TWO ARTICLES IN 1907 ILLINOIS LAW REVIEW REGARDING LENGTH OF RESOLUTION

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ILLINOIS LAW REVIEW

VOLUME I FEBRUARY, 1907 NUMBER 7

THE IROQUOIS THEATER CASES—A FLAGRANT INSTANCE OF THE LAW'S DELAYS

BY FREDERIC C. WOODWARD[1] AND FRANK O. SMITH[2]

IN the January number of the REVIEW attention was called to the fact that although three years had passed since the Iroquois theater holocaust, not one of the criminal and civil actions resulting therefrom had been brought to trial. This was declared to be a shocking instance of the law's delays, and it was promised that in an early issue the REVIEW would give to its readers a history of the litigation, with the hope of ascertaining the causes of the delay and pointing the way to the prevention of similar abuses in the future. In undertaking the fulfilment of that promise, we wish to make it clear, at the outset, that our complaint is not that no one has been punished or compelled to pay damages, but that the issues of innocence or guilt and of liability or non-liability have not been tried. And perhaps it should be added, in view of the apparent misapprehension, in certain quarters, of the editorial announcement in the January number, that there is no claim on our part—certainly none was made in the editorial—that the delay in these cases has been of extraordinary length. Doubtless there are cases, both in the criminal and civil courts of Illinois, which have dragged even more wearily along. What makes the Iroquois theater cases a particularly "outrageous instance of the law's delay" is their conspicuousness. For while a delay of three years in an ordinary personal injury action or prosecution for a petty criminal offense may be a grave injustice to a single individual or family, an equal delay in bringing to trial the large number of cases, both civil and criminal, arising from a theater fire which caused the loss of nearly six hundred lives and shocked the civilized world, sows broadcast the seed

[1] Professor of Law in the Northwestern University Law School.
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of contempt for law and gives notice to the world of the inefficiency of our judicial system.

Record of Criminal Proceedings

December 30, 1903—The fire occurred, as a result of which nearly 600 lives were lost.

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May 18, 1906—Motion *pending* for change of venue in Davis case. Counsel for Davis claimed that this motion was *made* on June 10, 1905, but there is no record to that effect.

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Causes of Delay in Criminal Cases

In studying the record of the criminal prosecutions, it is to be noted that the indictment against Will J. Davis, president of the company which owned the building and manager of the theater, was selected by the State's Attorney as the first case to be brought to trial. This may be accepted as the cause and justification of the postponement of the other cases.

The history of the Davis case shows that the chief causes of delay have been as follows:

1. Lack of despatch in the conduct of the prosecution. It is true that the first indictment was secured within two months after the fire, and that the case was ready for trial before Judge Kersten within ten months after the fire—not a very unreasonable delay, perhaps, when one considers the importance in such a case of giving time for popular indignation to subside. But the second indictment was not pushed forward as promptly as might have been expected, either before the motion to quash was made or after it was denied. At least in partial justification of the delays in the State's Attorney's office, however, it should be said that the office is heavily burdened with work, and moreover that because of the retirement of members of the staff it has three times been necessary to place the prosecution of this case in new and unfamiliar hands.

2. The Fabian policy of counsel for the defendant in postponing motions to quash indictments and for change of venue, and in securing postponements from the court. The motion to quash the first indictment was not made until about seven and one-half months after the indictment was returned by the Grand Jury, and the motions to quash the second indictment and for change of venue were not made until more than three months after the second indictment was returned.

3. The tardiness of judges in ruling upon motions. The record shows that Judge Kersten held the first Davis indictment under advisement more than three months and that Judge Kavanaugh held the second indictment seven and one-half months.

Record of Civil Actions

As a result of the fire more than two hundred civil actions for damages were instituted. Some of them were commenced within a few weeks after the fire; others not until the period of the statute

of limitations had nearly expired. It is out of the question to set out separately the record of each case. But the history of the civil litigation may be adequately summarized as follows:

Parties Defendant. Those who have been made parties defendant in some or all of the cases are the Iroquois Theater Company, owners of the building, Davis and Powers, officers of the said company, Klaw and Erlanger, owners of the "attraction" playing at the theater, Marshall, the architect of the theater, the Geo. A. Fuller Company, which constructed the building, John R. Walsh, Jessie B. Davis, Al Frohman, Charles Frohman, Sam Nixon, Fred Zimmerman and the City of Chicago.

Courts. Most of the actions were instituted in the Circuit and Superior Courts of Illinois. Two were commenced in the Circuit Court of the United States, and about eighty in the New York State courts.

