Denver Law Review

Volume 22 | Issue 5 Article 1

July 2021

The Place of the Judiciary in the Coming Revolution

R. V. Fletcher

DICTA

Vol. XXII MAY, 1945 No. 5

The Place of the Judiciary in the Coming Revolution†

BY R. V. FLETCHER*

We are told on every hand that we are on the threshold of a revolution. As one person of commanding influence in government circles has recently observed: "The war is but a step in the revolution." We may not be agreed as to the form which the revolution will assume. Mr. Henry Wallace has amiably suggested: "Those of us who realize the inevitability of revolution are anxious that it be gradual and bloodless instead of sudden and bloody." Those who are hopefully making plans for the new order are endeavoring to give it the aspect of an economic, rather than a political movement. Or, to state the matter with a little greater precision, the idea seems to be that if we can adopt an economic order that is radically different from that which has prevailed in this country for one hundred and fifty years, it will not be too difficult to alter our political framework so as to make it conform to the progressive ideal of an all-powerful state. Thus, Mr. Adolph Berle referred to a certain theory advocated by others but not by Mr. Berle which he thus stated: "The government will have to enter into direct financing of activities now supposed to be private, and a continuance of that direct financing must be inevitably that the government will ultimately control and own these activities. . . . Over a period of years the government will gradually come to own most of the productive plants of the United States."

In view of this ambitious program, thus clearly outlined, it becomes an interesting question as to how these ends are to be accomplished under our existing form of government. Obviously, the simplest and most effective method would be to convene a convention for the purpose of adopting a new Constitution, which would reframe our entire governmental structure in line with the advanced ideas of those who favor a totalitarian state. But it is not likely that this method of procedure will

*Member of Mississippi and Illinois Bars; former Attorney General of Mississippi and former Associate Justice of the Mississippi Supreme Court; Vice-President, Association of American Railroads.

†Reprinted by permission from the Mississippi Law Journal.

be adopted. Such a plan would not be in accord with the policy of making gradual changes in our way of life—changes which would avoid the shock of immediate adoption of theories of government not at present widely accepted by our people. The tactics would seem to be, rather, to take one careful step at a time.

For example, efforts are now in progress to attack the transportation industry in the courts in such a fashion as to make private operation impossible. Existing war-time controls may be continued after peace has been declared until the owners of essential industries are driven to despair. Under the guise of caring for the unemployed, the burden of taxation may increase to crushing proportions. There are many methods that may be adopted, all leading to the consummation of the revolutionary process.

To what extent Congress will acquiesce in such a program is, of course, debatable. Up to this time, there has been a marked tendency on the part of the national legislature to cling rather carefully to many of the ancient landmarks. It is safe to say that the group in Congress that is in agreement with those extremists who advocate a radical change in our political and economic system is in a decided minority. What subsequent elections will bring forth is anybody's guess. It is fairly safe to conclude, however, that unless the peace brings wholesale unemployment and consequent business distress, Congress will probably receive no mandate from the people for revolutionary alterations in our system of private control of business.

The question remains, however, as to how far the executive power can be exerted to accomplish these purposes, even though Congress is stubborn in its refusal to go along. In other words, can Congress be by-passed in the forward march of the revolutionary movement? It must be obvious that the answer lies in the attitude of the courts. The only effective check upon executive exercise of authority is the Supreme Court of the United States. Whether an executive order is or is not enforcible under our constitutional system is the exclusive province of the courts to decide. If an aggrieved citizen seeks to challenge the action of the executive or any of his agents, he can go nowhere except to the courts. If we can conceive of a judiciary that is in all respects amenable to the will of the Chief Executive, Congress would manifestly be helpless to check aggressive action. It is important, therefore, to look at the judiciary as it is organized and as it functions today to appraise the likelihood of that gradual but thorough revolution that has been so often and so confidently predicted.

It should be remembered that much of our law is judge-made. Although courts are constantly protesting that they have no power to legislate, yet by the very nature of the judicial function, they cannot avoid doing so. The great majority of our citizens are subject to the

common law. But what is the common law? It is that great body of rules and principles, reflecting the customs of our Anglo-Saxon ancestors. But who determined what customs were valid and entitled to be recognized as a part of the common law? Obviously, this determination was made by the judges in the early history of the development of the English law. To assume that these determinations were not influenced by the political and economic philosophy of the judges is to deny that they were human beings.

