THE LAW'S DELAY.

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It is a fact not creditable to the bar or the courts that while in every other department of human activity time has been practically annihilated, scarcely any progress has been made in facilitating the progress of litigation. If I had wished fifty years ago to communicate with a man in Canton, China, it would have taken me six months to do so and get an answer. I can now do the same thing in as many hours. I can go personally to London and transact business and return in three weeks. Fifty years ago I could not have done the same thing in as many months. But if I have a controversy with my next door neighbor involving $1,000 and he is disposed to make use of all his legal weapons of defense and delay, I am very fortunate if it is disposed of in a year, while two, three and four years are not uncommon periods for the duration of a hotly contested litigation.

This condition of affairs is not only theoretically wrong, but a cause of endless trouble to the community and to the bar itself. The ordinary man looks upon a litigation as a calamity little short in its disastrous consequence of a serious conflagration. He will sacrifice his just rights to an almost unlimited extent rather than resort to the courts, because he believes that although he may theoretically obtain justice it will be at the expense of such delay, worriment and vexation as to be no justice at all.

For instance, during the heat of a campaign some newspaper willfully and maliciously charges a candidate with giving utterance to some atrocious sentiment which makes him an object of contempt to all sensible voters. There ought to be for such a man some adequate redress. But as a matter of fact there is none. No lawyer can advise him that he can get such a case to trial in less than a year with any certainty. And yet the law is well settled and the facts and the evidence all easily obtained. But the injured party can get no redress and a conscientious lawyer will so advise his client. If he brings a suit the scandal simply

grows. A judgment for damages a year after the elections are ended is of no value as a means of redress, for what the libelled person requires is a vindication before the public. A verdict for a paltry sum long after the matter has been forgotten is no remedy at all.

If a man in active business whose time is valuable has a cause of action against another for a thousand dollars it will frequently cost him more in the end than it is worth to get it, and that not because the case is difficult or the charges of his lawyer excessive, for lawyer's charges are not generally excessive, competition having affected them as well as every other class, but on account of the delay and uncertainty of trial which will consume his time and interfere with all his engagements. Now there ought to be nothing terrible to the citizen in the resort to an intelligent tribunal for the adjustment of an ordinary controversy. I propose to inquire briefly into the causes of this condition and whether such causes cannot be, to some extent at least, removed.

Some of these causes are such as are founded on the nature of things, and are therefore unavoidable. To one who considers the various contingencies which may occur it will not seem strange that delays and postponements should frequently be necessary. Reflect for a moment how many persons are concerned in an ordinary jury trial. The judge, the twelve jurors, the two parties, and say six material witnesses. All these must be present at the time of trial, and in a physical and mental condition to discharge their duties. And further, considerations of humanity must have their due weight. The judge who insisted upon detaining any one of these individuals and compelling him to perform his duties immediately after the death or during the critical illness of a wife or child would be charged with inhumanity ; so that the progress of the suit depends to some extent on the condition of the families of each one of the persons actually concerned.

But it is not with these that I propose to occupy myself. We cannot change nature or abolish death by statute. There are other causes of delay which are avoidable, and with these I shall deal.

They may be divided into two classes, *i. e.*, those which arise out of the condition of the law, and those which arise out of its administration, using the term law in its broader sense, as including not only statutes and decisions but the established rules of the court. In discussing the subject, I shall use illustrations largely drawn from the practice in the State of Connecticut, because I am more familiar with that practice.

The first subject upon which a writer upon this topic naturally falls, is that of trial by jury. I shall not attempt to discuss the question whether the conclusions of jurors or of courts are more certain or more reliable. Most lawyers of experience would find some difficulty in stating from which source they had received the greater surprises in the matter of decisions. Whatever may be said in regard to this point, it must be admitted that the jury system adds immensely to the expense and delay of litigation.

