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Rehearing and the Crowded Docket in the Kentucky Court of Appeals

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Notes

REHEARING AND THE CROWDED DOCKET IN THE KENTUCKY COURT OF APPEALS*

The purpose of this note is to draw attention to the burden placed upon the Kentucky Court of Appeals by its present rehearing procedure and to suggest a solution.

The Problem

The overloaded appellate docket has long been a source of prime concern to the legal profession. As early as 1904, Judge O'Rear referred to the volume of business as "one of the gravest problems that the Court of Appeals has or has had for years. . . ."[1] Today the court receives an average of approximately six hundred cases each year and "probably disposes of more cases on their merits than any other court of last resort in the United States."[2] As characterized by Judge Eblen, the result is a vicious cycle—quality is sacrificed for quantity, and the poor quality inevitably produces more quantity.[3]

To solve this problem the General Assembly has experimented with an intermediate court,[4] increased the number of judges,[5] raised the jurisdictional amount for appeal,[6] and authorized use of commis-

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[1] O'Rear, "The Petition for Rehearing, Its Uses and Abuses," 1904 Ky. S.B.A. Proceedings 34, 35. An official report states that the court has been behind one year on its docket since its creation by the present constitution in 1892. [1951-1952] Ky. Jud. Council Biennial Rep. 4. Judge Eblen relates the problem back to the appellate court established by the 1850 constitution. Eblen, "An Intolerable Burden," 40 Ky. L. J. 78 (1951).

[2] [1959-1960] Ky. Jud. Council Biennial Rep. 6. The court has been referred to as a "super circuit court" instead of a "policy maker" as are most courts of last resort. [1951-1952] Ky. Jud. Council Biennial Rep. 4.

[3] "No court of last resort can dispose of six hundred cases per year on the merits and give to each the thorough research, careful analysis, and considered judgment that it deserves." Eblen, *supra* note 1, at 81.

[4] Ky. Acts 1881, vol. 1, p. 111, ch. 1324. The "Superior Court" lasted a decade; in 1892, it was abolished by the single-court advocates who silenced the intermediate-court proponents with a provision in the new constitution prohibiting any courts created by the legislature. Ky. Const. §§ 118, 135. See Bivin, "The Historical Development of the Kentucky Courts," 47 Ky. L. J. 465, 482-83, 488 (1959).

[5] The court operated under the present constitution with four judges until increased to the authorized seven by Ky. Acts 1891-1892, ch. 229. Bivin, *supra* note 4, at 488.

[6] In 1898, the jurisdictional amount for appeal as of right was raised from $100 to $200. Ky. Acts 1898, ch. 19. This was again raised to $500 by Ky. Acts

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sioners[7] and law clerks.[8] The court has employed the two-division system[9] and made more extensive use of per curiam opinions[10] in its own efforts for relief. Proposed remedies include pre-appeal conferences,[11] requiring printed records or abstracts,[12] and establishing separate civil and criminal courts of appeal.[13]

Most of these measures toward equalizing the appeal-to-opinion ratio are designed to increase the court's capacity rather than to decrease its business. It would seem that the saturation point has been reached and that further curative steps should focus on reducing the incoming work rather than increasing the output. That part of the court's workload which is contributed by petitions for rehearing has gone relatively unnoticed.[14] During the 1960 court year, the Court of Appeals disposed of 115 petitions for rehearing as compared with 502

(Footnote continued from preceding page)
1914, ch. 23. Since 1952, the requirement has been $2500. Ky. Rev. Stat. § 21.080 (1960) (hereinafter cited as KRS). However, the 1914 and 1952 increases authorized discretionary "pray" appeals between $200 and the respective minimum jurisdictional amounts for appeals of right. See Note, 43 Ky. L. J. 422, 423-24 (1955).

[7] The first commissionership was authorized by Ky. Acts 1906, ch. 6, which declared an "emergency" due to the backlog. The present four positions were approved for indefinite terms by Ky. Acts 1930, ch. 16. See KRS 21.150 (1960); [1951-1952] Ky. Jud. Council Biennial Rep. 4-5.

