Kentucky Law Journal

Volume 20 | Issue 2 Article 1

1932

Methods by Which the Judicial Council May Best Accomplish the Duties Imposed by the Statute Creating It

Thomas C. Mapother
Jefferson Circuit Court

KENTUCKY LAW JOURNAL

Volume XX January, 1932 Number 2

METHODS BY WHICH THE JUDICIAL COUNCIL MAY BEST ACCOMPLISH THE DUTIES IMPOSED BY THE STATUTE CREATING IT*

The Act creating this body imposes on it the duty "to study the organization, rules, methods of procedure, and practice of the judicial system of the Commonwealth of Kentucky, the work accomplished and the results produced by that system in its various parts, the problems of administration confronting the courts of the Commonwealth and the judicial system in general."

In discussing the methods by which it may best accomplish its duties, it would appear well to first inquire into some of the evils of our system; the good, of which there is much, will take care of itself.

The work of the courts is in theory that of dispensing justice. In practice it often amounts to dispensing with it. One of the greatest sources of grief to the judge is that he is powerless at times to prevent and must under compulsion do manifest injustice. The administration of justice is not individual. I often think the public would be better served if it was, if controlled solely by the conscience of the judge, instead of being hampered by innumerable rules and regulations governing both substantive law and its practice. The modern judge who is worthy and interested in his great work must, in order to keep abreast of the times, spend a week in studying precedent for every day he devotes to the consideration of what is right between man and man. The immense volume of reported decisions appearing in this country every year leads to confusion and chaos, it being impossible for any human being to have a fair acquaintance with most of them; and with promise of their increase, and that of the complexities of modern life, I often wonder what the poor public will do fifty years hence for efficient

*Address of Judge Thomas C. Mapother, of the Jefferson Circuit Court, delivered before the Judicial Council of the State of Kentucky at its meeting in Frankfort, Kentucky, on April 2, 1931.

administration of justice. It will, in my judgment, do without it unless the machinery of such administration is simplified.

It seems to me that little changes here and there are of no consequence, and I have none to recommend but major operations. Why is it that when a crime is committed in England, by either prince or peasant, the task of trial, conviction, appeal and sentence occupies some seven weeks, while here, like the brook, it rolls on forever? My study of that situation at first hand convinces me that it is not because the British people are different from us, but have been educated to their method of dispatching business. They are as indifferent in some directions as they are diligent in law enforcement. It is largely a matter of habit, which we have not yet acquired. The simple truth is that leadership in this country today is more prominent in fields of private endeavor than in government. I often think, however, that our people would rather have defects in public administration to complain of than to see them corrected. I have a friend in Louisville who is constantly abusing the law and its operation. He had several disappointing experiences in court, and confided to me one day that be believed the law was designed for the crook and against the honest man. The following week he was summoned for jury service in the criminal court, and was accepted on a panel trying a man for embezzlement. The proof overwhelmingly established the fact that the defendant, under the most aggravating circumstances, had impoverished a widow with several children by embezzling all the money left her by her deceased husband. Eleven men promptly voted to give him the limit, and my friend hung the jury because he would not vote to convict anybody that the Commonwealth's Attorney was prosecuting.

We need not indict a man on the day of the commission of a crime, try him the following week, dispose of his appeal within two weeks, and execute him ten days later. But we can eliminate some of the technicalities and abuses that prevent results when and after he is tried. Why should it not be sufficient in an indictment to charge that the defendant murdered his wife? He would know exactly what he was charged with, and no real information is contained in the additional averment that it was done willfully, maliciously, unlawfully or feloniously. Yet the heads of criminals have been saved in this State by the omission

of one of these words from an indictment. I do not follow criminal practice closely and had thought the courts were getting away from this, until I read the recent case of *Coates* v. *Commonwealth*,[1] where an apparently just conviction for shooting at another with intent to kill, but without wounding, was reversed on the sole ground that the indictment was faulty in failing to allege that defendant did it "maliciously", although it did allege he had done it "unlawfully, willfully, and feloniously". The opinion states that while the word "feloniously" had been held broad enough to include the word "maliciously" in an indictment for arson, yet Section 1166 of the Statutes, under which this man was indicted for shooting at without wounding, required that it be done "maliciously", in view of which the use of that particular word was necessary in order to give validity to the indictment and support a conviction for felony thereunder, the use of the words "unlawfully, willfully, and feloniously" being insufficient for that purpose, but sufficient only to charge a lower degree of offence than that of which defendant was convicted. This may be good reasoning, but seems substituting reason for justice, and such an anomaly should be made impossible in a modern system of administration. To say that Commonwealth's Attorneys should be careful to follow the exact language of criminal statutes under which they draft indictments is not to say that technical failures in that regard should avoid conviction thereunder where apparent justice has prevailed, nor to say that an indictment alleging that one did a thing "feloniously" does not charge him with felony.

