TENNESSEE LAW REVIEW

Edited by the Students and Faculty

THE UNIVERSITY OF TENNESSEE
COLLEGE OF LAW

Official Publication of
THE TENNESSEE BAR ASSOCIATION

FALL 1962 VOLUME 30 SUMMER 1963

aware of the need for such assistance before the Supreme Court makes such assignment.

In making the recommendations indicated, the Committee recognized the responsibility of the Judicial Branch of our Government to be on constant alert to improve the administration of justice and to expedite the trial of cases consistent with the proper and orderly administration of the Courts. The Committee also recognized that Tennessee is no longer a predominantly agricultural State but that it is rapidly becoming an industrial area with the natural result that the case load of such court is being increased substantially. Tennessee now has a population of approximately three and one-half million people as compared to about one million when the Constitution was adopted in 1870.

The work of the Supreme Court is on the increase constantly and you have just heard from acting Chief Justice Burnett that our work increases from year to year, and I say to you that the burden of work is great.

Next the case load of the Supreme Court continues to increase, as indicated above, and my colleagues on the Bench believe very stongly that proper provision should be made by the General Assembly at its next meeting for funds to employ a research aid or Law Clerk for each member of the Supreme Court to serve in such capacity for twelve months and certainly no more than twenty-four months, at which time he would be replaced by another new aid or Law Clerk. In the speech, delivered by the Chief Justice to the Conference in 1961 he stated that each member of the Supreme Court has assigned to him about one hundred and thirty-five to one hundred and forty cases annually. This number includes certiorari and criminal cases and indicates that the Court disposes of about seven hundred cases each year.

According to the statistics contained in Volume 75 No. 1 of the *Harvard Law Review* issued in November, 1961, the Supreme Court of the United States for the year ending in 1960 rendered a total number of one hundred and eighteen opinions with forty-two concurring opinions being written and one hundred and eleven dissenting opinions, or a total of two hundred and seventy-one opinions, concurrences and dissents by a body composed of nine Justices. Each Justice wrote an average of thirteen opinions for the Court and when considering his concurrences and dissents each Justice wrote an average of thirty opinions.

With these thoughts in mind, and with the full approval of the Court, I recommend the employment of Law Clerks in order that the work of the Court may be discharged with dispatch, the precedent in the law honored, the quality of each opinion maintained and the great body of the law properly served.

MODERNIZING COMMON LAW*

RALPH H. PHARR**

I am deeply conscious of the high honor accorded me in having the opportunity of addressing such a distinguished gathering of judges and lawyers. It was a pleasure to accept Judge Roy Miles' invitation to make this talk. It is always a pleasure to have an opportunity to say a few words concerning the National Conference of State Trial Judges. It is an organization composed exclusively of state trial judges of general jurisdiction and has been in existence approximately four years. During that period of time we think we have made considerable progress toward the objectives set out in our Constitution. This organization is dedicated to the proposition that by the exchange of ideas and experiences we can become better judges and thereby improve the administration of justice in the state courts. Every state trial court judge of general jurisdiction is eligible for membership provided he is a member of the Section of Judicial Administration of the American Bar Association. There are no dues to the National Conference of State Trial Judges and we invite all of you Judges to join with us in this organization.

Lord Eldon once said that in order to be a successful lawyer one must live like a hermit and work like a horse. As I look around me this morning I see a wonderful array of successful lawyers and of judges who, of course, were once successful lawyers. Yet I see no hermits and little evidence of any one resembling a horse. Of course I do not know you as well as you know each other. It is to be noted that when Eldon made that sage remark he was already Lord Chancellor of England, and perhaps he, like many other judges, had forgotten how he had achieved the woolsack.

I gave Judge Miles the title of this talk as *Modernizing the Common Law*. In order to appraise the significance of modern trial techniques and to understand the modernization of the Common Law, it is fitting that we have some understanding of them in the place they occupy in the changing facade of the Common Law.

In the last two decades, in fact, in lesser time than that, there has been a tremendous surge of new ideas and new techniques presented to the legal profession. The use of equitable bills for discovery has faded almost into obscurity and instead of that, there has come about the widespread use of modern discovery procedures. Also requests for admissions, pretrial conferences, motions for summary judgment and

* Delivered at a joint meeting of the Tennessee Judicial Council and the Tennessee Bar Association at Nashville, June 7, 1962.

