REHEARING IN AMERICAN APPELLATE COURTS

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Introduction

In December of 1949 the Supreme Court of Canada heard the appeal of Aimé Boucher, convicted in the province of Quebec of seditious libel for publishing and proclaiming that there existed in that province a "burning hatred of God and Christ and Freedom". The case was not easy to decide: three of the judges, somewhat divided among themselves, voted to reverse the conviction and order a new trial; two did not believe that the evidence presented could warrant a conviction under any proper instructions and voted for direction of acquittal.[1]

This is the kind it is hard to lose. Victory was close to the hands of Boucher's counsel. Instead of vindication, they received only a consolation prize: the right to retry the case on the facts under slightly modified instructions. To the lawyer who suffers such a defeat, there is one automatic reaction: appeal. One more opportunity and one more forum in which to raise his arguments and press his case. But appeal was not possible. For some sixty years of Canadian history, appeals both criminal and civil could be

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This article is being concurrently published by the California Law Review and the Canadian Bar Review. The numerous letters on rehearing received from various appellate judges and quoted from or referred to in this article are not generally identified by the name of the writer because, while it is improbable that any judge would object to being identified, when their views were solicited they were not expressly notified that they would be. The letters were unusually forthright and candid.

In this article we have put aside trial-court devices for re-examination of decisions such as motions for new trials, judgments n.o.v., amended findings, or other reconsideration by the trial judge. Generally in the United States a rigorous distinction is maintained between trial and appellate process, see footnote 22 *post* and accompanying text, and our concern is with the latter. Note that F.R.C.P. 59 incorporates former Federal Equity Rule 69 in providing that, in actions tried without a jury, new trials may be granted "for any of the reasons for which rehearings have heretofore been granted in suits in equity".

[1] [1951] S.C.R. 265; [1950] 1 D.L.R. 657; (1950), 96 Can. C. C. 48.

and were taken from the Supreme Court of Canada to the Judicial Committee of the Privy Council. But that avenue had been closed for criminal causes in 1933[2] and more recently had been abolished for civil causes as well.[3]

Appeal to the Privy Council has not been the exclusive method to review the decisions of the Supreme Court in the history of Canada, however. There appears to have been another device with somewhat different effect: by appropriate motion, it had been possible to induce the Supreme Court to review and rethink its own decisions. This motion was, in form, a request to the court that it correct the minutes of the Registrar. The Rules of the Supreme Court provided for and still provide for such a motion.[4] Doubtless the ideal use of such a procedure is to ensure that the minutes of the court accurately reflect the action taken by the court as the result of its deliberations. It is not surprising however —or even wholly objectionable—that such motions have been used to change the form of its order or action to correspond to that which it *thought* it had made or taken or *intended* to make or take; in other words, to alter an inadvertence on the part of the court itself, as well as errors made by its clerical staff.

Neither of the two processes just described would have served the purposes of Boucher's counsel. But a third possible variation on the motion to correct the minutes might have served at one time as the vehicle to obtain a reconsideration by the court. This form permitted the court to enter in the minutes, under the guise of correcting them, the action which the judges, or some of them, *wish* they had taken, in the light of after-thought. This doubtless was not the object for which the motion was devised. It apparently was used for this purpose, however, until the court amended its Rule 47 to prevent such an abuse.[5] But the possibility of obtaining reconsideration was not wholly abolished. A new rule was formulated which provided, and still provides:[6]

[2] Criminal appeals were abolished entirely by 23 & 24 Geo. V, c. 53, s. 17 (Canada 1933), and had been granted but sparingly before that time.

[3] The Supreme Court Act, 13 Geo. VI, c. 37, s. 3 (Canada 1949). See Abolition of Appeals to the Privy Council: A Symposium (1947), 25 Can. Bar Rev. 557; Livingston, Abolition of Appeals from Canadian Courts to the Privy Council (1950), 64 Harv. L. Rev. 104.

[4] Rule 47, Supreme Court of Canada.

[5] See Cameron, Canada Supreme Court Practice and Rules 560 (2nd ed., 1913). The amendment was accomplished by the addition of the following sentence: "Such a motion shall be based only on the ground that the minutes as settled do not in some one or more respects specified in the notice of motion accord with the judgment pronounced by the Court".

[6] Rule 61, Supreme Court of Canada.

> There shall be no re-hearing of an appeal except by the leave of the Court on a special application, or at the instance of the Court.

We have been unable to discover the number of times in which the motion to correct the minutes was used to obtain a reconsideration of a decision entered. Search discloses only one reported instance before the *Boucher* case in which the new rule on rehearings was invoked, and in that case it failed.[7] Perhaps the continued possibility of appeal to the Privy Council discouraged resort to rehearing. But rehearing worked for Boucher. Because a rehearing was granted, the rule assumes significance in the Canadian practice.

That significance is not measurable however. All that reports of the case indicate is that it was re-argued before a reconstituted court and that that body voted, five to four, to agree with the original dissenters and direct a verdict of acquittal.[8] Seven written opinions shed not the slighest light on rehearing procedures. The five years since elapsed have not improved the situation; a search of the reports does not disclose that any applications for rehearing under the rule have been filed or considered, and evidently none has been granted.

The editors of the Canadian Bar Review, aware that petitions for rehearing are known—are, indeed, even routine—in the United States, asked us to contribute a summary survey of the United States experience for the information of the Canadian bar. The writers found to their surprise that extensive use of the rehearing device in the United States has resulted in a formal body of knowledge little greater than that presently available to the Canadian lawyer. Treatises on practice and procedure touch the subject lightly when they bother to mention it at all.[9] We doubtless have more professional reviews and journals than the rest of the English-law world combined, yet this voluminous literature barely mentions the topic. The scope of official reporting in the United States on the appellate level is virtually all-inclusive, but the many references to the fact of rehearing tell almost nothing about either the mechanics of the process or the standards applied in judging applications.

The writers thus were relegated to less common avenues of legal research in attempting the promised survey. Principal reli-

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[7] *B.V.D. Co. Ltd.* v. *Canadian Celanese Ltd.*, [1937] 3 D.L.R. 449.

[8] *Boucher* v. *The King*, [1951] S.C.R. 265; [1951] 2 D.L.R. 369; (1951), 99 Can. C. C. 1.

[9] An exception is the coverage of rehearing in California in 3 Witkin, California Procedure (1954) pp. 2406-2410.

ance has been placed upon direct communication with courts in which rehearings are so often applied for and so infrequently granted. Inquiries were sent to courts of final instance in all the forty-eight states, as well as to the eleven United States Courts of Appeal which hear the great bulk of federal appellate cases and to the Supreme Court of the United States.

Almost all those canvassed responded. Many answered follow-up letters designed to clarify original answers or to elicit more detailed information than that called for by the original questionnaires. The results of this examination have been compiled. They suggest, as we shall detail later in this article, some insights and judicial attitudes which are only hinted at, at best, in official reports and rendered opinions.

Some foundation must be laid for the introduction of such matter however. An essential element of that foundation, although not the only one, is some elaboration of what the word "rehearing" means and the processes it describes.

What is a Rehearing?

The rules of the United States courts usually make relatively clear the general procedure contemplated. A decision unsatisfactory to one of the parties has been rendered. Assigning briefly his grounds, he applies or petitions[10] to have the cause set down for reargument and states the reasons why the court should grant his request. There may be, but need not be, oral argument on the petition or application, new or supplemental briefs, and an answer to the petition. If the court concludes as a body or through one or more of its judges that the application should be granted, the cause is set on the calendar for reargument, where it is treated substantially as though the matter had not been heard before.[11] Rules quite com-

[10] The form of application is most commonly known in the United States as a petition for rehearing. Texas practice names it a motion for rehearing, and Mississippi prefers to call it suggestion of error. Motions to modify or correct the mandate or opinion are occasionally employed by attorneys and considered by courts with the same ultimate objective in mind. Motion for reargument is a common variant.

[11] "When a rehearing is granted, it means what the term 'rehearing' indicates, *i.e.*, that the case is for reargument and resubmission, before judgment can be entered therein." *Granite Bituminous Paving Co.* v. *Park View Realty & Improvement Co.* (1917), 270 Mo. 698, at p. 701, 196 S.W. 1142, at p. 1143.

We point out in the text that occasionally courts grant rehearing and rehear in the same proceeding, *i.e.*, that whether a court should rehear and whether it should change its prior decision are treated by both courts and attorneys as a single question. The *Granite* case is the only one found in which this process was condemned: the Supreme Court of Missouri held that such action by the St. Louis Court of Appeals was void to the extent that it purported to reverse the prior decision without reargument.

monly provide that initiative in providing for rehearing may come from the court or one of its members, as well as from the attorneys, but the bulk of rehearings originate with the attorneys.

If, upon reargument and reconsideration, the court concludes that the order or mandate originally entered is erroneous or undesirable, it will revoke or vacate that action and substitute what it now deems appropriate. If, as is the more common case, it remains satisfied in substance with what was done on the first hearing, the court will reaffirm or reinstate its original action.

This is what the rules contemplate. Perhaps it is even an ideal from the standpoint of judicial administration over the long run. But expediency, lawyer-habit and judge-attitude, and perhaps the very nature of a claim to rehearing, contribute to widespread lack of observance. Ideally an application for rehearing should be devoted primarily to a showing of why the case should be reheard, not a discussion of the merits. But the ultimate justification for rehearing is error in the original decision, and naturally an advocate will sometimes conclude that his application will fail unless it establishes an error. Thus the application sometimes covers the same ground that the proposed reargument would itself cover. Courts are apt to treat the two as coincident and write more or less elaborate opinions on the merits, amounting to a reconsideration of the point in question, only to deny the application for rehearing. Whether rehearing has been denied or granted in such circumstances is apt to be a matter of definition only.[12] Nor will this problem of definition be restricted to those cases in which the court reveals its action by rendering an opinion. The simple order "Application for rehearing denied", which appears in almost every volume of the reports of every appellate court in the United States, must conceal a number of occasions on which the order was entered only after more or less full review of the original decision.

The Origin of Rehearing and its Justification

One of the practical and philosophical problems of any system of procedure is that of finality. Essentially, the problem is resolved by striking a balance between the competing demands of a prompt decision and disposition on the one hand and the desire, on the other, to do the most complete justice possible. A procedure per-

[12] Definitions are sometimes of significance however. As a letter from the Chief Justice of Utah points out, granting a rehearing stays the mandate under its rules, while substitution of an opinion does not.

emptory and summary, without review or appeal of any kind, satisfies the first demand but hampers the second. A procedure deliberative and reflective, with provision and time for re-examination and afterthought, promotes the second but violates the first.

It is not at all surprising to find that different legal systems have adopted differing lines of balance in this matter. The notion expressed by *res judicata* is as widespread as the Latin which crystallizes it. Nor is it surprising to one familiar with the evolution of the English legal system to find that our two ancient systems of jurisprudence, law and equity, adopted different standards in the matter of finality.

The law courts from their beginning until the nineteenth century knew little of review as we conceive of that form of the appellate process today. The prime device for correcting a mistaken decision below was the writ of error,[13] theoretically an entirely new proceeding. It was designed to eliminate and correct error which appeared of record, in a day and time when records were often so sparse as to be largely uninformative.

But the absence of any satisfactory form of appeal does not mean that there was no procedure resembling the kind of rehearing which has been discussed. To a limited extent, the power—said to be inherent but more accurately merely convenient—did exist to vacate or modify a judgment or decision during the term of court in which it was entered.[14] Thereafter the usual method of attack was by the cumbersome and not very fruitful device of writ of error to review the record, with or without a bill of exceptions, depending on the issues urged.

In short, the law courts had a decided love of finality—it was worth more than the wisdom provided by afterthought.

The equity courts took quite a different view on this as on other matters. And they went to the other extreme. In the early days of equity—roughly, before the Restoration—it was impossible to have any kind of appellate review of a decision of the Chancellor, not because he could not be wrong but because there was no body which sat above him.[15] At times even before this, he

[13] Pound, Appellate Procedure in Civil Cases (1944) pp. 88-94. Very limited alternatives were provided by certiorari: *ibid.* at pp. 60-62.

[14] See 2 Tidd's Practice (4th American ed., 1856) p. 942: "And, during the same term in which the judgment is given it is amendable at common law, in form or in substance". For a complete treatment, see Millar, Civil Procedure of the Trial Court in Historical Perspective (1952), c. XXII. Millar treats as well the evolution and present function of the writ of error *coram nobis*.