[8] Two law clerks were authorized by Ky. Acts 1946, ch. 156. KRS 21.160 (1960) presently authorizes eleven (one per judge and commissioner), but the court employs only three. For a report on the successful use of law clerks in relieving the appellate docket in one state, see Rugg, "Relief for Appellate Courts," 15 Am. Jud. Soc'y J. No. 6, 175, 176 (1932).

[9] This system, although authorized by Ky. Const. § 118, has not been continuously used by the court; its efficiency has been questioned by Judge Eblen. Eblen, *supra* note 1, at 84-85.

[10] KRS 21.135 requires written opinions in *all* cases, but the court in practice writes per curiam opinions where it affirms the trial court on a motion for appeal under Ky. Ct. App. R. 1.180 (hereinafter cited as RCA).

[11] This proposal contemplates a conference with another circuit judge or circuit court commissioner and a commissioner of the Court of Appeals to review the trial court's action. [1957-1958] Ky. Jud. Council Biennial Rep. 2-3. The additional burden placed on circuit judges and the reduction in the Court of Appeals' work capacity through diversion of the commissioners would seem to outweigh any possible advantages this proposal might have.

[12] The only value of this requirement would lie in harassing litigation out of court; its adoption would reverse the trend toward cheaper justice begun last year by RCA 1.180(d) which requires only a limited record in certain cases. See Stites, "The Problem of the Increasing Docket," 1938 Ky. S.B.A. Proceedings 100, 106-08.

[13] A division of civil and criminal appeals has support in the Texas and English judicial systems where intermediate courts are so divided. But the impracticability of such a system in Kentucky is illustrated by the fact that criminal appeals constituted only 14% of the court's workload during the 1960 court year. Based on statistics obtained from the Administrative Office of the Courts, Frankfort, Ky., Feb. 20, 1961. See Eblen, *supra* note 1, at 81-82. In addition, this proposal would require a constitutional amendment, which is no easy task in Kentucky! Ky. Const. § 135.

[14] The only step which has been taken, or for that matter suggested, to limit rehearings is the 1960 rule disallowing rehearing on the denial of motions for appeal. RCA 1.180(1)3.

regular appeals.[15] This means that approximately one-fifth of the court's time was devoted to petitions for rehearing.[16] Only if the results accomplished were proportionate to the time spent could this be justified, and that was not the case. Of the 115 petitions considered, the court reversed itself on only 3.[17] This waste cannot be rationalized as exceptional; the story has been much the same over the past decade.[18] As F. B. Wiener aptly puts it, "petitions for rehearing can be more poetically—and more accurately—labeled as 'Love's Labor Lost.' The normal petition for rehearing has about the same chance of success as the proverbial snowball on the far side of the River Styx. . . ."[19] The sad part of it is that the court's, as well as the petitioner's, labor is lost.

Legal scholars have long recognized rehearing at the appellate level as a thorn in the side of the judicial system. Chief Justice Taney's comment over a century ago is apposite in Kentucky today:

> But the great evil is in the enormous expenses occasioned by these repeated hearings, and the delays which [rehearing] . . . produces in the decision, which often prove ruinous to both parties before the final decree is pronounced. Nor is the mischief confined to the particular suit in which such proceedings and delays are permitted to take place. A multitude of others are always behind it, waiting anxiously to be heard. And the result of the practice . . . has been such that . . . the expenses and delays of the court have become a byword and reproach to the administration of justice. . . .[20]

Despite the expense, delay and slight chance of success, one out of every five appeals is ultimately reheard.[21] Dean Pound says the bar has come to regard appellate rehearing "as part of the ordinary routine of litigation. . . ."[22] And from the Court of Appeals came the

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[15] Statistics obtained from the Administrative Office of the Courts, Frankfort, Ky., Feb. 20, 1961.

[16] This may seem an overstatement, especially since fewer grounds have to be considered on rehearing than on the original hearing, but otherwise rehearings are afforded substantially the same treatment as the original hearings. Interview with Commissioner Watson Clay, Court of Appeals of Kentucky, in Frankfort, Ky., Feb. 20, 1961.

[17] Statistics obtained from the Administrative Office of the Courts, Frankfort, Ky., Feb. 20, 1961.

