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THE NECESSITY OF ORAL APPEAL

ALVAH J. RUCKER*

This article is written with entire respect and deference to the members of our courts of appeal, without attempt at the use of legal parlance and with an endeavor to be helpful to the courts and the voiceless public.

The right of appeal is the very handmaiden of justice; and although hidden from the multitude, it is of the very fibre of the law's administration in the trial courts. Without it uniformity fails, and administration would be left, minus the umpire, to the personal or peculiar views of the numerous individualities on trial benches.

I shall try to show that the present procedure in our courts of appeal is burdensome and encumbered with age-long encrustation, preventing due use and possession by the poor and average-circumstanced citizen, of that pearl of great price: the right of review. This procedure is not the fault of our contemporary courts or anyone, but is an inheritance from former times when the ox cart, not the horse and buggy, was the vogue. Since the Supreme Court has the right to make rules, it can, if it desires, reframe them to care for modernization and the fair play which the judges pre-eminently desire. I shall in addition state a remedy.

We have been properly solicitous and eager through the American Law Institute to declare substantive law, wherein our courts of finality have as a general rule, not been backward; but, having laid our stress on what to get, we have neglected the means by which to get it. Many think their capacities sufficient to equal those of Mr. Hoover or Mr. Roosevelt in the position of President, but these gentlemen were superior to all, at least in realizing the importance of the procedure to attain unto it. We should have a like realization for our worthy ends, with modern tools for our purposes.

The time required for an appeal and the vast labor and expense thereof under the present Rules, work, indeed, to deprive the little fellow of his precious privilege of appeal. This even hurts him in obtaining a fair and equal show "for his white alley" in the trial court, for, no appeal feared, a

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lackadaisical state of mind has at times caused therein decisions in favor of those who could appeal.

The present Rules of the Supreme Court have made some very commendable reforms but still usually and for the sake of safety, copied-pleading and all the evidence and record must be taken up instead of an inexpensive digested summary of the parts involved in the alleged error, in distinction to a forward movement found in Rules 75 and 76 of the Federal Rules of Civil Procedure.

The Rules of our appellate courts require for appeals a very meticulously prepared and bound transcript with index, marginal notations throughout, containing copies of the pleadings, the pertinent motions, the rulings, orders, judgment and record of the trial court and usually, the evidence. The pages must be numbered and there must be a formal Assignment of Errors, a new complaint on the appeal. A written, carefully prepared praecipe must be filed with the Clerk of the trial court, which together with his certificate shall be included in the transcript. Ordinarily this transcript must be filed within 90 days after final judgment below, although shorter periods are allowed in quite a limited class of cases. To prevent execution of judgment, bonds with approved sureties should be filed and shown in the transcript with due approval and stay. There are some exceptions, of course, but they are slight.

After filing his transcript, another 30 days is allowed for filing the brief of the appealing party, to be followed by the brief of the unappealing party within 30 days after appellant's brief is filed, with 15 days more for filing appellant's reply brief. Also, continuances for such filings may be and on due petition usually are allowed. Over five months is ordinarily required to get the case in shape where the court may even consider it. This consideration by the court requires one of its members to write an opinion on every topic raised, signed by him, and with numerous other opinions to meticulously compose, a year or two must pass after judgment below, before the appellant hears of his case again.

The losing party on appeal has 20 days to file petition and written briefs for rehearing and the other party another 10 days for his brief. Then the process is essentially repeated with the addition that a party finally losing in our

Appellate Court can file within 20 days his petition and briefs to the Supreme Court to transfer the case there, with 10 days more for the brief of the winning party. Then under the system the Supreme Court assigns one of its judges to study the Appellate Court opinion, and if it is wrong, to finally write a new, superseding opinion, with the same rights in the Supreme Court for a rehearing as in the Appellate Court. This of course, under the system consumes much time and incurs new labor and expense.

All briefs may be printed at the cost of about \$1.25 per page, or if the appealing party cannot afford that luxury, his lawyer's stenographer, putting aside usual business for several weeks, must copy the brief 3 times so that two ribbon copies with seven other copies may be furnished the court and one ribbon copy to the party who does not appeal.

