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The Significance of Verbatim Recording of Proceedings in American Adjudication

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THE SIGNIFICANCE OF VERBATIM RECORDING OF PROCEEDINGS IN AMERICAN ADJUDICATION*

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The practice in American courts of making a verbatim record of the proceedings affords an interesting illustration of how a procedural technique, which when superficially viewed seems to pertain merely to mechanical routine, can exert a vital and even dominating influence on the formulation of the philosophy of adjudication as well as on day-by-day judicial administration. It is our thesis that the practice of recording verbatim exerts a profound influence on the conduct of the trial, whether by court alone or by court and jury; the relationships between the trial judge and participating counsel; the procedures for review of the trial by the trial judge; and appellate review, including the feasibility of seeking such review and the nature, scope and potential achievements thereof. Indeed, verbatim recording is a dominant reason for the extensive review of the facts available in American appellate procedure. The full strength of the influence of verbatim recording is probably

*This paper has been prepared for delivery at the International Congress of Comparative Law to be held in Paris, August 1-8, 1954, under the auspices of the Académie Internationale de droit Comparé. It is here published by permission of the American Organizing Committee for the Congress. The subject was suggested by the interest of European lawyers in the American practice of verbatim recording of trial proceedings. In at least some of the European countries such recording seems to be unknown. Only in recent years has English practice made provision for official shorthand notes of trials. R.S.C., Order 66a, r. 2, effective August 21, 1940, as quoted in Burnand, Diamond and Burnett-Hall, The Annual Practice 1953 1523 (70th ed.), provides in part:

> "In every action, summons and motion tried or heard with witnesses in the Chancery Division or the Queen's Bench Division of the High Court or at Assizes an official shorthand note shall, unless the Judge otherwise directs, be taken of any evidence given orally in Court and of any summing-up by the Judge and of any judgment delivered by the Judge, and, if any party so requires, the note so taken shall be transcribed and such transcripts as any party may demand shall be supplied at the charges authorized by the scheme."

It will be noted that this rule does not include statements of counsel, and that the Judge may direct that no shorthand note be taken. Moreover, even where a trial is officially reported, apparently the Judge may preclude use of the shorthand reporter's transcript in the Court of Appeal by intimating that the Judge's own note is sufficient. R.S.C., Order 58, r. 11, Burnand *et al., supra* at 1268-1269. Depositions taken under the English rules are recorded "not ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witness." R.S.C., Order 37, r. 12, Burnand *et al., supra* at 653. The authors do not know to what extent official shorthand reporting under Order 66a, r. 2 *supra*, has actually superseded the English practice, still prevalent in the 1930's, whereby the trial judge made copious notes of the evidence, in the absence of an official reporter.

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not realized by American judges or lawyers, and certainly has not been much articulated. As with so many of the postulates of judicial administration, it has been assumed implicitly rather than analyzed and explicated. It is our purpose to show the strength of this influence, and to the extent space permits appraise its value and inquire into its current tendencies.

It will be well first to point out the universality in American federal and state courts of general jurisdiction, that is courts competent to adjudicate important civil and criminal cases, of the practice of verbatim recording. Such courts have attached to them a reporter whose function generally is to effect a verbatim recording in shorthand of everything said during the course of the proceedings in open court, as well as remarks between court and counsel out of hearing of the general public and the jury. Often the duties of these reporters are specifically set forth by statute.[1] The federal statute which requires a reporter for each of the District Courts of the United States is fairly typical.[2] While there is variation from place to place in the prescription of specific duties for reporters, their primary duty everywhere is to record all of the testimony, whether given on direct or cross-examination or examination by the court, every objection made, the ruling thereon and exception taken when exceptions are necessary, and all remarks of the court, counsel and other participants. Practice differs as to the recording of counsel's opening statement and closing summation, but generally

1. Representative state statutes are: Ala. Code tit. 13, § 261 *et seq.* (1940); Fla. Stat. Ann. tit. 5, § 29.01 (1941); Minn. Stat. § 486.01 *et seq.* (1949); N. Y. Jud. Law art. 9; Okla. Stat. Ann. tit. 20, § 105 *et seq.*, as amended April 13, 1953; Tex. Stat., Rev. Civ. art. 2321 *et seq.* (1948). See Pound, Appellate Procedure in Civil Cases 360 (1941). Section 108 of the Oklahoma statute as amended April 13, 1953 will be quoted as generally illustrative. It contains provisions which will be commented on later in this paper:

> "It shall be the duty of the official court reporter to take down in shorthand, stenotype, or such other method as may be approved by the court and agreed to by all parties, and to correctly transcribe, when required, all the proceedings upon the trial of any cause, as well as all statements of counsel, the witnesses or the court, made during the trial of any cause or with reference to any cause pending for trial, when required by a party or attorney interested therein, and all other matters that might properly be a part of a case-made for appeal or proceeding in error. An attorney in any case pending shall have the right to request of the court or the official court reporter that all such statements or proceedings occurring in the presence of the official court reporter, or when his presence is required by such attorney, shall be taken and transcribed. A refusal of the court to permit, or, when requested, to require any statement to be taken down by the official court reporter, or transcribed after being taken down, upon the same being shown by affidavit or other direct and competent evidence, to the Supreme Court, shall be deemed prejudicial error, without regard to the merits therof."