[18] For the period 1951 through 1960, the court sustained an average of slightly over 6% of the petitions filed. Based on statistics obtained from the Administrative Office of the Courts, Frankfort, Ky., Feb. 20, 1961, and letter from the Administrative Director of the Court of Appeals of Kentucky, to Robert G. Zweigart, Dec. 14, 1959.

[19] Wiener, Effective Appellate Advocacy 172 (1950).

[20] Brown v. Aspden, 55 U.S. (14 How.) 25, 27 (1852).

[21] Based on statistics obtained from the Administrative Office of the Courts, Frankfort, Ky., Feb. 20, 1961.

[22] Pound, Appellate Procedure in Civil Cases 214 (1941). See Justice Frankfurter's concurring opinion in Western Pac. R.R. v. Western Pac. R.R., 345 U.S. 247, 268 (1953); Cook, "The Rehearing Evil," 14 Iowa L. Rev. 36, 51-52 (1928).

observation that it "has come to be regarded by many of the bar as one of the standing jokes of the profession."[23]

THE SOLUTION

Relief from the burden of rehearing may be attained either by elimination or reform of the procedure. It shocks one's ideals of justice to think of completely eliminating rehearing—but why? Procedural due process does not demand appellate rehearing. In fact, the truth of the old saying that "justice delayed is justice denied"[24] suggests that a grant of rehearing is more unjust to the respondent and other waiting litigants than a denial is to the petitioner. One day in court, whether it be at the trial or appellate level, is all anyone should be entitled to.[25] This logic persuaded the Supreme Court of Ohio at an early date to abolish the right to rehearing and prompted the following remark:

> We do, therefore, adopt [the rule against appellate rehearing] . . . , without assuming any infallibility for our judgments, because we believe, upon the whole, that the cause of justice will be promoted by it. There must at some time be an end of litigation, not only for the benefit of the parties to each particular case, but to enable others standing behind them, to have their rights determined.[26]

Rehearing is provided for either by statute or by court rule,[27] and rarely is there a constitutional guarantee of the right. Kentucky Constitution section 118 assumes rehearing will be allowed, but it requires only that "the Court shall prescribe by rule that petitions for rehearing shall be considered by a Judge who did not deliver the opinion in the case. . . ." In *Armes v. Louisville Trust Co.*,[28] the court

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[23] O'Rear, *supra* note 1, at 34.

[24] "The business of the court is steadily increasing, and a delay of justice is in many cases a denial of justice. . . ." Ky. Acts 1906, ch. 6 (authorization of first commissionership).

[25] "It has never been regarded that any man is entitled to more than one fair trial of his case. . . . All of our practice looks to that end. . . . [And] when one's case has been tried under the forms which the experience of the bar and bench have found to be best calculated to bring a just result, that from necessity must be the end of the thing. It must stop somewhere. Why should a man be entitled to more than one fair trial of his appeal, if he is entitled to only one fair trial in the Circuit Court?" O'Rear, *supra* note 1, at 36-37. See also Fosdick v. Town of Hempstead, 126 N.Y. 651, 27 N.E. 382 (1891).

[26] Longworth & Horne v. Sturges & Anderson, 2 Ohio St. 104, 107 (1853). However, although *Longworth* has not been expressly overruled, Ohio's appellate procedure now includes rehearing. Ohio Sup. Ct. R. XX.

[27] See O'Rear, *supra* note 1, at 39, to the effect that rehearing is a "judge-made practice" which has never been allowed as of right in Kentucky.

[28] 306 Ky. 155, 206 S.W.2d 487 (1947).

held that this provision does not create a right to rehearing but merely recognizes the inherent judicial power of self-correction.[29]

In an article entitled "Presenting Your Case to the Court of Appeals," Commissioner Clay observes:

> It is surprising what good briefs the Court of Appeals receives in the form of Petitions for Rehearing. . . . They indicate that the losing attorney has finally realized that he must shake the heart out of his case. But by then it may be too late. Why not do the hard work from the beginning, when you have a greater promise of more certain dividends.[30]

Why not force the attorney to "shake the heart out of his case" *on appeal* by eliminating rehearing, thus ending this waste of judicial energy?

