Delayed Justice in New York State

(Address Before New York State Bar Association)

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"The Door to the Court Is Always Legally Open But It Is Jammed."

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THE present Commission on the "Administration of Justice" is one of several that have struggled to make justice in New York State cheap, simple and quick. Whether we make any immediate reform in procedure, we have about completed a state-wide study of the operation of the judicial mill from the Court of Appeals down to the rural Justice of the Peace and the City Magistrate. Since my own share in it has been negligible, I am free to say that it is the most thorough and complete study of actual conditions in the courts of New York State yet undertaken and will make available to those interested in law reform a foundation of rock on which to build their air castles.

The task still ahead of us is one of interpretation of the data assembled and of devising remedies for the abuses uncovered. The research work was so specialized that the Bench or Bar generally could not join in it, but the task from now on is your task as much as ours and as soon as our report is made available for study, we invite the help and suggestions of all men.

I dislike to burden you with statistics, but in the discussion of law reform there is so much irresponsible and uninformed estimat-

ing done that I shall make my chief mission today to state fundamental conditions from which you may draw your own conclusions.

Each Commission to reform the law has been called into being by a different need. Those demanded because the law was in a chaotic condition, devoted themselves to codification, those created because justice was too often defeated by technicality, tried to simplify procedure. It is not our problem today, to write the law anew but to speed it up, not so much to change the way lawsuits are tried as to give people a chance to try them at all.

The days when the public grievance was that "technicalities" defeated justice seem pretty well past. It is impossible to appraise the quality of trial court work except at the price of examining records in individual cases. But we hear less complaint of technicalities and it seems agreed that trial courts generally intend to avoid decisions upon legalistic grounds unrelated to merits. In 1930 the four Appellate Divisions reversed only 20 cases wholly on errors in evidence and 52 wholly on errors in procedure. This may yet be too many, but the complaint from this source is lost in the louder protest at the law's delays.

It is a general observation of press and laymen that our courts are from one to four years behind in their work and that justice is denied by unreasonable delays. The door of the court is always legally open, but the doorway is impassable because jammed with long suffering suitors. In spite of this general observation, we have so often been told by lawyers and judges that "There is no trouble in our district" that accurate and complete statistics were needed to test these manifestations of local pride. The studies of the Commission dispose finally of any contention that delayed justice is a local or sectional problem or that it is a trifling or passing symptom.

The first conviction that one working in these problems acquires is the urgent need of a system of reliable judicial information. The State Constitution (Art. VI, Sec. 22) directs the Legislature to provide for the "collection, compilation, and publication annually of the civil and criminal judicial statistics of the state." Notwithstanding this direction of the Constitution, we find no such information even kept generally by our courts, and no system at all provided to collect and publish it. Statistics must be complete to be useful and their value lies in intelligent interpretation. Our system of courts is so extensive and subdivided, the business it handles so various and vast, that no man or group of men can have personal knowledge of more than a small part of it. We must know our courts through statistics or not at all. In our study it was necessary to go into every section of the State to get information, some of which was obtained with difficulty from deficient records and some is not too accurate. Many papers in legal proceedings are never filed and our system of issuing process over a lawyer's own signature without application to the court means that the court is used privately many times and no record is made of the case if it does not get on the calendar.

If statistics are desirable, it follows that some kind of supervisory power over record keeping, reports, and to some extent over the practice of all courts must be lodged in a judicial council or some body of like function. Few people realize the magnitude of our judicial system, nor appreciate how decentralized it is. We lawyers form a habit of thinking of our higher courts as the more important because their decisions carry more authority. As a matter of fact, while the Court of Appeals, the Appellate Division and the Supreme Courts are impressive in settling the law, they are of trifling importance in settling individual lawsuits. In numbers of people affected, the inferior courts are our greatest courts, and they deal out justice that may be legally reviewable, but is in fact final to vastly more citizens than ever have personal contact with the higher courts where we like to practice. The Court of Appeals decided in 1930, 505 appeals, while Justices of the Peace were deciding over 30,000 cases under the Highway Traffic Law alone. Our whole Supreme Court from beginning Fall term 1930 to Fall term 1931, by trial, inquest, dismissal and all methods, disposed of only 41,968 cases in law and equity and had brought to it 43,293. But the Municipal Court of New York City alone entered 158,000 judgments, had 108,000 summary proceedings, and had cases pending or added in 1931 to the amazing number of 910,005.