It is easy to visualize a court procedure in the formative period, where an astute and strong-minded judge might very well conclude that a particular custom had not been established as authentic, if in the opinion of the magistrate, such a custom would disturb the orderly conduct of society. In America, we adopted the common law as our guide, but with the qualification that we would consider binding upon us only such portions thereof as were consistent with and applicable to the conditions under which we live. Whether a particular principle of the English common law fits into our scheme of things must be decided by the judges, unless the legislative branch has already intervened by the enactment of an appropriate statute. It is safe to say that a very large part of our American common law has been made by the courts, and in making these determinations, the courts have exercised a large measure of discretion as to what is advantageous and what is the contrary.

Chief Justice Marshall was a great legislator. He would probably, if alive, be the first to deny such a charge,[1] but he could not escape from the obligation. His great opinions establishing our system of government are many of them pure legislation. He formed a conception of the place of the Federal Government in our political system, and wrote the law to fit this conception. In Marshall's opinion, we could not flourish as a nation unless trade and commerce were free as among all the people of the United States, and so he wrote the opinion in *Gibbons v. Ogden*.[2] He saw clearly that we must have a national currency that would circulate freely and that our banking system must not be hampered by local rules, and so he wrote *McCulloch v. Maryland*,[3] with its far-reaching conclusions as to implied powers. He conceived the notion that we could not take our place among the great powers of the world unless we built on a foundation of business integrity, and that the cornerstone of such an edifice was the sacredness of contracts. And so he wrote *Fletcher v. Peck*[4] and the *Dartmouth College* case,[5] great constitutional cornerstones, upon which our whole business structure rests.

---

[1]Bank of the United States v. Deveaux, 5 Cranch 61, 87 (U. S. 1809).
[2]9 Wheat. 1 (U. S. 1824).
[3]4 Wheat. 316 (U. S. 1819).
[4]6 Cranch 87 (U. S. 1810).
[5]4 Wheat. 518 (U. S. 1819).

With a change in the style of popular thinking, evidenced by the election of Andrew Jackson in 1828, and the appointment of Taney as Chief Justice, there was a marked tendency away from the supremacy of Federal power and a drift toward recognition of the police power of the states as being equal, if not superior, in dignity. Mr. Justice Taney, indeed, in an effort to save the nation the horrors of civil war, went far out of his way in the *Dred Scott* case[6] to express views which were clearly non-judicial, as the judicial power had previously been understood. The effect was disastrous, and the decision, now known to have been inspired by President Buchanan, has always rested like a cloud upon the record of a great and good man—truly a saintly figure, both in respect to the purity of his life and the agony of his martyrdom.

In the Reconstruction era, all of us who love the South and live by its faith and its traditions owe a debt of obligation to the Supreme Court for the limitations it put upon the Fourteenth Amendment in the *Slaughter House* case[7] and others of like tenor.

If the Court as at present constituted undertakes to do some legislating in support of the revolution, it will not have to go far to find striking precedents, although as I shall presently point out, there is a very clear distinction between supplying the deficiencies in a statute, which is within the scope of its declared purpose, and expanding it to cover a subject matter which is clearly not embraced in its terms.

To form some notion of what the public may expect from the present Court, it is necessary to bear in mind its background and the atmosphere which it breathes. It is well known that the President in 1937, exasperated by certain decisions of the Supreme Court which he considered as obstructive and reactionary, sought to replace certain of the older judges with younger men to be appointed by him. The effort failed, but the ravages of time, always a potent factor in the affairs of men, enabled the President to accomplish his purpose. Of the nine judges of the Court as now constituted, seven have been appointed by the present occupant of the White House, and another has been promoted to Chief Justice by presidential appointment. So we have a new Court, and a new order.

