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UNNECESSARY DELAYS IN APPELLATE PROCEDURE

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Delays in the courts have always been with us. They have been criticized and defended. Many plausible arguments have been advanced against too hasty disposition of litigation. The last decade has witnessed a very marked intensification of complaint of delays, largely directed to what is characterized as antiquated procedure. No less authority than the late Chief Justice Taft has been unsparing in his denunciation of criminal procedure. There is no doubt that the only defenders of the system are the members of the bar, for laymen universally believe that there is something inherently defective in the manner in which litigation is conducted and disposed of. They believe, moreover, that the lawyers are responsible for these defects and selfishly support and defend them.

The courts and lawyers must recognize that, as their contribution to society, they have a duty, either to correct the errors, if such there be, into which their profession is charged to have fallen, or to convince the people who support our institutions that such errors do not exist.

It is not the purpose of this discussion to enter the controversial field as to whether there is a proper time for deliberation, and even delay, nor the extent of it, in the progress of litigation, but to direct your attention entirely to the delays occurring in appellate procedure. We all know that the commencement of an action, or the institution of criminal proceedings, carries no presumption of the right to recover or of the guilt of the defendant. In a civil case the plaintiff has the burden of proof; in a criminal case it is upon the state. This is a wholesome and thoroughly grounded rule. Fortunately, we

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have no such thing in America as convicting a man at the bar of public opinion, or of compelling him to prove his innocence of a crime. Therefore, until there is a judgment in either a civil or criminal case, no one can say *ex cathedra* which side should prevail.

But when a case has reached the point of decision in the trial court, *prima facie* one side is right. The presumption of the correctness of a judgment accompanies it through the courts of appeal and review, regardless of which side prevails below. The trial court must be able to say that the judgment is clearly right; the reviewing court cannot disturb unless it finds that the judgment is clearly wrong.

Therefore, after judgment, we are no longer dealing with the situation of an open controversy. There is a decision presumptively correct. In other words, before the decision we did not know judicially that the successful party was right. After judgment the rights of the parties are fixed, and there should be the least possible delay in the execution of the judgment, whether it be restoration of property or punishment of a criminal.

Whatever justification, therefore, may be found for delay in the trial court, that justification no longer exists after a decision has been reached there. So it is, therefore, clear that, while prior to judgment the parties litigant may, with propriety, or at least in consonance with the tendency of human nature, delay, within the limits of the law, the day when they must answer, yet when a decision has been reached, delay, except such as is imperative to present the case for review, and in the reviewing court an opportunity to consider it deliberately and decide it correctly, is intolerable and unjustified. It then becomes a case of withholding that to which one is lawfully entitled. In a criminal case unconscionable delay on appeal, either unjustly punishes a man who is unable, under the laws of Indiana, to give bail while awaiting a decision in the Supreme Court, or if he is at liberty, it unfairly stays the hand of justice and denies to the state that which it has a right to exact speedily of the culprit.

Our proposition, then, is that, by and large, a party gets all the delay which he has any right to expect or demand before the decision of his case in the lower court; that whatever delay he obtains in preparing, presenting or getting a decision on his appeal, beyond that essentially necessary, is to that extent a denial of justice to his opponent who prevailed below. Illustra-

tions of such injustice will doubtless occur to the minds of all of us and could be multiplied indefinitely with many soul stirring accounts of delayed justice which in the end was injustice.

In Indiana, I believe, we have fallen into very bad lines. Responsibility for this situation rests jointly upon the courts and the bar. I fear that lawyers generally have the impression that when a case is on appeal, it is tucked away and put at rest for an indefinite period. Usually it is the last thing to which a lawyer will give attention. In reality, it should receive his first consideration. If the ultimate end of our legal procedure, as a part of the social order and an instrumentality of the state, is to do justice, certainly the man who has obtained a judgment *prima facie* correct, is entitled to the first call on the time of interested lawyers. This applies not only to his own counsel, who may be more directly concerned, but there is furthermore a duty upon his opponent not unduly to delay the doing of complete justice, even at the expense of his client who has been proved to be wrong.

A study of 13 criminal cases and 5 civil cases in the Supreme Court, and 15 civil cases in the Appellate Court, all selected at random from the docket within the last few years, is illuminating. The study is confessedly not exhaustive enough to warrant the claim that these cases present a cross-section of the situation, but cases were deliberately selected in which extensions of time were granted with a view of disclosing the abuse of this practice. The study is made collectively because it would be unfair to the Supreme Court to conclude that because it decides fewer cases than the Appellate Court, it is less diligent or industrious, for it must be remembered that the Supreme Court is required not only to carry its own docket, but to review a large percentage of the cases that pass through the Appellate Court. No one but a member of the court can say exactly how much time is consumed in disposing of petitions to transfer, but that the system of handling these petitions is unwieldy and fraught with unnecessary delay will be discussed later on.

