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Affirmance Without Opinion

Cover Page Footnote

Member of the New York Bar

AFFIRMANCE WITHOUT OPINION

PHILIP MARCUS†

PRICK AN attorney and he may break into print. The genesis, but it is hoped, not the circumference of this paper, is an encounter of the writer with a phenomenon of appellate practice, a phenomenon which at one time or another is an unwelcome visitor in almost every law office. It is called, "affirmance without opinion."

In 1934 a Surrogate of New York County was called upon to decide whether he had power to permit a trustee to modify the terms of a trust under circumstances of considerable importance to trustees and attorneys in New York. The case was decided by the Surrogate in a briefly reported opinion. An appeal was perfected to the Appellate Division of the First Department which unanimously affirmed without opinion. A motion for leave to appeal to the Court of Appeals was made in the form of a petition which endeavored to point out the importance and novelty of the question involved. Leave to appeal was granted.¹ It seemed to the writer that a study of this aspect of appellate procedure might reveal that there is a problem here which deserves careful consideration. The results of that study are embodied in this paper.

That all judges are not equally capable of determining an issue of law, if not of fact, is a cardinal assumption in our judicial system. Essentially, the theory of an appeal is that there is some person or body of persons better able to render a correct decision than the tribunal to which the litigants have first resorted. Thus, we have a judicial hierarchy which begins with *nisi prius* and ascends through various gradations of appellate *curiae* to a court of last resort.

Appellate courts generally enjoy a reputation among attorneys and laymen which is difficult for a court of first instance to acquire. They enjoy a larger degree of insulation from deleterious exterior pressure, political and otherwise. The product of their efforts receives more publicity in lay sheets as well as legal journals.

Tribunals of the first instance are generally one-man affairs. The Court is one judge. He sits in one locality, imbibes local sympathies and antipathies. On the other hand, the appellate tribunal normally is composed of several members; most of them have gravitated to that bench by way of a judicial apprenticeship in which they have proved their ability. One judge of superior ability may often leaven an otherwise run-of-the-mill court. Time pressure, moreover, has less effect upon

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1. Matter of Irving Trust Co., as Substituted Trustee, *etc.*, of F. K. Agate, 242 App. Div. 811, 275 N. Y. Supp. 630 (1st Dep't 1934), *leave to appeal granted*, 243 App. Div. 520, 276 N. Y. Supp. 793 (1934).

the deliberations of an appellate court than in the case of a *nisi prius* judge whose daily calendar resembles, often, a broker's counting board, whose courtroom, a meeting place of hordes of margin customers.

Traditionally, then, the function of the appellate court has been to expound what the law should be. As chief oracle, by virtue of authority and prestige, it has furnished a pattern of thought by which lower courts, lawyers, and laymen might guide themselves—a refining process by which judicial dross has been separated from the gold. A serious undermining of that function has come about through the practice, common in several appellate courts, of affirming decisions without opinion.

Decisions, upon occasion, are reversed without opinion,² appeals dismissed *sub silentio*,³ and writs of *certiorari* denied without more.⁴ But the infrequency of the first, and the fact that there is little, if any, consideration of the merits of the action in the other two⁵ give them little significance as compared to the decision which is affirmed without opinion.

Early English common law knew little of a written report of a decision. Occasional judgments pronounced from the bench might be remembered by some lawyer or judge. Opinions were uncommon.⁶ In the last two centuries, however, it has become recognized that the opinion may be more important than the decision.⁷ But a contrary tendency, under the

2. *Houston v. Williams*, 13 Cal. 24 (1859); *Matter of Beck v. Cohen*, 268 N. Y. 617, 198 N. E. 521 (1935). And see Slayton, *Functional Indications in Reported Opinions*, (1935) 14 TEX. L. REV. 1, 11.

3. Each volume of contemporary New York Reports contains numerous decisions of this sort. "As in the case of a denial of an application for a writ of *certiorari* in the Supreme Court of the United States, a denial of leave to appeal is not a decisive precedent." *Matter of Marchant v. Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 169 N. E. 386 (1929).

4. As to writs of *certiorari* in the United States Supreme Court and in Illinois appellate practice, see Comment (1936) 4 GEO. WASH. L. REV. 257.

5. It is customary to dismiss appeals or deny writs of *certiorari* without rendering an opinion. The appellant is asking the court to hear the appeal, not as a matter of right and not necessarily to decide the question involved, and if the court has the right to refuse to hear the appeal in the first instance, there is no strong reason why it should be required to give its reasons for so doing.

Even here, however, an argument might be made for a different conception of a dismissal or denial. The Supreme Court of Tennessee has said: "A written opinion disposing of the question presented through petition for *certiorari* to the Court of Appeals is not necessary in every instance. Denial of the writ of *certiorari* to review the action of the Court of Appeals, without a written opinion or some explanatory memorandum, emphasizes the concurrence of the Court in the opinion of the Court of Appeals." *Beard v. Beard*, 158 Tenn. 437, 442, 14 S. W. (2d) 745, 747 (1929).

6. POTTER, *HISTORICAL INTRODUCTION TO ENGLISH LAW* (1932) 234-235; *Houston v. Williams*, 13 Cal. 24 (1859). The more frequent use of oral opinions has been urged. See *Williams*, *The Multiplication of Law Reports* (1918) 5 VA. L. REV. 316.