However, the fact that there is a strong argument in favor of rehearing is evidenced by the virtual unanimity of the states in providing for some type of rehearing procedure.[31] This argument is simply that even courts of last resort are not infallible and cannot be denied the power of self-correction.[32] But if this device for correcting appellate errors is not to be eliminated, procedural reform is essential to avert its accompanying evils.

A brief statement of how rehearing *does* function in Kentucky necessarily precedes a discussion of how it *should* function. Aside from the constitutional requirement concerning the proper judge to consider petitions for rehearing,[33] the procedure is governed entirely

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[29] *Id.* at 157, 206 S.W.2d at 488. If initial appeal is not an absolute right, a fortiori rehearing is not. See Marlow v. Commonwealth, 142 Ky. 106, 116-17, 133 S.W. 1137, 1141 (1911).

[30] 16 Ky. S.B.J. 73, 78 (1952). The same thought was expressed by Chief Justice Taney when he remarked that "the natural result of [allowing rehearing] . . . is to produce some degree of carelessness in the first argument and hesitation and indecision in the court." Brown v. Aspden, 55 U.S. (14 How.) 25, 27 (1852).

[31] Maine seems to be the lone dissenter. Cook, *supra* note 22, at 46; Louisell & Degnan, "Rehearing in American Appellate Courts," 44 Calif. L. Rev. 627, 632 (1956), 25 F.R.D. 143, 145.

[32] "Appellate courts are known in law as 'courts of error.' Their primary task is that of correction of the errors of subordinate courts. That task, however, is by no means exclusive. Self-correction, too, is a part of the job of appellate jurisdiction. Which is to say that no mortal judge becomes free from error, even though for a time he wears the saintly robe of a state's highest court. High court judges do get into their legal shorts, one leg at a time every morning, just as do other correspondingly experienced and competent members of the bar. . . . They can and do make mistakes. . . . And, when they do err, their misjudgment affects many—if not countless—more than the single litigant whose case comes or has come to divagated decision. That is the real reason—the effect of discovered error on unrepresented others whose relevant rights may or may not have ripened—why *some* judges of high courts are quick to swallow pride, in favor of candid confession, when such confession is due." (Footnote omitted.) Taylor v. Michigan, 360 Mich. 146, —, 103 N.W.2d 769, 786-87 (1960). See also O'Rear, *supra* note 1, at

[33] Ky. Const. § 118; RCA 1.390.

by court practice, rules, and decisions. "A party adversely affected by a final decision" of the court may petition for a rehearing[34] "within 30 days after the opinion is delivered."[35] When a petition is submitted to the court it is handled in the same manner as an initial appeal except that it is usually given priority over the appeal docket and considered within 2 to 3 weeks as compared with the 12 to 18 months delay in hearing appeals. The case is then considered de novo.[36]

Theoretically, a petition for rehearing is just what the term implies, a *request for reconsideration;* the only question raised is whether the case should be *reheard.* But in practice, the question answered by some appellate courts is whether the case should be *reversed.*[37] This, of course, is the inevitable result where the petition is denied, but where granted, "no new judgment [should] . . . be rendered without a resubmission and actual rehearing of the cause."[38] Every party is entitled as of right to *apply* for a rehearing, but there should be no right to have it *granted.*[39] However, when the questions of granting the rehearing and reversing the decision are combined, as they are in Kentucky, it is evident that rehearing is a matter of right.[40] The court's use of the one-step rather than the conventional two-step procedure is responsible for much of the delay and waste characteristic of Kentucky rehearing. It requires re-examination of the record by the assigned judge and reconsideration of the cause by a majority of the court. The results are that the court must devote the same attention to the many undeserving petitions as given to the few meritorious ones, and ordinary appeals are deprived of their rightful consideration.

For the remedy, an analogy may be drawn to another phase of appellate procedure where the court just last year incorporated the

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[34] RCA 1.350(a).

[35] RCA 1.370.

[36] Interview with Commissioner Watson Clay, of the Court of Appeals of Kentucky, in Frankfort, Ky., Feb. 20, 1961.

[37] Louisell & Degnan, "Rehearing in American Appellate Courts," 44 Calif. L. Rev. 627, 650 (1956), 25 F.R.D. 143, 157.