However, jury trial is too large and too hackneyed a subject for treatment in this article, and the institution is so firmly rooted in our system that only a constitutional change can remove it. It is, however, perfectly feasible to hedge about jury trial with restrictions which will greatly diminish the delays incident to it. In this State we have adopted the practice of trying all cases in the court unless specially claimed for the jury. But the law allows parties to claim such cases within the first term, or after in case issue is joined after the first term. This was not so bad under the old system of short terms, but since the new system in the Superior Court it enables a litigant to conceal his plans for a period, and by claiming a jury just before the case is reached for trial throw the case over possibly for a year, as it may easily happen that such a course may be taken at a time when no jury will be in session during the remainder of the year. There could be no possible objection, either constitutional or practical, to requiring a litigant to claim a jury, if he intends to do so, within a short period, say ten days, of the return of the process to court. There would be no hardship in requiring him to make up his mind within this time. In practice he generally knows when he commences his action or is served with notice of a suit whether he desires a jury trial or not. In cases where he makes up his mind at a later period the claim for a jury trial is generally made to secure delay, and no expedient is more commonly resorted to for this purpose.

On the other hand, it is a common practice for corporation lawyers to suffer a default just before the case is reached for trial before a jury, which under our anomalous practice carries the case away from the jury, for a hearing in damages, to the court, and may cause a delay of months. An attempt was made to remedy this evil by chapter 157 of the Laws of 1889, providing: "In every action of tort in which the defendant suffers a default and there is a hearing in damages, said hearing in damages shall be to the jury unless the defaulting defendant shall have given notice of his intention to suffer such default to the clerk of the court in which such action is pending within thirty days after the time

fixed by law for closing the pleadings in such action shall have expired." But this statute is of doubtful efficacy and can possibly be evaded by the interposition of a demurrer. There can be no reason why the hearing in damages should not take place before the jury in all cases where a jury was claimed by either party unless the defendant should suffer a default within ten days after the return of the case to court. There could be no question about the meaning of such a provision.

Another obstacle to the progress of suits is the excessively long time allowed in Connecticut to prepare pleadings. Rule 4, Sec. 1, provides:

"SECTION 1. In every civil action in the Superior Court, Court of Common Pleas, and District Court, the defendant, if he does not plead in abatement, shall answer or demur within thirty days from the return day of the writ, and thereafter the pleadings in the action shall advance at least one step, at the expiration of each successive period of twenty days, until the same shall be closed."

Now thirty days is an absurdly long time for the preparation of an answer in an ordinary case. In three-quarters of the cases such a plea is so simple that it can be prepared in an hour. The only effect of the long periods allowed is that lawyers put off the consideration of the matter, and then forget about it. Lax as the rule is, it is never enforced. Such a thing as a default for the lack of a plea is scarcely heard of, and no penalty, not even nominal costs, is exacted for a breach of the rule.

The time for pleading should be shortened to two weeks. Such an allowance would be more than ample to prepare pleadings in the vast majority of cases. In special cases where more time was required, it could be granted on application to the court, but such cases would be very few indeed.

Furthermore, the time for filing the plea should date from the service of the process, provided that a plea might be filed on or before the third opening of the court, and process itself should be made returnable on any Tuesday in the month and not solely on the first Tuesday as at present. There is absolutely no reason why a defendant should not commence the preparation of his answer as soon as he receives notice of suit and a copy of the complaint.

This rule of pleading should in all cases be enforced except when special circumstances were shown requiring delay. In all other cases costs should be exacted as a condition of pleading after the time fixed by the rule.

