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THE WORK OF THE SUPREME COURT OF MINNESOTA

By Maynard E. Pirsig*

We all agree that the administration of justice is a joint enterprise between the bar and our courts, and that we can attain the best results only when there is complete co-operation and understanding between the bar and the bench. When lawyers and the courts work at cross purposes and there is not a proper understanding of what should be expected by one of the other, what suffers is the proper and just decision of the cases that come before the courts. At the same time, judges hold positions of more or less dignity and are by tradition reserved in manner, and lawyers have a natural reluctance to express even sincerely held views that are critical of the work of the courts. Often times these criticisms smoulder without any attempt by any one in a systematic manner to get existing difficulties straightened out. Particularly is this true when the situation has to do with an appellate court, whose judges hold the highest judicial office that the state can offer.

Contacts with lawyers and judges indicate that this situation exists to a considerable extent in this state. Lawyers frequently grumble about the manner in which their cases are dealt with in the supreme court, and that criticism is passed along from one lawyer to another without any organized attempt being made to get matters straightened out. At the same time, without doubt, the supreme court judges think this attitude is unjustified and based on serious misconceptions of what they are doing.

The sensible thing to do in a case like that is to break the ice and discuss the problem openly and frankly as lawyers, and

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*Professor of Law, University of Minnesota.
1Address given at the institute on The Work of the State Supreme Court during the 1940 annual meeting of the Minnesota State Bar Association.
without the animosity or feeling often engendered by particular cases, with the aim of trying to improve what we do as lawyers before the court, to improve what the judges are doing, and to get the benefit of any suggestions that can be made. It was in the hope that something of this character might be done here that I agreed to present the subject at this meeting of the bar, away from particular cases and with an attitude of fairness and without animosity toward anyone.

It should be said at the outset that any problem we have here is not peculiar to this state. It exists in other states as well. An examination of the literature of lawyers and bar association proceedings reveals, more or less in veiled language, that elsewhere they have problems of a similar character.

What is here presented is entirely my own. The study of the supreme court was made for the Minnesota Judicial Council, but a report of the Council on the subject is not here being given. Any views expressed are not therefore to be taken as those of the Council or any member of it. Many of the facts and figures given here will probably appear in its report, if the council feels that they merit inclusion, but what is presently said is not to be treated as having the endorsement of the Council.

The same thing should be said with respect to the members of the supreme court. Some information was received from some of the members as to how they go about their work, much of it from public addresses made by them. There was no other place to go for such information. But beyond that they have had no part in developing the facts and material to be given nor in any of the conclusions offered about their work. At the same time, it would be less than fair to them not to say that, despite the opportunities that have been open to them, there has not been the slightest attempt by any of them to influence the survey or the methods employed in making it, or to influence what will be offered here, either as to the subject matter or as to the conclusions drawn. I am sure that they welcome a frank discussion of the subject as fully as the bar, and are ready to consider suggestions that might follow from such a conference as this. Recently a member of the court made a comment which undoubtedly reflects the attitude of every one of the supreme court judges. He remarked that if it were not for the esteem of the bar, if it were not for the good opinion of them held by the bar, the office would not be worth the taking. Judges are anxious to have the
merited, well-considered respect of the bar of this state. For that reason, if there are any misunderstandings about their work, they are as anxious as any to have them cleared up.

There are two questions that might be expected to come up in any consideration of the work of a court which will be excluded. In the first place, in going over the numerous briefs, opinions and records of the court, it would be out of place for me to pass judgment on the soundness of the principles asserted by the court and permit this to influence the study that was made. If a case has been fully presented, with thorough analysis of the issues and the authorities, so that the court has everything before it necessary to reach a sound conclusion, and the court has fully considered these matters, then the fact that I might have reached a different conclusion is of little significance. Better conclusions are undoubtedly reached by the court when proper methods are pursued in dealing with the cases, but we are concerned here only with the methods employed that will bring about the best judgment of the members of the court in deciding the cases that come before them. If these methods are pursued we are not here concerned with whether the conclusions they reach are as sound as we would like.

In the second place, it would be even more improper to attempt to pass judgment on the qualifications of any individual member of the court. I might think that a better man might have reached a better conclusion. But if a survey such as this were to go into such considerations it certainly would not have much value. The subject belongs more properly to the field of selection and retirement of judges. Here the question is, are the maximum results of which the court is capable being produced whatever the personnel.

It will not be feasible to discuss particular cases. We would need the record of those cases before we could discuss them, and, of course, that is not possible here. What will be discussed is: how well is the court doing its work, and how well is the bar performing its part in presenting the cases that come before the court.

The study that was made consisted of two phases. First, there was an extensive reading of many decisions of the court. All of the decisions for the years 1937 and 1938, and, for purposes of comparison, the decisions for the year 1927, were read and

analyzed. This was done under my direction by Miss Virginia Ritt, an honor student of the University Law School who graduated this spring. She read a total of 1,138 cases, the number appearing in the Minnesota Reports for those three years. For each case she kept a record of numerous items, such as kind of case involved, the county appealed from, what disposition was made of the case, the nature and number of the issues involved, the length of the opinions, by whom the opinions were written, and other similar items. Then she tabulated these various items and some of the results will be presented in the course of this discussion.

The other part of the research I undertook myself. That consisted of an intensive examination of the records and briefs of about 60 cases and a comparison of those records and briefs with the opinions of the court in the cases in which the records and briefs appeared. Most of the cases were selected at random. I simply took the latest cases in which I could get the record, without any suggestion from anybody as to which cases they should be. They should represent a fair picture of what might be found in the cases generally. In addition to these, four or five cases were examined because counsel who had appeared in them had expressed dissatisfaction with the way the court had dealt with them and an attempt was made to find out to what extent the criticism was justified.

Let us examine the results, first, of the analyses made of the decisions rendered in the years 1927, 1937, and 1938. Four phases of that study will be examined:

(1) Volume of cases presented to the court.
(2) Sections of the state from which they came.
(3) The kind of cases presented.
(4) The disposition of the cases made by the court.

**Volume of Cases**

There has been a significant decline in the number of cases that appear in our reports, in the amount of work that is being presented to our court. Including memorandum and per curiam opinions, in 1927 there were 538 cases disposed of. In 1937 there were 307 such cases and in 1938, 302. In other words there has been about a 40 per cent decline in the number of cases that the supreme court has had to pass upon.
That decline in litigation is not peculiar to the supreme court or to litigation in this state. Thus the report of the Minnesota Judicial Council issued last year\(^3\) shows that in the counties of Hennepin and Ramsey, the only counties for which comparable information is available, there has been a similar decline in the work of the trials courts. It is to be expected, therefore, that there should be a similar decline in the appeals to the supreme court.

Appellate work in other states shows a similar decline. In Wisconsin the number of cases in the Wisconsin supreme court declined from 504 for the year 1933-34 to 419 for the year 1937-38.\(^4\) Again in Michigan, from 676 cases in the Supreme Court of that state, the volume declined to 388 cases in 1938,\(^5\) very nearly a 50 per cent decline. It is evident therefore that the reduction in the volume of work in the supreme court of this state is not a local phenomenon.