[38] Granite Bituminous Paving Co. v. Park View Realty & Improvement Co., 270 Mo. 698, –, 196 S.W. 1142, 1143 (1917). The Missouri court held that judgments entered on consideration of the petition without resubmission and rehearing "are coram non judice and void, and the cases are yet before that court for final determination."

[39] Sunderland, Cases and Materials on Trial and Appellate Procedure, 697, n.1 (2d ed. 1941).

[40] In Kentucky, "some form of rehearing is . . . virtually automatic. Although known as a petition for rehearing, it is actually a request for reversal of the original decision or a modification of it." Louisell & Degnan, "Rehearing in American Appellate Courts," 44 Calif. L. Rev. 627, 643, n. 63 (1956).

two-step process. RCA 1.180(1), which governs disposition of motions for appeal,[41] prescribes two steps by the following language:

> 1. If the motion is denied, the order or judgment shall stand affirmed. . . .
> 2. If the motion is sustained, the appeal shall be perfected and prosecuted as appeals taken as a matter of right, unless otherwise directed by the Court of Appeals.[42]

The argument against the two-step process is that it results in double consideration of the matter, but the rule precludes this. In ruling on the motion itself (the first step), only the motion—a clear and concise statement of the material facts, questions of law, and the reasons for review[43]—is considered. The record cannot be considered until the appeal is perfected (the second step), as it is filed only if the motion is sustained.[44]

This labor-saving device is readily adaptable to rehearing procedure. Like the motion for appeal, the petition for rehearing is addressed to the discretion of the court. Both are designed to call attention in a succinct manner to errors in a previous proceeding. Neither procedure deserves the same time and effort afforded regular appeals of right.

The present one-step procedure encourages elaborate argumentative briefs, because the parties know the merits will be re-evaluated. Employment of the two-step procedure would render briefs, as such, unnecessary. The petition would be limited to specifying the grounds, without argument, on which the rehearing is sought, just as RCA

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[41] There is no right of appeal in controversies involving less than $2500, but a motion for appeal (sometimes referred to as a "pray" appeal) may be made in a civil case where between $200 and $2500 is involved and in a criminal case where there is a fine of $50 or a sentence exceeding 30 days for a misdemeanor. KRS 21.060, .080 (1960); RCA 1.180(a); Ky. Crim. C.P. § 347. Similar to the Supreme Court's review by certiorari, appeal by motion is in the court's discretion. [1959-1960] Ky. Jud. Council Biennial Rep. 6-7; 24 Ky. S.B.J. 151 (1960). The motion for appeal is not new to Kentucky procedure. See note 6 *supra*. But prior to the 1960 revision of RCA 1.180, "all cases involving less than $2500 [were] . . . given exactly the same treatment and consideration as other appealed cases. . . . On a motion for appeal in cases involving less than $2500, *when that motion [was] . . . passed upon the litigant [had] . . . already had his appeal.*" Clay, "How to Avoid the Abortive Appeal," 20 Ky. S.B.J. 82, 83 (1956). In other words, a one-step procedure was employed as with petitions for rehearing today.

[42] The last clause is the loophole which may cause the court to revert to the old one-step procedure. See, *e.g.*, Stoll Oil Ref. Co. v. Pierce, 343 S.W.2d 810 (Ky. 1961). The Judicial Council itself has expressed doubt as to the work the new rule will save the court. [1959-1960] Ky. Jud. Council Biennial Rep. 7. *But see* Note, 43 Ky. L.J. 422, 429 (1955).

[43] RCA 1.180(c)5.

[44] RCA 1.180(d) provides that the complete record will not be filed with the motion. RCA 1.180(1)2 provides for filing when the appeal is perfected. But these rules are limited to civil cases; the record must be filed with the motion for appeal from conviction of a misdemeanor. Ky. Crim. C.P. § 348.