2. 28 U. S. C. § 753 (1946).

these too are recorded verbatim upon order of the court or request of either party.[3] In summary, therefore, when the court or either party desires it, there is recorded every work spoken during the course of the proceedings.

Customarily the recording process is the taking of shorthand notes by the reporter. He is necessarily an expert highly qualified for rapid recording and translation of his notes into words, that is, an expert in the stenographic arts. He is under oath faithfully to perform the duties of his office. He is paid a salary for acting as reporter, which is often supplemented by income earned when he is called upon to transcribe his notes into typwritten manuscript form, or transcript, upon request of any interested party. He is under obligation to attach a certificate of correctness to his original shorthand notes, which are preserved in the custody of the court for a specified time. When called upon to make a transcript, he is under obligation to attach to it a similar certificate. He is subject not only to the legal sanctions implicit in his oath but to sanctions imposed by professional standards of integrity and competence.[4]

While the reporter as one of the officers of the tribunal is subject generally to the direction of the court, the performance of his essential duties cannot be curtailed by the court. Thus, a trial court has no authority to direct the court reporter ". . . to disregard his sworn statutory duty to take down all rulings and exceptions."[5] In other words, the right of each party to have made a word for word record of everything said cannot be negated by the trial court. Even before the trial begins, depositions taken for use at the trial or discovery purposes will normally be recorded verbatim in American practice.[6] Verbatim recording of formal hearings before American administrative agencies and Congressional committees is also the rule.[7]

3. Goldberg v. Mutual Life Ins. Co., 24 N. Y. S. 2d 929 (1940), *rev'd on other grounds*, 263 App. Div. 10, 31 N. Y. S. 2d 154 (1st Dep't 1941), *appeal dismissed*, 288 N. Y. 662, 43 N. E. 2d 69 (1942); *see* Jovaag v. O'Donnell, 189 Minn. 315, 318, 249 N. W. 676, 677 (1933).

4. For representative statutory provisions, see note 1 *supra*. Court reporters customarily develop and manifest a spirit of professional pride in the accuracy and integrity of their work.

5. Weber v. Interborough Rapid Transit Co., 152 N. Y. Supp. 197, 199 (App. Term, 1st Dep't 1915). Note the stringent sanction against the trial court's interference with the making of a verbatim record provided by the Oklahoma statute quoted in note 1 *supra*. In Keady v. Owers, 30 Colo. 1, 7, 69 Pac. 509, 511 (1902), the Supreme Court of Colorado, in ordering by mandamus a court reporter to furnish a transcript to an interested party, said: "The order of the judge of the [trial] court not to furnish it is no excuse or justification whatever."

6. Fed. R. Civ. P. 30(c).

7. See Administrative Procedure Act, § 7(d), 60 Stat. 237, 5 U. S. C. § 1006(d) (1946). Even in labor arbitration proceedings, which are private

The attitude of the Bench and Bar respecting the reliability of the verbatim record made by the court reporter is well summarized in *State v. Perkins*:[8]

> ". . . The foregoing provisions of the statutes are referred to for the purpose of showing the faith and credit which are to be given to the shorthand reporter's notes by legislative enactments. It is true that in some instances the notes may not be used until they have been certified to be correct, but notwithstanding this the general trend of the enactments is to recognize the correctness of the notes of the shorthand reporter, and aside from this lawyers and judges of experience know that such notes contain, with few exceptions, the testimony of witnesses as it was given, and are thoroughly reliable. . . . The testimony is reported so that it may become a part of the permanent record, and thus assist in the administration of justice in both civil and criminal cases. The lawyers depend upon the report in the future progress of the case, and a translation thereof furnishes this court its only means of determining disputed questions as to the record."

The confidence of Bench and Bar in the verbatim record is crystallized in the federal statute providing that such record is to be deemed prima facie correct.[9] Moreover, the Federal Rules of Civil Procedure provide that whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.[10]

The significance attributed to the verbatim record is perhaps best illustrated by cases where the party who lost in the trial court is granted a new trial because of his inability to obtain a verbatim record caused by the death of the reporter or the inability for any reason of the reporter, or of a substitute for him, to make a transcript from the reporter's notes. It is of course recognized that imposition of a new trial upon the prevailing party is an unfortunate hardship for him; but in the words of the Massachusetts Court:

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and as to which economy is often an important consideration, there appears to be an increasing tendency for the parties to agree upon hiring a reporter to make a verbatim record. Lord Brougham in his famous speech of 1828 called for verbatim reporting in all *nisi prius* courts. He pointed out, *inter alia,* that a judge could give better consideration to a case if he were relieved of the mechanical task of taking notes. 2 Speeches of Lord Brougham 465-466 (1838).

