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Thomas W. Shelton

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# HOBBLLED JUSTICE—A TALK WITH JUDGES

By THOMAS W. SHELTON\*

UNCONVENTIONAL treatment and untechnical language are helpful in discussing the application of the spirit, as contrasted with the letter of the law. A layman's views may be best expressed in lay language. Because they set out in bas-relief two essential features in the administration of justice, proposed to be discussed, two questions may be asked. Is it the function of the courts to administer justice or to follow technicalities? Where no principle is involved, should a court feel obliged to obey the demands of justice, or the rules of procedure? If these questions, whether viewed in the abstract or with reference to concrete cases, stimulate the campaign against a prevalent judicial mental status leading to a technical administration of justice, the object intended will have been achieved.

Preceding an attempt to answer the question in the light of practical reason, there should be quoted the efforts of Congress, probably, to coerce the courts and certainly to relieve them from obligations to observe technicalities

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment *after an examination of the entire record* before the court, *without regard to* technical errors, defects, or *exceptions* which do not affect the substantial rights of the parties."<sup>1</sup>

That salutary portion of the statute became law on February 26, 1919. And there is still another statute

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the case thereof *and such court shall amend every such defect and want of form*, other than those which the party demurring so expresses, and may

\*Of the Norfolk, Virginia Bar chairman of the Committee on Uniform Judicial Procedure of the American Bar Association. This paper will form a chapter in a book, "Spirit of the Courts," to be published by Callaghan & Company, Chicago, Illinois.

<sup>1</sup>28 U. S. C. A. sec. 391, 2 Mason's Code, tit. 28 sec. 391.

at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."<sup>2</sup>

These statutes are monuments to the persistent labor of the American Bar Association who pursued a reluctant Congress for years and not to the enterprise of Congress. Their history and obvious necessity are not creditable to lawyers, Congress or the courts. Nor was it just to allow the judges and lawyers to carry the blame for the miscarriages that these statutes were designed to prevent, until Congress would permit rules of court. They are still viewed by some reactionary judges as procedural solecisms. It is suggested that the responsibility rests now wholly upon the judges, for there is hardly room for "interpretation" or the excuse of lack of power, as chaotic as are present procedural conditions.

Putting to one side the questionableness of legislative coercion, in the face of the refusal of Congress to permit the modernization of the court, and commending so salutary and necessary an aid to justice, one finds support for the quoted statutes in the very genius of and reason for pleading, practice and procedure. Pleading and procedure are normally but a means to an end in the consecrated search for justice, as we have endeavored to show and as the American Bar Association contends. This is now a fixed principle. As such they are of first importance, otherwise they are obstructions. There is no possible excuse for the defeat of justice through upholding a simple court-made rule of procedure, however binding upon the court a statutory rule may have been until the enactment of the federal statute just quoted. Many of the states have adopted similar statutes.

An Arkansas case<sup>3</sup> presents an outstanding illustration of voluntary hobbling of justice giving as an excuse its inability to act. The trial judge apparently coerced a jury into reaching a verdict. Unfortunately counsel failed to "except" in the formal manner required by a widely prevailing rule, with stated reasons therefor and the appellate court would not sua sponte observe the wrong and correct it. That the conduct of the trial judge was prejudicial and reversible error and that the appellate judges knew of the transgression and deliberately closed their eyes, the supreme court itself concedes by saying "We are all of the opinion that the remark was highly improper and should not have been made." There will be few to disagree that a verdict obtained by such methods does

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<sup>2</sup>28 U. S. C. A. sec. 777 2 Mason's Code, tit. 28 sec. 777

<sup>3</sup>Holmes v. State, (1922) 153 Ark. 339, 240 S. W. 425.

not recommend itself. It is very earnestly protested, if a judge persists in that character, that the *penalty* thus inflicted upon a helpless litigant or an unfortunate lawyer is not justified by the offense of oversight or of ignorance of which they were guilty. It is a forfeiture of liberty or property of a helpless layman innocent of wrong, and equity looks with disfavor on a forfeiture. Moreover, it was not a trial of an issue of fact and law between the parties litigant, but of the vigilance or wit of a lawyer. Courts were not created for that purpose.

These circumstances, it strongly appeals, presented to the court a rare opportunity to brush aside the technicality that stood between it and the justice that laymen think can be found in courts and that must be found in them. That is the only policy that will command respect for the courts or justify their existence, in the estimation of laymen. Laymen are sportsmanlike losers in a fair contest, but protesting dissenters against deprivation by technicalities. But it is the reason given that will be least understood by the lay public. The majority of the court ruled that the lapse was *waived* when appellant failed to object. Passing that by as a necessary fiction of law, if the rule be recognized as binding upon the court, the result is that the conduct of counsel, instead of the law and the facts, became the measure of justice in that court. By the same token it is to be assumed that prejudicial misconduct would likewise be considered as waived, if not formally excepted to with reasons therefor. Let us suppose that the appellant did waive for whatever reason, and that is a far fetched conclusion to a layman, the impeding of justice was not thereby cured, and that is the point. The state is a third party to all civil actions and was the complainant in the cited criminal prosecution. Based on the premise that it is as much the duty of the state to protect as to punish, it is the duty of some agency of the government, and it ought to be the first duty of an appellate court, to supervise trials on review and see to the proper functioning of the trial courts to the end that justice may be administered. It is such a sacred duty that neither waiver, negligence nor ignorance should be allowed to limit the interference of an appellate court to that end. By the same reasoning the prejudicial oversight of counsel should be remedied, just as should the prejudicial oversight of the judge, whenever possible. Any other oversight should be ignored, when justice has been done. In other words, *no judgment should be entered except upon the law and the facts and the justice of the case.* There is

no possible justification in a court of justice for any other disposition of a case.