When we suggest central administrative control over records, statistics and practices of the courts, do not judge the proposal from the Supreme Court view point alone. Remember that while we have only about 120 Supreme Court Justices, we have 3,600 Justices of the Peace, over 1,500 of whom are holding court upstate, passing on citizens' liberties and property rights. We have also 59 upstate City Courts existing under as many separate acts of Legislature with no uniformity of jurisdiction or practice. And besides the New York Municipal Court, we have in civil business also the New York City Court with a general calendar over 3 years behind in New York, Bronx and Queens Counties and over four years behind in Kings and with over 40,000 cases awaiting trial.

This whole vast system moves with no central authority, without even conference between one court and the other, and the machine tends to simply fly apart. A far-sighted program would seem to call for abolishing several courts, or unifying them, centralizing control and administrative supervision, and erecting, instead of a perfect museum of odd courts of all sizes and degrees of usefulness, a simple compact judicial system.

That it is entirely reasonable to propose substantial supervision of our Judicial officers, and changes in our system, and that those who oppose all change have a heavy burden of explanation, is apparent when we learn the fix into which our judicial system has gotten itself.

The Supreme Court of the whole State of New York opened the Fall term of 1930 faced by 52,323 law cases. It faced 55,554 law cases a year later, or an increase of 6%. In New York County the increase was 16%. Between cases pending at the beginning of

the year and cases added, the court had pending during the year 75,000 law cases and it disposed of 30,000 from which it appears to be 45,000 cases in arrears, which at the rate of disposition is a year and a half of judicial work in arrears as an average over the entire state.

This is not, however, the true measure of the delay to which a litigant may be subjected. Cases are not tried in the order in which they are begun. Because of a haphazard system of preferences, which is difficult to justify in many cases, some new cases are tried early and they force other unpreferred causes even farther behind. The Supreme Court from Fall term 1930 to Fall term 1931, disposed of 45% of its old cases and of 32% of the 23,339 cases added during the year. Of the total business disposed of 76% was pending at the beginning and 24% added during the year. The story is summarized by saying that while 100 new cases are added to the Supreme Court calendar, 69 that are a year or more old and 22 new ones are disposed of and 9 are added to the burden upon the court. This again is for the whole state, some counties being better, as some are worse, than this average.

The evil of delay, as it may affect the litigant is best reflected in the age of the issues when actually tried. Of the 8,016 cases disposed of by the Supreme Court by trial at the 1930–31 term, 86 or about 1% were 5 to 6 years old,

364 or about 4% were 4 to 5 years old
1,055 or about 13% were 3 to 4 years old
1,343 or about 17% were 2 to 3 years old

We find 84% of our trials take place more than a year after the case was placed upon the calendar. That is the time our records begin. That is some weeks at best after the cause of action arises. Most of the testimony given in our courts concerns events more than a year, often several years, past, and that is the cause of no little mischief in our courts.

New York County appears to be about a year behind the average for the state. 50% of the cases tried there are between two and three years old while in the whole state 17% only fall in this age.

We have pointed out that the malady is progressive, and it is not local. While New York County with its 16% annual increase in unfinished business is falling behind faster than upstate, the state-wide average of 6% increase in pending cases, was contributed to by an unfavorable showing in seven of the nine Judicial Districts of the State, and the two exceptions are more apparent than real.

The delays of Supreme Court are but as a watch in the night compared with the delay in some of the inferior courts of New York City. At the end of 1929, the municipal court had pending 287,678 and at the end of 1931 it had 484,481 in spite of the fact that is disposed of over eighty thousand more cases in the latter than in the former year.

In New York City Court we find a general calendar delay of

from three to four years in all counties except one. Courts that withhold their aid such length of time in a fast moving age are a disgrace to our civilization and should be corrected or else abolished.

It is often sought to discount these statistics because it is said that the calendars are loaded with "dead wood." Granted. But would they have become "dead wood" had prompt trial been possible? Our study reveals many cases commenced at considerable cost, and then abandoned to eventually drift off the calendar, and many defenses interposed only to be abandoned and the case allowed to go to inquest. If they had no merit why were defendants obliged to go to the expense of meeting them and if they have merit why are they abandoned? "Dead Wood" is to some extent a by-product of delay and is itself one of the major problems of our system. It is probably more than a coincidence that the greatest amount of "dead wood" is found where trial is most delayed. Witnesses die, testimony is lost, plaintiffs become weary and defendants conceal their property while the case awaits trial. What are we to do about it? Suggestions pour in from lawyers, judges and laymen. Generally, however, they all tend to fall in a few classifications.