1.180(c) now limits motions for appeal.[45] It would then serve its proper purpose as a "pleading"[46]—a plain and concise statement of the court's errors. As further assurance against argument and prolixity, length of petitions should be limited.[47] This would compel the attorney to edit his work carefully and get directly to the alleged error.[48]

The two-step procedure could also cure much of the delay and waste caused by successive petitions for rehearing. Courts have not stopped at granting one rehearing; where the first has been denied, a second petition is sometimes granted to the same party.[49] And the party originally successful on appeal who has been reversed on rehearing is deemed entitled to a further rehearing.[50] In some instances, the parties play "rehearing ping pong," a game resembling the common-law pleadings of a rejoinder, surrejoinder, rebutter, surrebutter, etc.[51] These repeated and renewed petitions are often disguised as

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[45] The content of the motion is limited to the names and addresses of parties and counsel, the dates of judgment and notice of appeal, the jurisdictional amount in controversy, a statement of execution of supersedeas bond, and "a clear and concise statement of (1) the material facts, (2) the questions of law involved on appeal, and (3) the specific reason or reasons why the judgment should be reviewed, including authorities."

Soon after the new rule became effective, the following comment came from the court:

"As all proper motions, the application should be short and to the point. The object is to convince the Court that a significant question is raised which merits later consideration of alleged errors in the judgment. The procedure was designed to save time and expense incident to filing the record and full briefing until a determination that the controversy warrants appellate review.

". . . [The rule] . . . does not contemplate a discussion of authorities. They need be cited only when necessary to indicate the points on which appellant will rely if an appeal is granted." 24 Ky. S.B.J. 151 (1960).

[46] "The petition for rehearing is a pleading, and should not be an argument." Enright v. Grant, 5 Utah 400, —, 16 Pac. 595, 596 (1888). See Fla. App. R. 3.14(f), which refers to petitions for rehearing as pleadings.

[47] For motions for appeal, the court has suggested a maximum of three pages. 24 Ky. S.B.J. 151 (1960). Petitions for rehearing are limited to three pages in Colorado. Colo. R. Civ. P. 118(c).

[48] The ability of lawyers to be concise has not gone unquestioned: "[M]any lawyers are either not competent or else not trained to make a condensation that will present their cases properly." Stites, *supra* note 12, at 108.

[49] Board of Educ. v. DeWeese, 343 S.W.2d 598 (Ky. 1961); United States v. Ohio Power Co., 353 U.S. 98 (1957); Zap v. United States, 330 U.S. 800 (1945); Dodd v. State Indus. Acc. Comm'n, 211 Ore. 98, 315 P.2d 138 (1957). In the *Ohio Power* case, *supra,* after petitioner had been denied two rehearings the denial was vacated, the petition granted, and the decision reversed in spite of U.S. Sup. Ct. R. 58(4) which prohibits consecutive and untimely petitions.

[50] RCA 1.350(d) provides that "in the event a petition for rehearing is sustained, a party adversely affected by the new opinion may petition for a rehearing." The only limitation on successive rehearings in Kentucky seems to be the constitutional provision requiring assignment to different judges! Ky. Const. § 118.

[51] This persistence is well illustrated by the appellate history of the now infamous Kentucky "salary" case, Board of Educ. v. DeWeese, 343 S.W.2d 598 (Ky. 1961):

1959

(1) Judgment of trial court affirmed (June 19).

(Footnote continued on next page)

motions to amend, correct, recall, modify, extend, or reconsider,[52] but they all have the same objective. This maneuvering evoked Justice Story's comment that "if rehearings are to be had until counsel on both sides are entirely satisfied, I fear, [*sic*] that suits would become immortal."[53] Successive petitions should be permitted only where a court has been so persuaded by the first petition that it has reversed or altered its original decision without benefit of counter-argument by the respondent.[54] Response to the petition is optional under RCA 1.350(a), but the fact that the merits will be decided on the petition itself due to the one-step procedure forces the respondent to answer. Under the two-step procedure, the respondent would answer only if the petition were granted. In that event, both parties would have equal opportunity to argue on the rehearing. It would be a rehearing of both sides, and allowance of a successive rehearing to rebut the first would be redundant. Surely this must be the end of litigation!