As I see it, no legitimate criticism can be directed against the President for the type of men selected for positions on the Court, always provided those chosen are competent men, judged by conventional standards. Of course, the President should select men learned in the law, with ample experience and possessing judicial qualities of a very high order. But no one can demand that the President select for these high duties men who are out of sympathy with the President's political

[6] 19 How. 393 (U. S. 1856).
[7] 16 Wall. 36 (U. S. 1872).

or economic theories. So far as my reading goes, no President has ever done so. Certain it is that President John Adams selected Marshall with full knowledge of his passionate devotion to the principle of a strong central government. There can be no doubt that President Jackson called Taney to the Chief Justiceship after a thorough testing out of his devotion to the principles of democracy as Jackson understood and applied them. President Lincoln probably named Chase to the woolsack, believing that he would uphold Federal action with respect to paper money as legal tender. That Chase did not go along with the Congressional intent was something which could not be anticipated. It has been commonly asserted that Mr. Justice Bradley was appointed to the bench for a specific purpose. And so it has been through all the decades of our history.

The question remains as to how the new court will react to executive action, if it should be exerted in the direction of bringing about the industrial and political revolution which has been so generally and confidently predicted. Of course, no one can speak on this subject with anything that approaches authority. And yet certain tendencies may be the subject of legitimate comment. Those tendencies can best be appraised by considering a few decisions of the new Court.

The case of *United States v. Hutcheson*[8] is illustrative of the present Court's tendencies. This was a criminal prosecution by indictment under the Sherman Act for an alleged criminal conspiracy by labor union leaders resulting in boycotts, picketing and the like. That such a prosecution would lie if the facts be established had long been settled by decisions of the Supreme Court (*United States v. Brims*).[9] It was argued, however, that the rule had been changed by the Norris-La Guardia Act.[10] But this Act had no application whatever to criminal prosecutions. It was directed against the much-discussed evil of "government by injunction." It prohibited the issuance of an injunction by a Federal court in a labor dispute. The history of the Act showed that it was passed by Congress as a restraint upon the equity power of Federal Courts, and so that persons charged with violations of the law might have the benefit of a jury trial, with the obligation upon the prosecuting authority to establish guilt beyond a reasonable doubt. But the court, speaking through Mr. Justice Frankfurter, upheld the contention of the defendants, upon grounds that must strike the average lawyer as extraordinary. The learned Justice, in his opinion extending this prohibition against injunctions to criminal prosecution, reasons thus:[11]

[8]312 U. S. 219 (1940).
[9]272 U. S. 549 (1926).
[10]47 STAT. 70, 29 U. S. C. A. §§ 101-115 (1932).
[11]312 U. S. at 234.

> "To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the Duplex case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines. That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking."

Here is something to give us pause. The Court concludes that Congress, in depriving Federal courts of equity of power to grant injunctions in labor dispute cases, in effect legalized conspiracies to effect secondary boycotts, although there is not a line in the statute indicating such an intention. This decision marks a departure in judicial legislation. Previous decisons, hundreds of them, had construed statutes so as to accomplish what was considered the real intent of the law-making body. Obscure phrases had been clarified by decision, and contradictory provisions reconciled, sometimes by disregarding portions of the statute. In other cases, where the end sought to be accomplished was definitely and clearly stated, the statute was given effect, despite deficiencies in language. But here, as Mr. Justice Roberts points out in his dissenting opinion, concurred in by Chief Justice Hughes:[12]

> "By a process of construction never, as I think, heretofore indulged in this court, it is now found that, because Congress forbade the issuing of injunctions to restrain certain conduct, it intended to repeal the provisions of the Sherman Act authorizing actions at law and criminal prosecutions for the commission of torts and crimes defined by the anti-trust laws. The doctrine now announced seems to be that an indication of a change of policy in an Act as respects one specific item in a general field of the law, covered by an earlier Act, justifies this court in spelling out an implied repeal of the whole of the earlier statute as applied to con-

[12] *Id.* at 245.

duct of the sort here involved. I venture to say that no court has ever undertaken so radically to legislate where Congress has refused so to do."

It should be stated that Mr. Justice Stone, now Chief Justice, concurred in the result, but upon grounds having no relation to the Norris-La Guardia Act. Justice Stone believed the indictment insufficient under the criminal provisions of the Sherman Act. Here is a decision that may well mark an epoch. If the Court proposes to extend a statute in this fashion to accomplish an end not stated by Congress but which the judges think Congress ought to have included for consistency's sake, there is no limit to judicial legislation. It may well happen that authority granted to the Executive by Congress to be exercised in a war emergency may be amplified by the Court so as to permit the seizure and operation of properties in peace times, upon the theory that the exigencies of peace are just as serious and important as the incidents of war.

