Problems of Precedent Affection Court of Civil Appeals Opinions

Gordon Simpson

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EACH year the 11 courts of civil appeals in Texas write more than 800 opinions. This output represents the work of 33 able and learned jurists, and is sufficient to fill several volumes of books. Of what value are these opinions to the jurisprudence of the state? This question is likely to occur each time a lawyer prepares a brief, or advises a client, or adds a volume of reports to his library. An inquiry into the relationship between the purposes and functions of an intermediate appellate court and the court of last resort may throw some light on the problem.

Subordinate appellate courts are established for the purpose of relieving the court of last resort from an overburdening docket. To make effective the purpose of their creation, the supreme court must not be required to spend too much time in scrutinizing their work. As said in People v. Davis, requirement of too minute a review would defeat the object which their creation was intended to secure. Every lawyer and practically every client would like to have the supreme court decide his case; but this would be an impossible thing, and clients and lawyers alike must realize that "there is no abstract or inherent right in every citizen to take every case to the highest court." Having accorded the right of appeal essential to due process, the framers of the
judicial system must then concern themselves with regulating the nature of the review in the court of last resort so as best to attain its ultimate purpose—the establishment of precedent rulings.

When an appellate court’s business accumulates faster than it can be disposed of, several things can be done: the court can be left in its plight, until eventually the entire appellate system bogs down; or its work can be divided among coordinate courts; or auxiliary bodies can be created to assist it; or its jurisdiction can be restricted to a supervision of inferior courts brought into existence to carry the main burden of deciding appeals for litigants. The Supreme Court of Texas has experienced all of these situations. It has gone through periods when it was submerged in a deluge of accumulated work. Fairly early in its history a part of its jurisdiction was given to the coordinate Court of Appeals. At various times it has been assisted by commissioners and justices of other courts. But its most significant relief was achieved by the creation of intermediate appellate courts and the restriction of its jurisdiction in the judicial reorganization of 1891.

In this reorganization of the appellate system in 1891, the Court of Appeals was replaced by the Court of Criminal Appeals, a

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4 See Stayton and Kennedy, *A Study of Pendency in Texas Civil Litigation*, 21 Tex. L. Rev. 382, 392 (1943), for data on one such era, which was finally relieved by the establishment of the Commission of Appeals in 1918.

5 *Tex. Const.* (1876) Art. V, §§ 1, 6, 8; Tex. Laws 1876, c. 5. This court had appellate jurisdiction in all criminal cases, and in civil cases which could originate in courts below the district court.

6 A commission of appeals was first created in 1879, and except for two years continued in existence until 1892. It was originally a "commission of arbitration and award," whose opinions had no effect as precedent, for deciding cases submitted to it upon consent of parties. Tex. Laws Spec. Sess. 1879, c. 34. In 1881 its powers were enlarged to allow the Supreme Court and the Court of Appeals to refer any civil case to it for the preparation of an opinion and synopsis "to facilitate them in reaching a conclusion on the law and facts of the case." Tex. Laws 1881, c. 7; Tex. Laws 1883, c. 36. In 1887 it became an adjunct to the Supreme Court alone. Tex. Laws 1887, c. 95; Tex. Laws 1889, c. 55; Tex. Laws 1891, c. 59. It was revived in 1918 and continued in existence until 1945, when the membership of the Supreme Court was increased from 3 to 9 members. Tex. Laws 4th Spec. Sess. 1918, c. 81, and acts in 1919, 1921, 1923 and 1925; Tex. Laws 5th Spec. Sess. 1930, c. 2.

In 1917 and 1918, the Supreme Court was also assisted in passing on applications for writ of error by a panel of court of civil appeals justices. Tex. Laws 1917, c. 76. This statute is still in effect. *Tex. Rev. Civ. Stat.* (Vernon, 1948) arts. 1748-1754.

forum exclusively for the review of criminal cases. The reorganization also brought into existence the courts of civil appeals with appellate jurisdiction over all civil cases.

The jurisdictional scheme put into effect immediately following the constitutional amendment of 1891 was essentially that still existing today. As with the old Court of Appeals, the courts of civil appeals were given final jurisdiction in certain civil cases, but this important distinction was present: the Supreme Court had certain revisory jurisdiction over these "final" decisions, which it had not possessed over decisions of the Court of Appeals. And more important still, in certain types of cases the decisions of the courts of civil appeals were not final but could be reviewed by the Supreme Court on application for writ of error. So it was that the birth of the intermediate appellate system in Texas occurred in 1892 with the opening of the first three courts of civil appeals.

Since that date the judges, lawyers and legislators of the state have been concerned with problems which grew out of this pyramiding of appellate jurisdiction, some of the most vital of which revolve around the authoritativeness of the opinions of these intermediate courts and may be called "problems of precedent."

**Problems Considered**

It is some of these problems of precedent which will be discussed in this paper. They may be stated as follows:

1. To what extent does the refusal by the court of last resort to revise an intermediate court’s opinion enhance or destroy its value as a legal precedent?

2. What is the value of an unreviewed opinion of the intermediate court as a legal precedent?

3. In the light of the answers to the first two questions, what opinions of intermediate courts should be published?

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8 Texas and Oklahoma are the only states having separate appellate courts for criminal business. Although other state courts mentioned herein exercise criminal as well as civil jurisdiction, this paper is limited to a discussion of civil jurisdiction only.

Underlying these problems is the question of the extent to which the supreme court should be under a duty to indicate the correctness of legal principles announced in opinions written by the intermediate courts. The solution of this question must of necessity result in a compromise between certainty and expediency. Certainty in the principles of law, by placing an authoritativeness on every opinion supporting a judgment of an intermediate court, is doubtlessly desirable; but the same expediency which necessitates the existence of intermediate appellate courts demands that the highest tribunal be relieved of the duty of assuring a correct expression of these principles in a substantial number of the opinions written by the intermediate court.

Proposals Affecting These Problems

These matters have been put before the bar of Texas recently in the form of two proposals. The first is a resolution adopted by the State Bar of Texas at its 1949 meeting, calling upon the Supreme Court to amend Rule 483 of the Texas Rules of Civil Procedure to require the Supreme Court to indicate "by an appropriate memorandum the particular part of the opinion of the Court of Civil Appeals which is not approved" whenever it denies an application for writ of error with the notation "Refused. No Reversible Error."\(^{10}\)

The second proposal is a resolution adopted by the Texas Civil Judicial Council proposing an amendment of Rule 452 aimed at reducing the number of opinions written by the courts of civil appeals, curtailing the number of opinions which are published in the law reports, and denuding unpublished opinions of any standing as precedents.\(^{11}\)

At first glance this second proposal might seem to be counter to the State Bar resolution, the latter seeking to enlarge the body

\(^{10}\) 12 Tex. Bar Jour. 368 (1949). At the Supreme Court's last biennial conference on amendments to the Rules of Civil Procedure, in April, 1949, the rules advisory committee rejected a similar proposal.

of opinions which should be published, i.e., those having precedential value, and the other seeking to curtail publication. However, the Texas Civil Judicial Council's resolution is aimed not so much at a numerical reduction as at an elimination of those opinions which are of no importance as precedents.

The resolution of the State Bar attempts to secure the Supreme Court's express approval of portions of the court of civil appeals opinions in these "NRE" cases by the indirection of requiring the court to point out all disapproved portions, and by thus separating the wheat from the chaff to increase the stature of these approved portions as precedents. Fundamentally the object seems to be to have an authoritative expression by the Supreme Court on all points of law discussed by the courts of civil appeals in all cases where applications for writ of error are filed.

Some seem to regard the "NRE" notation as a curse placed upon court of civil appeals opinions. They say that it deprives the opinion of any worth as a citation in support of the legal principles announced in it, arguing that the Supreme Court evidently disapproved of some portion of the opinion since it did not use the unqualified "Refused" notation, and that the whole opinion becomes worthless since it is impossible to tell what specific portion the court does not agree with.