8. 143 Iowa 55, 57-58, 120 N. W. 62, 63-64 (1909). See also Harris v. State, 23 Wyo. 487, 494-496, 153 Pac. 881, 882-883 (1916).

9. 28 U. S. C. § 753(b) (1946).

10. Fed. R. Civ. P. 80(c). However, use of the transcript is not the exclusive method of showing the previous testimony. Any person who heard the testimony and recollects it is competent to testify to it. 4 Wigmore, Evidence § 1330 (3d ed. 1940).

"... to deprive the defendant of [the right to bring a case to the appellate court on all the evidence] because of an event for which he was in no wise responsible would be manifestly unjust. That a hardship is imposed on the plaintiffs in requiring them to undergo the burden and expense of a second trial after a decree in their favor cannot be gainsaid. But the hardship is less than that which the defendant would suffer if it were to be deprived of its full day in court."[11]

The consequences of making verbatim records and of the significance accorded them by Bench and Bar, are many and profound. They go to the philosophic roots of judicial administration in the United States. They are daily exemplified in the trial courtroom in techniques and procedures and the inter-relationships between judges and counsel. Their greatest impact, however, is on American appellate practice and procedure. It is hardly an exaggeration to say that the verbatim record has been a dominant influence in making the appellate process a cornerstone of American adjudication. Brief consideration will show, we think, that the verbatim record's potential is not based alone upon legal sanctions, but as well upon custom, tradition and psychological factors.

I. Verbatim Recording and Trial Techniques

As a consequence of verbatim reporting each participant in the trial speaks with full realization that everything he says is being recorded exactly as he says it and that, depending on the future developments of the litigation, the recorded notes may be transcribed into a permanent word record. Even if at the time of the trial the prospects are that there will be no appeal and hence no occasion for the court reporter to transcribe his notes, there is always the possibility that a transcript will be made; in any event, the notes are available for transcription as the occasion may demand.

The psychological impact of verbatim recording upon counsel is potent. The trial lawyer gauges his presentation not only for the trial tribunal, but potentially for the ultimate tribunal, whose consideration of the facts in the event of an appeal will be limited to the record made in the trial court. Thus the case is tried not only for the elusive moment, but for the permanent record. The arguments, concessions and admissions made and the positions taken by counsel are made and taken with the realization that they will appear in the record as specific, definite and certain, and that attempted retreat from them will normally appear as a retreat, a

11. Brooks v. National Shawmut Bank, 323 Mass. 677, 681, 84 N. E. 2d 318, 321 (1949). For a discussion of this problem, see Note, 19 A. L. R. 2d 1098 (1951).

change of front. There will be little occasion for prolonged dispute as to what counsel has said; the reporter can be asked to read a disputed statement, and the dispute quickly put to rest. Similarly, all of the testimony adduced is permanently and exactly recorded. Of course it is always possible for a witness to claim that he did not comprehend an earlier question, and thus attempt to escape the consequences of his answer. But such escape hatches are narrowed and circumscribed by potential confrontation of the witness with the exact earlier question and his reply to it. This has important results in respect of cross-examination and impeachment. The mistaken or deliberately false witness can be confronted on cross-examination with exactly what he said on direct examination. If one witness is contradicted by another, exactly what each said is potentially available.

The rulings of the court are recorded with similar exactness which enables counsel to gauge his further presentation in the confidence that all the judge's previous conduct during the trial can be summoned forth to test its consistency with his subsequent conduct. While in theory the trial judge is the master of the record and may correct errors of the reporter, rare is the occasion for the trial judge to dispute the reporter's recording, so confident is Bench and Bar in the accuracy of that process. Thus, if the trial judge changes his ruling on the admissibility or exclusion of any item of evidence, the fact of that change will appear of record. Of course it is true that the judge's manner or demeanor in speaking —those subtle nuances that can be conveyed by tone of voice or attitude of expression and which may be important to jurors—are in the nature of things not concomitantly recorded with the spoken word. This is one reason for the suggestion that trials be also recorded as talking movies.[12] We will later take note of the progress of recommendations for mechanical recording which, generally, is still in an experimental stage. For present purposes it will suffice to note that it is not unknown for counsel, faced with a trial judge guilty of prejudicial conduct by attitude, demeanor or tone of voice, to have the reporter note in the record the physical manifestations of such judicial conduct.

The realization of permanence and definiteness engendered by verbatim reporting conduces to deliberateness and formality on the part of the trial lawyer. He cannot afford to be careless or casual or trust to the vagaries of human recollection to exculpate him from verbal errors. Even when he finds that he has misspoken and must

12. See Frank, Courts on Trial 224 (1949).

request that an erroneous remark be stricken from the record, the erroneous remark, the request for correction, and the corrected remark, usually are all physically preserved. The trial lawyer, therefore, customarily approaches his task with the philosophy of trying his case, not only to the tribunal, but "to the record" as well. Indeed, there is a considerable literature concerning the trial lawyer's problem of striking a proper balance between emphasis on convincing the trial tribunal and winning his case there, on the one hand, and making a strong record for possible appeal, on the other.[13]