In addition to adoption of the two-step procedure, the court's rehearing burden could be relieved by strict enforcement of RCA

(Footnote continued from preceding page)

(2) Petition for rehearing filed by appellant (July 20).
(3) Motion to hold mandate filed by appellant (July 31).
(4) Motion to hold mandate sustained (July 31).
(5) Petition for rehearing overruled, opinion modified, and mandate stayed until June 1, 1960 (Nov. 20).
(6) Motion to recall order (overruling petition for rehearing) and to reconsider (petition for rehearing) filed by appellant (Dec. 11).

1960

(7) Motion to hold mandate for indefinite period filed by appellant (March 18).
(8) Previous order withholding mandate continued until Jan. 1, 1960 (March 24).
(9) Motion to recall order (overruling petition for rehearing), to reconsider order, and to sustain petition for rehearing renewed by appellant (Nov. 18).
(10) Motion to stay issuance of mandate filed by by appellant (Dec. 9).
(11) Petition for rehearing sustained, old opinion withdrawn, and new opinion delivered (Dec. 16).

1961

(12) Petition for rehearing filed by appellee (Jan. 16).
(13) Petition for rehearing overruled (March 24).

[52] See, *e.g.*, Cahill v. New York, N.H.&H.R.R., 351 U.S. 183 (1956), and the motions in the *DeWeese* case, *supra* note 51.

[53] Sunderland, *op. cit. supra* note 39, at 697 n.1. This same fear was expressed by Judge O'Rear:

"If the losing man, whose argument has not been answered to his satisfaction may, as a matter of right, re-argue the same question before the same court, and if perchance he may convince the court and have it written his way, and then his opponent who had just lost may re-argue the same question, presenting again the same argument, though possibly slightly different, and if decided against him, he may again present the same argument, though slightly different, when will the matter end?" O'Rear, 1904 S.B.A. Proceedings 34, 38.

Dean Pound states it more positively. "The decision of the highest court is but the beginning of litigation." Pound, *op. cit. supra* note 22, at 373.

[54] *Compare* Caldwell v. Caldwell, 55 So.2d 258 (La. 1951), *with* Camden Fire Ins. Ass'n v. Delaney Moss Co., 152 Miss. 392, 118 So. 535 (1928).

1.350(b) which specifies the proper grounds for rehearing.[55] That rule boils down to this: A rehearing will not be allowed unless the petition shows that the *court has overlooked a decisive fact or authority or misconceived an issue which was seasonably presented upon appeal and which will substantially affect the result* of the case.[56] The matter must be overlooked by the court and not by or because of the petitioner.[57] The petition which alleges only new matter not presented on the appeal is insufficient.[58] The petition which alleges only old matter presented to *and* considered by the court is likewise insufficient.[59] This leaves as the only legitimate topic for rehearing *matters seasonably presented but neglected or misconceived by the court itself in its initial decision.* Even this is qualified to the extent that the "presented but neglected or misconceived" matter must substantially affect the result. Minor points presented in the brief do not constitute grounds for rehearing merely because left unanswered in the opinion.[60] As the New York Court of Appeals explained:

> It is a mistake for counsel to assume that any particular portion of his argument, which has not been the subject of express reference in the opinion, has been overlooked. It is scarcely possible, within the bounds of an ordinary opinion, to meet and answer every argument which has been made by counsel orally or which may be in his brief.[61]

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[55] *"Except in extraordinary cases when justice demands it,* a petition for rehearing shall be limited to a consideration of the *issues argued on the appeal* and will be granted only when it appears that *the Court has overlooked a material fact* in the record, *or a controlling statute or decision,* or has *misconceived the issues* presented on the appeal *or the law applicable thereto."* (Emphasis added.)

[56] *Cf.* Fosdick v. Town of Hempstead, 126 N.Y. 651, 27 N.E. 382 (1891); O'Rear, *supra* note 53, at 41. For a compilation of the grounds which have been held adequate and inadequate, see 12 Tenn. L. Rev. 212 (1934).

[57] It is sometimes stated that matters overlooked through the "neglect or inadvertence" of counsel constitute grounds for rehearing. See, *e.g.,* Fosdick v. Town of Hempstead, *supra* note 56; O'Rear, *supra* note 53, at 41. But unless the court is to practice law for the petitioner, only matters inadvertently overlooked by the court itself after due presentation by petitioner should warrant rehearing. See 8th Cir. R. 15(b).

