1918

Cost of Public Justice

John R. Rood
University of Michigan Law School

THE COST OF PUBLIC JUSTICE

By John R. Rood[1]

"There are few Englishmen who will not admit that English law, in spite of modern improvements, is neither so cheap nor so speedy as might be wished. Still it is a system which has grown up among us. In some points it has been fashioned to suit our feelings; in others, it has gradually fashioned our feelings to suit itself. Even to its worst evils we are accustomed; and therefore, though we may complain of them, they do not strike us with the horror and dismay which would be produced by a new grievance of smaller severity."

"No Majratta invasion had ever spread through the province such dismay as this inroad of English lawyers. All the injustice of former oppressors, Asiatic and European, appeared as a blessing when compared with the justice of the Supreme Court. Every class of the population, English and native, with the exception of the ravenous pettifoggers who fattened on the misery and terror of an immense community, cried out loudly against this fearful oppression."[2]

The common citizen who becomes victim of a wrong and seeks redress in the courts of America soon finds by bitter experience that it is better to bear those ills we have than go to law. The expense is more than the thing is worth. The result depends on who has the longest purse, the most endurance, and the shrewdest lawyer, and little on the merits of the case. When he gets to court he finds his remaining money is being spent, not in the trial of his case, but in deciding whether an absque hoc is a sine que non, or some similar piece of jugglery. And if in the end he is so fortunate as to succeed in this haphazard game of chance, he finds in settling that he who wins, loses; but, worse than that, he is disappointed even in his hope that the results of the affray will partly recoup his losses. For when he offers the court's judgment to prove his right he is solemnly informed that it amounts to nothing, because the notice of trial was too short, an affidavit or bond not according to statute, or some rule of the game violated. I have with some care examined the last volume of the American Annual Digest, and it appears that about three-fifths of the matter in the volume relates to procedure, evidence, and other rules of the game. This volume is a fair sample of the others. It is the same old story.

If the decision could be ascertained by an application of the rules of the game it might not be so bad; but even that is not so.

1. Professor of Law, University of Michigan Law School. This article is an address delivered at the twenty-seventh annual meeting of the Michigan State Bar Association at Grand Rapids, Mich., June 30, 1917.

2. *Macauley*, "Warren Hastings."

An investigation of the cases in a recent volume of the decisions of the supreme court of Michigan, which averages fairly with the rest, and with the decisions of other courts, shows that 37 decisions were reversed and three modified, out of 103. The first guess of one court seems to be about as good as the last guess of another, except that every new trial adds to the expense.

The cost of judicial proceedings under our complicated and antiquated system practically closes the doors of our courts to the great mass. Even the part of the expenses which the parties have to pay is more than the matter in contest, and as effectually denies them a day in court as an explicit enactment to that effect would. Closing the doors of justice to the people closes the doors of business to the lawyer. The lawyers are responsible for the continuance of the system, are justly held accountable for it by the people, and suffer more from it indirectly than the public does directly. If the cost of prosecuting my lawful claims in the courts is more than the claims are worth, I am recompensed by the fact that the cost of prosecuting claims against me is also more than the claims are worth; and if I am a good and bold bluffer I win as much as I lose. But the lawyers, on the other hand, lose at both ends.

I greatly dislike to say sensational or unpleasant things, and to guard against exaggeration and make sure that I am well within the facts, I have made a careful analysis of the business of the Circuit Court for Washtenaw County, Michigan, for the year 1916, that being the county in which I reside, and, as I believe, a fair sample of the situation throughout the state. By the official journal kept by the clerk of the court it appears that the court was in session as follows in the year 1916:

	Days in Session			
	Criminal.	Civil Jury.	Chancery and Motions.	Total.
January	1	3	8	12
February	1	1	17	19
March	6	11	8	25
April	1	0	19	20
May	2	16	5	23
June	1	1	21	23
July	0	0	0	0
August	0	2	19	21
September	0	0	25	25
October	1	0	25	26
November	2	0	22	24
December	3	8	13	24
Grand Totals	18	42	182	242

From the same journal it appears that during the year the following judgments and decrees were entered in civil cases:

Without contest:

That mortgage was outlawed and barred	6
Judgments by default at law	3
Judgments by confession in court	5
Voluntary non-suit	12
Total	26

Contested cases:

No cause of action	12
Judgments as follows for Plaintiff, 14:	
Ordering common council to issue saloon license	3
Ordering payment of accrued alimony	1
For damages	10
Total number of contested cases	26

Grand total of all judgments during the year for damages rendered by the court, $20,237.65.