** Judge of the Superior Court, Atlanta, Georgia.

motions for judgments notwithstanding verdicts have become useful implements in the hands of skilled trial lawyers.

There has developed a great awareness of the effectiveness of demonstrative evidence and it is common practice for counsel to use a blackboard, motion pictures, colored photographs, plastic skeletons, X-ray demonstrations and many other items of similar nature. The use of experiments, facsimiles of automobiles and railroad trains, switch tracks, flashing signals, and other reproductions of physical scenes are now encountered, not infrequently, in the trial of cases. Long and painstaking examination and cross-examination of expert witnesses, particularly of the medical profession, now constitute an important phase in the trial of tort cases.

To those of us who have been in the legal profession for some forty years, many of these things appear at times to be radical and drastic changes, necessitating the readjustment of our ideas and the development of new techniques and skills. We have watched the changes taking place, listened to the hue and cry both from laymen, lawyers, and newspapers for improvements in the processes of the law and, while I do not wish to shock or alarm you, it is a fact of life which we must acknowledge, that we are now in a period of great legal and procedural reform.

We may call it improvement, modernization or some other pleasant name, and some may even seek to ignore it in the hope that it will painlessly pass away. This reform movement is perhaps as great and substantial as any in the history of the Common Law.

Each day we feel the accelerated pace and the tremendous pressure of the work both on lawyers and judges. If we analyze it carefully we must realize that we cannot, in justice to ourselves, as well as to litigants, permit ourselves to become so enmeshed in the niceties and technicalities of legal procedures that the ultimate objective of discovering the truth is lost from sight.

Efforts are being made in some quarters to turn the settlement of disputes over to boards or bureaus or arbitration proceedings. There are movements to provide compensation benefits in automobile personal injury cases without regard to the laws of negligence and tort.

If we sit silently by and encourage such movements, we are acquiescing in treachery to the legal profession. We are acceding to a destruction of the greatest system for settling disputes ever devised by civilized man. To stem this tide and to stop this tragic trend, we must examine ourselves and our legal system. We must be alert to improve the efficiency of court procedure. We cannot, in our fascination for the beauty of our traditions, be allergic to change. We must be willing to shed some of the anachronisms of the past.

As we look back over the panorama of Common Law history, however, we should not be too shocked at the turbulence of change. Indeed the Common Law is a system of change. And while I shall not undertake to define the Common Law, ephemeral as it may at times seem, it is yet real and practical in administering justice. One of its important component parts is the channel or procedure through which relief is obtained. Indeed, every basic right is either dependent upon or is of a procedural nature. And in truth the history, growth and development of the Common Law is in very substantial measure the concern with the Courts over the procedures by which the rights of parties are ascertained. It is the processes by which law is administered that have undergone tremendous changes over the centuries of the Common Law.

If we take the five stars of the first magnitude which have shown in the firmament of legal literature – Glanvill, Bracton, Littleton, Coke and Blackstone and add to them Sir Matthew Hale and Lord Mansfield (William Murray), we will observe that they had a tremendous influence in the change and formulation of legal procedures and court organization.

When Glanvill was Henry II's adviser and Chief Justiciar, drastic and important changes were made by Henry II, great-grandson of William the Conqueror. About a hundred years after the Norman conquest he inaugurated trial by jury as a procedure in the courts for disputes between individuals. True, it was not the jury as we now know it, but it was a radical change from decision of cases by ordeal or duel. Henry II promulgated the doctrine that the King's Peace pervaded the entire realm and that a disturbance anywhere was a breach of the King's Peace and punishable as such. He provided a system of courts which came to administer law common to the whole land and to all men, which gave to us the name "Common Law." While this may be referred to insofar as we are concerned as the beginning of the Common Law, the idea used by Henry II was not unique or entirely new. Hammurabi who ruled Babylonia about 2,000 years before Christ gathered together all of the laws of the different parts of his kingdom and made them into one set of laws for all of his people.

