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John T. Loughran
Associate Judge of the Court of Appeals of the State of New York

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THE ARGUMENT OF AN APPEAL IN THE COURT OF APPEALS

JOHN T. LOUGHRAN†

I WANT to begin with a word or two about the admirably happy discourse upon the present topic that was presented two years ago in this room. You cannot have forgotten the picture of the fisherman to which I owe the part I shall now attempt to perform. On the theory that such an argument is a conscious and deliberate angling for the judicial mind, you were asked to fancy certain advantages that might ensue "if the fish himself could be induced to give his views on the most effective methods of approach."[1]

As I play this part of the fish in the picture, I take for granted your understanding that I speak for myself alone, and only from my own point of view, and that, in the nature of things, there is no judicial dogma on this subject. With your leave, then, I shall candidly do my best to turn the picture 'round and let you look at it from the back. As a preliminary, something must be said respecting methods of the work of appellate tribunals in general.

A few years ago, I was told by an Australian judge that an appeal in his court was argued in this fashion: After the facts were stated, counsel on either side was permitted to cite three cases and no more in support of each of his points. The reports of these cases were then and there examined on the bench, after which all hands discussed the issues in

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† Associate Judge of the Court of Appeals of the State of New York.

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1. Davis, *The Argument of an Appeal* (1940) 26 A. B. A. J. 895; a lecture delivered by John W. Davis, before the Association of the Bar of the City of New York, October 22, 1940: "And in the second place a discourse on the argument of an appeal would come with superior force from a Judge who is in his judicial person the target and the trier of the argument than from a random archer like myself. Or, supposing fishes had the gift of speech, who would listen to a fisherman's weary discourse on fly-casting . . . and all the other tiresome stuff that fishermen talk about, if the fish himself could be induced to give his views on the most effective methods of approach. For after all it is the fish that the angler is after and all his recondite learning is but the hopeful means to that end."

the light of the cited authorities until a decision was reached. Such an oral analysis of all the difficulties would probably be generally accepted as the perfect method of arguing any appeal. My Australian friend, however, told me also that so detailed a dissection often took two days or more to do, and that consequently the process was almost too much, even for a tribunal which heard but fifteen appeals at a session of four weeks.

Of course, no routine of that extended order would be possible in our affairs. During the eight years I have been in our Court, six hundred or more appeals have been disposed of every year. Sometimes we take in as many as a dozen cases on the order calendar in one afternoon. The weekly grist runs on the average anywhere between twenty-five and forty cases. The conditions of our work were once described by Chief Judge Crane with characteristic directness. I borrow from him these words:

"The majority of us dine together every day of the session. Every Tuesday, Wednesday and Thursday we are in consultation from half-past nine in the morning until one, followed by the court session from two until six. In the evening, it has been customary for members of the court to work in their chambers in the courthouse until late at night. . . . By tradition the consultations of the court are an outstanding feature of main importance to the work. They are quite formal. The judge to whom a case has fallen is expected to report fully upon all questions involved, and while making his report it is the duty of the Chief Judge to see that he is not interrupted, no matter how long he may take. When he is through, the matter then passes to the next associate in rank who is accorded like treatment."[2]

In his lectures on the Supreme Court of the United States, Chief Justice Hughes sets forth the different practice employed in that tribunal. He says:

"At the conference, it is the practice for the Chief Justice, unless he desires otherwise, to be the first to state his opinion with respect to the case to be decided; he gives his opinion first and votes last. After a decision has been reached, the Chief Justice assigns the case for opinion to one of the members of the Court that is, of course, to one of the majority, if there is a division and the Chief Justice is a member of the majority. If he is in a minority, the senior Associate Justice in the majority assigns the case for opinion."[3]

As to whether either of these divisions of labor is superior to the other, I shall have nothing to say. My point about the matter is simply

2. Minute of the Court of Appeals, 278 N. Y. V, VI (1938).
3. HUGHES, THE SUPREME COURT OF THE UNITED STATES (1928) 58-59.

this: There is nothing in the idea that a case in the Court of Appeals is likely to fall to one judge rather than to another merely because of the nature of the controversy. The assignment of cases among its judges does not depend at all on any supposed expertness of some member of the bench in a given field, common as the contrary impression may have been. The medium of assignment, as Judge Crane said, is an affair of rotation and nothing else.