[15] As the late Justice Jackson remarked of the Supreme Court of the United States, "We are not final because we are infallible, but we are

had truly been both original and final. Originality tended to fade as he acquired assistance in the form of clerks, the Master of the Rolls and Vice-Chancellors. But the decisions were his, and they were not final until he had acted upon them by affixing the Great Seal.

This conception of a purely one-judge court, designed as it was to produce the purest form of justice, probably is responsible for the development of a device called rehearing in chancery practice. Its object is very similar to the rehearing provided by Rule 61 of the Supreme Court of Canada and American rehearing rules generally—to enable the deciding agency to reconsider a decision once rendered and correct and revise views once expressed. In this function of course it is unlike the writ of error, designed to correct the mistakes of one court by reference to another.

Whatever may have been the original object of rehearing in equity, its result came to be notorious and shocking abuse. Over the years the standard for granting rehearing degenerated to the point where any party could obtain one by specifying some part or all of an order or decision deemed objectionable and attaching to the petition a certificate of counsel that the case was one appropriate to be reheard. It applied to all orders, interlocutory and final, so long as they were not, as Francis Bacon's ordinance had it, under the Great Seal. And the problem became more acute as the staff of the Chancery Court increased: in the nineteenth century it was possible to have a matter decided before the Master of the Rolls, then reheard before him; heard before the Chancellor, then reheard before him; and finally reviewed on appeal in the House of Lords.[16] This was obviously too much, especially when the matter might be but an insignificant fragment of a larger case.

What then led the great Holdsworth to say[17] that one of the three features in which equity procedure was superior to procedure at law was the rehearing process? Deficient as the writ of error was, it surely could not surpass the horrors of Lord Eldon's administration of Chancery; Holdsworth recognized that equity was too concerned with complete justice and had sacrificed, as he put it, "any decent finality" to the competing value. But there are

infallible only because we are final". *Brown* v. *Allen* (1953), 344 U.S. 443, at p. 540.

[16] See Potter, History of Equity and its Courts (1931) pp. 18-19. It is said that rehearing was possible only so long as the seal was not affixed. This seems true, but it was not the end; review thereafter could be had by a Bill of Review.

[17] 9 Holdsworth, History of English Law (1926) pp. 369, 373.

values other than expedition, and rehearing allowed the Chancellor to review the case that was decided below rather than the artificial and inadequate record that was made at law. This is the virtue to which Holdsworth referred.

Evidently his views were anticipated, since by force of the Judicature Act and the Rules of the Court of Appeal[18] in England, all appeals are by way of rehearing. The same seems to be true of Canadian provincial courts, or at least some of them.[19]

The administration of appellate practice in the adjacent lands, the United States and Canada, has thus taken slightly divergent courses. The pattern of review for the federal courts of the United States and of most of the state courts has been the writ of error of the law courts.[20] The pattern was strong enough to dominate in review of both law and equity cases and to some extent continues to dominate in their conjunct administration.

In the light of this divergence, it might be thought that the experience of the United States would be of limited instructional value in the Canadian rehearing practice. But in the United States also many of the most objectionable vestiges of writ-of-error practice have been eradicated by statute or rule, so that appeal is quite uniformly regarded as a removal of a case to a superior court rather than the initiation of wholly new proceedings, just as chancery review was but a continuation of a proceeding already begun.

The other major objection to writ-of-error practice, noted by Holdsworth and others, that it resulted in a review of a record rather than a case, has been met not so much by improvement of the appellate procedure as by improvement of the trial. The record made under the system of verbatim recording commonly

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[18] 36 & 37 Vict., c. 66 (1873); Supreme Court Rules, Order 58, Rule 1.

[19] See British Columbia, C.A. Rule 3; New Brunswick, Order 58, Rule 1; Nova Scotia, Order 57, Rule 1; Prince Edward Island, Order 58, Rule 1.

[20] From the Judiciary Act of 1789 until 1929 review in the federal courts was by writ of error only: 1 Stat. 73, c. 20 (1789). In 1803 a review proceeding styled appeal was introduced for equity cases, but it was modelled upon the writ of error: 2 Stat. 244 (1803). See Payne, The Abolition of Writs of Error in the Federal Courts (1929), 15 Va. L. Rev. 305. Roscoe Pound, in his elaborate study, Appellate Procedure in Civil Cases (1941), points up the pervasive influence of the writ of error on state procedures generally and describes as the major problem in the field of what is now called appeals the elimination of the remnants of error practice. The general consolidation of law and equity, both substantive and procedural, has helped, but some states preserve the distinction at the appellate practice level because it is there incorporated in the judicial article of the state constitution: *e.g.*, Iowa Const., Art. V, § 4; Utah Const., Art. VIII, § 9.

in use in the United States is quite as full and complete[21] as the written evidence and depositions which moved up the line of chancery review and gave it the characteristics which so commended it to Holdsworth.

A final objection to the writ-of-error procedure, but one of less importance to the topic of rehearing, is that defects in evidence below—even those of a purely formal nature—still ordinarily are not remediable by the introduction of supplementary evidence on the appellate level.[22]

This inquiry into the genetics of rehearing is less enlightening than might be hoped. The name employed is that used by equity courts to describe their entire process of reviewing decisions. But clearly the rehearing of today, as a feature of appellate review, is only a very small part of the rehearing practice of equity. Probably it is more accurate to say that the name is drawn from equity but the object bearing it is similar to the very limited prerogative of a law court to reconsider and rescind within the term of rendition its judgments or decisions. This is as much of ancient foundation as can be found. But our courts and procedures have changed so much that it would be foolish—even if possible—to attempt a conformity with an older practice. If rehearing is to achieve its potential as a safety valve in modern appellate practice, its existence must be made to depend on current need, and its scope must be determined by that need.

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[21] See Louisell and Pirsig, The Significance of Verbatim Recordings of Proceedings in American Adjudication (1953), 38 Minn. L. Rev. 29, for an account of this development and its implications.

[22] The usual rule in the United States, which limits the appellate court to the record made in the trial court, to the exclusion of new evidence in the appellate court, has been modified in several jurisdictions (as it has been in England, see (English) Rules of the Supreme Court, Order 58, Rule 4), California being one of the principal ones. Eminent scholars have urged this reform in the United States generally. See Pound, Appellate Procedure in Civil Cases (1941) pp. 368, 387; Clark, Code Pleading 67 (2nd ed., 1947); (1910), XXXV Reports of American Bar Association 645. The usual rule is of ancient lineage, see 3 Blackstone's Commentaries, pp. 454-455, but in the United States today is largely a function of the constitutional guarantee of jury trial, as demonstrated by the California provision for taking additional evidence in the appellate court in cases "where trial by jury is not a matter of right or where trial by jury has been waived". Cal. Const. Art. VI, Sec. 4 3/4; Cal. C.C.P. Sec. 956a; see *People* v. *Carmen* (1954), 43 Cal. 2d 342, at p. 349, 273 P. 2d 521. The procedure for taking the additional evidence is specified in Cal. Rules on Appeal, Rule 23(b); see Witkin, New California Rules on Appeal (1944), 17 S. Cal. L. Rev. 232, at p. 247. Probably the most significant practical characteristic of this California exception is its sparing use, especially in situations where the additional evidence aims at reversal of the judgment instead of affirmance, see *Tupman* v. *Haberkern* (1929), 208 Cal. 256, at p. 270, 280 Pac. 970, noted in (1930), 3 So. Cal. L. Rev. 351; *Estate of Schluttig* (1950), 36 Cal. 2d 416, 224 P. 2d 695; cf. *Bassett* v. *Johnson*

Counsel for Boucher, in their application[23] to the Supreme Court of Canada, vouched as a prime reason for the granting of rehearing the fact that the Supreme Court had, with the abolition of appeals to the Privy Council, become the court of last resort for Canadian litigants. As they pointed out, this places an increased responsibility on the court to ensure the quality of its decisions. This seems justification enough for the cautious exercise of a recognized power which long had lain dormant in Canada. But it does not identify the cases in which employment of the practice is wise or say how that practice should be limited to prevent abuse. On some of these points experience in a neighbouring land under not dissimilar conditions may be helpful. And a look at that experience may be helpful to the courts of the United States as well.

The United States Experience with Rehearing

I. *Grounds for Granting*

The basic postulate of rehearing in the United States, as in Canada, must be that a court which is final must also be careful; it must admit the possibility that error may occur and that original decisions may not always be the best possible decisions. Because it is final, it must make its own provisions for correcting its error or misjudgment. But it seems equally obvious that automatic reconsideration will largely fail to achieve the objective desired, as well as sacrifice that "decent finality" mentioned by Holdsworth. Some standards must be evolved to single out those cases in which reconsideration will be profitable to the system.

With few exceptions the starting point is the rules of the several appellate courts. Forty-five of the forty-eight states have provided by rule for some type of rehearing procedure.[24] Of the three re-

(1949), 94 C.A. 2d 807, 211 P. 2d 939. For a comprehensive treatment of this California exception to the usual United States rule, and of the related provision of Cal. Const. Art. VI Sec. 4 3/4, also executed by Cal. C.C.P. Sec. 956a, for new findings by the appellate court, see 3 Witkin, California Procedure (1954) pp. 2392-2400; see also Comment (1932), 20 Cal. L. Rev. 171; Note (1928), 1 So. Cal. L. Rev. 387. In at least one instance in California, *Adolph Ramish, Inc.* v. *Woodruff* (1934), 2 Cal. 2d 190, 40 P. 2d 509, the additional evidence was taken while the case was in the Supreme Court after rehearing had been granted, and the additional evidence lead to affirmance of the judgment on rehearing whereas it had been ordered reversed before rehearing.

[23] A copy of the Memorandum of Argument on the application for rehearing has been made available to the writers.

[24] The rules are generally all-inclusive, but not entirely identical in scope. Montana Rule XV(1) permits preclusion in advance of rehearing in certain types of proceedings. Many have special limitations on petitions in criminal causes, particularly with reference to time limitations.

maining, only Maine[25] provides no opportunity; informal, non-rule procedures create the equivalent of rehearing in both Rhode Island[26] and Massachusetts.[27] The eleven federal courts of appeals and the Supreme Court of the United States have rules of varying degrees of specificity.

This virtual unanimity is strong evidence that the need for rehearing is recognized. But, with recognition of need, consensus ceases. The most important thing would seem to be the grounds upon which rehearings will be granted, for here should be found indication of when and why finality must accommodate deliberateness and thoroughness for proper discharge of the judicial function. And it is just here that most confusion and uncertainty exist. Only twelve of the forty-five states having formal rehearing rules specify any grounds, and but one of the federal courts of appeals makes the attempt.

The following are typical of the grounds regarded as sufficient by those which attempt to specify:

(a) the court has overlooked, misapplied or failed to consider a statute, decision or principle directly controlling;

(b) the court has overlooked or misconceived some material fact;

(c) the court has overlooked or misconceived a material question in the case;

(d) there is serious doubt over the validity or correctness of precedent relied upon and the case itself is of great precedent potential or of grave public interest.

The major difficulty in regarding specified grounds as a reliable measure of the scope of rehearing is that, of the relatively few courts which attempt by rule to specify, most are extremely indefinite. An example may be drawn from Rule 15(a) of the United States Court of Appeals for the Eighth Circuit:

> For the sole purpose of directing the attention of the court to some controlling matter of law or fact which a party claims was overlooked

[25] Maine has no rule for rehearing in law cases, and no case has been found. Chancery Rule XXXIX seems to apply to equity cases only. But a letter from the Supreme Judicial Court says, ". . . I have no doubt that, if a patent error should be discovered in an opinion, a method would be found by which the same could be corrected".

[26] Known there as a motion for reargument, the mechanics and function of which seem to be the same as rehearing elsewhere (letter from the Supreme Court of Rhode Island).

[27] A letter from Massachusetts says that rehearing is not forbidden, but that no rule exists because it is not encouraged. A letter from the clerk of that court describes the petition as an informal, "friendly information" to the court. And see *Old Colony Trust Co.* v. *Pepper* (1929), 268 Mass. 467, 167 N.E. 656.

> in deciding a case, a petition for rehearing may be served and filed not later than twenty days after the filing of an opinion. . . .

Despite its emphatic form, the rule tells little to an attorney who must determine whether his petition has a chance for favourable reception.