Which included:

One award in eminent domain proceedings amounting to.	$2,275.00
One negligent injury judgment against the street railway Co.	12,000.00
Eight other judgments totaling	5,962.65

Leaving out the first two, the total of the money judgments rendered would not pay the judge's salary, to say nothing of the other expenses of operating the court.

That this stagnation is due to our system of justice breaking down by its own weight, and not to the lack of need for mediation, is shown by the fact that this small total is recorded in a county having 50,000 inhabitants, property assessed at $50,000,000 and that the bank clearings in one town in the county were more than $17,000,000 in the year 1916.

It is not conceivable that any such sum should represent the real need for adjustment of major civil differences in a year in such a community.

But someone will say, your figures are not fair, because most cases are compromised before trial and never appear in the judgment roll at all. I ask no better proof of my indictment. If submitting a matter to the judgment of the court is so terrible an ordeal or so expensive that parties with a real and honest difference submit to a forced settlement rather than take the judgment of the court the system stands convicted at the outset.

Some of the items of circuit court expense paid by the tax-payers are:

Judge's salary	$6,000.00
Court reporter's salary	1,800.00
Annual warrants for jury fees	7,606.96
	$15,406.96

To which should be added part of the following:

County clerk's salary	$ 2,000.00
County clerk's deputy	1,000.00
County clerk's clerk	600.00
Deputy sheriff	1,000.00
Repairs on courthouse	354.80
Court house janitor	800.00
Lights and fuel for the year	2,962.04
4 per cent on the market value of the courthouse square @ $50,000	2,000.00
	$10,716.84
Charging 1/3 of which to holding court is	$ 3,572.28

Which would make the tax-payer's share of the cost of keeping circuit court per year $18,979.24

If half of this is charged to the jury days in court, the cost of one day in the circuit court with a jury paid by the tax-payer is $158.16.

But the tax-payer stands only a fraction of the cost of the suit. The parties and their witnesses have to pay:

1. Two lawyers on a side, one case on trial and one waiting call, twice as much labor in preparing for trial as in trying the case, fees $25 per day each: Total cost per day for lawyers, $625.

2. Lost time of the parties to attend trial, one on a side, one case on trial and one waiting call, and as much time preparing for trial as in trying the case, time worth $10 per day, $80.

3. Cost and lost time of witnesses, four on a side, one case on trial and one waiting call, time worth $5 per day, $80.

Total cost of a day in court to the parties and witnesses is $785.

If to this we add the cost of a day in court to the tax-payer, $158.16, the total cost of a day in court is $943.16.

The fact that this cost of a day in court is in most cases much more than the difference between the parties, practically amounts to a denial of justice; and forces them to adjust their differences out of court as best they can, with God always on the side of the long purse.

I trust that I have shown that the great defect in our legal system is that justice costs more than it is worth; but I can not pass this topic without a remark to avoid unwarranted assumptions. This cost of justice is due to the system and not to the men administering it. Our judges are able and upright, diligent, worthy, and well qualified. The business, moral, and ethical standards of our lawyers are not excelled by any profession, trade, or calling. They do not over-charge for their work. I am not aware of any profession requiring such elaborate or expensive apprenticeship for admission and paying such modest returns to its members for services performed.

If you agree with me that public justice as now administered is so expensive as to amount to a practical denial of relief in most cases, we may for a minute turn our attention to the causes of the expense. Here I think there is no room for argument. The causes of expense are:

1. The number of persons required to make a decision, and that they must assemble at one time and place and wait each other's turn. These persons are judge, reporter, clerk, sheriff, jury, attorneys, parties, and witnesses.

2. The right of parties to be heard in person or by attorney at each step, to produce, examine, and cross-examine witnesses, and accumulate evidence without limit so long as it has any relation to the controversy.

3. The number of steps and processes required to reach a decision: Complaint, plea, demurrer, hearings, repleadings, appeals, and new trials.