7. "New developments of principles from new pursuits, ought and will always be made public through reports. They are of infinite value to progress and to civilization itself."

guise of a colorless phrase, "affirmed without opinion," has tended to exalt the decision to the oblivion of the opinion.⁸

The reason most often adduced for this disposal of an appeal is that of expediency. The pressure of judicial duties makes the rendering of opinion in each appeal impractical, if not impossible. Case crowds upon case. The decision in a case should not be delayed by reason of the necessity of writing an opinion in another case.⁹

It is true that the amount of appeals heard by some courts is impressive.¹⁰ But this argument for the curtailing of written opinions is not im-

Letzkus v. Butler, 69 Pa. 277, 281 (1871). The decision is the result of the court's deliberations. The opinion is the exposition of the court's reasons for arriving at that result. *Houston v. Williams*, 13 Cal. 24 (1859). The decision affects only the litigants, or a limited number of persons whose interests are involved in the facts of the particular case. The opinion may, and often does, affect the body politic at large. See Higgins, *Observations on Judicial Opinions* (1929) 8 TENN. L. REV. 19; cf. CARDOZO, JURISDICTION OF THE COURT OF APPEALS (2d ed. 1909) § 6.

8. Undoubtedly the purpose of almost every legal action is to get a decision in that particular case: persons would continue to resort to the courts even though they knew no opinion would be rendered, as long as the decision would be forthcoming. But the argument of this paper is that the opinion should accompany the decision and that the opinion is often of far greater importance than the decision it supports.

9. See Radin, *The Requirement of Written Opinions* (1930) 18 CAL. L. REV. 486.

10. The following data in New York was made available to the writer through the courtesy of the clerks of the respective Appellate Divisions and in the case of the Court of Appeals through the State Reporter.

Court of Appeals:

1934: 195 cases decided with opinion.
455 cases decided without opinion.
1935: 223 cases decided with opinion.
461 cases decided without opinion.

Mr. Rezzemini, the State Reporter, has stated that there were approximately the same number of appeals in the three preceding years.

Appellate Division, First Department:

<i>Year</i>	<i>Appeals Decided</i>	<i>Opinion Appeals</i>	<i>Opinions in Disciplinary Proceedings</i>
1931	1872	323	26
1932	1773	372	24
1933	1830	316	31
1934	1764	366	74
1935	1724	228	26

Appellate Division, Second Department:

<i>Year</i>	<i>Appeals</i>	<i>Opinions Written</i>
1931	1421	65
1932	1413	81
1933	1475	65
1934	1484	50
1935	1565	58

posing when analyzed. Seemingly, only in a very few states do decisions appear in the reports as *fait accompli*, with the curt observation of "no opinion."¹¹ In many states full opinions are written in all reported decisions.¹² In most of the states, whatever memorandum or *per curiam* decisions appear express some explanation of the result arrived at.¹³ It is a fair supposition that other states than those in which the affirmance without opinion is common have a comparable number of appeals to deal with.¹⁴ It is fairly significant that so few of the states have resorted to this summary disposition of an appeal. And in an argument of numbers, Alabama is a strange bedfellow to New York.

The courts of some states have stricken statutes which have required written opinions, mainly upon an argument of division of powers. Although there is some doubt as to whether courts of other states in which the validity of such statutes has not been tested would reach a like result,¹⁵ the odds are heavily weighted against judicial sanction of such

Appellate Division, Third Department:

1931-1935

Decisions handed down: 3714. Opinions: Approximately 530.

Appellate Division, Fourth Department:

	1931	1932	1933	1934	1935
Number of appeals heard:	496	561	546	485	542
The number of opinions written during 1934 and 1935 were:					
Total prevailing opinions	62	81			
Concurring opinions	1	1			
Dissenting opinions and memoranda	7	18			
<i>Per curiam</i> opinions	6	22			
<i>Per curiam</i> memoranda	72	95			

11. The writer has checked all the official state reports for the past five years and does not vouch that the same is true as to prior years. But it is more than likely that such is the case. Alabama, New York, and Wisconsin are in this category. Rule 49 of the Alabama Rules of Practice expressly provides for affirmance without opinion; most of such decisions are found in the Alabama Court of Appeals reports. In Arkansas, some opinions are omitted from the reports by order of the court as having no value as precedents. In the reports of the Illinois Appellate Court some of the reported decisions merely give the nature of the action but state the date of the opinion. In Tennessee, under a rule of the Court of Appeals, only the opinions of cases in which writs of *certiorari* are denied without written opinion or explanatory memorandum are published. See preface to volume 14 of the Tennessee Appellate Reports. The Tennessee Supreme Court decides which opinions are to be published. See Rule No. 31, 167 Tenn. 702 (1933).

12. Colorado, Hawaii, Idaho, Illinois (Supreme Court), Iowa, Kansas, Louisiana, Massachusetts, Michigan, New Mexico, Rhode Island, South Dakota, Utah, West Virginia.

13. Connecticut, Delaware, District of Columbia, Florida, Maryland, Pennsylvania. In Georgia, official headnote opinions are often resorted to.

14. California, Florida, and Illinois compare with New York in this respect, at least as to the New York Court of Appeals.