Let us see just what is the meaning and effect of the "NRE" notation. This stamp, which was first used in 1945, means essentially the same as the following notations of past years:12

1892-1927 Refused
1927-1939 Dismissed (also meant lack of jurisdiction)
1939-1941 Dismissed—Correct Judgment
1941-1945 Refused for Want of Merit

Generally speaking, the notation signifies neither approval nor disapproval of the holdings expressed in the court of civil appeals opinion. Rule 483 itself defines the meaning of the notation: "In all cases where the Supreme Court is not satisfied that the opinion

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of the Court of Civil Appeals in all respects has correctly declared
the law, but is of the opinion that the application presents no
error which requires reversal, the Court will deny the applica-
tion, with the notation ‘Refused. No Reversible Error’.” While
ordinarily indicating that the Supreme Court approves the judgment of the court of civil appeals, the “NRE” stamp signifies ex-
press approval of the reasoning in the opinion only to the extent that a particular holding necessary to the judgment—such that the judgment could have been rendered on no other view of the matter—is attacked by proper assignment in the Supreme Court.18
But it does not follow that the notation denotes disapproval of any of the holdings. The language of Rule 483 is not the equivalent of saying that the Supreme Court is satisfied that the court of civil appeals opinion has not correctly declared the law.

While it is natural for every lawyer to want the Supreme Court to write on all of his cases, this object is necessarily inconsistent with the purpose for which the courts of civil appeals were established. As has been pointed out, a litigant has no inherent right to have the court of last resort pass on his case. Justification for a demand for an expression by the Supreme Court must be based upon a need for establishing precedent, and not upon the litigant’s desire to have an opinion by the Supreme Court in his individual case.

BURDEN ON THE SUPREME COURT

The questions immediately brought to mind by this proposal are, first, would this be placing too great a burden on the Supreme Court, and second, is our jurisprudence suffering by the use of the “NRE” stamp under the present practice? The answer to both questions must be framed in the light of the history and present functioning of our appellate system.

During the year 1949 the Supreme Court considered 478 applica-
tions for writ of error. To require the writing of a memorandum opinion on each of the 272 applications which were marked

“Refused. No Reversible Error” would increase the court’s burden enormously. True enough, the proposed rule would require only that the Supreme Court “indicate” the particular part of the court of civil appeals’ opinion which is not approved. What amount of work would this entail?

In the first place, it must be remembered that the Supreme Court is taking action on an application for writ of error, not on the court of civil appeals opinion. While it naturally also weighs the portions of the opinion which are involved in the points of error, its focus is not on the court of civil appeals opinion as a whole but on the portions under attack. Rule 451 requires the courts of civil appeals to announce in writing their conclusions on all issues presented to them. Consequently, the opinion may include a great many rulings which are not questioned in the Supreme Court. To require the Supreme Court to point out every portion of the opinion of which it does not approve would put on it the task of going outside the application to determine the correct rule of law, whether error was assigned or not. This process would not only be burdensome but would require the court to pass on matters beyond its jurisdiction, since the Supreme Court has jurisdiction of assigned errors only.14

In the second place, the mere pointing out of an unapproved portion would be worse than meaningless without a statement of the reasons for the Supreme Court’s disapproval. Such a practice might result in positive mischief by casting doubt on established principles of law where the court of civil appeals’ statement was partially correct but not entirely so. It seems inescapable that, in order to realize any value from such a system, the Supreme Court would have to write an opinion rather than a simple memorandum. The amount of time required to frame a judicial opinion will not be underestimated by those who have had experience in this field. The preparation of a carefully presented appellate brief, difficult as it may be, is usually much less exacting work than the prepara-

tion of a judicial opinion, which should be painstakingly correct and precise in its language as well as its content.

Even where the Supreme Court might reach identical conclusions on all the questions discussed, the process of determining that the court of civil appeals has reached the correct result is much simpler than evaluating each sentence of its opinion as a completely accurate expression of the principles involved.

With these increased demands on the court's time, it seems inevitable that the result would be a recurrence of the days when cases remained on the docket for years, awaiting action by a court so overloaded with work that it could not dispatch its business.

Is Our Jurisprudence Suffering?

We come next to inquire whether the jurisprudence of the state is being emaciated by the use of the "NRE" notation, and whether it is in a more unfavorable condition than that of other states with intermediate appellate courts.

As a preliminary observation, it should be remembered that prior to 1927 no notation used on applications for writ of error signified a greater degree of approval of the reasoning in the court of civil appeals opinions than does the "NRE" stamp at the present time. Since 1927 the Supreme Court has been empowered to signify express approval of the court of civil appeals opinion by using the notation "Refused" on the application, but it has never been required to write any kind of memorandum opinion on applications which it denied or to give any reason for the denial other than that implied in the notation used.

In a divided appellate system, the chief function of the court of last resort usually is to establish precedents. It may also perform the function of securing a correct decision of the particular case, but its primary concern is not for the individual litigants.\[16\]


\[16\] In some instances the courts of last resort do act primarily for the protection of the individual litigant's rights. This seems to be true in New York where appeals of right are allowed in cases reversed by the intermediate appellate court. See Table 2, infra.
This interest in the welfare of the general jurisprudence is exemplified in the following language by the Pennsylvania Supreme Court:

"The authority of the justices of the Supreme Court to allow special appeals [from the subordinate court] is not limited, but it is apparent, from the general scheme of the act, that it is intended to be exceptional, and based on considerations other than the mere desire or interest of the particular parties. The most obvious of such considerations are the bearings of the question on public interest or rights, the importance of the decision as a precedent in frequently occurring litigation, diversity of opinion in other courts, and consequent desirability of a final determination, and, generally, the preservation of uniformity in the application of legal principles."17

Under the pattern prescribed by our constitution, the legislature has divided the appellate jurisdiction so that the courts of civil appeals have final jurisdiction in certain types of cases and intermediate jurisdiction in others. The Supreme Court's revisory power over cases within the final jurisdiction of the courts of civil appeals—which must rest either on conflict of decisions or on dissent—is based exclusively on the first function.


"The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Judgments.'

"The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court.

"To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country."
It is the intermediate jurisdiction of the courts of civil appeals which affords the basis of the Supreme Court's jurisdiction by writ of error. Article 1728 of the Texas Revised Civil Statutes lists six types of cases in which the Supreme Court may entertain a writ of error: (1) dissent in the court of civil appeals; (2) conflict of decisions; (3) construction or validity of statutes; (4) revenues of the State; (5) Railroad Commission a party; (6) error of substantive law affecting the judgment of the court of civil appeals.

What function is the Supreme Court performing in passing on these cases? The rationale of the first five classifications would appear to be the importance—a priori—of these types of cases because of their general interest to the jurisprudence from the standpoint of establishing precedent and preserving uniformity. The primary objective behind them is the enunciation of general principles of law—although correct decision of the particular case would also follow. The explanation for selecting them seems to lie in the fact that by their very nature cases falling within these categories are considered of such importance that they should be cognizable by the court of last resort, whose ultimate duty it is to fix the precedents for subsequent decisions.\footnote{This function was minimized in the Supreme Court's practice, from 1918 to 1934, of adopting judgments of the Commission of Appeals without approving its holdings. See Lattimore, Decisions of the Commission of Appeals as Authority, ⁴Tex. L. Rev. 335 (1926) and Note, 12 Tex. L. Rev. 356 (1934).}

But subdivision 6 is founded upon different considerations. The language of this subdivision, stating in effect that there must exist an error of substantive law which caused the rendition of an improper judgment, indicates that the concern is not for precedent, but for according justice in the specific case. Here the legislature had in mind the Supreme Court's second function, namely, to insure a correct judgment in the particular case because of its importance to the litigants.\footnote{Under the statute as it existed between 1917 and 1927, subdivision 6 also emphasized the first of these functions. Tex. Laws 1917, c. 75. It read: "In any other case in which it is made to appear that an error of law has been committed by the Court of Civil Appeals of such importance to the jurisprudence..."}
amount in controversy is the only characteristic which takes the case out of the final jurisdiction of the court of civil appeals.