Judge Henry of Bratton, or Bracton, as he is commonly known, in the century after Glanvill kept a notebook of cases and writs and he is credited with having collected some 2,000 of them ranging between the years 1217 and 1240. While it is believed that the main purpose of his collection of cases was not to use them primarily as authority in the decision of other cases, but in connection with his book *De Legibus Angliae*, nevertheless he was one of the early judges in the Common Law who resorted to previously decided cases as a source of authority upon which to decide the litigation then pending before him and in this

way, he is to some extent the father of the case law system and of the method of deciding cases upon precedent.

Edward I (Longshanks) (1272-1307) is extolled by Blackstone as the English Justiciar and his reign is recorded as one of great legal reforms and improvements.

Littleton paved the way for later changes and reforms by dealing with the tenures in real estate under the feudal law as established by the decisions of the courts down to his time. Littleton seems to have ignored equitable estates in his *Treatise*, yet his will expressly created an equitable estate in his own property.

While the magnificent Coke had his quarrels with Lord Ellesmere over Chancery jurisdiction, yet he contributed much to the growth of the Common Law and the procedures for the enforcement of individual rights. Coke believed that the law must grow from ancient roots and his reliance upon authority and precedent exemplified that belief. It is true, however, that even in Coke's day, England as yet had no rules of evidence and anything was accepted, including hearsay opinions, garbled recitations of gossip, and centuries had to elapse before litigants were able to obtain protection therefrom under law.

After Coke came Sir Matthew Hale who became a judge of the Court of Common Pleas in 1654 and Chief Justice of King's Bench in 1671. He was an early apostle of land registration and of that systematic distribution of the law that must form the foundation of codification.

Lord Mansfield (who was Chief Justice of Kings Bench, 1756-1788) introduced the Law Merchant into the Common Law and laid the foundation for many of the improvements of the 19th Century.

Many of you of the older generations are familiar with Blackstone's *Commentaries*. As you will well recall, these were not originally law books written for the legal profession, but were lectures prepared for and delivered to the young gentlemen at Oxford who, it was thought, should have some acquaintance with the laws of England in order to make them educated English gentlemen.

Blackstone's comfortable optimism and smugness in his attitude toward the English law kindled the flame which started Jeremy Bentham on his campaign of reform, and he, along with Brougham and Romilly, brought about the great reforms of English law and procedures around 1830. The public criticism of the courts and the publication of Dicken's novels and other writings directed to ridiculing the Courts and the long delays of the law brought about further and greater reforms in 1880.

At the present time in England one cannot obtain a jury trial as a matter of right except in cases involving injuries to reputation and in fraud cases. There has been a long cycle from 1166, in the time of

Henry II, to the present stage of the Common Law and it has been accompanied by many vigorous periods of reform, improvement and changes.

Just as the great changes in the law which cluster around the English reform acts of the 19th century were accompanied by many measures which purged the private, procedural and criminal law of much, though hardly enough of its medieval dross, so the present techniques, to which I have earlier referred, are an attempt to bring our system into a simpler and more cohesive method of arriving at the truth.

The discovery processes are designed to eliminate much of the surprise and ambush which up until a few years ago were prevalent in the trial of many cases. It was not so much the legal acumen of the lawyers which determined the outcome of the case as the staging of a carefully planned diversion of the jury from the direct question under consideration. These discovery processes are not weapons of the plaintiff only — they are of just as much vital importance to defendant's counsel as to the plaintiff's counsel, and the end result is that it is much easier to simplify the cases if the lawyers for both sides have fully explored all of the facts and all of the evidence before the actual trial begins.

Thus, we have as a natural result, the pretrial conference, which if properly conducted, is a splendid means of eliminating the chaff and getting down to the kernel of the case. However, the so-called pretrial conferences which are held purely for the purpose of intimidating counsel into a settlement of the case cannot be put into the same category as the pretrial hearings which are held for the purpose of simplifying the issues and preparing the case for trial before a jury.

Through actual experience in many, many pretrials, I have found that much can be accomplished. The work of the lawyers can be made much more effective if a real pretrial is had and I think it behooves us to take full advantage of these processes in order that we may operate in a more efficient and economical manner and endeavor to obtain a much clearer ascertainment of the truth.