Another case which deserves attention is *United States v. Southeastern Underwriters Association et al.*,[13] decided on June 5, 1944. This celebrated case involves the question whether the Sherman Act, which deals with transactions in interstate commerce, is violated by insurance companies when they fix non-competitive rates for general application in a particular state or region. For seventy-five years, the Supreme Court had held that contracts of insurance are not commerce. This doctrine was announced first in 1869, in the case of *Paul v. Virginia*,[14] twenty-one years before the enactment of the Sherman Act. The view was reaffirmed time after time,[15] so that both before and after the passage of the Sherman Act, which does not expressly refer to insurance, the doctrine was well-established that insurance writing is not commerce. But the new Court, nevertheless, held in this decision that the insurance business is commerce and, as conducted, interstate commerce as well; that the making of insurance contracts is within the purview of the Sherman Act; and the Act as so construed is constitutional. There were vigorous dissents by three justices, including the Chief Justice, with two justices recusing themselves.

It is not within the scope of this paper to argue the pros and cons of the controversy. The case is referred to as indicating the slight respect which the Court is showing for our old friend the doctrine of *stare decisis*. This doctrine is, of course, not sacrosanct. It is not an absolute rule, by which the courts are straitjacketed. It cannot be invoked to give life to pernicious error, nor can it defeat the paramount demands of

[13]64 Sup. Ct. 1162 (1944).
[14]8 Wall. 168 (U. S. 1869).
[15]Hooper v. California, 155 U. S. 648 (1895); New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495 (1913).

justice or sanction a violation of the decencies of civilized society; to borrow phrases from some of the decided cases. But it has been generally recognized that absent elements of manifest wrong and mischief, the rule should be observed where not to do so would disturb rights under contracts entered into on the faith of an accepted course of decision, or where to disregard the principle would disturb long-accepted business principles and practices. The familiar principle has never been more clearly or emphatically stated than by the Supreme Court itself in such a case as *United States v. Flannery*,[16] where it is said that decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons.

In passing, it may not be amiss to mention a case where the rule of *stare decisis* was departed from, upon grounds which to many of us seem sufficient. I refer to the case of *Erie Railroad Company v. Tompkins*.[17] This is the justly celebrated case in which Justice Brandeis overruled the long-standing rule that Federal courts, while following the construction which the State courts give to their own statutes, must decide for themselves questions of general law, and are not bound by the State courts' conclusions thereon. The doctrine thus abandoned had been in effect for nearly one hundred years, or since the decision by Justice Story rendered in 1842 in the case of *Swift v. Tyson*.[18] Recognizing the importance of assigning "cogent" reasons for departing from a rule so long-established, Mr. Justice Brandeis devotes a good part of his opinion to pointing out respects in which the rule in *Swift v. Tyson* leads to confusion, injustices and discriminations. Neither does it appear that the change in the rule would seriously disturb vested property rights, or disrupt long-established business practices.

Returning to the insurance case, not only does the majority opinion ignore accepted principles governing the doctrine of *stare decisis*, but it seems to ignore as well familiar principles governing the construction of statutes. As we have pointed out, *Paul v. Virginia* was decided in 1869, holding the writing of insurance is not commerce. So that when the Sherman Act was passed in 1890, Congress had known for twenty years that a statute relating to commerce would not embrace the activities of insurance companies. Furthermore, as pointed out in the dissent by the Chief Justice, on at least two occasions, a President of the United States had asked Congress to extend its authority over insurance, only to be denied on the ground that Congressional authority could not extend to a subject which the Supreme Court had declared not to be commerce. Furthermore, the Sherman Act has been repeatedly amended, and in the Clayton Act somewhat expanded and clarified without any reference

[16] 268 U. S. 98 (1925).
[17] 304 U. S. 64 (1938).
[18] 16 Pet. 1 (U. S. 1842).

to insurance, and that, too, within one year of the decision in the *Deer Lodge* case,[19] holding again that insurance could not be considered as commerce.