Subdivision 6 also includes cases involving title to real property, probate matters, contested election of a state officer, and a few other subjects which by their subject matter, as distinguished from the amount in controversy, fall within the potential writ of error jurisdiction of the Supreme Court. The legislature evidently deemed these subjects of more importance, either to the litigants or the general welfare or both, than slander, divorce, and other election contests. Possibly the legislature had in mind the desirability of securing precedents as well as a correct judgment in at least some of these categories.

These observations raise the question whether the Supreme Court should grant a writ of error under the first five subdivisions of Article 1728 for the purpose of clarifying principles of law where it is of the opinion that the court of civil appeals has rendered a correct judgment. Parenthetically, the Supreme Court's jurisdiction even under subdivision 6, based on an error of substantive law affecting the judgment, does not actually depend upon the existence of an erroneous judgment. If it did, the Supreme Court could not affirm a judgment of the court of civil appeals but would be obliged to dismiss the writ after its deliberation and conclusion that the judgment was correct. If erroneous judgment were a jurisdictional matter the proper order in deny-

of the State, as in the opinion of the Supreme Court requires correction, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by Statute. Upon the showing of such an error the Supreme Court may, in its discretion, grant a writ of error for the purpose of revising the decision upon such question alone...."

If the Supreme Court did not consider the case of importance, it dismissed the writ for want of jurisdiction without passing on the correctness of the judgment. See Decker v. Kerlicks, 110 Tex. 90, 95, 216 S.W. 385, 386 (1919); National Compress Co. v. Hamlin, 114 Tex. 375, 385, 269 S.W. 1024, 1028 (1925). 20 TEX. CONST. Art. V, § 8; TEX. REV. CIV. STAT. (Vernon, 1948) art. 1821. The district court has exclusive original jurisdiction over forfeitures and escheats, divorce, title to land and enforcement of liens thereon, slander and defamation, contested elections, right of property levied on over $500, general control over executors and administrators, guardians and minors, and original jurisdiction over all causes of action for which a remedy or jurisdiction is not provided by law. Article 1821 makes the appellate jurisdiction of the court of civil appeals final in divorce, slander, and contested elections other than for state officers.
ing an application would be “Dismissed” rather than “Refused” or “Refused. No Reversible Error.”

Adverting to the first five subdivisions of Article 1728, under the present wording of the statute\(^1\) is it contemplated that the Supreme Court shall settle all matters of dissent, conflict, etc., even though the judgment of the court of civil appeals is correct or, indeed, even though the holdings are correctly stated? It has never been the practice of the Supreme Court, either prior to or since 1927 when it was first empowered to give express approval to holdings of law in court of civil appeals opinions, to grant writs of error in all cases coming within all of these subdivisions.\(^2\) But perhaps it is not a far-fetched notion to say that the legislature intended for the Supreme Court to declare the correct rules of law within these five subdivisions in all cases, either by granting the application or by giving it an unqualified refusal. This interpretation of legislative intent appears to be borne out in regard to subdivision 2 in the provision, added in 1927, reading:

“Provided further that in cases of conflict named in Subdivision 2 above, the Supreme Court may, in its discretion, refuse the writ of error where the court is in agreement with the decision of the Court of Civil Appeals in the case in which the application is filed; and in cases of such conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse and remand the same on the application for writ of error.”\(^2\)

This interpretation would comport with the view that the first

\(^1\) The language has undergone several changes. The first enactment in 1892 provided that the Supreme Court should grant the writ if it appeared that there was error in the judgment. Tex. Laws Spec. Sess. 1892, c. 14. The language of the 1913 statute seemed to contemplate the granting of a writ in all cases of conflict, and in cases within subdivisions 3, 4, and 5 if there was an erroneous holding. Tex. Laws 1913, c. 55. The seemingly mandatory language of the 1913 statute was omitted from the 1917 act. Tex. Laws 1917, c. 75.


\(^3\) Tex. Laws 1927, c. 144, now a part of Rule 483, Tex. Rules Civ. Proc. But the statute allowing the Supreme Court to designate justices of the courts of civil appeals to assist in passing on applications for writ of error (Tex. Laws 1917, c. 76, Tex. Rev. Civ. Stat. (Vernon, 1948) art. 1752) apparently did not contemplate the granting of writs in all cases within these subdivisions.
five subdivisions were selected on the basis of their importance to the general jurisprudence rather than to the specific parties to the suit. In conflicts and dissents, the Supreme Court may be obligated to settle the disputed questions when they arise in cases within the final jurisdiction of the court of civil appeals.\(^{24}\) It is not unreasonable to think that the court was expected to do as much when these disagreements occur in cases not within the final jurisdiction of the court of civil appeals. As to subdivisions 3, 4, and 5, various arguments might be made both for and against the conclusion we have advanced, and there is no way of knowing definitely just what motivated the selection of these categories.\(^{25}\)

However that may be, the following conclusions certainly appear justifiable:

1. Where the case comes within the jurisdiction of the Supreme Court only because of its importance to the litigants (generally speaking, most cases within subdivision 6), the court should not be required to do more than to pass on whether the judgment is or is not correct on the basis of the assignments presented in the application. That is exactly what the present "NRE" practice is designed to do.

2. Where the case comes within the Supreme Court's jurisdiction because of its general importance to the jurisprudence of the state (cases within part or all of subdivisions 1 to 5), the court might reasonably be required to indicate its views on all questions referable to the matter which is endowed with this jurisprudential importance—but not necessarily on every other matter raised

\(^{24}\) In cases which cannot reach the Supreme Court by writ of error, the court of civil appeals may certify questions of conflict and dissent, under Rules 462, 463 and 465, Tex. Rules Civ. Proc.; or the Supreme Court may answer the question in a mandamus proceeding to compel certification, under Rule 475. The Supreme Court will not decide certified questions in cases which can lawfully reach it on writ of error, Rule 461, Tex. Rules Civ. Proc.; Duval v. Clark, 137 Tex. 186, 157 S.W. 2d 626 (1942).

\(^{25}\) When subdivision 5 (Railroad Commission a party) was first included, the Railroad Commission's functions were confined to regulating rates of railroads, express companies, and docks and wharves. Tex. Laws 1891, c. 51, c. 45, and c. 104. This was a new field of regulation in Texas at that time, and litigation involving the Railroad Commission was doubtless thought likely to affect the public and the railroad industry generally. With the expansion of the Commission's fields of regulation through the years, much of its litigation is now primarily of interest to the litigants alone.
in the opinion. For this purpose the device of a memorandum accompanying the marking of an application with the notation "Refused. No Reversible Error" might be a convenient and expeditious one. But to accomplish its purpose the memorandum opinion should assume a positive aspect by pointing out correct rulings, rather than negatively pointing out erroneous ones.

Further on we will attempt to determine the extent to which the Supreme Court is performing these two functions. But first let us see what the practices are in other states having intermediate appellate courts, in an effort to determine whether our Supreme Court is falling short of the duties imposed on their courts of last resort.

**Practice in Other States**

Twelve other states have added to their judicial systems one or more intermediate appellate courts which regularly write opinions in causes decided by them. The division of appellate power in Texas is considerably different from that obtaining in most of these states. The majority of the states allocate the appellate jurisdiction in such a way that certain appeals go directly to the supreme court and others to the intermediate court. In Texas, New Jersey, New York and Ohio, however, the court of last resort has no major direct appellate jurisdiction.

26 The following table shows the state intermediate appellate courts now in existence. The number represents the number of independent bodies, whether designated officially as separate courts or as divisions of the same court.

<table>
<thead>
<tr>
<th>State</th>
<th>Name of Court</th>
<th>Number of Courts</th>
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<tbody>
<tr>
<td>Alabama—Court of Appeals</td>
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<td>1</td>
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<td>California—District Court of Appeal</td>
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<td>Georgia—Court of Appeals</td>
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<td>Illinois—Appellate Court</td>
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<td>Missouri—Court of Appeals</td>
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<td>New Jersey—Superior Court, Appellate Division</td>
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<td>New York—Supreme Court, Appellate Division</td>
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<td>Ohio—Court of Appeals</td>
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<td>Pennsylvania—Superior Court</td>
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<td>Texas—Court of Civil Appeals</td>
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Revisory power of the court of last resort over the decisions of the intermediate court varies. The intermediate courts of most of the states could be more accurately characterized as inferior or subordinate courts of what might be termed conditional-final jurisdiction, the revisory power of the highest court being conditioned upon a need for settling precedent and preserving uniformity of decisions.\textsuperscript{2} In other words, they correspond to our courts of civil appeals when acting within the field of their final jurisdiction.