Implicit acknowledgment that verbatim recording conduces to formality at the trial is found in the attitude of certain judges that such recording should be avoided at pre-trial conferences. These are conferences before trial between a judge and the opposing counsel in a lawsuit for the purpose of simplifying the issues to be tried. The systematized use of pre-trial conferences is relatively new in American adjudication. The provision for them in the Federal Rules of Civil Procedure of 1938[14] gave impetus to this innovation in the United States, and now they are frequent and increasing phenomena in American practice.[15] The objectives of pre-trial are the simplification of the issues to be tried, amendments of the pleadings when necessary or desirable, obtaining admissions of facts and documents, limitation of the number of expert witnesses, and the elimination of frivolous or insubstantial issues. Some judges are known to favor pre-trial conferences in chambers rather than in open court, and without verbatim recording, on the ground that free discussion and the spirit of conciliation and compromise are promoted by the absence of formality which accompanies the making of a verbatim record. Whether or not this attitude toward pre-trial conferences is sound, it has no necessary derogatory connotation respecting the value of verbatim recording of trials. The pre-trial conference is essentially what its name implies, a conference, and hence is properly concerned with concessions and to a degree at least, with conciliation, whereas a trial's objectives are the accurate ascertainment of the facts and the application to them of objective standards; in a word, adjudication. While verbatim recording may sometimes

13. See, *e.g.*, Tracy, The Successful Practice of Law 202 *et seq.* (1947). Cutler, Successful Trial Tactics 206 *et seq.* (1949).

14. Fed. R. Civ. P. 16.

15. See 3 Moore, Federal Practice ¶ 16.06 (2d ed. 1948); Louisell, *Discovery and Pre-Trial*, 36 Minn. L. Rev. 633, 660 (1952); Wright, *Modern Pleading and the Pennsylvania Rules*, 101 U. of Pa. L. Rev. 909, 931-932; Laws, *Pre-Trial—Its Purposes and Potentialities*, 21 Geo. Wash. L. Rev. 1 (1952); Sarpy, *Pre-Trial in Louisiana*, 6 Loyola L. Rev. 105 (1952); Vanderbilt, Cases and Materials on Modern Procedure and Judicial Administration 645 *et seq.* (1952).

promote an attitude of undue formality by counsel, on the whole we believe that its influence on the conduct of counsel is wholesome in an adversary proceeding. When trial is reached, conciliation as an objective is necessarily subordinate to the requirements of adjudication. Verbatim recording tends to induce counsel to be precise, thorough and careful; it restrains the impetuous; it spurs on the laggard; it casts over all a sense of responsibility engendered by the psychology of "making a record."

Verbatim recording has certain collateral advantages for counsel which we have not mentioned. Probably the chief one is that it is often possible for the trial lawyer to arrange with the reporter to transcribe his notes after the close of each day's session and furnish the day's transcript to the lawyer prior to the commencement of the next day's session. Thus the trial lawyer may have at his elbow a running record, so to speak, of all of the previous sessions. This is of inestimable value not only to counsel but also to the trial court, whose recollection can be refreshed quickly by reference to the appropriate page of the transcript. Of course such procurement of the transcript assumes a party financially able and willing to pay the reporter for transcribing his notes because the reporter's officially paid salary embraces only the duty of recording the notes, not ordinarily of transcribing them as well. Therefore such day by day procurement of the verbatim transcript is customary only in litigation involving substantial sums and parties able to bear the burden, or litigation where an appeal is practically inevitable and where procurement of the transcript will in any event be necessary for appellate purposes, or important criminal cases where the prosecutor feels justified in incurring the expense of the daily transcript as a burden on the public treasury. We will later discuss the economic factors in verbatim reporting.

II. Verbatim Recording and Motions for New Trials

In American practice the losing party has the right to make the claim before the trial tribunal that it erred either in ascertaining the facts or in applying the law. The usual method of making this claim is by motion to the trial judge, within a specified time after decision, for a new trial, whether the case was heard by judge and jury or by judge alone, although in the latter event an alternative and less radical method is by motion for amended findings of fact and conclusions of law.[16] The motion for a new trial is a common

16. Illustrative of modern American practice is Fed. R. Civ. P. 52(b) which provides in part: "Upon motion of a party made not later than ten days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly."

device to test the accuracy of the trial's adjudication. It is sometimes made in the genuine expectancy or at least hope that the trial court will be persuaded to acknowledge error, and sometimes as a prudent if not indispensable preliminary to an appeal. In modern American practice new trials can be granted on any or some of the issues without being granted as to all the issues.[17] Whether a new trial is granted in whole or in part, so much of the first trial's conclusion as is condemned by the order for a new trial is obviated, and the results of the new trial supersede it.

