PROCEEDINGS

OF THE

FOURTH ANNUAL MEETING

OF THE

Kentucky State Bar Association

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The motion was duly carried.

THE PRESIDENT: The next order of exercises is an address by Chief Justice J. P. Hobson on "Appellate Proceedings." I take pleasure in introducing to you Judge Hobson—perhaps some of you have heard of him, or read some of his opinions. [Laughter.]

JUDGE HOBSON'S ADDRESS.

JUDGE HOBSON: It gives me great pleasure to be with you this evening. Our Kentucky State motto, "United we stand, divided we fall," applies to nobody with more force than to the bench and the bar. We are united in the effort to administer justice. It is an old saying that the judges must play the hands that the lawyers deal out to them, and therefore you will understand that the judges are very largely dependent upon the lawyers, however good their intentions may otherwise be. Of course, all of you perhaps know a great many things that I am going to say about appellate proceedings, but all of you, I have no doubt, will endorse one thing about them, and that is that they are rather slow, and that if anything can be done that shall expedite appellate proceedings, it will be a step in the right direction. There is wisdom in common experience; so in preparing this paper for this evening, I undertook to inform myself, as well as I could, on what the practice is on different points in the other States of the Union, on the idea that there are forty-four States in the Union, each with a separate system of appellate courts and appellate proceedings, and that we might from the experience of the other courts find something that would be helpful to us. Now, it is not the purpose of the paper which I have prepared to make suggestions, but only to lay before you the information that I have gathered from these sources, and also to tell you in a few plain words just how your business is done in the Court of

Appeals, and the exact condition of that business. I always prefer to speak without a paper, but I shall have to read this paper to you:

APPELLATE PROCEEDINGS.

Appellate proceedings are as old as civilization, but appellate proceedings, as we know them, are the product of modern thought and legislation. We read in the Bible that when Moses had brought the Jews out of Egypt, 1,400 years before Christ, he chose out discreet men to hear the disputes arising between the people and only the weightier matters were brought before him. In Egypt the administration of justice was an attribute of sovereignty, and this notion appears to have obtained in all ancient nations. There was no separation of executive and judicial functions and certain officers named by the sovereign exercised both. Appeals were in the most simple form. Thus we read of appealing from Philip drunk to Philip sober and the appeal of Paul from Festus to Caesar. In the Roman law, as among the Greeks, the sovereign assumed to himself all final appeals from judicial judgments. When the Roman Empire went to pieces before the barbarians, disputes among our Saxon ancestors were determined by a jury of the neighbors who knew the parties and were more or less cognizant of the facts. The defeated party might then appeal to mortal combat on the idea that the God of Battles would decide for the right. When the authority of the tribal chief ripened into that of the king, appeals were made to him and were heard by him in a very summary and rude fashion. In time the king followed Moses' precedent and appointed discreet men to hear these complaints. The king heard suitors in open court, and so when these officers sat they were said to be holding court for the king, and their sessions became known as the court of our lord, the King. For convenience, the judges held court at different places and so this ripened into circuits, the more important matters being

reserved for all the judges when they got together on their return from the circuits; and from this custom of the judges grew the modern system of appeals, which was matured in France at the time of the Revolution in the latter part of the eighteenth century, and was subsequently adopted in other continental nations. In England there were the Court of the King's Bench, the Court of Common Pleas, and the Court of Exchequer, under a statute passed early in the reign of Victoria, each consisting of a chief justice and four judges, and an appeal from either one of these courts might be taken to the Court of Exchequer Chamber, which consisted of all fifteen of the judges; but the five judges from whose court the case came did not sit in it.

The system obtaining in the United States was patterned after that in force in the mother country. So far was this carried that even in the United States Supreme Court the judges were each assigned to a circuit to hear cases like the common law judges, and this is continued even to the present time. But with the growth of population and wealth and the consequent increase of litigation as society became more complex, the necessities of the case led in all of the States, or in nearly all of them, to the creation of a separate body of magistrates to review the decisions of the circuit courts. The procedure in most of the States is much the same. In some States there are intermediate courts, which have jurisdiction of certain appeals, but, as a rule, these are only for the relief of the court of last resort and do not exist except when necessary. The distinction between a writ of error and an appeal is not observed where the Code of Practice is in force, and even in other jurisdictions seems to be given now little prominence as a rule. In most of the States the appeal is taken by filing in the higher court a copy of the record; in many States this transcript is not printed; printed transcripts are required in California, Connecticut, Delaware, Illinois, Mary-

land, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Vermont, Virginia, West Virginia and Wisconsin.

In the following States an abstract of the record is required to be made out by the attorneys and this abstract is printed: Arkansas, Colorado, Illinois, Iowa, Minnesota, Missouri, New Hampshire, Oregon, South Dakota, Utah, Vermont and perhaps some other States.