15. See Gertner, *The Inherent Power of Courts to Make Rules* (1936) 10 U. CRR. L. REV. 32.

legislation.¹⁶ But the legislatures and people of many states have thought it important that opinions in decisions be given by the appellate courts. By constitution and by statute, a large number of states have called upon their appellate courts to render opinions.¹⁷

Professor Radin has used New York State as a prime example of the expedition of appellate work by the disuse of written opinions.¹⁸ Writing in 1930, he states that in the First Department appeals can be heard within a few months, whereas in California the time is from one to two years. Reverting to the figures of the work in the New York Appellate Courts for the five years preceding 1936,¹⁹ the Appellate Division of the First Department had more appeals than any of the three other Divisions. But although that department had considerably less than twice the number of appeals than the Second Department had, it rendered more than four times as many opinions annually. Upon Mr. Radin's argument the First Department should be far behind the other departments in the hearing of appeals, but, as he himself has said, appeals are heard in that department within a month or two. In fact, in all the departments appeals are normally heard in the term for which they are noticed.²⁰

It is well recognized that the jam in litigation in New York lies in

16. See Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally* (1928) 23 ILL. L. REV. 276; Gertner, Note 15 *supra*.

17. ARIZ. CONST. art. VI, § 2; CALIF. CONST. art. VI, § 2; COLO. CODE ANN. (Court-right-Mills, 1933) § 475; GA. CODE ANN. (Park, Skillman & Strozier, 1936) § 6-1606; ILL. STAT. ANN. (Smith-Hurd, 1935) c. 37, §§ 21, 41; IND. CONST. art. VII, § 5; KAN. GEN. STAT. ANN. (1935) §§ 20-111, 20-112, 60-3328; LA. CONST. art. VII, §§ 1, 6; MD. CONST. art. IV, § 15; MICH. CONST. art. VII, § 7, MICH. COMP. LAWS (1929) § 13556; MO. CONST. art. VI, § 15, MO. REV. STAT. (1929) §§ 1067, 1068; NEV. CONST. art. XV, § 8, NEV. COMP. LAWS (Hillyer, 1929) § 8381; N. H. PUB. LAWS (1926) c. 315, § 13; N. D. COMP. LAWS (1913) § 7343; OHIO CONST. art. IV, § 6 [*cf.* OHIO CODE ANN. (Page, 1926) §§ 1483, 1484]; OKLA. CONST. art. VII, § 5, OKLA. STAT. ANN. (Harlow, 1931) § 13557; ORE. CONST. art. VII § 7; S. C. CONST. art. V, § 8; UTAH CONST. art. VIII, § 25; WASH. CONST. art. IV, § 2; W. VA. CONST. art. VIII, § 5.

In some states there is an implication that written opinions are required, or the limits of discretion are expressly stated. In Tennessee [TENN. CODE ANN. (Williams, 1934) §§ 1334, 9924], written opinions are required in all cases except where there is no defense. And see IDAHO CODE (1932) § 1-205; MASS. GEN. LAWS (1932) c. 211, §§ 8, 9; MISS. CODE (1930) § 3379; NEB. COMP. STAT. (1929) § 27-208; N. C. CODE (1935) § 1416.

18. See Radin, note 9, *supra*.

19. See note 10, *supra*.

20. All the Appellate Divisions of the four Departments in New York keep their calendars up to date. See REPORT OF THE COMMISSION ON THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE (1934), and REPORT OF JUDICIAL COUNCIL OF THE STATE OF NEW YORK (1936) 18. The Appellate Divisions of the First and Second Departments consist of seven judges respectively; a maximum of five sit on any one case. The other Appellate Divisions have five judges each. Additional judges may be assigned to an Appellate Division when the pressure of business makes such augmentation necessary.

the courts of first instance. Yet in those courts most decisions are unadorned with opinions.

The work of legal secretaries, most of whom are honor graduates of law schools, in easing the burdens of preparing opinions, should not be overlooked.

It is essential to remember that an opinion is by no means necessarily an essay in legal jurisprudence, although a well-written opinion is something to be cherished.²¹ The length of judicial opinions has been frequently condemned,²² and memorandum opinions might well be more frequently employed. Unquestionably it is burdensome for a judge to have to write full length opinions upon each case appealed to the court, but the extra time and space would be infinitesimal if the court when not desirous of writing a comprehensive opinion would affirm because: "we think there was a proper question for the jury"; "the doctrine of *res ipsa loquitur*"; "the exceptions disclose no prejudicial error in the rulings of the trial court"; "affirmed upon authority of . . .";²³ "affirmed upon opinion below."²⁴ A comprehensive statement of fact appears in the decisions of the Court of Appeals which are reported without opinion. It would seem not too much to ask to have a brief resumé of the reasons for the decisions appended thereto. The reports of the Appellate Divisions in New York of cases decided without opinion often omit even a statement of the facts. But in at least one department an attempt has been made to cut down the court's labors without extirpating the opinion.²⁵

21. The reputation and veneration earned by our great judges rest largely upon their written opinions and not upon their decisions.

22. Kingsley, *The Length of Judicial Opinions* (1932) 10 NEB. L. BULL. 398; Leach, *The Length of Judicial Opinions* (1911) 21 YALE L. J. 141; Winslow, *The Courts and the Paper Mills* (1915) 10 ILL. L. REV. 157; *The Output of the Courts* (1915) 2 DOCKET 1443; *Report of the Special Committee on Reports and Digests* (1916) 2 A. B. A. J. 618; Frankfurter and Landis, *The Judiciary Act of 1925* (1928) 42 HARV. L. REV. 1, 14.

The causes of wordy opinions are many. See Slayton, note 2, *supra*. Ironically enough dictation to a stenographer is most often blamed.

