Detail Work of the New York Court of Appeals

An Address Before the Phi Delta Phi Association of New York

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"The Courts would make no progress at all if we were bound to follow blindly every decision of the past."

I HAVE been asked to talk about the work in the Court of Appeals, particularly that part which relates to the preparation and argument of cases before the court. The request is taken by me to be in the nature of a command, for it surely is the duty of every judge, on a fitting and proper occasion, to account to members of the profession for the work of his court.

However, in these days of many investigations the Socratic method has supplanted the speech, address and oration, and I feel as if more benefit would be derived should you question me regarding the work and the things you would like to know. Every active practitioner is more or less an inquisitor. Frequently some lawyer will say to me. "How did your court ever come to decide the way you did in the case of *Smith v. Jones*?" And it has been my pleasure to try and furnish some enlightenment. In fact, some time ago I stated in an address at the New York City Bar Association that as the Court of Appeals of this State deals solely with questions of law, it was the privilege of any lawyer who had argued a case in the court to ask me or my associates the reasons for our decision, in case they did not fully appear in the opinion. Somewhat to my surprise the invitation was readily accepted and the following week I had six or seven lawyers in my chambers making this inquiry about their cases. Naturally the decision had gone against them and yet I am certain that they were fully satisfied when they appreciated how fully and completely all their points had been considered. While it is the duty of an attorney to press every available point in favor of his client, be realizes at the same time, the weak spots in his case. Only the fanatic sees but one side of a proposition. Experience in law, as in life, teaches us that there are many aspects to most questions.

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Perhaps, however, before answering such questions as you desire to ask, it may be well to say one or two things regarding the court itself and our method of work. Once in a while I experience a shock when some leading member of the New York City Bar asks me if I do not get a chance to play golf in Albany. How little such an one knows the traditions of the Court of Appeals.

The work today is done in the same way it was seventeen years ago, when I first went there and as it had been done many years before that. We sit from two to six in the afternoon to hear oral argument, having on the average five to seven cases on the calendar a day. Within a day or two after argument the case is taken up in consultation. Every morning from half-past nine until one we sit in consultation taking up every case in its numerical order, that is, the order of argument in open court. These consultations are as formal as the court hearings, no one of us being permitted to interrupt a judge while he is making his report upon the case. Cases are not assigned by the Chief Judge, as in the Supreme Court of the United States. The first case at the opening of the Fall session goes to the Chief Judge and then they fall to each judge in the order of seniority, so that every man is thus obliged to do his full share of the work. When a judge is reporting on the case which has fallen to him. two stenographers take down everything that is said, which is supposed to be a complete presentation of every point. Many times the report covers points not thought of by the lawyers in the case. After the judge has made his formal report it then passes on to the next judge on the left and so around through all of seven. Every judge is expected to have studied the questions and to be ready to express his reasons for affirmance, reversal or modification. There is naturally a pride among all the judges to hold up their end of the work and to be of aid and assistance to their associates in solving knotty problems. A shirker has no place in such a court. Be would be very uncomfortable, because there is no opportunity to bluff. We have all studied the same thing and can readily tell whether a judge knows what he is talking about.

Now, what does this daily consultation mean? How is it possible to take up in consultation the cases which have just been argued, at the latest, within a day of two? The oral argument in court helps some, but I have never known a case to be decided upon the merits of the oral argument. Neither have I known of any case being reported by a judge in consultation in a loose or informal method, such, for instance, as saying, "You have just heard this case argued and are quite familiar with it." No indeed, the traditions of the court permit no such off-hand disposition. A judge reporting on the case begins as if no one of us had ever heard of it before. More thorough indeed is he than have been the lawyers in their oral argument.

The time in which to get ready for these consultations. which constitute the very heart of the work of the Court of Appeals, is that time which we have between six o'clock at night, when the court adjourns, and until half-past nine the next morning. This means, of course, that all the judges work at night as late as possible and are in the courthouse every morning, as a rule, by eight o'clock. For the first ten years that I was in the court it was the implied understanding that no judge should have any social engagements in the evening, with the exception possibly of Thursday night, as the court met on Friday morning, sitting from ten to two, making the consultation session in the afternoon much shorter than other days.

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The Court of Appeals is a work-shop and no man would be happy there who did not find his chief enjoyment and satisfaction in the work. It takes some time for one to break into this routine, but, like everything else, when once the habit is formed, the judge does not find it so hard, after all. What the Court of Appeals would do under the N. R. A. and the standard hours of work is beyond me. I can say without exaggeration, choosing well my words, that I have known some judges of my court to have worked day in and day out from eight o'clock in the morning until ten or eleven at night, time being taken out for meals only.