Pleadings. A detailed account of the pleadings in these cases would fill a great many pages of the REVIEW. Undoubtedly the interests of the defendants have been most skillfully guarded. There have been pleas of not guilty and pleas in abatement, general demurrers and special demurrers in large number. In many cases, defendants have been permitted after the lapse of several months to withdraw pleas of not guilty and file general or special demurrers. And the success of special demurrers is one of the most striking features of the litigation. Instances have been found in which five or six successive declarations have been found defective, and it is estimated that in the cases now pending the average number of declarations drawn has been not less than three.

The general demurrers of the Fuller Company are of particular interest, since they present the novel question as to the liability of the contractors for damages, where at the time of the injury they are no longer in possession. The question has been argued, upon the Fuller Company's demurrers, in the Federal, Circuit and Superior Courts, and before at least five judges. In the Federal Court, Judge Landis has sustained the demurrer. In the Circuit Court, Judge Windes has overruled it but Judges Clifford and Pinckney have sustained it. In the Superior Court, Judge Chytraus has sustained it.

Present Status. Only a small proportion of the cases that were commenced are still pending. For example, of 175 actions in which the Fuller Company was made a party defendant, about 80 have been dismissed for want of a declaration or for technical defects, and about 40 settled for nominal amounts, leaving only about 60 cases still on

the calendars. So far as can be learned, not a single case is actually at issue, and the outlook is that none will be tried for some time.

Causes of Delay in Civil Cases

The cases in the New York and Federal courts have not been pressed by the plaintiffs, the attorneys expressing a desire to have the questions tested first in the Illinois courts, a desire which results from a disinclination to undertake the expense of a trial so far away as New York and a feeling that in personal injury and similar litigation the Illinois courts are more favorably disposed toward the plaintiff than are the Federal courts.

In the Circuit Court of Illinois, the delay thus far appears to be due exclusively to the congested condition of the calendar. The first action resulting from the fire was commenced in this court on January 28, 1904, and the indications are that it will not be reached for some time.

In the Superior Court, a number of the pending cases—approximately twenty—have been reached and passed. In some of these the failure to go to trial seems to be attributable solely to the reluctance of plaintiffs' counsel. As one of the judges of the court says, "the counsel in each case seemed anxious to have one of the other cases tried first." Others might have been tried, apparently, had not pleas of not guilty been withdrawn and demurrers filed in their stead.

Causes of Dismissals and Settlements

The practical abandonment of considerably more than one-half of the cases indicates the discouragement of counsel for plaintiffs. The chief causes of this discouragement, so far as can be ascertained, are—first, the great difficulty that has been encountered, under the present system of pleading, in drawing declarations that will withstand the fire of the defendants' special demurrers; second, the apparent difficulty of collecting from some of the defendants any judgment that might be obtained against them; third, doubt as to the liability of the Fuller Company. It is possible, of course, that all of these causes might be removed. By patient and persistent effort, a good declaration might finally be produced. By more patient and persistent effort and the expenditure of considerable money, assets of some of the apparently insolvent or nearly insolvent defendants might be recovered or brought to light. It may ultimately be held that the Fuller Company is liable. But the lawyer whose compensa-

tion is contingent upon success, as is probably true in nearly all of these cases, is likely to conclude, unless he has a sufficient number of cases to repay him for a long and bitter struggle, that the game is not worth the candle.

Suggested Remedies

As to Criminal Prosecutions

1. Some method should be devised by which judges may be forced to decide within a reasonable time questions submitted to them. What possible excuse can there be for holding a motion to quash an indictment under advisement for seven and a half months? Yet this is what was done in the Davis case. Indeed, it is altogether probable that the Davis case could have been brought to trial nearly a year ago but for judicial procrastination.

2. The State's Attorney should be given a larger staff of assistants. It is the testimony of former members of the staff, now on the bench, as well as of present members, that the number of assistants is inadequate for the prompt and efficient despatch of business.

As to Civil Actions

1. When a case is reached on the calendar, and no substantial reason for further delay in going to trial appears, it should either be tried or dismissed. Such a practice, strictly adhered to, would stiffen the backbone of counsel who want "to have one of the other cases tried first," and by clearing away dead wood would materially accelerate the work of the court.

2. When precisely the same question arises in a number of cases pending at the same time, either all of the cases should be assigned to the same judge, or the decision of the judge first passing upon the question should be binding upon all of the other judges of the court. Such a rule apparently would have resulted in a great saving of time, trouble and expense, in the case of the Fuller Company's demurrers.

