of such appeals by the state in criminal cases.¹¹

Even though only the opinion below is considered by the Supreme Court, the effect upon the litigants will be such that their self-interest can be relied upon to furnish the Supreme Court an adequate supply of briefs. The Supreme Court may adopt the opinion of the Appellate Court as its own, or write a substitute opinion, or combine the two

11. For a discussion of the problems involved in connection with such appeals, see Justin Miller, "Appeals by the State in Criminal Cases" (1927), 36 Yale L. J. 486; S. S. Z., "Criminal Law—Criminal Procedure—Appeals by the State—Double Jeopardy" (1930), 4 So. Cal. L. Rev. 69.

procedures. The Appellate Court will have the entire responsibility of applying the opinion of the Supreme Court to the facts of the case. Any additional opinion rendered by the Appellate Court will be appealed in like manner. No opinions of trial courts should be published, thus eliminating the last possibility of the existence of conflicting opinions within the jurisdiction.

The administration of justice involves a great field of problems. The present proposal is but a single specific suggestion which it is believed may have a place in aiding toward their solution. Adoption of the present suggestion would make Supreme Court practice more expeditious and less expensive, and it is felt that at the same time it would increase the effectiveness of the court.