Rule 18 of the New Mexico Supreme Court represents what is probably the greatest attempt at precision:[28]

> The motion for rehearing shall be directed to the opinion of the court, and shall distinctly specify wherein the same is erroneous; but shall not renew contentions previously argued and submitted and expressly disposed of except to invoke an earlier decision, a statute or a rule of court deemed controlling and previously overlooked. The motion may also direct the court's attention to fundamental or jurisdictional error not previously presented, and may renew any contention deemed controlling and not expressly passed upon.

To fill out the spectrum, we may include Utah,[29] one of those states which has a rule on rehearing but does not specify the grounds for a petition, and Massachusetts, which has no rule. Letters have been received from justices of each of the courts mentioned: New Mexico, with the most detailed rule; the Court of Appeals for the Eighth Circuit, which refers vaguely to grounds; Utah, which has a rule not mentioning grounds; and Massachusetts, without a rule. The letters all are frank and detailed, and in substance they are the same. Each court is reluctant to grant rehearings; will not do so when the only object could be to rehash arguments already raised and disposed of; will do so when their attention is called to some matter of law which is deemed controlling; but almost without exception will not do so if the matter urged is now being raised for the first time.[30]

In short—and this is the single "ground" referred to most often in the responses received—if the court is persuaded it has or may have blundered, it will grant rehearing to avoid an unjust result, or to correct material error. It is a safe suggestion that nine out of ten lawyers who have lost a case on appeal are genuinely

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[28] Montana Rule XV(2) reads as follows: "A petition for rehearing may be presented upon the following grounds and none others: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the Court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the Court was not directed".

[29] Utah R. Civ. P. 76(e)(1): "The petition shall state briefly the points wherein it is alleged that the appellate court has erred".

[30] On this last point—matter raised for the first time—the letters from judges are less adamant than rules and cases: several letters note that the fact that new matter is presented would not control the judges' attitude in every instance.

convinced that the court has blundered, that the error is material and that the result is grossly unjust. Lapse of time tends to restore perspective, but the decision of the attorney on the matter of rehearing must be made, as we shall see, before time can have much of this effect. The result has been, in many states, a deluge of quite useless and objectively hopeless petitions. Since no expressed standards exist by which attorneys may guide themselves, there is no non-judicial screening device to separate petitions of possible merit from those conclusively doomed to denial.

The common law, procedural no less than substantive, gains its content as much or more from decisions as from rules. Examination of the multitude of cases on the subject, as well as the responses of the various courts, does not bear out the hope that case authority will supply the obvious defects of the rules. There is general agreement that rehearing will not be granted merely for the purpose of again debating matters on which the court has once deliberated and spoken—on this rules, cases and justices speak with one voice.[31] Nor is there much disposition to grant a petition which raises for the first time a question of law or a legal theory which was not raised on the first argument, especially when that question has not been raised in the trial court and appears for the first time in the petition.[32] The latter principle is really a corollary of the common appellate rule which bars consideration, except in exceptional circumstances, of matters not raised in the trial court. The simultaneous preclusion from rehearing of certain matters which have been previously raised, on the one hand, and matters which have not been previously raised, on the other, superficially suggests an impasse based on inconsistency in the philosophy of rehearing. Actually, however, there are sound policy reasons for excluding both types—the former because they

[31] This, of course, is a standard rather than a rule. On occasion, courts have quite simply changed their minds without any new considerations being advanced. Official reports ordinarily will not disclose this information, but *Constance* v. *Harvey* (1954), 215 F. 2d 571, at p. 575 (2nd Cir.), is a notable recent example.

[32] *Rayner* v. *Rayner* (1950), 216 La. 1099, 45 So. 2d 637; *Standard Clothing Co.* v. *Wolf* (1945), 219 Minn. 128, 17 N.W. 2d 329; *Hays Finance Co.* v. *Bailey* (1952), 56 So. 2d 76 (Miss.); *Wholey* v. *Columbia Nat'l Life Ins. Co.* (1943), 29 R.I. 254, 33 A. 2d 192; *Shoaf* v. *Bringle* (1951), 192 Tenn. 695, 241 S.W. 2d 832; *Morrill* v. *Boardman* (1952), 117 Vt. 103, 86 A. 2d 146 (refusal to note new references to evidence); *Walgreen Co.* v. *State Board of Equalization* (1946), 62 Wyo. 336, 169 P. 2d 76. But see *In re Riverton State Bank* (1935), 48 Wyo. 372, 49 P. 2d 637, granting rehearing on a point not originally raised because of the important public interest involved, and *Dabney* v. *Stearns* (1913), 73 Wash. 583, 132 Pac. 400, considering a statement of facts not available for the first hearing through non-culpable inadvertence of counsel.

have had their day in court, the latter because the parties did not see fit seasonably to bring them to court. And there are left as the legitimate subject of rehearing matters seasonably presented by the parties but neglected by the appellate court itself in the first decision.

There are pronouncements that rehearings are not granted when the object of the petition or application is to obtain a restatement of a proposition or correction of an erroneous statement which would not result in a change in the mandate or in the practical result of the decision.[33] It is interesting to note, however, that the order denying the rehearing is often accompanied by an opinion which accomplishes the object of the petition: a clarification of the original opinion or a correction of it.[34] To the extent that the pronounced rule is actually followed, however, it sometimes seems unfortunate. Opinions of appellate courts are published, and indeed often written, primarily because they are of interest to people other than the parties to the instant dispute. So far as the parties alone are affected, they should bear whatever burden inheres in non-prejudicial error, and perhaps in an adversary system should not complain if an inadequate presentation of the case has led to or permitted the court to commit even prejudicial error. But whatever the consequences of error to the parties, the precedent rôle of the decision sometimes seems important enough to justify limited use of rehearing to amend or clarify unfortunate statements which may result in confusing or even misleading indications of what the law is.

The application of this rule that the error, if any, must be prejudicial to the parties has another sometimes unfortunate aspect. It logically precludes applications or petitions by *amicus curiae*, and the relatively few cases on the subject seem to accept the logical thrust.[35] But in so far as the decision has legislative as well as ad-

[33] *Donnelly* v. *United States* (1913), 228 U.S. 708; *Continental Optical Co.* v. *Read* (1949), 119 Ind. App. 643, 88 N.E. 2d 55; *Jackson* v. *Mountain Sanitarium & Asheville Ag. School* (1952), 235 N.C. 758, 69 S.E. 2d 29; *Beaver County* v. *Home Indemnity Co.* (1935), 88 Utah 1, 52 P. 2d 435.

[34] *E.g.*, *Supreme Council of Royal Arcanum* v. *Hobart* (1917), 244 Fed. 385 (1st Cir.); *Forrester* v. *Johnson* (1928), 126 Kan. 590, 270 Pac. 602; *U.S. Fidelity & Guaranty Co.* (1941), 191 Miss. 103, 199 So. 278.

In *Fernstermaker* v. *Tribune Publishing Co.* (1896), 13 Utah 532, 45 Pac. 1097, the court granted rehearing to reform the opinion although it adhered to its original procedural disposition. When the result of the order will be a new trial or other subsequent proceedings below, the doctrine of law of the case provides a special reason for care in the expression of the holding.

[35] *Parker* v. *State* (1893), 133 Ind. 178, 33 N.E. 119; *New Orleans* v. *Liberty Shop* (1924), 157 La. 26, 101 So. 798; *State* v. *McDonald* (1912), 63 Ore. 467, 128 Pac. 835; cf. *Barnes* v. *Lehi City* (1929), 74 Utah 321,

judicative aspects, this emphasis may be misplaced. A court could rationally take the position that while the parties might be precluded from objecting to certain errors or misjudgments because they had participated in formation of the posture of the case, an *amicus* or intervener who had not previously been heard would be the only person with sufficient standing to obtain reconsideration. And, upon that reconsideration, the original decision might stand as to the parties with a new opinion substituted for the one deemed defective. Such a rule would not be easy to administer and it might invite an increase in the already excessive number of petitions filed. But we think that a substantially higher percentage of this new type of petition would be meritorious, and that distinguishing between the *amicus* who presents an interest which deserves hearing and the one who is but the losing party in another guise would not present insuperable difficulties. However, permitting a result concededly erroneous to stand for the parties who invoked the court's aid to settle their troubles, and at the same time correcting the result for the public at large, presents obvious psychological and even moral difficulties.[36]

A number of cases suggest that an equal division of judges in the first instance is not sufficient reason to grant a rehearing.[37]

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279 Pac. 878. *Contra, Green* v. *Biddle* (1823), 8 Wheat. 1 (U.S.). The Iowa Supreme Court refused rehearing when petitioned by counsel for a since deceased party on the ground that authority to act for him expired with his death and that counsel had no interest of their own to vindicate: *State* v. *Rutledge* (1952), 243 Iowa 201, 50 N.W. 2d 801. The court stated another less shaky ground for its decision however.

That a distinction may be made between the propriety of rehearing and the right to petition for it, see *Folding Furniture Works* v. *Wisconsin L.R.B.* (1939), 232 Wis. 170, 286 N.W. 875, considering but denying rehearing despite the fact that one of the parties no longer existed.

[36] See, however, *Green* v. *Biddle*, *ante* footnote 35, where the petition was advanced to protect numerous parties claiming under the same right as appellee but not joined in the proceeding. In *Mayflower Ins. Co.* v. *Brill* (1938), 132 Fla. 530, 180 So. 754, the petition of an intervenor was granted. In *Sun Oil Co.* v. *Burford* (1942), 130 F. 2d 10 (5th Cir.), rev'd on other grounds (1943), 319 U.S. 315, the court called a petition by one not a party "incongruous" but considered it nevertheless. And in *Boucher* v. *The King*, the case which prompted this study, one of the points made by counsel was that more than 100 cases identical in character were then pending in the province of Quebec.

[37] *Shreveport* v. *Holmes* (1888), 125 U.S. 694; *Seaboard Airline Ry.* v. *Jones* (1904), 119 Ga. 907, 47 S.E. 320; *Latimer* v. *Sovereign Camp* (1901), 62 S.C. 145, 40 S.E. 155. But a number of petitions have been granted in the Supreme Court of the United States after decision by a divided court when an important constitutional question is involved: *United States* v. *Grimaud* (1910), 216 U.S. 614; *Home Ins. Co.* v. *New York* (1886), 119 U.S. 129. State cases granting rehearing in such circumstances probably outnumber those denying.

The petition is deemed denied when the court is equally divided on whether it should be granted: *Carolina Power & Light Co.* v. *Merrimack*

Petitions are frequently filed in such cases, however, and the temptation to file them must be greater here than elsewhere, when the losing party appreciates that if he swings but one of the judges he will succeed. Indeed, the inclination must vary in direct ratio with the number of dissents he obtains. Despite the suggestions that equal division is not an adequate basis, rehearings often are granted when this seems the only apparent ground.

A slightly different case exists when the rehearing, if granted, would be heard by a reconstituted court. This may come about because a new judge has replaced a deceased or retired one and will be able to break the deadlock, or because the membership of the court has been increased since the time of the original hearing and decision of the case. Whatever may be said about granting rehearing when the deadlock seems likely to continue, the reconstituted court might well allow it as a matter of routine for the purpose of resolving the matter.[38] While the Supreme Court did not explain its grant in *Boucher* v. *The King*, two new judges were added to the court after the original argument.[39]

Consideration of the specific grounds upon which petitions for rehearing have been granted is probably more enlightening than the generality of statement employed when they are dismissed or denied. We have already adverted to four general grounds which appear in the rules and statutes and are supported by letters

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Mut. Fire Ins. Co. (1954), 240 N.C. 196, 81 S.E. 2d 404. And see Comment (1938), 51 Harv. L. Rev. 1287.

A letter from Connecticut says: "The motion is least likely to avail in such a case [decision by a divided court], for the very fact of disagreement indicates that the questions involved have been particularly thoroughly argued pro and con by the members of the court before such an opinion is handed down". While this is doubtless true, it seems to ignore the value assumed to inhere in argument to the court.

[38] As in *Olds* v. *Alvord* (1939), 136 Fla. 549, 188 So. 652, where the opinion was by a divided court and one petition to rehear had been denied also by a divided court. The appointment of a new judge prompted the court to rehear, but it should be noted that it was a class action and purported to bind many parties not represented. In *Rice* v. *Sioux City Mem. Park* (1954), 348 U.S. 880, the Supreme Court had granted certiorari and affirmed the Supreme Court of Iowa by a 4-4 decision. On the appointment of Justice Harlan, it granted a petition to rehear and dismissed the petition for certiorari. At least one court has refused, correctly it seems, to call in another judge to resolve the deadlock when the court is equally divided on the petition to rehear: *Wilson* v. *Rowan Drilling Co.* (1950), 55 N.M. 81, 227 P. 2d 365. But cf. *James* v. *Clements* (1914), 217 Fed. 51 (5th Cir.), where a new judge was called when one of the three who heard argument had died before decision.

