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## DELAY AND UNCERTAINTY IN THE ADMINISTRATION OF JUSTICE.\*

The mischiefs of delay and uncertainty in the administration of the Law will be better appreciated if we advert to the advantages the community gain by litigation. Some persons imagine litigation to be an evil. Unnecessary litigation doubtless is. But the chief labors of the sixty thousand lawyers and the seven or eight hundred judges of this country are not devoted to unnecessary litigation. What then is the use and value of litigation?

First, it supersedes private contention, precludes resort to violence and circumvention for self-redress, and terminates quietly and efficiently the specific controversy submitted.

Second, the existence of the court, and the force which stands behind it, prevents many differences from ripening into controversies.

Third, the results of litigation present to the community rules of justice well reasoned out, officially sanctioned and formally announced as rules that will be applied to all similar cases, thus defining universal rights and precluding future differences of the same kind.

\* This article, by Hon. Austin Abbott, acquires additional interest from the fact that it was one of the last written by this distinguished scholar.

When men are involved in controversy the immediate effect of a resort to litigation is to take the question out of their hands, and render private passion futile, and when the question is finally decided by a disinterested tribunal, the state itself enforces the decision, thus precluding future controversy. A quarrel stops the progress of affairs. The law lifts the quarrel, and lets affairs go on. It is as when the whole current of traffic in a city street is stopped by two angry drivers of colliding teams. The law takes the contestants out of the line, and lets traffic proceed.

This immediate effect of litigation is felt far beyond what is indicated by the number of causes actually tried. The number of controversies which resort to the courts that are settled without actual trial, is far larger than many persons suppose. I have not at hand the means of stating the American experience on this point; and in many of our jurisdictions where attorneys begin actions without causing record thereof in the clerk's office, it would be impossible to ascertain the facts. But in a recent year in England (1879) the facts recorded, according to their practice, showed that out of every ten thousand actions commenced, only three hundred and seventy-eight were brought to trial; there were twenty-five hundred and sixty-eight settled without appearance; thirty-five hundred and forty-four went to judgment by default, or otherwise, as undefended; and thirty-five hundred and ten were partly litigated, but either settled or abandoned without judgment.

If we assume that one-half of the cases litigated but not decided were settled, we find that in round numbers the actual trial of two thousand cases in a year's work carried along with it the immediate termination of forty-five thousand other controversies.

But the settling of controversies which actually come to be litigated is by far the smaller part of the service which litigation renders to the community. The courts in deciding a litigated case reason out the principles of justice involved, apply them, and set forth the result in an intelligible and authoritative form, which, becoming known in the community,

may forestall thousands of like controversies which otherwise would arise to disturb the peace of families and the progress of business.

A single litigation, well contested all the way up to the court of last resort and considerably determined there, will not only settle the particular controversy which gave rise to it, and lead also to the settlement or discontinuance of a number of similar suits; but, when reported, the principles affirmed by the court enter into the law of the state and for years, yes for generations, afterward, when men in a similar controversy apply to attorneys for redress, the same answer is ready for both sides, "the courts have settled that, it is no use to fight it." It would be impossible to state the usages of a single business or trade, or to describe any phase of domestic or social relations of the present day without mentioning numerous points of contact where the peace and prosperity of the community is due to the service which the courts are rendering through litigation in thus removing obstructions from the channels of life. This is an endless service. The increasing complexity of modern affairs gives rise to new questions as fast as the courts can settle them. It is the ingenuity of men in producing new situations of doubtful rights that taxes the ability of our present judicial system to the utmost to develop rules which must settle the resulting controversies.

It is not merely the increase of population that causes our long calendars and dockets. The volume of business in the courts increases faster than population. There is an increase of doubtful questions arising from new relations. A million of population scattered sparsely over a whole state, raise questions of justice which three or four judges of general jurisdiction can settle as fast as they are raised. The same number of men crowded together on the limited area of Manhattan Island or Cook County, crossing each other's paths and purposes, and crowding and jostling one another, raise questions with which twenty or thirty judges of general jurisdiction can scarcely keep abreast, even by incessant sessions and by despatching business with peremptory haste.

It is thus plain that litigation is essential to the progress of

our people, and that its use and value far transcend the mischiefs incidental to any abuses involved in it, and that the need of it is increasing. Facilities for litigation are an essential condition of modern civilization.