23. The Court's own rules in some states so provide. See Rule VIII in Preface to 130 Ohio State Reports (1935).

24. These and other instances of succinct memoranda opinions have been employed by many courts in the United States. The Appellate Divisions in New York sometimes state their reasons for a decision in a few short sentences but end the statement with the observation of "no opinion." This practice may be applauded even though the accuracy of the court's appellation of its own efforts be doubted.

25. Mr. Herrick, Clerk of the Appellate Division, Third Department, in a letter to the writer stated that the court adopted a form of decision several years ago, which to a large extent eliminated the writing of lengthy opinions. A sample decision follows:

In the Matter of the Claim of PATRICK DODD, *Respondent*,

v.

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY AND
ANOTHER, *Appellants*.

"We take this occasion to announce that in causes referred to the Commission of Appeals, our approval of the judgment recommended by the Commission is to be understood as having no further effect than simply to adopt the view of the Commission as to the determination to be made of the cause. It is not to be construed as an approval by the Supreme Court of the opinion of the Commission in the particular case, or the reasons given in the Commission's opinion for its conclusion."²⁶

This is the attitude taken by practically all of the appellate courts which have adopted the use of the affirmance without opinion.²⁷ What, then, is the effect of an affirmance without opinion? Not only are attor-

STATE INDUSTRIAL BOARD, *Respondent*.

This is an appeal by the employer and insurance carrier from the decision of the State Industrial Board.

The claimant was employed by the Great Atlantic & Pacific Tea Company as a store manager. There is no question raised as to either the disability claimed, the period of such disability, or the amount of the award. As an employee he was a member of the employer's benefit system in good standing and paid 75c a month which entitled him to \$10.00 per week in case of disability, to this amount the company added \$30.00 a week so that he was paid \$40.00 a week by the company during his disability. This was paid to all employees belonging to the association in good standing who were sick without regard to whether they had suffered an industrial accident or not.

The claimant filed a claim for compensation and two awards were made, a check for \$50.00 covering two weeks and a check for \$250.00 covering ten weeks. The check for \$50.00 was sent to the claimant who cashed it, the check for \$250.00 was sent to the employer who induced the claimant to endorse it to them. They also required the claimant to return to them the \$50.00, representing the check which he had cashed, so that the claimant received none of the compensation which had been awarded to him, the employer received it all.

The employer never made any claim under Section 25 of the Compensation Law for advance payment of compensation or for sums paid as wages. The employer having failed to file a demand for reimbursement as provided in Section 25 was not entitled to reimbursement.

Decision and award unanimously affirmed with costs to the State Industrial Board.

Present—HILL, P.J., RHODES, McNAMEE, CRAPSER and HEFFERNAN, JJ.

26. *McKenzie v. Withers*, 109 Tex. 255, 206 S. W. 503 (1918). Since 1934 an addition to the court rules of the Supreme Court of Texas provides: "All opinions of the Commission of Appeals, accepted by the Court, will . . . be adopted by the Supreme Court." Preface to 123 Texas Reports (1934).

27. *Chicago & N. W. Ry. v. Board of Supervisors*, 182 Iowa 60, 165 N. W. 390 (1917); *O'Hara v. Lamb Const. Co.*, 200 Mo. App 292, 206 S. W. 253 (1918); *In re Basset's Will*, 84 Misc. 656, 146 N. Y. Supp. 842 (Surr. Ct. 1914); *Viertels v. New York, O. & W. Ry.*, 182 App. Div. 92, 169 N. Y. Supp. 497 (1st Dep't 1918); *S. W. Scott & Co. v. Scott*, 186 App. Div. 518, 174 N. Y. Supp. 583 (1st Dep't 1919); *Erie R.R. v. International Ry.*, 209 App. Div. 380, 204 N. Y. Supp. 771 (4th Dep't 1924) *aff'd without opinion*, 239 N. Y. 598, 147 N. E. 211 (1924); *In re Brush's Estate*, 154 Misc. 480, 277 N. Y. Supp. 559 (Surr. Ct. 1935); *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290 (1923); *Duckworth v. Thompson*, 22 S. W. (2d) 528 (Tex. Civ. App. 1929).

neys uncertain what the affirmance of a lower court decision "without opinion" imports, but frequently the courts themselves admit they do not know whether to regard such decisions as fish or fowl. The following quotations bring into bold relief the embarrassment of the parental court when confronted with an illegitimate offspring which some one has proffered for a fatherly blessing:

"One case only do I find in this state which seems to hold a contrary opinion, and that is *Haven v. New York*, 67 App. Div. 90, affirmed in 173 N. Y. 611, without opinion. Affirmance by this court without opinion does not mean that we have adopted the opinion of the court below in its entirety. The Appellate Division in that case not only held that the payment by the plaintiff was voluntary, but it also found that the assessment was not illegal. One judge concurred in the result. This court may very well have affirmed upon the latter reason."²⁸

And may not have. Evidently the court does not know. A few years later the same court says:

"Two decisions in the former General Term are cited by the adverse parties at bar. They are in conflict, but, although the actual determination of one was affirmed without opinion by this court, neither controls the rule to be applied by us. (*Crummey v. Mills*, 40 Hun, 370; *Mordecai v. Pearl*, 63 Hun, 553, affirmed 136 N. Y. 625.) We are free to accept or reject the argument of either opinion."²⁹

The Supreme Court of Iowa met the problem by saying:

"In affirming the judgment below this court does not necessarily affirm the argument by which the trial court came to its conclusion, and the fact that we did not mention the same in our former opinion is not to be construed as an approval. But to avoid misapprehension in that respect, we have to say that. . . ."³⁰

And in Georgia we find that:

"The identical question was involved in the case of *Williams v. W. & A. R. Co.*, 24 Ga. App. 750, and a petition for certiorari was filed in this court to review the judgment rendered by the Court of Appeals. After careful examination and consideration of the question, this court was then of the opinion that the decision by the Court of Appeals, citing the case of *American R. Co. v. Coronas*, supra, presented the better view of the question. There were, however, as we have shown above, decisions in which a contrary view was taken. The same question coming before the Court of Appeals, that court has certified it to this court; and, on further consideration of the question, we have reached a different conclusion, which we think, is sustained by the better reasoning.