A letter from the Supreme Court of Iowa reports that it frequently grants rehearing because of change in personnel of the court.

[39] The Supreme Court Act, 13 Geo. VI, c. 37, s. 1 (Canada 1949). The original appeal was heard by a quorum of five, the rehearing by the full new court of nine.

from the several appellate courts and their decisions. In addition to these, cases have granted rehearing to cure defects of parties or where one of the parties made no appearance because of lack of notice,[40] where the party who appealed had no appealable interest,[41] and to amend an inadvertent confusion in the mandate.[42] The normally cautious attitude of courts toward jurisdiction of the subject matter has occasioned rehearing to determine whether the court had any power to conduct the original hearing,[43] and the same result followed when matters were raised which would have caused one of the sitting judges to disqualify himself for the original hearing, had they been known.[44]

It is only in rare cases in the United States that raising facts not in the record will avail the petitioner, and that is almost invariably true when the facts existed at the time of trial.[45] This attitude is not peculiar to rehearing procedure, of course, and the only consistent exception is Louisiana,[46] which has a procedural history largely untainted by the writ of error.

The courts have understandably been less adamant when the new matter, whether fact or law, is something which arose between the time of trial and the time the rehearing is requested. And when the matter—almost invariably one of law—arose between the time of the original hearing and the application for rehearing, the

[40] *Mayflower Ins. Co.* v. *Brill* (1938), 132 Fla. 530, 180 So. 754.

[41] *Woodbine Savings Bank* v. *Yager* (1932), 61 S.D. 1, 245 N.W. 917.

[42] *Florida East Coast Ry.* v. *Townsend* (1932), 104 Fla. 371, 142 So. 900. In *Chicago R.R.* v. *Fosdick* (1882), 106 U.S. 80, and *In re Warren's Estate* (1952), 74 Ariz. 385, 249 P. 2d 948, rehearing was granted to ensure that the mandate did not reverse the wrong judgment, one from which appeal had not been taken.

[43] *Jacques* v. *Wellington Corp.* (1938), 134 Fla. 211, 183 So. 718; *Armes* v. *Louisville Trust Co.* (1947), 306 Ky. 155, 206 S.W. 2d 487; *West* v. *Edwards* (1943), 12 Nev. 1, 139 P. 2d 1022; *State* v. *Sexton* (1898), 11 S.D. 105, 75 N.W. 895. Some strange things masquerade as jurisdictional defects: see *Ross* v. *Robinson* (1942), 169 Ore. 293, 128 P. 2d 956, granting rehearing on a claim, raised for the first time, that the complaint did not state a cause of action; *Sime* v. *Malouf* (1949), 95 Cal. App. 2d 82, 213 P. 2d 788 (dictum).

[44] *Electric Auto-Lite Co.* v. *P & D Mfg. Co.* (1940), 109 F. 2d 566 (2nd Cir.).

[45] Letter, Supreme Court of North Carolina: when new evidence is presented, ". . . it must be made to appear *prima facie* that the petitioner was not advised of the existence of the evidence at the time of the original trial, that it is of such nature that it would probably affect the result of the trial; and that petitioner's failure to discover the evidence prior to the original trial was not due to any neglect on his part". See *Miller* v. *Scott* (1923), 185 N.C. 93, 116 S.E. 86; *Briggs* v. *Kennedy Mayonnaise Products* (1941), 209 Minn. 312, 297 N.W. 342; but cf. *Morrill* v. *Boardman* (1952), 117 Vt. 103, 86 A. 2d 146; *Wantulok* v. *Wantulok* (1950), 67 Wyo. 22, 223 P. 2d 1030.

[46] See Comment (1944), 19 Tulane L. Rev. 307; footnote 22 *ante*, describing the California practice.

petition is commonly granted—assuming, of course, that the new matter is of rather high relevance. The latter case seems easily justified as well as easily distinguished. Since the new matter arose after the original hearing, it is not really being reheard; the question is what impact such things have upon the decision formerly made. The procedural name of rehearing is not precisely descriptive of this process and some other might well be employed.

Examples of the kind of thing described have arisen in the federal courts of appeal, where a controlling or analogous decision has been rendered by the Supreme Court after the decision in the court of appeal,[47] or where an authority, either in case or statute form, has been discovered in state law[48] in that rather tender area of state-federal conflict known in the United States under the rubric of *Erie* v. *Tompkins*.[49] It has also arisen in the federal courts of appeals, in which eleven courts with separate geographical areas of jurisdiction administer and propound a uniform federal law; a conflict with the decision of another circuit may prompt reconsideration, even though the other case is not "controlling" in the sense that any one of the eleven outranks any of the others. A decent respect for conformity and the stature of a co-ordinate court justifies such action, whether failure in the first instance to acknowledge the decision is caused by its nonexistence at the time of the original hearing or by the failure of counsel for the parties to call it to the attention of the court. The conflict, indeed, is a major—perhaps the pre-eminent—ground employed by the Supreme Court in the exercise of its discretionary power of review in federal cases.[50] But the fact that a court's error

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[47] *E.g.*, *Brenna* v. *Federal Cartridge Corp.* (1950), 183 F. 2d 414 (8th Cir.); but cf. *Brabham* v. *Mississippi* (1938), 97 F. 2d 251 (5th Cir.).

[48] *American Nat'l Ins. Co.* v. *Belch* (1938), 100 F. 2d 48 (4th Cir.). *Maghill* v. *Travelers Ins. Co.* (1943), 134 F. 2d 612 (8th Cir.), denied rehearing when the object was merely to delay the mandate until a parallel state case was decided. This is a consideration which cuts both ways, and Massachusetts has vacated an order for reargument when a statute was enacted which clarified the point on which reargument was ordered: *Liberty Mut. Fire Ins. Co.* v. *Comm'r of Insurance* (1952), 328 Mass. 653, 104 N.E. 2d 437. See *Rice* v. *Sioux City Mem. Park* (1955), 349 U.S. 70, where certiorari, once granted, was dismissed on rehearing because of a clarifying Iowa statute.

In *Doggrell* v. *Southern Box Co.* (1953), 208 F. 2d 310 (6th Cir.), the court granted rehearing when the state court changed the local rule during the pendency of the petition. Substantially the same thing may happen in a state court: *Bailey* v. *Commerce Union Bank* (1954), 223 Ark. 686, 269 S.W. 2d 314, where the court granted rehearing to permit presentation of a conflicts argument.

[49] *Erie Railroad Co.* v. *Tompkins* (1938), 304 U.S. 64.

[50] See *Layne & Bowler Corp.* v. *Western Well Works* (1923), 261 U.S. 387, at p. 393; Rule 19(1)(b), United States Supreme Court Rules; Roeh-

is subject to correction by another and superior court seems not sufficient excuse to refuse to consider its own errors when a procedure adequate for the purpose already exists.[51]

The same problem has been presented over rehearing by the fact that the federal courts of appeals, as well as a few state appellate courts, customarily sit in panels which consist of less than the full membership of the court. The probability of intra-court or intra-circuit conflict thus presented may move and has moved a panel to grant a rehearing and reconsider the result reached even though the alternative of convening the entire membership of the court to consider the conflict and finally resolve it for the circuit exists everywhere as a possibility and in some cases as a probability. This alternative is of sufficient significance to warrant separate treatment in a later part of this article.[52]

The conclusions to be drawn from examination of the rules and cases dealing with the grounds upon which rehearings have been granted or will be granted are obviously disappointing. The standard, perhaps more precisely called ideal, which appears almost everywhere is that rehearing will be granted to avoid doing substantial injustice. It is not disparagement of the concept of justice to note that this standard is most uninformative to the practitioner. Perhaps the most satisfactory generalization is that petitions which point specifically to some conflict between the holding of the case or decision and a "controlling" statute or precedent are those likely to receive favourable consideration; another expression of the same basic notion seems contained in the cases which grant rehearing when the court has misconceived some material proposition of law or fact. Those relatively few cases in which petitions have been granted because of a change in the composition of the court or its personnel seem to stand on their own quite satisfactory footing as accommodations necessary to the adequate administration of an appellate system.

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ner and Roehner, Certiorari—What is a Conflict between Circuits? (1953), 20 U. of Chi. L. Rev. 656.

[51] But see *Stamphill* v. *Johnston* (1943), 136 F. 2d 291 (9th Cir.), denying rehearing yet distinguishing cases said to be inconsistent. Cf. *Camfield* v. *United States* (1895), 67 Fed. 17 (8th Cir.), a pre-*Erie* case.

The United States Courts of Appeals are essentially final although apparently intermediate, as contrasted with some state intermediate courts, from which appeals normally may be taken to the highest court of the state. In the year ending June 30th, 1954, the Courts of Appeals disposed of 2,427 cases; in that same period, petitions for certiorari to obtain Supreme Court review were denied in 481 such cases and granted in 70: Adm. Office of the United States Courts, Annual Report 1954, pp. 138, 141.

[52] See text at pages 929-932 *post*.

A final remark on the question of grounds is that a certain amount of flexibility must be retained, even though it be imagined that it would be possible to eradicate it. The prime justification of rehearing as a procedural device is that it permits an element of accommodation in an otherwise rigid system. The result of crystallizing rehearing would almost surely be to create another device to relieve that rigidity—a safety valve on a safety valve.

Admitting this much does not lead to the conclusion that the present condition of rehearing is satisfactory. The road to repair of the defects seems to lie primarily in explicating more carefully the grounds which move the courts to act favourably on petitions. This kind of law is peculiarly lawyer's law. Granting rehearings because justice requires it exposes precious little of value to a lawyer in his professional capacity, however much it may satisfy him and laymen generally that our judicial system is trying hard to accomplish the main purpose of its existence.

II. *Additional Screening Devices*

We have noted that the major adverse effect of having nebulous grounds for granting rehearings is the hoard of hopeless petitions which result and which the courts, to some extent, invite. There may be some method other than clarification of grounds to accomplish reasonable limitation in the number of petitions. If there is, it is doubtful whether it has been found. The devices in common employment are not new; they existed in Lord Eldon's tenure in Chancery and they failed then. It is not really possible to measure the effect of the devices in present practice; even if statistics were available, they would be doubtful bases of judgment.

We attempt here only to set out the forms employed, without effort at detailed assessment of their efficacy. The first is one routine in appellate proceedings in the United States: the losing party must pay the costs, primarily printing, of the successful.[53] Since the odds are vastly against success when a petition for rehearing is filed, this sometimes might act as a deterrent. Probably it is not very effective: the costs incurred on a routine petition are apt to be nominal when contrasted with the expense which the losing party has already incurred. And many courts do not require printing, accepting petitions in typewritten form. None of the states

[53] Many courts accept a short petition in form other than printing, *e.g.*, Colo. R. Civ. P. 118(c): "Such petition shall be mimeographed or typewritten or reproduced by some other [*sic*] method other than printing, . . .". When the petition and argument are a single document, printing normally is required.

seems to have adopted Lord Eldon's rule of requiring a deposit of £50 to be forfeited if the petitioner failed to prevail,[54] but his scheme evidently did not work either. It is questionable whether such a system has much to commend it even if it works; true, it may discourage some petitioners, but the discouragement is apt to be a function of the resources of the petitioner rather than the merits of his case.

Another screening device more commonly employed is that the petition must be accompanied by a certificate of petitioning counsel that it is filed in good faith and not for purpose of delay.[55] Lord Hardwicke noted that in his day ". . . such credit is given by the Court to their [counsels'] opinion that the cause ought to be reheard, as to order it to be set down".[56] There is little reason to suppose that the advocate's capacity for objective judgment is much greater today than at that time, or that judges are more inclined to discipline lawyers who solemnly certify a frivolous petition. Nor does it seem that much assurance is added by the rare requirement that the certificate of merit be made by "impartial" counsel;[57] any member of a large bar can obtain such a certificate if he is inclined to do so.

The remarks of Roscoe Pound are appropriate here, although they were made about the appellate process generally: the way to ensure prompt and proper disposition of appellate work is not to penalize abuse of an unworkable system but to ensure efficiency and dispatch in the system itself.[58] This is not only the best but really the only way of winnowing the wheat from the chaff.