In capital cases defendants have been forgotten after the appellate court has over-ruled a petition for rehearing. Death warrants must be signed by the Governor, and I have read of mandates lying on his desk for months awaiting attention. It is not clear why the Governor should be required to order an execution. This would seem the proper function of the courts and would be more efficiently performed by them, the pardoning power of the executive being exercised in cases requiring it; and such method is pursued in some other jurisdictions. There is little occasion for fear that a case which merits clemency would escape the attention of the Governor unless he signs the death warrant.

[1] 235 Ky. 683.

Very much injustice in civil cases results from unskillful pleading, and from defects in pleadings that are not altogether chargeable to carelessness or want of skill. And often when justice is not thereby literally slaughtered it is jeopardized and delayed through amendments during trial and resulting continuances. Fully realizing the drastic character of the suggestion, I am nevertheless convinced that the abolition of ordinary pleadings would result in great improvement. This has been done in cases involving less than fifty dollars, and there is no apparent reason for its limitation to that or any other sum of money. Nine times out of ten the substance of the controversy is well known and understood by both sides in advance of suit, and under our system permitting the taking of depositions in advance of trial, there is no apparent difficulty in ascertaining the theory and details of a cause of action or defense. If surprise develops on trial, as it may in rare cases, the court can control the situation in the interest of justice.

The general demurrer is another source of delusion and snare. I have never had much respect for it since I witnessed one of its operations in a nearby county some years ago. A young man had sued a municipality for personal injury and was present in court on crutches. A general demurrer was interposed to his petition. The court examined the document and, finding it apparently sufficient, asked defendant's counsel what he had to urge in support of his demurrer, and received the answer that it was merely formal for the purpose of the record, whereupon it was over-ruled with exception for defendant. The trial proceeded, resulting in a verdict for the plaintiff for $1,500.00. That evening defendant's counsel pointed out to me a defect in the petition that was fatal to it. I asked why he had not urged the point and had his demurrer sustained. He answered that if he had the Court would have permitted its correction by amendment, whereas he now had a hole in the record which would work a reversal. But, I said, he can amend on the return of the case from the upper court; to which he replied "Yes. But you saw that plaintiff hobbling around on crutches this morning. By the time the case comes back for another trial his crutches will be gone and I shall have a dozen snapshots of him breaking broncbos."

If there is humor in this anecdote, that plaintiff will never be able to appreciate it. It forcibly illustrates to what base uses a general demurrer may be put and what an instrument of fraud it can become—fraud on the litigant, fraud on the lawyer, and fraud on the court. There is no more reason why a party should not be required to specify and be bound by his grounds of demurrer than of new trial. Yet the court, on a submission on demurrer, must search the record for defects and is under a duty to find them if they exist. They are often not found until after trial.

The more I see of the operation of the jury system in ordinary civil trials the less regard I have for it, and believe its restriction would result in great economy of time, expense, and in more efficient service to the litigant. I do not court the additional burden and responsibility which the abolition of the system would transfer to the shoulders of the judge, and would like to have the privilege of calling a jury in any case wherein I might consider its service required. But there are many civil common law actions which could be disposed of quicker and better by the court than a jury. I have had juries in the plainest cases, submitted to them only out of abundance of caution under our scintilla rule, and where even the scintilla was overwhelmed with evidence to the contrary, deliberate for two hours on one day and three hours on the next without an agreement, and have to discharge them and declare a mistrial. And I have had any number of others take as long to reach a compromise verdict under which a plaintiff is rendered three hundred dollars on a claim worth three thousand or nothing. While it might be said that such verdicts are subject to the court's control, it cannot, as a practical proposition, undertake to re-try all such cases, and under the present system it has neither legal nor moral right to substitute its judgment on the facts for that of the jury. The litigant is often required to submit to punishment and even gross injustice at the hands of a jury in support of the system itself, though there are occasions and circumstances under which the conscience of the court is aroused beyond the point of endurance, and it sets aside a verdict on the ground that everything is in favor of a litigant except the jury.