There are two principal types of motions for a new trial,[18] namely, (1) motions made on the minutes of the court, and (2) motions made on a so-called settled case. A settled case is the reporter's verbatim transcript of the trial, approved as correct by the trial judge.[19] Which method the losing counsel will use in a given cause depends on a variety of attending circumstances, including the type of question urged, economic factors and the likelihood of an appeal if the motion is unsuccessful. A motion made on the minutes of the court relies essentially on the trial judge's recollection of the incidences of the trial, and thus avoids the expense of procuring a transcript from the court reporter. If the reason urged for a new trial is a question of law separable from the trial's mass of evidence, as for example a ruling that a particular person was a competent witness, or that a particular measure of damages was the correct one, the probability is that moving counsel will think it adequate to move on the minutes of the court. On the other hand, if the challenge to the decision is that it is not sustainable by the evidence, thus involving an appraisal of the testimony given at the trial, a motion on a settled case is in order, if the moving party can afford it. If it appears reasonably certain to the moving counsel that he will have to appeal the case and therefore will later need the transcript, he may decide to get it for purposes of his motion for a new trial, even though except for the probable appeal he would be content to predicate the motion on the judge's minutes.

Thus the significance of the verbatim record on motions for a new trial depends on the kind of motion used. The verbatim

17. Typical of modern American practice is Fed. R. Civ. P. 59(a) which provides in part: "A new trial may be granted to all or any of the parties and on all or part of the issues. . . ."

18. We omit consideration of motions based upon grounds which do not appear of record, that is, which are not normally exposed by the trial proceedings, *e.g.*, the ground of newly discovered material evidence. The usual method of establishing such a ground is by affidavit.

19. See, *e.g.*, Minn. R. Civ. P. 59.07. Sometimes approval by the judge is dispensed with, except where necessary to settle specific disputes between counsel. See Fed. R. Civ. P. 75(h).

record is of compelling significance when the motion is made on a settled case. The entire trial is spread before court and counsel for possible argument and appraisal of each significant item of evidence. Where the motion is on the minutes of the court, the bearing of the verbatim record is less direct, but nevertheless important. Portions of it may be transcribed as needed; in any event, it is all potentially available, and this potentiality naturally acts as a check on unwarranted assertions by counsel as to what the record contains. If the trial judge in considering the motion for a new trial finds that he reaches an impasse because of doubt as to what a witness said, he may have the reporter read to him, or transcribe for him, the pertinent testimony. Therefore even motions technically made on the minutes of the court realistically are based on the ultimate availability of the verbatim record.

The verbatim record's function of making possible and facilitating a broad scope of appraisal of what took place in the trial court, will be considered in more detail in the discussion of appeals.

III. Verbatim Recording as a Sanction on the Trial Judge

Many of our observations under this point are implicit in what has already been said. By reason of verbatim recording the American trial judge, no less than the advocate, is psychologically aware that he is creating a definite and permanent record. Every ruling that he makes, every word that he pronounces, whether in interrogating a witness, deciding for or against admissibility of evidence, restricting, reprimanding or otherwise conversing with counsel, or instructing the jury, is subject to potential appraisal by an appellate court. Therefore he stands, in relation to the appellate court, much in the position that the attorneys before him stand in relation to him, subject to control and censure. He stands, in a word, not as the arbitrary master, but almost as the servant, of the record. In this, the verbatim record is an enemy of capriciousness; in this, it serves the ideal of the supremacy of law.

Not all of the verbatim record's sanctions on trial judges constitute legal or formal restrictions. The trial judge is aware that if an appeal is taken and in consequence a transcript of the trial made, it will be appraised not only by the appellate judges, but copies of it will be distributed to bar and school libraries throughout his jurisdiction, there to be kept permanently available for the perusal by his fellow judges, lawyers, and scholars. Thus there will always remain at least the possibility of exposing error, shoddy intellectual performance, or dereliction in carrying out judicial duties. In those states

where, by reason of the democratic tradition or perhaps a perversion of it, undue emphasis has been placed on popular election of judges, sometimes in the opinion of some observers[20] with the unfortunate result of obtaining mediocre trial judges, the need for the sanctions afforded by the verbatim record is correspondingly great.

IV. The Verbatim Record and Appeals

But the most important consequences of verbatim recording concern appeals and appellate processes. American appellate courts, like trial courts, must base their conclusions as to the facts only on evidence introduced at the trial, except for facts within the doctrine of judicial notice.[21] The introduction of new evidence during truly appellate stages of litigation is not a normal part of American practice.[22] Therefore the case is won or lost on appeal on the verbatim record made in the trial court. In fact, the potential appeal of the adjudication of each trial court is the principal reason for making a verbatim record, as observed in *Keady v. Owers*:[23]

> "Indeed, the chief object of having this done [*i.e.*, making a verbatim record] is not for the benefit of the trial court, but that, in case of a review of the judgment, a full and complete record of the proceedings may be written out to be laid before the appellate tribunal."

Adequate appraisal of the significance of the verbatim record in appellate procedure requires at least an outline of the history of American appellate practice. Before the merger of law and equity,

20. See Pirsig, Cases on Judicial Administration 675 *et seq.* (1946). Joughin and Morgan, The Legacy of Sacco and Vanzetti (1948) affords a good illustration of how the verbatim record facilitates a profound analysis of the conduct of a trial, including the performance of the trial judge, and thus imposes on trial judges a significant psychological and moral sanction.