In many of the States written opinions are filed in all cases but in some States written opinions are only delivered when necessary to show error in the proceedings below or deemed of importance by the court. When the printed abstract is made, it is, as a rule, examined by all the judges. Printed abstracts seem to give satisfaction and to greatly relieve the work of the courts. But hard cases arise often from the negligence or inefficiency of attorneys where justice is defeated from defects in the abstract.

In Alabama, Connecticut, Iowa, Ohio and perhaps one or two other States, the court, as in Kentucky, sits in divisions, the chief justice being a member of both divisions, and where there is a difference of opinion, the case is referred to the whole court.

In New York, New Hampshire and Ohio the court passes on only questions of law.

In Maine, New Jersey and Vermont, the appellate judges do work in the courts of original jurisdiction as at common law, and in Delaware three judges of the Court of Appeals sit as a circuit court in common law cases. This works so well that only about ten appeals are taken in a year.

The only limitation as to oral argument is a time limit, which varies in the different States from an hour and a half on a side to half that or less. In nearly all of the States appeals lie as a matter of right; but in Virginia the appellant

must present his transcript to a judge of the Court of Appeals who examines it and determines whether the appeal shall be allowed. In this way the number of appeals in Virginia has been reduced to less than one-half of what it was before. A similar system is followed in West Virginia. In Texas, Illinois, Indiana, Missouri and New York they have intermediate courts and only certain classes of questions may be appealed to the court of last resort. In South Carolina, when there is involved a question of constitutional law or of conflict between the Constitution and laws of the State or of the United States and the entire court is not agreed, all the circuit judges sit with the judges of the Supreme Court in the determination of the case. In North Dakota by statute when the law and facts are heard by the district court in an ordinary action without a jury, the Supreme Court, whenever justice can be done without a new trial, directs such a final judgment to be entered in the action as may seem right on the whole case, and in this way the cost of successive trials is avoided. In Georgia, by a constitutional provision, every case must be disposed of before the end of the second term after it is submitted and each record is read by two of the judges. In Indiana, the appellant's attorney is required to set forth in his brief a short statement disclosing the nature of the action, what the issues were, how they were decided, the errors relied on and a concise statement of so much of the record as presents the matter relied on, referring to the pages and lines of the transcript. In Pennsylvania, by a similar rule of court, a printed paper book is required of the appellant, stating the errors relied on and containing a brief digest of so much of the record as is necessary to illustrate them. In the following table the number of appeals, the number of judges, the minimum of jurisdiction and the rule as to whether opinions are written and the records printed are given:

STATES	Number of Appeals	Number of Judges	Minimum of Jurisdiction	Are Opinions Written in All Cases	Are Records Printed
Alabama	600	7	None	Yes	No
Arkansas	350	5	"	"	"
California	750	7	$ 300	"	Yes
Colorado	300	7	100	"	No
Connecticut	123	5	None	No	Yes
Delaware	10	6	"	Yes	"
Florida	200	6	"	No	No
Georgia	1,000	6	"	"	"
Idaho	100	3	"	Yes	"
Illinois	1,000	7	1,000	"	Yes
Indiana	225	5	200	"	No
Iowa	550	6	100	No	Yes
Kansas	450	7	100	Yes	No
Louisiana	450	5	2,000	"	"
Maine	450	8	None	No	"
Maryland	225	8	"	Yes	Yes
Massachusetts	350	7	"	"	"
Michigan	650	8	"	"	"
Minnesota	500	5	"	"	"
Mississippi	800	3	150	No	No
Montana	150	3	None	"	"
New Hampshire	100	5	"	Yes	Yes
New Jersey	300	16	"	No	"
New York	600	7	"	"	"
North Carolina	400	5	"	"	"
North Dakota	200	3	"	Yes	No
Ohio	500	6	"	No	"
Oregon	200	3	"	"	"
Pennsylvania	500	7	1,500	Yes	Yes
Rhode Island	575	7	None	"	No
South Carolina	200	4	"	"	Yes
South Dakota	200	3	"	No	"
Tennessee	1,200	5	"	"	No
Texas, Sup. Court	450	3	1,000	"	"
Vermont	175	7	None	Yes	Yes
Virginia	175	5	300	No	"
Utah	125	3	None	Yes	No
West Virginia	150	5	100	"	Yes
Wisconsin	400	7	None	No	"
Wyoming	25	3	"	Yes	No
Washington	500	7	200	"	"

For the facts given above, I am indebted to the chief justices of these States, who have courteously given me the information, and, while the table is not complete, it serves to give a fair general idea of the subject.

In Kentucky the number of appeals filed in each year since 1901 is as follows: 1901, 837; 1902, 891; 1903, 938; 1904, 960. The number of cases decided in each of these years is as follows: 1901, 969; 1902, 840; 1903, 1,030; 1904, 1,038. The number of appeals filed for the January term, 1905, was 282; for the April term, 312; total, 594. The number decided at the January term was 247, and at the April term, 241; total, 488.