28. *Adrico Realty Corp. v. New York*, 250 N. Y. 29, 44, 164 N. E. 732, 737 (1923).

29. *Joseph v. Schatzkin*, 259 N. Y. 241, 245, 181 N. E. 464, 466 (1932).

30. *Chicago & N. W. Ry. v. Board of Supervisors*, 182 Iowa 60, 165 N. W. 390 (1917).

"The denial of a writ of certiorari by the Supreme Court is not binding as a precedent in another case, and does not come within the doctrine of stare decisis as provided in the Civil Code . . ."³¹

Such remarks are a sad commentary upon the courts which make them and the judicial system which sanctions their utterance. Moreover, there is an unavoidable danger that a case affirmed without opinion will be used by some other court as a precedent for a point not meant to be decided.³²

In many ways, affirmance of an appeal without opinion, instead of lessening the work of the courts, will often increase their burden. When, in a later appeal, a case is cited which was affirmed without opinion as authority for a proposition in the instant appeal, the judges almost invariably must read not only one record but two or more to decide the case before them and to ascertain what the prior case stood for. And if the appeal is heard in the same court which rendered the prior decision, when the court writes an opinion in the later case it will often say what it meant to decide in the former case:³³

"The usual and most forceful reason advanced against regarding unreported cases as judicial authority is that it is not always possible to ascertain the exact legal proposition involved and decided. It is urged, and with good reason, in such cases, that where several errors have been assigned, and the court does not state the point on which the decision rests, the uncertainty is such as to destroy the case as commanding authority. However, in the Gardner Case, *supra*, it is wholly beyond dispute that the question involved in the instant case was there decided by the Court. The point made by the receivers in that case, and on which they predicated their motion to dismiss, was that under the statute

31. *Seaboard Air Line Ry. v. Brooks*, 151 Ga. 625, 631, 107 S. E. 878, 881 (1921).

32. The constant *caveat* of the courts not to take a decision affirmed without opinion at its face value suggests that the judiciary is well aware of this danger. The scant number of opinion decisions in New York in comparison to the number of no-opinion decisions, (see *supra*, n. 10) compels some use of such ambiguous cases as precedents. Compare, on the other hand, the strange position of the lower court in *Haggerty v. New York*, 153 Misc. 841, 276 N. Y. Supp. 722 (Mun. Ct. 1934), *rev'd*, 267 N. Y. 252, 196 N. E. 45 (1935) which interpreted a decision affirmed without opinion as not decisive of the question before it, only to have the Court of Appeals say otherwise.

33. In New York this practice appears to be fairly common. See *Adrico Realty Corp. v. New York*, 250 N. Y. 29, 164 N. E. 732 (1928); *Cherrington v. Burchell*, 147 App. Div. 16, 131 N. Y. Supp. 631 (2d Dep't 1911); *In re Basset's Will*, 84 Misc. 656, 146 N. Y. Supp. 842 (Surr. Ct. 1914); *In re Brush's Estate*, 154 Misc. 480, 277 N. Y. Supp. 559 (Surr. Ct. 1935).

Other courts have gone through the same process. *Chicago & N. W. Ry. v. Board of Supervisors*, 132 Iowa 60, 165 N. W. 390 (1917); *O'Hara v. Lamb Const. Co.*, 200 Mo. App. 292, 206 S. W. 253 (1918); *Thompson v. Denton*, '95 Ohio St. 333, 116 N. E. 452 (1917); *American Indemnity Co. v. Austin*, 112 Tex. 239, 246 S. W. 1019 (1922) (where the court had to reexamine two prior cases); *Duckworth v. Thompson*, 22 S. W. (2d) 528 (Tex. Civ. App. 1929).

then regulating the jurisdiction of the circuit court that body was wholly without jurisdiction, since the order from which appeal was had was not a final order. The action of the court in overruling the motion to dismiss and in proceeding to hear the case on its merits necessarily sanctioned the practice there invoked, and the Supreme Court . . . necessarily gave to that decision its full commendation. Under such circumstances, the decision of the Supreme Court cannot be brushed aside as being wholly without influence."³⁴

The *reductio ad absurdum* is to be found, perhaps, in a Texas case:

"On May 10, 1922, in *Millers' Indemnity Underwriters v. Hayes*, 240 S. W. 904 (an unadopted opinion of the Commission of Appeals) it was held that under Section 12 d of Article 8306, R. C. S., the Industrial Accident Board had jurisdiction to review for mistake or fraud its orders denying as well as those of awarding compensation. On June 25, 1930, in *Cooper v. U. S. F. & G. Co.*, 29 S. W. (2d) 973 (also an unadopted opinion of the commission), it was held that section 12 d only applied where the board has previously made an award allowing compensation, and has no application whatever to cases in which the board has made an award refusing compensation. No reference, however, was made to the Hayes case.