Corresponding with this decline in volume of cases decided, there has been a reduction in the number of opinions written by each particular judge. For the year 1927 these were as follows:

- Dibell, J. ........................................ 71
- Holt, J. ........................................ 76
- Quinn, J. ........................................ 54
- Lees, C. ........................................ 52
- Olsen, C. ........................................ 17
- Stone, J. ........................................ 62
- Wilson, J. ........................................ 67
- Taylor, C. ........................................ 72
- Per curiam ....................................... 38

In 1937, the opinions written were as follows:

- Devaney, J. ........................................ 10\(^6\)
- Gallagher, J. .................................... 22
- Hilton, J. ........................................ 36
- Holt, J. ........................................... 45
- Loring, J. ......................................... 39
- Olson, J. .......................................... 49
- Peterson, J. ..................................... 34
- Stone, J. .......................................... 37
- Per curiam ....................................... 21

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\(^4\)The Work of the Wisconsin supreme court, 1940 Wis. L. Rev. 5. For the year 1938-39, the number of cases increased to 437.
\(^6\)Justice Devaney resigned and Justice Gallagher was appointed in his stead in February, 1937.
The opinions written in 1938 were:

- Gallagher, J. .......................... 27
- Hilton, J. .............................. 17
- Holt, J. ............................... 53
- Loring, J. ............................. 41
- Olson, J. ............................... 55
- Peterson, J. ........................... 42
- Stone, J. ............................... 23
- Per curiam ............................ 32

The number of opinions written by the chief justice does not represent the total amount of work he is called upon to do. A considerable amount of time is consumed by work on the Pardon Board alone. Out of nine months of the year, about a month is spent on Pardon Board work, and that does not take into account the consultations and conferences that are necessary in that connection in his chambers.

Justice Hilton was very seriously ill in 1938 and was not able to take part in all of the work of the court. This was true also of Justice Stone, and accounted for a good many cases in which he could not participate.

These figures show that there has been a substantial decline in the total number of decisions rendered by the court and in the number of opinions written by the individual judges. That decline in number of cases may not mean an equivalent decline in the amount of work required of the court. There probably has been some increase in the difficulty of the individual cases that have been presented. We have, for example, mortgage moratoria and labor legislation and disputes, fair trade practices acts, and other similar legal problems that undoubtedly have given the court more difficult questions to deal with than they used to have in previous years.

It is true that these cases represent only a small portion of the total number of cases handled, and that other situations which raised problems for the court in the past have largely disappeared. We no longer have the prohibition law, liability of stockholders, bank failures and mortgage foreclosures, and others which raised so many of the problems of 1927. But the current problems are of more complexity and more vital public concern, and need more careful examination and attention. While, therefore, the number of cases that have been presented has declined by forty per cent, the amount of work required of the court has declined somewhat less.
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GEOGRAPHICAL ORIGIN OF CASES APPEALED

The largest single source of appeals are the three large cities. In 1927, out of a total of 538 appearing in the reports, 136 came from Hennepin County, 74 from Ramsey County and 51 from St. Louis County, making a total of 261 cases for the cities, or 48 per cent of the total. The other counties in the state had 226 appeals or 42 per cent of the total, and from other sources, such as original proceedings, appeals from the Industrial Commission, and the like, came 10 per cent of the appeals.

In 1937, with a total of 307 appeals, there were 87 appeals from Hennepin County, 42 from Ramsey County and 28 from St. Louis County. This makes a total of 157 cases for the cities or 50 per cent of all cases appealed as they appear in the reports. From other counties there were 114 appeals or 37 per cent of the total, and 13 per cent came from other sources.

The figures for 1938 do not vary a great deal from those for 1937, except that the number of appeals from the cities declined, so that out of 302, 126 or 45 per cent came from the cities, and the number of appeals from counties outside of the cities increased to 127 or 45 per cent of the total.

What relation do these appeals have to the total number of cases tried in the courts from which they come? For the purpose of showing this relationship, the cases decided by the supreme court in 1938 were compared with the total number of cases tried in the different counties in 1937. This was done because there is a lag, a period of time after the case is tried until it is decided in the supreme court. This is usually about 6 to 8 months. The appeals decided in 1938 are likely to come from cases tried in 1937.

In Hennepin County and in St. Louis County there is 1 appeal for every 11 cases tried. In Ramsey County there is 1 appeal to every 22 cases tried, and in the rural districts 1 to every 17½ cases tried. In this connection it should be observed that some appeals are brought in Ramsey County because it is the county in which the State Capitol is located and the test cases which are likely to be brought there tend to increase the ratio of appeals to cases tried. Despite this there is only one appeal for every 22 cases tried.

These figures must be accepted with a measure of caution, for

7For cases tried in 1937 see (1939) First Report, Minnesota Judicial Council 27-29.
the comparisons are rough only. But they appear to justify the conclusion that in Hennepin County and in St. Louis County there are more appeals from the same amount of litigation than from the rest of the state.

Why this should be true is not suggested by the study made. There are undoubtedly differences in the various sections of the state which influence the number of appeals that are taken. These may involve the inclination or ability of litigants to appeal, greater or less confidence in the trial bench, greater or less litigious disposition on the part of the bar or a community, more frequent errors by the trial bench, and other factors may be suggested.

**Kind of Cases Presented**

Not many cases can be put in a single category for purposes of classification. For example, a contract case may involve the construction of the contract involved, a question of contract law, but it may involve, in addition, the law of infants, constitutional law, statute law, questions of procedure and evidence, and so forth. We felt, therefore, that it would give a better picture of the kind of cases presented if we considered the nature of the issues dealt with in its opinions. Hence a single case might involve several issues, and each of these was recorded and classified. To give the results there is no need in keeping the years 1937 and 1938 separate. The combined figures for both years are as follows:

<table>
<thead>
<tr>
<th>Total issues</th>
<th>1139</th>
</tr>
</thead>
<tbody>
<tr>
<td>Substantive law issues</td>
<td>410 or 28 per cent of the total</td>
</tr>
<tr>
<td>Procedural issues</td>
<td>729 or 72 per cent of the total</td>
</tr>
</tbody>
</table>

Some difficulty was encountered in determining what were substantive law issues and what were procedural issues. We resolved this by classifying an issue as one of substantive law if the disposition of it by the court turned on a rule of substantive law, even though the issue in form appeared as one of procedure. If it was decided by application of a rule of procedure it was classified as procedure.

An example may be given. Suppose an item of evidence is offered, it is objected to as irrelevant and immaterial, the objection is sustained and the ruling is upheld in the supreme court. If the court decided it was irrelevant and immaterial because as a matter of substantive law the evidence had nothing to do with the case, the issue would be classified as one of substantive law. If,
on the other hand, the court so decided because the pleading under
which the evidence was offered had not raised the point for trial,
it was classified as a procedural issue, because a rule of procedure
and not of substantive law determined the disposition of the issue.

