Use of Sound Films in Trial Courts

Edward T. Lee
THE USE OF SOUND FILMS IN TRIAL COURTS

At the last annual meeting of the Illinois State Bar Association, the writer of this article introduced the following resolution:

RESOLVED, that Illinois State Bar Association, having in mind the wide spread criticism of decisions of the Supreme Court of Illinois in cases involving major crimes, and appreciating the limitations under which such Court participates in the administration of justice, and believing that the Court should have every assistance that modern science can supply for the more perfect performance of their high duties, is of the opinion that the use of scientific apparatus for recording the pictures and testimony of witnesses in the trial of appealable cases is advisable, to the end that a closer approximation to justice may be obtained on appeal than is possible from the printed and expressionless transcript of the record alone, on which the Supreme Court must now base its decisions.

No one was more surprised than the writer at the reaction of the public press and of members of the profession to this suggestion. Not only from the United States, but from the British Islands and from Japan came newspaper clippings and letters indicating that the proposed plan was feasible and worthy of trial.

An editorial in one of our metropolitan newspapers summed up the argument for the innovation in these words:

"It is a commonplace among judges and lawyers that reviewing courts are severely handicapped in endeavoring to reach just decisions by the barrenness and lifelessness of the printed records of court trials. Juries and trial judges have important advantages that now are denied to the reviewing tribunals, for they see and hear the witnesses, the defendants and the prosecutors, and, as every one knows, words not infrequently are contradicted by the way in which they are spoken, by involuntary gestures or facial expressions.

"The official reporter's record cannot reproduce the drama as it is presented in the trial court, yet the interests of justice often require the re-enactment before the reviewing court of that same drama. The sound film can fulfill the requirement. There is no good reason, aside from the question of cost, why that method of bringing the trial back to life should not be utilized."
It is because of the situation thus depicted, that a prominent and learned member of the Illinois Bar, in a public address, facetiously referred to our Supreme Courts as "courts of ultimate conjecture." Unfortunately this description is not in every case wide of the mark. In fact, every trial court and jury are open to the same classification. For in the very nature of things, in a large majority of cases it is impossible to reconstruct completely the facts and the situation underlying every case that comes into a court of justice.

Let us take an ordinary case of assault and battery committed in public. The police arrest a man believed to be the assailant, who is in due time placed on trial. He demands a jury trial. From that time on it is the object of the prosecution and of the defense to reproduce, as far as possible, every pertinent detail of the unlawful affair. The parties, the witnesses, and the arresting officer, assuming they are all honest men and trying their hardest to tell what they saw, what they heard, and how it all happened, are nevertheless unable to re-produce what a moving picture and a sound recorder would produce if the assault and battery had been committed in the presence of the one and in the hearing of the other. Every lawyer knows how much honest witnesses may vary in their testimony of what they saw or heard. Accuracy of recollection is different with different people.

Indeed, those we might call the intelligentsia may be like common folk in this respect as a story that recently came from Vienna would indicate. There, at an international meeting of psychologists, those in charge of the meeting pulled off, as the saying is, a "stunt" on their fellow psychologists. During the proceedings, a man dashed into the assembly room followed by another brandishing a revolver from which he fired several shots at the pursued. The learned audience rose to its feet as one man, and while some shouted: "Don't shoot him, don't shoot!" others
ducked behind desks and back of chairs, evidently forgetting they were psychologists. The presiding officer, who was *particeps criminis*, rapped for order and then informed the members that the act had been staged for a particular purpose, and then he requested each man to write down all that he saw and heard of the affair. It is said that hardly any two accounts agreed.

But, we will suppose that the assailant is convicted, and that convinced of his innocence he directs his attorney to appeal the case to the Appellate Court. The next step is to prepare an abstract of the record, incorporating all the testimony that appellant may deem material in support of his case, and to prepare a brief and argument on the law as he sees it. The State’s Attorney does likewise on behalf of the State. When the case is called in the Appellate Court the Judges will read, or will have read, the transcript and the briefs and arguments on both sides, and will perhaps listen to oral arguments, but try as counsel may and the Judges wish, the scene at the trial of the case in the court below cannot be re-produced. Much less can the original scene on the public street be re-produced. Gone are the voices and the faces of the witnesses, their intonations and their facial expressions. And so likewise with the lawyers and their court room by-play. The atmosphere of the court room like the atmosphere of the fight cannot be restored in the Appellate Court.

True, the Appellate Court reviews both the facts and the law of the case, and it must take all its facts from the printed transcript of the record. But in the trial court the Judge and jury may have been influenced by facts which do not appear in the transcript of the record, and can never be made to appear in a transcript of a record. A glib lie told by a witness may read much better than it was uttered. When uttered its tone and the expression of the witness may easily have convinced the jury that the
fellow was lying. The Appellate Court can never have this advantage. Again, in the transcript the testimony of a witness appears with nothing to indicate that while he was testifying he halted, spoke very deliberately, and was evidently striving to tell the truth, the whole truth and nothing but the truth, and the court and jury were so impressed, but nothing in the record before the Appellate Court can show this.

Assuming now that the Appellate Court affirms the judgment and sentence of the trial court and that there may still lie an appeal to the Supreme Court of the State. If the general rule prevails in that State, the Supreme Court will have to accept as facts those found to be such by the Appellate Court, and will confine itself to the single question of whether there has been any error either in the trial court or the Appellate Court as to the law applicable to the facts of the case, which may or may not coincide with the actual facts of the occurrence—the assault and battery.