"December 20, 1930 (two days after the award in this case), motion for rehearing was overruled in the Cooper case, the Commission handing down an unadopted opinion (33 S. W. (2d) 189, 190) from which we quote: 'An examination of the opinion in the Hayes case convinces us that our holding in the instant case is in conflict therewith; in fact, while the original opinion in this case was pending before the Supreme Court, and before they had adopted the judgment recommended therein, we had our attention called to the Hayes case, and in turn, called the attention of the Supreme Court thereto. In this condition of the record we have consulted with the Supreme Court and they have informed us that they entered the judgment recommended by us in our original opinion in this case, with the opinion in the Hayes case before them, and with the full realization at the time, that the holding in the instant case has the effect of overruling the Hayes case. Also the Supreme Court have informed us that . . . the construction placed on section 12 d of article 8306, supra, in our original opinion in this case is correct, and that the construction placed thereon in the Hayes Case is erroneous and should be overruled. We therefore still adhere to the holding in our original opinion, and expressly overrule the holding in the Hayes Case."³⁵

The case just quoted from cannot help but make one suspicious of the time-saving qualities of the decision affirmed without opinion. In New York, moreover, it is the writer's belief that many a motion made in the Appellate Division or in the Court of Appeals for leave to appeal from an unanimous affirmance of a lower court decision has its genesis in the fact that no reasons have been given for the affirmance.³⁶

34. *Thompson v. Denton*, 95 Ohio St. 333, 339, 116 N. E. 452, 454 (1917).

35. *Casparis v. Fidelity Union Cas. Co.*, 65 S. W. (2d) 404, 405 (Tex. Civ. App. 1933).

36. Every appellate term sees a considerable number of such motions which require

It has been suggested that the practice of affirming without opinion should be encouraged since the courts would restrict the giving of opinions to cases of importance or novelty.³⁷ This argument tinkles pleasantly. But the results of such an approach are unfortunate.³⁸ It is unfortunately quite true that courts which have adopted the affirmance without opinion method of disposing of an appeal have sometimes shown little discrimination as to the questions which are thus summarily disposed of. Thus, in Texas, a provision of its Compensation Act was construed in opposite ways by lower appellate courts and the Supreme Court adopted both decisions; not until the Commission of Appeals, in perplexity, advanced an inquiry to the Supreme Court did the latter actually state upon which side of the fence it stood.³⁹ In Ohio, a case involving important questions of procedure and jurisdiction is affirmed without opinion only to be later discussed *in extenso*.⁴⁰ In New York we find a case involving the application of criminal sanctions to picketing in non-labor disputes affirmed without opinion, although the case was

more or less time for disposition. A study of the motion docket of the Supreme Court of Texas for 1886 revealed that about one-third of the motions for rehearing and relating motions pertained to dispositions unreported on the original hearing. See Stayton, note 2, *supra*.

37. See Radin, note 9, *supra*. This feeling has been translated into statutory enactment in a few states. See note 17, *supra*. Some courts have asserted that this is what they do.

The Chief Justice of the Supreme Court of Wisconsin in 1915 enumerated four instances where opinions might be omitted (see Winslow, note 22, *supra*):

1. Where only questions of fact are involved.
2. Where the case is determined by legal principles well settled by prior decisions in the same court.
3. Where the question is one of practice or procedure unless the court thinks it of such importance for the proper administration of the law as to require an authoritative pronouncement.
4. Generally no opinions except where case is of such importance as to require treatment in an opinion.

As to the first two examples, it is submitted that a statement that the appeal is decided on its facts or by reason of a prior designated authority would be an opinion neither burdensome to the court nor unhelpful to litigant and attorney. The danger in the other two mentioned instances is adverted to in Judge Winslow's own comment that the efficiency of this practice would depend upon the personal views of the judges.

38. At one time there appears to have been a tendency among several courts to select what opinions should be published. This practice was severely censured. See *Report of the Special Committee on Reports and Digests* (1916) 2 A.B.A.J. 618; Comment, *The Welter of Reports and Court Opinions* (1920) 90 CENT. L. J. 316; and it has been said: "Experiments along this line have been made, and have failed in so many states that this plan must surely be rejected." *The Output of the Courts* (1915) 2 DOCKET 1443. The weakness of this system in England has been expressed in the remarks of Lord Sumner in *Palgrave Brown & Son v. S.S. Turid*, [1922] 1 A. C. 397, 413, and in Comment (1935) 51 L. Q. REV. 422 on *Tate & Lyle v. Hain S.S. Co.* 39 Com. Cas. 259 (C. A. 1934).

39. *Casparis v. Fidelity Union Cas. Co.*, 65 S. W. (2d) 404 (Tex. Civ. App. 1933).

40. *Thompson v. Denton*, 95 Ohio St. 333, 116 N. E. 452 (1917).

considered important enough to be noted in the *Columbia Law Review*.⁴¹ So, the effect of an *in terrorem* clause in a will, a question about which there are several views in the United States, is decided without opinion.⁴² The same is true of *In re Green's Estate*,⁴³ a case involving the right of a widow under a comparatively recent amendment to the Decedent Estate Law. And other examples may be cited.⁴⁴ There is considerable danger, moreover, of the courts allotting perfunctory attention to an appeal which is affirmed without opinion inasmuch as the care in expressing a rationale is absent. In New York we find the Court of Appeals extricating itself with difficulty from the implications of a prior case decided without opinion:⁴⁵

"The respondent cites *Lasky v. State of New York*, 126 Misc. 360; *Id.*, 217 App. Div. 420; *Id.*, 246 N. Y. 569, for the proposition that in such cases as this the order of payment should be to (1) the lienor, (2) the surety, and (3) the assignee. Undoubtedly that was the order adopted in that case. In giving our approval to the decision by an affirmance without opinion, we certainly did not intend in the face of overwhelming authority to the contrary to countenance the proposition that the stated order was the order of priority generally to be observed. Nor did we intend to adopt the reasoning of the Special Term, that a lienor must have priority over an assignee, though the lien is filed subsequently to the filing of the assignment, because the assignee may take no more than the assignor-contractor, and the latter may, where filed liens are outstanding, take nothing except the excess over the liens. The argument fails to recognize that lienors and assignees have claims of a nature, if not identical, at least quite similar."

