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Expediting Court Procedure

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EXPEDITING COURT PROCEDURE

By Geo. F. Dunklee, Presiding Judge District Court, at Luncheon of the Denver Bar Association, January 9, 1933

Honorable Judges and Members of the Denver Bar:

I APPRECIATE that it has not heretofore been customary for a retiring presiding judge of this court to make a report, or make suggestions or recommendations concerning the procedure or business of the court to the bench or bar.

However, it may not be out of place. I am confirmed in that opinion because the law singles out the judges of the Supreme and District Courts from all other persons in Sec. 7165, C. L. 1921, which is as follows:

"It shall be and is hereby declared to be the duty of the judges of the supreme and district courts, to make a special report to the legislature, at each session thereof, of all such defects, omissions or imperfections in this code, as experience may suggest."

When I hear of laymen, that have never given any special study to the subject, advocating sweeping changes in our constitution, civil code of procedure and laws, without the advice of competent counsel, I think that perhaps said judges have been derelict in the performance of that duty.

However that may be, I make the following recommendations which I deem pertinent to the occasion, based upon my experience as an attorney at law, judge and presiding judge of this court.

I.

In the April, 1932, issue of "Dicta" there is an article entitled "Speeding Up Justice" (p. 158), followed by a report of a committee on the subject (p. 167), which has been considered by the court en banc.

Sections 5718 to 5720, C. L. 1921, provide, in substance, that a judicial district of the district court having more than one judge, each judge shall exercise all of the powers and functions of his court, and, therefore, each judge can and does conduct his court in his own way, and will continue to do so unless the court en banc, or the judges by common consent,

should deem it advisable to adopt some rules or practice on the particular subjects hereinafter mentioned in order to make it more uniform and better understood for the benefit of court and counsel.

II.

The new municipal building, the court rooms of which we formally dedicate tomorrow—the first day of the January, 1933, term of court—when Hon. Charles C. Sackmann takes office as presiding judge—is situated three and a half blocks from the old court house—over a quarter of a mile one way and over half mile round trip, taking more than fifteen minutes extra time as usually walked to and from court, or about a half hour's walk each way from the downtown law office district.

The foregoing is of sufficient importance to cause us to pause and consider if some system or practice of the court cannot be adopted that will save attorneys and clients from making any unnecessary and useless trips to and from court.

III.

This seems particularly fitting when we consider that the courts were established by the people, and for the benefit of the people, in which to transact their legal business. Consider that a trip takes about, if not quite, a half day's time of a lawyer, and a day for his client and witnesses every time he or they come to court and are simply told by the judge when they can come again. The ordinary run of cases does not involve sufficient to stand the expense caused by delay and unnecessary trips to court.

IV.

REVENUE OF CLERK'S OFFICE

Previous to the act concerning the taxing of fees, S. L. 1923, p. 249, whereby a flat docket fee of $7.50 or $12.50 was fixed, according to the kind of an action, as a total cost for the plaintiff to pay for trial in each case filed, and a fee of $5.00 for the appearance of the defendant, the revenue of the clerk's office was derived from a multitude of small fees from "5 cents to $1.50," for each paper filed or order entered as per Sec. 7878, C. L. 1921.

V.

JUDGE SWEARS WITNESSES

Among other things, a fee was established to be taxed as clerk's costs for each witness sworn by him, but there was no provision for taxing any costs if the judge performed that duty. Consequently, it was customary for revenue purposes for the clerk's office to have the clerk of the division swear the witnesses instead of the judge.

In view of the change of the fee system by said law of 1923, in my opinion it is better for the trial judge to swear the witnesses during the trial of a case, and thereby relieve the division clerk from any unnecessary interruption in the performance of his duties. I have in mind that the division clerk has a great deal of work to do in taking and writing up his orders, answering inquiries of attorneys on the telephone, or otherwise, and notifying them when their cases will be reached, and other matters that accommodate counsel, and count for efficiency in handling of the docket and business of the court.

VI.

MATTERS OF COURSE

In my judgment matters of course, defaults, noncontested divorce cases, alimony hearings and all such matters of course, should come up for hearing and disposition at 9:30 A. M., without any previous notice or setting of the same of record by the court, and heard before taking up the trial of cases. Such a practice saves the time of court and counsel, and "speeds up justice." Where such a practice prevails daily, it seldom, if ever, runs past 10:00 A. M., and as a rule not to exceed fifteen minutes.

VII.

UNNECESSARY ORDERS

Under the old fee system quite a number of unnecessary acts or orders were made for extra revenue for the clerk's office. In my opinion all such orders should be done away with, as they simply tend to make unnecessary work for the clerk's office—such orders as continuing all cases on the docket

from day to day, striking a case from the trial docket, except on request of an attorney, which nceessitates another notice and a re-setting of the case, instead of carrying the same on the docket and taking it up for trial when the parties are ready.