[58] "Except for most extraordinary cause, we will not consider an issue on appeal raised for the first time in a petition for rehearing." Herrick v. Wills, 333 S.W.2d 275, 276 (Ky. 1960). See also Hembree v. Hembree, 208 Ky. 658, 271 S.W. 1100 (1925).

[59] "The office of a petition to rehear is to call the attention of the court to matters overlooked, not to those things which the counsel supposes were improperly decided after full consideration." Louisville & N.R.R. v. United States Fid. & Guar. Co., 125 Tenn. 658, —, 148 S.W. 671, 680 (1912). See also Commonwealth *ex rel.* Meredith v. Johnson, 292 Ky. 288, 166 S.W.2d 409 (1942); Shinkle v. City of Covington, 13 Ky. Opin. 889 (1886); Badger v. Boyd, 16 Tenn. App. 629, 65 S.W.2d 601 (1933), noted 12 Tenn. L. Rev. 212 (1934); Cook, *supra* note 22, at 54-55.

[60] United States Fid. & Guar. Co. v. Travelers' Ins. Mach. Co., 169 Ky. 158, 183 S.W. 492 (1916).

[61] Fosdick v. Town of Hempstead, 126 N.Y. 651, —, 27 N.E. 382, 383 (1891).

Simply stated, the petitioner must present his claims and make his objections seasonably at each level of litigation and when the opinion is delivered by the Court of Appeals he can protest only decisive error in the basis for the result and not the result alone. Judge O'Rear estimated that there would be eighty per cent fewer petitions for rehearing if this rule were followed and enforced.[62]

CONCLUSION

Rehearing is the fulcrum upon which the opposing interests of finality and justice are balanced.[63] But only where considerations of finality are plainly outweighed by the interests of justice should the principle of finality yield.[64] The argument for retaining rehearing as a safety valve is convincing and is supported by tradition, but the procedure needs reform to prevent its abuse.

First, the court should extend the two-step procedure, which it has adopted to conserve time on motions for appeal, to petitions for rehearing.[65] Second, a three-page limit should be made for the petition.[66] Third, successive petitions by either party should be prohibited.[67] Fourth, petitions which exceed the three-page limit or which are filed upon improper grounds should be summarily stricken.[68] Waiver of these requirements should be only upon the court's own motion.[69]

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[62] O'Rear, *supra* note 53, at 45.

[63] "A court which is final must be careful, but not so careful that its judgments never become final." Louisell & Degnan, "Rehearing in American Appellate Courts," 44 Calif. L. Rev. 627, 657 (1956), 25 F.R.D. 143, 164.

[64] See Justice Harlan's dissent in United States v. Ohio Power Co., 353 U.S. 98, 99 (1957).

[65] Colo. R. Civ. P. 118(c) compels the two-step procedure simply by providing that "no action will be taken save to grant or deny the rehearing." In Vermont, "if the motion is granted briefs shall then be filed and the case reargued." Vt. Sup. Ct. R. 22(2).

[66] See Colo. R. Civ. P. 118(c).

[67] Second rehearings are denied by Fla. App. R. 3.14(e), Mo. Sup. Ct. R. 1.19, and Nev. Sup. Ct. R. 34. Some rules allow second rehearings only upon special court order. Ga. Code Ann. § 24-4544 (1959); N.M. Sup. Ct. R. 18(7); Okla. Sup. Ct. R. 29(1); Tenn. Sup. Ct. R. 32.

[68] Petitions which are argumentative or which exceed the three page limit are stricken in Colorado. Colo. R. Civ. P. 118(c). See also Fla. App. R. 3.14(d). Some rules limit rehearing to points designated by the court. La. Code Prac., art. 913 (Dart 2d ed. 1942); Tenn. Sup. Ct. R. 32. 8th Cir. R. 15(d) prohibits reargument of old matter and provides for a $100 fine against petitioner or counsel if the petition is found to be "vexatious, without merit and filed for delay;" 10th Cir. R. 24 provides for a $100 fine in favor of respondent on the same grounds.

[69] The petition itself cannot even be filed without special leave of court in Oklahoma. Okla. Sup. Ct. R. 28(1).