3. The simplification of our pleading and practice is a crying need. This is recognized by nearly every disinterested and right thinking lawyer. The State Bar Association has for many years advocated reform. If arguments in its support were needed, they could be found in the litigation under discussion. For as has already been suggested, the abandonment of many of the cases appears to be due, in large measure, to discouragement resulting from inability to cope with the present complicated and antiquated system.

4. Relief from the present congestion of the calendars of the Circuit and Superior Courts is of the utmost importance. It is hoped, of course, that many cases will be diverted by the new Municipal Court, but if prompt and complete relief is not thereby afforded, other measures should be adopted. It is worthy of note, in this connection, that Governor Hughes, referring to similar conditions in the City Court of New York, declared in his first message to the legislature, that to compel litigants to wait three years for a hearing of their causes is a "shocking injustice." And continuing upon the same subject, he wisely said: "While we are spending many millions on public works of great importance to the business interests of the State, we must not fail to make adequate provision to secure to the masses of the people the prompt enforcement of their rights and the swift redress of their grievances"—fitting words for the conclusion of this article.

THE IROQUOIS THEATER CASES—ANOTHER VIEW

By George A. Follansbee[1]

IN the January number of your excellent Review is an Editorial Note entitled "The Iroquois Theater Cases—An Outrageous Instance of the Law's Delays," in which the writer announces that it is "the purpose of the Review to give its readers in an early issue a complete and detailed history of the litigation, civil and criminal, which has resulted from the fire [and] to state as accurately and fairly as possible what are believed to be the causes of this shameful delay."

The editor prefaces this purpose with a statement in which he says, "certainly one must search far and wide for a more outrageous instance of heart sickening and contempt breeding delay in the administration of justice."

The clear inference to be drawn from the article is that in some way or other the laws of the state, and the courts of this county are responsible for this so-called "outrageous" and "shameful" delay.

In reading these charges, unusual in a legal periodical but common enough in the unprofessional newspapers, one wishes that the writer had had before reaching so decided conclusions some slight acquaintance, at least, with the facts in reference to the delay in these cases; that in drawing generalizations he should have had before him his "complete and detailed history of the litigation."

Your correspondent expressly disclaims being a spokesman for the bench but writes simply as a lawyer, who by reason of his connection with the civil cases above referred to has been compelled to form an opinion why they have not been tried. The dockets of the courts of this county have been crowded. Civil cases taking more than one hour to try are seldom reached in less than a year or two or sometimes three from their commencement. Many of the civil cases mentioned in the editorial note were begun within a few hours of the running of the statutes of limitations which applied thereto.

Apart from these conditions and facts, how are the courts of

[1] Of the Chicago Bar.

Cook County responsible for the "outrageous instances of the law's delay?" To be sure, one judge declined to hear a case when it was reached on his calendar—though it was not at issue—because of the active part that he had taken before coming to the bench in securing an indictment growing out of the same accident against one of the defendants to the suit, but that judge made every effort to have the case transferred to another judge, free from the prejudice that he feared he himself might possibly have, and the only reason that the transfer was not made was that the case was not at issue and ready for trial.

What, then, are the real reasons for the "shameful delay?" The writer predicts that the promised "complete and detailed history of the litigation" will, if accurate, show three principal causes: First, the failure upon the part of the plaintiffs to serve the defendants or dismiss their cases as to those not served. Second, the failure on the part of the plaintiffs either to file declarations, or if declarations were filed, the failure to file declarations which were not demurrable; and, Third, the reluctance and unreadiness of the plaintiffs to try their cases even when they were at issue and reached for hearing.

The editorial states "three years have passed and not a single indictment or a civil action has been brought to trial." That is incorrect in this: One case was called in the Federal Court, a jury was selected after the examination of a large venire, but at the outset of the case the plaintiff was obliged to dismiss it as against one defendant and continue it as against the other for want of a proper declaration. One of the defendants, a solvent one, has constantly served notices on the plaintiffs that it should demand trials when the cases were reached. It has urged the court to compel the plaintiffs to put their cases at issue and try them and has moved for a severance when the cases were not at issue as to all the parties defendant. In each case the plaintiff has successfully opposed such action.

In no brief statement could be set out all the proof there is to convince one that the courts are in no sense responsible for the delays referred to in the editorial, that is, unless all the usual safeguards which the law throws around both parties to the suit are to be ignored.