That such a large proportion of the issues considered turned
on questions of procedure is surprising and, at the same time,
disturbing. It is probably true that where procedural issues were
involved, the consideration given to them by the court was more
brief in a greater number of cases, but the figures given still
mean that a large proportion of the court’s time, as reflected in
the reported cases, is devoted to a consideration of the manner in
which substantive rights are being enforced and not to a deter-
mination of what the substantive rights themselves should be.
In other words, the court is dealing with the mechanics and not
with the substance of the administration of justice.

Still more significant is the fact that 295 issues, or 26 per-
cent of the total issues considered, had to do, not with formulating
rules of substantive law or general rules of procedure, but merely
with the question, was there evidence in the particular case to
justify the particular findings of fact made in it. This will be
discussed further later, but the fact should be emphasized here
that that is an undesirable situation.

Only a few words need be said about the issues of substantive
law. The figures are small for any particular group, but for
what they are worth they may be of some interest in making
comparisons for the different years.

<table>
<thead>
<tr>
<th>Issue</th>
<th>1927</th>
<th>1937</th>
<th>1938</th>
</tr>
</thead>
<tbody>
<tr>
<td>Banks and Banking</td>
<td>33</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Bills and Notes</td>
<td>17</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Constitutional Law</td>
<td>20</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Contracts</td>
<td>25</td>
<td>13</td>
<td>8</td>
</tr>
<tr>
<td>Corporations</td>
<td>20</td>
<td>14</td>
<td>8</td>
</tr>
<tr>
<td>Mortgages</td>
<td>22</td>
<td>7</td>
<td>5</td>
</tr>
<tr>
<td>Negligence</td>
<td>12</td>
<td>9</td>
<td>15</td>
</tr>
<tr>
<td>Property</td>
<td>24</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>Statute construed</td>
<td>15</td>
<td>19</td>
<td>23</td>
</tr>
<tr>
<td>Taxation</td>
<td>13</td>
<td>10</td>
<td>10</td>
</tr>
</tbody>
</table>

The increase in statutes construed is, no doubt, a reflection of
the increase in modern problems that are being presented to the
court. With respect to the decrease in number of questions of
corporation law, the State Bar Association is entitled to con-
siderable credit, because between 1927 and 1937 a modern cor-
poration code was adopted through the efforts of this association,
and this was without doubt a large factor in reducing the number of such questions raised.

**Disposition of Cases**

In 1927, 397 cases, or 74 per cent of the total, were affirmed, dismissed or relief otherwise denied in toto, and in 141 cases, or 26 per cent of the total, relief was granted in whole or in part, or questions submitted were answered.

In 1937, in 219 cases or 70 per cent of the total, relief was denied by affirmance, dismissal or otherwise, and in 88 cases or 30 per cent of the cases, relief was granted in whole or in part, or answers were given to questions submitted.

In 1938, there were 215 cases, or 74 per cent of the total, affirmed, dismissed or relief otherwise denied in toto, and 87 cases, or 26 per cent of the total, in which relief was granted in whole or in part or questions answered.

These figures are relatively the same whether the appeals come from the three large counties or from the rural districts. Likewise the results are the same whether the appeal turns on issues of substantive law or on procedural issues. In all these cases 70 to 75 per cent of the cases appealed are affirmed or relief is otherwise denied in all respects.

The percentage of appeals which fail looks large, but, in so far as comparable statistics are available from other states, this does not appear to be out of line with dispositions made by appellate courts in other states. In Iowa, out of 228 cases, 164 or 72 per cent were affirmed and 28 per cent were reversed or modified. In Wisconsin,8 out of about 350 cases submitted to the court, about 200 cases, or 57 per cent, were affirmed or relief otherwise denied in toto. The appellants won, in whole or in part, in 43 per cent of the cases. In most states no information is available.

**Procedure of Court in Dealing with Appeals**

In giving an account of how the judges go about their work, it should be emphasized that I am giving only my own interpretation from the best evidence available and it is not based on any confidential information from any of the judges. Necessarily, therefore, it may contain errors.

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81939 Wis. L. Rev. 5, 6. But compare statistics given for the year following, 1940 Wis. L. Rev. 5, 7.
Before describing the methods they employ and for the purpose of having a basis of comparison, the practices of some other courts should be mentioned to the extent that they are available. They have been disclosed by the courts only to a limited extent. It is unfortunate that appellate courts generally have not followed the fine example of Chief Justice Hughes in his valuable book written in 1928 on the Supreme Court of the United States. Lawyers over the country generally have had to guess about how the judges proceed in their work.

Chief Justice Hughes described the methods employed in the Supreme Court of the United States at the time he wrote. These methods had been pursued for many years prior thereto and, no doubt, represent substantially the practice in that court today.

According to this description, after the arguments of counsel have been heard, each judge takes the case, goes over the record and briefs, without, in the meantime, any formal conference between the judges, and after making such examination and research as is necessary, he comes to a conclusion as to how the case should be disposed of. Then a conference of the judges is held and each judge states his views as to how the case should be decided, and the case is discussed and argued and then a vote is taken. After that, the chief justice, provided he is in the majority, assigns the case to some member of the court to write the opinion. He can, if he likes, take the case to write the opinion himself. If he is in the minority, then the senior member of the majority makes the assignment. Justice Hughes says:

“I regard it as far better than the method of some courts of assigning cases in rotation so that the judges know when the case is argued, unless there is some division making a different assignment necessary, who is going to write the opinion. In the Supreme Court every judge comes to the conference to express his views and to vote, not knowing but that he may have the responsibility of writing the opinion which will accord with the vote. He is thus keenly aware of his responsibility in voting. It is not the practice in the Supreme Court to postpone voting until an opinion has been brought in by one of the judges which may be plausible enough to win the adherence of another judge who has not studied the case carefully.”

What the judges do in the way of preparing themselves before the oral argument he does not say.

Hughes, The Supreme Court of the United States (1927) 55, et seq. He was not a member of the court at the time the book was written.

Hughes, The Supreme Court of the United States (1927) 59.
A method similar to this is described in a very good report in 1938 of the Committee on Simplification and Improvement of Appellate Practice of the American Bar Association. Quoting from that report:11

"In at least one court, ... the oral argument, which is always encouraged, is followed on the same day by a conference. Each judge thereafter prepares a separate memorandum opinion in each case, which invariably requires him to make an independent study of the record and briefs. At the final conference each judge presents his views and usually reads his memorandum opinion, whereupon the case is decided and one of the judges is then assigned to write the final opinion of the court."

The committee then adds: "Such a system is excellently adapted for obtaining the well considered opinion of the entire bench."

It may be said with considerable confidence that this is not the practice of any large number of courts.