The most general suggestion is centralization of supervision and control of court administration in a Judicial Council, either with or without an executive Judge in each district, to assume executive responsibility and to supervise calendar practice. Twenty states have tried the Judicial Council experiment and while I cannot regard it as a uniform or certain success, it might lack much of success and still be an improvement. The Executive Judge idea, as centralizing calendar control has been investigated by the Commission as it is operated in Detroit, Chicago and Cleveland chiefly and it seems a uniform success. Both of these suggestions involve some degree of control and supervision of judges, many of whom regard their power as coming directly from the people and resent any suggestion that they should surrender any control of judicial administration or any of the right to be a law each unto himself. This opposition cannot, it seems to me, be long sustained in face of the showing our present system is making.

Another practice designed to stem the flood of cases is the imposition of heavy calendar fees. To such a practice I am opposed on principle and regardless of any temporary or apparent relief it may give. It is putting a price upon justice which of all things should be without price. No worthy cause should be kept out of court for want of a fee and no false one should buy a place on its calendar. Well reasoned reform, in both Supreme and inferior courts will be in the direction of reducing the cash outlay necessary to hearing, and of abolishing all selection based on financial ability of parties, and all possible claim that justice is beyond the reach of disadvantaged men.

Another and more promising development is in the extension of the summary judgment procedure. The summary judgment motion

practice, introduced in New York, cautiously and to a limited class of cases, was not received hospitably by either bench or bar. In spite of its limitations and failure of the bar to generally resort to it and in spite of judicial reluctance to apply it, it has justified itself. Mr. Leonard Saxe who made a comprehensive study and report to the Commission finds that in New York County the summary judgment remedy even in its limited form, was invoked in about 5,600 cases which actually eliminated from trial 3,474 cases. This is about a full year's work for the 14½ parts of the Trial Term of Supreme Court of New York County. His conclusion was that 600 hours of court time, used in hearing the motions, saved 13,900 hours of trial court time. The rule should in my opinion be extended to include every class of litigation whatever and be made available to defendants as well as plaintiffs.

A general proposal is frequently heard to revise our practice, our procedure and our rules of evidence so as to speed up the machinery. A number of changes of wide scope have been proposed by Bar Association Committees, Judges, Lawyers, Chambers of Commerce and lay reformers. If they would accomplish all they promise, it would not solve our basic problem of delay. Many practice changes can and should be made because they would improve and simplify practice. But to solve congestion by change in practice would be so extensive as to amount to saving our system by destroying it. It would require radically different conduct of trials, abolition of juries, modification of the rights of litigants to cross examine, to produce oral testimony, resort perhaps to some of the European methods of trial.

The most sweeping change responsibly advocated is the proposal of a system of automobile accident compensation, similar in administration to Workman's Compensation.

In view of the persistent and respectable advocacy of the removal of automobile cases from court, the commission has been at pains to learn the true influence of the negligence case upon delayed justice. It is often overstated or understated according to the partisanship of the speaker. Mr. Patterson French has made an impartial and complete study for us.

We find that negligence cases of all kinds formed almost the same proportion of pending cases in the fall of 1931 as they did a year before. In the State as a whole, negligence actions formed 72% of the whole in 1930 and 71.6% in 1931. In New York City, however, in spite of its traffic problem the negligence cases form a smaller proportion of the total, being 60% in 1930 and 62% in 1931. Negligence cases show about the same percentage of disposition by trial as other law cases. But we find that negligence cases move through the judicial mill at an uniformly slower rate than other cases. This is in part due to the preference generally given to commercial causes.

We must also learn the true relation of the automobile case to all negligence cases. It was difficult because in upstate counties

the notes of issue fail to identify the cause of injury. By study of private records the conclusion was reached that upstate about 88% of all cases are automobile cases and 73% are automobile personal injury cases. In New York County the automobile causes 57% of the negligence cases and 35% of all cases.

The study seems to warrant the conclusion that an automobile compensation plan would eliminate one-third to one-half of the burden of law cases in the State of New York.

And what does all of this judicial effort actually produce in terms of money. The Johns Hopkins study reported examining 4,279 judgment entries in New York Supreme Court and found only 17% of them satisfied in whole or in part and less than 7% of the amount involved paid. The study made under the direction of Shipman Lewis shows the disasterous results of financial irresponsibility among motorists. If one is injured by an uninsured motorist he will collect damages in only one case in four. But if the motorist is insured some payment will be received in 85% of all cases. This inability to enforce judgments after the court has invested its time in settlement of the controversy is not confined to automobile cases for a study recently completed by a committee of the Brooklyn Bar Association shows that out of 5,385 executions issued to the Sheriff, only 88 were wholly satisfied and 78 more satisfied in part, leaving 97% of the executions issued producing no results.

