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THE DISAPPEARING ARGUMENT

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One of the most pronounced characteristics of the trials of cases, civil as well as criminal, formerly was the length of time devoted to the argument of the law and the facts, by the attorneys for the respective parties. I say formerly for effective argument in the trial of jury cases, unless in exceptional instances, is rapidly becoming a thing of the past.

It is a fashion which still survives in the country, although the custom of putting a short time limit upon the arguments of counsel is growing increasingly common even outside of the larger cities. That the protracted argument of the earlier days had its faults, and absurdities, cannot be denied. That much time was thus used to little purpose is doubtless true. But it may well be questioned whether we are not, in the rush and hurry of latter day court proceedings, especially in the cities, drifting to the other extreme, with consequences more grave even than those which attended the practice of unlimited argument.

With the increasing complexity of modern civilization, there has developed a corresponding complexity in the rights which the courts are daily called upon to determine. Evidence has increased in volume, and relates more and more to matters which lie more or less outside the experience of the average juror, insomuch that expert testimony, formerly comparatively rare, has become an incident of almost every trial. Out of this growing mass of evidence has evolved an increasing volume of rules of evidence, and the fast-multiplying decisions of courts of last resort have distinguished and refined upon these rules times without number. Instructions have multiplied in number, increased in length, and grown more and more technical in character. The body of the law, in other words, both substantive and adjective, is greater than ever before.

The questions dealt with by the court are more delicate, more intricate, and, at least so far as the amounts involved are concerned, more important than ever before. The conflict of authority is greater than ever before.

But while the general average of intelligence is higher than formerly, it is doubtful if the average juror of to-day is any better acquainted with the complexities of the law and its administration than his grandsire was. Indeed the reverse is probably

true. That he is more impatient of jury service, more anxious to get back to his own affairs and more addicted to a certain cocksureness of judgment than his forebears is certain.

Now the very function of the argument of counsel is to explain to the mind of the layman the principles of law embodied in the instructions of the court and, in decent and logical fashion, to show the application of these principles to the facts of the case on trial. The average man is averse to following blindly a rule which he does not understand. Even if he attempts to do so, he is extremely apt to err therein. The average juror serves in that capacity but rarely. In many states, service within one year entitles a juror to exemption at least until twelve months have passed from the date of his last service. We have, therefore, no experienced body of jurors upon which to draw. Yet upon the conclusion of the average trial perhaps a dozen witnesses, in more or less haphazard fashion, have told the various portions which go to make up the whole of the evidence in the case. This process consumes usually not less than two days in doing so. The witnesses are constantly interrupted by objections, and arguments of coun- of the same facts. Upon the conclusion of this medley, there is read to the jury a number of "instructions," supposed to be applicable to every theory urged by the parties and to declare the law as applicable to any state of facts which the jury may possibly find from the evidence to be true. These instructions also are not set forth in ordinary, everyday language, but are couched in the form of "approved precedents," containing fine-spun distinctions and dealing frequently with abstractions so shadowy that a trained legal mind grasps them only after much labor. They vary in number and length, but are rarely less than half a dozen in number or less than half a page of typewritten matter on an average, each, in length. This is the minimum. There is little or no maximum in practice despite the admonitions of appellate tribunals.

Then follows the curt statement of the court: "Twenty minutes on a side for argument." Even this brief space, however, must, for one party and frequently is for both, broken into two fragments of ten minutes each. Only he who has made the effort knows how futile it is to attempt anything like a logical or rational application of any law to any facts within ten or twenty minutes. The desire to crowd as much as possible into the time allowed

calls forth a rapid speech, touching the salient points only, in which law and facts are jumbled in one hurrying stream before the minds of men of little training, and the so-called argument is over. A foolish verdict follows—not so often as might naturally be expected, it is true, but too often, and an appellate court is called upon by the aggrieved litigant to review and reverse the case in order that it may again be sent upon its chaotic journey through the same maelstrom. As a result, the jury system is denounced as archaic and is growing in unpopularity.

But suppose the case is taken up. Note what happens in the appellate court. In the first place, the case is heard by a smaller body of men, generally, perhaps, not more than three, and rarely if ever more than nine in number, hence the probability of conflicting opinion is proportionately reduced.

Again, these men are men who are especially trained and presumably peculiarly fitted for the task in hand. All of the pleadings and all at least of the material evidence is before them in printed form. The arguments of counsel, without any limitations other than those of good sense, are also before them in printed form. The judges are left to take whatever time they may deem necessary in which to review the bill of exceptions and the briefs and to refresh their minds again and again as to their contents. Yet, in spite of all this, the time for oral argument is rarely, if ever, limited to less than one hour on each side, and it is by no means an uncommon thing for appellate courts to permit or to order a case to be re-argued. Even after all these precautions, opportunity is still given the losing party to file a printed petition for a rehearing and thus again to call to the attention of the Court any matter of law or fact which the Court inadvertently may have overlooked. Furthermore, it has been, I think, the experience of most lawyers, that the higher the appellate tribunal is in point of dignity, power and learning, the more apt it is, in the language of an eminent jurist now upon the bench of a court of last resort, "to lean, as upon a staff, upon the argument of counsel," to complain of the absence of briefs and to advise and encourage oral argument. Indeed the bench has ever willingly availed itself of this assistance.

"If judges," said Lord Coleridge, "only would appreciate what an invaluable assistance it is to their own minds, to listen to those who have prepared their arguments and are perfectly familiar with the facts, they would recognize that initial listening, at all

events, is most desirable." By "initial listening," as the context shows, the learned Lord Chief Justice referred to listening, at least, at the beginning of the argument, without interruption. Strange, is it not, that we should deny, in effect, to the unlearned juror the aid which the learned judge so highly values?

There is another consideration, somewhat far afield, it is true, from the main purpose of a trial or of an argument, yet not without merit. To the average laymen the law is a mighty mystery. Its rules are arbitrary rules, having, as he too frequently thinks, no root in right reason, and its ways past finding out.

If reverence for the law is bred of a right understanding of it, and if it be a desirable thing that the law should be reverenced, surely that time would not be wasted which capable and conscientious lawyers might daily consume in pointing out the reason for the law as applied to the facts of a given case and thus daily, in some measure at least, educating the endless procession of juries in an understanding of the reason and reasonableness of the laws of the land.

Possibly, also, justice would be rendered somewhat more certain, unjust and foolish verdicts somewhat less frequent, trial by jury be brought into somewhat better repute and the administration of the law be somewhat less blown upon than is at present the case.

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