The importance of these considerations is still more enhanced by the present great acceleration of life. Consider the speed at which business moves on to-day. What a man formerly wrote, he now telegraphs; what a year or two ago he telegraphed, he now telephones. Business in many departments moves at quickstep; in many more it is on the run. It is touch and go. Nothing but celerity will secure the profits. The business man's whole nature is adjusted to alert action; and so are all his affairs. He not only wants to know his rights as soon as possible, he needs to; he must, or lose the deal.

A broker leaves the New York Stock Exchange, goes to the Cable office, sends an order to his London correspondent, who in turn steps from his office to the London Stock Exchange and executes the order by a large transaction, and cables his report, which is received on the floor of the New York Exchange—all within nineteen minutes. This is not an extraordinary incident.

The business of arbitrage thus conducted in all our great exchanges is only a striking instance of a general acceleration. There has grown up a whole generation of business men in almost all lines whose way of doing things is timed in this manner; and what is more, they know very well that it is this celerity that makes their good judgment and knowledge run against slower men and methods. It is not surprising that such men are emphatic in chafing at the slow movement of an examination of title, an accounting in the Surrogate's Court, an investment on mortgage, or a partition of an estate; and refuse to resort to the courts to settle the meaning of a contract when they are told that it may take three years to reach final judgment.

The needs of business and of social and domestic interests throughout the country call for prompt solution of controversies. Every lawyer knows that the most valuable clientage is

that characterized by this desire to get through doubts and uncertainties. It would not be easy to overestimate the amount of business needing the services of the profession, which never gets as far as a lawyer's office because the law is too slow. The organization of boards of arbitration in all commercial centers attests this disposition of business men to seek quicker methods. Laymen do not now complain aloud of the courts so much as formerly, but they keep away more. They do not criticise the courts so much perhaps, but they do not come into the courts so often.

There is no reason why business men should turn aside from the courts and try the slipshod experiment of amateur arbitration in place of the skilled exactitude of compulsory justice, except that they hope to find a remedy quicker and more sure to end. We do not find that clients generally complain of the ordinary and fair expenses of litigation; it is rather the unknown engagement of time, effort and money which is undertaken in commencing a litigation, that deters men from the courts, and business from the profession.

The business view of the question was well illustrated on the trial of a commercial cause that, after the usual delays in pleading and on the calendar, occupied the jury for the greater part of a week, in-hearing the plaintiff's case. When defendant came to his part of the case, his affirmative defense was a former adjudication by award. The arbitration and award being proved, the witness who testified to them was asked incidentally how long they were trying the arbitration. About fifteen minutes, was the answer. The jury laughed, and brought in a verdict for defendant.

The courts are ready, when asked, to act; and the judicial power can never act except when invoked. But our statute, fixed delays are about the same as they were generations ago. When twenty days was fixed for the time of answering, it took much more than that time to go across the continent or to correspond with Europe. Now a man can go in person to San Francisco and back, or to Europe and back, within that time, and have time enough left to draw an answer, or he can telegraph for information or instructions and have it in twenty-

four hours, at not much greater expense than was formerly involved in the postage on a letter to get an answer in three or four weeks. Everything is shortened and quickened except the process of law as practiced on business men and criminals. When the politicians, with fifty or sixty thousand votes in view, commence a proceeding in the end of October, get it to issue, try it before a referee, file his report, have it confirmed, get a hearing at General Term, carry the case to the Court of Appeals, get the decision, the *remittitur*, and final process in time to carry out the decision on election day early in November, business men look on in amazement at the practical denial of justice which present usages inflict on business litigation, and which the profession so blindly tolerate.

We, of course, do not forget that in litigation one side often wants to delay justice; but courts exist not to aid such a desire, but to defeat it. Courts are created for the benefit of plaintiffs. If there were no plaintiffs there would be no courts. In serving plaintiffs it is the duty of courts to do full justice to defendants as well as to plaintiffs, but the primary duty is to get to final judgment as soon as may be without injustice. This consideration should be applied with freedom, especially to commercial controversies and all forms of action on contract.

Our courts are in advance of the bar and of legislation in endeavoring to diminish delay and uncertainty. There is nothing in the general methods of the courts, nor in the nature of the judicial function itself, incompatible with reasonable promptness.

Opportunity to bring together parties and witnesses on both sides requires some time; judicial deliberation requires some time, but such time should be measured in weeks, not in years. The practicability of an acceleration of justice is frequently demonstrated. In April, 1893, three Chinamen were arrested under the Geary Law for not registering. The questions involved were as difficult, delicate, and far-reaching as any that a business question between man and man can require. Experienced counsel, knowing how to proceed without slips or blunders in practice, sued out process to try these ques-

tions by applying to the United States Circuit Court in New York for a writ of *habeas corpus*. On the 10th day of May the case had reached argument in the Supreme Court of the United States. Ample and well-considered arguments were presented on each side. The court gave full deliberation, and on the 15th gave a well-considered and final decision in extended opinions.