In 1937, Chief Justice Maltbie of Connecticut explained to the bar of that state the practice of his court.12 After the case has been argued, a conference is held shortly after, in which the case is discussed but no conclusion is reached or agreed upon. Then the case is assigned to some member of the court. How is not stated. This judge then carefully studies the record and briefs and prepares an opinion. Copies of this opinion are then sent to each of the other judges and "it becomes the duty of each, with it before him, himself carefully to study the case." If he disagrees with the opinion in any manner, he makes a memorandum of it and returns it to the writer of the opinion to consider. The final opinion is then taken up at a conference of the judges, in which a final conclusion is reached on the case.

In 1921 Justice Grace described the methods employed by the supreme court of North Dakota at that time.13 They were offered as a model of what might be done by the supreme courts of other states. They are not offered here as such. In substance it is this:

When a case is appealed, the clerk of the court assigns the case to a judge automatically in rotation. That judge gets the case immediately, and one of the merits claimed for this is that the judge has ample time before the arguments occur to examine

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11(1938) 63 Repts. of Am. Bar Ass'n 602, 611.
the record and find out all about it. After the oral argument, the judge who has the case assigned to him writes the opinion and that opinion is circulated among the other judges. If two other judges (out of a total of five) sign the opinion then or at a later conference, the remaining judges have ten days in which to decide what they want to do. If they do nothing it comes out as the decision of the court.

That was the method followed by the court to compel the judges to make a decision within ten days. Judge Grace says: “This rule worked like magic.” All the arrears were cleared up and the court was up to date in a year. He adds: “If a given case is particularly complicated and a judge desires a few days additional, the court may extend the ten days period, but,” he adds, “no judge so far has found any need of applying for additional time.”

One can see from these examples, and they could be multiplied by a few other courts which have indicated their practice, that every court has pretty much a method of its own.

With that as a background, we may examine what our court does. The general pattern or formal arrangement of their work is quite simple. As soon as a case is filed in the court, the clerk fixes a date for hearing. On the day set, the oral argument takes place. After the arguments the judges retire immediately to the conference room, where the case is discussed, and in many cases, at least a tentative agreement is reached as to the disposition to be made of the case.

Then the case is taken by the judge who is to write the opinion in the case. Normally the cases are taken by the judges in rotation in the order in which they are submitted. The chief justice does not assign the cases to the various judges, as is the practice in the United States Supreme Court, and possibly a few others.

After the opinion is written, it is circulated among the other judges, who examine the opinion and indicate their approval, dissent or concurrence, as the case may be. If any judge writes a dissentering or concurring opinion, those opinions in turn are circulated among all of the judges.

When a decision has finally been reached, the opinion or opinions are filed, lawyers are notified and a limited time is given for petitions for rearugment. These petitions are considered at meetings of the judges in which all participate.
This is the formal arrangement of the work. But what are probably more important are the informal practices of the judges, and it is with these that the bar seems most unfamiliar.

The first of these that may be mentioned is the preparation made by the judges before the oral argument. Having observed the courts of England pass upon vital cases without written briefs and on the basis of oral arguments, it is my belief that an argument properly made can be of great value to the court. It affords an opportunity, through the exchange of ideas participated in by court and counsel, for clarification and emphasis for which there is no substitute in the printed word. But for an oral argument to be effective, it is necessary that counsel know to what extent he can assume that the court is familiar or unfamiliar with the case. The practices of our supreme court appear to be the following. They are pursued by different judges or by the same judge at different times and with different cases.

(1) Some of the judges do not familiarize themselves with the case before the argument, and purposely do not do so. They prefer to get their information about the case from and during the oral argument. They probably appreciate the suggested value of a good oral argument. Then, having had the benefit of the argument, the judge reads the record and briefs in the light of it.

(2) Some judges examine the briefs in order to get the points in mind that are in issue and the general tenor of the arguments that will be made for and against the points raised.

(3) Some of the judges examine the records and briefs with care, so that a tentative conclusion is formed in his mind before the argument takes place on the basis of which he can direct his questions and attention.

If all these methods are pursued, and they vary from case to case, it would seem plain that a lawyer cannot adapt his oral argument so that it will be most effective with all the judges. Some of the judges will be unfamiliar with the facts and points involved. For them, counsel must explain. But in so doing, it will be but a repetition and a waste of time for those judges who have examined the case before the argument.

There is a definite need for clarification between the court and the bar on this subject. If counsel had a better knowledge of how much the judges could be expected to know about the case when it came on for argument, it would result in a decided improvement in the quality of the argument they make. Without
that knowledge, and here I know I am expressing the feeling of many lawyers and some judges, the oral argument is largely a waste of time.

Furthermore, it can be said without hesitation that, except for the occasional judge who has the capacity to grasp facts, issues and authorities and their relevancy, on the statement of them in oral argument, the argument would be more effective and serve its purposes better if the judges would familiarize themselves with the case at hand and the law relating thereto before the argument.

As stated, immediately after the arguments, the case is considered in conference. From descriptions received of such conferences, the case is thoroughly considered by all of the judges, and discussion and exchange of views is extensive. Sometimes disagreements develop which never are finally reconciled and show up in our reports as dissenting or specially concurring opinions of particular judges. In many cases where the issue is a narrow one, the briefs and relevant parts of the record are short, where no complicated facts are involved or counsel agree as to what they are, and the authorities are not numerous, the court can come to a well considered conclusion as to what the disposition of the case should be at the conference itself. In cases of greater complication, on no more than the oral argument and without prior preparation, only a tentative conclusion can be reached until a later examination of the record, briefs and authorities has been made. But even in the latter cases, a conference of this kind immediately after the oral argument is of decided value. It means the participation of all the judges in the consideration of the case and an exchange of ideas and suggestions with reference to it. The fact that many of the dissenting opinions have their origin in those conferences indicates that this value is being realized in our supreme court.

Following the conference, the case goes to the judge who writes the opinion and the judges take the cases in rotation. The criticism of this practice by Chief Justice Hughes and his preference for the United States Supreme Court practice of having the chief justice assign the cases already has been referred to. For a court whose judges are elected, there are disadvantages to the latter practice which outweigh the objections made to it. In the first place, assignment by the chief justice would add a heavy responsibility, and he is already burdened with manifold
duties quite outside his regular court work. Second, the charge
could too easily be made, especially around election time, that
cases were being assigned or manipulated for political or other
purposes. For similar reasons it might easily lead to friction
within the court. It would appear to be a better policy to have
the judges take cases in their order, unless some reason affirma-
tively appears why the normal order should not be followed.

The disadvantages associated with the rotation of cases can
be minimized through the intelligent use of it by the court. It
need not necessarily follow that because the judges know that a
particular one of them is going to receive the case for the writing
of the opinion that the others lose interest in the case. Moreover,
they cannot always be sure that the order will be followed. The
judge in line for the case may be in the minority, in which case
another judge takes the case, or there may be other reasons why
a judge will be passed over, such as illness or a heavy load of
cases already assigned.

The rotation of cases together with the fact that opinions are
reported under the name of a particular judge, has led, at times,
to the charge that what we are getting from the court are “one-
man opinions.” The charge is that by this system each judge
knows what cases he will get and it is only in these cases that he
shows any interest or tries to understand what they are about.
When the opinion is written, the other judges, according to this
accusation, readily sign their names without any real knowledge
or understanding of the issues in the case. It is said that this is
confirmed by the fact, frequently noted, that the judge who writes
the opinion is the only judge who asks any questions, or at least
intelligent questions, during the oral argument.