What I have here stated applies to the sessions of the court. We have Saturdays and Sundays for reviewing the work more leisurely and the recesses in which to write our opinions at home or in our chambers at home. I do not want you to get the impression, however, that every case is decided within a day or two after argument. This, you know, would be impossible. I may say that the vast majority of cases are so disposed of, but the harder ones needing further study and reflection are passed on from day to day or week to week until the judges are ready to make a decision. Some cases have been held as long as four or five months, but I think you will bear me out—at least those of you familiar with our work—that as a rule our decisions are handed down within two to four weeks after argument.

A very learned and able lawyer was once arguing a case in the Court of Appeals. After listening patiently for nearly an hour without interruption, the Chief Judge turned to his opponent and said, "Would you mind telling us what this case is about?" Not one of us had been able to gather the facts of the case from the appellant's counsel. Now this is due in part to the over-emphasis which is placed upon the decisions and upon the law, by the training of our young men in the law schools, and of their brief-writing in the offices. Many a man will begin to talk about the cases and the mistakes in the rulings of the lower court and the distinction to be drawn in the decisions without having said one word about the facts of the case he was arguing. Many a brief I have read with perplexity and doubt to find the seventh or eighth point headed, "Now we come to the facts."

One reason why newspaper reporters and those trained in journalism have generally made such good lawyers and judges is because of their ability to state the facts, paint the picture, make others see what they have seen, to pick out the material and vital point, leaving something to the imagination. A man who has to write for his bread and butter or address a jury, as did Lord Erskine, to get the weekly rent, very soon makes others understand what he has to say. Would that the lawyers who appear in my court had some such training. Eloquence. fire, vigor, learning, decisions never have the importance of a single, vital fact. Disraeli once said : "Events are terrible things." Events are facts, and they play havoc with the fine law brief of many a learned lawyer. "Give us briefly and clearly the facts," should be the words ringing in the ears of every advocate appearing before an appellate court This sounds easy but try it, see how clearly and concisely you can state the events of a single day or the items of a single incident without interpolating or wandering or digressing into immaterial matters. Lord MacMillan, in his address before the American Bar Association in Chicago, "Law and Letters," in 1930, closed his address with these words: "Clear thinking always means clear writing, and clear writing is always good writing." Mind you, I do not mean that the facts should be elaborated upon or given in too much detail—I do mean that the facts of the case should be thoroughly studied and digested and then boiled down to a clear and concise statement or outline of the matter in hand.

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This gathering of such a large number of leading lawyers at our bar gives me the opportunity of saying one other thing which am sure needs some attention. I have reference to the overweight and importance which is given to some particular authority or decision. We have carried the doctrine of *stare decisis* entirely too far in this country and it is time we came back to fundamental principles. The courts would make no progress at all if we were bound to follow blindly every decision of the past.

If I speak in the highest terms of the work of my court, it is not self-praise, as I am merely part of the system which was established by other men long since passed on. The desire for care, thoroughness, learning and expedition is really a tradition of the court. The Court of Appeals does not consist of the courthouse and the seven men who for the time being happen to be sitting judges; it is the spirit which has animated the court from its earliest day, and the devotion which great jurists have given to its work, setting a standard which every man who enters that court aims to maintain.

Now let me say a word regarding the work before the court by the lawyer. Realizing the way in which the judges do their work, you at once see how important it is that oral argument should present a clear statement of the case and of the points to be decided. Oral argument in my court is always desirable. "We like to see and hear the lawyers—that is, most of them. But I wish I could impress upon the profession the importance of a clear statement of the facts of the case. It is surprising how few lawyers are able to think clearly and talk plainly. Many are the learned men of rank and standing in the profession who are unable to state in sequence the simplest facts of the case. To tell the story of what happened is either beneath them or beyond them, and yet this is the principal part of oral argument. We are not attempting in this age to settle the law finally and forever. The chief aim of the judiciary is to settle litigation, to decide satisfactorily the difficulties between people or communities or states, to do something practical in the aid of governing this vast society of individuals.

Law has little merit as law, in and of itself. It is a rule of action, with the emphasis upon *action*, governing the living, not praising the dead. It must be something that works here today and, if possible, for the future. The past can take care of itself. Therefore, the court wants to know just what the trouble is, what has gone wrong, where the mistake lies. I am quite convinced that the ability to point these things out clearly is an art, a gift born with a man, and, for the acquirement of which, education does very little.

The Chief Justice of England, Lord Hewart, told me that in the Court of Appeals over which he presided, the court decided the case immediately after argument. On the presentation there is never a dispute about the facts. Any barrister who misrepresented or overstated a fact would never appear in the court again. As for the law, so careful was the barrister in citing it that the books were sent for and the decision consulted during argument. All of this, however, as I told him, was the result of their barrister system—men set apart and trained solely for the work of arguing cases in court for a fee paid by a solicitor, never by a client. Here in this country any attorney may appear in court with the result that, however able in other fields, few have the art of speech or presentation.