It may be asked why the plaintiffs did not prepare and try their cases. By way of explanation, one can only say that the defendants are supposed to be divided into two classes, one financially responsible, the other financially irresponsible. Possibly the first class is not legally liable and the second class not worth the time and trouble

of pursuing. As evidence of this theory a very large number of plaintiffs have voluntarily dismissed their suits.

Nothing here said should be taken as any criticism of the numerous, able and industrious attorneys representing the plaintiffs in these cases. There was a terrible accident, the principal defendant became bankrupt, the liability of other defendants became on closer study a matter of doubt,—for the facts were complicated and a recovery would have to be had on novel propositions of law,—and so as in many another line of litigation, while it was proper to begin suits before the statute of limitations became a bar and before the matters in controversy had been carefully studied, still it has become just as proper for those plaintiffs who have been convinced that they have no cause of action, to refrain from the work of a trial, continue or dismiss their suits, and lift from the tax-payers and litigants of the county the burden of crowded calendars.

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   Not locked, people did not know how to open

2. Doors to stairways from balcony locked.
   One door was locked, in a utility stairwell

3. Water tanks empty.
   Tanks were full but not plumbed to standpipes on stage

4. Skylights nailed down.

5. Fringe on stage curtain within a few inches of the "spot-light."
   No, curtain was within inches of the arc lamp that was atop the spotlight

6. Fire curtain out of order.
   Curtain worked when not blocked by a lamp. Is your car “out of order” if a moose blocks its path?

7. Theater so crowded that 262 persons were standing.

8. Ventilators not in use.
Ventilators at back of auditorium were in use until the electrical power went out; was never determined if ventilators above stage were turned on

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In the Superior Court, a number of the pending cases—approximately twenty—have been reached and passed. In some of these the failure to go to trial seems to be attributable solely to the reluctance of plaintiffs' counsel. As one of the judges of the court says, "the counsel in each case seemed anxious to have one of the other cases tried first." Others might have been tried, apparently, had not pleas of not guilty been withdrawn and demurrers filed in their stead.

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The practical abandonment of considerably more than one-half of the cases indicates the discouragement of counsel for plaintiffs. The chief causes of this discouragement, so far as can be ascertained, are—first, the great difficulty that has been encountered, under the present system of pleading, in drawing declarations that will withstand the fire of the defendants' special demurrers; second, the apparent difficulty of collecting from some of the defendants any judgment that might be obtained against them; third, doubt as to the liability of the Fuller Company. It is possible, of course, that all of these causes might be removed. By patient and persistent effort, a good declaration might finally be produced. By more patient and persistent effort and the expenditure of considerable money, assets of some of the apparently insolvent or nearly insolvent defendants might be recovered or brought to light. It may ultimately be held that the Fuller Company is liable. But the lawyer whose compensation is contingent upon success, as is probably true in nearly all of these cases, is likely to conclude, unless he has a sufficient number of cases to repay him for a long and bitter struggle, that the game is not worth the candle.

Suggested Remedies

As to Criminal Prosecutions

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1. When a case is reached on the calendar, and no substantial reason for further delay in going to trial appears, it should either be tried or dismissed. Such a practice, strictly adhered to, would stiffen the backbone of counsel who want "to have one of the other cases tried first," and by clearing away dead wood would materially accelerate the work of the court.

2. When precisely the same question arises in a number of cases pending at the same time, either all of the cases should be assigned to the same judge, or the decision of the judge first passing upon the

question should be binding upon all of the other judge= of the court. Such a rule apparently would have resulted in a great saving of time, trouble and expense, in the case of the Fuller Company's demurrers.

3. The simplification of our pleading and practice is a crying need. This is recognized by nearly every disinterested and right thinking lawyer. The State Bar Association has for many years advocated reform. If arguments in its support were needed, they could be found in the litigation under discussion. For as has already been suggested, the abandonment of many of the cases appears to be due, in large measure, to discouragement resulting from inability to cope with the present complicated and antiquated system.

4. Relief from the present congestion of the calendars of the Circuit and Superior Courts is of the utmost importance. It is hoped, of course, that many cases will be diverted by the new Municipal Court, but if prompt and complete relief is not thereby afforded, other measures should be adopted. It is worthy of note, in this connection, that Governor Hughes, referring to similar conditions in the City Court of New York, declared in his first message to the legislature, that to compel litigants to wait three years for a hearing of their causes is a "shocking injustice." And continuing upon the same subject, he wisely said: "While we are spending many millions on public works of great importance to the business interests of the State, we must not fail to make adequate provision to secure to the masses of the people the prompt enforcement of their rights and the swift redress of their grievances"—fitting words for the conclusion of this article.

