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G. A. Farabaugh
Member, South Bend Bar

Walter R. Arnold
Member, South Bend Bar

THE WHY OF WRITTEN OPINIONS IN THE APPELLATE COURT IN CASES AFFIRMED

An article over the signature of W. W. Thornton, Esq., a veteran of the Indianapolis Bar, appearing in the December issue of the INDIANA LAW JOURNAL, entitled "Written Opinions in Cases Affirmed," has provoked much comment, pro and con, in the profession. A casual canvass would lead one to conclude that the author of the article expresses the sentiments of a very lean minority of the bar by the inveighment against detailed opinions by the Appellate Court in cases where there is no statutory or constitutional duty imposed to render them. True, in part, the author correctly reflects the general sentiment of the bar that many, if not most, of the opinions are inordinately and unnecessarily lengthy to be of maximum utility in the administration of justice; but to reprehend the undue length of opinions is quite different from advocacy of *no opinions at all* in affirmed cases. It is believed that the article in question is based largely on a misconception of the function of written opinions. The ground upon which the constitutional provision for written opinions by the Supreme Court is placed, according to the author, lends strong support to that belief. It is postulated that at the time of the constitutional convention of 1850 there existed

"antagonistic feeling toward our courts. It was then felt they worked too much in the dark, and that their decisions should be set forth in the full light of the day."

Historical support for this premise is lacking.

From the beginning of the sessions of the Supreme Court under the Constitution of 1816, the first session being May 5, 1817, *every* decision of the Supreme Court was accompanied by written opinion, whether affirmance or reversal was the judgment. There was then no constitutional requirement that this be so, and the legislative mandate on the subject was of a nature practically resting the sole determination in the court as to what should, and what should not, carry with it the dignity of a written opinion, as note the following statute:

"The opinions and determinations of said (Supreme) Court shall be in writing, *except in cases and on subjects unimportant in nature,* which opinions and determinations shall be recorded by the clerk, in a book kept for that purpose."[1]

[1] 153 Rev. Laws Ind. 1831 Sec. 23.

The legislature had not provided for the publication of these opinions, and Judge Isaac Blackford, the John Marshall of the Indiana Supreme Court, on his own initiative, brought out the first printed volume of the opinions of the court in November, 1830, covering the first ten years of the court's existence. It will be observed that the first and succeeding volumes of Blackford's Reports contain opinions in a great many more cases than we are accustomed to find reported in any single modern volume of the same size. This is due to the remarkable brevity of some of the opinions. Yet, of none can it be said that it is a *memorandum* opinion. Each determines, and exhibits the determination, of some one or more questions of law.

At the constitutional convention of 1850, the judiciary committee discussions brought out only four points of criticism against the workings of the court under the Constitution of 1816: firstly, under the old Constitution, by virtue whereof the membership of the court was appointive, at least two incompetent judges had been benched for political reasons solely; secondly, the long delay in the rendition of decisions owing to insufficiency of personnel on the bench; thirdly (and these last two points are very pertinent to the subject under survey), the undue delay in publication of written opinions of the court with resultant paucity of precedent to guide the bench and bar of the State; and, fourthly, the failure of the court, in opinions *as published,* to cover the entire case, and all of the points involved which resulted in other cases being brought up for review of questions already decided, *but not published,* in cases precedent. A complement of this criticism was the newspaper comment of the day that Judge Blackford was putting entirely too much time on his reports to the neglect of his official duties; that he was making a large amount of money out of his reports.[2] It was this condition and this criticism that brought about the inclusion in the Constitution of 1851 of the provisions: (a) making the judges elective; (b) permitting an increase in the membership of the court from three to five; (c) that all decisions should be in writing and go to *each question* arising in the record; and (d) that

"The general Assembly shall provide, by law, for the *speedy* publication of the decisions of the Supreme Court made under this constitution; but no judge shall be allowed to report such decisions."

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2 The Supreme Court, 1816-1853, Vol. 1, Courts and Lawyers of Indiana, Monks, pp. 175-246.

History of Indiana, Esarey, 516 et. seq.