Again, despite the protestations of the court in Georgia in the quotation heretofore recited,⁴⁶ there is a justifiable suspicion that something less than "careful consideration" was afforded the question involved upon its prior trip to the court.

41. *People v. Kopezak*, 266 N. Y. 565, 195 N. E. 202 (1935); (1936) 36 Col. L. Rev. 153.

42. *In re Brush's Estate*, 154 Misc. 480, 277 N. Y. Supp. 559 (Surr. Ct. 1935), *aff'd without opinion*, 247 App. Div. 760, 287 N. Y. Supp. 151 (2d Dep't 1936).

43. 155 Misc. 641, 280 N. Y. Supp. 692 (Surr. Ct. 1935), *aff'd without opinion*, 246 App. Div. 583, 284 N. Y. Supp. 370 (1st Dep't 1935); (1936) 36 Col. L. Rev. 155.

44. *E.g.*, *Aetna Life Ins. Co. v. Asba Corp.*, 268 N. Y. 504, 198 N. E. 376 (1935), commented upon in Cohen, *Collection of Money Judgments in New York* (1935) 35 Col. L. Rev. 1196, 1212. In (1934) 3 BROOKLYN L. REV. 343, 345, a note writer criticizing *American Lumberman's Mutual Casualty Co. v. Trask*, 238 App. Div. 668, 266 N. Y. Supp. 1 (3d Dep't 1933) said: "It is dangerous in the sense that should the Court of Appeals affirm without opinion, the law on this point will be hopelessly confused." The case was affirmed without opinion in 264 N. Y. 545, 191 N. E. 557 (1934).

45. *Aaron Iron Works v. Greene*, 260 N. Y. 330, 341-342, 183 N. E. 515, 518 (1932).

46. *Seaboard Air Line Ry. v. Brooks*, 151 Ga. 625, 631, 107 S. E. 878, 881 (1921), note 31 *supra*.

If the courts were consistent the Appellate Division in New York would never grant leave to appeal to the Court of Appeals after affirming unanimously without opinion. Such permission is not often given but a few such motions are granted each term. The theory upon which such permission is granted is that the question involved is so novel or important, or the state of authority in such conflict, that a court of last resort should decide the question. When such permission is granted, it is strange that the court in the first instance did not think the case important enough to write an opinion.

The rendering of an opinion is some, if not the main, assurance possessed by a litigant that his appeal has received fair consideration at the hands of the court. Appellate courts are not wont to abuse their powers, but when appeals are reversed without opinion,⁴⁷ or affirmed without opinion even though the decision is not unanimous,⁴⁸ or even in the more usual case of affirmance without opinion by the whole court, the possibility of abuse is present. Treatment of an appeal in this manner is unfair to the litigant and to his attorney who prosecutes the appeal. In most instances an appeal is taken because an attorney believes the case was erroneously decided. Moreover, the reason for the affirmance might be such that the defeated litigant, if the reasons were given, might feel that by remedying the defect in his case he might get his just desserts in another action; or, perhaps he would refrain from the cost and trouble of bringing another action if the reasons given were such as to preclude hope of recovery.⁴⁹

It has been argued, also, that the age of transition has passed. New situations are on the wane. And the argument is pressed to the conclusion that opinions are correspondingly less necessary.⁵⁰ It is difficult to believe that such an apology can have been made seriously. A depression comes along not wanted, not expected. With it, thousands of legal problems cast their shadows across the courts. The defaulting mortgagor, the hard-pressed debtor, the uneasy creditor become familiar figures. And abnormal times beget abnormal problems. The legislative grist mills operating yearly produce countless statutes which the courts are called upon to interpret. A static social economy is still unknown.

47. See note 2 *supra*.

48. *Bibbo v. Penn. Mutual Life Ins. Co.*, 268 N. Y. 626, 198 N. E. 525 (1935); *Matter of Roth v. Harlem Funeral Car Co.*, 268 N. Y. 661, 198 N. E. 545 (1935) (a 4 to 3 decision).

49. Thus, if a landlord sues a tenant, the same fact situation might be true of many of his other tenants. When the decision is handed down without an opinion, his attorney is in a quandary when the landlord asks him if he can do anything against the other tenants.

50. See Radin, note 9 *supra*.

The courts are not blind to the fact that the world of tomorrow will always have its problems which have not been decided by the past.⁵¹

Still another point has been made: the mass production of reports makes it increasingly difficult for the attorney to keep abreast of the law, to look for the particular precedent he has in mind.⁵² In the first place, the opinion, as has been heretofore asserted, need not unduly enhance the bulk of the reports. Again, it is submitted that the lawyer of today has so many short cuts in digests, textbooks, and other devices that the mass of material is usable with as great if not greater facility and accuracy than at any time in the past.