III. *Procedure on Rehearing*

(a) *The petition—form and content*

The form and content of the petition are the heart of the rehearing process. It is here that most battles are won or lost. With

[54] The penalty provision varied from time to time; 2 Daniell, Chancery Pleading and Practice (1871) p. 1480, reported that a deposit of £20 plus an undertaking to pay costs assessed was then necessary to obtain a calendar setting. Rule 15(*d*) of the United States Court of Appeals for the Eighth Circuit provides that the court may assess *costs* not exceeding $100 against petitioner or certifying counsel if satisfied that the petition is "vexatious, without merit and filed for delay . . .": Tenth Circuit Rule 24(3).

[55] Delaware, Georgia, New Jersey, North Carolina and Utah, as well as nine of the eleven federal courts of appeals, require the certificate; so does the Supreme Court of the United States.

[56] Quoted in 2 Daniell, *ante*, footnote 54, p. 1478.

[57] Seemingly North and South Carolina are alone here; see North Carolina Rule 44 and South Carolina Rule 17.

[58] Pound, Appellate Procedure in Civil Cases (1941), pp. 88 and *passim*.

a few exceptions, notably Kentucky,[59] where some form of rehearing is, as it was in ancient chancery practice, virtually automatic, the vast bulk of petitions are refused out of hand and without opinion. Comprehensive statistics are not available, but the few which are show this conclusively. A letter from the Supreme Court of New Hampshire tells that 92 per cent of petitions filed over a period of twenty years were denied; 5 of the remaining 8 per cent were granted limited to a specific issue. Letters from other courts tell the same story; some judges with twenty years of intimate experience with appellate work recall the granting of but 2 or 3 petitions during that period.[60] The Supreme Court of Arkansas, during its 1954-55 term, disposed of 256 appellate and 12 original proceedings. 60 petitions for rehearing were filed in these cases (almost 1 for every 4) but only two were granted.[61] The Supreme Court of Texas has much the same record: of 71 petitions (known there as motions), 1 was granted, 67 were overruled and two were denied with new opinions substituted for the originals.[62]

And the petition alone must carry the load. In only one court, Nebraska,[63] is oral argument permitted as a matter of course. Elsewhere it is either non-existent or allowed only upon exceptional order of the court.

The ideal petition must be aimed not at the reason or reasons why the court was wrong in its original decision but at establishing reasons for the court to *reconsider* rather than grounds to *change*.

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[59] Although known as a petition for rehearing, it is actually a request for reversal of the original decision or a modification of it (letter from the Judicial Council of Kentucky). Description of the procedure makes it doubtful if standards there differ however.

[60] Letter, Supreme Court of Nevada. The Chief Justice of Massachusetts estimated that petitions were filed in about 5 per cent of their cases; he thought that about 4 had been granted during his twenty-year tenure. The Judicial Council of Kentucky, by letter, reports that 109 petitions were overruled during 1951, while 15 were granted. This proportion is somewhat high and may be explained by the unusual conception of the petition there. See footnote 59 *ante*.

For the year 1952, the Supreme Court of Missouri (which sits sometimes in divisions; see footnote 99 *post*) denied 38 motions for rehearing by the divisions and 58 alternative motions to rehear or transfer to the court *en banc*, while granting 16 motions to rehear or transfer: Work of the Missouri Supreme Court for the Year 1952 (1953), 18 Mo. L. Rev. 331, at p. 333.

[61] Supreme Court of Arkansas, 1954-55 Term (1955), 10 Ark. L. Rev. 114, at p. 115.

[62] Texas Civil Judicial Council, Judicial Statistics State of Texas (1953) pp. 1-4.

[63] The Supreme Court of Iowa expressed doubt, by letter, of the wisdom of allowing oral argument as routine, but allotted 20 minutes to the petitioner and 15 minutes to the opponent. By amendment effective March 6th, 1956, Iowa Rule 21 now provides: "Oral arguments on petitions for rehearing shall be permitted only at the request of the court".

This is the initial hurdle; it normally behooves the petitioner to observe the distinction carefully (despite a natural temptation to the contrary growing out of realization that the ultimate justification for rehearing is error in the original decision) and to deal carefully with the problems we have referred to under grounds for rehearing, whether or not the rules of his particular court attempt to specify or detail the grounds. If he is unable to state grounds other than that the court was wrong in its original decision, the prospect that his petition will be granted, with consequent opportunity for full reargument on the merits, is remote, and he does not even have assurance that the petition will receive more than perfunctory attention.

Some few of the rules of court clearly contemplate service of the petition on the opponent;[64] a few clearly do not.[65] The majority are indefinite. As a matter of practice, of course, the petitioner should follow the hallowed rule, when in doubt serve everybody in sight. But as a matter of policy, whether or not service is to be required must depend upon (1) whether a response to the petition is required or permitted, (2) whether the opponent is certain that he will not lose his victory without having a chance to oppose the argument on whether the court was in error, and (3) whether or not the petition and argument are combined in a single document.

The important thing, of course, is that the rule about service be consistent with the central scheme of rehearing. The ideal would seem to us to be (as we note elsewhere) that the petition be a brief, non-argumentative statement of why the matter should be reheard; it should not be elaborate argument on the merits. Assuming this, service on the opponent seems normally to serve no purpose other than to warn the opponent that he should be prepared for the eventuality of possible reargument. This we think is reason enough to justify service, although service involves the countervailing danger that it will produce quite unnecessary and quite useless responses on the merits. Prohibition of replies to petitions for rehearing except by leave of court, coupled with assurance that no petition will be granted—or, at least, assurance that the origi-

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[64] *E.g.*, Minnesota Rule 20; Montana Rule 15. Iowa R. Civ. P. 350 requires the filing with the court of sufficient copies for each of the other parties to the appeal; the clerk is directed to mail these copies to the other parties.

It should be noted that while the rule on rehearing may make no specific provision for service, other rules of court on service may have general application.

[65] *E.g.*, North Carolina Rule 44. The opponent there is not informed that a petition has been filed unless it is also granted.

nal result will not be changed—without giving the opponent a chance to reply, seems the best solution.[66]

A perhaps unnecessary warning is that petitions for rehearing are like other applications in our procedural system: they avail only those who make them. Thus Idaho has quite properly ruled that a judgment became final as to losing parties who did not petition, but stayed its mandate as to those who did petition.[67]

(b) *The problem of time*

Time for filing an application for rehearing is commonly provided by the various rules on the subject. These periods range from a minimum of eight to a maximum of forty days, but fifteen days is about average, this being the limit provided by twenty-one of the courts studied. A few courts require notice of intention to file a petition,[68] the petition itself being filed at a later time. As might be expected, courts ordinarily insist upon compliance with time requirements and waive non-compliance in exceptional circumstances only. It is difficult to make a flat statement about the chances for obtaining an extension of time in this matter, since the information commonly is not reported. It is certain, however, that some courts have, at one time or another, granted extensions, and several rules provide for extension.[69] Since rehearing rules are court-promulgated, there is ordinarily no legal reason why the court cannot depart from them.

There is little evidence that time considerations have been of major difficulty in administration. Probably the outstanding problem has been what will be done when the time allowed would carry the case beyond the term of court in which the decision has been rendered, doubtless because of the ancient notion of the law courts that they had inherent power to revise their judgments within the term but that the power died with its expiration.[70] To

[66] See footnote 116, *post*, and accompanying text. One additional qualification must be made here. The opponent is entitled to notice of an extension of time as well as of a grant, since the former will disturb his expectations of finality.

[67] *Koehler* v. *Stevenson* (1953), 74 Idaho 281, 260 P. 2d 1101.

[68] *E.g.*, Illinois Rule 44: notice in 15 days, petition in 25; Virginia Rule 5:13: notice in 10 days, petition in 30.

[69] United States Supreme Court Rule 58(1); Delaware Rule 13, The United States Supreme Court Rule also provides that the time may be shortened. While this is a much less common occurrence, a recent instance is *Flynn* v. *United States* (1955), 99 L. Ed. 1298.

[70] See footnote 14 *ante*; *Foster Bros. Mfg. Co.* v. *NLRB* (1937), 90 F. 2d 948 (4th Cir.); *Kirchberger* v. *American Acetylene Burner Co.* (1905), 142 Fed. 169 (2nd Cir.). It is not surprising to find that the "term" rule has controlled over rules provisions on occasions, courts considering petitions which were not timely within the rule but were still within

this purpose, the rules of some courts explicitly state that expiration of the term does not conclude their power to reconsider within the time provided by rule.[71] There is little evidence that hardship has been worked without such a proviso however.

More perplexing but even less common is the question whether the case can be reheard after the mandate has been returned to the lower court. In about half of the states, and all but one of the federal courts of appeals, the mandate is stayed by the filing of a petition. This is also now true, unless otherwise expressly ordered, under United States Supreme Court Rule 59(2), except where the twenty-five day period in which to petition for rehearing expires in vacation. The Court of Appeals for the Fourth Circuit and at least four states[72] will stay the mandate only by special order of the court or one of its justices.

It has exceptionally happened that rehearing has been granted after the mandate has been returned to the trial court.[73] While this seems so infrequent a case that it spells little threat of confusion or contradiction, it might be avoided by adoption of the majority rule that the mandate is stayed by the filing of a petition. A con-

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the term of rendition: *Sun Oil Co.* v. *Burford* (1942), 130 F. 2d 10 (5th Cir.); *Wichita Royalty Co.* v. *City Nat'l Bank* (1938), 97 F. 2d 249 (5th Cir.); *Unitype Co.* v. *Long* (1906), 149 F. 2d 196 (6th Cir.); *Weinrob* v. *Heintz* (1952), 346 Ill. App. 30, 104 N.E. 2d 534.

While such decisions are not surprising, they are deplorable. The "term" of a modern appellate court is so different from the "term" at which the common-law courts considered decisions and rulings at *nisi prius* that the common-law concept should be irrelevant today. The effect of 28 U.S.C. § 452 (1952) may lead to curious results in this context: "The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding". *Cahill* v. *New York, New Haven & Hartford R. Co.* (1956), 76 Sup. Ct. 758, is at least curious, although the majority does not rely upon the statute.

[71] *E.g.*, United States Court of Appeals for the Eighth Circuit Rule 15(b); Tenth Circuit, Rule 24(1). Without such express authority, it would seem that most courts would recognize that the time permitted by rule would, in effect, extend the "term". Cf. *Burget* v. *Robinson* (1903), 123 Fed. 262 (1st Cir.).

[72] The states in which this is provided by rule are Alabama, Illinois, Maryland and North Carolina. It may happen elsewhere as well; in this as in other procedural areas, rules do not always accurately portray the practice. (The word "mandate" is used in a generic sense to describe the device of remand from superior to inferior court; *procedendo* and *remittitur* are common variants.)

[73] *Wichita Royality Co.* v. *City Nat'l Bank* (1938), 97 F. 2d 249 (5th Cir.); *Sun Oil Co.* v. *Burford* (1942), 130 F. 2d 10 (5th Cir.); *Central Vermont Ry. Co.* v. *Campbell* (1937), 108 Vt. 510, 192 Atl. 197. The last was a chancery case in which the final decree had not been enrolled, despite the return of the mandate—another example of the persistence of ancient and presently pointless distinctions. And see *Cahill* v. *New York, New Haven & Hartford R. Co.* (1956), 76 Sup. Ct. 758, in which the mandate had been returned and the judgment collected before the petition to "recall and amend" the judgment was filed.

trary danger appears however: delay is already too ubiquitous in the judicial process and especially at the appellate level. The attorney who is resorting to all the delaying tactics at his command is thus given another arrow to add to his already overflowing quiver. The exceptional confusion which may result from a petition granted after return of the mandate is probably a small price to pay if in fact it avoids much delay.[74]

(c) *Answer or response*

Some rules prohibit replies to petitions altogether; several require them; others make them optional unless requested by the court.[75] Whether or not a reply is appropriate must in large measure be determined by the character of the petition itself. If the petition is but a summary, non-argumentative statement[76] of the errors relied upon or a reference to allegedly controlling authority, a reply brief usually serves only to delay disposition of the matter.