This is not a fair statement of what the court does and indi-
cates a failure to appreciate the limits of what it is possible for
the court to do. In the first place, it ignores evidences to the
contrary. Whenever there are concurring or dissenting opinions,
it is a pretty convincing demonstration that there has been argu-
ment, discussion, careful examination and dissension within the
court on the issues in the case. They reflect that the judges are
reaching independent conclusions of their own and are not rubber-
stamping the views of other members of the court to whom the
cases may have been assigned.

Dissenting and concurring opinions are common in our court
and they are not limited to any particular members. We do not
have a minority and a majority group on our supreme court. We have dissenting opinions from all of our judges. In 1937 and 1938 they were as follows:

<table>
<thead>
<tr>
<th>Judges</th>
<th>1937</th>
<th>1938</th>
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<tbody>
<tr>
<td>Devaney, J</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Gallagher, J</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Hilton, J</td>
<td></td>
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</tr>
<tr>
<td>Holt, J</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Loring, J</td>
<td>1</td>
<td>4</td>
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<tr>
<td>Olson, J</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Peterson, J</td>
<td>10</td>
<td>8</td>
</tr>
<tr>
<td>Stone, J</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>

In the same years the following concurring opinions were written:

<table>
<thead>
<tr>
<th>Judges</th>
<th>1937</th>
<th>1938</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gallagher, J</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Holt, J</td>
<td>2</td>
<td>1</td>
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<tr>
<td>Loring, J</td>
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<tr>
<td>Olson, J</td>
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<td>Peterson, J</td>
<td>3</td>
<td>1</td>
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<tr>
<td>Stone, J</td>
<td>5</td>
<td>4</td>
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</tbody>
</table>

These figures show that from 30 to 40 cases out of about 300 contain dissenting or concurring opinions. That situation does not result unless all of the judges are discussing and considering all of the cases.

Second, there is behind the criticism a view as to what may be expected from the judges which on analysis will be found to be difficult to sustain. According to this view, each judge should take up each case, make his own independent investigation of the record and briefs, examine the authorities and, upon that basis, make an independent decision as to how the case should be disposed of. Consultation and conferences among the judges are desirable, according to this view, but only to assist each judge in making up his own mind.

That this would be desirable, if it could be attained, no one would question. It would mean the most thorough consideration possible of the cases submitted. It is the practice followed in the United States Supreme Court, with the help, incidentally, of able law clerks, and with fewer cases in which to write opinions.14

But it is quite impossible to expect our court to do the same

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14In 1938 there were 176 full opinions and 10 per curiam opinions. There were, in addition, 52 per curiam opinions rendered on less than full consideration of the case. 676 petitions for certiorari were denied or dismissed. Hart, The Business of the Supreme Court at the October Terms, 1937 and 1938, (1940) 53 Harv. L. Rev. 579, 582.
under present conditions. Consider what it would involve on the basis of the present volume of work, which, as we saw, is much less than it used to be. In 1938 there were 302 cases decided. In about 80 cases taken from volumes 200 and 202 of the Minnesota Reports, in which the records and briefs were examined, the average length of the record was 200 pages and the average length of the various briefs combined totaled 75 pages. In 46 cases taken from volume 206 of the Minnesota Reports the records averaged 135 pages per case and the briefs totaled 58 pages per case. This would mean, under the view being discussed, that each judge, in the nine months the court is in session, would have to take up better than one case each day, read and examine anywhere from 190 to 275 pages a day, and, in addition, examine at least some of the leading cases and authorities cited, and in many cases make an independent research of his own. This would be required in addition to his participation in the oral arguments and conferences and the writing of opinions in cases assigned to him and the study of opinions written by the other judges.

Just the bare statement of what is expected by the criticism under discussion indicates its impossibility. All that the judges can of necessity do is to place the major responsibility of examining the records, briefs and authorities on some particular judge, and that judge is the man to whom the case has been given for the opinion. The other judges must of necessity rely largely upon him for the painstaking and thorough examination of the record and briefs and the careful analysis of the authorities. The contribution of the remaining judges can only be to give careful consideration to the opinion submitted in the light of the oral argument and the conferences, and with such checking of crucial cases and particular portions of the record as time permits them to make. How much of this they can do depends on the volume of cases, the time available, the capacities and energies of the individual judges and the assistance available to them through law clerks, etc.\textsuperscript{16} That our judges are not failing in this respect

\textsuperscript{16}In some states, restrictions on appeals, such as discretionary power to deny or allow appeals and limitations on the class of cases appealable as of right, reduce the volume of work. The appellate courts of these states cannot be compared with courts of states which do not have the benefit of such restrictions.

In New York, for example, the reports of the court of appeals show only 184 opinions rendered during the year 1939. There were, of course, numerous other matters dealt with without opinion.

Likewise, the Ohio State Reports dealing with the work of the Ohio
is indicated, as already stated, by the dissenting and concurring opinions that appear. Such opinions would not appear in one out of every ten cases unless the judges were giving substantial consideration also to the other nine.

With respect to the preparation of the opinion, another practice should be mentioned. The judges of the supreme court have their offices but a few steps apart. It is only natural that a judge, as he is considering a case, should walk over to the office of another judge and discuss the case with him. That informal discussion, about which we are not told and which does not go into the record, has a vital and desirable influence on the final product that comes from the report.

Finally, where disagreements develop in the court, the case is undoubtedly discussed in conferences of the judges in addition to the original conference after the oral argument.

After the opinion has been written, it is circulated among the other judges. I am told that oftentimes some other member of the court does not agree with the opinion and writes a dissenting or concurring opinion. This in turn is circulated and sometimes receives sufficient support from the other members of the court to become the majority opinion, sometimes, even, with the withdrawal entirely of the original opinion.

Supreme court in 1939 show:

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
</tr>
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<tbody>
<tr>
<td>Opinions by individual judges</td>
<td>74</td>
</tr>
<tr>
<td>Per Curiam opinions</td>
<td>56</td>
</tr>
<tr>
<td>Dismissals because “no debatable constitu-</td>
<td>63</td>
</tr>
<tr>
<td>tional question” involved</td>
<td></td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>7</td>
</tr>
</tbody>
</table>

The per curiam opinions were usually substantially shorter than those of individual judges and rendered without syllabi. The dismissals were without syllabi or opinion.

The Ohio supreme court has a long established rule requiring that the judge assigned to write the opinion shall state a syllabus and submit it to the concurring judges. Ohio supreme court Rule VI. More weight appears to be given to the syllabus than to the opinion as an authoritative statement of the law. State v. Hauser, (1920) 101 Ohio St. 404, 407, 131 N. E. 66, stating, “Naturally the query, why then an opinion, since the court is bound only by the language of the syllabus. A satisfactory answer is difficult. However, in so far as an opinion applies the law to the facts of the case, and states the process of reasoning by which the court arrives at its judgment and its declaration of the law in the syllabus, it undoubtedly serves a useful purpose. Beyond that it may indicate rather the divergence of the opinion of the member rendering the same from the judgment of the majority, and become the cradle of legal heresy and serve to befog and unsettle rather than to clarify and establish the law.”