What, then, are the removable causes of the existing delays and uncertainties? We must not neglect to notice that some of the causes cannot be removed. What is called the uncertainty of the law is, perhaps, most commonly the uncertainty of facts, uncertainty of human testimony, uncertainty of memories. Moreover, the uncertainty which is more properly attributed to the law is in part, at least, the uncertainty in the mind of a particular judge or court on a point which has been well settled without his knowledge. The law's delay, also, is in part the deliberation essential to investigation and decision. But, after all due allowance for necessary delay and unavoidable uncertainty, it is clearly true that the present arrangements for the free resort of citizens to the judicial power are not only inadequate, but are framed with a design to hinder rather than promote the usefulness of the law.

Suppose that the growth of Chicago or New York should so accelerate that the building department of the city or county should get two or three years in arrear in examining and approving plans for new buildings within the fire limits. Should we ever hear of a proposal to restrict new buildings because the bureau was overworked?

What would be thought of a proposal to restrict importations because the force of appraisers at the custom house was too small, or of putting a pecuniary or other limit on the patentability of inventions because the examiners were overworked?

But this is precisely the policy which legislation has pursued in regard to our courts. When the number of new questions and the pressure of a great commerce find litigation so necessary, and so frequently necessary, that our courts are overworked, the remedy chiefly thought of is to raise the minimum

of jurisdiction from five hundred dollars to two thousand dollars and restrict the right of appeal by a pecuniary value ; and in one way or another to check and suppress business out of consideration for overworked courts. Such a policy is quite incompatible with the interests of justice. Adequate provision should be made for the prompt disposal of all business that citizens bring to the courts.

Our judicial systems have not been enlarged in proportion to the increase of business nor in proportion to the enlargement of other departments of government. The growth of the legislative and executive departments of government are far better provided for than the growth of the judicial. Our legislatures deal with the judicial department in a parsimonious way which makes the appropriations freely granted for some other objects astonishing by contrast.

Next to the need of a more liberal policy in providing an adequate judicial force, I would call attention to the feasibility of improvements in procedure. I do not propose here to compare different systems and advocate an abandonment of one and adoption of another. I confine myself to the more moderate, and I trust more fruitful, suggestion that whichever system we live under should be better understood and more carefully applied. Nearly one-half of the reversals and new trials now ordered are ordered because of errors in procedure. I estimate that it was more than half under the old procedure. The courts of last resort have in late years made much progress in diminishing the number of new trials by establishing the simple and wholesome rule that a judgment shall not be reversed on an objection that was not clearly specified in the trial court in a manner to point to the precise error, and to enable the adverse party to correct it if it be then capable of correction. Masked objections can no longer be planted in the record to be explained for the first time in the appellate court. Every volume of reports attests the number of errors in procedure which this good rule cures. But notwithstanding this improvement, a very considerable proportion of the successful appeals are founded on errors in procedure. An examination of the most recent volumes of the reports of the



Supreme Court of the United States and of the New York Court of Appeals indicates that about two-fifths of all the reversals are for errors in procedure and only about three-fifths upon the merits. The most obvious way then to relieve our appellate courts (irrespective of enlarging the force) is to attack the sources of errors in procedure. To strengthen the courts of first instance, and increase the degree of care and deliberation with which their work is done, is the point deserving attention.

Consider a moment the peculiarity of the work of the legal profession in litigation. In other departments of applied science, whether it be in architecture, shipbuilding, engineering, or whatever other task of scientific skill, the experts at the outset of a work frame the plans and prescribe the methods by which subordinates are to proceed. In law the journeymen, among whom are the neophytes and novitiates, frame the action, put in the evidence, and formulate the judgment, and then, perhaps, after greater skill and experience have been called in to inspect the result and advise whether it will stand, the work is carried up to the court of last resort to be scrutinized by the highest authority, and, if irregularly done, set aside to be wrought out over again. When we add to this that nearly half the rejected work is condemned by the highest authority on the ground, not of direct injustice seen in the substance of the result, but because of bad workmanship in reaching the result which may have prevented ascertaining justice, we see the need of a better trained bar. It is as if two-fifths of the concerts attempted had to be stopped on account of the musicians having got out of tune, or two-fifths of the games in a chess club had to be set back to correct false moves, or two-fifths of the professional boxing matches were declared off because of not obeying the Marquis of Queensberry's rules.

