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THE LAW'S DELAY

By Bentley M. McMullin of the Denver Bar

AMONG the evils, none would willingly live to bear, but for the dread of something after death, Hamlet listed "the law's delay". Delays in justice caused the barons to wrest from King John at Runnymede the pledge "To none will we sell, to none will we deny, to none will we delay right or justice". The roots of interminable and endless litigation, exemplified in Bleak House's Jarndyce and Jarndyce, strangled property rights in this country as well as in Great Britain, until the pressure of reform brought about the English Judicature Act of 1873 and the earlier and contemporaneous American codes. Present day conditions in civil practice show that the courts are again out-distanced by society's speedy pace and that an acceleration of judicial civil machinery is again necessary.

That such acceleration can be achieved has been proven in the once notoriously dilatory criminal field. In recent years there has been such a continuous wringing of hands at the alleged eternal procrastination of American criminal justice, and such a hue and cry about the speed and certainty with which the English courts are said to function, that criminal charges have at length come, in Denver trial courts at least, to be promptly and speedily disposed of. One or two months, and sometimes less, is now here regarded as sufficient time in which to deprive a once free man of liberty and the pursuit of happiness and even of his right to life itself. With courts functioning so swiftly when dealing with the most vital of human rights, it is difficult to see why, in mere matters of property and commercial transactions, they should still creep painfully toward an obvious and simple goal. If a court can hang a man in thirty days, why need it take six months to reduce a simple promissory note to judgment?

That even a common action on a note can be made to cost the most diligent plaintiff more than six months precious time and endless hard work is a simple fact, familiar to every lawyer, ⁽¹⁾ and so is the further circumstance that the time consumed bears no relation whatever to the merits of defense, if any. In an energetic and vigorous system such delays in civil

procedure would be unthinkable; the purpose of litigation is not delay, nor formal perfection, nor genteel horse-play; it is the achievement of justice. Justice delayed ceases to be such. Courts must, therefore act promptly, directly, quickly, or they partially fail.

The effect of such failure is far from theoretical. The credits tied up in useless litigation are withdrawn from the resources of the community and their prompt return to the channels of trade, particularly in a period of credit stringency, is of the utmost importance. The amounts withdrawn being in the aggregate enormous, and varying directly with the length of their withdrawal, useless delay must cast a heavy burden upon commerce. The mere cost of prolonging litigation is itself considerable, and this additional cost must also be finally passed on to the public. The legal profession likewise bears the burden, for business men, knowing of the delays ahead of them in the courts, use legal proceedings only as a last and desperate resort when all else has failed, preferring to secure protection through credit associations, insurance, and the employment of lay agencies who thrive more because of their contrasting promptness than for any other reason, and who handle a vast amount and variety of legal business. The effect upon the legal profession needs no emphasis, and shows the necessity, not only to the community, but to the lawyers who attempt to serve it, of speeding up court proceedings wherever possible without disturbing the substantial rights of litigants.

It will probably be agreed that the principal causes of unnecessary delay in ordinary civil procedure are that motions and demurrers neither having nor supposed to have merit can be and are filed for purely dilatory purposes; that these motions and demurrers are not promptly disposed of when filed; that it is possible to compel a plaintiff to go thru the form of perfecting his pleadings and to prepare for trial where no defense at all exists; and that continuances are too frequently granted for wholly insufficient reasons. With these causes stated, certain definite remedies suggest themselves.

First, the summary disposition of motions. Instead of noticing, setting and final argument on weekly motion days, all of which requires from two to three weeks time, motions

should stand for argument without notice three days after filing at a daily morning court session, and should then be summarily heard and determined. They seldom go to the merits, are nearly always waived by pleading over, and in exceptional cases, where a real question arises, further time for briefs and decision can be reserved by the court.

Second, the imposition of costs for frivolous motions and demurrers. Litigants causing needless delay by dilatory pleadings would do so less frequently if the penalty were the payment of double or triple costs, at the time.

Third, the awarding of attorneys fees as costs. One reason for the reputed celerity of English justice lies in the fact that a successful litigant recovers his attorney's fees. There are few litigants who wish to purchase delay at its real cost to their opponent.

Fourth, the entry of summary judgments in commercial matters upon proof of lack of meritorious defense. If at the time of filing a complaint based on a note, account, or other commercial transactions, the plaintiff sets forth that the defendant has no real defense and if the defendant fails to show by counter affidavit that such defense exists, the plaintiff should not be compelled to get the case at issue, prepare his proof and await trial; judgment can and should be then entered summarily. This or a similar method is extensively used, at this date, in Connecticut, Massachusetts and New York, and can be readily adopted to use elsewhere.

Fifth, continuances should be allowed only upon legal grounds. Courtesy to counsel in matters of continuances is misguided; what both parties want and need is a termination of the litigation.

These simple reforms, requiring but little legislation to effectuate them, are respectfully submitted as ways of aiding our courts to achieve their maximum efficiency and usefulness to the community in general and to business in particular.

(1) The following table illustrates the time that may be required to prosecute to judgment an ordinary civil action in the Denver District Court, assuming the plaintiff to act as promptly as possible and the defendant to exert every possible means of delaying final judgment. This will serve to illustrate that six months is a conserva-

tive estimate of the time required. It will probably be agreed that even the ten months shown here is frequently exceeded, for one cause or another.

Days

- 1 Complaint filed.
- 20 Motion for Cost Bond filed.
- 21 Notice to set Motion for Cost Bond for hearing, served.
- 22 Motion for Cost Bond set for hearing.
- 32 Motion for Cost Bond granted; bond filed; time to plead allowed.
- 42 Motions to strike, to make more specific, or for Bill of Particulars filed.
- 43 Notice to set motion to strike, etc., served.
- 44 Motion to strike, etc., set for hearing.
- 54 Motion to strike, etc., overruled; time to demur allowed.
- 64 Demurrer filed.
- 65 Notice to set demurrer served.
- 66 Demurrer set for hearing.
- 76 Demurrer overruled; time to answer allowed.
- 86 Answer filed.
- 87 Reply filed.
- 97 Motion to strike parts of reply filed.
- 98 Notice to set motion to strike parts of Reply served.
- 99 Motion to strike parts of reply set for hearing.
- 109 Motion to strike parts of reply overruled.
- 119 Notice to set case for trial, jury demanded, served.
- 154 Case set for trial.
- 154 Case continued because counsel engaged in another trial.
- 164 Case continued because of illness of witness.
- 174 Case continued because of absence of another witness.
- 204 Case reached for trial.
- 205 Trial completed.
- 225 Motion for new trial.
- 226 Notice to set motion for new trial for hearing served.
- 227 Motion for new trial set for hearing.
- 247 Hearing on motion for new trial.
- 257 Motion for new trial overruled; 30 days stay of execution.
- 287 Expiration stay of execution.
- 288 Execution issues.
- 300 Miscellaneous delays unaccounted for.

The fundamental law of our land is a document that should be studied not only for its principles but for the great genius that it displayed in encompassing the organic law of a great nation in so small a space and without waste of words.—*John J. Sullivan.*

The design and object of the law is to ascertain what is just, honorable and expedient; and when it is discovered it is proclaimed as a general ordinance equal and impartial to all.—*Richard Olney.*

The lawyer's great opportunity is to be useful, to teach the principles of our form of government, to instill respect for law, to show why the law is, and to spread good citizenship.—*John G. Sargent.*