It must be borne in mind that at the time of the convention of 1850, there were only seven volumes of Blackford's Reports in publication, and upon those seven volumes the bench and bar of the State had to rely for Indiana common law to determine all cases. The complaint was that there was unwholesome lack of precedent, by which the bar might advise its clients—the bench decide cases coming before it. Reports from other states, excepting Ohio, New York, Massachusetts, Virginia, Illinois and Kentucky, were not easily got by lawyers. Moreover, from the states indicated, the reports did not number over 175 in the aggregate. It was also quite common for a learned member of the bar of that time to have pending before the Supreme Court a case involving some question of law, undecided, so far as published precedents might disclose, particularly involving some statutory or constitutional construction, which, in casual discussion with a brother member of some distant county, he would learn the Supreme Court had determined, but not by written opinion, some three, four or even *ten* years before. This was an exasperating situation, and the lawyers on the judiciary committee of the Convention of 1850 (and with a single exception the committee was recruited entirely from the bar) fostered on these grounds a movement for reform that would eradicate this anomoly.

Now that we are somewhat set right in respect to the historical background of the subject, let us turn to the question of utility and purpose of written opinions, and, in this connection, it is well again to point out that it is from the written opinions that we obtain that vast body of common law without which society, in its present complexity, could not function with orderliness. *In limine* we are led to speculate on how much more difficult it would be to practice law in Indiana today, without the large body of published decisions on cases *affirmed* by the Appellate Court. As demonstrative of the usefulness of opinions in affirmed cases, we hoist Mr. Thornton by his own petard. He bemoans the fact that in the eighty-fourth volume of the Appellate Court reports, 435½ pages are devoted to opinions on affirmance. *Que utile?* Let us examine some of them: Taking the first case affirmed, that of *Payne, Agent, v. Vise,* at page 1. A very important question was settled by this opinion, of general benefit to the public of the state. In *Oleson v. Lake Shore, etc., R. Co.,* 143 Ind. 405, and in *Ft. Wayne, etc., Traction Co. v. Schoeff,* 56 Ind. App. 540, the Supreme and

Appellate Courts, respectively, had laid down rules of law applicable to the subject of contributory negligence (as a matter of law) which threw the profession into considerable confusion in similar cases. By the Payne case, the Appellate Court cleared up this doubt, so far as it could in the circumstances, and left with courts and bar a reasonably intelligible rule to follow in similar cases which occur almost weekly. A rule of law and procedure was laid down on this troublesome subject which has the force and effect of a legislative enactment (at least until the legislature should act), in view of the fact that the Supreme Court denied a petition to transfer the cause. Regardless of what side the decision may hurt most (plaintiff or defendant), has not society in this state reaped plentiful as a result of the clarification laid down by this decision? Should we not continue to have with us the apparently perplexing conflict between *Oleson v. Lake Shore, etc., R. Co., Fort Wayne, etc., Traction Co. v. Schoeff,* and *Indiana Union Traction Co. v. Love,* 180 Ind. 442, to deal with except for this decision? Would not the commonweal be much at disadvantage without this decision?

In the next case in this volume, *Charters v. Citizens Nat'l Bank,* 84 Ind. App. 15, the Appellate Court adds something to the interpretation of Sec. 309 Burns 1926—the tolling provision of the statute of limitations. While not exactly pronouncing a new principle of interpretation or construction, predicated on this statute, it does materially assist the bench and bar of the state to a more specific definition of what constitutes "concealment of a cause of action," within the terms of the statute, so as to operate as a tolling of the limitations. It would be exceedingly poor judgment to have omitted such a decision from the published opinions of the court, were it to order such omission.

The next case affirmed in this volume (*P. H. & F. M. Roots Co. v. Morgan,* 84 Ind. App. 32) is a very apt illustration of a too lengthy opinion. No new question of law was presented, so far as the decision shows, and it should have been disposed of in somewhat the following brief manner:

"This is a suit to determine the rights of the parties with reference to a patent which stood in the name of the appellee. Appellant, by its complaint, averred that appellee had agreed to transfer the patent to appellant, and asked that appellee be required to effect the transfer. Appellee counterclaimed to have his title to the patent quieted as against any claim of appellant. Appellant answered to the counter-claim that even though it be

held that appellant was not entitled to the ownership of the patent, it should be held that appellant was entitled to make use of and sell articles manufactured in accordance with the patent without paying any royalty to appellee. The trial court made a general finding for the appellee on the issues. There is some conflict in the evidence, but sufficient on each point to sustain the finding and judgment. We cannot weigh the evidence.