Another interesting case indicating the temper of the fresh wind that sweeps the halls of the Supreme Court is *Railroad Commission of Texas v. Pullman Co.*,[20] decided by the Court speaking through Mr. Justice Frankfurter in March, 1941. In that case, the Pullman Company and certain railroad companies assailed in a Texas Federal court the validity of a Railroad Commission order requiring the Pullman Company to employ a conductor on every train which carried a sleeping car. The order was assailed on the ground that it violated the due process and commerce clauses of the Federal Constitution and upon the additional ground that, under the state law, the Commission had no power to make such an order. This last-mentioned ground of attack had never been adjudicated by the courts of Texas. The opinion of the Supreme Court is to the effect that the District Court should not decide the case at all. It was held that the pleadings raised a serious question of state law, as to which admittedly the state court's decision would be conclusive. True, the state courts had never passed upon the question, and in such cases jurisdiction over the whole controversy being undeniably lodged in the Federal court, one would suppose that the necessity of disposing of the case somehow would require either a decision by the Federal court of the state question, or a decision on Federal grounds admittedly present in the case. But the Supreme Court held that the District Court should not have decided the case at all. It was sent back, presumably to be retained on the docket of the District Court until perchance the courts of Texas, in some future litigation, should adjudicate the point. Most of us, I suspect, have hitherto entertained the view that when a court's jurisdiction is admitted, litigants are entitled to have their legitimate controversies decided so that justice may not be denied.

I have referred to these few cases as indicative of the changed attitude of the Supreme Court toward familiar and long-recognized principles of the law. No carping criticism of the Court is intended. I am only making the point that revolutionary measures approved by the Executive may, conceivably, become effective as a result of the new spirit that seems to animate the Supreme Court, and that Congress may be powerless to obstruct the process.

New Members of Denver Bar Association

The following were admitted to membership in the Denver Bar Association, March 5, 1945:

Wilbur E. Rocchio Horace B. Van Valkenburgh

---

[19] 231 U. S. 495, 510 (1913).
[20] 312 U. S. 496 (1941).

Denver Bar Association Holds Supreme Court Day

The April 2, 1945 meeting of the Denver Bar Association was designated "Supreme Court Day". At a well attended meeting, Chief Justice Norris C. Bakke presided over a panel presentation by the Supreme Court judges. Justice Mortimer Stone, who was scheduled to discuss "How not to prepare an abstract," became ill at the last moment, and Chief Justice Bakke made a very fine last-minute presentation of this subject. Justice William S. Jackson discussed "How not to write a brief", and Justice Wilbur M. Alter discussed "How not to make an oral argument". Justice Jackson's complete address, and a summary of the remarks of Justices Bakke and Alter follow.

How Not to Prepare an Abstract

BY CHIEF JUSTICE NORRIS C. BAKKE

The Supreme Court rule requires fifteen copies of an abstract of record to be furnished the court. In a number of instances this rule is not complied with.

The defendant in error may furnish a supplemental abstract if it is necessary, the cost to be borne by the plaintiff in error. Defendant in error should be certain that the supplemental abstract is necessary, because if it is not, he will bear the cost.

The abstract of record should not omit an abstract of the contents of the pleadings, and should not fail to set out the judgment in full. The abstract should not fail to contain a good, complete and accurate index, as such an index will save the time of the court. The court rules require that a proper index be contained in the abstract.

Incorrect folio numbers must not be used in the abstract. Incorrect folio numbers lead to trouble in finding the referred to matter in the record.

The lawyer's oath includes a pledge that I "will never seek to mislead the Judge or jury by any artifice or false statement of fact or law". This oath must not be violated in the preparation of the abstract or brief. An attorney will, of course, interpret the facts as they appear to him.

The abstract of record should not be less brief than is consistently possible.

Attention is directed to a provision in the rules that an agreed record may be submitted. If this rule is followed, it may well take the place, in appellate matters, that the pre-trial conference has taken in trial matters. Attention is directed to a very excellent article entitled "Shortening Records on Appeal", by Harry D. Nims, of New York, appearing in the October, 1944, issue of the Journal of the American Judicature Society, p. 73.