The automobile compensation plan is summarized by its advocates as resting upon three principles from which its details flow.

1. Removal of automobile personal injury cases from the courts and the handling of these by an administrative commission with swift and simple procedure, similar to that in Workmen's Compensation.

2. Abandonment of common law rules of damages, negligence and contributory negligence. The plan would place absolute liability upon owners of motor vehicles for all injuries in which their vehicles were involved. Damages would be limited and measured strictly according to statutory provision upon a basis of medical expense and loss of earning power.

3. Compulsory financial responsibility among automobile owners by requiring them to carry insurance, covering all awards which may be made against them.

This compensation plan goes far beyond mere changes in procedure and a large part of the good it seeks could be accomplished without removing the cases from the courts. Compulsory insurance, if desirable can be had now, rules of liability, if now too vague, may be made more definite and arbitrary, and if a fair schedule of damage can ever be made acceptable it could be now adopted and applied by the court, as well as by a Commission.

Admitting all this, advocates of the compensation scheme insist that removal from the courts is necessary to overcome the delay, cost, and technicality of our court procedure. We have to admit

that their indictment of our practice has at least probable cause. Kinney vs. New York Central, furnishes an exaggerated but true example of the possibilities of our practice. The accident happened in 1908, the case ended after 14 years of litigation, in 1922. There were six trials, five appeals to the Appellate Division, two to the Court of Appeals and one to the Supreme Court of the United States. The final verdict was like the first only larger. Of course this is an uncommon case but the threat of long delay and wearisome appeals faces every man who must seek aid or protection of the law.

The negligence case is the source of more criticism of courts and lawyers than any other class of case. It is through the accident, now unavoidable and incidental to existence itself that so many people have contact with the court and reap so much disappointment.

Few cases in court present so unsatisfactory and uncertain a basis for decision as negligence cases. They grow out of sudden and unlooked for events, there are few dependable landmarks to refresh the memory and confine the imagination of witnesses and the test of liability is itself the erratic and unpredictable application of the degree of care that would characterize the mythical reasonable man.

Negligence cases have an unhappy effect in dividing the interests and sentiments of the bar. In considering general and commercial business, most lawyers appear on either side and are interested in having a fair rule and an unbiased court. But in negligence cases we divide into "plaintiff's lawyers" or "defendant's lawyers". We even hear judges referred to as "good plaintiff's judge" or as "a defendant's judge" and legislators and public tend to separate along the same lines. When a law is considered that touches the negligence field, we do not find the same balance of intermediate and impartial opinion as in other fields. Plaintiffs and defendants men often struggle not for fair, but for advantageous rules, and seek not a neutral, but a favorable court.

The compensation proposal is a threat at the source of income of many lawyers. Apart from those who specialize in accident cases, hundreds are occasionally retained in the course of general practice upon one side or the other. The lawyers are a very large social group, created by the needs of society, and they are as much entitled to be heard as any advocate of group interests. No one can deny that, with their increasing numbers, if any large field of work is withdrawn from them, it would be a serious cause of individual and collective demoralization of a group so influentially related to society as to have consequences far beyond the bar itself. The menace of such a plan should provide lawyers and judges with the strongest of motives to make any sacrifices necessary to solve the riddle of delayed justice, even if higher motives fail.

The compensation scheme involves problems, not primarily legal, but economic and social. The policy of the state should not be

settled from purely legalistic considerations. It seems possible to adapt our legal system to either policy of settlement of automobile collisions that the state may deem to be best for its whole economic and social fabric. The compensation scheme can be made to work, though it would be highly arbitrary and I am not convinced that its average of justice would be better than at present attained.

On the other hand, while the automobile case, in view of the rising accident rate, presents a problem of the first magnitude, it has not reached a point where we must admit that our legal system is incapable of dealing with it. The situation in some of the lower courts is desperate—so far out of control that my limited knowledge of their practice suggests no certain remedy. But so far as the Supreme Court is concerned, its salvation is in the hands of its Judges and its Bar.

Only about 3% of the automobile accidents result in actual trials in Supreme Court. The Supreme Court at its average ran behind 6% and at its worst 16% in the year studied. Do these figures present a problem before which Supreme Court Bench and Bar must confess defeat? I believe that intelligent cooperation among the judges themselves and between the courts and the lawyers could meet this challenge, and in three years clean the calendars. Once the court gains on its trial lists and breaks through recent additions to older issues, they will melt away very fast.

This Commission, if this Legislature shall extend its life, and the next Legislature if it shall adopt our recommendations, may be able to help some by changes in procedure and practice rules. It would be a mistake however, to place our chief reliance upon rules.

Judges frequently charge that the bar is blameworthy and causes much of the delay. The charge is true and the bar is thereby digging a pit in which it is likely to fall. Lawyers too much think the courts exist for them instead of for their clients. In Detroit a rule was made that only one postponement of a cause would be permitted unless upon written consent of the client. Requests for postponement were so suddenly and greatly reduced, that the inference may be drawn that postponements were more sought for convenience of counsel than of client. The economic condition of the Bar as a whole is serious. It should welcome the chance to catch up with its unfinished business.

The primary duty and opportunity is that of the Supreme Court itself. Nothing would so silence criticism and so establish public confidence in the Court as a bold, concerted and successful attack upon the problem by the Judges. Notwithstanding the deep concern by some judges over this mounting problem, the majority have been passive and indifferent and while generally conscientious as to the case on trial, have given little thought to those awaiting their traditionally sacred "day in court".

A 6% increase in Judicial effort would have kept the court even, a 16% increase would have kept the worst county even and shown a fine average gain. Is this too much to ask of men to whom so much has been given?

Laymen and lay organizations send us criticisms, some mild and well reasoned, some intemperate and unstudied, suggesting that the courts have no regard for the plight of delayed litigants, that judges work is distinguished from that of all other governmental and private workers by short hours, frequent recesses and long vacations. I should dislike to repay an invitation with criticism. But these meetings are only of value if they rise above the merely perfunctory and polite. I must say to you that it is difficult to justify under present conditions, an average vacation of over three months for judges whose work is so in arrears. The Judicial function cannot fairly be suspended so long and if there are lawyers who are taking such vacations (think there are but few) they should be compelled to relinquish their cases to others who will work to the end that the Bench and Bar may be relieved of the reproach of being incompetent or of too leisurely habits to solve their own problem.

The Supreme Court is one state-wide tribunal. If its members through conference, or committees, through Presiding Justices and representatives of district trial benches could make a voluntary and effective effort to meet delay, they could, I am convinced, succeed and their success would bring such prestige collectively and individually as would end agitation to take business from them and hand it over to Commissions. It would lay a foundation of confidence upon which the greatest possible reform could rest, and for which we cannot now get either public or bar consent.

The most effective reform to reduce delay and cost and miscarriage of justice, would be to unshackle the judge, give him greater discretion, wider power and more finality. Our judges are bound on every hand by statutes, and every word they utter may be appealed. The simplest, cheapest and quickest justice would be that administered by a trial bench of wide discretion and some finality, at least in matters of procedure.

England under the "New Procedure" established, not by Act of Parliament but by rule of court in 1932, points the way. A cause, if counsel move the judge for the "New Procedure" may be set down for speedy hearing, jury trial dispensed with, issues framed, the number of experts to be called limited and any question involving expert knowledge referred to a Special Referee for inquiry and report. The class of cases to be included in the "New Procedure" is not even defined with precision, but is left to the judge to use reasonable discretion.

Until we are so convinced of the disinterestedness, the earnestness and competency of the judges that we cease to keep them in a statutory strait-jacket, we will always have delays, technicalities and expensive justice.

If your Commission is continued, we will take up the task of translating our material into specific proposals designed to quicken, cheapen and simplify civil justice. Many Judges, lawyers, law school men, Bar Committees and lay organizations are working to

that same end. We hope to provide them all materials to sound work, and to help focus all their efforts in effective and simple legislation. But after all we may do is done, the problem comes back to you. Rules are but scraps of paper—justice will always be what the judges make it.

If in what I have said, or in the facts the Commission may report, there is any note of criticism, I ask you to believe there is no purpose to injure or embarrass, but only to correct. We recognize, no group is in a position to know so well, the sincerity and self-denial with which many men in judicial office dedicate themselves to the delicate and soul searching task of doing justice between their fellow men. We who are in the work of the Commission are happy to be your fellow servants and share with you the burden and heat of these troubled days. All of us will have need, even at our best, that the work shall be viewed with indulgent eye by the Master Workman after Whose pattern we try to model a more perfect Justice.