It is, however, contended by appellant that the court erred in adjudging, (as it did) that while appellant has the right to make non-exclusive use of the patent, it must, to avail itself of that privilege, pay a reasonable royalty to appellee. The court found there was an agreement to that effect. The finding is supported by the evidence. There is nothing for us to do but to affirm the case. Judgment affirmed."

The syllabus to this case is utterly useless as a statement of law. It does not even purport to state any proposition of law. The most that can be gleaned from the body of the decision by way of legal propositions are the following well-settled rules of appellate jurisdiction: (a) The Appellate Court will not weigh conflicting evidence; (b) where the finding and judgment of the trial court is supported by some evidence, the reviewing court will not disturb the judgment.

The Appellate Court held, *In re Boyer,* 65 Ind. App. 408, that a workman on a traveling wheat-threshing outfit was under the protection of the Workmen's Compensation Act notwithstanding Section 9, providing that the act should not apply

"To farm or agricultural employees . . . nor to employers of such persons, unless such employees and their employers file with the Industrial Board their voluntary joint election so to be bound."

In the case of *Dowery v. State,* 84 Ind. App. 37, the appellants' decedent was an employee of the Indiana Girls' School

"whose duties as such employee were limited to work in the operation of the farm, and received an injury as a result of an accident which arose out of and in the course of his employment."

It was held that, notwithstanding the Boyer case, the deceased did not come within the provisions of the act. A distinction is attempted, but here is a glaring instance where an opinion would have been helpful, but for a failure of the opinion to disclose in just what circumstances the deceased met his injury. The written opinion has missed its purpose because *too brief.* Was he threshing grain? Was he cutting corn-fodder? Was he operating a buzz-saw, or what? As the opinion stands, we admit it is of practically no value to the bar of the state in

general, though the Industrial Board doubtless profits by it because it has *the facts* in its files. But whereas this opinion should not have been omitted, it may as well have suffered oblivion because it fails to state sufficient facts to be of value in the application of the law. An addition of three or four words may have sufficed to transmute this case from an unwarranted preemption of space to a valuable rule of law.

American Mills Company v. Fifer, Treas., 84 Ind. App. 41, is the next case in this volume affirmed. It is not a decision which we would see omitted, but it could well be cut down to twenty or thirty lines of opinion and not consume, as it does, three and a quarter pages.

Enough illustrations have been given of the contents of this volume (placed on exhibition by Mr. Thornton as an evil example) to demonstrate the fallacy of his contention. It would not be, however, inappropos to touch on the underlying reasons of written opinions in *all* cases. To begin with, the rights of the inhabitants of this, as of every other state in the Union, are determined (either *in* or *ex foro*) *five* times by precedent (whether on affirmed or reversed decision) of the courts of last resort, where they are determined *once* by statute. And if the common law of written opinions be extended to statutory interpretation, construction and application, the ratio would be easily doubled in favor of the common law. What a chaos would ensue but for written judicial opinions! What determination to come to with the indefiniteness of, say, the Code Napoleon and its problematical construction upon which to wager a great enterprise or undertaking in the sea of incertitude!

We are more than a little impatient with the judge who employs sixty pages to write an opinion which six should suffice to cover. We are equally impatient with the court which, through mental inertia, will dispose of a case in six lines when it should have written six pages—the court which will pertly say, "Affirmed on the decision of *Holland v. Hummell,* 43 Ind. App. 358," when, as a matter of law, the appellant has duly presented *ten* important and novel questions of general interest to every member of the bar in the state, not one of which is remotely involved or touched upon in *Holland v. Hummell.* We are likewise impatient with the lawyers (usually those who do little Appellate Court practice) who would compress all the common law into three convenient volumes with an elaborate index, not realizing that it would take three thousand volumes to make

proper application of the excerpts so that they may become a moving force—a vital guide, a source of declaration of right and wrong assimilable by the body politic. Against these considerations, how inconsequential does it strike one when complaint is made that so many opinions entail more work and more expense in outlay for the tools with which to carry on the work. Galileo with his crude (but simple) telescope in the seventeenth century discovered the four satellites of Jupiter, but Pettit at Mount Wilson could only determine the fluctuations in the amount of ultra-violet radiation emitted by the sun through the medium of complicated apparatus costing hundreds of thousands of dollars, but would it be seemly in the modern astronomer to decry the expense that intermediate discoveries and invention has placed on twentieth century researches in the profession of astronomy? Is greater certainty in astronomy more important than more certitude in the administration of justice?