It should not be necessary to mention that one should not, in any manner, insinuate that the judges do not read the petitions, abstracts, briefs, etc.

How Not to Make an Oral Argument

BY JUSTICE WILBUR M. ALTER

If there are good briefs and abstracts there is little need to ask for an oral argument. There are three situations which might call for oral arguments:

1. Based on an unwarranted assumption that the court will not read the brief.
2. When a good brief has not been filed.
3. When an oral argument will increase the lawyer's fee.

A good oral argument is helpful in the determination of the case. Many oral arguments which are made do not merit the taking up of the time of the court or the attorneys with them. Unless an oral argument will assist in the determination of the case, it should not be made. Probably the court, rather than the attorneys, should request the oral argument.

Briefs and abstracts are passed around among the members of the court at least a week before oral argument.

Do not start an oral argument without a reference to the facts as contained in the brief and abstract. Do not fail to tell the court what the case is about, what happened in the lower court, and why the lower court should be reversed or sustained.

The court has frequently granted an extension of time of oral argument when the facts and law cannot be discussed in thirty minutes.

There is often no excuse for an oral argument. A request for oral argument does not expedite the disposition of the case and the rendering of the opinion. No oral argument should be requested without a real reason.

How Not to Write a Brief†

BY HON. WILLIAM S. JACKSON*

Whenever the time comes around for judges to speak to a bar association, the majority of them appear to wish that—for the time being, and only for the time being—we were following the English custom alluded to by Mr. Somerville, the Attorney General of England, when he was in Denver the summer of 1943. You may recall he referred to the fact that the separation of bench and bar went to the

†An address before the Denver Bar Association, Denver, Colorado, April 2, 1945.
*Justice of the Supreme Court of Colorado.

extent that neither attended each other's meetings. In England, for instance, no judge is a member of a bar association. And even if an English judge did find himself, through some break in precedent, in a bar meeting, talking on the subject that has been assigned to me, he would not find the subject as important as it is in this country. For I assume the subject of the brief is limited to briefs on appeal, and in England the appellate brief does not seem to have attained the importance that it has in this country.

Fairly early in the legal history of this state the appellate brief came in for comment by the judiciary, and one judge particularly made frequent reference to it in his opinions. I refer to Mr. Justice Elliott. In 1890, in *Crane v. Farmer,* 14 Colo. 294, he wrote: "In the preparation of their briefs on this motion, counsel have been very diligent in searching for the decisions of other states upon this question, while entirely overlooking our own. This is a common fault, especially among the older attorneys of this bar, whose habits were formed while our reported decisions were exceedingly limited. But it should be borne in mind that Colorado now has twelve volumes of published reports, covering a variety of subjects; and counsel may save time and aid us materially by citing them whenever they are pertinent." (p. 296). This case seems particularly appropriate today, just as the 112th volume has come off the press.

A later case, *Martinez v. People,* 55 Colo. 51, emphasizes what Judge Elliott had already said, and the Martinez case in turn is cited in support of that point in American Jurisprudence.

In *Henry v. Travelers' Insurance Co., et al.,* 16 Colo. 179, Judge Elliott makes the following reference to the brief: "The brief filed is merely typewritten; it is very imperfect and unsatisfactory; it has been of very little assistance to us in the investigation of the questions involved in the record. If a motion to dismiss for non-compliance with the rules in respect to briefs had been insisted upon in apt time, it might have prevailed. Briefs need not be lengthy; but they should conform substantially to the rules of the court; and should be full and clear upon the points relied on for reversal." (p. 183).

In *Townsend v. Fulton Irrigating Ditch Co.,* 17 Colo. 142, Judge Elliott complains as follows: "The printed abstract, brief and argument filed in behalf of appellant are very meager, and aid but little in pointing out the supposed errors; besides, we have not had the benefit of oral argument. In general, it is inexpedient and contrary to good practice to attempt to review a cause except so far as counsel give their assistance by brief and argument. The circumstances in this case furnish no exception to such rule." (p. 144, 145).