The 33 cases examined passed entirely through the lower courts in the average time of 12 months. The average time consumed in filing all the briefs, including the 30 day submission period, was 13 months. If the briefs had been promptly filed, under the rule, this would have been only 4½ months.

In these cases 119 extensions of time were granted to the appellant, with an average of almost 4 to a case, and 55 extensions

were granted to appellee. The average time of the total extensions was 13 months per case. The industry of attorneys is strikingly contrasted in the fact that of these cases, one was fully briefed in 1½ months after filing the transcript, and the briefing period extended from this to the astonishing extreme of 3 years and 3 months. The maximum number of extensions granted in a case was 10 to the appellant and 10 to the appellee.

In one case that required 3 years to brief, the appellant obtained 3 extensions and the appellee 2. These extensions were granted over the objections of the other side. The attorneys who briefed their case in 1½ months got little for their pains, because the Supreme Court kept it under consideration for 4½ years.

That the delay in these cases was not all upon the part of the attorneys is proved by the startling fact that the average time for decision, after the cases were fully briefed, was 3 years and 9 months.[1]

In one case a petition to advance was granted in 1926. The decision was written almost exactly 4 years thereafter.

There is reason, therefore, for the widespread conviction that there is undue delay in appellate procedure. Few lawyers are willing to accept any share of the responsibility, but nonchalantly pass it off by placing the blame upon the courts. The responsibility is joint and the evil can be remedied only by voluntary cooperation on the part of both the courts and the bar. What, it is asked, can be done? The Attorney General of the United States is quoted as saying recently that we hear only the criticisms of legal procedure, with no constructive suggestions. Without pretence of consummate wisdom, the following changes

[1] The following amazing history of a case in the Supreme Court is vouched for by the attorney for the appellant. He was required by the court below to furnish an appeal bond in the sum of $50,000. The appeal was taken in the summer of 1924, the case was fully briefed in the Appellate Court, and argued orally in about two years after filing. The Appellate Court being unable to agree upon a decision, certified the case to the Supreme Court early in 1927. It was re-argued in that court in January, 1928. No decision has yet been rendered. In the meantime, the assets of the corporation which were at stake in this litigation have shrunken almost to the point of disappearance, while the appellant has been compelled to pay a total of $4,000 in premiums to the surety company on the appeal bond. It is said that both parties to this litigation have long since despaired of reaping any benefits therefrom, and even intimate that if the case is held much longer, they will be inclined to get in a bad humor and say uncomplimentary things about courts.

are offered in the hope that if they do nothing more, they may provoke sufficient discussion to bring about beneficial results. It may be asked why one who lacks judicial experience essays to advise the court, or suggests reforms in procedure, but must the physician be ill to diagnose or prescribe for the ailment of his patient? Must one be a bankrupt to counsel those who are in financial stress? Except for the indefensible statute permitting 6 months to appeal, the remedy is practically within the control of the courts in the making and enforcement of their rules. Doubtless, they hesitate to act arbitrarily, or go beyond the point where they are generally supported by the bar, but some things can be done. Courageous action, though radical, may be criticized, but in the end should be its own reward.

First. The anomalous rule of submitting a case 30 days after filing should be abolished. It rests neither in right nor reason. A case should be considered submitted when filed, and jurisdictional questions should be permitted in the appellee's brief. The appellant should be required to file his brief with the transcript, or within 30 days thereafter. We all know that in the preparation and filing of a transcript, counsel's mind is centered on the cause to such an extent that then is the logical time to prepare his brief. Instead of that, the transcript is filed, 90 days elapse before the appellant is required to file a brief if he obtains no extensions whatever, and by that time other matters having intervened, and the whole case must be reviewed again. There is much lost motion, and consequent unnecessary and unjust expense upon the client. Reorientation is costly. The appellee's brief should come in within 20 or 30 days after the appellant's brief, and the reply brief within 10 or 15 days thereafter. Other courts considering questions fully as difficult and complicated as those which come before the courts of Indiana establish and enforce similar rules.[2]

Second. Extensions of time for filing briefs should be rarely granted. Both the Bar and the *nisi prius* courts should understand that a case on appeal has the right-of-way in an attorney's office. It is his most important business. Certainly no exten-

[2] For illustration, New York allows the equivalent of 20 days for appellant's brief, 10 for the answer and 5 for reply. Wisconsin, 15 days for appellant's brief, and 5 days for answer. Illinois, 20 for the appellant's brief, 20 for the answer and 7 for reply. United States Circuit Court of Appeal, 7th Circuit, 20 for appellant, 20 for appellee, and 10 for reply. United States Supreme Court, 21 for appellant and 14 for answer.

sion whatever should be granted without notice and an opportunity on the part of the opposite party to be heard. The reason for the extension should be substantial and not perfunctory, as is too frequently the case at this time. The granting of extensions is sometimes defended on the ground that the court is not up with its docket, and hence, an extension can work no delay, but that answer in a measure begs the question. Other conditions, both herein discussed and otherwise, combine to develop a system of procrastination in both the preparation and decision of appeals. The liberal practice of granting extensions contributes a full share to the general result.