We all know that appellate courts are not infallible, and that the best judges often differ as to procedure. But two-fifths of the reversals is too large a proportion to be charged to allowable difference of opinion on procedure. Every judge knows the unnecessary hindrance put upon his labors by the

mass of undigested allegation and fact put before him in a confused mixture of relevant and irrelevant matter, by men at the bar who ought to assist instead of impeding the work of justice.

The first great remedy, therefore, for the delays and uncertainties of the law is to take measures to improve the work of the courts of first instance, and to do this one chief requisite is greater thoroughness in training for the bar. Procedure is merely the means to reach, as quickly as fairness to the party on the defensive allows, the noble contest on the merits. That contest on the merits is the field where all the useful work of the profession is done, and all its laurels are won, and its real pecuniary rewards are earned.

A bar having this true conception of procedure, and well trained in its rules, will rise above the wretched wrangles in which cunning and ignorance involve so many causes, and will deal with worthy questions of justice in a truly scientific and workmanlike manner. We see frequent instances of this when some cause—it may be of national interest—enlists ability which makes no slips, moves smoothly along the lines of correct procedure, and fascinates the country with the admirable spectacle of a forensic contest on the merits, with the keen weapons of the law of evidence, and with masterly skill in forensic logic.

The law schools have laid the foundations of systematic instruction, and their efforts, if seconded by the bar at large and fostered by the bench, must surely, though gradually, strengthen the courts of first instance, and facilitate the prompt, deliberate, and accurate administration of justice.

One specific source of error and of reversal is of a nature to invite special mention here. It is now almost universally understood by our courts that in jury cases, before the jury have to decide, there is a question for the judge to decide, if asked to do so, namely, whether there is sufficient evidence to go to the jury; or, if the evidence is clear, whether there is sufficient doubt to allow the case to go to the jury. If he thinks there is not enough to go to the jury he should nonsuit. If he thinks there is so much that there is not

enough doubt to go to the jury he should direct a verdict. The general test as to the sufficiency of the evidence to go to the jury is, whether it is such that fair minded men might reasonably differ on the question involved. If so, it is error for the judge to decide it. If not, it is error for him to submit it to the jury.

Curiously enough, nothing is more common than for the appellate court to say that a case which the judge sent to the jury he ought to have decided himself. Here the appellate court and the trial judge differ, but if they are all fairminded men, weighing the evidence reasonably, it would seem that the fact they differ is a vindication of the course of the trial judge. But it is not so regarded. In such cases, whichever course the trial judge takes, the result is a mistrial if the appellate court thinks he should have taken the other; and a new trial is then necessary. This commonly delicate question which constantly embarrasses our courts, leads to a multiplication of appeals and writs of error, and many new trials.

Now there seems no good reason why a trial judge, if asked to nonsuit or direct a verdict, should not have power to suspend the motion, and take the verdict of the jury, subject to his after decision of the motion. Then should he grant the motion and disregard the verdict, the appellate court, if of opinion that he ought not to have granted it, can, if there be no other error, set aside his decision and order judgment on the verdict without requiring a new trial.

The introduction of this practice would relieve our judges of the embarrassment now involved in one of the most difficult classes of questions they have to deal with, and would enable one trial to settle the facts and enable the appellate court to give judgment at once. It would doubtless, also, in many cases, take away the disposition of unsuccessful parties to appeal for delay merely, which engenders many unmeritorious appeals, to the great burden of our calendars and delay of justice.

In brief recapitulation, attention is called to these five points :

I. The profession should not sit under the popular imputa-

tion that litigation is an evil, but should teach the community the great sociologic and economic value of the judicial function.

II. The statute-fixed periods of delay should be reconsidered, and shortened as much as may be reasonable, particularly in actions other than for tort.

III. Liberal provision should be made for the judicial department.

IV. Procedure should be systematically taught.

V. The multiplicity of new trials, resulting now from the double character of the tribunal in common law jury cases, should be diminished by giving the judges unquestionable power, if not making it their duty, to take a verdict of the jury at the same time that they grant a nonsuit or direct a verdict.

Other specific measures probably occur to us all. I would add a single suggestion. General attention among the best men in the profession is now being attracted to the subject of delays and uncertainty. Our forty or more well organized systems of procedure in different jurisdictions are so many experiment stations where the working of different measures of improvement may be studied and compared. The next great step in advance in the amendment of procedure should be founded on a comparative jurisprudence in which all that is best in every system should be considered and utilized.

*Austin Abbott.*