21. Sometimes in American practice a case is transferred from a court of limited jurisdiction, *e.g.*, a probate court, which is often without the services of a court reporter, to a higher trial court, where a new trial is had, and the transfer is called an appeal. See, *e.g.*, Minn. Stat. §§ 525.71, 525.72 (1949). But lawyers in modern American practice usually think of "appeal" as connoting review by a higher court of a record made in a lower court, rather than a new trial in the higher court. Thus the word "appeal" is ambiguous. *Cf.* State *ex rel.* Spurck v. Civil Service Board, 226 Minn. 240, 244, 32 N. W. 2d 574, 578 (1948). It is noteworthy that usually transfer of a case, wherein a verbatim record has not been made, to a higher court results in a new trial in the higher court; appeal where a verbatim record has been made results in a wholly different kind of consideration in the higher court, namely, an examination of the record to ascertain whether there was error. For a succinct outline of the steps in American appellate procedure, see Morgan, The Study of Law 72-74 (2d ed. 1948).

22. One of the outstanding American scholars regards the limitation of appellate courts to the record made in the trial court, to the preclusion of new evidence in the appellate courts, as a misfortune in American appellate practice. See Pound, Appellate Procedure in Civil Cases 387 (1941).

23. 30 Colo. 1, 6, 69 Pac. 509, 511 (1902).

review by an appellate court in an equity suit differed substantially from such review in a suit at law. In an equity suit, the case was tried before the chancellor on written evidence, and on review it was feasible to send to the appellate court the identical written evidence which had been presented to the chancellor. In suits at law, however, the evidence was taken orally in open court and, prior to the time of verbatim recording, the only feasible way of presenting issues for review by the appellate court was to reconstruct in some manner those incidences of the trial of which review was sought. The technique developed for such reconstruction was the Bill of Exceptions. This is a statement of the proceedings reconstructed from the notes of the trial judge, counsel, other participants in the trial, and sometimes bystanders, approved as correct by the trial judge.[24] Under this procedure appellate courts got the evidence second-hand, and were handicapped in appraising its reliability as compared with the trial tribunal who heard the witnesses testify orally. A much broader scope of appellate review prevailed in equity appeals as compared with appeals in suits at law.[25]

The practice of making a verbatim record, however, renders obsolescent such indirect methods of reconstructing the trial proceedings as the Bill of Exceptions. An order to the court reporter to transcribe his notes produces a verbatim transcript in lieu of a mere summary of the testimony stated according to recollection. While the Bill of Exceptions remains available in some places as an alternative to use of the verbatim transcript,[26] modern American appellate practice normally contemplates the use of the verbatim transcript, or the relevant portions thereof, as a basis for review of the trial proceedings. This does not mean that the evidence is always presented to the appellate court as transcribed by the reporter in question and answer form. While this is the preferred and most frequently used method, in some places counsel have the option of

24. See Miller v. United States, 317 U. S. 192, 198 (1942): "Historically a bill of exceptions does not embody a verbatim transcript of the evidence but, on the contrary, a statement with respect to the evidence adequate to present the contentions made in the appellate court. Such a bill may be prepared from notes kept by counsel, from the judge's notes, from the recollection of witnesses as to what occurred at the trial, and, in short, from any and all sources which will contribute to a veracious account of the trial judge's action and the basis on which his ruling was invoked."

25. See Pound, *op. cit. supra* note 22, at 300 *et seq.* U. S. Const. Amend. VII, provides in part ". . . no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

26. Even under the most modern American appellate practice, provision is made for what is essentially a Bill of Exceptions in cases where no stenographic report of the proceedings was made. See Fed. R. Civ. P. 75(n).

reducing the testimony to narrative form, and in a few places it is required that they do so.[27] However, even where the testimony is reduced to narrative form, the verbatim transcript is available as the norm of accuracy by which to measure the narration, and the narration is the product of agreement of opposing counsel.[28]

What are the practical consequences of verbatim records on appeals? In the first place, the right of the losing party to obtain a record shaped not by the recollections of the judge who has decided against him but by the indifferent pen of the ever-recording reporter, may cause counsel to think an appeal worthwhile which otherwise he might deem hopeless. Secondly, the verbatim record makes practicable, as well as theoretically possible, a comprehensive scope of review. It is the verbatim record which makes feasible the extensive review of the facts common in American appellate practice to ascertain whether the evidence reasonably sustains the decision of the trial tribunal. It is perhaps easy enough without a verbatim transcript to present to an appellate court a naked legal question such as the proper construction of a statute or written contract. But when the issue is whether the evidence reasonably sustains the decision, an appellate court naturally is reluctant to hold the trial tribunal unreasonable unless the appellate court has means of appraisal at least roughly equivalent to those of the trial court. While the verbatim transcript cannot perfectly equate the appellate court's and trial tribunal's capacities to appraise the facts since the appellate judges do not observe the manner of oral testimony, it does provide the requisite rough equivalence.