In a slight majority of courts,[77] however, the petition is either

[74] This is not to say that exceptional cases may not be treated on an individual basis, despite general rules. An example is *Town of Narragansett* v. *Kennelly* (1955), 115 A. 2d 693 (R.I.), where the court made final so much of the decree as would determine a rate base during the period the court was in vacation, leaving the application for leave to file a motion for reargument over until the commencement of the fall term. See also *Albright* v. *Moeckly* (1923), 196 Iowa 366, 193 N.W. 625. But such an exceptional consideration takes time, and routine use of this device would but add to delay while attempting to avoid it.

[75] Colorado, Illinois, New Hampshire, North Carolina and Virginia, among the states, and the Court of Appeals for the Fourth Circuit prohibit a reply; Tennessee, Utah and the United States Court of Claims seem to require a response. In other jurisdictions, response is either optional or upon special request of the court. See, *e.g.*, United States Supreme Court Rule 58(3).

The wisdom of the varying requirements can be assessed only in the light of the form of petition to which response is to be made. In any event the petition must make out what might be called a *prima facie* case for rehearing before the response should be considered. Since so few of the petitions filed accomplish this, most responses filed go for naught.

[76] Few of the rules speak on this point. Beyond occasional admonitions that the petition "briefly" or "concisely" point to the errors relied upon, South Carolina Rule 17(2) and Colorado R. Civ. P. 118(c) (adopted but not yet effective at the time of this writing) alone seem to prohibit argument. Fifth Circuit Rule 29 and Eighth Circuit Rule 15(b) impose the same requirement among the federal courts. Case authority may add to this. See *Reiff* v. *City of Portland* (1914), 71 Ore. 421, 142 Pac. 827.

It seems obvious that this is the preferable practice: the petition is essentially a pleading, and the absence of argument should characterize it. Despite the ideal, the reluctance of a lawyer to point without elaboration to a "controlling" authority, when the court has once wholly missed the point of that authority, is understandable.

[77] Information about form, as we have noted, is particularly imprecise. It seems that at least thirty-two jurisdictions tend to blend the petition and the argument by incorporating them in the same document or by having them filed together. It is to the distinct advantage of counsel, however, to recall that the question whether a court should reconsider is

in form of a brief or is accompanied by a brief on the merits of the points raised. In those courts, the opponent must feel decidedly uneasy in the knowledge that the court is considering, at least in part on the merits, points on which he has not been permitted to speak. He may gain some solace from the remark attributed[78] to William Howard Taft when he was serving as a judge of the Circuit Court of Appeals for the Sixth Circuit: a young lawyer asked whether he was expected to respond to a petition for rehearing and Judge Taft replied, "Son, until we handed down our opinion, the controversy was between your adversary and you. Now, it is between your adversary and the court, and don't you think the court is able to take care of itself?"

Occasionally voices may be heard to doubt, and probably most petitions are met by opposing briefs when rules of court permit. The substantial number of cases in which the court disposes of the petition or otherwise acts upon it by examination of the merits contributes to this uneasiness; more rigorous adherence to the concept of the petition raising only the question whether the case will be reheard might minimize the threat, but it might also interfere with expeditious disposal of the vast majority of such petitions, doomed as they are to denial.

(d) *Consideration by the court—processing and the burden of persuasion*

The hurdles which the petitioner must overcome are complicated by the processing procedure in a number of states which send the petition first to the judge or justice who wrote the opinion complained of for his consideration and report to the court.[79] There is something to be said for such a practice, since it is presumably directed to the man best acquainted with the case and the authorities relied upon. If an authority which controls has been overlooked, he is the judge in the best position to realize the fact.

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quite different from the question whether it should reverse itself. If he fails to convince on the first, he cannot win on the second.

[78] Letter from the United States Court of Appeals for the Sixth Circuit.

[79] This follows the common United States procedure of initially assigning cases to individual judges who are expected to read the record and examine the briefs with a care not accorded that case by other members of the court. At least 18 state courts and 4 federal courts assign to the original writer. The United States practice on the appellate level differs from what seems more common in English and Canadian practice of separate opinions by the sitting judges.

A letter from the Pennsylvania court, which assigns to the judge who rendered the decision of the court, reports: "In a great majority of the cases he advises against a rehearing and in practically every case his views are accepted".

But, being human, he may have some personal pride in the matter, and thus he may be a doubly difficult man to persuade that his ideas, expressed for all the world to see, are wrong. If his report is the primary means of informing the rest of the court about the merits of the application, hope of success is lessened unless he is a judge of high calibre.

Recognition of this difficulty has persuaded another body of courts to adopt the opposite course: the petition is assigned to one judge for initial consideration, but with the proviso that he must not be the author of the opinion under attack.[80] At least one state, Kentucky, required this procedure by the judicial article of its constitution. With remarkable frankness, an early Kentucky judge attributed[81] the provision to a factually baseless suspicion of judges and revealed that the court did not follow the constitutional command, assigning it instead to the writer of the original opinion. Still a third group[82] assign the petition to the original writer for investigation, but transfer it to someone else if the court as a body concludes that a rehearing should be granted. This device would seem to do little to remove the initial major obstacle in the path of petitioners, since they must still persuade the whole court through the medium of the original writer. It does tend to save the face of judges, however, since it does not compel the writer publicly to retract his views.

Again, the special problems raised by petitions addressed to courts which customarily sit in panels comprising less than their full membership are reserved for separate discussion.[83]

A few courts make special rules prohibiting initial assignment to a judge who dissented from the original decision. If the procedure of initial assignment must be employed at all, as apparently it is in appellate procedure in many of the courts in the United States, it would seem most appropriate that the petition be assigned to some judge who neither dissented nor wrote the prevailing opinion. At least one court so provides.[84]

[80] At least six states employ this practice.

[81] Proceedings of Kentucky State Bar Ass'n 1904, pp. 48-49. With all deference to the judges, we suspect that the rules and even the letters received are not a wholly accurate portrayal of actual procedure. The internal functioning of a court, particularly what happens at conferences and the relationships between judges, has long been regarded as privileged information, the courts revealing only so much as they feel the bar and the public should know. We thus report here on the information available to us, neither assuming nor representing that the whole picture is disclosed.

[82] Letters from Delaware and Wisconsin indicate that those states, at least, follow this practice.

[83] See text at pages 929-932 *post*.

[84] The unusual Nebraska provision for oral argument results in as-

When the petition and the accompanying briefs, if any, have been circulated and considered, a conference is held to determine whether the petition will be granted or denied.[85] Most, of course, are peremptorily denied; very occasionally the court may, because it is in doubt, request oral argument on the question whether the petition is to be granted. Doubtless it is also at this conference that it is so frequently decided that the petition should be denied with the denial accompanied by an explanatory or clarifying opinion. As noted before, this occasionally amounts to a granting of the petition in everything but name. In some cases,[86] the petition has been granted and the original decision summarily reversed, without the reargument which the procedure normally contemplates.

Not at all infrequently,[87] the petition when granted is limited to issues or points which do not comprehend the whole case. Sometimes this is because that is all petitioner has requested; probably as often it is on some point less than the whole case that the court feels it may have erred.

It is evident from what has been said that the possibilities are all against granting. The burden of persuasion is high. At least some of the judges who concurred in the majority must be shaken in their views: a common expression in the letters is "conviction of error" and a feeling that "injustice will result". Measures of

signment to an individual judge after argument has been had, when it is given to a judge who concurred in but did not write the majority opinion. North Carolina assigns to two judges, neither of whom dissented.

[85] Because of the secrecy surrounding conferences, our information is extremely vague here. Doubtless they are of varying degrees of formality.

[86] *E.g.*, *Granite Bituminous Paving Co.* v. *Park View Realty & Improvement Co.* (1917), 270 Mo. 698, 196 S.W. 1142. Such decisions are a product of courts and lawyers combining the question of "Should it be reheard?" with "Should it be reversed?" Doubtless the combination is sometimes inevitable when the decision is to deny, because of the economy of time and effort accomplished. It should never be permitted when the answer is that the case is worth rehearing, and at least enough formality should be observed to guaranty the party originally prevailing an opportunity to be heard in opposition. If the practising profession is assured that its victories will not be vacated without that opportunity, it will have much less inclination to prepare and file opposition or resistance to petitions for rehearing. And courts would not then be as often faced with petitions to rehear petitions to rehear. The benefits of procedural regularity here seem to outweigh the slight economy gained by out-of-hand vacation of the original opinion, no matter how firmly the court is convinced that a new brief or new argument could not dissuade them from their revised view.

[87] See, *e.g.*, Iowa R. Civ. P. 350(a). Letters from 5 courts specifically mention the practice of limited grants of rehearing. The Supreme Court of New Hampshire reported that only 8 per cent of petitions filed were granted and of these more than half were limited to specific issues. We are inclined to believe this typical. See, *e.g.*, *Hadrian* v. *Milwaukee Electric Ry. & Transport Co.* (1942), 241 Wis. 122, 3 N.W. 2d 700.

persuasion are always difficult to state; probably the most apt is the following:[88]

> In general, I should say that it is not enough for the petition for rehearing to leave us in doubt as to the correctness of our previous decision. We may have had doubts before; but it is our job to come down off the fence and decide the case, which we do to the best of our ability. We might be aware that even if we had been persuaded to decide the case the other way, doubt would still remain in our minds as to the correctness of the decision. . . . Of course it is something else again if the petition discloses that our previous opinion materially misapprehended the state of the record, or misunderstood the purport of a major argument advanced by counsel, or overlooked a controlling precedent.

Putting the expression in any of the forms mentioned tends to conceal yet another problem. All the courts involved consist of more than one man. How many must cross the line between mere doubt and decided reluctance? Doubtless a majority always suffices. But so many is not invariably required. Several courts seem to feel that an unpersuaded majority may profit from hearing reargument if one who was originally with them has recanted to the point that he wishes the matter reheard.[89] New Jersey follows the rule that only a member of the original majority may ask for reconsideration;[90] North Carolina will not consider a petition unless two judges endorse it.[91] Some caution about counting of num-

[88] Letter from United States Court of Appeal for the First Circuit.

[89] It has long been the rule of the United States Supreme Court in the administration of its certiorari jurisdiction that 4 of the 9 justices in favour of granting the writ will suffice. See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (2nd ed., Wolfson and Kurland, 1951) pp. 598-600. A source of intra-court controversy has been the occasional decision of a majority to vacate a writ on the ground that it was improvidently granted, creating the seeming anomaly that the concurrence of four is sufficient to get the grant, but the concurrence of five is necessary to keep it. See, *e.g.*, *Hammerstein* v. *Superior Court of California* (1951), 341 U.S. 491.

According to letters received, Minnesota, South Dakota, Virginia and Wyoming have employed this test. This may mean, however, that initiative from within the court must come from a judge who concurred with the majority, but still require a majority vote on whether the petition will be granted. This is the pattern of the federal court rules, including the Supreme Court of the United States. To this extent, it is not unlike the New Jersey rule described in the next succeeding footnote.

[90] Letter from Supreme Court of New Jersey. Here again, information must be treated with caution because it concerns the internal functioning of a court. Speculation on human nature seems here as informative as statistics.

[91] Rule 44(3) provides, in essence, that the petition is not directed to the court but to two justices who did not dissent or, in the event three of the seven dissented, to only one concurring justice. The conclusion of those justices (or that justice) determines whether the case will be docketed for rehearing. It would seem, under the rule, that two members of the court—and those two selected by the petitioner—may determine that a rehearing be held, even though the other five opposed.

bers is in order however; without reflecting in any way on the integrity of judges, it is possible to believe that many of the frivolous petitions which are submitted neither deserve nor receive the kind of consideration the stated procedures would indicate they get.

(e) *Reargument and resubmission*

When the petition has survived the conference and is granted, it is normally set down for argument and heard as though no prior argument had been had.[92] It may well be doubted that judges are able to erase from their minds what they heard and what they did before, but it is not surprising to find that a very substantial percentage of such cases results in a modification or reversal of the prior stand. Only those with evident merit can survive the elimination process, and there is a constant and understandable tendency on the part of judges—re-enforced by the inadequacy of the petitions themselves—to blend the question of granting rehearing with the question of correctness of the prior decision. Almost all denials represent, in varying degrees, a conclusion upon the merits.

(f) *Repeated and renewed petitions*

The kind of persistence which prompted a first petition for rehearing will, with some frequency, produce a second when the first has been denied. Some courts do not permit the clerk to file a second petition.[93] Where they are filed, and a few rules specifically contemplate them,[94] they doubtless are perfunctorily denied in most cases, absent a clear showing of new developments. Rather more generosity is shown to a petition submitted by a party who, originally successful on appeal, has been reversed on rehearing.[95]

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[92] "Rehear" may be a misnomer; some cases are resubmitted on briefs only.