A fourth comment of Judge Elliott appears in *Nesbit v. People,* 19 Colo. 441: "The standing rule of this court for many years has

been and still is, that 'the brief of counsel for appellant or plaintiff in error shall contain a statement of the errors relied upon and the authorities to be used in the argument.' See Rule 19, 6 Colo. Reports; Rule 20, published in 1887; Rule 17, as published in 1893. The propriety of such rule cannot be doubted. It is not incumbent upon the appellate court to search through volumes of statutes to ascertain what may have been enacted in relation to mere matters of procedure without the assistance of counsel, with the view to giving an opinion concerning the same. In the absence of more specific objections, and in the entire absence of citations of statutes or other authorities, we are warranted in assuming that the challenge to the array is not much relied on." (pp. 459, 460).

An example of another early judge's criticism is seen in Judge Bissell's opinion in *McDonald v. McLeod,* 3 Colo. App. 344: "The brief filed is without statement of any errors upon which the appellant relies, or a discussion of any of the assignments upon which he predicates his right to a reversal of the judgment. The brief simply states that the appellant refers to the opinion of the court below as his best argument for reversal. Manifestly, this is without force as an argument to reverse the cause, since if the judgment is adequately supported by the proof and can be upheld under well settled principles at law, it is unimportant that inadequate reasons may have been expressed for the finding." (p. 345).

And in *Wolff v. Chapman,* 7 Colo. App. 179, the same Judge Bissell became irritated by the small type used in the printed brief, and specified nothing smaller than small pica.

Probably the most popular advice on "What a good brief is not" is that it shall not urge a point or contention and then not argue it or refer to it in the argument. Some thirty odd opinions of the supreme court make reference to this situation, and with two exceptions[1] the unvarying answer of both federal and state courts in this jurisdiction from the beginning up to and including the cases of *Contes v. Metros,* 111 Colo. 561, and *Edward v. Quackenbush,* 112 Colo. 337, is that "an error assigned by appellant will not be considered on review, if not argued in the brief."

McAllister v. McAllister, 72 Colo. 28, warns that extraneous matters, not appearing of record, should not be injected by brief and argument. And under this head might also well be cited the case of *Carroll v. Industrial Commission,* 69 Colo. 473, which lays down the proposition that: "A brief should not contain language disrespectful to the courts, to the opposing counsel, or to individuals. The remedy

[1]King Solomon, etc., v. Mary Verna M, Co., 22 Colo. App. 528; Fitzsimons v. Olinger Morturary Ass'n., 91 Colo. 544.

most frequently applied where counsel has used improper language in his brief is the striking of the offending brief from the files."

In telling "what a good brief is not" one should not overlook the matter of saving one's best points for the reply brief and not mentioning them in the opening brief.

Here again the supreme court has spoken a number of times and generally to the effect that it does not comport with good practice for the court to consider points raised by plaintiff in error for the first time in his reply brief. *Isabella Gold Min. Co. v. Glenn,* 37 Colo. 165; *Zinc v. Fry,* 72 Colo. 42; in the absence of good cause shown *Neikirk v. Boulder Nat.,* 53 Colo. 350; *Mesa De Mayo Land and Live Stock Co. v. Hoyt,* 24 Colo. App. 279. But where new points so raised in the reply brief were made in reply to answer brief, they may be considered. *Snider v. Town of Platteville,* 75 Colo. 589.

If counsel somewhat alter their position in the reply brief from that taken in original brief, care should be taken that this shift is not misunderstood as abandoning a point, as it has been held in *Joyce v. State,* 81 Colo. 306, that it is unnecessary to consider a point raised on the original brief but apparently withdrawn in the reply brief.

In *Clark v. Kraig,* 21 Colo. App. 196, it was necessary for the court to point out that appellant in the brief must give both the title of cases relied upon and cite the state or official reports.

One should not put a statement in the brief that can be used against one, because in *People v. Cartwright,* 99 Colo. 437, it was held that defendant in error was bound by a statement contained in its brief.

In the recent case of *McLaughlin v. Collins,* 109 Colo. 377, complaint is made that: "There are but 31 pages of abstract, and 52 pages of the brief of defendants in error. In that short space 227 decided cases and 26 tests are cited. It seems impossible that counsel could entertain the delusion that we would read these, but if so, they should be disabused of that hallucination. If in all the cases presented to this court the same method were followed and the seven judges should actually undertake such a task, and conscientiously discharge such a duty, we would do well to dispose of a dozen cases in the course of a year. The fault here criticized is on a par with that of citing no authorities when many are available." (p. 380).