So far as we have been dealing with the utility—the value—the indispensability, of the written opinion on the public welfare. The welfare and contentment of the *individual* litigant and his advocate should bear some consideration, not as respects the *publication* of the opinion, so much as its actual *rendition.*

Can a more plausible ground for disgruntlement of the advocate with our reviewing courts be pointed to than the all too frequent practice of a case affirmed against him without opinion, after he has laboriously worked up an appeal on six or seven profoundly interesting questions of law, vitally affecting the rights of his client? Yet, it is safe to say, such an event happens almost every time the Appellate Court affirms a case without opinion. Unquestionably occasion occurs where the decision is affirmed without opinion because no question is properly preserved or presented by the record. But, how easily and speedily could that be stated in the opinion, briefly pointing out in what respect the appellant has failed to preserve or present his question? The physical exertion, or the space involved, in so setting forth the fact, would be negligible. Judges of our courts of review who have been reproached with this matter often dismiss the subject by somewhat the following justification:

"Frequently there are presented to us records so inartificially prepared that there has been neither preservation of nor proper presentation of *any* question at all. A decision pointing out such infirmity in the record could

only humiliate the attorney for the appellant in the eyes of his client and colleagues. In order to spare his feelings, we render a *per curiam* memorandum opinion. Of course, we expect the attorney to advise his client that the Appellate Court affirmed the case for purely political reasons or reasons of friendship, without opinion, because of trepidation to make public the lame logic to which resort must be had to write up the facts and affirm thereon."

We believe it is high time for this sort of charity to cease. If a member of the bar is so unskillful that he cannot properly conduct a case in the court of appeal, his feelings should not be consulted in making that fact public. Point it out to him, and to all the bar, to the end that, (a) the lawyer will not again repeat the error; and (b) that other members of the bar may be fore-armed against commission of the same mistake. Suppose the multitude of principles of law under the heading "Appeal and Error"—mostly enounced in *affirmed* cases—were not available to the bar because the court of appeal desired to spare the feelings of the appellants' counsel. Could even the most seasoned practitioner average more than an "affirmance *per curiam*"? The mistakes and errors made by others, in bringing a case to the reviewing court, enables the bar generally to avoid them by the landmarks of precedent. Furthermore, it is less humiliating for the attorney to advise his client, when reading the opinion pointing out the failure of preservation or presentation of his appeal, that the case was affirmed on a technicality (which the client little understands) than to be forced to the admission that he erroneously advised his client on a point of law.

No, *not more,* but *less per curiam* memoranda affirmances is what the bench *nisi* and the bar asks of the Appellate Court. More decisions on *all* points of law presented. Less complexity and marathon lengthy opinions; more *conciseness* and *completeness,* by all means. Six or seven pages covering inconsequential recitals of the pleadings, when six or seven lines would suffice to bring in bold and uncomplicated relief the questions at issue —be they of practice or of substance—would be welcome. More of the brevity of Blackford's Reports, *vide* the first volume, as in *Durham v. State,* p. 33, 1½ pages; *Bond v. Patterson,* p. 34, 1½ pages; *Blackford v. Peltier,* p. 36, 1 page; *Morris v. State,* 1 page; *Sturgeon v.. State,* ½ page; *Dougherty v. Campbell,* 1 page;; *Crenshaw v. Bullitt,* 1¼ pages; *Connor v. President,* 3 pages; *Jones v. Cooprider,* 2 pages. The decision in the first

volume of Blackford which extends over 3 pages is the exception; the rule is 1 and 1½ pages. Every opinion, it appears, fully decides the points presented. It adds to the body of the law. Give us *more such* decisions, less memoranda affirmances.

G. A. FARABAUGH,
WALTER R. ARNOLD.

Of the South Bend Bar.