It will be seen that earnest contention is being made for the application of the spirit of the statutes just quoted that, in some way, all omissions and errors may be corrected by appellate courts, instead of allowing them to become decisive of the case. It matters not whether they were overlooked, seen and not excepted to, or seen and improperly excepted to. That this means a substantial revolution in common law states and some others is obvious, but what justice demands is what ought to be done and what will be done in time. Technical rulings, like the ancient bills of exception, errors which so long muffled the eyes and ears of appellate judges, find their roots in the ancient and abandoned common law practices that are imbedded in the mind of every well trained lawyer, but no longer respected in England the home of their origin. They are rapidly being outlawed in America. Lest we become discouraged it was not so long ago that a case improperly brought in equity instead of law was thrown entirely out of the courts, and judgments were reversed because of the omission of the article "the" from an indictment. It was only in 1919 that Congress forbade judgments on technicalities. Surely it is not necessary that the courts shall be legislated into the spirit of justice. A right sort of precedent is needed.

It is so shocking to the sensibilities that a layman searches for justification in any court for its refusal to correct a conceded wrong, or for the policy of a court to allow its measure of justice to be limited by the inefficient conduct of counsel, who are its officers. That is precisely what happens. It is to be regretted that a mandatory record requires the limitations and restrictions of some fixed rules of pleading, procedure and practice, for that which is not juridically presented cannot be judicially decided. But that should be the limit of the absolutism of the mandatory record. That a mandatory record can be presented in America with technicalities of procedure and practice brushed aside, as well as in England and Canada, will not be denied by any American judge or lawyer. When statutory procedure prevents justice, it is the duty of the judges to inform the Legislature directly or through the organized Bar, and seek relief. In a great many states the appellate courts have the necessary power. The creation of judicial councils and Rules Commissions is a wholesome judicial response.

Another phase of this matter is that the public measures only by the results produced by the courts, without having any idea of or interest in the manner in which it is achieved. This is a most vital social element of which the courts should never be unmindful. Courts are the servants of the people and were set up by them for one specific purpose, and that is to administer substantial justice. While the courts may make rules for their orderly regulation, they may not lessen their own obvious duty or power to administer justice. It is worth while to repeat here that it is said in Proverbs<sup>4</sup> that "a righteous man failing in his cause before his adversary is as a troubled fountain and a corrupt spring." Lord Bacon<sup>5</sup> concluded "and surely there be also that turn it into vinegar; for injustice maketh it bitter, and delays make it sour." The judge who overlooks this patent factor in the social compact is inviting disaster to himself, the courts and to the government. Laymen will seek to destroy any agency that fails to produce common sense results or works wrongs. A fine example was the threatened "recall of judges" that had to be resisted by the American Bar Association, through an organized national campaign of education, entailing the expenditure of valuable time and wealth. Encouraged by Theodore Roosevelt's attitude in its favor, the agitators did not fail to use it in support of their propaganda against the courts. As we have seen, it is all so entirely unnecessary, if the courts *would recognize the entire actual record in a common sense way*, instead of the technical record of the discarded common law practice. It is now very much a question of judicial mental attitude and it is the purpose of this paper respectfully to bring home that fact.

Another thought mentioned elsewhere protrudes itself. Are the lawyers sufficiently conscious of their function as officers of the court to make possible the suggested improvements? If they resist, will the judges be courageous enough to overcome it? Is it not a fact that the attitude of the American lawyer is to trap the judge, instead of help and aid him, the corollary to which is the mental attitude of the judge of being on the defensive? There is a lack of cooperation. Has not this influence much to do with the narrow technical rulings of the court? In other words do the lawyers as officers of the court sworn like the judges, approach the seat of justice as aids or as enemies? There will not likely be a

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<sup>4</sup>XXX 26.

<sup>5</sup>Essay LVI.

division of opinion on that score amongst thoughtful lawyers and judges. But do they realize the seriousness and evil results of such a status and its reflection upon a noble profession?

With the statutory exception previously quoted, the obligation of the oath of qualification to uphold all statutes—both the substantive and the adjective law—does justify the lawyer's lack of cooperation as to statutory procedure and pleading. He is compelled to recognize the rigid thongs with which the Congress and Legislature bind and restrict both him and the court to a fixed course, though injustice be done in their presence, which is the strongest possible argument for a procedural change to the policy of the English and Canadian courts, of simple rules.

We have obviously digressed in introducing the lawyers in order to complete the trial atmosphere, for the judge and the lawyer are inseparable in the administration of justice. They must cooperate. Moreover, in the retirement of his home where this may be read, the lawyer as well as the judge is a citizen with a highly trained mind, an alert conscience, a knowledge of government, a keen sense of the public concept of the courts and a fine measure of his public duty. It is to that good citizen, and not to the enslaved counsel and a legislative and precedent bound judge, that an appeal is made to think less technically in the trial of cases.