The appealing party at the peril of his appeal must have seven complete sections of his brief, wherein he states the nature of the action, the issues, the decision thereon and the judgment, the errors relied upon for reversal, a concise statement of the entire record with accurate transcript references, including that of all the evidence or the special findings if the sufficiency of the evidence is attacked, and all of the given and refused instructions, which should be set out verbatim if the giving or refusal of any instruction is attacked. Then the lawyer must set out "Propositions, Points and Authorities" in short form, citing under Propositions or sub-heads thereof the statutes and decisions relied upon, capitalizing or black facing the first three of a series, giving book, page and year of a decision. After this the lawyer does it all over again but expansively in the final section called "Arguments." Then he must provide a careful index for the whole. Of course, this requires many pages of printing or typing. It is ideal and a presentation on a gold platter of much that the court will not need in any event.

With every respect and deference to ancient custom, I assert that the Rules are for a "reading court" instead of a "listening court"—one listening to advocacy.

There is a danger to a court other than eye strain, when it reads; and when it minimizes the swift, pointed and living word of the advocate directed to each and all of the judges. In the heat of discussion by those who have made themselves experts on the particular case, the truth is bound to fall out,

while "mousing the record," as Chief Justice Taft called it, brings forth so often, the fruits of the cloister: technicality, fine spun theory and the narrow or broad views of one man instead of the whole court. The books are replete with the forgotten opinions of judges who sought scholarship or the fame of having composed "the leading case."

Would it not be better, I say in all deference, for the courts of appeal to sacrifice some scholarship and great detail, in favor of speedy justice and right to all men?

The present system is too slow and prohibitive in cost.

Instead of writing to the court about it, let the lawyers tell the court about it, face to face.

The old rule of the merchants in having a decision "While the dust is falling from the shoes," complies with our Constitution's requirement for cheap speedy justice and accords with at least some former English and to the Roman law practice, and has been successfully applied in America. Chief Justice Marshall craved argument to repletion, and when it was over, he pithily and forthwith made his short decision. When the Apostle Paul appealed in a capital case, he did it orally and his appeal no doubt, was orally and fully heard by the able lawyers in Rome.

Nine out of every ten appeals, judging from the rather simple propositions and constructions of law upon which they were determined in our decisions, could have been decided by the five or six judges on our respective appellate benches at once, as was done in the merchants' courts, or as it is done, practically so, by Boards which the people have demanded for cheapness of procedure and speed. If the remaining case after full argument cannot be decided at once by a full bench, it, alone, could have the present treatment or a modified prescription thereof.

It would be refreshing and a great accretion to appellate courts in popular favor and trust, if they would take decisions from the cloister, putting them out in the open with each judge stating his views extempore in easily understood language, on the case in the presence of all interested, with the consensus of the majority the final decision. Let the time for arguments be lengthened; let the statutes and books be readily available for the discussion; let advocacy be the main-spring and not the incidental; and our good judges will find that their sense of justice, sharpened by personal contact

with the lawyers, litigants, public and the vital issue, will be more accurate and to the point than after weeks spent in the library. The snarls of technicality vanish or appear of small worth in the face of a world of practicality.

What then will become of expensive transcripts, costly briefs and bonds of the surety companies? The answer is that they will become, at least in a large measure, extinct. If full oral argument should be sought and given shortly after the trial court judgment, the kernel and nub of the case would be before the Court for its quick decision without all the certifications, the typewritten and printed superfluities and the gingerbread thought so necessary by the former generation.

When communication was difficult in pioneer days; when there were few competent law schools, no great legal digests or texts, no bar associations nor discipline for lawyers or officials; when the appellate courts had no knowledge of lawyers and judges in the remote counties nor long distance phone, and when the best lawyer was considered the trickiest and the one who would "admit nuthin'," there was an excuse for the long winded transcript showing every shoe lace tied and every button sewed on. But today, there are very few lawyers who will not agree on the facts of the points in dispute (and generally, there is but one) and will admit the same in open court. A brief, quite brief, written statement signed by both counsel should be enough to make an appeal, and if a lawyer will not sign after a letter or phone call from the clerk or a judge, the trial court should make the statement. Our attorneys at law are highly educated, honest and respectful; they will readily enter into the spirit of a rule requesting honest and speedy compliance.

Let the lawyers bring or the clerk of the trial court send the original papers and no one will dispute them. Then let the case be fully argued and the ordinary record and judgment below told orally, if necessary, and if there be genuine doubt due to a new and difficult proposition of law, briefs or authorities on any point may be handed in informally within a short time, without the present labor and expense. All informality conducive to the attainment of truth should be indulged. If the case be of the usual kind, the decision should be forthwith delivered with each judge giving his view from the bench, viva voce and without delay, subject to any cor-

rection pointed out next day or soon thereafter in any argument for rehearing. Certainly five or six learned men, knowing instinctively justice from injustice, in almost any case can so perform, and no harm could possibly arise. If now it were used only as a preliminary to discover what might be necessary for transcription or briefing under our present practice, it would pay its way in money and time saving and through voluntary dismissals of appeals.