Despite the changes and the adoption of new techniques, we still have problems. Our major one is that under present conditions and under present procedures, we have more cases than we can dispose of within the time when it was believed they should be disposed of. Succinctly, it is the length of time of litigation that concerns us. It is generally stated that accelerated population growths, urban concentrations of people, multiplication of the problems and complexities of commerce, industry, and government, ascending numbers of automobiles on the public streets and highways, and contingent fees are the causes of court congestion. All of these may contribute in some greater or lesser degree to the problem. However some detailed studies by Judge

Aaron Steuer of New York, indicate that neither the amount of nor concentration of population nor the number of automotive vehicles has any direct proportionate ratio to the number of cases filed in the courts.

I suggest to you that we must look deeper and farther to ascertain the real underlying causes and I submit to you for your consideration the following:

1. There has grown and is continuing to grow a *public awareness of negligence*. Perhaps it should be stated as an awareness of potential liability for possible negligence and we might go further and use the expression "alertness" to assert claims of negligence. In nearly every personal injury nowadays the injured person seeks to impose liability upon others for his injuries and even most property damages give rise to at least a claim of liability therefor.

2. There has been *a broadening of the law relating to negligence actions by appellate court decisions*. If one follows the decisions of the appellate courts, it is easy to perceive a liberalized attitude on the part of those courts toward an extension of liabilities for unintentional acts of human conduct.

These two awarenesses have been aided and furthered by the legal profession, as lawyers have become more and more conscious of the economic value to them of claims for tortious injuries. Indeed in many instances the difference between a good year and a bad year for a lawyer has come to be a good personal injury case.

3. There is *an awareness of the growing scope and amount of insurance coverage*. We are now increasingly sold insurance to cover all forms of even remote hazards which a few years ago were almost totally unknown. And since we are so insured, it does not greatly offend us now if our best friend sues us for gross negligence.

While the contingent fee is frequently spoken of in invidious terms as if it were something evil, it does serve the purpose of assuring almost everyone the opportunity to obtain representation in the assertion of one's claim and legal rights. To some degree, the contingent fee provides a substantial incentive to greater and more effective work on the part of counsel. It also partially serves to make litigation within the reach not only of the rich or the poor but also of the average person.

We in the legal profession must acknowledge that our business has increased. The law is a big business. So what shall we do? Shall we turn down the business and drive disputants to other means of settling their disputes? Most of us have long ago been convinced that the courts are the places to determine controversies and that substitute forums and administrative boards simply invite disaster and destruction to our basic rights.

What does an ordinary commercial or industrial organization do when it has an increase in business? The number one rule followed by good businessmen is to analyze the operations of the concern, correct its inefficiencies, eliminate waste in time, money and manpower, find better and more effective means of doing things and then add such personnel, plant and equipment as are necessary and economically feasible.

I suggest that we as lawyers and judges must look at our court operation in the same manner and follow a similar course of action. We must examine microscopically and analytically every phase of our court operation from the filing of a case, its clerical handling, the system of calendar making and handling, the cycle of operations, the scheduling and determination of motions, demurrers and other non-jury matters, the functioning of discovery proceedings, pretrials, amendments and pleading rules, the summoning and handling jurors, the records relating to jurors, the selection of jurors, the methods of examination of witnesses, the techniques and time of arguments, instructions of the court to the jury, and the determination of what issues should be submitted to the jury and how. In time, all phases of the litigation process from the beginning to the final judgment in the trial court must be analyzed and microscopically examined.

In short we must all embark upon a comprehensive project, dedicated to analyzing our present system and to finding better and more efficient means of doing the work entrusted to us.

In finding means to accelerate and expedite the court business, studies should be made of what other courts have done and what procedures have been successfully used elsewhere. We should consider (1) time and motion studies in court trial; (2) procedural aids; (3) mechanical and equipment aids; (4) personnel needs; (5) calendar and assignment systems; (6) courtroom techniques; (7) jury waivers; (8) handling of administrative functions and delegation of ministerial matters; and (9) the merits of the Auditor System as used in Massachusetts.