How much of this expense is unavoidable? Must justice now be more expensive than it was when nails, shoes, cloth, and other things were made by the slow hand-process; when it took six months

to travel from Chicago to New York and as long to get a reply, which today is flashed in the twinkling of an eye? Only in the administration of justice is the slow and expensive process of the Dark Ages still in vogue. What sane person would use court methods of investigation in his affairs? What corporation, public or private, could survive adopting them?

To speak of the last cause of expense first, efforts to simplify the procedure have been made in this state and elsewhere, and constitute the main attempts to solve the problem up to the present time. If pleadings ever served the theoretical purpose of informing the opposite party of the nature of the cause of action or defense, they long since ceased to perform any such function; and I venture the opinion that exception was never taken to any pleading for any reason other than to obtain some ulterior advantage over the other party, such as delay, abatement of the action, seeing the opponent's cards, showing by example to prospective suitors that it does not pay to try to call this party to account in the courts, and the like.

The conclusion is: Make exception to the pleadings unprofitable and such exceptions will cease.

Whatever can be done to simplify procedure is a step in the right direction; but the evil is deeper than that, and requires more drastic remedy. Another and more effective means of cheapening justice is to limit the right of the party to be heard and to produce and examine witnesses. This suggestion produces a gasp of horror. But why should it shock? If you are not accustomed to such action by courts you are familiar with it in other governmental bodies.

The legislature, board of supervisors, city council, and town-meeting vote appropriations and cause them to be levied and collected by taxes on my property without giving me any notice or opportunity to be heard. The tax assessor raises the valuation on my property without any notice to me, and the courts answer my contention that my property is confiscated by assessing it too high, saying that someone must appraise and the assessor's decision is final. The police order my house or machinery destroyed as a nuisance, without giving me a hearing or compensation, order my choice breeding animals shot and buried in the same summary manner, and the courts tell me this is not taking property without due process of law. The highway commissioner closes the road while I am on the way and tells me to go around, giving me no notice, no hearing, no chance to testify. The railway and livestock commissions close the stockyards and markets and prohibit my shipments to my

embarrassment and bankruptcy, and I am told no notice, no hearing, no testimony are necessary, and that I am entitled to no compensation. The health officer puts me and my family in close confinement in my own house without trial or opportunity of defense. I go abroad to visit my ancestors, and on my return am excluded by the immigration commissioner, on such investigation as he sees fit to make, without giving me a hearing or right to produce evidence according to the accustomed court procedure, and I am told by the courts that the legislature has properly authorized the commissioner finally to determine my case without giving me any opportunity at all to be heard. I am charged with a criminal offense, demand trial by my peers, and am told by the courts that the legislature has properly excluded all persons of my political faith, religion, sex, age, and race from all juries. I am drafted to serve in the army where my life is periled, without right to jury trial as to my exemption from liability to service. If upon my trial in any case, civil or criminal, the court errs outrageously, accepts jurors prejudiced against me, convicts me on hearsay evidence, rules out the only evidence on which I hoped to obtain an acquital, and finally charges the jury contrary to the law and the evidence, I am told by the courts that I have no constitutional right to appeal or new trial. All the rules I have stated are established by decisions too numerous to mention, well known to you all, and I will not weary you with citation. If all these things are reason and due process of law, why may not the decision of what and how many witnesses shall be called, and whether any or what argument shall be heard, be taken away from the parties and left to the discretion of the court? And why should not that be done to expedite and cheapen justice, and that, too, with regulations that would insure that the court was not too liberal in extending the inquiry? As it costs more today to adjudicate the matter than the controversy involves, it is not so important how the case is determined as it is that it be decided. The main value in court decisions today is to end the dispute, all that certainly could be accomplished at much less cost with the restrictions I have suggested, and with quite as much prospect of reaching a correct conclusion. I would favor steps being taken in that direction.

I come lastly to the first class of reasons why justice is expensive; and here it is we find the great items of expense, and the reason why the expenses more than exhaust the fund involved. It is the army of men our system of law requires for the decision of a case: Judge, jury, reporter, clerk, sheriff, parties, attorneys, wit-

nesses; twenty-five to fifty men required to do what could be done better by one or two at one-hundredth of the cost.