Let the lawyers, their intelligence and honor be trusted by the court and its confidence will not be misplaced.

How soon after final judgment should the appeal be heard by the courts of appeal? Within two weeks thereafter while the matter is hot, and when fresh in the minds of counsel, litigants and the trial court. The appeal would be, due to expedition, but a continuance of the matter in the trial court and therefore, except in emergency cases, the superfluity of expensive appeal bonds would be dispensed with as a protection of a party. Appeal should not be at the mercy of bonding companies. The appellate court should be ready to hear argument on short notice, waiving technicality and looking only to swift and full hearing and discussion. Let it become an advocate's court.

It should be presumed in this modern day of crowded book shelves, that the lawyers of the Indiana bar immediately after the trial, would be prepared to argue expertly with every intelligence and pertinent authority, the points, and that the trial judge exercised his functions diligently. The undisputed fact should be indulged that learned judges en banc could decide after full argument from a learned bar, forthwith the simple questions involved in the usual appeal, at least. In the evening the judges could "point up" their oral opinions in court taken down by a stenographer, and although they may not have the heavy lucubrations of a mulled over opinion, they, unconsciously, would garnish their views with a crisp and living quality, fresh from the scene of a forensic combat of able advocates and a breathing issue. It can be done and well done. It only requires the will to do it.

Were this plan adopted, many appeals, now brought merely for putting off the evil day, would not be filed. "The law's delay," due, I respectfully say, largely to an unwarranted lack of confidence in their acknowledged ability by the schol-

ars on the bench, would be avoided. If adopted, there would be no need of rehashing in a brief what already appears in the transcript, the exhibiting of the seven sections thereof, or of any of these expensive briefs at all. There would be no need of a transcript. The cheapness, in the sense of finances, of an oral appeal would permit the poorest litigant to have equally with all others, his right of review of a trial court's decision. Appeal bonds, the perquisite of the rich or well-to-do, would generally be abolished. Red tape would be thrown in the discard.

The law's delay, that frightful spectre which has impoverished the bar, terrified the clients, held the bench up to scorn and miscarried justice since the time of Shakespeare, would have been conquered by a common-sense plan of which our Indiana courts of appeal would receive the credit as the pioneers in the nation.

If this plan were adopted, the position of our bar before the courts and the public would be immeasurably advanced. Instead of an underpaid hack writer and composer of written briefs with their great onslaught to his precious time, he would become an advocate in our highest courts. He could get things done for the public and increase his means of livelihood. His reassured clientele, realizing that appeal did not spell delay and expense and that litigation had a speedy end, would abandon fears of the law and perhaps through his office like patients do the office of a physician. Thousands of persons need desperately the lawyer's advice on their problems as much as others need medical advice, but their fears of legal administration compel them to suffer in silence. New fields of usefulness and just remuneration would be opened up; and perhaps this plan might abolish some Boards which have taken over important matters that Courts should decide.

A reversal, say, for a bad instruction under this plan would not be a disaster to a litigant with a right, but a mere incident to his case.

I lay however, the chief stress of this plea on the present inability of the poor or average-circumstanced citizen to use his undoubted right of review by the appellate courts set up for him by our laws and constitution. His right to their use is, today, generally quite unexercised and to a large extent, merely nominal. Almost any appeal costs from \$350.00 to \$500.00, especially when we include a fee for the indefati-

gable services of the appellant's lawyer in seeking to comply with severe old fashioned practice. The average man cannot afford the expense and the long wait, yet the Supreme and Appellate Courts are erected as peoples' courts.

Few lawyers have considerable appellate practice, and when they see that their offices must be turned for a season into bookbinder and proof reader shops, and the vast unknown of this kind of practice to be investigated almost anew for something that may occur a year or two thereafter, they naturally pour cold water on the client's appeal, especially when the strenuous effort would be without legal fee and compensation. If appeal should be made simple, speedy and informal; if the constitution's mandate that the courts shall be open to all with justice administered freely and without purchase by money, completely including right of appeal, speedily and without delay, should be honored, then our courts of appeal undoubtedly will adopt a plan like this and win the enviable reputation of knocking off the time-honored manacles of the ancients, injecting new life in the practice of law and a wholesome respect for the weak.