But whatever the merits of either of the practices described, there has been in some appellate courts another practice which has been roundly condemned—that is to say, the practice of assigning a record on appeal to one judge to write an opinion without previous consultation by the whole court. "This course," said Judge John F. Dillon, "ought to be forbidden, peremptorily forbidden by statute."[4] There is no such practice in the Court of Appeals. On the contrary, every appeal—and every motion for that matter—is in the first instance freely and openly discussed in the conferences of the court until all are satisfied. Except in emergencies, our opinions are written and circulated among us when the court is in recess. During a recess we also exchange written reports upon all cases that were left undecided at the end of the conferences of the last session. These opinions and reports are the first things taken up for discussion at the start of the following session and are then voted upon. There will also be at that time a number of motions to be got out of the way before the current calendar becomes the order of the day in our conferences. Meantime, the oral arguments have been going on each afternoon in the court room with the result that the first case argued at any session does not come up at the consultation table earlier than the following week. Moreover, this gap constantly widens as the session runs along, for in the conference debates—as Judge Crane put it—"every man is afforded full opportunity for self-expression and the indulgence of his own peculiar method of approach or attack."[5]

The bearing of all this upon questions as to the effectiveness of any argument, oral or written, cannot be left out of account, if the advocate would in imagination change places with the court, as I assume he has already been persuaded to do by a cardinal rule of his own. With so great a volume of work to be done in time so limited, it must be clear that the judges approach every case with a strong feeling of the necessity for prompt and exact grasp of the issues to be determined at the consultation table. Note this one point, if no other: the chief end—nay,

4. DILLON, THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA (1895) 192.
5. Minute of the Court of Appeals, 278 N. Y. V, VI (1938).

the sole end—of every argument of counsel is to equip the judges for the work of their conferences.

Next I take this question: Do the judges ordinarily look into a case in advance of the oral argument? At the beginning of my apprenticeship eight years ago, the kindly gentleman who at that time was clerk of the court tried to convince me of the benefits of getting a head start by examining over the summer the records and briefs in the cases that were filed for the autumn session. Laudable as that advice may have been, it was not suited to me. You may decide for yourselves upon the validity of my reasons, which were these: It must be to any advocate a disenchanting thing to have to work out the pattern of his oral argument before an auditor who gives evidence of having already gone below the surface of the thing for himself. Again, such antecedent diligence of an auditor might make it necessary that some pre-acquired notions be rubbed out of his mind before anything else could well be put in, inasmuch as nothing is more important to the average man than his own little discoveries. Go back for a moment at this point, if you will, to the figure of the angler and consider his trouble in this last predicament. See how he is now forced to follow, not only his own purpose, but also some unanticipated notions of the fish as well. Behold the change in his ordered plan, as, in a single cast, he now launches two or even three flies instead of one. I pass to another question.

Can anybody read all the records in so many cases within the available time? The whole record is read scrupulously in cases of murder in the first degree, and usually when there is exercise of the jurisdiction to review new findings of the Appellate Division. In many other situations a great part of the record is nothing to the purpose. One or two commonplace examples will be enough to make this sufficiently plain. You would probably be surprised to find how many are the negligence cases in which the story of the accident will be but a minor fraction of a record which bulks big in medical expert testimony and other items of proof of damage which are no longer in the case, since the facts have now been finally determined. So the mass of a record in a condemnation proceeding may at this last stage present no more than the single question whether the correct measure of damage was applied.

But however many the cases in which the review may thus be limited —whether the pages to be read are few or many—a judge must at all events bring with him to the conference an accurate and ready knowledge of all matters of fact that are relevant to the points open to discussion. If he is industrious, he will, perforce, gather technique and perhaps wisdom in this indispensable business of getting into and out

of a record. Be that as it may, every word of an argument which helps him on his way in that direction will fall pleasantly on his ears. Hence the primary importance to the court that the advocate have sure knowledge of every nook and corner of his record. It sometimes happens that a judge will disclose some misapprehension respecting the facts you have stated. Be ready then with chapter and verse to put him back on the track—for his own good, I mean—and to your profit also, because you may lose much of his interest should you fail him in such a moment. I pass now to something of almost equal importance.

The main facts are the pivot on which most cases turn, and it is not in the power of man to state them too clearly. Unless the appeal is before the court by its own leave, the judges will probably know very little about the controversy before the argument begins. Let the main facts be adequately brought forward and they will vitalize the whole discussion as it proceeds thereafter. Let the main facts be clouded by a slipshod statement of them and the rest of the argument is as good as lost. In truth, it is a personal confession that the charm of a lucid fact presentation seems one of the best arguments of all.