[93] *E.g.*, Alabama. The rules of the United States Supreme Court adopted on April 12th, 1954 (1954), 346 U.S. 951, Rule 58(4), contain a new provision: "Consecutive petitions for rehearing, and petitions for rehearing that are out of time under this rule, will not be received". But see *Cahill* v. *New York, New Haven & Hartford R. Co.* (1956), 76 Sup. Ct. 758, in which the mandate was "recalled" because the court deemed the original order erroneous, both after the expiration of the ordinary time *and* after rehearing had once been denied.

[94] New Mexico, Oklahoma and Tennessee all provide by rule that a second petition may not be filed unless the court has granted special permission. Louisiana has a curious provision that a second petition may not be filed unless the court in its opinion reserves to the unsuccessful party the right to apply: Louisiana Rule XII(3). What might prompt the court to make such a reservation we are unable to imagine.

[95] *People* v. *Hinderlinder* (1936), 98 Colo. 505, 57 P. 2d 894; *Dumaine* v. *Gay, Sullivan & Co.* (1940), 194 La. 177, 194 So. 779. What seems

Incidence is so rare as to defy generalization, but seemingly this type of petition should be necessary and permissible only in those circumstances in which a court has been so persuaded by the first petition that they have reversed out of hand without the benefit of a counter-argument by the original winning party.[96] And what is true of second petitions is true of third and subsequent ones—which, astonishingly, are not unknown.[97]

A device which seeks to evade rules against second petitions for rehearing is to disguise the subsequent petition as something else or call it by a different name. The most common is a "motion for leave to file a petition for rehearing", which has a legitimate as well as an illegitimate function. It has in the past been the vehicle in the United States Supreme Court to present second petitions, as well as to present a first when the time provided by the rules has elapsed. Other variants are "motions to modify the mandate", to "correct the mandate", or to modify the opinion. On the whole, they have received their practically inevitable fate.[98]

IV. *En Banc Rehearings in Panel Courts*

In several instances we have referred to the peculiar problems presented by a court which consists in full of more judges than customarily sit in any one case. Two divergent patterns exist in the United States. The appellate courts of several of the states are authorized to sit in what are aptly called divisions or departments.[99] When they do so, they are recognized as something less

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evident is stated in a letter from the Supreme Court of Montana: "Upon the modification of a decision on motion for rehearing, any further petition for rehearing shall be directed only to the modification".

[96] We have argued earlier that this should never happen. Another innovation of the 1954 rules of the United States Supreme Court attempts to give assurance that it will not: "No petition for rehearing will be granted in the absence of such a request [by the Court for a reply to the petition] and an opportunity to submit a reply in response thereto" (Rule 58(3)).

[97] During the 1948-49 term the Supreme Court of the United States denied 7 motions for leave to file a second petition, 2 for leave to file a third, 1 for leave to file a fourth: Reeve, The Work of the United States Supreme Court for the Current Term 1948-9 (1949) p. 34 (Table 3).

Alabama Co. v. *Brown* (1921), 207 Ala. 18, 92 So. 490, confirms what seems evident, that a second rehearing may be obtained on the initiative of a member of the court.

[98] See *Blau* v. *City of Milwaukee* (1949), 232 Wis. 197, 287 N.W. 594. But cf. *Phillips* v. *Ordway* (1880), 101 U.S. 745, to the effect that a motion to vacate a decree and for reargument is not a petition for rehearing and need not conform to the rehearing rules; *Cahill* v. *New York, New Haven & Hartford R. Co.*, *ante* footnote 93.

[99] *E.g.*, Calif. Const. Art. VI, § 2; Mo. Const. Art. V, § 7; Wash. Rev. Code § 2.04.120 (1951). A number of states provide authority by Constitution or statute for sitting in divisions, but not all courts employ the au-

than the court, and provision is commonly made for review by the full body of the decision rendered by a department upon motion of the court or if there are dissenters in the department. Review by the full court may indeed be a "rehearing" by some of the justices involved, but the standards applied differ in some respects from the general standards already discussed. Perhaps that difference may best be stated by reference to the underlying theory: the review involved is regarded as an integral part of the system, although the majority of cases decided by a department will not be further reviewed. In California, for example, the judicial article of the constitution provides that no judgment will be pronounced by the panel without the concurrence of three sitting judges.[100]

The other pattern seems confined to the United States Courts of Appeals. Originally all these courts consisted of three members. Because of the press of business and the increasing load in several of the circuits, new judges were added.[101] But three judges still constitute a court, and rehearing by all the members is the exceptional safety-valve device we have been discussing. There are very rare cases in which the entire membership may be convened for the original hearing of a case, a practice which is recognized by the Supreme Court[102] and authorized by the Judicial Code;[103] invoked usually for cases involving issues of great moment, it is to be distinguished from rehearing, although the considerations warranting it resemble those which warrant rehearing *en banc*.[104]

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thority. For example, the California Supreme Court does not now sit in divisions.

[100] Calif. Const., Art. VI, § 2. Wash. Rev. Code, § 2.04.120 (1951), provides for panels of 4, with the concurrence of 3 members necessary for a decision. If 3 do not concur, the case must be reheard or transferred. This may result in automatic rehearing by the full court. And this result is not wholly peculiar to panel courts. Idaho Code, § 1-207 (1947), and Utah Code, § 78-2-3 (1953), both require the concurrence of 3 justices to pronounce judgment; ". . . if three do not concur, the case must be reheard".

[101] 28 U.S.C. 44 (1952), as amended, 68 Stat. 8 (1954), provides 3 judges each for the first and fourth circuits; the others range up to 9 each for the ninth and District of Columbia circuits.

[102] *Textile Mills Securities Corp.* v. *Comm'r of Int. Rev.* (1943), 314 U.S. 326.

[103] 28 U.S.C., § 46(c) (1952).

[104] See Frankfurter J. concurring in *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.* (1953), 345 U.S. 247, at p. 270: "Rehearings *en banc* by these courts, are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern. Moreover, the most constructive way of resolving conflicts is to avoid them. Hence, insofar as possible, determinations *en banc* are indicated whenever it seems likely that a majority of all the active judges would reach a different result than the panel assigned to hear a case or which has heard it."

The genesis of the special characteristics of the type of "rehearing" now discussed is the circumstance that each panel of three is a "court" and that, absent exceptional review by the Supreme Court, its decision is a final disposition of the case. It is unseemly that decisions on identical issues should vary because the assignment pattern puts Judge Jones on the panel in case *A* and Judge Smith on the panel in case *B*. However unseemly, it has happened.[105] And the courts of appeals have taken quite different views about whether it should be permitted to happen. The practice varied from the position of the second circuit, which never convened *en banc* for any reason, to that of the third circuit and the Court of Appeals for the District of Columbia, which have been relatively free with the practice.[106]

This in brief was the situation before 1953. *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*[107] might be said to mark a turn, if only one could chart the direction. The Supreme Court considered and rejected an interpretation of the Judicial Code which would have compelled each judge of the circuit to consider a petition for rehearing *en banc* of the decision of a three-judge court. The majority opinion says that the power exists and that the discretion of each circuit governs the manner in which that power is to be invoked, subject to the minimum requirement that so "necessary and useful" a power cannot be ignored. "A court may take steps to use the *en banc* power sparingly, but it may not take steps to curtail its use indiscriminately."[108]

In a dissenting opinion, Justice Jackson said, "If I were to predict, I would guess that today's decision will either be ignored or it will be regretted".[109] "Ignored" seems to be its fate to date. The only noticeable response to the opinion was the adoption of new rules[110] by several courts in compliance with the admonition that the procedures contemplated, whatever they might be, be known to the lawyers affected by them. Perhaps experience yet to come will tell whether or not the decision will be regretted.

[105] *E.g.*, *P. Beiersdorf & Co.* v. *McGohey* (1951), 187 F. 2d 14 (2nd Cir.), where Frank J. voted against his expressed convictions, partly to create an intra-circuit conflict and provoke a grant of certiorari. See concurring opinion of Clark J., in *Lopinsky* v. *Hertz Drive-Ur-Self Systems* (1951), 194 F. 2d 422, at p. 424 (2nd Cir.).

[106] See Maris, Hearing and Rehearing Cases in Banc (1953), 14 F.R.D. 91; Comment (1953), 5 Stan. L. Rev. 332.

[107] (1953), 345 U.S. 247; Note, The En Banc Procedures of the United States Courts of Appeals (1954), 21 U. of Chi. L. Rev. 447.

[108] 345 U.S. at p. 261.

[109] *Ibid.*, at p. 274.

[110] Court of Appeals for the Eighth Circuit Rule 15(e); Ninth Circuit Rule 23.

To the extent that the practice develops, the principal grounds must be the resolution of intra-circuit conflicts and consideration of issues of great importance. Intra-circuit conflict is apt to be the most important, since this is an area in which the Supreme Court has been noticeably reluctant to exercise its discretionary power of review—even refusing on the express ground that the matter could be returned to the court of appeals so that they might, if they thought it wise, rehear the decision *en banc* and thereby resolve the conflict.[111] In the "great issue" case, convening the full roster of judges may involve waste motion, since many of such cases are destined to be resolved in the Supreme Court in any event, as one judge of the Court of Appeals for the District of Columbia is reported to have said in describing their *en banc* consideration of the *Steel Seizure* cases as a "dress rehearsal."

Rehearing: A Suggested Resolution of Certain Problems

Two possible extremes suggest themselves in the matter of rehearing: it should be available automatically on application by counsel, or it should be abolished altogether. The former has nothing to commend it; lawyers, like shepherds, will be ignored if they cry "Wolf!" too often. The latter is not at all impossible; it is the present rule[112] of the Court of Appeal in England, a court which is as final for most purposes as is the highest court of any of the United States. And an unpublished study by Charles E. Cropley, late Clerk of the Supreme Court of the United States, finds that Canada alone among the Commonweath nations makes provision for rehearing. But neither of these two extremes is likely to be accepted in the United States or Canada; tradition alone would compel some middle course.

To some extent, the character of that middle course will vary from court to court. The form of rehearing traditional in a particular jurisdiction will influence it, as will such practical and imponderable matters as the press of business and the disposition of individual judges. But the similarities of problem and practice on the appellate level submerge the differences, and the same basic

[111] *Civil Aeronautics Board* v. *American Air Transport* (1954), 344 U.S. 4; *United States ex rel. Robinson* v. *Johnston* (1942), 316 U.S. 649.

[112] *Flower* v. *Lloyd* (1876), 6 Ch.D. 297. Some caution about the history of rehearing is suggested by an apparent paradox here. In the English Court of Appeal all appeals are "by way of rehearing": Order 58, Rule 1. But they do not permit rehearing in the sense that it is discussed in this article. All but one of the United States appellate courts studied does employ "rehearing", although the writ of error rather than equity rehearing is the base upon which their practice is built.

questions about rehearing should be answered in substantially the same way throughout the United States. First and foremost in determining the rôle and conduct of rehearing is the requirement of a basic theory and a comprehensive scheme.

The basic postulate we have already noted is: a court which is final must be careful, but not so careful that its judgments never become final. The range between may be bracketed by two recent statements on rehearing by Justice Frankfurter. The first is from the *Western Pacific* case:[113]

> Rehearings are not a healthy step in the judicial process; surely they ought not to be deemed a normal procedure. . . . If petitions for rehearing were justified, except in rare instances, it would bespeak serious defects in the work of the courts of appeals, an assumption which must be rejected.

Doubtless the justice would reject the same assumption about the work of the Supreme Court itself. In *Flynn* v. *United States* he said:[114]

> A petition for rehearing of a denial of a petition for a writ of certiorari is part of the appellate procedure authorized by the Rules of this Court, subject to the requirements of Rule 58. The right to such a consideration is not to be deemed an empty formality as though such petitions will as a matter of course be denied.