Third. The next point concerns preparation of briefs. Much time could be profitably spent upon this subject alone. Undoubtedly the manner of the presentation of an appeal is of tremendous weight in the decision. Rule 22 has wrecked the ambitions of many a worthy lawyer; more than that, it has spelled disaster for litigants without number whose causes were poorly presented in the briefs. The easy way out is to blame the rule and the court which promulgated it. The rule is not fairly subject to criticism. I believe that if a lawyer will carefully study the rule so as to understand it, and then comply with it without repetition or redundancy, and further, if the court will ignore some of the strictures announced in by-gone days, not so remotely in the past, briefs will be better prepared, hence appeals more readily understood and disposed of with more dispatch. Very few briefs fail to betray uneasiness or doubt upon the part of counsel as to what should be said and how it should be said. A case may involve the sole question of contributory negligence, and an instruction given or refused on that point. Now it is sufficient under the rule, and the Supreme Court has so held, to set out instructions and so much of the evidence as will show the propriety of the one tendered or the error in the refusal, but how many briefs stop at this point! Almost invariably a narrative of all the evidence in the case is set out regardless of its remoteness from the point in issue. Thus, a veritable heap of rubbish is piled onto the Court. The place where the relevant evidence is to be separated from the irrelevant, and the latter omitted, is in the preparation of the briefs, but if appellant's counsel fails to do this accurately, appellee has his remedy by corrective suggestions. Attorneys seem too timid to write a brief in this manner, and it must be said that there is foundation for this timidity, because frequently the courts have seized

upon trifling departures from the strict letter of the rule to disregard a point. Briefs are now on file which in the narrative of the evidence recite every adjournment and recess, and even colloquy between counsel. This is inexcusable stupidity.

A rule that requires a complete transcript of the evidence as a part of the record on appeal is archaic and belongs to the "horse-and-buggy" age. We might well consider the Federal rule, and permit the trial court to fix the bill of exceptions in narrative form.[3]

A brief should state succinctly what the controversy is, and how it was decided below. There is a rock upon which so many slip. To state succinctly is no easy task, but upon it may depend the result of the appeal. Justice Stone of the Supreme Court of the United States has said in substance that most of the questions decided by that court are upon questions of fact. The court pretty well knows the law, and its task is merely to apply it to the case in hand. This involves a consideration of the facts. It is important, then, to have the facts properly and clearly stated.

Fourth. The business of the court could be expedited by setting a calendar and calling every case for oral argument. This is done in the Supreme Court of the United States, in the Circuit Courts of Appeal, and in many of the state courts of last resort. It might be well to require counsel to submit a brief of points for oral argument so many days before the argument, and to confine the oral argument to these points. Some students of appellate procedure recommend the hearing of this argument before the briefs are filed, and then confining the briefs to the points on which the court indicates a desire to hear further. In all probability, instead of allowing 2 hours for an argument, the court could hear the average case in less than an hour. There would be no place for extended oratory, but rather a round-table discussion, by which would readily be developed either the fallacy of the appellant's propositions or the error of the court below.[4]

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[3] One case went to the Appellate Court of Indiana and was decided on the propriety of instructions and the sufficiency of evidence where, because of the loss of a shorthand notebook, over half the evidence was embodied in the bill of exceptions in narrative form. It required seven pages, while that part of it which was set out verbatim required nearly a hundred pages. The seven pages got precisely as far, and was exactly as accurate and reliable as the hundred pages.

[4] The New York Court of Appeals sets 8 causes each day and the United States Supreme Court, 10.

Oral arguments greatly clarify contentions. There are but few substantial questions in any appeal. Some attorneys, and this school is not a small one, believe in an omnibus attack, presenting everything trifling, or otherwise, in the hope, as Justice Holmes once said, that something would be made to stick. Others concentrate on points which they can emphasize and, moreover, do not smother up as a few grains of wheat in many bushels of chaff. Moreover, arguments limited to 20 or 30 minutes on a side would be excellent lessons in concentration. It is well-known that the most efficient counsel appearing before the Supreme Court of the United States are usually very brief. One famous member of that court, a few years ago as a practitioner therein successfully presented a very important case in a printed brief of 6 pages, citing 2 cases. Few cases will not lend themselves to a policy on the part of counsel of constantly narrowing the issue: as a case progresses through the courts, they should gradually focus and not scatter.