In addition to the reduced volume of work, these courts, in many cases, have also the benefit of opinions rendered by the intermediate appellate courts from which the cases came.
COMPARISON OF OPINIONS WITH RECORDS AND BRIEFS

When the reading of the various records and briefs was undertaken, its purpose was to find out the extent to which the court examined the records and briefs, in so far as this could be ascertained by their comparison with the opinion, and to what extent counsel's contentions had been met. Lawyers have at times complained that they did not recognize their cases when they examined the opinion, that they looked wholly new, something quite different from what they thought they had appealed. As already stated, about sixty cases were examined to ascertain to what extent this was true.

As to the court's examining the records, the comparison of the records with the opinions showed beyond question that, in so far as the disposition of the case made it necessary, the records had been read and read with care, and in the great majority of cases the analysis of the facts of the case made in the opinion corresponded more accurately with the record than the statement of facts in either of the briefs of counsel.

As to the court's examining and answering the points made in counsel's briefs, it was evident almost at once that no general conclusion could be drawn that would be applicable to all briefs. In the first place, there were some briefs that could not be termed as anything less than hopelessly inadequate. There were obvious points in the cases that were simply not seen, or if seen, badly mishandled. In one conspicuous case the brief of the appellant, containing 97 pages and about 200 citations of cases, failed even to recognize the basic point involved. Respondent saw it but stated that there were no cases on the question. In fact there are at least a dozen cases from other jurisdictions that deal with the problem. In another case, the leading case in the country on the question raised by the appeal was a Minnesota case. It was in favor of the appellant. His brief made no mention of it and, of course, neither did the respondent's. Appellant lost in an opinion which likewise did not mention the case, and the resulting law on the point is, to say the least, confused.

What the court has been doing in such cases is to make the necessary research and analysis itself. Obviously, there will be little attention paid to the points and arguments raised by counsel in his brief. The question may be raised whether in these cases the court ought not to refrain from doing the work itself. It would be fully justified in returning the case to counsel and delaying the
hearing of the appeal, with such penalties as appeared appropriate, until a satisfactory brief had been presented either by the delinquent counsel or by competent counsel retained for the purpose.

In the second place, there are numerous cases in which one or more important questions are raised in the briefs and then other issues are thrown in by way of assignments of error such as rulings on the admission or exclusion of evidence, errors in instructions, misconduct of opposing counsel, etc., with comparatively short treatment of them by appellant. There is every indication that they have been included with the hope of fishing out some error, and that, alone, they would not have been used as a basis of appeal. As is to be expected, the court devotes its attention to the major questions and passes off the others with a remark or two or none at all.

In the third place, there are appeals which submit for decision questions dealing with the sufficiency of the evidence to sustain a determination of fact. In these cases, the briefs are likely to be exceedingly long, with detailed discussion of the testimony of the different witnesses and the inferences to be drawn. The most the court can do in such cases, and does do, is to state the evidence most favorable to the lower court's decision and determine whether this was sufficient. Clearly, the court cannot take up each contention of losing counsel on the various questions of fact, for this would extend the opinion to enormous lengths.

Finally, there are the adequate briefs, and there are many of them. Points are seen and analyzed and authorities are brought together and persuasively discussed. In these cases, the judges vary in their treatment of them. Some are painstaking in their effort to answer losing counsel's arguments, distinguish his cases and adopt winning counsel's contentions and cases so far as they are applicable. Others tend more, and less desirably, to write a discourse centering on the issues presented and only indirectly or incidentally are losing counsel's arguments on the points answered. But taking the opinions as a whole, those examined indicate that where counsel have done a good job of briefing the court has done an equally good job in meeting the points raised by counsel. Issues seriously presented are met, and if the contrary takes place it is sufficiently rare, so that it did not appear in sixty cases picked at random.

In a few cases the court proceeded, in disposing of the case, on a basis which was wholly new and not to be found or suggested
in either brief. At the same time, the briefs indicated that the point would have been competently handled by counsel had they thought about it. There can be no doubt that in such cases, when the court discovers a point which controls the disposition of the case, it should not be ignored merely because the parties' counsel did not happen to think of it. But it would appear a better policy to ask counsel to brief the point, rather than dispose of the case solely on the basis of the court's own research. It is making unnecessary work for itself, and the wisdom may be doubted of deciding cases without the searching aid of opposing counsel. If there is any justification for having the assistance of counsel at all in any case, it is equally applicable here.

**Defects Noted in Briefs**

A number of lawyers have requested that some comment be made on the defects which suggested themselves as the briefs were read, and that some suggestions be offered for their improvement.

One of the mistakes I felt counsel too often made was the distortion of the facts of the case in his favor. Sometimes this was easily detected by the simple reading of the brief itself. This is bound to put the whole case of counsel in an unfavorable light, in a light of suspicion, right at the start of the judge's examination of the case. It is not a secret that judges will often remark of a particular lawyer that he is one whose statement as to the facts can be relied on as always having support in the record. Such a lawyer has a good reputation with them and is bound to have an influence with any court. Such a reputation is not gained by the practice referred to.

Another weakness was the use of over-elaborate and ineffective argument and reasoning. The arguments were presented as though the court was disagreeing with counsel right at the start. Counsel argued with the court instead of stating their case and the reasons to support it. The briefs did not line up the issues on which the decision of the case would turn and present the position taken by counsel with respect to them and the reasons and authorities in support thereof. Sometimes it was simply impossible from the argument to get at what the contentions really were. An examination of the briefs of fifty years ago will disclose a much greater capacity for conciseness and clarity. One explanation may be the present use of the typewriter. Another is probably the present curtailment of the oral argument. Lawyers
feel they cannot present their full case in oral argument, and hence expand the argument in the brief to compensate for it. But this is hardly a justification for failing to make the argument understandable.

A third failing frequently evidenced by the briefs was the ineffective use of cases. The most objectionable form of this was to state a general proposition of law and then to cite a number of cases in support of it. What the cases held and how they were applicable to the case at hand were left to the judge to find out. What the judge is likely to do is to sample a case or two of those cited, and, if their application is not immediately evident, pass on to something else more productive. What is more effective, if one can judge by comparing the briefs and opinions, is to take two or three directly applicable cases, or as nearly applicable as can be found, and state their holding and their application to the case at hand. Cumulative authorities may then be cited without their amplification. When this is done, the cases show that time and again the judges answer counsel’s arguments, or, if the point is well made, they will adopt the argument and cite the cases used by counsel.