The effect of the present system can be best studied by following out an imaginary case brought to the Superior Court, we will

say, in the long vacation in July or August, and returnable in September. The thirty days rule requires a pleading about October 1st, that is to say, the defendant has three months to prepare an answer, which in most cases is a general denial in perhaps twenty words, requiring as many minutes for its preparation. But this is not all. A dilatory counsel, and in fact most lawyers, pay no attention to this rule, and there is no reason why they should, because there is no penalty for neglect. The plaintiff must then move for an answer. Such a motion must go on the short calendar, necessarily requiring a delay of another week. If the defendant can suggest no excuse to put the motion over, which he almost always can, unless his lawyer has an unusually barren imagination, he is ordered to file his answer some time during the following week. The case has now been carried over to the middle of November. As the rules provide that no case shall be put on the trial list until after the pleadings are closed we have this result, that a plaintiff cannot even claim his case for trial until four months and a half after it is commenced. The case then takes its place at the foot of the trial list. As business has then fully commenced it is almost certain to be carried over to the following January, when it only fairly commences to take its chances of trial. The case will practically fare no better, for obvious reasons, as regards delay, if brought in April or May.

Nor is this result due to any excessive pressure of work upon the courts. On the contrary, nothing is more common than threats from the judges to adjourn court unless cases are brought forward for trial.

Another cause of infinite delay, is the abuse of the power of amendment and change of plea, as well as of demurrers and dilatory motions to strike out or make more specific, etc. The right of amendment and change of pleading is a beneficial one, but the practice has become so lax in this respect that lawyers have no longer any motive for accurate pleading, and papers are drawn with an utter disregard of form. Before the practice act it was, I believe, the general rule to exact costs as a condition of amendment, and that too when the costs, owing to the exaction of attendance fees of twenty-five cents for every court day, were much heavier than they now are.

The Statute, R. S., Sec. 3720, in specifying the fees allowed to parties in civil actions, uses the following language: "for the trial of an issue of law or fact, fifteen dollars, and if more than one issue of fact shall be tried at one time only one trial fee shall be allowed."

Now no language could apparently be more plain. It is obviously the intent of the Legislature that issues of law or fact in a case separately tried should be separately taxed. If there could be any doubt as to the meaning of the language of the first part of the clause the last portion would fix it beyond question. If it were intended that but one fee should be taxed for all issues of law or fact tried, why should it be provided that issues of fact tried at the same time should carry only one fee.

And yet, under this statute it has become the established rule of the courts that there can be but one issue of law in any case, *i. e.*, if an answer is interposed, to which a demurrer is filed and the demurrer sustained on argument, and thereupon a new answer interposed and another demurrer successfully interposed at another term of the court, but one fee can be taxed.

A plainer case of judicial legislation it is difficult to imagine. It apparently controverts both the language and the reason of the statute. The statute was intended to indemnify the parties to some extent for the expense of litigation. Each trial of successive issues involves expense of counsel fees, etc., to one of the parties.

This ruling has been severely criticised by some of the judges, but is too well established to be questioned.

Another singular ruling has been made by the courts in regard to a different clause of the same statute, which provides as follows: "In difficult or extraordinary cases in the Superior Court, where a defense has been interposed, said court may also in its discretion make a further allowance to the prevailing party of a sum not exceeding one hundred dollars." Though this statute has been on the statute book for eight or ten years, no case has ever occurred of sufficient difficulty in the opinion of the courts to call for its application.

There can be no doubt that a large part of the delay in the progress of litigation in this State has resulted from the construction of the statutes in regard to costs. Had the rule been adopted that every motion or separate pleading calling for a distinct or separate hearing should entail upon the defeated party the payment of ten or fifteen dollars costs, the innumerable motions and demurrers which occupy the short calendar would be diminished at least one-half, and the disposal of lawsuits correspondingly facilitated. Such motions and demurrers are frequently interposed without any excuse and solely with a view to delay, and this is done under the present system with absolute impunity. Counsel would hesitate before exposing his client to an expense of fifteen dollars for such an end.

The construction adopted of the rules in regard to costs is undoubtedly responsible for a large part of the delay in litigation. Certainly that cause, together with the unnecessary amount of time allowed for pleadings and the failure of the courts to enforce such rules as exist, is very largely to blame.