Our present Constitution provides that a majority of the judges of the Court of Appeals shall constitute a quorum and that the court when composed of seven judges shall divide itself into two sections for the transaction of business if, in the judgment of the court, this is necessary. Under this provision, the court sits in two sections, each consisting of the chief justice and three of the judges.

All cases in which there is a disagreement of opinion in one of the divisions are heard by the whole court, and so are cases involving questions of constitutional law, or other matters deemed of sufficient importance by the court to be reserved for the decision of the full bench. As a rule, only one judge reads the record, but where the briefs are printed, they are distributed among all the judges and when there is a difference of opinion among the judges, the record is frequently examined by another judge. But the second examination rarely adds light to the case, as the judge who has the record feels under responsibility to state the case fully to the court.

The method of distributing the cases to the judges is as follows: When the court gets ready to take up the submitted cases, the clerk, by the direction of the chief justice, divides

them into bundles as nearly equal as may be done. These bundles are then tied up separately and sent to the chief justice who locks them up in a drawer in the consultation room. The chief justice does not know what papers are in any bundle, and the clerk does not know to what judge the chief justice will send any bundle. When a judge needs more records, the chief justice goes to the drawer and takes out at random a bundle and sends it to the judge, and when all the bundles are sent out, a new distribution is made in the same way. Cases that are orally argued, or advanced, are sent by the clerk to the chief justice, as they are ready, and these are distributed by him to the judges in rotation. The names of the judges are set down in a book; the first case is sent to the judge at the head of the list, the second to the next on the list, and, when the foot is reached, he begins at the top again and goes down. The chief justice takes his papers in his order just as any other judge. There is no picking—the cases go simply where they fall. No papers are sent out by the clerk.

When a judge has examined a record and is ready to state it, he brings it to the consultation room and states fully the facts of the case and the points made by counsel. After the case is considered by the court, an opinion is outlined and the judge who has the record takes the case to draw up an opinion in accordance with the views thus expressed. The opinion, when prepared, is brought to the next meeting of the court and read and, if concurred in, is handed down. Opinions are so prepared as to show the points the court understands to be made in the case and the facts upon which they are based. There has been at times in the history of the court some complaint on the idea that one man on the appellate bench reverses the judgment of the circuit court, and not unfrequently an opinion is regarded by the litigant or his counsel as the production simply of the judge who wrote it. But if the case is fairly stated in the opinion, the defeated party may rest

assured that the court understands his case, for the case was so stated in the consultation room before the opinion was written, and after it was prepared the opinion was read to the members of the court so that all might understand that the judgment of the court was properly expressed. To guard against misapprehension of the case by the other judges than the one who has the record, the Constitution provides that the court shall prescribe by rule that when a petition for rehearing is filed, it shall be considered by a judge who did not deliver the opinion in the case. A petition for rehearing may be filed as a matter of right within thirty days after the opinion is delivered and when filed, it is sent, under the rule adopted pursuant to the Constitution, to another judge than the one who wrote the opinion. If there is anything in the case material to its determination which is not set out in the opinion, or if there is any mistake of fact or law, the attention of the court may thus be called to it, and, when this is done, the judge to whom the petition is sent brings the matter before the court and the case is reconsidered. The opinion of the court in many cases is not in accord with the judgment of the judge who writes the opinion, but he writes what the court directs to be written in deference to the judgment of his associates. An opinion is not prepared until the case is stated to the court in consultation and a conclusion is reached. The court, when the case is considered in consultation, determines what points shall be embraced in the opinion and when the opinion is read, if it fails to conform to the views of the court, it is corrected. When the judges differ, the case is laid aside to give all the judges time to examine the matter and in this way many of these cases go over to the latter part of the term.

It will be seen from an examination of the table that Illinois, Georgia and Tennessee are the only three States in which the number of appeals equals that in Kentucky. But in Illinois the

records are printed and counsel are also required to furnish printed abstracts, while in Georgia and Tennessee written opinions are delivered in only such cases as the court deems necessary. In Kentucky the practice is much the same as it has been since the time when the memory of man runneth not to the contrary. Written opinions are delivered in all cases and, as these opinions are published, the facts of the case are stated to show the application of what is determined. The records are not printed and, since the evidence is taken down in the circuit courts by stenographers, the size of the records has been much increased, both in ordinary and equity actions. The statute allowing the appellant to bring up the stenographer's transcript of his notes has greatly added to the labors of the court, as the bills of exceptions are no longer brief statements of the substance of the evidence, but contain the evidence by question and answer as it was given in the circuit court. The amount of the labor required of the court will be understood when it is realized that the court must read from the typewritten transcript all that is said and done on the trial of the case. An effort was made in 1877 to shorten the records by allowing the appellant to file an assignment of errors and a schedule of such parts of the record as he thought necessary on the appeal. But for some reason, after a few years trial, the Legislature repealed the statute as to assignment of errors and, as a partial record is dangerous unless the points to be urged on the appeal are understood, the filing of schedules and the bringing up of partial records has been almost abandoned, although in many cases but a small part of the transcript is necessary for the determination of the appeal. One reason why schedules fell into disuse was, it was held by the court that it would be presumed that the judgment of the circuit court was right where a partial transcript was brought up, unless it affirmatively appeared that the omitted part of the record was not material.