It is necessary to note the wide variance in viewpoint among American jurisdictions as to the extent of reviewability of the facts on appeal. Despite the assimilation of law and equity cases into one form of civil action, remnants of historical differences still affect the scope of factual review on appeal. In federal practice, the constitutional command persists that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."[29] In equity cases, often a

27. See Vanderbilt, Cases and Materials on Modern Procedure and Judicial Administration 1081-1084 (1952). Apparently only one federal appellate court, the U. S. Court of Appeals for the Eighth Circuit, requires that the pertinent evidence be reduced to narrative form. See Rule 10(b) of the Rules of that Court, as amended January 1, 1951.

28. For an exhaustive comparison of nineteenth-century appellate procedure with modern appellate procedure in the United States, see Pound, *op. cit. supra* note 22, c. 4 and c. 5.

29. See note 25 *supra*.

more comprehensive scope of review of the facts is available, sometimes amounting to *de novo* consideration. Further, there is variation as to whether appeals in cases triable by jury but wherein a jury is waived, should have the type of review of equity cases or jury-tried cases, and whether in court-tried cases the scope of review is more comprehensive in respect of documentary than oral evidence.[30] Generally, however, it may be stated that the trial tribunal's decision of the facts, whether by verdict of a jury or findings of a judge, can be examined by the appellate court at least to the extent of determining whether the evidence reasonably sustains the decision. In numerous cases this is the only question presented on appeal. In deciding this question which is often determinative of the appeal, the appellate court is able to measure the contentions of each party by the verbatim record before it.

It is true that American appellate courts, in varying terms, often deprecate the taking of appeals on factual questions. The bar is often reminded that verdicts and findings below are presumptively correct and will not be reversed unless clearly erroneous; that the trial court and not the appellate court is the place to resolve factual differences; that the appellate court must not substitute its judgment on the facts merely because it differs from the trial court; that the only factual question proper on appeal is whether reasonable minds could reach the trial tribunal's decision on the evidence. But despite these oft-repeated generalities, the reality is that where an appellate court is convinced that the factual determination of the trial tribunal is erroneous, it will often convert that conviction into a holding of essential unreasonableness. Thus every losing party, fortified with a verbatim record, tends to indulge the hope that he can convince the appellate court that the trial tribunal was unreasonable. Therefore in a certain sense the American appellate court, normally isolated from the evidence-taking function and dependent for its grist on what has taken place elsewhere, is nonetheless converted into another trial forum. In a real sense, therefore, the verbatim record has done much to make American judicial administration largely a matter of appellate adjudication.

30. As illustrative of the multiplicity of considerations that affect the extent of appellate reviews of the facts, see Kansas Pacific Ry. v. Kunkel, 17 Kan. 145 (1876); Peterson v. Chicago Great Western Ry., 106 Minn. 245, 118 N. W. 1016 (1908); Dimick v. Schiedt, 293 U. S. 474 (1935); United States v. Gypsum Co., 333 U. S. 364, 394-395 (1948); Orvis v. Higgins, 180 F. 2d 537 (2d Cir. 1950), *cert. denied*, 340 U. S. 810 (1950); 5 Moore, Federal Practice ¶ 52.01 *et. seq.* (2d ed. 1948); Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 Vand. L. Rev. 493, 505-506 (1950).

The consequences are profound. From the parties' viewpoint, we think it no exaggeration to state that behind the American trial lawyer's conception of the trial court lurks the possibility of limiting, checking and controlling that court by a possible appeal. On the other hand, substantial burdens are imposed on appellate judges beyond the task of ascertaining and explicating the applicable rule of law. The appellate judges must carefully appraise the record made in the trial court. When a factual question is raised on appeal, the appellate judges normally have to study the pertinent testimony, or at least those portions to which attention is directed by counsel. This may involve reading hundreds or even thousands of pages of recorded testimony. The resulting appellate opinion is often primarily concerned with an analysis of the facts. While such an opinion may have scant value as a precedent, the factual analysis entailed in preparing it affords a significant safeguard against arbitrariness by the appellate court as well as by the trial court.

Perhaps the most pertinent generalization of the verbatim record's significance on appeal is that it provides another manifestation of the American distrust of concentration of power. It is not surprising to find in a constitutional system which emphasizes the judiciary as a check upon the arbitrary exertion of executive and legislative powers, such correlative restraints upon the judiciary itself as are implicit in the verbatim record.