THE IROQUOIS THEATER CASES—ANOTHER VIEW

By George A. Follansbee1

IN the January number of your excellent Review is an Editorial Note entitled "The Iroquois Theater Cases—An Outrageous Instance of the Law's Delays," in which the writer announces that it is "the purpose of the Review to give its readers in an early issue a complete and detailed history of the litigation, civil and criminal, which has resulted from the fire [and] to state as accurately and fairly as possible what are believed to be the causes of this shameful delay."

The editor prefaces this purpose with a statement in which he says, "certainly one must search far and wide for a more outrageous instance of heart sickening and contempt breeding delay in the administration of justice."

The clear inference to be drawn from the article is that in some way or other the laws of the state, and the courts of this county are responsible for this so-called "outrageous" and "shameful" delay.

In reading these charges, unusual in a legal periodical but common enough in the unprofessional newspapers, one wishes that the writer had had before reaching so decided conclusions some slight acquaintance, at least, with the facts in reference to the delay in these cases; that in drawing generalizations he should have had before him his "complete and detailed history of the litigation."

Your correspondent expressly disclaims being a spokesman for the bench but writes simply as a lawyer, who by reason of his connection with the civil cases above referred to has been compelled to form an opinion why they have not been tried. The dockets of the courts of this county have been crowded. Civil cases taking more than one hour to try are seldom reached in less than a year or two or sometimes three from their commencement. Many of the civil cases mentioned in the editorial note were begun within a few hours of the running of the statutes of limitations which applied thereto.

Apart from these conditions and facts, how are the courts of

1 Of the Chicago Bar.

Cook County responsible for the "outrageous instances of the law's delay?" To be sure, one judge declined to hear a case when it was reached on his calendar—though it was not at issue—because of the active part that he had taken before coming to the bench in securing an indictment growing out of the same accident against one of the defendants to the suit, but that judge made every effort to have the case transferred to another judge, free from the prejudice that he feared he himself might possibly

have, and the only reason that the transfer was not made was that the case was not at issue and ready for trial.

What, then, are the real reasons for the "shameful delay?" The writer predicts that the promised "complete and detailed history of the litigation" will, if accurate, show three principal causes: First, the failure upon the part of the plaintiffs to serve the defendants or dismiss their cases as to those not served. Second, the failure on the part of the plaintiffs either to file declarations, or if declarations were filed, the failure to file declarations which were not demurrable; and, Third, the reluctance and unreadiness of the plaintiffs to try their cases even when they were at issue and reached for hearing.

The editorial states "three years have passed and not a single indictment or a civil action has been brought to trial." That is incorrect in this: One case was called in the Federal Court, a jury was selected after the examination of a large venire, but at the outset of the case the plaintiff was obliged to dismiss it as against one defendant and continue it as against the other for want of a proper declaration. One of the defendants, a solvent one, has constantly served notices on the plaintiffs that it should demand trials when the cases were reached. It has urged the court to compel the plaintiffs to put their cases at issue and try them and has moved for a severance when the cases were not at issue as to all the parties defendant. In each case the plaintiff has successfully opposed such action.

In no brief statement could be set out all the proof there is to convince one that the courts are in no sense responsible for the delays referred to in the editorial, that is, unless all the usual safeguards which the law throws around both parties to the suit are to be ignored.

It may be asked why the plaintiffs did not prepare and try their cases. By way of explanation, one can only say that the defendants are supposed to be divided into two classes, one financially responsible, the other financially irresponsible. Possibly the first class is not legally liable and the second class not worth the time and trouble of pursuing. As evidence of this theory a very large number of plaintiffs have voluntarily dismissed their suits.

Nothing here said should be taken as any criticism of the numerous, able and industrious attorneys representing the plaintiffs in these cases. There was a terrible accident, the principal defendant became bankrupt, the liability of other defendants became on closer study a matter of doubt,—for the facts were complicated and a recovery would have to be had on novel propositions of law,—and so as in many another line of litigation, while it was proper to begin suits before the statute of limitations became a bar and before the matters in controversy had been carefully studied, still it has become just as proper for those plaintiffs who have been convinced that they have no cause of action, to refrain from the work of a trial, continue or dismiss their suits, and lift from the tax-payers and litigants of the county the burden of crowded calendars.