The judge we must have; but why should he be selected from the inhabitants of the community, bound to them by the ties of blood, fraternity, and business, affecting almost every case that comes before him by some sort of relationship to one or both of the parties—friendships, prejudices, and indirect interests. No judge should ever be permitted to hold court in the county in which he resides, nor twice in any year in the same county. The work of the judges should be assigned to them individually from term to term by some central officer, for example, the chief justice of the supreme court. Such is now the law in some states, I believe; and I am told it pleases everybody but the judges; and I believe even the judges would be content if to this were added a tenure of office which relieved them from the humiliation and expense of standing for re-election at such short intervals. To ask a man with an established business to give it up to accept a place on the bench, and then require him to stand for re-election almost before he has familiarized himself with the duties of his new office is neither fair to him nor good for the public.

Now, as to the jury. This, too, we must have; for throughout all its history the jury has been found the most satisfactory device to protect against special interest, oppression, and class-rule, that has ever been discovered. It is the most effective means of making the law as administered in the courts reflect public opinion and the common sense of justice. No other means has been found of guaranteeing that special interests and classes will not become intrenched in the courts and impose their will on the people by that means. We jeer and joke on juries and verdicts, but they remain our best bulwark and guaranty of liberty. And yet why should it be a jury of twelve or of six? Frankly, I believe a jury of one would be as good or better and far cheaper. It is here that I believe the great stroke could be made to make justice cheap. Let the jury panel be made up as at present, then let each party alternately strike out one name till but one name is left; then let that man be the jury unless excused by the court on challenge for cause; in which case a new panel or veniremen might be enrolled to make a new jury.

Next as to the attorneys. I am profoundly convinced that one of the chief reasons why justice is expensive is the fact that parties are *permitted* to have men selected and paid by them, men specially trained and skilled in the game and the rules of the game, appear for

them, speak for them, examine witnesses, and control the course of the proceedings. These men are not interested in having justice done. They are employed and paid to see their clients win, win on the merits if convenient, win by technicality if need be, but win, at all events, win. Their compensation in large measure depends on their success. Their reputation and future in even greater degree depend on it. Instead of being aids in arriving at *justice* they are a positive hindrance.

You all know how worthless expert testimony is. And why is it so? Merely because the parties are permitted to have men of their own selection, *in their private pay*, create erroneous impressions by testifying to half the truth. Half the truth is a lie. Colored and biased influences have no just place in our courts of justice, whether they be on the part of attorneys or expert witnesses.

The difficulty is in permitting any person interested in the result of the case to have anything to say as to the conduct of the proceedings, whether he be party or agent for a party. The cure is to select a jury as I have indicated, then to require the court to appoint some person skilled and learned in the law, who shall be in the pay of the court and of the court only, as the assistant of the jury and the court, and guilty of bribery if he receive any compensation directly or indirectly from either party, who shall be liable to challenge as a juror would be for interest, prejudice, etc. This referee will proceed with the jury to visit the place involved in the controversy, call upon the witnesses named by either party as being able to testify, and other persons if they see fit, examine them so far as the referee and the jury deem desirable to get at the truth, and no further; the referee will give the jury such assistance as may be desired; and finally the jury will report to the court his finding of the facts; the referee will report to the court his finding of the law; with the facts as found by the jury and the law as found by the referee, the judge will take the case under advisement, make such further investigation into the law as he deems necessary, and enter judgment in the case, which shall be final and conclusive unless appealed from.

To sum up what I have said: If you would make justice cost less than it is worth, throw pleadings and procedure to the winds. They never assisted in arriving at practical justice, and have been the tools and instruments of technicality, delay, and defense against just claims since the days of King Edward I. Next, take from the parties the right to be heard in person or by attorney or to have anything to say as to how the trial shall be conducted, what or

how many witnesses shall be examined, or what or how many questions shall be asked. This will strip the case of unessentials and expedite the conclusion. Instead of an army solemnly assembled at one place at an expense greater than the amount in controversy, let two persons, the referee and jury, go about visiting the witnesses to ascertain the facts and law and report them to the court, and the administration of justice will take on new life. People will take their differences to the court for settlement. Do these things, and public justice will be cheap and fair to rich and poor alike, the long purse will cease to control the result, the business of the lawyer will wax beyond his wildest dreams, and the name of the lawyer will be blessed in the land.