First among the requirements in charting a way down the narrow defile bounded by these expressions is the problem of grounds: if the factors which will move a court to reconsider can be isolated, an attorney deciding whether or not to petition for rehearing can make a rational estimate of his prospects and phrase his petition in such form as to present succinctly and squarely his claim to rehearing. It is easier to describe grounds than it is to itemize them; the New Mexico rule set out in the text on page 909 may be as satisfactory as can practicably be attained. But it must be conceded that the New Mexico rule invites petitions when the only ground is that the opinion of the court has neglected to respond directly to some point raised by the attorneys. An experienced appellate judge once suggested to the writers that a major reason for the deplorable length of many modern opinions is that the court desires to ward off in advance petitions complaining that it has ignored one of the points of counsel. The problem of course is the duality of function of the appellate opinion: to

[113] (1953), 345 U.S. 247, at p. 270; see also Frankfurter and Landis, The Business of the Supreme Court at October Term, 1931 (1932), 46 Harv. L. Rev. 226, at p. 237.

[114] (1955), 99 L. Ed. 1298, at p. 1299.

build for the future, and to satisfy the parties that they truly have had their day in court.

Second only to an explication of grounds for rehearing, and closely allied to it, is the question of the form of petition. It should be brief and it should not be argumentative; it should point to the conflict created or the "controlling" matter overlooked in the original decision. It should not be expected to serve also the rôle of persuading the court how the conflict or error should be resolved. That is the object of resubmission. In short, the petition should be expected to make, and only to make, a showing of entitlement to rehearing.

How this limitation is to be enforced is not easily answered. The following sentences lifted from the Colorado rule[115] might accomplish the purpose:

> Such petition shall be mineographed or typewritten or reproduced by some other [*sic*] method other than printing, in conformity with [the rule governing briefs], and shall not contain more than three pages without the consent of the court. . . . In no case will any argument be permitted in support of such a petition. If argumentative matter is contained therein, the petition may be stricken.

Page limitations are arbitrary, but they will be more effective to prevent argument than any mere rule against argument can ever be.

We have indicated that we doubt both the practicability and the wisdom of what we have labelled screening devices to eliminate frivolous petitions. It is not cynicism to say that the certificate of the attorney is wholly useless; certificate by an impartial member of the bar is little if any better. Taxation of costs and other penalty provisions doubtless are more effective—if provisions apart from the general strictures against dilatory practices are thought necessary. In short, such provisions might be included or omitted as tradition or local inclination dictates. They do no real good, but probably they do little harm.

Rules about responses to petitions for rehearing are presently confused. A few require replies; most permit them. But it is undoubtedly true that most lawyers present them, at great waste of time and effort and money. Because most applications are thrown out on the petition alone, the answers seldom are read by the judges. But those cases in which the petitioner and the court blend the separate questions of rehearing and change of decision are a potent threat against the attorney who wonders whether he should respond. If, in addition to the requirement that the petition be

[115] Colo. R. Civ. P. 118(c), effective July 1st, 1956.

non-argumentative, there were at least assurance that the court would not change its decision out-of-hand, a great mass of useless answers would be avoided. Again the Colorado rule, as well as others of recent adoption,[116] gives this assurance:

> No answer will be permitted and no action will be taken save to grant or deny the rehearing.

Time is an important matter. The governing provisions now vary widely. In those states in which the petition is really a petition-plus, and includes argument on the merits, much time must be allowed. As every attorney knows, preparing and printing the argument take time. Thirty days or more are not too much when the procedure contemplates argument on the merits at the petition stage. But it is wholly excessive when it becomes clear that allowing thirty days in every case prolongs the ninety-nine per cent of cases in which rehearing is not had for the benefit of the one per cent or less in which rehearing is had.[117] The solution, we think, is clear. A three-page non-argumentative petition can be prepared for submission in not more than a full working day by an attorney who is familiar with the case and has the opinion of the court before him. Allowing for mailing, press of work and other routine delays, surely ten days from the time the decision is mailed to the parties by the clerk is adequate. Extensions for extraordinary causes, such as illness, might continue to be available as they have been generally. Waiving printing of the petition not only would expedite but would accord with the modern tendency to economize on the mechanical costs of appeals.

Another question of time is presented: What rules should apply to briefs and arguments on the rehearing or resubmission? This is largely a local matter to be resolved in accord with the general appellate practice of the state, although time at this stage might be more restricted than for the original presentation, because the issues presumably will be both narrower and sharper the second time around. In any event, more time can be allowed than presently is. The reason is that we are now dealing with allowance of time in a case where it has already been determined that deserving questions are presented, rather than practising that falsest economy

[116] *Ibid.* United States Supreme Court Rule 58(3) provides: "No reply to a petition for rehearing will be received unless requested by the court. No petition for rehearing will be granted in the absence of such a request and the opportunity to submit a reply in response thereto." Cf. Mississippi Rule 14(3), which blends the two questions, but guarantees opportunity to argue on the merits.

[117] Letter from the Supreme Court of Iowa: "In practice it seems to merely delay the procedendo in by far the majority of cases".

of all, allowing a short period of time for all cases because less than one of each 100 *may* deserve some extra time. Continued existence or expiration of the term is, of course, irrelevant.

Whether the mandate will be stayed by the filing of a petition for rehearing is another matter to be resolved partly by considerations extrinsic to rehearing proper. Most court rules provide for some delay, whether or not a petition is filed. If a short, non-argumentative petition is filed within ten days, it can be disposed of so quickly that the question of delay of mandate because a petition has been filed will largely be obviated. An express stay until the petition is acted upon normally would be wise. When the petition is granted, a stay should ensue until final disposition.

Some problems arise over processing within the court: whether resubmission must be by oral argument or on briefs or both, assignment to judges, and the number of votes required to obtain a grant of rehearing are the type of thing which, while appropriately the subject of court rules, is not fundamental to the pattern or the underlying theory of rehearing. One jurisdiction might require a simple majority, another might think that deference to the desires of a substantial minority could be profitable to the system as a whole. We do not mean that we are indifferent to the resolution of such questions, but we think that the resolution, however reached, will not prevent the standards we have set out working as the essentials of a sensible and functioning procedure for rehearing in a modern appellate court.

But, whatever the reforms, the problem of rehearing will always present a dilemma. For the goals of accurate adjudication and finality often in the nature of things are inconsistent. The United States Supreme Court recently has demonstrated this once again in a dramatic and tragic context. Less than two years ago the court, with the services of an advisory committee of experts and after benefit of intensive study, adopted its Revised Rules.[118] Whatever the shortcomings of its Revised Rule 58 on Rehearings (and admittedly the court faces problems not precisely parallel to state rehearing problems), paragraph 4 of the rule accords with the felt necessities of modern appellate practice. It provides simply:

> Consecutive petitions for rehearings, and petitions for rehearings that are out of time under this rule, will not be received.

Yet, in the teeth of that explicit limitation, the Supreme Court by a five to four vote in *Cahill* v. *New York, N.H. & H. R. Co.*[119] "in the interests of fairness" granted, after time to petition for rehear-

[118] See Wiener, The Supreme Court's New Rules (1954), 68 Harv. L. Rev. 20, at pp. 83-87.

ing had expired, under the guise of a "motion to recall and amend the judgment", what was in substance a second petition for rehearing, after the first petition seasonably filed had been denied. Four justices vigorously dissented, pointing out that the "motion to recall" presented precisely the same contention which was raised in the petition for rehearing.[120] Grant of the "motion to recall" prompted widespread and sensational press attention because the judgment for a large sum to a labourer in impecunious circumstances had already been paid and in large part spent.[121] It is hard to escape the conclusion that in the laity's opinion at least the court's action evidenced serious inefficiency in the judicial process. Perhaps it only truly evidences the inevitability of some escape hatches from the rigidity of absolute limitations in procedural law.[122] But the escape hatch, if justified at all in this case, might better have taken the form of candid dispensation from the rule rather than subtle evasion of it.

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[119] (1956), 351 U.S. .—, 76 Sup. Ct. 758; cf. *Boudoin* v. *Lykes Bros. S.S. Co.* (1955), 348 U.S. 336, 350 U.S. 811; *Union Trust Co.* v. *Eastern Airlines, Inc.* (1955), 350 U.S. 907, (1956), 350 U.S. 962.

[120] 351 U.S. at .—, 76 Sup. Ct. at p. 760.

[121] *E.g.*, Minneapolis Sunday Tribune, July 8th, 1956, 8B, col. 1.

[122] As the Associated Press, *ibid.*, dramatically tells the story of the *Cahill* case, with surprising accuracy in the procedural steps (see (1955), 224 F. 2d 637 (2nd Cir.), judgment on jury verdict for plaintiff against the railroad reversed for insufficiency of evidence; (1955), 350 U.S. 898, certiorari granted and Court of Appeals' judgment reversed, reinstating award to plaintiff; (1956), 350 U.S. 943, railroad's petition for rehearing denied; (1956), 76 Sup. Ct. 758, railroad's motion to recall judgment granted, and judgment amended so as to provide for a remand to the Court of Appeals for further proceedings, namely, consideration of a point of evidence pretermitted by Court of Appeals when it reversed for insufficiency of evidence): "THEY SIT ON BRINK OF WEALTH, POVERTY [Picture of Cahill with wife and three young children]. Railman's family awaits word on injury suit. . . . In 1953, Cahill, then a brakeman for the New Haven railroad, was flagging traffic at a train crossing when a truck suddenly pinned him against a coupling. He was crippled for life. While the Cahills went on relief, their lawyer sued the railroad on the grounds Cahill wasn't properly prepared for the hazards of the job. . . . That began a legal marathon. Late in 1954 the Cahills won an award of more than $90,000 from a federal court jury in New Haven. The railroad appealed and won a reversal in circuit court but the United States supreme court set aside the reversal. The railroad asked the high court for a rehearing but was denied. At this point, last Feb. 3 [1956], the railroad paid — $96,000 in damages plus interest. But the railroad returned again to the supreme court and this time — the third time that court acted in the suit — the case was ordered returned to the appellate court for consideration of claimed errors by the trial judge. Thus, the supreme court reversed itself, 5 to 4, by the same vote it originally upheld the award. [Actually, in the first instance Justices Frankfurter, Burton and Harlan expressed the view that certiorari should be denied; they did not participate in the decision on the merits, 76 Sup. Ct. at p. 760]. It now held that the circuit court should have ruled on one more point — whether it was proper for the trial judge to admit evidence of previous accidents at the spot where Cahill was injured. One justice — Sherman Minton — made the difference; he

Conclusion

Rehearing in theory is a conscientious judicial effort to make the appellate process as good as it can be. It thus constitutes another laudable Anglo-American attempt practically to realize the great social and moral importance of sound judicial administration, which pervasively and vitally affects the well-being of the people. The shortcomings of rehearing are those largely inherent in all efforts to modify the universality of a rule of law by devices which ultimately invoke the varying value judgments of individual men. The real quality of rehearing is thus a function of the quality of the judges. There is no panacea for the shortcomings. But we urge consideration of the changes proposed in the preceding section for such help as the improvement of formal rules may afford.

The Lawyer and History

You cannot be a good lawyer unless you can cultivate good historical sense. The more you try to understand the reason or principle that lies behind any branch of our jurisprudence, the more you are forced to see that it is not Reason in itself but a decent rationalisation of attitudes, moral or social, which belong to the history of our society. When I was a young man I used to get rather embarrassed by this. I used to think that it rather lowered the status of Law and of our learning in it. Now I do not feel quite the same way. It seems to me that the life of man in society is so complex a thing that good social habit which has some root in the past, which is nourished by the emotional association of history, is a more valuable possession for the individual than a mastery of a dialectic which may be intellectually more satisfying. Not all of us in fact know much about history and very few of us know as much as we should: but nevertheless I think it is true as a generalisation that to the lawyer the history and the historical development of his country convey a more vivid sense of living and practical reality than they do to others who follow other callings. We are so often forced to see the present in its true light as a point of time in a continuous process which does not itself pause for time. That is a strength: at least it should give a certain richness, at the expense of a certain soberness, of tone. (Rt. Hon. Lord Radcliffe, How a Lawyer Thinks, The Royal Society of Medicine's Lloyd Roberts Lecture for 1955 (1956), 270 The Lancet 1, at p. 2)

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changed his mind and swung the decision the other way. A harshly worded minority opinion, protesting against reopening the case, said 'there should be a finality somewhere'. Meanwhile, the Cahills say they have disposed of about $71,000, including $36,000 to their attorney. If the circuit court orders the case retried and this time the railroad wins, will the railroad try and could it get any or all of its money back? . . . . Having lived on an emotional roller coaster for three years, the Cahills try not to discuss the suit among themselves. But the moment the radio comes on with a news program, they automatically fall silent — tensely silent. Over coffee at night, they frequently find themselves staring at each other. Then one laughs, knowing that both are thinking of only one thing — THE CASE. . . ."