For instance, where a divorce case comes on for trial as noncontested, the custom of an attorney for one of the parties asking for an order withdrawing an answer, a cross bill or a complaint, before the case is set for trial as a noncontested case, serves no useful or legal purpose. Every such order requires four operations: first, a division clerk makes an entry on his pad; second, writes it up on his minute sheet; third, a clerk in the main office writes it in the registry of actions, and, fourth, a clerk types it in the permanent book.

If the issues are made up, or it is noncontested of record, and one of the parties does not desire to contest the case, the attorney for such party can so state in open court, and it can be set for trial and the case proceeds at once as a noncontested case, which legally adjudicates the matter for all purposes just as effectively as though the foregoing extra orders were asked and granted. There is no more legal reason for making those orders in a noncontested divorce case than there would be in any other case that comes on for trial before the court where a party does not wish to prosecute or defend, and so states for the record.

VIII.

SETTING OF CASES

All cases regularly noticed for trial, either to the court or jury, should be set on the first day of the term, unless special setting is made, and all other cases should stand on the docket as set for the first day, and be given special settings from time to time as requested to suit the convenience of both court and counsel.

The advantage of the foregoing system is that the clerk who keeps the docket has all of the cases before him, and in case some that were especially set are settled, or, for some reason, cannot be tried, many times can immediately get in touch with attorneys who can get ready for trial.

IX.

UNTRIED CASES STAND ON DOCKET

In my opinion, a case once regularly set on the trial docket should remain there, and not be stricken therefrom, except by request of counsel. If the case is not tried on the date set, as has been stated, it can be carried on the trial docket as originally set, until some time convenient to court and counsel, when it can be tried. The division clerk can usually conveniently arrange this matter over the 'phone, or otherwise, by agreement of counsel without coming to court in person. If the attorneys cannot agree, the matter can be regularly heard and decided by the court.

X.

AVOIDS DELAY

Where such system does not prevail it frequently happens that the court gets behind with its docket, notwithstanding some of the time it cannot find a case ready for trial, first, due to a case specially set and being at the last moment, just before trial, settled or dismissed, and, second, other cases set for a particular day cannot be called; whereas, some cases could have been taken up and tried or disposed of, if some of them had been left standing on the docket as set on the first day of the term, and counsel kept in touch with the clerk over the 'phone, thus enabling the court to keep up with the board and not get behind.

Experience shows that cases settled are many times not actually settled until they are reached on the docket and the court is ready to start the trial.

XI.

AT CHAMBERS

Sec. 472 of the Code, C. L. 1921, provides:

"Duty and powers of judge at chambers.—Sec. 29. The judges of courts of record shall, at all reasonable times, when not engaged in holding courts, transact such business at their chambers as may be done out of court. At chambers they may hear and dispose of all applications for orders and writs which are usually granted in the first instance upon ex parte application, and may, in their discretion, also hear applications to discharge such orders and writs."

You will note that this section provides that the "judges when not holding courts" may "transact such business as may be done out of court."

For the better administration of justice it follows, in the interest of public policy, that when a judge is "holding court," his judicial duties should be performed in open court, in the regular court room, open to the public, where the court reporter and clerk are in their places to take down and record the proceedings.

XII.

MAKING UP ISSUES

The greatest delay in the trial of cases occurs, in my opinion, in making up the issues. The filing of various motions to quash service of summons, to strike parts of complaint, answer or replication, and a motion to make them more specific and certain, and finally a demurrer to some or all of said pleadings takes much time and prolongs the reaching of the case for trial on the merits if the court sets such matters for hearing several weeks ahead on the docket after notice has been served and a setting asked for a day for hearing.

I do not in any way desire to discourage the filing of any or all of said motions or demurrers as the attorneys elect, but, in my opinion, they should all be set for hearing on the next hearing day after the filing of the notice, unless for some reason attorneys request a later date.

Experience shows that generally on calling the docket, several of such matters will be withdrawn before argument, others will be submitted without argument, and a number will have to be continued to accommodate counsel for one reason or another, with the result that not more than eight come up for actual hearing, and some of them not taking more than five or ten minutes of the time of the court. Unless this system prevails, frequently the docket gets blocked, and much of the time of the court is idle.

XIII.

EX PARTE RESTRAINING ORDERS

Divorce Cases

Sec. 5721, C. L. 1921, and Rule I of the Rules of the

District Court, define the office and powers of the presiding judge. Sec. 5 of the rules provides, among other things, "The presiding judge shall act on all matters before cases have been assigned."

In the May, 1932, issue of "Dicta" on page 190 there is an opinion by me as presiding judge on ex parte orders in divorce proceedings.