For purposes of illustration, a criminal case has been taken, for usually it has more dramatic elements than any other kind of case; but a civil case might also be taken to illustrate the same procedure.

If now a trial court room could be equipped with scientific apparatus to record the pictures and the voices of those participating in the trial of a case—the judge, the lawyers, the litigants, and their witnesses, whenever a demand should be made for the use of such apparatus, should have their pictures and voices recorded and have the record so taken made a part of the record of the case and so made capable of use in courts of review, which would also have to be equipped with proper apparatus, it would then be possible for the reviewing court to get nearer to the heart of the case than is at present possible upon the written transcript thereof. It is said that the famous and cryptic line of Macbeth to the witches "Had I three ears I'd hear thee" is capa-
ble of as many different meanings as it has words, depending upon the intonation of the voice. Expressions of the countenance of a party litigant or a witness may be equally capable of different interpretations, but they are all alike lost in the reviewing court.

Moreover, a sound film would doubtless do much to improve the morale of the average court room; it would make the court and lawyers more circumspect and restrained in their speech and demeanor. "Wise-cracking" and secret signaling would disappear, and there would be less intrusion into court room scenes of unretained lawyers and politicians whose presence might be counted on to impress the judge or jury with their interest in the case.

And again the jury itself in their deliberations might be very glad to refresh their impressions and recollections of the case by turning on a reel or two to bring before them once more the faces and words of witnesses.

Not all criticisms of the resolution were favorable. The two chief objections made were, first that it interfered with the functions of the judge and the jury in the trial court; that these administrators of justice settle the facts that constitute a case; that they are in a position to see and hear everything that the attorneys for the respective parties are able to present in court, with the addition of impressions obtained of the parties and the witnesses; and that the only function of a reviewing court is to decide whether upon the facts so found the proper law was applied. There is weight in this argument. But as it stands today a reviewing court is authorized to scan the testimony taken in a trial court and to decide whether the jury drew the proper reference from the testimony presented and came to a correct legal verdict, and whether the judge of the trial court erred in admitting or excluding any evidence that was offered or in overruling motions made at the conclusion of the trial. But our contention is the Judges of the reviewing court now
do not get all that the jury had before them in the way of evidence and that the missing element may be a necessary element in coming to a just determination of the cause before them. The printed word does not yield sufficient evidence. Appellate Judges, themselves, as has been truly said, "have often averred to the disadvantage of not having seen the witnesses or observed their manner of giving testimony."

The other objection is based upon alleged practical difficulties that are declared to be almost insurmountable. This objection is not one that can be solved very well by lawyers or judges but is to be determined by those expert in the production of sound films. It is said that if a sound film were to be taken in a court room, many judges might become more theatrical and dramatic than they now are and would regard their court room as a parade ground, and that the court and lawyers and the jury as well as the parties and witnesses would be made to feel that they were on a dress parade and would cease to act natural. One writer graphically pictures the difficulty by representing the motion picture director who would have to be in charge of the apparatus, as breaking in on the proceedings of the court in this manner: "Cut!" "Turn your head more to the left and speak more slowly, your Honor." "Camera!" "Action!" And then he proceeds to tell how the sound film might be broken in upon by the noises of a passing truck or someone vending wares upon the street.

It has been suggested, also, that an Appellate Court which is so largely called upon to decide only points of law should not be confused by making "a motion picture house of the Appellate Court." There might be considerable force in this objection if the use of the sound film were made compulsory in all cases. This need not be so. In a very large majority of civil cases there would be no occasion to use a sound film; and probably there would be many criminal
cases and cases of negligence when the same would be true. Moreover it might well be left to the attorneys of the respective parties, or to one of them, to determine whether a sound film was necessary during all or any part of the trial, or the court might decide upon its necessity. In some cases today there may be no court reporter present, or if there is one present he is there at the expense of one party or the other. So the expense of a sound film might be at the expense of one or both of the litigants. But these are matters of detail.

Doubtless the most valid objection may be found in the expense involved in equipping a court room with the necessary apparatus for producing a sound film. Of course, one must not think of the movie theater talkies in this connection. They represent a varied group of sights and sounds with constantly changing attitudes and positions, running continuously from one and a half to two hours. In the court room, a single individual would generally be subjected to the moving picture and the sound recording instruments, and the operation could be taken care of by two or three of the court officials, especially trained in that work. Unless heavy royalties and exhorbitant leasing charges had to be met the expense should not be great after the first installation of the device. The writer is informed that already there exists a simple process of electrical transcription of voices and speech, which records everything spoken, with every shade of tone and every inflection of voice and emphasis. The recording is done on thin metal discs, indestructible in handling, unalterable, a permanent record, and capable of being re-produced on any phonograph. It is claimed that this apparatus can be set up anywhere at a moderate cost and that it is capable of being used without any noise or inconvenience.

As for photography we all know what wonderful things even a small modern camera is capable of—one that can
be purchased at no great price. It is not hard to believe that a combination of these two devices may be worked out successfully to be used wherever the more elaborate and expensive sound film apparatus cannot be installed.

The State has no higher function than that of the administration of law and justice, and nothing, within reason, should be permitted to stand in the way of its performance of this supreme duty. A sound film in the Sacco-Vanzetti case or in the Tom Mooney case might have saved us from ceaseless agitation and bitter complaints of the denial of justice.

The legal profession is popularly regarded as the most non-progressive profession in our society. Many older lawyers will recall the prejudice and opposition that some, of the courts had to typewritten pleadings and legal documents. Let us hope that it will not be found arrayed against this possible help of science in the administration of justice.

*Edward T. Lee.*