Another aspect of the propriety of affirmance without opinion about which, since it is largely subjective, only a proximate guess as to its significance may be made, is the reaction of the intermediate appellate courts to the practice of courts of last resort affirming without opinion. It would appear that the effect of affirming the decision of the intermediate appellate court is to give it less effect than if it had never gone up to the highest court. The appeal which stops with the intermediate appellate court has the untarnished sanction of the court which renders it. But when it goes up to the higher court and is affirmed without opinion, that court has deliberately refused to approve the opinion of the intermediate court.⁵³ As to the psychological reactions of the judges of the intermediate court when told that this opinion has no value because affirmed without opinion the evidence is not generally available to hazard a dogmatic statement, but in at least one state the proof is present. In Texas, the Supreme Court in 1918 expressed its views on the effect of the adoption by it for the lower court's judgment.⁵⁴ The reactions of the lower

51. "The body of reports emanating annually from the press in this country is almost illimitable. A contrast with this is forcibly brought to my mind by recurring to a remark of an old writer, the name of whom I do not remember. Speaking of the Year Books, which were semi-official reports, he said that when these publications were discontinued in the reign of Henry VIII, it was because it was thought enough reports of decisions had been published to establish the law of the kingdom for all possible cases which might arise in the future. A great mistake this, indeed." *Letzkus v. Butler*, 69 Pa. 277, 281 (1871).

"My own position as director of the American Law Institute, the first and still the most important work of which is the Restatement of our Common Law, is ample testimony that under present economic and social conditions we shall continue to place in a judiciary trained to recognize the authority of precedent the task of stating and developing large fields of law and, therefore, that the efficiency of the system is greatly important to our well being and orderly progress." Lewis, *The Future of Our Judicial System of Stating and Developing Law* (1937) 23 VA. L. REV. 259, 264.

52. In the same vein the Court in *Letzkus v. Butler*, 69 Pa. 277, 281 (1871) said: "The new Act of Assembly will also be a relief to the professors of law, in diminishing the number of volume of reports they must annually buy."

53. See notes 26, 27 *supra*.

54. *McKenzie v. Withers*, 109 Tex. 255, 206 S. W. 503 (1918).

judiciary in Texas have had somewhat of a Gilbert and Sullivan flavor. In 1919 one of the judges of the Texas Court of Civil Appeals bravely asserts:

"It is true that in the same volume and on the same page the Supreme Court in that case disowns and declines to stand even as godfather to it or any of the offspring of the Commission of Appeals, simply consenting that it shall live and be enrolled on the parish register. Believing, however, it to be a vigorous offshoot with a striking family resemblance to Rosen-Trammell and Hermann-Allen, *supra*, I hereby adopt it, and will, as far as I can, thereby remove the bar sinister."⁵⁵

And in 1924, the same court refused to believe that the Supreme Court meant what it had said:

"We do not believe the Supreme Court intended in the above quotation to hold that no conclusion by the Commission, however, essential to the judgment recommended is authority merely because the Supreme Court only adopted the judgment. Such holding would render the opinions of the Commission of such doubtful value as to hardly warrant their publication in the Southwestern Reports. We prefer to think, as expressed by the Supreme Court upon rehearing (255 S. W. 601) in *Texas Co. v. Davis* decided the same day as the *Stephens County Case*, that their conclusion is not accurately expressed in the quoted portion of the opinion, which was prepared under the stress of the closing days of last term."⁵⁶

The value of an intermediate opinion in the arrival of a reasoned decision by the highest appellate court is well recognized.⁵⁷

If appellate courts are to continue to affirm without opinion, they will necessarily have lost sight of their principal purpose which was vividly defined by Mr. Justice Cardozo in discussing the theory of the Court of

55. *Knight v. Waggoner*, 214 S. W. 690, 699 (Tex. Civ. App. 1919).

56. *United North and South Oil Co. v. Meredith*, 258 S. W. 550, 556 (Tex. Civ. App. 1924).

57. "The Supreme Court is equally dependent upon the thoroughness with which issues are sifted and explored before they reach the Court. In this process the opinions below play an important role. They compel analysis and formulation of the issues in a controversy, sharpen responsibility in adjudication, and advise litigants and the appellate court of the factors that control decisions. Only by such a process is the controversy adequately focussed for the consideration of the Supreme Court. Opinions by the lower courts are therefore indispensable for the adequate exercise by the Supreme Court of its *reviewing* function. Without them, as the Supreme Court has remarked . . . , 'the appellate court is denied an important aid in the consideration of the case; and the defeated party is often unable to determine whether the case presents a question worthy of consideration by the appellate court. Thus, both the litigants and this court are subjected to unnecessary labor.'" Frankfurter and Landis, *The Judiciary Act of 1925* (1928) 42 HARV. L. REV. 1, 23-24. Cf. *People ex. rel. Rogers v. Graves*, 57 Sup. Ct. 269 (1937), in which the Supreme Court reversed a decision of the New York Court of Appeals which had affirmed without opinion a decision by an intermediate court.

Appeals' function in our judicial system. "That function," Justice Cardozo wrote, "the court itself has defined. It is, briefly stated, the function, not of declaring justice between man and man, but of settling the law. The court 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 formula of justice."⁵⁸

To affirm without opinion is to leave aggrieved suitors stunned and overcome by incoherent algebraic symbols which they have neither the duty nor the power to forge into usable formulae.

58. CARDOZO, JURISDICTION OF THE COURT OF APPEALS (2d ed. 1909) § 6.