Finally, there are some practices which go not so much to the effectiveness of the briefs as to the unnecessary expense they entail. First, there is the unnecessary printing of portions of the transcript of the evidence into the record. Only some portion of the fact questions is raised for consideration on the appeal, but the whole transcript is included in the record. The court has tried to curtail this wasteful practice by Supreme Court Rule VIII (2) adopted in 1938 which permits the omission in the record of unnecessary portions of the transcript, and subdivision (5) of this rule authorizes the denial of costs for failure to comply. In the cases that have been examined, where counsel have attempted to comply with this rule the court has been extremely liberal in ignoring objections made by opposing counsel. With the express invitation to counsel to keep down the size of the record, one may be sure the court is not going to permit counsel to get into difficulty where there has been an honest effort to comply.

Second, there is often an unnecessary elaboration of the statement of the facts in the brief. Sometimes this goes to the length

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16200 Minn. xxix.

17See records, briefs and opinions in Larson v. Lowden, (1938) 204 Minn. 80, 282 N. W. 669, and Sverkerson v. City of Minneapolis, (1939) 204 Minn. 388, 283 N. W. 555.
of including extensive portions of the evidence. This may be due in part to a fear that the court will not go to the record itself to examine the evidence. As already indicated, this fear appears unfounded. Also, at times, there is an extensive restatement of the facts in respondent's brief which in no way contradict those given in appellant's brief. When no attempt is made to indicate which of these facts differ from those stated by appellant, it simply adds to the difficulty of the court. All that need and should be done is to state in what respects respondent disagrees with appellant's statement of the facts.

Third, is the long quotation from cases. With the express injunction against this in Supreme Court Rule VIII, this has been less in evidence,18 but it is still present to an unnecessary degree. Recently, the Judicial Council adopted a recommendation to the court that notices be sent out to counsel in the appeal calling attention to the provisions of Rule VIII. With such advance notice to counsel, the court may be expected to be more severe with counsel who ignore the rule.

Fourth may be mentioned the unnecessary multiplication of assignments of error. An example of what is in mind may be given. The trial court takes a position as to some principle of law. Counsel offers evidence of several witnesses claiming that the evidence is relevant because the rule of law is not what the trial court says it is. Each time the evidence is offered opposing counsel objects, the objection is sustained and there is an exception to the ruling. This may occur several times with each witness. Then the court instructs the jury on the same principle and again there are exceptions to the instructions. Counsel then files requested instructions which incorporate the principle he has contended for and these are refused and exception is taken. By the end of the trial, this principle of law has caused the court to err, according to counsel, fifty or sixty times. It is unnecessary to assign all these errors in the brief. If the trial court was right or wrong in one ruling he was right or wrong in all of them, and all that is necessary is to raise the correctness of a few of these rulings to get the point before the court. It is unnecessary to clutter up the brief with pages and pages of assignments of error.

Finally, there is a class of cases in which the objection to them

18 This rule undoubtedly was a substantial factor in reducing the size of the records and briefs appearing in cases reported in 206 Minn. See supra 838.
is not so much the method of presentation in the briefs as the fact that these appeals occur at all. These are cases which involve the sufficiency of the evidence to sustain some determination of fact in the lower court. In 1937, there were 56 cases in which no issue, other than this, was raised. Of these, only 15 were reversed. In 1938, there were 45 such cases, of which only 8 were reversed. There were, of course, other cases which involved this issue along with others. In all too many instances, the briefs of appellants showed a failure to understand the application of the simple rule that if there is any evidence to support the determination of fact, even though there is much more evidence or more convincing evidence to the contrary, it is not a case for the supreme court. It does not substitute its judgment for that of the lower court.

In addition to the fact that so many of these appeals are affirmed, there are a number of other serious reasons why the number of these appeals should be cut down. In such cases most or the whole of the evidence must be printed in the record with the attendant expense, and the longest records examined were found among these cases. Likewise the briefs which attempt to show that the evidence does or does not sustain the lower court's decision are usually long. The preparation and printing of all this material necessarily involves a large expense to the litigants.

Another objection is that these appeals place a tremendous burden on the supreme court judges. They must necessarily read, and read with care, all of the evidence that bears on the issue on which it is claimed that the necessary minimum of evidence was not present. A glaring example of this is found in a recent decision. The brief of appellant begins,

“A careful study of the memorandum attached to the decision of the commission by the majority and dissenting members thereof makes manifest the importance and desirability of a careful scrutinizing of the record with a view to determining which way the evidence preponderates.”

There was in that case the testimony of eighteen doctors. Picture the task of the court from the words of Justice Stone's opinion.

“With the aid of a medical dictionary, we have striven to

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19 Susnik v. Oliver Iron Mining Co., (1939) 205 Minn. 325, 286 N. W. 249. The appeal was from the industrial commission.

20 Susnik v. Oliver Iron Mining Co., (1939) 205 Minn. 325, 328, 286 N. W. 249, 251.
understand not only the views of each of them, but the factual basis assigned by each for his conclusion."

The testimony in the case covered 1231 pages in the record, and the appellant's brief contained 141 pages, and the respondent's 55.

Finally, when the opinion is written, it is of very little value to any one. All it establishes is that in that case, the evidence submitted in that case was sufficient to sustain the findings in that case. There will never be another case like it. Yet, the opinion is there and it goes into the Minnesota reports for all lawyers of this and future generations to buy and read.

In short, these appeals on the sufficiency of the evidence, the large majority of which are affirmed, are a serious financial burden on the litigants, a burden to the court, and a burden to the bar as a whole.

The court, on several recent occasions, has criticized these appeals. In *Turnmire v. Jefferson Transportation Co.*, in which the question was the sufficiency of the evidence to support the finding of negligence of the defendant and absence of contributory negligence of the plaintiff, Justice Hilton said:

"Both claims are entirely without merit. We might state at the outset that under the evidence these matters were so obviously a fact issue for the jury's determination that counsel's sincerity in raising them on this appeal seems questionable. In a situation such as that involved here, the evidence, of course, must be considered in a light most favorable to the prevailing party below, and the latter is entitled to the benefit of all inferences reasonably deductible therefrom. In spite of our reiteration of this principle, times almost without number, counsel, although usually frankly acknowledging its existence, will persist in entirely ignoring its application and effect. ... It is not our purpose to review the great mass of evidence in detail. Exclusive of the medical experts, 20 witnesses testified in this action, and the record is extremely long. ..."

Again in *Dayton-Lee Inc. v. McGowan*, Justice Olson remarked:

21 In discussing what should constitute a model code of evidence, Professor E. M. Morgan, Some Observations Concerning a Model Code of Evidence, (1940) 89 U. of Pa. L. Rev. 145, 154, says, "Certainly no code should crystallize decisions upon particular states of fact into hard and fast rules, for only in rare instances will exactly the same states of fact recur and rarely will the circumstances of the trial in which evidence of them is offered be precisely alike. No record of the proceedings can reproduce the situation at the trial with fidelity. Consequently the ruling of the trial judge should be final except in the most unusual cases where his action appears to be arbitrary or capricious."

22 (1938) 202 Minn. 307, 309, 278 N. W. 159, 160.