What we mean by *stare decisis* is to follow the few fundamental principles of the law to which we should give both our allegiance and by which all courts should be bound. But we know that courts are not bound by any rule of *stare decisis* to follow prior decisions which have proved unworkable or inappropriate for changed conditions. We know what Chief Justice Taney did in the case of *The Genesee Chief v. Fitzhugh*, 12 How. 443, regarding the admiralty jurisdiction of the Federal Courts. Following the English rule, the admiralty jurisdiction, prior to 1850, was limited to the waters where the tide ebbed and flowed. When we acquired the territory with

the long rivers and the Great Lakes, such a rule became unworkable, inappropriate, and, with a mere scratch of the pen, Chief Justice Taney and his associates extended the jurisdiction to all navigable waters. Recently, that is, within the last year or two, the United States Supreme Court has taken the same stand regarding the taxation of intangibles, and the doctrine of what is interstate commerce as applicable to injured workmen. Previous decisions were frankly and openly overruled as unworkable or erroneous.

I heard a lawyer in my court apologize for not being able to cite an authority in point, saying that he had hunted for weeks and months through all the digests and textbooks in vain. I felt like saying, "Well, I know of nothing in the law which prevents you from thinking for yourself." The approach to every case, of course, is to read the authorities upon the points and follow them if they have established a rule of property to which the people have adhered for a long time. But there is a vast field in which the law must be more or less experimental, conforming to experience and the needs of the time. Life changes, which calls for acts of Legislature and of Congress to remedy new evils and adjust new rights.

There is the other field, in which the courts must also modify or overrule decisions which have served their day and generation. The rule of *stare decisis* must never degenerate to a blind worship of the past or a final determination that a case is right simply because it is printed in big letters in a book. We must still be free to test the application of the fundamental principles and not shirk this duty because it is easier to follow some decision which has already been made.

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Let me also mention that too often a decision, even of my own court, is taken for more than it really attempts to decide. The opinion is picked to pieces and a sentence here or a sentence there is sought to be adopted as a rule for another case. Opinions are written somewhat in the nature of arguments,—to convince or to state the reasons for the decision. The point—and the single point—upon the facts presented in that case, is the only thing decided as an authority for the future. Much that is said in opinions may be disregarded because seldom, if ever, are the facts in any two cases identical. Here again I emphasize that it is the fundamental principles of the law which are the mainstays.

When I first went into the Court of Appeals in 1917, Judge Vann of Syracuse, who had recently retired, asked me how I found the work. Under the drive which I have heretofore described I was somewhat overpowered and swamped with the mass of material I had to read and digest. His words to me were these: "Judge, there are a few great fundamental principles of the law. Never be abashed or frightened when they come up to you clothed in different garments"—meaning, of course, surrounded by different facts.

So, too, let me refer you to the words of Mr. Justice Brandeis, in *Burnet v. The Colorado Oil — Gas Co.*, 285 U. S. 405. "The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided."

The force of opinions was very early limited by Chancellor Lansing, in *Hallett v. Peyton*, Caines Cases I, p. 38. The decision was by the court of Errors and Appeals, a predecessor of the Court of Appeals. He said, "The general reasoning resorted to in the decision of cases, is sometimes calculated to mislead; but whenever it becomes necessary to examine them as authority, it must be rigidly restrained to the existing case."

A word in closing regarding the jurisdiction of our court. This is a perplexing question at all times, both to the court and to the Bar. "What is a final judgment," has received various interpretations. We are limited to reviewing final judgments in actions and final orders in special proceedings. An order may be final without being in a special proceeding, and a judgment may be final in part, and interlocutory in part. When a verdict is set aside and a new trial granted, a reversal of the order by the Appellate Division and a reinstatement of the verdict amounts to a unanimous affirmance, so that leave must be obtained to appeal to the Court of Appeals. Not so if the judge in setting aside the verdict had dismissed the complaint. The reversal by the Appellate Division would then have entitled the appellant to go to the Court of Appeals as a matter of right. These distinctions and many others indicate the perplexities which confront the trial lawyer regarding our jurisdiction. Only occasionally do lawyers have cases in our court, and I desire to say to you that, if perplexed regarding questions of jurisdiction, I and my associates—I think I am justified in speaking for them—are perfectly willing to have you consult us. If we can answer your questions we will do so. Sometimes we cannot answer them ourselves without consultation and deliberation but, if we can, any one of us will gladly help and assist you in this matter.

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