In the case of Sedgwick v. Sedgwick, 50 Colo. 164, the question was before the Supreme Court. Paragraph 1 of the syllabus states:

"1. INJUNCTION—PRELIMINARY—OBTAINED BY FALSE REPRESENTATIONS OR PRACTICE AS TO EMERGENCY.—Nothing in the provisions of the code requires the discontinuance of an action, on account of the wrongful procuring of a preliminary restraining order, unless the opposing party moves to have the case dismissed on said account."

The questions as to whether or not the code provisions on injunction, or as to whether the district court possesses inherent common-law power to issue restraining orders without notice and without bond, was not decided for the aforesaid reason.

On page 168 the court says:

"This is not to be construed as implying that the code provision on injunction is applicable to divorce actions. Whether the district court possesses inherent comon-law power to issue restraining orders in proper cases, in divorce actions, without notice and without bond, we express no opinion."

As presiding judge, before whom the applications for practically all of these drastic orders are heard, after reviewing the authorities, I decided that, as a matter of law, the court possesses no such arbitrary power, and that certain provisions of our code of civil procedure (Secs. 165, 167) concerning notice (406-407) and contempt (Sec. 365) of court do apply to divorce proceedings, and other sections of the code that are not in conflict with the statutes concerning divorce and alimony (Secs. 5593 to 5609, C. L. 1921, and amendments thereto). It should be borne in mind that these arbitrary orders are not asked in cases except where the husband and wife are actually living together at the time of the filing of the complaint for divorce and make the ex parte application without notice.

The last section of our civil code, 479, C. L. 1921, says:

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions, and all proceedings under it, shall be liberally construed, with a view to promote its object and assist the parties in obtaining justice."

From practical experience, and the records of the clerk's office, the way the custom works out in the courts is that the husband being summarily, without notice, barred from his own home by an ex parte order of the court, where he has been living with his wife and family, leaves the wife to take the divorce by default and the property by some settlement. A previous notice before the drastic order would have given the husband and wife an opportunity for reconciliation.

It is the unfair advantage that the practice of granting these ex parte orders without notice has upon the marriage relation and the orderly proceedings of the court that I stress this point.

It should be borne in mind that the interest of the complaining wife, as she sees it when applying ex parte, is not the only one to be considered in the granting of such ex parte orders, but the interest of the state and minor children. A case has never come to my knowledge where a husband was living in his home with his family, and she, ex parte, obtained one of these drastic orders, became reconciled.

The above fact is one reason why so many of them have been applied for in the past.

People ex rel. v. MacCabe, 18 Colo. 186.

XIV.

CASES NOT JUGGLED

The practice, that has sometimes prevailed in the past, of juggling cases from division to division and from judge to judge, either when assigned or by request of an attorney, or by dismissing without prejudice of a case and refiling the same, when it appears to the court that the object was to get that particular case before a particular judge, or to avoid a certain judge, for one reason or another, has been stopped by amendment of Rule II, requiring all cases to be assigned to divisions in open court, and by certain decisions and opinions

of record in certain cases where the question has been raised and passed upon by the court.

The reason for stopping that practice was that it was demoralizing to the legal profession and the administration of justice.

There is usually behind such action an ulterior motive to prevent justice.

Our judges are not timid, but have the courage of their convictions; and if any lawyer or his client has any charges to make or reasons why a certain judge should not try a case, let him face the facts, file his motion, supported by affidavit as evidence of his good faith, as was done in the case of People v. District Court, 84 Colo. 367.

I think I speak for all the judges of the District Court when I say that a loose practice on this question will not be tolerated in the future.

Colin A. Smith, formerly attorney for the Public Utilities Commission for Denver, Colorado, has entered private practice.

DATES AND SUBJECTS OF RADIO BROADCASTS PRESENTED BY THE AMERICAN BAR ASSOCIATION

FEB. 12 *The American Bar, Its Past Leaders and Its Present Aims*

CLARENCE E. MARTIN, President of the American Bar Association, introduced by

WILLIAM J. DONOVAN, former Assistant United States Attorney General

FEB. 19 *Training for the Bar*

ROSCOE POUND, Dean of the Harvard Law School

FEB. 26 *An Interview: A Young Man in Search of a Profession Asks Mr. Rogers, "Shall I Become a Lawyer?"*

JAMES GRAFTON ROGERS, Assistant Secretary of State

MARCH 5 *The Lawyer's Influence on Public Opinion*

JUDGE SAMUEL SEABURY, Counsel, New York City Investigation Committee

MARCH 12 *Pitfalls Along the Legal Education Road*

JOHN KIRKLAND CLARK, Chairman, Section of Legal Education and Admissions to the Bar of the American Bar Association