Fifth. Is there any reason why, in this age of rapid communication and highly efficient mechanism for getting results, an unsuccessful party should be allowed sixty days to apply for a rehearing in a court of review? Yet that is one of our "horse-and-buggy" rules adopted in 1900. This is challenged in the light of the fact, for example, that one is obliged to appeal from an order appointing a receiver within 10 days, and get his transcript on file within that time. Why should one not be able to prepare his petition for rehearing within 10 or 20 days at the outside? He cannot raise new matter; certainly the cause has become narrowly centered upon one, or at most, very few points, and it seems that in the exercise of diligence, one should be able, within a very few days, to make his appeal for rehearing. This situation can be cured by amending Rule 29. This unduly lengthy period is criticized also in the light of Rule 29½ which requires the party opposing a transfer to file his brief within 10 days after the petition to transfer must be filed; 30 days is allowed for a petition to transfer. This is really too long, but why should 60 days be permitted to ask for rehearing?[5]

Sixth. Petitions to transfer must be the bane of the life of some judges of the Supreme Court; others have seemed per-

[5] Illinois allows 15 days to petition for rehearing and 10 days to answer the petition; New York Court of Appeals allows 15 days for the petition. Wisconsin, 40 days to petition and 10 days to answer. The 7th C. C. A. 20 days. The United States Supreme Court, 40 days.

fectly complacent in their presence. Each justice has a transfer docket, and it is understood that the petitions are assigned to the several judges, and called up for conference and disposition when the judge having the particular petition on his docket is prepared to do so. This system greatly tends to delay. It is notorious that petitions pend for 2, 3 and 4 years. As the vast majority of civil appeals go to the Appellate Court, petitions to transfer probably cause the greatest injustice of any feature of appellate practice.

If the court would set one day each month for hearing these petitions orally, the possibilities are that much progress could be made in disposing of them. There are but two questions that can be presented in a petition to transfer, and there should not be great difficulty in reaching a decision. By this method, all petitions would be heard by all the members of the court, thus avoiding the present condition of one judge of the Supreme Court, in all practical effect, passing upon the work of the entire bench or three members of the Appellate Court. Moreover, we would be saved the sorry spectacle that we have witnessed in Indiana, of one judge leaving the Supreme Bench with 49 petitions for transfer upon his desk. It is frequently said that Indiana decisions are one-man opinions. It is admitted that unless a case is argued orally, or is otherwise an exception, it is not considered by the judges except the one writing the opinion until the latter is brought in for consideration in conference. Appellate judges are selected for their collective wisdom, and litigants should enjoy the privilege of having all of the judges thoroughly familiar with each appeal. This is probably true in Indiana where cases are argued orally.[6]

Fifteen minutes of intelligent, carefully prepared and well presented argument ought to be enough in the average case to give the court a pretty accurate idea of the merits of the petition.

We can take a lesson from the work of the Court of Appeals of Ohio. The three judges on the circuit attend at a given time in each county, and hear orally all the appeals arising therein. Of course, briefs are filed, but the discussions are informal and

[6] In the Supreme Court of the United States, it is the practice to agree upon the line of decision immediately after the argument, and then assign the case to a justice for writing the opinion. His opinion is a composite of the judgment of the court, and not one man's ideas submitted to his colleagues for censorship.

usually not unduly extended. Many of the cases, it is said, are decided without leaving the Bench, at least the court is able to announce the character of its decision, and very shortly thereafter render its opinion. The Supreme Court of Ohio usually decides a case which it takes over within 4 months after the Court of Appeals has decided it, and the court is striving to shorten this average to 30 days, and believes it ought to do so.

Without advice as to the present situation in Ohio, it is known that a few years ago when the Supreme Court adjourned for the summer vacation, not a case remained on its docket that had been filed 60 days before. In one case involving a great emergency, the court received the briefs a day after the case had been filed, heard it the third day, and decided it the fourth day. This, of course, is an exceptional case, but no more so than many that are found on the other extreme in Indiana. Who can say that the case decided within 4 days was not correctly decided, or that in the long run, an early decision is not more substantially just than a delayed one?

Reference is repeatedly made to the informal, speedy and withal, satisfactory practice in the English and Canadian Courts of Review. Delay is rare and appeals are usually decided within six weeks after the rendition of judgment below. Who can deny that substantial justice is done in these jurisdictions?

This discussion could be indefinitely prolonged by a citation of authorities in support of the general proposition here advanced, that there is undue delay in appellate procedure, and this is particularly true in Indiana, but the case for remedial action will be concluded with this observation; that the Bar and the courts must be stirred out of what may be deliberately called lethargy into which, by years of routine, we have inadvertently fallen. A radical revision of the rules and practice, and the conduct of counsel in the preparation and presentation of cases on appeal will render a great service to the people of Indiana who are unfortunate enough to be engaged in litigation.