Issues of fact in important equity cases are decided by the chancellor without the intervention of a jury, with satisfactory

results; and I believe a similar practice could be followed at law with similar results, with a provision for appeal from a common law finding of fact similar to that in equity.

I read every opinion of our Court of Appeals as they appear in the Advance Sheets. I believe there could easily be compiled into one volume everything of professional interest appearing in the last five volumes of the Kentucky Reports. I am aware that in law all are required to be published, but this ought not to be, because it is filling the books with chaff. I am also aware that the court is required in most cases to write opinions, though not of any given length. I have read a number recently of ten or more pages which I thought could be improved by boiling down to one or two. The questions involved were whether certain instructions given or refused were applicable to certain states of fact disclosed by the record; and the first eight pages were devoted to a statement of the facts, and the remainder to the conclusion that the instructions involved either did or did not fit such facts, because of established and well understood rules governing the application of such principles. It seems to me that narration of the facts of a record at great length, with the further explanation that certain principles contended for are inapplicable thereto, is in the average case of little or no professional interest, and involves an undue burden on the appellate court without any corresponding benefit to the profession; for there are no two cases alike on their facts and each decision of this character must of necessity be individual. It would seem sufficient in such cases to merely state generally the contention of the complaining party and why such contention is or is not well taken. I am not speaking now of cases involving the soundness of a given proposition of law supported by argument or authorities on both sides, but of those where the soundness of a proposition of law is conceded and the question is one of its applicability to a certain state of facts.

It seems to me highly important that a method be effected to save remanding and re-trial of many common law cases. It is of course essential to correct errors in judgments of the lower court, but there are many cases in which this can be accomplished without remanding them for re-trial. I have always felt, for example, that if damages are excessive there is a point beyond which they are not so—otherwise there is little excuse for pro-

nouncing them so—, and that the courts should determine that point and correct the judgment accordingly. The appellate court should not only have but use freely the power in common law civil cases to reverse or modify without remanding for re-trial whenever practicable. Under our system although seven-eighths of the questions of both law and fact involved are properly settled by a first trial in favor of a litigant, and the eighth one improperly so, the action is remanded generally for re-trial on all issues, settled and unsettled; and I have known cases reversed solely on the ground of excessive damages or error in the measure thereof, under which the bars were let down and the plaintiff required to start over on liability as well as damage, it being impossible to recognize the second trial as the same case that was tried before. This practice is a downright invitation to fraud, which is usually accepted. The same is true of cases wherein a plaintiff recovers a verdict and the upper court holds on the record of that trial that there should have been a peremptory instruction for the defendant. Instead of ordering such instruction and ending the case on the strength of one trial, which is all that a party is entitled to, the judgment is reversed with directions that if upon another trial the testimony is substantially the same the lower court shall award a peremptory. Why another trial, with an invitation to perjury, in order to produce additional evidence, when a party has or should have produced all he had on the first trial?

For many years I have observed closely the operation of our appellate court system in this state, which seems to me thoroughly antiquated and to call for reformation in the interest of judges, lawyers and litigants. The judges of that court are not only not pack-horses, and are entitled to better treatment, but their work demands time which they do not have for the proper consideration of important decisions, and this is apparent from their opinions, which are written under pressure. Judges of such a court do their full duty when steadily available to the bar in the interest of litigants, and should have time to spare. I think they do splendidly, considering the intolerable conditions under which they are compelled to work.

I have never favored sitting in divisions, but think all the judges should be familiar with every record in every case decided and participate in its decision; though this would

involve an entire change of system. Cases go up on complete records, which it is impossible under prevailing conditions for more than one judge to read, and this involves danger through oversight of one mind. Several years ago I saw a comparative statement covering the number of cases decided by various appellate courts in the United States, which showed that in that particular year the court of last resort of the State of New York had written less than 200 opinions, whereas our Court of Appeals had handed down over 800; and the New York court returned practically all it had, while ours was far behind. Does not this demonstrate serious vice in our system, considering the fact that New York has many times Kentucky's volume of litigation? The court of last resort of that state is not clogged with cases of the peanut variety, but has an intermediate tribunal with real teeth to keep this character of litigation out of it.