In the following tables we have endeavored to present graphically the appellate jurisdiction of the courts of last resort in the thirteen states which have intermediate appellate systems. Certain omissions of detail, and also certain liberties in treatment, have been indulged in order to avoid cumbersomeness as far as possible, but broadly speaking the table gives a correct statement of jurisdictional grounds as we have interpreted the constitution, statutes, rules and decisions of the particular state. The following symbols have been used:

D—direct appeal to the supreme court.
I—review by the supreme court after appeal to the intermediate court, the supreme court having a certain discretion as to whether review is granted.
IR—review of right in the supreme court after decision in the intermediate court.

\textsuperscript{27} Central of Georgia R. Co. v. Yesbik, 146 Ga. 620, 91 S.E. 783 (1917); State ex rel. Miles v. Ellison, 269 Mo. 151, 190 S.W. 274 (1916).
## Table 1

<table>
<thead>
<tr>
<th>Jurisdictional grounds for review by supreme court&lt;sup&gt;28&lt;/sup&gt;</th>
<th>Alabama</th>
<th>California</th>
<th>Georgia</th>
<th>Illinois</th>
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<td>Establishment of roads, drains, etc.</td>
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<td>Divorce, alimony</td>
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<td>Annulment of marriage</td>
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<td>Guardianship, etc.</td>
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<td>Contested election of officer</td>
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<td>Isolated grounds</td>
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<td><strong>III. Amount in controversy</strong></td>
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<td>Over certain sum</td>
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<td><strong>IV. Treatment or outcome in intermediate court</strong></td>
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<sup>28</sup> Original jurisdiction by mandamus, etc., against administrative boards and officers, which sometimes takes the place of appeal or other forms of review, has not been included. The constitutional and statutory provisions supporting the jurisdictional grounds here shown are as follows: Alabama: Ala. Code (1940) tit. 7, §§ 754, 755, 757, 759,
In studying this table we observe a similarity of pattern, though by no means a uniformity, in the types of cases which are expressly reserved for the court of last resort. Each state has arrived at its own particular set of cases which it wants its supreme court to be directly responsible for; but we may assume that each state has been motivated by the same purpose, that is, what seemed most important either to the general jurisprudence or to the litigants. The volume of appellate business is also an important factor. In the balance of the cases, the supreme court generally passes only on those necessary to preserve a uniformity of decision of importance to the jurisprudence of the state. Grounds for review of cases appealed to the intermediate courts, based on the treatment or outcome in the intermediate court, are shown in Table 2.


Review of these decisions is discretionary. ILL. REV. STAT. (1947) c. 148, § 172.19.

Jurisdiction is limited to review of contested elections of state officers, unless the validity of a statute is questioned by the decision.

Personal injury suits are excepted.

In Tennessee, for example, workmen's compensation cases are appealable directly to the supreme court (see Table 1), while in Indiana they are final in the intermediate court, regardless of an erroneous ruling on a new question of law or conflict with a supreme court decision. Kingan & Co. v. Ossam, 190 Ind. 554, 131 N.E. 81 (1921).

## Table 2

<table>
<thead>
<tr>
<th>State</th>
<th>Review granted by Supreme Court</th>
<th>Review on motion of intermediate court</th>
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</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Conflict with decision of supreme court; validity of statute; disqualification of intermediate court judges; errors of law in certain instances.</td>
<td>Dissent in intermediate court; invalidity of statute.</td>
</tr>
<tr>
<td>California</td>
<td>Conflict of decision; dissent; settlement of important questions of law; disqualification of intermediate court judges.</td>
<td>Any question certified by intermediate court; failure of requisite number of judges to concur.</td>
</tr>
<tr>
<td>Georgia</td>
<td>Error in intermediate court in cases of public concern and in matters of importance (e.g., revenue, construction of statutes, public officers, conflict of decision).</td>
<td>Case of such importance that it should be passed on by supreme court.</td>
</tr>
<tr>
<td>Illinois</td>
<td>May grant in any case; no grounds specified. If in contract or in damages, amount involved must be over $1500.</td>
<td>Where two judges of intermediate court are of opinion that ruling precedent of supreme court is erroneous.</td>
</tr>
<tr>
<td>Indiana</td>
<td>Conflict with decision of supreme court; new question of law directly involved was erroneously decided; failure of requisite number of judges to concur.</td>
<td>Any question of law on which it desires instruction.</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Conflict of decision and questions of public importance.</td>
<td>Decision contrary to previous decision of an intermediate court or of supreme court, where a dissenting judge so certifies; general interest or importance of question; re-examination of existing law.</td>
</tr>
<tr>
<td>Missouri</td>
<td>General interest or importance of question involved; existing law erroneous; conflict with decision of supreme court.</td>
<td>Question of law involved which ought to be reviewed by highest court.</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Dissent; transfer by order of supreme court.</td>
<td>Conflict of decision.</td>
</tr>
<tr>
<td>New York</td>
<td>Review of right where dissent, judgment of reversal or modification, or certain judgments of remand in intermediate court. Discretionary review where court thinks it should review &quot;in the interest of substantial justice.&quot;</td>
<td>Questions involved so difficult or important that supreme court should decide.</td>
</tr>
<tr>
<td>Ohio</td>
<td>Cases which it deems to be of public or great general interest.</td>
<td>Certification of conflicts, dissents, and questions of law in cases within its final jurisdiction.</td>
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<tr>
<td>Pennsylvania</td>
<td>Cases of great importance; conflict of decision and preservation of uniformity.</td>
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<tr>
<td>Tennessee</td>
<td>Errors of law; errors of fact where reversal in intermediate court.</td>
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<tr>
<td>Texas</td>
<td>Dissent; conflict of decision.</td>
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</table>
Where there is an appeal of right to the supreme court, either directly or through the intermediate court, the supreme court necessarily passes on all cases falling within the classifications affording appeal. Where no appeal of right exists, the court of last resort in most states reviews only selected cases which present matters of importance to the jurisprudence. When the court refuses to review a case, it is simply refusing to take jurisdiction rather than passing on the merits. In other words, it is doing the same thing the Supreme Court of Texas does in dismissing a writ of error for want of jurisdiction. There is no in-between group of cases in which the court is required to determine the correctness of judgments rendered by the intermediate court. The Supreme Court of Texas does exercise this function of insuring correct judgments in a great bulk of cases, and that is perhaps the most important distinguishing feature of Texas’ system.

Do other supreme courts indicate whether the intermediate court has correctly stated the law in the cases which they refuse to review? As would be expected from the fact that a refusal to review is usually equivalent to a refusal to take jurisdiction, the general rule is that a denial of review is not to be taken as an expression on the merits of the case. In no state is there a positive requirement that the supreme court write an opinion or otherwise indicate the reasons for its action. In a few states the supreme court does occasionally write a memorandum opinion, but it is not obliged to do so. In instances where memorandum opinions are written, they generally deal with practice points arising on the application and indicate nothing as to the merits of the questions involved, although in Alabama and Louisiana the supreme court’s memo-

34 An alternative method of review provides that any case may be certified to the supreme court from the trial court on a question of law decisive of the correctness or erroneousness of the judgment. Ind. Laws 1937, c. 76.

35 Concern for precedent rather than for correct judgment in the particular case is demonstrated in the holdings of various states that the supreme court can consider only the opinion of the intermediate court, not the record, to determine whether the reasons assigned as ground for review are sustained. People v. Davis, supra note 2 at 350, 81 Pac. at 719; Julian v. Bliss, 196 Ind. 68, 147 N.E. 148 (1925).

36 Information on the practice of the various states was obtained in part from letters written by the clerks of the courts in response to an inquiry on the matter.
random may approve the judgment or the holdings of the intermediate court.