V. The Costs of Verbatim Recording

The American lawyer is aware that the values of the verbatim record are had only at a price. One price is the tendency toward prolongation of litigation, because the verbatim record doubtless encourages appeals. But there is also a price in the more literal sense, for frequently the procurement and printing of the verbatim record is costly for the appealing party. Commonly court rules require that a specified number of the transcript be printed for use of the appellate judges and later distribution to bar and school libraries. If the trial has been a lengthy one, the court reporter's and printer's charges for transcribing and printing the record may amount to hundreds, even thousands, of dollars. Therefore there is sometimes a disturbing contrast between the brand of justice available for those able to pay for its contrivances, and those unable to pay. This contrast is odious in a society which idealizes equality before the law. The administration of criminal justice particularly emphasizes the need for ameliorative measures, already largely ac-

complished in federal practice, for those unable to pay for transcripts.[31] In the field of civil adjudication attention has recently been called to the substantial decrease in the number of appeals apparently attributable primarily to the cost of mechanically processing the appeals, that is, obtaining the transcript from the reporter, and having the requisite number of copies printed for the appellate court.[32]

However, factors should be noted which tend to minimize the significance of economic disparity between adversary parties: (1) the cost of obtaining the transcript is commonly taxable in favor of the prevailing party and hence ultimately recoverable by him if the losing party is financially responsible;[33] (2) it is not always necessary on appeal to use the entire transcript. Rules of appellate courts commonly encourage the inclusion in the record of only those portions of the testimony pertinent to questions raised on appeal.[34] For example, in a suit for damages for negligently caused personal injuries, if the defendant who lost in the trial court wishes to raise on appeal only questions pertinent to his alleged negligence, there would be no occasion to procure those portions of the transcript which contain medical testimony respecting plaintiff's injuries. Some courts already have reduced the requirements of printing the record,[35] and further reforms tending to economy are doubtless likely, such as using off-set printing or other reproduction processes more economical than conventional printing.

31. Prior to 1944, see 58 Stat. 5 (1944), 28 U. S. C. § 9a (1946), there was no statutory provision for government-paid court reporters in the United States District Courts. The practice was for the parties by agreement to engage a reporter. An impecunious defendant in a criminal case was much handicapped in the preparation of the record for appeal; his Bill of Exceptions, in the absence of a verbatim transcript made available to him, had to be made up ". . . from the judge's notes, from the recollection of witnesses . . . and . . . from any and all sources which will contribute to a veracious account. . . ." Miller v. United States, 317 U. S. 192, 198 (1942). Now, the federal statutes require the reporter upon request of the judge to transcribe the reporter's notes, 28 U. S. C. § 753(b) (1946); and authorize the court in both civil and criminal cases to impose upon the United States the costs of a transcript upon affidavit of a citizen that he is unable to pay such costs, 28 U. S. C. § 1915(b) (1946). See United States v. Sevilla, 174 F. 2d 879 (2d Cir. 1949).

32. See Desmond, *Where Have the Litigants Gone?*, 20 Ford. L. Rev. 229 (1951); Pirsig, *The Work of the Supreme Court*, 25 Minn. L. Rev. 821, 824 (1941).

33. Compare the general rule of non-taxability where the transcript is procured for the convenience of counsel for use during the trial, and is not furnished the court. Marshall v. Southern Pac. Co., 14 F. R. D. 228 (N.D. Cal. 1953).

34. See, *e.g.*, Rules of Practice of the Minnesota Supreme Court VIII, ¶ 2 (Nov. 1, 1946).

VI. Proposals for Mechanical Recordation

Various proposals have been made to substitute mechanical techniques of recordation of trial proceedings for shorthand reporting. These proposals in part are based on the desirability of effecting economies, and partly on the desirability of more accurately and fully reproducing the trial and exposing nuances not recorded with the written word. A recent innovation in Puerto Rico is provision for mechanical sound recorders, the recorder being under the control of the trial judge who is able to turn it on and off by use of a foot peddle.[36] While not fully informed on the details of this innovation, the writers have heard complaints that it is deprecated by the Bar, apparently in part for the reason that it puts the making of the record at the discretion of the trial judge, thus obviating one of the special values of the verbatim record as made by an independent officer. Although not wishing to disparage experimentation with mechanical means of preserving the trial, and envisaging the possibility that such means may facilitate economical and more accurate preservation, the writers venture to predict that mechanical instrumentalities will not displace the court reporter in American practice but rather will be utilized by him in the execution of his ultimate and independent responsibility of obtaining and preserving the record.[37]

35. See, *e.g.*, Rules of the U. S. Court of Appeals for the Eighth Circuit 10(a) (Jan. 1, 1951); Rules of the U. S. Court of Appeals for the District of Columbia Circuit 17(a) (1952) which provides in part: "Unless ordered by this court, it shall not be necessary to print the record on appeal . . . , except that appellant shall print as a part of the appendix to his brief the pertinent pleadings and pertinent docket entries, the judgment or order appealed from . . . , together with any findings of fact, conclusions of law and opinion or charge of the court. . . ."

36. See Clark and Rogers, *The New Judiciary Act of Puerto Rico*, 61 Yale L. J. 1147, 1164 (1952); *cf.* 3 Wigmore, Evidence § 809 (3d ed. 1940).

37. *Cf.* Rep. Judicial Conference of the U. S. 22, 23 (Sept. 1949). Observe that the Oklahoma statute quoted in note 1 *supra*, authorizes recording by ". . . shorthand, stenotype, or such other method as may be approved by the court and agreed to by all parties." But whatever the means used, the recording remains the duty of the official court reporter.