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Written Opinions in Cases Affirmed by the Appellate Court

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WRITTEN OPINIONS IN CASES AFFIRMED BY THE APPELLATE COURT

In 1851, a wave of judicial reform was sweeping over the country; and members of the Indiana Constitutional Convention of that year caught the full force of that movement. There was then, as there is now, antagonistic feeling toward our courts. It was then felt they worked too much in the dark, and that their decisions should be set forth in the full light of the day. In the distrust of them, and as one of the reforms, juries in criminal cases were given "the right to determine the law" applicable to the facts involved, a most absurd provision which at the present day they at times do not hesitate to wield. It was provided that "The Supreme Court, upon the decision of every case, give a statement in writing of each question arising in the record of such case and the decisions of the court thereon."[1]

The Supreme Court soon felt the oppressiveness of this constitutional provision, and by construction narrowed its full force in cases where a reversal took place, saying:

> "When does a question, in the sense of the Constitution, arise in the record? We do not think it does so merely because it is raised by counsel, nor because it is presented in the assignment of errors, nor necessarily because it is cited in a bill of exceptions. It must be a question, the decision of which is necessary to the final determination of the cause; and which the record presents with a fullness and distinctness rendering it possible for the court to comprehend it in all its bearings. Hence, it has been the frequent practice of this court, in cases where a single point would put an end to a case, to decide that point and no other."[2]

Under this decision if a single error requires a reversal of a case, it is unnecessary to pass upon any other error, even though sufficient to require a reversal; and this not infrequently occurs. It is sufficient to pass upon the error requiring a reversal of the case, and as to the remaining errors not passed upon, there is no "decision." But as to each case affirmed, every "question arising in the record of such case" must be decided and a reason therefor given in writing.

This constitutional provision has no application to the Appellate Court. It is not required to give an opinion, either oral or written, in cases it affirms; but in every case it reverses it must give an opinion "on the material questions therein in writing."[3]

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[1] R. S. 1926, Sec. 172.

[2] *Willetts v. Ridgeway*, 9 Ind. 367.

[3] R. S. 1926, Sec. 1361.

A true construction of this provision requires a decision upon every "material" question involved, even though a single erroneous "question" is sufficient to require a reversal.

How has the Appellate Court treated this statutory provision?

In the 84th Appellate Court Report, in which opinions were prepared and filed, 73 of the cases were affirmed and 33 reversed. In the 85th, 75 were affirmed and 59 reversed. In the 84th, 16 cases were affirmed without opinions and 4 with very short ones printed in small type and inserted in the last pages of the volume. In the 85th, 33 cases were affirmed without opinions, and 8 reversed with very short ones, also inserted in the last pages of the volume. In these two volumes we have 148 cases affirmed with opinions and 92 reversed, also with opinions.

The opinions in the affirmed cases, with the syllabus, in the 84th volume, occupy 435½ pages, the reversed cases 236. The opinions in the affirmed cases in the 85th Volume occupy 378 pages, the reversed, 304. In the two volumes the opinions in affirmed cases occupy 813½ pages, the reversed, 540.

It will thus be seen that in the two volumes opinions were written and filed in 148 cases where there was no law requiring it to be done.[4]

These two volumes are fair samples of the other 83 volumes, except more cases are now affirmed without opinions than formerly. In the early volumes scarcely a case is affirmed without an opinion.

In the 84th Volume a dissenting opinion occupies 13 pages and in the 85th, another, 6. But there are very few dissenting opinions.

The question arises, why do the Appellate Court Judges laboriously prepare opinions in practically all the cases, when no statute, nor even a rule of practice, requires it? Occasionally some of these opinions are 20 and 25 pages long. Is it a desire to see one's self in print? A very compelling force it must be admitted.

The preparation of an opinion is a laborious task. But it is not essential to a correct decision. In nearly every case more time is consumed in the writing of the opinion than is required to examine the record, read the briefs and the authorities cited. Many a case can be decided correctly by the court on the reading of the briefs without an examination of the authorities; yet the

[4] *Cleveland R. R. Co. v. Van Natta,* 44 Ind. App. 608, 87 N. E. 999, 88 N. E. 716.

preparation of a written opinion calls for the citation of authorities. If the Appellate Court did not prepare opinions in all the cases it affirms, it could dispose of three times the number it handles, probably more, and as accurately as it does when it prepares opinions in each one.

There is another more serious question. In opinions inaccuracies creep in. Not every judge can always accurately state a legal proposition applicable to the facts involved in the case, although his ultimate conclusion be correct. These inaccurate expressions lead to confusion in the practice. This by all means should be avoided. Then there is great danger in the clash between the Appellate and Supreme Court opinions, and yet the case be accurately decided. Thus the profession find themselves in doubt as to just what is the law of the state; for the Appellate Court opinion is an interpretation of former Supreme Court opinions. This leads to confusion in the law. And it is right here that petitions are often filed for a review of the case by the Supreme Court. These petitions are, unnecessarily, a great burden on the Supreme Court, consume much of its time, with little or no credit by the public for the labor.

No litigant, as of right, is entitled to ask for written opinions unless some statute or constitutional provision expressly confer it upon him. A nisi prius judge who gives no opinions is a wise judge. The only persons having an interest in an affirmed case are the litigants, and they know what the case is about. The public have no interest in their litigation. It is a personal quarrel between the litigants. Then why should an opinion be written telling them about their own differences, and the public about it, and the opinion be published at the expense of the state?

There are thousands of pages of opinions in the Appellate Court reports affirming cases, occupying nearly two-thirds of the 85 volumes. Thirty of these volumes are sufficient to contain all the opinions in the reversed cases. About 55 volumes could have been dispensed with if no opinions in affirmed cases had been filed. Formerly the Reporter was eager to publish as many volumes as possible when he reaped a profit on each volume sold; but now he receives no such profit. The publication of these reports is at the expense of the state.

The multiplication of reports is a very serious thing for the legal profession; and their publication ought to be restricted. When the writer, in 1874, began reading law, there were 44 vol-

umes of Supreme Court Reports, 8 Blackfords, and one Smith. In the last fifty years the number of Indiana Reports has gone up by leaps and bounds. In the English speaking world the method of reporting opinions is bound to break down. It cannot last. In 1916 (the writer has no more recent data) the number in England, Ireland, Scotland, and in all the British colonial countries, was 6,836; and in America, 9,621; a total of 16,457. From 1885 to 1916, a period of thirty years, over 6,000 reports were published, about 1,600 more volumes than had been published in America down to 1882.

So it stands us in hand to curtail the number of written opinions as much as reasonably possible. Cannot the Appellate Court help us in this endeavor by not writing opinions in practically all cases it affirms?

There is another phase of this question. Not all the cases affirmed are of importance. Opinion after opinion simply reiterates well settled and accurately stated principles in hundreds, even thousands, of cases. Often opinions contain lengthy quotations or paraphrases from former opinions. If opinions were not written in those affirmed cases of minor character, involving no new principles, and of only those of any importance, then the judges would have more time to devote to important affirmed cases, would write better opinions and shorter ones. A hurriedly written opinion and one written under pressure for lack of time, means the production of a longer opinion and often a "sloppy" one. Let us hope there will be fewer opinions in affirmed cases, and shorter ones.

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