Let us see more fully what the supreme court's denial of a review means in each of these states, and to what extent it affects the intermediate court's opinion as a precedent.

In Alabama a denial of review does not always indicate approval of the lower court's judgment. Where the judgment is approved, it does not mean that the supreme court approves all that was said in the opinion not necessary to the result.\(^{37}\)

The Supreme Court of California announced its policy soon after the establishment of intermediate courts in that state, in *People v. Davis*:\(^{38}\)

"It is proper to add that the denial in any case of an application for the transfer of a case decided by a district court of appeal is not to be taken as an expression of any opinion by this court, or as the equivalent thereof, in regard to any matter of law involved in the case and not stated in the opinion of that court, nor, indeed, as an affirmative approval by this court of the propositions of law laid down in such opinion. . . . It will not hold itself bound, even where questions of law alone are involved, to order a transfer of the cause, after a decision of the district court, except where it shall appear necessary in order to carry out the above-stated purposes of securing uniformity of decision and the settlement of important questions of law. The significance of such refusal is no greater than this—that this court does not consider that the interests of justice, or the purposes for which the power was given, require its exercise in the particular case."

A rule of the Supreme Court of Georgia succinctly states the effect of a denial of review: "The denial of a writ of certiorari shall not be taken as an adjudication that the decision or judgment of the Court of Appeals is correct."\(^{39}\)

The significance which appears to be given to a refusal to review


\(^{39}\) Rule 54, Rules of S. Ct. of Ga., 202 Ga. 901.
in Illinois at the present time was stated in *People v. Grant*. In comparing the Illinois practice with that of the Supreme Court of the United States, the court said that by denying a writ of certiorari the Illinois Supreme Court does not review the judgment of the appellate court, but declines to do so. A denial of review is not equivalent to a holding that the judgment is correct or that the questions of law have been properly decided.

We have observed that the Louisiana Supreme Court sometimes writes a memorandum giving its reasons for denial of review. The practice of the court appears to be rather flexible, and the notation may even indicate in some instances that there is no error in the ruling complained of. However, a refusal to review on the ground that the judgment is correct is not necessarily an affirmance of all that is said in the opinion of the lower court. But it has been said that where only one question is involved, the refusal of a writ signifies the court's approval of the decision.

The denial of leave to appeal in New York is equivalent to a refusal to take jurisdiction of the cause, and does not have the force of an affirmance. In *Marchant v. Mead-Morrison Mfg. Co.* the court stated the effect of its action on the precedential value of the intermediate court’s opinion:

> “Appellate Divisions and trial courts are at liberty, if they please, to give such a refusal some measure of significance, as a token, though indecisive, of the impressions of this court. They are not bound thereby as an authoritative precedent.”

The denial of review by the Supreme Court of Ohio does not amount to an affirmance of the judgment. It may mean only that the case was not one of great public or general interest; and no

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43 252 N. Y. 284, 169 N. E. 386 (1929). The court pointed out the similarity of its practice to that of the Supreme Court of the United States expressed in *United States v. Carver*, 260 U. S. 482 (1925), and numerous other cases. Several other state courts have also noted the similarity of their practice to the federal system.
precedent for the decision of later cases is established by a refusal to review.\textsuperscript{45}

In Pennsylvania, the refusal of the appeal "must not be taken as an indication of any opinion on the merits of the decision, or the correctness of the application of legal principles in the particular case."\textsuperscript{46}

Tennessee occupies a unique position in the effect given to a denial of review and the practice of the court in writing an opinion in connection with the denial. In \textit{Beard v. Beard}\textsuperscript{47} the Tennessee Supreme Court described its practice as follows:

"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. Where there is a divergence of opinion or merely concurrence in the result reached without approval of the reasoning or authorities in the opinion of the Court of Appeals, a differentiating opinion or memorandum is filed by this court."

This interpretation of the effect of a denial of review was questioned in \textit{Lingner v. Lingner}\textsuperscript{48} and other opinions,\textsuperscript{49} but in two later cases\textsuperscript{50} the court has reaffirmed the rule announced in \textit{Beard v. Beard}. Under this rule the denial of review without an opinion is the equivalent of an unqualified refusal in the Texas practice. Only the opinions of the intermediate court which have thus received the approval of the court of last resort are published. We have not had access to the memorandum opinions of the Tennessee Supreme Court, which are not published, and consequently we cannot say whether they are in the nature of the memorandum opinions contemplated by the proposed amendment to Rule 483. Appar-

\textsuperscript{45}Leighton v. Hower Corporation, 149 Ohio St. 72, 77 N. E. 2d 600 (1948).


\textsuperscript{47}158 Tenn. 437, 442, 14 S. W. 2d 745, 747 (1929).

\textsuperscript{48}165 Tenn. 525, 529, 56 S. W. 2d 749, 750 (1933).


\textsuperscript{50}Jones v. Mercer Pie Co., 187 Tenn. 322, 331, 214 S. W. 2d 47, 49 (1948); Ludlow v. Life & Casualty Ins. Co., 218 S. W. 2d 65 (Tenn. 1949).
ently they are not, since they do not give the intermediate court opinion a precedential value warranting its publication.

In summary, the practice of the majority of the courts of last resort in the 12 other states having intermediate appellate systems encompasses:

1. Decision and announcement of controlling legal principles (most frequently upon direct appeal) of all cases within certain categories, corresponding in a general way to cases within subdivisions 3, 4, 5 and 6 of Article 1728.

2. Announcement of controlling legal principles in all cases of conflict and (less often) of dissent, corresponding to subdivisions 1 and 2 of Article 1728 and to the Texas Supreme Court's jurisdiction over cases within the "final" jurisdiction of the courts of civil appeals.

3. Announcement of controlling legal principles in cases decided by the intermediate courts which involve unsettled questions of great importance to the jurisprudence.

4. No indication as to the correctness of the judgment or of the holdings in all other cases.

How does the Texas practice agree with this? At the outset we find that the Supreme Court of Texas possesses no power to take jurisdiction of a case on the sole ground that it presents a question of importance to the jurisprudence of the state. If the case falls within the court's potential writ of error jurisdiction, as a practical matter the Supreme Court is able to announce the controlling legal principles, either by an unqualified refusal of the application, or by granting the application and writing its own opinion (even where the court of civil appeals judgment is correct but the Supreme Court does not agree with the reasoning). Within the scope of the final jurisdiction of courts of civil appeals the Supreme Court has no opportunity to pass on questions of importance, on that ground alone, unless the court of civil appeals wishes to certify the question to the Supreme Court for determination.

We have remarked that the cases decided by the supreme courts of other states upon direct appeal correspond roughly to subdivi-
sions 3 to 6 of Article 1728. Upon closer examination this state-
ment must be greatly qualified and limited. The bulk of the cases
which reach the Supreme Court of Texas on application for writ
of error fall within subdivision 6 of Article 1728 on the basis of
the amount in controversy. Referring to Table 1, we see that only
four other states make the amount in controversy a jurisdictional
ground for review by the court of last resort. In Alabama, where
the volume of appellate business is much smaller than it is in
Texas, the minimum amount is fixed at $1000, as in Texas. In
Louisiana it is $2000, but personal injury suits are excluded; and
in Missouri it is $7500, more than seven times the minimum in
Texas. In eight of the states the amount in controversy is never of
itself a ground for conferring jurisdiction on the supreme court.

So in comparing the operation of the Texas Supreme Court with
that of other states we should either exclude this group of cases
altogether or make allowance for the disparity in the minimum
amount. Furthermore, we should keep in mind that when measured
by the amount in controversy alone, a case is important only to the
litigants, not to the general jurisprudence. And as we have seen,
the Supreme Court of Texas exercises the function, not exercised
by most other courts, of insuring correct judgments for the benefit
of the litigants in this large body of cases.

In order for our Supreme Court to meet the standard of furnish-
ing authoritative decisions on a comparable plane with the majority
of these other states, we may conclude that it might be expected to
point out correct principles of law on all questions within certain
selected classifications, as under Headings I and II of Table 1.
But these classifications should be re-examined and revised to con-
form to the present needs of our jurisprudence. In the rest of the
cases—including all those where the amount in controversy is the
sole ground for bringing the case within its writ of error jurisdic-
tion—we might ask the court to decide conflicts, settle dissents,
and select cases which in its opinion involve important questions
of law. But, on the contrary, we should not also ask the Supreme
Court to examine the merits of cases under Heading III to deter-
mine the correctness of their judgments, as we now do. In short, if we emphasize the court’s function of announcing precedents, we should relieve it of the duty of inquiring into the correctness of judgments in cases of no real importance to the jurisprudence.

PRESENT PRACTICE OF THE SUPREME COURT OF TEXAS

We have said that the majority of the cases which reach the Supreme Court of Texas on applications for writ of error fall within subdivision 6 of Article 1728, on the basis of the amount involved. This assertion would be difficult to substantiate without an exhaustive analysis of the applications themselves, and we regret that we have not had an opportunity to make such an analysis. However, personal observation while connected with the Supreme Court convinces us that this is true.

It should be borne in mind, of course, that the mere allegation of the existence of a jurisdictional ground is not sufficient to confer jurisdiction. For example, the Supreme Court does not acquire jurisdiction of a case merely upon the petitioner’s allegation of a conflict of decision; the court must be of the opinion that a conflict actually exists. Also, the fact that some statute is involved in the proceeding does not necessarily make the case one involving the construction of a statute necessary to a determination of the case.

In order to arrive at some idea of the number of cases coming within the first five subdivisions of Article 1728 and within subdivision 6 on a ground other than the amount in controversy, we tabulated the court of civil appeals cases reported in 15 recent volumes of the South Western Reporter in which applications for writ were filed. We had to assume that in each application the assigned errors included these matters. We realize the inadequacy of this method. It was impossible to know, for instance, in how

51 West Disinfecting Co. v. Trustees of Crosby Ind. Sch. Dist., 135 Tex. 492, 143 S. W. 2d 749 (1940).
many cases the petitioner made a valid claim of conflict not expressly disclosed by the court of civil appeals opinion. Whether the case involved the statutory construction contemplated by subdivision 3 was also difficult to appraise in some instances. However, other matters could generally be classified easily enough.

It was found that these cases represented less than a fourth of the total applications filed. This would indicate that about three-fourths of the cases reviewed by the Supreme Court upon application for writ of error would come within the final jurisdiction of the intermediate courts of most other states.

From this tabulation we found that in approximately two-thirds of the cases within subdivisions 1 to 5 the Supreme Court either granted or unqualifiedly refused the application, and in the other third the applications were either dismissed or marked "Refused. No Reversible Error." The percentage of "NRE" cases was considerably higher for subdivision 6.

In cases of revenue or in which the Railroad Commission is a party, if no new statute or application of legal principles is involved, the jurisprudence is not likely to suffer by the use of the "NRE" notation. This is also true of cases involving title to property and other matters within subdivision 6. Where the principles involved are already established by prior decision, the "NRE" notation when properly understood should not cast suspicion upon the prior holdings. In cases of dissent, conflict, and validity of statutes, it is not so clear that the "NRE" notation does not hamper our jurisprudence.

An observation from personal experience might be added in regard to new or unsettled questions of general interest or importance to the jurisprudence. It was our observation while connected with the Supreme Court that the inclination of the court is to grant writs of error in cases involving questions of that nature where it is not in agreement with the reasoning of the court of civil appeals and consequently cannot give the application an unqualified refusal.
COURT OF CIVIL APPEALS OPINIONS AS PRECEDENTS

From what has been said, we believe it is fair to conclude that the Supreme Court of Texas presently is giving authoritativity to as many court of civil appeals opinions as could be expected. This leads to a consideration of the value of those opinions which do not have the express approval of the Supreme Court, and the related question of their publication in the law reports.

The authoritiveness of an intermediate court’s opinion depends upon the action taken by the supreme court. Whether its jurisdiction is final or intermediate, the inferior appellate court is bound by the decisions of the supreme court, and its opinions cannot be considered as strictly authoritative unless they are approved, in some manner, by the highest court. But it is an erroneous assumption that an intermediate court opinion which has not received the express approval of the court of last resort has no worth in the body of opinion law. In Texas the courts of civil appeals are primarily responsible for developing the principles of law applicable, for example, to divorce, contested elections, slander, venue, and all procedural matters.53

The Supreme Court of Texas may deny a writ of error by either of the following three notations: “Refused”; “Refused. No Reversible Error”; “Dismissed for Want of Jurisdiction.” The “Refused” notation, since 1927, is equivalent to approving the court of civil appeals opinion in its entirety, so that it attains the dignity of an opinion of the Supreme Court.54 We have seen that “Refused. No Reversible Error” ordinarily amounts to an approval of the judgment without either approving or disapproving the holdings. Where an application is dismissed, the Supreme Court expresses neither approval nor disapproval of the judgment or the holdings.55

53 The Supreme Court cannot overturn a decision within the final jurisdiction of the court of civil appeals simply because it disagrees with the ruling. Harris v. Willson, 122 Tex. 323, 59 S. W. 2d 106 (1933).
There is no rule of *stare decisis* attaching to an unapproved court of civil appeals opinion which compels another court of civil appeals to follow it. But it requires no more than a glance at the reports either of the Supreme Court or of the courts of civil appeals to see that these opinions are not without value. The Supreme Court has no hesitancy in citing opinions of the courts of civil appeals in which no action was applied for in the Supreme Court, or in which the Supreme Court dismissed the application or marked it "Refused. No Reversible Error." Undoubtedly these opinions have a persuasive weight, even though not compelling.

Many lawyers who find dissatisfaction with the "NRE" notation shun the citation of these cases in briefs and arguments in the mistaken belief that the opinion is tainted. They say, "There must be something wrong with the opinion or else the Supreme Court would have given it an unqualified refusal." They overlook the fact that ordinarily there must have been a great deal right with it, or else the Supreme Court would have granted the writ. And, as we have seen, the "NRE" notation does not necessarily mean that there was anything whatever in the opinion with which the Supreme Court could not agree. It may be that the court, being satisfied as to the correctness of the judgment, did not consider the questions discussed of sufficient novelty or importance to warrant the "fine-tooth comb" treatment essential to an unqualified approval of an opinion. As Chief Justice Brown once observed, it requires almost as much work to approve an opinion as to write it; and where the principles involved are neither new nor unsettled, it would be defeating the object of courts of civil appeals to

56 Texas & P. R. Co. v. Wood, 211 S. W. 2d 321, 322 (Tex. Civ. App. 1948) *er ref. N.R.E.;* Hargrave v. Texas & P. R. Co., 12 S. W. 2d 1009, 1010 (Tex. Comm. App. 1929). *But cf.* Sovereign Camp, W. O. W. v. Jackson, 264 S. W. 289, 292 (Tex. Civ. App. 1924), saying that a court of civil appeals is bound by prior court of civil appeals decisions, especially one by the same court. In Binford v. Harris County, 261 S. W. 535, 537 (Tex. Civ. App. 1924), it was said that a decision of the court of civil appeals in which writ of error was refused (in 1919, when refusal was equivalent to the present "NRE") was the law of the state until changed. This statement may have been based on the necessity of the correctness of the ruling to the judgment in the case followed. *Also see* Orndoff v. El Paso County, 295 S. W. 219, 222 (Tex. Civ. App. 1927) *er ref.*

spend too much time in culling every expression in their opinions. These lawyers apparently do not entertain the same fear for the "Dismissed" cases, nor do they hesitate to cite opinions in which the Supreme Court took no action at all. So far as authoritativeness is concerned, these latter cases are on a parity with the ones which are dismissed for want of jurisdiction. If any distinction is to be made, the "NRE" cases should be appreciably higher in the hierarchy of persuasiveness than either of the other two groups.

**Publication of Court of Civil Appeals Opinions**

A written opinion serves the dual purpose of informing the litigants of the basis of the judgment and of announcing principles for the determination of future litigation. The first purpose is fulfilled by the delivery of the opinion; but the second purpose is not fulfilled until the opinion is made accessible to the public through some practical medium—specifically, through the medium of publication.

Rule 451 of the *Texas Rules of Civil Procedure* requires the courts of civil appeals to "announce in writing their conclusions," indicating on its face that the courts of civil appeals shall write opinions in all cases decided by them. But the precursor of this rule, in conjunction with the statutory provisions on which Rules 453 and 454 are based, was construed as not requiring the writing of opinions in cases in which the Supreme Court has no writ of error jurisdiction, where the court of civil appeals affirms the judgment of the trial court. Rule 452 directs that only brief memorandum opinions be written where the issues involved have already been settled by authority or elementary principles of law. This direction is largely neglected by judges of courts of civil appeals, mostly because of pressure from losing attorneys, who want the court to state fully and specifically why they lost their case.

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The trend in recent years has been toward reducing not only the number of full opinions which are written, but also the volume of published opinions. This trend was expressed in the provision of Rule 452, drafted in 1940, that "opinions [of the courts of civil appeals] shall be ordered not published when they present no question or application of any rule of law of interest or importance to the jurisprudence of the State." Broadly, this description corresponds to the cases in which the courts of civil appeals are directed to write memorandum opinions. In 1943 the rule was amended to require the publication of court of civil appeals opinions where application for writ of error is unqualifiedly refused or is granted. Even with this enlargement, the rule still seeks to prevent the publication of opinions not deemed important as precedents.

The amendment to Rule 452 recommended by the Texas Civil Judicial Council would add the following significant paragraph:

"When the court has ordered that an opinion shall not be published such opinion shall be considered as having no precedential value and shall not be cited or referred to by any court in any other opinion or memorandum and shall not be cited or referred to by any party in any proceeding or in any brief. Should this rule be violated in any brief, it shall be the duty of the court upon attention being called to such violation to order expunged from such brief all references to such unpublished opinion and if the court finds that such opinion was cited or referred to with full knowledge that it had been ordered not published, the court may, in its discretion, strike from the record the entire brief."\(^{60}\)

As all Texas lawyers know, there is no official publication of court of civil appeals opinions, their reporting in the South Western Reporter ordinarily being the only publication given them. While the enforceability of an order against publication might be doubtful, the West Publishing Company does not report any opinion which is designated for nonpublication. All the opinions appearing in the South Western Reporter are published with the

\(^{60}\) See note 11 supra.
sanction of the court, then, and are in that sense officially published.

Under the present rules an unpublished opinion is entitled to as much consideration as a precedent as is a published opinion. It has been questioned in some quarters whether a rule adopted by the Supreme Court prohibiting the citation of opinions whose publication is not authorized could reduce or nullify their status. As a practical matter, it is only the opinions in the South Western Reporter which influence the course of the law, as very few lawyers ever know of the holdings in the unpublished ones. The Civil Judicial Council's amendment is aimed at checking the procurement of the officially unpublished opinions through private channels. The Council takes the view that lawyers fortunate enough to have access to these opinions gain an unfair advantage over other members of the profession.

Under the present operation of Rule 452 there is no uniformity in the percentage of unpublished opinions written by the various courts of civil appeals. A survey for the period from October 1, 1948 to October 1, 1949 showed the average number of unpublished opinions to be 17 per cent, but in the individual courts the percentages ranged from one per cent to 55 per cent. If we are to accept the policy now existing under Rule 452, these figures suggest that closer scrutiny should be given to its application. Two approaches are open. The first is by more thought to whether the opinion presents any new question; the other is through attention to the action taken in the case by the Supreme Court.

It must be conceded that it is not always an easy matter to determine whether an opinion is of interest or importance to the jurisprudence of the state, and many court of civil appeals judges have expressed the difficulty they encounter in applying this standard. Some judges believe that all opinions of the courts of civil appeals should be published, and that the solution lies in curtailing the length of opinions rather than the number of ones published. Ob-

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61 Letters from the chief justices of the courts of civil appeals in October, 1949, indicate that the citation of unreported opinions in briefs and arguments is rare.
viously, resort to memorandum opinions as authorized by Rule 452 would tend toward this result, although it is doubtful that the publication of memorandum opinions would be of any benefit. Here, too, the judge runs into the same problem of deciding whether a full opinion should be written that he does in deciding whether it should be published. As we have remarked, much of the difficulty in applying Rule 452 comes from the desire of the lawyers to have the court write a full opinion in their cases, and if lawyers were willing to be satisfied with memorandum opinions the judges would not be so hesitant to take advantage of this provision. However, lawyers are more likely to be satisfied with having an opinion written and not published than with having no opinion written at all.

The opinion in every case which reaches the Supreme Court should be evaluated in the light of the action taken by that court. Dismissal of an application for want of jurisdiction indicates nothing in regard to the merits of the case, and the opinion’s publication value is unaffected by the Supreme Court’s action. Likewise, denial of a motion for leave to file a petition for mandamus to compel certification ordinarily does not affect the opinion’s publication value. The jurisdictional ground in these cases must be either conflict of decision or dissent. It might be thought that the denial would mean that the opinion was not in conflict with any other opinion, but it actually means only that the relator has not pointed out a conflict.

By an amendment to Rule 475 which became effective March 1, 1950, the Supreme Court may deny the petition, although a conflict exists, if the opinion of the court of civil appeals under attack has correctly stated the law. In this event, the rule requires the Supreme Court to state in its order that it approves the holding of the court of civil appeals. The holding on that question thereby receives the express approval of the Supreme Court and the opinion

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63 Simpson v. McDonald, 142 Tex. 444, 179 S. W. 2d 239 (1944).
should be published, as it not only represents the Supreme Court's view on the question but serves to overrule another case already in the law books.

The Supreme Court may also deny a petition for mandamus where jurisdiction is based on dissent in the court of civil appeals, if it is of the view that the majority opinion correctly states the law, "in which event it shall state in its order that it approves the majority holding." The fact that there was a diversity among the judges indicates that the question was at least doubtful, if not unsettled, and therefore the approved portion of the majority opinion is of interest to the jurisprudence of the state. Publication of the dissenting opinion would also be necessary in order to show the points of dissent.

Where the Supreme Court grants the mandamus and writes a full opinion on the question which give rise to its jurisdiction, there is no occasion for publishing the court of civil appeals opinion unless it decides, additionally, some new question of law not reviewable by the Supreme Court.

The Supreme Court's answer to questions certified to it by a court of civil appeals is always published as an opinion of the Supreme Court, and ordinarily publication of the conforming court of civil appeals opinion is unnecessary.

Rule 452 provides that in every case where application for writ of error is unqualifiedly refused or is granted, the opinion shall be ordered published. When an application is granted, the entire case is then before the Supreme Court on all questions of law involved. This must be qualified by the further statement that error must be assigned in order for the Supreme Court to have jurisdiction to decide the point, but it is seldom that neither party assigns error on a new or unsettled point of law decided by the court of civil appeals. In other words, ordinarily the only por-

65 Rule 475, Tex. Rules Civ. Proc., as amended effective March 1, 1950. Petitions for mandamus on the ground of dissent are infrequent, since these cases are usually certified under Rules 463 and 465.


67 See note 14 supra.
tions of the court of civil appeals opinion not before the Supreme Court represent settled principles of law or involve fact determinations.

Usually the Supreme Court, whether affirming or reversing the court of civil appeals judgment, embodies in its opinion a full development of the important principles of law supporting its decision. Where this is true, there is little justification for reporting the court of civil appeals opinion. In reversed cases the opinion of the court of civil appeals has no value whatever so far as the erroneous portions are concerned. In affirmed cases, although the court of civil appeals opinion may have stated identical rules of law, it is superseded by the Supreme Court’s expression of those principles. Contrary to the requirement of Rule 452, the suggestion is offered that in the majority of cases where application for writ of error is granted, publication of the court of civil appeals opinion serves no useful purpose.

Sometimes the Supreme Court in affirming the court of civil appeals judgment expressly approves portions of the opinion; or, though holding differently on some points, it may expressly or implicitly approve other portions. In these instances publication would have to be determined on the basis of whether the approved portion announced a new principle or settled a doubtful question. If it did, the Supreme Court could avert the need for a separate publication by simply embodying the approved portion into its opinion.

Rarely is there need for publishing a court of civil appeals opinion written after a remand to that court, for it would usually involve fact questions only. This same policy of nonpublication should hold, also, where the original opinion decides only fact issues.68

68 The preface to the first volume of Tennessee Appeals Reports sets out a lucid criterion for publication of intermediate court opinions. "No opinion will be published if the decision is reversed or materially modified by the Supreme Court; or if the Supreme Court affirms with a written opinion for publication, or a memorandum opinion, placing its affirmance on different grounds from the opinion of the Court of Appeals; or if the opinion deals altogether with questions of fact. If an opinion of the Court of Appeals deals mainly with questions of fact, but also involves some questions of
The requirement for publication of all opinions in which application for writ of error is unqualifiedly refused also seems too broad. Refusal of an application frequently indicates simply that the principles involved have already been thoroughly settled, and the opinion may add nothing to the jurisprudence of the state.\(^6^9\)

Where an application for writ of error is marked "Refused. No Reversible Error," we have seen that the holdings in the opinion do not necessarily have either the approval or the disapproval of the Supreme Court. Its publication, then, should depend entirely upon whether it presents a question or application of a rule of law of interest or importance to the jurisdiction of the state.

**TIME OF PUBLICATION**

If the action taken by the Supreme Court is to be considered in determining the matter of publication of all court of civil appeals opinions, final decision on publication would have to be deferred until the Supreme Court had acted or until time for review had elapsed.

Speedy publication of opinions which form precedents is desirable, of course, but the advantage in publishing court of civil appeals opinions before possible action on them by the Supreme Court is slight. Admittedly, it sometimes happens that some other case in preparation involves the same question of law; but the instances in which a controlling decision will be rendered just at the time a like case is pending are fairly rare. Moreover, a case which is still within the potential jurisdiction of the Supreme Court

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\(^6^9\) As an illustration, during the week this paper was drafted the Supreme Court unqualifiedly refused 9 applications for writ of error. One of the opinions, Howe v. Howe, 223 S. W. 2d 944 (Tex. Civ. App. 1949) er. ref., clearly adds nothing to the jurisprudence of the state. It is extremely doubtful that two others, Wilson v. Barnes, 224 S. W. 2d (Tex. Civ. App. 1949) er. ref., and Mender v. Bryant, 225 S. W. 2d 877 (Tex. Civ. App. 1949) er. ref., contribute anything new. Another, Louisiana & A. R. Co. v. Chapin, 225 S. W. 2d 614 (Tex. Civ. App. 1949) er. ref., has nothing new in it except possibly on the recovery of funeral expenses in an action for wrongful death, the propriety of which had already been established by a long line of decisions.
PROBLEMS OF PRECEDENT

could not be aptly termed a controlling decision. The advantage of a few weeks' advance publication certainly does not seem to offset the disadvantage of placing a valueless case in the permanent reports.

The current practice of ordering opinions published varies in the courts of civil appeals. Some courts withhold publication of all opinions until the Supreme Court has acted on the application or the time for filing an application has elapsed. Other courts release them immediately after they are handed down, and they are published in the South Western Reporter advance sheets as soon as the motion for rehearing has been overruled or time for filing the motion has elapsed.

If we are to obtain the maximum effect from Rule 452, it would be best to withhold all publication until after the time for the Supreme Court to act. This would entail some inconvenience to the courts of civil appeals, it is true, for they would have to reconsider the matter of publication several weeks after the opinion was adopted. However, the burden would not be enormous. At the time of preparing the opinion the judge who wrote it could make a notation whether it should be published, on the assumption that it would not be overturned in the Supreme Court; or if the whole court decides which opinions are to be published, the notation could be added when the opinion is adopted. Beyond that point the matter of publication could be determined by more or less fixed rules, and a complete re-examination would not be necessary.

Some court of civil appeals judges think that the Supreme Court should determine publication in all cases which reach it on applications for writ of error. This suggestion is a plausible one where the application is unqualifiedly refused. If the application is dismissed for want of jurisdiction, the Supreme Court has no occasion to weigh the opinion's publication value. In the "NRE" cases the court of civil appeals is probably in a better position to decide on publication than is the Supreme Court.

Another possible system, one with manifold and obvious advantages, would be to have an administrative officer attached to
the Supreme Court, whose duties would include the release of opinions for publication. Under such a system the clerks of the courts of civil appeals would forward to him copies of all opinions, with the court's recommendation on publication. The administrative officer would then follow up the case in the Supreme Court and determine under the court's direction which opinions should be designated for publication in line with standards similar to the ones outlined above.

Publication Policies in Other States

Other states have adopted various policies with respect to the publication of opinions of their intermediate courts. An Alabama statute provides that the judges of the court of appeals "shall not be required to write opinions in cases where the decisions merely reaffirm previous decisions, or relate to questions of fact only, or when the case decided would, in their opinion, serve no useful purpose as precedents"; but it further provides that "the title of every case decided by said courts, and not reported in full, shall be published in the reports with brief notes of the points decided or a statement of the disposition made thereof." 70

In California the Supreme Court decides which opinions of the intermediate courts are to be published. 71 An Illinois statute directs the intermediate courts to designate for publication in the official reports only such written decisions "as contain a discussion of a new or doubtful question of law, or involve the application of rules of law to a novel state of facts, or decide a new or unsettled question of practice." 72 All other opinions are published by abstract or in condensed form. 73

The Indiana intermediate court decides which of its opinions shall be reported, but no fixed standard is prescribed. It is required to write an opinion only where a case is reversed. 74

70 Ala. Code (1940) tit. 13, § 66.
74 Ind. Stat. (Baldwin, 1934) §§ 1366, 1391.
Missouri each court designates the opinions which are to be officially published "for the benefit of jurisprudence," but there is no restriction on unofficial publication.

We have observed that in Tennessee the denial of a review without a written opinion by the supreme court amounts to an approval of the opinion of the intermediate court. Publication of the intermediate court opinions in the South Western Reporter and in the Tennessee Appeals Reports is confined to those cases in which petition for certiorari was denied without a written opinion or explanatory memorandum.

An Ohio statute allows each intermediate court to select the cases which shall be published, and provides that "only such cases as are reported in accordance with the provisions of this section shall be recognized by and receive the official sanction of any court within the state." This is the only instance we have found where a state has expressly undertaken to suppress the citation of unofficially reported cases. It is similar in purpose to the recommendation of the Texas Civil Judicial Council, and it resulted from the same kind of situation which the Council seeks to prevent. The Ohio statute has been both criticized and defended by the lawyers.

It has also been both disregarded and applied by the courts.

Suppression of the citation of cases whose publication is not authorized by the court can be argued on both sides. However, lawyers who do not have access to these opinions may take consolation in remembering that the court which delivered the opinion thought it did not involve a novel situation—that some other case could be cited just as well.

It is not our intention here to assume the role of advocate for curtailment of publication. Rule 452 has announced a policy, and

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76 See notes 47 and 68 supra.
77 Ohio Code (1940) § 1483.
78 The historical background of the statute is given in Note, 1 Ohio St. L. J. 135 (1935).
79 Ohio Bar Reports 343 (1932) and 37 Ohio Law Reporter 129 (1932).
80 See Note, 1 Ohio St. L. J. 135 (1935).
it has been our intention only to suggest ways of implementing it. While we are in full agreement with the policy, we recognize that there is among the lawyers and judges of the state another school of thought, taking the view that all opinions written by the courts of civil appeals should be published. We have mentioned the difficulty which some court of civil appeals judges have expressed in applying the rule, and they are able to cite specific instances where opinions originally marked not for publication have later been ordered published by demand from the bar. The problem of striking a balance between the advantages and disadvantages of full publication is a knotty one, and is likely to plague us as long as we preserve our time-honored case law system.