Another avoidable cause of delay is the practice of continuing causes on account of the absence or inability to attend of material witnesses. It is perfectly apparent that in the hands of an unscrupulous party there is no limit to the extent of delay which can be obtained by this excuse. The law allows the taking of a deposition when the proposed witness lives more than twenty miles from the place of trial, is out of the State, or by age or infirmity is unable to travel to court, or is going to sea. The practice is general to grant a continuance on account of the absence of a material witness, even when under the rules the party might take the deposition of the witness. It seems to me this, in the majority of cases, is wrong, and that the party who relies on the testimony of a witness out of the State or likely to be absent at the time of trial should be obliged to take the deposition of the witness, have him present at the time of trial, or lose his testimony. The plea often made that the actual presence of witnesses is necessary to the trial of a case does not seem to me to justify the continuance of cases where a deposition could be taken.

A class of cases involving the most important and difficult questions of fact and enormous sums of money is tried in the United States under the patent laws entirely on written testimony, and no complaint has been made that this practice has resulted in any greater amount of mistake or uncertainty than the ordinary methods of trial.

But nothing is more common than the continuance of cases for successive periods amounting in all to years, because for some reason which the party could have anticipated, he himself, or a witness who perhaps resides in a remote State, cannot be present. Seafaring men, for instance, who spend three-quarters of their time on the high seas, should not be allowed to secure the indefinite continuance of the cases and make the courts and the opposing parties dependent on the tides and the winds.

But after every allowance has been made for causes mentioned, it must still be confessed that the blame for the delay of justice lies mainly with the bar and with the court, so far as they yield to the pleas of counsel based upon their unreadiness or inability to dispose of their cases. And yet this cause is one which should have the least possible weight. There is some plausibility in the

claim that the personal presence of parties or witnesses is necessary, but in a community where there is no lack of intelligent lawyers it cannot be claimed that the presence of any particular counsel is essential to the trial of a case. Theoretically, only the actual engagement of counsel in the trial of a case in court is acceptable as a plea for continuance, but in practice every possible excuse is accepted, down even to the absence of counsel in attendance on an important consultation, or the necessity of preparation for some other case.

There are two classes of lawyers who are always demanding delay. First, those whose natural indolence resents any demand for action as a personal injury ; second, the excessively busy ones who have managed to get under their control more cases than their time and strength will enable them to dispose of, and who remind one continually of a hen trying to hatch out more eggs than she can cover.

No consideration should be given to the first class, and as to the second, they should not be allowed to obstruct the progress of justice in order that they may hold cases which they should not have accepted, with the knowledge that their engagements would not allow them to dispose of them within a reasonable time. A due regard for the interests of justice and the rights of his fellow members of the bar make it the duty of a lawyer who finds himself in such a situation to throw off a portion of his burdens, exercising a selection as to the quality of his cases, and leaving the less desirable cases for the younger or less fortunate members. An attempt on the part of one person to engross an undue share of practice and make the courts and other members sacrifice themselves to wait his convenience should receive scant consideration from the bar or the courts.

The recent experience of the State of Connecticut in connection with our political imbroglio has furnished an excellent example of the practical impossibility of disposing of legal business in the courts. One set of persons became entitled to the State offices in January, 1890. The courts did not determine who they were until by lapse of time the question ceased to be of practical consequence, the terms of office having nearly expired. As a consequence of this every department of government was obstructed. There was practically no legislature, and the machinery of justice was delayed in other cases. Only the moderation and good sense of the people saved us from public disorder. And yet the cases involving these questions were of such overwhelming importance that they were recognized as having the right of way over every

other controversy. The courts in this instance failed utterly to accomplish the end for which they were established. If such a failure of justice occurs in a case of such overwhelming importance what hope is there for a mere private litigant to receive prompt justice? The result points to something wrong in the system of administration.