To remedy this the court has, by rule 27, provided that the record brought up on a schedule will be treated as a complete transcript, the appellee being allowed before submission to file a copy of other parts of the record if thought necessary. As an experiment in the direction of printing records, the court has adopted rule 28, by which the appellant may file a statement with the clerk indicating the parts of the record necessary to the hearing of the appeal and showing concisely the grounds of reversal relied on. A copy of the statement is mailed by the clerk to the appellee and he may then indicate such other parts of the record as he deems necessary to be printed and if a cross-appeal is desired, the grounds of reversal relied on. The clerk then has the record thus indicated printed, the expense of printing to be paid by the party asking the record to be printed and taxed as costs. The rule applies only to cases where the amount involved is as much as $5,000.00. By another rule, notice to the adverse party must be given of all motions not made on the day on which the case is set on the docket. Cases to be orally argued are passed until the court is ready to take them up and, when heard, are immediately sent out. To this end the briefs of counsel should always be in when the case is orally argued, otherwise much of the effect of the oral argument is lost.

When the court of seven judges began work in 1895, there were between 1,600 and 1,700 cases under submission and undecided. In January, 1899, there were between 1,100 and 1,200 such cases, besides a large number of cases passed for oral argument from previous terms, because the court was not then ready to take them up. When the court adjourned on June 17th, there were under submission the cases submitted at the April term, except a few which had been advanced and decided, and, in addition to these, there were undecided 133 cases which had been submitted at previous

terms, making the total number of cases now under submission about 400. But it will be observed that the number of appeals has been steadily increasing since 1900. This increase still continues, the percentage of increase for the first half of 1905 being greater than for the corresponding time in 1904. The total for the year will be considerably over 1,000.

The average man who, while at the State Capitol, attends a session of the Court of Appeals gets a very inadequate conception of its work. In the public sessions only the results of the court's work are shown. The real work of the judges is done in their rooms, reading the voluminous records, collating the facts, comparing the authorities and presenting the cases to the court in consultation, where they are carefully gone over by the judges. If people realized how well the court understands a case before it is decided, the feeling that the loss of the case is due to the judge who writes the opinion, now so prevalent, would not exist. If an attorney could hear the earnest plea made for his client by one of the judges in the consultation room, he would often think very differently of the judge than he does when he receives the opinion of the court written by that judge at the direction of his associates. In most of the cases, the petition for rehearing presents the identical view which some of the judges labored in vain to get the court to adopt. The opinion delivered is the opinion of the court, and so it is that petitions for rehearing are often fruitless, for, though one man may change his opinion on a matter, a body of men will much more rarely abandon a conclusion it has deliberately formed. If the case is not correctly stated to the court, this will appear from the opinion and for this the judge who writes the opinion is responsible, but if the case is fairly stated in the opinion, then the result is the conclusion of the court. The object of an appellate court is not merely to secure a uniform rule of law throughout the State, still less to have learned essays written by the

judges on legal principles for the guidance of persons interested. These things are incidental, but it should always be borne in mind that the State maintains its appellate court at public expense to administer justice. In other words, the administration of even-handed justice to the litigant is the first duty of the court and all technical rules are simply in aid of justice. As has been the case from the foundation of the tribunal, the opinions of your court show that the judges make it their first aim to do justice, and if sometimes technical rules are not applied as strictly as you would like, still, in the long run, you will enjoy greater satisfaction in seeing justice done.

THE PRESIDENT: Gentlemen of the Association, is there any discussion of the paper of the learned chief justice desired? It seems he has covered the entire question to the satisfaction of the bar.

MR. HALL: I was out when the discussion in relation to the admission of members to the bar was had. I have a bill here which I have drawn which I desire to offer to the Association to be acted upon and, if it is thought proper, to be presented to the Legislature, on that subject.

THE PRESIDENT: I will say that there has been a resolution adopted, directing the Law Reform Committee to prepare a bill and present it to the next Legislature.

MR. HALL: I would like to have the Secretary read the bill and refer it to the Committee.

THE PRESIDENT: Very well. If it is the desire of the convention, the Secretary will read the bill.

The proposed bill was then read by the Secretary as follows: