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Handicap of Poverty in Litigation

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The Handicap of Poverty in Litigation

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In law as in medicine the poor and destitute often get gratuitous service of a quality far beyond the reach of those of little means. Only recently one of the leaders of the American Bar, at the instance of an interested clergyman, without fee of any sort, took the case of a poor Chinaman to the Supreme Court of the United States and obtained a reversal of a judgment of conviction of first degree murder because the constitutional rights of this alien had been outrageously violated.[1]

Lawyers in active practice usually can point to numerous cases where they have helped deserving poor people without remuneration. The aggregate of such cases handled is undoubtedly large. But what of the cases of injustice both civil and criminal which are never brought to light?

There has been a general awakening to the seriousness of the problem in recent years. The guaranty of the equal protection of the laws given by the Fourteenth Amendment is of little use unless the ways and means of getting into court are provided. The writ of habeas corpus is a gruesome joke to the man behind the bars without counsel to prepare his petition. The right to an injunction or attachment avails a man little if he has not the means to provide the undertaking required by statute. The well established rules of torts and contracts and damages mean nothing to a non-resident plaintiff who cannot provide security for costs as a condition precedent to the continuance of his lawsuit.

It is not alone the destitute with no means to procure counsel who find the way to justice difficult. Self-respecting citizens who are accustomed to pay their way and who ask charity of no one find that in litigation their well-to-do adversary has an advantage of no small consequence. No lawyer who has practiced in the courts fails to appreciate the advantage in a litigation which means give in the engaging of counsel, the securing of expert witnesses, the locating and attendance of absent witnesses, the making of maps, the taking of pictures and the general preparation for trial.

Nor is it alone in the trial of causes where the disparity exists.

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[1]Ziang Sung Wan v. United States, 266 U. S. 1, 45 Sup. Ct. 1 (1924) in which John W. Davis, without fee, argued the case for the appellant at the request of Rev. Peter J. O'Callahan.

The mounting cost of printing alone, to say nothing of the providing of security, often proves an insurmountable obstacle to an appeal. This practical disarming of a litigant in the midst of his fight because of his poverty is no infrequent occurrence. Tiring out one's antagonist by men of means is sometimes the most effective of all legal weapons. It is encountered at many turns, and instances are known to every lawyer.

That it is the imperative duty of society to develop a more perfect administration of justice wherein there will be a greater equality before the law than now exists, is generally recognized. Unquestionably the leadership rests with the Bar. The problems are often baffling and require vision in their treatment. At times the surgeon's knife seems necessary.

There has been more or less discussion of late as to how far the administration of our criminal law has failed to meet requirements of society. All agree that it is not satisfactory. Legislatures are striving with might and main to make trials speedier, convictions more frequent, and punishment more severe. The apprehension and punishment of the guilty is highly desirable. If, in doing so, the innocent, too poor to present their cases at full strength, are immeshed and also punished, the results will be had at a heavy price.

In the administration of criminal law and in furtherance of an effort to bring justice more nearly within the reach of the poor, probably no single step in recent years has meant so much or presents so much of promise to innocent poor persons accused of crime as the development of the public defender idea. The assignment of counsel system falls wide of the mark. The "youthful mouthpiece"[2] appellation describes it correctly. As a training ground for recent graduates it is admirable. As a means of placing rich and poor on a common footing it is a failure. The public defender plan does not bring equality of service to rich and poor. It does, however, give the poor competent representation, a fair opportunity to have cases investigated and adequately presented. It raises the standard of criminal trials, discourages perjury and places the responsibility on a public official actively to see that injustice does not continue because of poverty.

One of the most frequent causes of injustice among the poor accused of crime is the problem of bail. Two men are arrested accused of larceny. Both are innocent and both are eventually discharged. One with means puts up cash security or a bond and walks out, rides

[2]An expression used in BRAND WHITLOCK'S "THE TURN OF THE BALANCE" (1924).

in his car, attends to his business, makes his living and is little inconvenienced by the unjust charge. The other, too poor to even have a friend able to become his bondsman, lies in jail for weeks and sometimes months. Acquittal to him is no redress for the irreparable injury done to himself and family by his imprisonment. An aggravated instance of this occurred in one of the counties of Western New York a few months ago when a farm hand, accused of stealing a jug of cider worth twenty cents, was held in jail eleven weeks in default of $1000.00 bail. The District Attorney eventually moved for the dismissal of the charge. At the same jail, at about the same time, was a destitute man held as an alien improperly in the country with bail fixed at $500.00, who, as an inmate from February to November, became the oldest inmate of the jail occupying the "bullpen" by day and a cell by night until a charitable society of New York effected his release.

Any one who has frequented the police courts has seen case after case where an adjournment of a trial has been asked by the prosecution undubtedly for proper reasons, but where the defendant, helpless in his poverty, is led back to the detention room and thence to the jail to spend sometimes weeks of waiting until his case can be heard.

The duties of the public defender should require him to visit the jails from day to day and watch out for the cases of apparent injustice which are lost sight of because of poverty. He should recommend cases for the use of the notify warrant and a parole where poverty exists and investigation shows the chance of escape to be negligible. Likewise it should be his duty to watch with painstaking care the daily grist through the Police or Magistrate's Courts to see that in the great volume of petty cases passing through that court (a court of last resort probably for at least 90% of the accused appearing there), no worthy unfortunate is deprived of his liberty because of failure to be fully heard.

The public defender idea, which has grown so steadily during the past ten years, has not only had an unusual success but its possibilities as an instrument of justice are so great that it deserves the study and interest of every member of the Bar.

The handicap of poverty in asserting civil remedies or defenses has grown with our centers of population. The sense of fair play and justice in rural communities has generally brought legal assistance to the deserving poor because the details of the particular case are known throughout the community. With the growth of cities such cases when they arise are often unknown to the public. Injustice

can and often does exist in civil cases because without means one whose rights have been invaded knows not which way to turn.

Take for example the matter of imprisonment for debt. Abolished in name in this State in 1831,[3] it survives in certain specified actions where orders of arrest may be granted in the course of a litigation and a body execution may issue if an execution against property is returned unsatisfied.[4] Among the classes of cases in which arrest may be had, as well as a body execution, in the default of payment after judgment, is that of conversion. The growth of the installment business during the past two decades has enormously increased the number of actions of this character in the courts.[5] People generally do not understand the importance of the reservation of title in a vendor. Those who default in installment contracts are often unfortunate and the victims of circumstances. Sometimes they have been inveigled into buying beyond their means by enticing advertising. Sometimes upon default, the clothes, furniture, appliance or other subject matter has been worn out and discarded. Restitution of the article itself cannot be made. It makes no difference how well intentioned the debtor may be or how innocently he has acted. Conversion may exist under an honest or mistaken belief as to ownership on the part of the one exercising dominion over the property.[6]

Probably no one ever needs legal assistance and advice more acutely than the wage earner out of work who is apprehended by the sheriff and told that in default of paying a small balance on some judgment, possibly rendered five years before, he will be locked up in jail unless he provides a bond to observe the jail limits.[7]

The need of counsel for the poor is confined to no one class of cases. Controversy between landlord and tenant and employer and employee, the administration of estates so small as to be pitiful, the guardianship of children and domestic difficulties of all sorts present problems of grave concern to those involved, calling at times for legal skill of the highest grade. The statutes of this[8] and other states

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[3]Laws of 1831, Ch. 300.

[4]N. Y. Civ. Prac. Act, §§ 764–771; 826–827.

[5]"Exclusive of houses, life insurance and stocks and bonds all of which are sold on installments on an extensive scale, it is estimated that approximately six billion dollars' worth of goods are now sold at retail annually on the installment plan." WILBUR C. PLUMMER, SOCIAL AND ECONOMIC CONSEQUENCES OF BUYING ON THE INSTALLMENT PLAN, published as a supplement to the ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE.

[6]Suzuki v. Small, 214 App. Div. 541, 212 N. Y. Supp. 589 (1st. Dept. 1925), *aff'd* 243 N. Y. 72 (memo).

[7]Ford, *Imprisonment for Debt* (1926) 25 MICH. L. REV. 24 gives an extended comment upon this general subject.

[8]N. Y. Civ. Prac. Act, §§ 196–199; N. Y. Civ. Prac. Rules, 35–37.

provide for the assignment of counsel to poor persons under conditions that are impracticable and almost useless.

Professor John MacArthur Maguire of the Harvard Law School has portrayed most graphically the absurdity of these provisions.[9] To get a lawyer assigned one must have a lawyer's certificate as to the merits of the case. It is no wonder that the provisions are obsolete. Poor people either get some lawyer voluntarily to assist or else swallow the injustice and try to forget.

Substantial progress has been made toward eliminating the need of counsel for poor people in certain classes of cases. The growth of the small claims courts and informal procedure therein unquestionably has been a great step forward. The substitution of the Workmen's Compensation Laws for the old litigation between employer and employee, with the Attorney-General in this State acting as counsel for the workman, has been the means of relieving vast numbers from the unnecessary expense of costly suits and appeals. The growth of legal aid in industry and among fraternal organizations is but another evidence of an effort to bring justice within the reach of those least able to pay.

A most significant development has been the growth of the legal aid societies. Under the statutes of this state they are founded to "assist persons without means in the pursuit of any civil remedy."[10] The societies in New York, Buffalo and Rochester are doing an increasing social service year by year. The Bar Associations are more and more taking an interest in legal aid work often giving it financial assistance. Several years ago the New York State Bar Association adopted the following resolution:

> "RESOLVED, That the State Bar Association and all local Bar Associations should assume greater responsibility for the maintenance and conduct of legal aid work and to that end should actively seek support for established legal aid organizations, and in communities where no such organizations exist should become directly responsible for the systematic conduct of such work."

At the 1927 meeting of the New York State Bar Association, the

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[9]Maguire, *Poverty and Civil Litigation* (1923) 36 HARV. L. REV. 361. In the United States this article has been reprinted by (April, 1923) 21 LEGAL AID. REV. No. 2; reprinted in abbreviated form by (April, 1923) 6 JOURNAL OF THE AM. JUDICATURE SOC. No. 6, at 179, and also by the (May, 1923) 2 MICH. STATE BAR JOURNAL No. 7, at 202; reviewed in the (July, 1923) 9 AM. BAR ASS'N JOURNAL No. 7, at 457 by Prof. Austin Wakeman Scott. In England the entire text has been reprinted in 156 LAW TIMES 345, 368; the article has been reviewed in 67 SOL. J. 419; and in the EVENING STANDARD (London) April 16, 1923; and referred to as the "Standard Exposition" of the subect in BULLETIN OF THE U. S. LABOR STATISTICS No. 398 entitled *Growth of Legal Aid Work in the United States* by Reginald Heber Smith and John S. Bradbury.

[10]N. Y. Cons. Laws (Cahill, 1923) C. 41, § 280.

subject of legal aid was accorded a prominent place on the program. In the City of New York, Edward S. Harkness recently gave $150,000, for the furtherance of legal aid work and this will be expended under the general supervision of the Association of the Bar of the City of New York. In Rochester, the Bar Association within the past few months voted financial support to the legal aid society of that city and appointed a committee of its members to work with that society in order that the Bar in general might be better informed and kept more closely in touch with the rendering of legal aid. In Buffalo, the legal aid work is partially supported from public funds, thus leaning in the direction of the policy of some states of making legal aid a public function, run by public officials and supported by the public treasury.[11] Some of the law schools, notably Northwestern, Harvard and Minnesota, provide work for their students with established local legal aid societies. At Northwestern and Minnesota, it is a part of the curriculum of the work, thus affording a "legal clinic" for the experience of the students as well as for developing their interest in the social problem.[12]

Successful and gratifying as has been this work of the legal aid societies, they are often handicapped by lack of means. The furnishing of counsel is but one step toward relieving the condition of the poor. Furthermore, there is great need of facilities for the handling of such cases wherever legal aid societies do not exist.

With keen insight into the difficulties presented, the American Bar Association, through its committee on legal aid, has taken up the matter of securing an adequate poor litigants' statute to supplant the awkward and unworkable *in forma pauperis* statutes as they now exist. This committee has proposed for consideration a tentative draft which has won much favorable comment.[13] The outstanding feature of this proposal is the delegating to District and County attorneys, and under some circumstances to the Clerks of inferior courts, the duties of a "public counsellor". This "public counsellor" is the one to whom poor litigants may resort for legal assistance. He shall make the investigation either himself or through assigned counsel. If the investigation shall show that the applicant is a poor

[11]There are public bureaus conducted in Philadelphia, Kansas City, St. Louis, Los Angeles, Bridgeport, Dayton, Duluth, Omaha and Hartford. Most of the legal aid societies have been incorporated as private charitable corporations. New York, Boston, Cleveland, Cincinnati, Milwaukee, Newark and Providence have adhered to this type.

[12]At Harvard Law School the Harvard Legal Aid Bureau, established in 1914 has averaged 100 cases per year. There are 30 students appointed by the Dean on the basis of scholarship. At Harvard no credit is given for the work toward a degree.

[13]GROWTH OF LEGAL AID WORK IN THE UNITED STATES, 106.

person within the new and enlightened definition of the term[14] and that the cause appears to be meritorious, counsel will be assigned to conduct the case. Such assigned counsel shall receive a reasonable fee for his services. Under this proposed statute all fees and compensation shall be payable from a revolving poor litigants' fund which shall be created by public appropriation and which may be augmented by gifts as well as from fees from successful litigations conducted for poor litigants.

It is not the idea of this proposal to supplant the legal aid societies. Wherever legal aid societies exist they will be utilized as supplying the most appropriate and best equipped counsel that can be assigned. The significance of the proposal is that there is provided someone in authority responsible for seeing that people too poor to pay may have their day in court as a necessary function of government in the administration of justice.

The awakening of interest in the movement to bring justice more nearly within reach of the poor is encouraging. In assuming the leadership, the Bar recognizes its responsibility. Nowhere, however, is the opportunity so great for developing interest in the subject as in the law schools. If the young lawyer entering practice shall be given a clear conception of the difficulties to be overcome, the measures proposed and the end to be sought, he will be of invaluable assistance in this movement which is gaining yearly momentum.

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[14]The present rule in N. Y. is that a poor person within the meaning of the statute "shall be a person who is not worth $100.00 besides the wearing apparel and furniture necessary for himself and his family and the subject matter of the action." (N. Y. Civ. Prac. Act. § 199.) Under the proposed "Poor Litigants' Statute" the definition of a "poor litigant" is "any applicant found by the public counsellor not to be worth a sum exceeding $500.00 exclusive of his rights in respect of such cause and also exclusive of property exempt from execution and from being reached or applied upon a creditor's bill; and not to be receiving or reasonably to be expected to receive an income averaging more than $25.00 per week."