The proportion of the wealthy or well to do appellants to the poor or average-circumstanced is indicated in 59 North Eastern 2d, containing 42 cases decided by our two courts of appeal. Five of them are criminal cases and one a disbarment before the Supreme Court, which should be ignored in this calculation, leaving 36 civil cases. Counting with corporate appellants those in auto cases shown to be actually corporate insurers by the counsel involved, and executors, administrators and receivers of estates, we have 25 well to do appellants. This leaves 11 appellants not appearing to have been other than poor or of moderate circumstances. Thus, this volume reveals by this approximation, that the well to do exercise the right of appeal over twice as much as the others, although the moderately-circumstanced have their legal controversies and are myriad times more numerous than their more fortunate fellow citizens.

In 60 North Eastern 2d. some 34 Indiana cases are decided, 3 of them being criminal cases, leaving 31 civil cases. In 18 of these cases, it would appear that the appellants were either wealthy, well-to-do, or otherwise fully and well capable of satisfying the charges of appeal. 13 of the appellants were not shown to have been well-to-do. Al-

though this showing is not quite as conclusive or clear as in 59 North Eastern 2d., it reveals that by a goodly majority, the minority class of the well-to-do as appellants, decisively outnumber appellants from ordinary walks of life who compose a vastly superior amount of our population. And it should be remembered that these two reports were in wartime with its great influx of funds into the hands of the common man.

The violence of a break from old custom would be more apparent than real. Present cases could go on as before and the new ones under the new arrangement. By the latter far more business could be transacted, and the long, arduous and conscientious plodding through reams of transcript, briefs and Additional Authorities, by the judge to whom the case is assigned, eliminated.

Under the old custom, except for a paragraph of "Court News" occasionally, a judge of an appellate court has small contact with men in general. But the bar desires continuance in office of the good and able under our elective system; a consummation attainable only by a proper meeting of the judge with members of the public. What more conducive and grateful to this end could there be than the judge duly exercising his notable functions before the very eyes of all? What would be more educative in the laws of the land to the people, than an appellate court, hearing, explaining and deciding matters affecting their dearest interests in their actual presence, as though a part of them? What greater incentive to respect for the law could be devised for the laity than the sight of the courts honestly and with good reasons given, bravely and openly expounding the law from living lips?

Our courts of appeal should be freed from the entanglement of these Rules of iron and enabled to perform their duties in a manner similar to that of sensible men in other walks of life.

A commonplace illustration of the defeat of justice by the Rules as distinguished from the courts, is the recent case of *Jenkins v. King* 61 N. E. 2d, 474, (Indiana Appellate, decided on June 12, 1945). On January 4th, 1940 under an alleged written contract in consideration of his employment in Mr. Jenkins' long established insurance business in Richmond, Indiana, Mr. King agreed in one provision, not to engage in competition with Jenkins in such form of business in Wayne County for 5 years after leaving the employment.

Jenkins sued King on that provision, alleging that King left the employment on December 1, 1943 and thereafter continued in such business in that County, having the records and data of his, Jenkins', business. Jenkins asked that King be enjoined from so continuing for the 5 years, alleging irreparable injury.

The trial Court sustained Mr. King's demurrer to the Jenkins' complaint as stating no cause of action. On appeal, the Appellate Court, as speedily as the Rules would permit, but over a year and a half subsequent to the alleged breach of King, rendered its opinion, subject to the further delays and toil of rehearing and transfer to the Supreme Court, deciding in favor of Mr. Jenkins. In the meantime, if Mr. Jenkins' complaint be true, his business probably remained open to such wrongful competition as might have destroyed it, with no redress except for an uncertain claim for damages. The Rules locked the stable but only after the horse was stolen, if it was.

On the other hand, had the trial court under evidence produced, erroneously enjoined Mr. King, wrongfully he would have remained enjoined with his occupation gone, like Othello's, until after a year or two the court on appeal, if Mr. King were able to afford appeal, should have dissolved the injunction. Without question, the full bench of the Appellate Court could and gladly would have decided the real or supposititious case within two weeks after the trial court's judgment with ability and skill had it not been tied to the Rules.

The judges of our present appellate courts, upon their recent entering their rather short terms, found and by the circumstances have been compelled to operate under an old system superimposed upon them largely from the hoary decades of the past. Due to pressing and manifold present duties, neither of these courts has had the time to initiate reforms. Both courts would, no doubt, respectfully listen to suggested changes and apply them if reasonable and public-serving.

They are as much concerned over the cost and delay of the law's administration and the rights of ordinary people as any practicing lawyer or member of the public. And if there be a demand for reform from the members of the bar or their associations, there should and would be no holding back by these courts. To crystallize this demand, this article with every respect to the views of others, is directed.