23 (1938) 202 Minn. 655, 658, 279 N. W. 580, 581.
"We have read the record with care and have no hesitancy in saying that not only is the trial court's finding supported but that an opposite finding would have been difficult to sustain. It is not helpful to the bar or to the parties that we should be compelled to repeat the testimony of the several witnesses testifying. . . .

"This case represents nothing more than that appeals of this type are entirely unjustified and exhibit only a desire to litigate."

The court then quotes from a prior case:

"Counsel should realize that they are doing their clients no service in permitting appeals of this nature to be taken. Such procedure as has here been followed cannot help causing criticism and condemnation of law in general and of lawyers in particular. The expense incurred is out of all proportion to the rights, real and imaginary, involved."

Despite these criticisms these appeals continue coming to the court. It is a problem that deserves the serious consideration of the bar. It may be that counsel not experienced in appellate work should get the advice and assistance of specialists in the field. It would avoid many of these unnecessary appeals. If the bar cannot meet the problem by its own devices, probably the solution is to give the court discretion to allow or refuse appeals in these cases.

**Opinions of the Court**

One of the problems troubling lawyers is the enormous volume of decided cases. In 1938, the report of a committee of the American Bar Association showed that there is a total of about 1,500,000 reported cases in this country and that over 25,000 cases are added each year. Young lawyers who are setting up practice, particularly, are complaining about the large outlay that is required to obtain even a minimum library necessary for any kind of decent practice. The problem is not as great in Minnesota as in some older states. But that the problem is here no one can doubt.

At the same time, the bar is not yet ready to accept the policy of giving the court discretion as to which cases it deems an opinion will serve a useful purpose. Hence the most the court can do is to keep the length of its opinions as short as possible.

In this respect, when compared with other courts of equal standing, our Supreme Court has a commendable record. For example, in Volume 232 of the Wisconsin Reports, excluding an

84 page opinion in a telephone rate case, the average number of pages per opinion was 5.85. In Volume 225 of the Iowa Reports, the average number of pages per opinion was 6.54 pages. In Minnesota, in 1937 the average opinion contained 4.68 pages and in 1938, 4.15 pages. The opinion in the comparable telephone rate case rendered in 1939 was 36 pages long. Differences are to be expected in the capacity of individual judges for brevity of expression, but on the whole the Minnesota supreme court opinions show a commendable absence of extensive citation of cases, of lengthy quotations from authorities and cases, and of wordy discourses designed to demonstrate the learning of the writer.

Against this, however, should be pointed out that opinions of the court rendered in 1937 and 1938 were distinctly longer than they were in 1927, when the average length was 3.01. Of those examined, Justice Dibell wrote the most concise opinions with an average length of less than two pages. For every 300 pages written in 1927, the judges wrote 400 pages in 1938.

Several explanations for this increase may be suggested. In the first place, new and more difficult problems are being presented, and naturally require longer consideration. But an examination of the opinions in 1937 and 1938 indicates that the increasing length is not confined to opinions involving such issues.

Second, since the volume of cases is less, the judges have more time to give to the individual cases and hence have more to write.

Finally, it is in part a response, conscious or unconscious, to the criticism of the bar, which the court feels exists, that cases are not being adequately considered, and through their opinions the judges attempt to demonstrate that the criticism is unfounded.

The last explanation may account especially for an unfortunate tendency evidenced in some of the cases. This is the unnecessary and too detailed analysis of the evidence in cases which turn on the sufficiency of the evidence to sustain a determination of fact. The only purpose of such an analysis is to satisfy losing counsel, and this is hardly possible within the confines of an opinion. As already stated, from the standpoint of any contribution to the law of the state, it is worthless.

It would be a wholesome measure and one that should be welcomed by the bar if the court would return to the policy expressed in a number of decisions of the Minnesota court itself. Thus, in
Armstrong v. Minneapolis, A. & C. R. Ry. Co., the court in dealing with a fact question said:

"We have considered all the evidence and the arguments of counsel based thereon, and have concluded that contributory negligence on the part of the truck driver was not conclusively proven. We make no analysis of the evidence, for it is not the duty of the court to demonstrate that the evidence was such as to justify the refusal of the trial judge to set the verdict aside."

**Petitions for Re-hearing**

Only a few of the petitions for re-argument appear in the Minnesota Reports. It was necessary, therefore, to examine the Register of Actions. Such an examination disclosed that out of 305 cases there recorded, including all cases dismissed or settled by stipulation or otherwise disposed of with or without an opinion, there were 53 petitions for re-argument. All of these were denied, one with opinion.

In this, the court is but reflecting a policy and result which is no different from that of most appellate courts of the country. In Iowa, for example, out of 78 petitions for re-hearing, 77 were denied, of which two were with opinion, and in one the opinion was modified. In Wisconsin, out of 352 cases decided on submission, 22 such motions were denied with costs, 4 were denied without costs, and 3 were granted. In 1938, in a discussion of the 1935-36 work of the United States Supreme Court, Messrs. (now Justice) Frankfurter and Fisher remarked, "The Court continued its almost conclusive practice against rehearings."

In other words, our court, in this respect, is not doing anything different from the practice in other courts of the country or that of the highest court in the United States. There must, of course, be finality to a decision. All appellate courts have adopted a policy that once they have considered a case and a decision has been reached, the court ought not to be expected to do it over again.

Judging from the petitions for re-hearing examined, there appear to be about four reasons why so many such petitions are

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27The Work of the Wisconsin Supreme Court, 1939 Wis. L. Rev. 5, 10.

made. First, there is the litigious lawyer. Such a lawyer will not concede he is wrong, and will insist on having the last word. This is particularly true when the issue is one of the sufficiency of the evidence to sustain a finding of fact in the lower court.

Second, it is used as a vehicle for enabling counsel to tell the court what he thinks of the court.

Third, it represents a misunderstanding of the function of a petition for re-hearing and a failure to appreciate the policy of finality which not only appellate courts but all courts must adopt.

Finally, there is the rare case in which such petitions serve a real function, namely to correct some oversight of some vital fact or some binding decision which was not called to the attention of the court and which should have its attention before the case is finally disposed of.

It is to be expected, therefore, that but few such petitions should be granted. In fact, but few such petitions should be made. They probably serve some purpose in letting the court know the feeling of the bar about certain matters, but a conference between the bar and the court or some other informal means outside the heat of litigation would be far more effective in attaining this objective.

In concluding these comments on the work of the supreme court it is sincerely hoped that the impression has not been given that either the work of the court or that of the bar is considered generally inferior. We should not permit ourselves to lose sight of the fact that the court has the reputation of being the equal of any comparable court and decidedly superior to many. This standing it has attained with the help of the bar. It comes from no less authority than a member of long standing of our supreme court that the quality of the work of the bar, as evidenced in the cases before the court, is higher today than at any other time in his experience.

But these facts should not keep us from recognizing conditions which may need improvement and from trying to bring about a closer co-operation and better understanding of the work of the court and of the bar. It is from that standpoint that these remarks have been offered.