I realize, of course, the futility of this suggestion as far as Kentucky is concerned, in the absence of constitutional amendment, but recommend the subject to the committee of this body which is considering the need of a new constitution. Whatever our experience with the old Superior Court in this State, I am satisfied that a real intermediate court, with final jurisdiction in misdemeanor and in civil cases involving money judgments not in excess of $1,000.00, would afford us a satisfactory deliverance of the law, besides giving better and more prompt service to litigants and relieving the congestion of our court of last resort.

While the last named court is nothing like as far behind as it has been in years past, it should not be behind at all. A judge who, no matter how hard he works, has bundles of records always awaiting his attention, is as much under pressure when two months behind as if it were two years. The time allowed by law in which to perfect appeals from the circuit court is out of all reason in the light of modern conditions, and would be shortened if the appellate court was up with its work and awaiting the arrival of more.

Another means that might afford relief is that of the case made system, which can be brought about by legislation. Much has been suggested in the past on this subject by the State Bar Association, with no result, and even appellate judges have differed as to its advisability; but it appears to be operating satisfactorily, with certain limitations, in many of our sister states

and in the Federal courts. One objection thereto that was urged by several judges of our Court of Appeals some years ago when the matter was agitated, was that lawyers could not be trusted to make a record without doing violence to the interests of clients; but the same might be truly said of their ability to try a lawsuit, which does not excuse the circuit judge from presiding at the trial. The litigant is entitled to no better lawyer than he chooses, and it is not the duty of any court to supervise his selection.

Many ponderous records come to our Court of Appeals, every word of which must be observed by the judge to whom it falls, and 90 per cent of which are pure junk. The reading of them slaughters time and produces confusion, the judge having to select from a complicated and often meaningless mass of facts the real issue involved in the case. I see no reason why an appellant should not be required to boil such a record down to a few pages and submit the result to appellee, who could have climinated from or added to such statement any matter justified by the record, the case so made being printed and a copy thereof read by every judge of the Court of Appeals.

I do not wish to suggest any further limitation of the right of appeal from money judgments, for I think it is too high now; but the establishment of a certiorari, under which the appellate court would be given discretion in the allowance or disallowance of appeals, handling this situation similar to the practice now prevailing in the Federal Supreme Court, might be advisable. I have little sympathy with the present statute allowing such discretion in cases involving over $200 and less than $500, which is both cumbersome and burdensome. The litigant must now prepare his complete record as though entitled to an appeal, only to have it disallowed. It would seem that a simple preliminary certified statement or abstract of what is involved, both as to law and facts, should entitle one to move for an appeal and to know before the complete record is prepared whether he is to get it. I am told that records involving over two and under five hundred dollars are now considered by the Court exactly the same as other cases, the only difference being that in the former class opinions are omitted where judgments are affirmed; in which event the relief to the Court afforded by this statute appears slight.

There are improvements which the appellate court itself can adopt by rule, and still others which can be authorized by legislation, that would lighten its burden and produce better results, some of which have been suggested above, such as shortening opinions, remitting and affirming instead of reversing on the ground of excessive damages, and reversing and rendering instead of remanding cases for trial on records not making out a case.

While I have personally observed no substantial difference in the quality of appellate opinions between those of judges and of commissioners, and am aware of no demand in Jefferson County for abolition of the office of the latter, there are sections of the State where the people do not accept kindly the idea of opinions written by other than regular judges, and who are unwilling to believe that the one who reads the record, states the case and writes the opinion has no practical voice in its decision. Under an ideal arrangement there would be no occasion for the statement of a case in conference by either judge or commissioner, for each judge would be familier with the record in advance of conference and merely discuss and record his vote thereon, which is impossible under our present system.

The method by which reforms in our entire system may best be accomplished is not by discussing and forgetting them, as many organizations do, but in agreeing among ourselves upon the more crying abuses, and utilizing energy and determination in the direction of their elimination. Unless we are united we can do nothing. But if we know what we want, and want it bad enough, we can get it, for the influence of this body, with an enthusiastic and supporting representative member in every judicial district of the State, is well-nigh irresistible. The General Assembly will give weight to the recommendations of this Judicial Council, provided there are not too many. If we request a few vital reforms at the hands of that body we are more likely to secure them and with better result than by requesting many changes of minor importance.

THOMAS C. MAPOTHER.

Judge, Jefferson Circuit Court.