In this article I have attempted to point out some of the evils of the present system. The first two, namely, the system of pleadings and the failure of the courts to restrict dilatory motions and proceedings by the assessment of costs or otherwise, can be remedied by appropriate legislation, or possibly by the adoption of more adequate rules. These evils are perhaps peculiar to Connecticut, while the others referred to are more universal. The second evil, the continuing of cases on account of the absence of parties or witnesses when their depositions can be procured, it is comparatively easy to deal with by a stringent rule of court such as I have indicated in this article.

The last obstacle is the most difficult one. As senatorial courtesy sometimes renders national legislation impossible, so professional courtesy or the abuse of it results in such a delay as amounts almost to denial of justice. Yet not until the courts or bar become strong enough to restrain its abuse will the courts be enabled to discharge their duties with reasonable dispatch.

The gubernatorial controversy already referred to suffered from having too many eminent counsel and too much professional courtesy. I am led by the fate of this case to suggest that possibly it would not be too severe a rule that where there were several counsel on a side, any one of them competent to the trial of a case, it should not be continued or postponed on account of the professional engagements or convenience of one.

The subject is, as I have said, a very difficult one to deal with. But it must be dealt with vigorously if the courts are ever to accomplish their duties with dispatch. The only completely adequate remedy would be the adoption of a rule that any lawyer bringing a suit or accepting a retainer to defend one should be prepared to try the case when it comes up, or get some one else to do so. In either case he should commence the preparation of the case at once. As it is, the last thing a lawyer ever thinks of is the preparation of a case. It would be idle for him to do so at an early period. It will generally be so long before he gets a chance to try it that the information he gets will be forgotten and his labor lost. So he pigeon-holes the papers and thinks no more about the matter until his attention is called to it by a demand for some

pleading, or the case is called for assignment. He then begins to look about for witnesses and evidence, only to find that evidence which he could have easily obtained in the first place and which should have been embodied in a deposition, has passed beyond his reach. He thereupon states that fact to the court, and the case is continued to some indefinite future period. Let the rule once be established that cases must be disposed of when assigned without regard to the convenience or engagement of counsel, and must be assigned and tried within a certain short period unless some extraordinary cause can be shown rendering the trial impossible, and the result would be different. Such a rule would in the end be a relief to the bar itself. I think a large part of every lawyer's time, perhaps the larger part, is consumed in the preparation for trials which for some reason do not come off at the time appointed, so that the labor of preparation is lost and has to be done over again. If the stringent rule I have suggested were adopted business would be so arranged that there would be a reasonable certainty of trial at the times appointed. And business would be so distributed that cases would not interfere with one another. Thus the convenience of the bar as well as of litigants would be in the end promoted.

I believe it to be entirely possible, without any increase in the existing judicial force, by insisting on proper changes in the rules and the rigid enforcement of such rules, that the great majority of litigated cases could be disposed of in sixty days in the court of first resort, and thirty days thereafter in case of appeal, and that six months should be an entirely exceptional period for the duration of a cause. Such changes, in my opinion, would not increase but would lighten the labors of the bar and bench. Until such a result is accomplished the administration of justice will be behind the age.

And yet I am well aware that these ideas would be regarded by many, perhaps most, lawyers, as wildly Utopian. Any one who attempts to interfere with the legal traditions of leisure and deliberation is apt to be regarded as a disturber of the peace. Both the bar and the courts are too apt to think that accurate results are more apt to be reached by delay and deliberation. I believe in many cases the contrary is true. Courts which decide cases immediately after full argument by trained counsel, while the impressions of the case and of the discussion are fresh in their minds, are more apt to reach sound conclusions than those which hold cases undecided until the impressions of the case have become indistinct. I have a distinct recollection of one case, an

example I believe of many others, where the court after holding a case, ostensibly under advisement, for a period of five months, rendered a decision leaving out an item of four or five thousand dollars to which the plaintiff was plainly entitled, and had to correct its decision in that particular; a mistake which could not possibly have happened had the decision been rendered immediately on the close of the argument, or even after a fresh inspection of the record in the case. In this case, as in many others, deliberation had resulted in oblivion.