I have been speaking of the statement of the facts themselves; the argument of questions of fact is quite a different thing. You often hear it said from the bench that the court will not hear extended discussion of questions of fact. I have already given you the reason: the work at the consultation table is always a week or more behind the arguments of counsel. During this hiatus, usually twenty-five or more other cases have been argued and inevitably the subtleties of the oral argumentation of a case a week old will, to a great extent, have been forgotten. This is the reason why the court calls out, "Give us the high-lights," when for example, the argument is whether there is any evidence to support a finding of fact. The record alone can in that instance supply the answer and whether or not that record constitutes any evidence is a matter of individual interpretation. Yet it is remarkable how frequently the time and attention of the court are taken up by lengthy arguments on this very point, which always involves on one side the proving of a negative. The development of such arguments, as I believe, is more wisely made the office of the printed brief.

And now what of questions from the bench during argument? Not so long ago, Lord Justice Atkin of England delivered himself on this subject in forthright fashion:

"There are times in our courts when it is rather difficult to know whether the argument is proceeding or whether the Court is delivering a series of interlocutory judgments. I remember one case, when I was a junior at the Bar,

which excited great interest, a case as to whether you could obtain an interlocutory injunction against an alleged libel. The Court sat, and, the argument having proceeded all day, about a quarter to four the presiding judge said to counsel: 'I suppose, Mr. Cozens-Hardy you have about concluded your argument?' He said, 'My Lord, I have not begun yet. The Court has taken the whole time.' "[6]

This seems to me to go to the heart of the problem. Questions from the bench are well enough so long as the oral argument is not too much disturbed. In my personal opinion, such questions should be directed solely to the speedy and precise exposition of the thing to be decided.

A moment ago I remarked that nothing was more important to the average man than his own little discoveries. Now judges are average men and, if in the course of your argument there should occur to one of them some theory which would do you no good, it is better you should know it through a question from him than that it should remain a masked battery for your possible undoing. When you are faced by such an unexpected question, it is far more to the judge's satisfaction either that you meet it head-on or frankly concede your present unreadiness to answer. In the latter case, do not hesitate to ask for time for the submission of some further memorandum; never risk the weakening of a well-constructed argument by attempting an out of hand response to a question raising an undigested difficulty.

Tonight I have said a good deal about oral argument and the thought may arise whether an exhaustive brief really requires the aid of oral presentation. Again the answer must be a personal one. I know that I experience a feeling of distinct disappointment when on the call of a case that falls to me, I hear the clerk say, "Submitted". When the briefs in a submitted case are picked up at the end of a day that has told heavily they are dead things. Under those circumstances, it is hard for a judge not to feel a diminution of his ardor. The printed word of the ablest advocate, to me at least, falls far short of the same arguments when heard face to face through his living voice.

The phrasing of my feeling in this aspect is difficult; but you may take my word for it, oral address may breed an intimacy between advocate and judge that can never come out of a printed page. Even an expression lacking in grace and of no great profundity often conveys a hidden appeal to the feelings of the court. I shall not easily forget the counsel who, just before our tired closing hour, half-complainingly but with grave earnestness said this: "Now, your Honors, before I sit down,

6. Atkin, *Appeal in English Law* (1927) 3 CAMB. L. J. 1, 8-9.

I want to say a word about a brief that has been filed against us by an *amicus curiae*. I have to talk about that brief because, if the man who wrote it is a friend of this court, he certainly is no friend of mine." He instantly had the attention of the whole court.

I remember another who argued an appeal in a capital case. Every transition of his thought was introduced by the phrase, "Now, gentlemen, I expect to show". After he had repeated this phrase a dozen times, he pulled himself up and humbly said to the court: "I beg your Honors' pardon. This is my first time in this court. You see I am used to talking to juries." Chief Judge Crane thereupon broke in: "Why did you tell us that? We would never have known you were not here before. You talk like an old-timer, and, if you want to call us gentlemen, it's all right with us. I hope we are." After that lawyer had concluded, the Chief Judge said to him: "When you come here again may you be fortunate enough to make as good an argument as you did today; and the best part of it is that you were yourself."

Simple incidents like these, and all I have said before, are meant to convey the truth that the advocate is indeed at all times the instructor of the court. Professor James Bradley Thayer, in the prefatory note to his Cases on Evidence, said, and on this note I close: "In law, as in other things, every teacher has his own methods, determined by his personal gifts or lack of them,—methods as incommunicable as his temperament, his looks or his manners." On that basis, I give you as a final word this blunt but kindly admonition of Chief Judge Pound to a young lawyer on his first appearance in our Court: "Don't forget that you are talking to seven ordinary men like yourself."