A short answer to the question of "What a good brief is not" would be its failure to observe any or all of the requirements of Rule 115 R.C.P.

Another answer to the question of "What a good brief is not" is one which fails to tell clearly what the case is all about. In the brief the facts of the case meet the law, and a clear and concise answer as to the result of this meeting goes a long way toward getting a superior opinion

from the court. If it is possible to show just where the particular tile of one's client's case fits into the general mosaic of the law, the chances of a favorable result are enhanced greatly. For while the endeavor of the brief-writer is to win, the endeavor of the judge is, in the process of administering justice, to write a sound opinion that will stand up. A good brief greatly increases the possibilities of a good opinion from the court.

If you ask that the final result of this discourse be stated positively instead of negatively, we might paraphrase the motto of the Persian Gates, which reads: "Be bold, be bold, be bold, be not too bold"—and say, "Be brief, be brief, be brief—but not too brief."

Personals

Charles H. Queary, former director of the Legislative Reference office has been promoted from chief attorney, district rent office, to O.P.A. regional rent attorney.

Richard G. Luxford, recently discharged as a lieutenant in the army, has been appointed assistant city attorney to handle cases in Denver's municipal court.

Paul A. Hentzell, who has been assistant city attorney handling cases in Denver's municipal court, has been transferred to the city attorney's office for trial work.

Mary Seach, assistant city attorney of Denver, has resigned to enter private practice.

L. Ward Bannister, prominent Denver attorney, has been appointed to represent Colorado on the Missouri Valley Development Association.

Lieutenant Commander Bentley M. McMullin, Denver attorney, in active practice until he entered the war in February, 1942, spent a few days in Denver, describing some of his experiences over-seas, pending his transfer to New Orleans for special duty in the office of the judge advocate general of the navy.

Prof. Frederic P. Storke has been appointed acting dean of the law school of University of Colorado, succeeding Milton D. Green, who resigned to accept a position with the University of Washington, Seattle. Prof. Storke will act as dean until the return of Lt. Col. Edward C. King, now with Allied Military Government in Italy.

DICTAPHUN

The Old West Is Dead

Any lingering doubts you may have had that the spirit of the old West is gone forever will be smothered by an Act of the Thirty-fifth General Assembly, lately so happily adjourned. We find on page 38 of Holland's Session Laws an amendment to the charter of the once roaring, robust and rambunctious mining camp of Central City. It provides the pay-off for the splendid services rendered and to be rendered by the Mayor and Aldermen in these words:

"The Mayor and Aldermen shall each receive his water rent, not to exceed $2.50 per month, for respective services."

The municipal officers of Central, at the time when we were a boy, wouldn't have used water for any purpose, and if they had, two dollars and a half's worth would scarcely have been one day's chasers.

What About This, Shakespeare?

Charles Edgar Kettering, County Judge and benefactor of mankind, or at least of one man, has now made it two by granting a petition for change of name, chronicled (at the legal rate for such advertising) in *The Rocky Mountain Herald.* The good, grey judge has fixed it up so that he who was formerly known as Yit On Nip is now hailed as Norman Yit On Nip.

Poetry About Our Family

We were over in the office of the Clerk of the United States District Court the other day, inquiring whether our debts justify the expense of bankruptcy, and received this gem from Deputy Clerk H. A. McIntyre. It is from the column of the justly celebrated Franklin P. Adams:

"* * * Appropos of nothing. Mr. Hilliard's law firm before his elevation to the bench, was Hilliard, Lilyard & Finnicum, a fact which is offered free to F. P. A." Which caused F. P. A. to come forth thusly:

"Hilliard, Lilyard & Finnicum
Are not in the 'Mikado',
But attorney chiefs who file their briefs
In Denver, Colorado.
They practice not in Camelot,
In Truro, Troy or Tinicum,
But they work and loll in Denver, Col.,
Do Hilliard, Lilyard, Finnicum."