For especial consideration I suggest the following:

1. The necessity for *statistics*. All courts need some accurate and vital statistics. Every business has an inventory system, and yet courts frequently do not know how many cases are pending and how many cases are actually ready for trial. Do we know how many cases of certain types such as personal injury, land condemnation, equity, contract, or the like are pending? Do we accurately know how many cases are disposed of each year, and how disposed of? Do we have statistics on the length of trials of various types? We need reliable and accurate balance sheets of cases filed and cases disposed of. We need an accurate tabulation of the number of cases assigned to a particular

judge and the length of time consumed by those cases under his consideration and handling. Only by a skilled and detailed study can the figures be gathered to keep us constantly informed of our position and to enable us to know whether we are gaining ground, holding ground, or losing ground. Statistics can show where trouble spots exist and thereby afford us an opportunity of providing a cure.

2. All courts should be constantly alert to the necessity of *improving the calendar and assignment system.* This is usually a focal point in the matter of court congestion and in our search for improvement of this phase, we must strive to obtain a system which (a) fixes a trial calendar and trial date sufficiently in advance to allow full preparation for trial (b) fixes a definite date for trial with some realistic likelihood of trial on that date (c) eliminates or substantially reduces the waiting period of counsel, parties and witnesses in court and ready for trial.

3. We should study and endeavor to devise some system to *eliminate calendar breakdowns.* Calendar breakdowns are contributed to largely by six factors: 1. Engagements of counsel elsewhere. 2. Unreadiness of counsel (although this is rarely, if ever, given as an excuse for continuance or taking case off of calendar). 3. Settlements. 4. Amendments at the last minute. 5. Delay in taking depositions or having medical examination of opposite party. 6. The legal habit of procrastination.

4. The *cycle of court operation* should be studied. Some courts, such as the one in which I sit, operate upon a weekly cycle insofar as jury trials and the usual calendar settings are concerned. I am not at all convinced that the weekly cycle is the most efficient one and I suggest that a careful study should be given to determine what is the most efficient period of operation which should be provided under the procedures and laws prevailing in the particular jurisdiction.

5. *Jury handling and selection* is particularly important. It is my personal view that practically every phase of the process of handling and selecting of the jury can usually be vastly improved if given sufficient attention. It is important that consideration be given in the jurisdictions of congested courts to a full time jury clerk and staff so as to concentrate the responsibility for the efficiency of this phase upon particular individual skill in that special field.

6. It may sound iconoclastic to urge that there be a study made of *a realistic system of submission of a case to a jury.* It may be even unrealistic to suggest a realistic jury trial – yet some audacity is required to accomplish any important change.

We may charge on various propositions of law at long length and to the extent of an hour and a half – but, I ask you, in facing the

situation from a practical standpoint, is it possible for a jury of laymen unacquainted with the niceties of legal distinction to understand the charge by the court on the doctrine of comparative negligence, or res ipsa loquitur and similar matters which we day to day submit in legal jargon to these twelve laymen who are to reach a verdict on the rights of the parties involved? Is it not truly unrealistic in the way we actually submit a case to the jury? We submit to them dozens of principles of law that oftentimes even the counsel in the case do not understand and, I might add, frequently about which even our appellate courts disagree. If we are to retain our system of jury trials, why should not they be clarified and simplified so that the jury will precisely understand the matters which they are called upon to decide by their verdict.

I suggest to you that there may be answers to some of our problems in the four following categories: (1) simplification of procedures and methods; (2) management; (3) personnel; and (4) proper preparation for trial.

In analyzing our problems we should always keep in mind that:

1. Litigation and court trials are the work of skilled craftmanship. It cannot become a mass production operation. Automation can have very little part in our operations.

2. We are dealing with the problem of *Time.*

3. Judges and lawyers have a tendency to become engrossed in the refinements and technicalities of procedure and sometimes make the simple complicated.

4. We are living in an age of accelerated pressures.

Are the suggestions I have made to you idealistic? The answer is yes – but it is only through idealism that real and practical results are obtained.

Have you ever head these words: "The law is a spider's web that catches the little flies and lets the big bugs escape"? Those words were not said yesterday but were said in the days of Solon about 600 years before Christ, by Anacharsis, a friend of Solon's, who was no admirer of Solon's system of laws.

Our system of law is under similar attacks now. That these assaults are false is not a good enough answer. We in the law are the ones who can more clearly see the way to improve our system. We should strive to make it so fine in its operation and so adapted to present day disputes that more and more people will want to solve controversies through its machinery. We must more clearly perceive the pathway to truth and cut a more direct passage to its ascertainment.