



3-1-1932

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Recommended Citation

William M. Cain, *Delay in the Administration of Justice*, 7 Notre Dame L. Rev. 284 (1932).

Available at: <http://scholarship.law.nd.edu/ndlr/vol7/iss3/2>

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DELAY IN THE ADMINISTRATION OF JUSTICE*

Over 700 years ago, the Great Charter of England classified "delay" in the administration of justice in the same category with its "sale" or outright "denial." The Constitution of the State of Indiana provides that "Justice shall be administered freely and without purchase; completely and without denial; *speedily and without delay.*" The Constitutions of other states of the Union contain similar provisions and every lawyer and every judge makes oath that he will support the constitution. All this is well known to the Bench and Bar, but to the weary litigant who has waited four, five or six years for final decision of his lawsuit, it may be an item of startling news. Happily, in America the "sale" of justice is practically unknown, but delay in its administration is so flagrant and widespread, in many states, as to bring Bench and Bar into disrepute. These remarks in no sense apply to those states where justice is expeditiously administered,—and what I mean by such expedition is that no more than one year shall elapse from the time a suit is commenced until its final decision in the state court of last resort. In many states, it has been demonstrated that this period of one year is amply sufficient.

An amazing feature of this evil of delay is that the people for whose benefit and at whose expense the judicial establishment is maintained have tolerated it with a patience that is almost pathetic. Possibly, their attention has been diverted from its existence by the spectacle of some sensational criminal case being tried with reasonable dispatch, for the knowledge of the public of functioning of the courts

* This address was broadcast over radio station WFAM on February 22, 1932, by Professor William M. Cain of the University of Notre Dame, College of Law.

is, unfortunately, confined to criminal cases. It is high time that the people generally should know of inexcusable delay in the disposition of civil cases, so that they may effectively co-operate with the legal profession in the elimination of this reproach. It is a joint responsibility and a joint duty.

Let us now take a brief survey of the time consumed in the trial of civil cases in courts of general jurisdiction and their subsequent review in appellate courts, excluding from consideration petty civil and criminal cases triable in courts of inferior jurisdiction. But, before doing this, let me say that I know nothing of how any individual judge in this or the immediately surrounding states conducts his court or how any particular lawyer manages his business. I know only of general conditions. It follows that there can be nothing personal in what I shall say on this subject. What, then, is the general situation?

It is conservative to say that, in most states, the trial, review and final decision in the court of last resort of an important civil case occupies from three to five years' time. We say nothing here of those numerous instances in which the judgment of the trial court is reversed on appeal, and the same process has to be gone over again. Plainly, this is inexcusable. It means that nearly one-seventh of a man's active business life is consumed in the trial of a single cause. No one will contend that such a length of time was contemplated by the framers of the Indiana Constitution when they said that justice should be administered "speedily and without delay," even in those ox-team days of 1851 when the constitution was adopted. Nor does Indiana stand alone. Unfortunately, it has the company of many of its sister states in this unsavory business.

What now are the practical *results* of such indefensible delay? One effect is that it partially paralyzes the business activities of the litigants. Pending final decision of a civil

case of major importance, they do not know whether to expand or to retrench, whether to hoard or to invest. Another result is a lessening of respect for the courts, and in popular estimation "respect for the law" coincides with respect for those who administer it. In any and every view of it, the results are detrimental, sometimes even calamitous. In many cases, the wrongdoer gains some advantage, for delay in litigation is the unfailing ally of the wrongdoer and the criminal.

Let us now consider the *causes* of this intolerable delay. What are they? In discussing this phase of the matter, every effort will be made to avoid the use of technical language; and, also, we will first consider the causes which exist in the trial courts as distinguished from the appellate courts. These causes may safely be stated as follows:

1. Excessive professional courtesy existing among the members of the bar, and complacently tolerated by the trial court judges. Lawyer A. asks his adversary that the case be continued over the term at which it should be tried, and Lawyer B., fearful of reprisals when he himself is similarly circumstanced, accedes to the request; and the trial court seeing that neither counsel is anxious for trial, continues the case over the term, and three or four months time is lost.

2. Next in order of importance of those processes which make for delay in the trial courts must be mentioned *dilatory pleas* directed to the major pleadings of fact in a case. Here it might be well to explain for the benefit of laymen that the principal "pleadings" in a lawsuit are not the arguments of counsel at all, but are the written allegations of fact constituting the plaintiff's cause of action on the one hand, and the statement of facts constituting the defendant's ground of defense on the other. Dilatory pleas, usually called "motions" or "demurrers," might be defined as written objections to these major pleadings of fact on the ground of their real or imagined insufficiency. Such pleas are argued and

submitted to the court, who often takes them "under advisement." Decision upon them,—save in those rare instances where the party interposing them "refuses to further plead,"—does not mean a decision of the controversy on its merits at all, for if the trial judge holds the pleading assailed to be defective, leave is asked and given to amend it, and, if the pleading is held to be good, the one making fruitless objection to it, is given leave to answer. Very many of such dilatory pleas are without substantial merit, and are filed for the sole purpose of preventing a default, or delaying pleading to the real merits of the case. In such cases, it is a sham battle with no fatalities. Excessive time is often allowed by the trial court in which to amend a major pleading, or in which to answer. When two days is amply sufficient, often two weeks is allowed, and the case goes over to another term. In Nebraska, "thirty days" was the customary time allowed for this purpose, until the trial judges abolished the absurdity. In Florida a session of court is held a couple of weeks before the opening of a new term at which all dilatory pleas are disposed of, and the issues of fact are made up ready for the trial. It is, of course, true that the parties to the suit have the legal right to file these dilatory pleas and to be heard upon them, but, if they were disposed of expeditiously, not only would trial on the real merits be hastened but the number filed would be greatly decreased. Effective remedy for this sort of delay is wholly in the hands of the judges of the trial courts, and, if their attitude toward such pleas as were obviously without merit was known to be definitely hostile, few would be interposed. If the number of trial court judges is inadequate, more should be speedily provided, since the expeditious administration of justice is of first importance to the State.

When we come to inquire into the causes for delay in the state courts of last resort,—usually called "Supreme Courts,"—we find such causes to be entirely different from those

existing in the trial courts. Briefly, though requiring explanation, the causes which contribute to delay in supreme courts may be summarized as follows:

1. Insufficient number of judges of such courts.
2. Failure of the judges thereof to sit in divisions.
3. Existence of intermediate courts of appeal,—half way between the trial courts and the supreme courts,—which, on the whole, merely prolong the time required for final decision of the cause.
4. Excessive periods of time, provided either by statute or by rule of court, for perfecting appeals, and filing briefs and petitions for rehearing.

These will be taken up in order.

In most states, the number of judges of their supreme courts is not sufficient for the expeditious dispatch of business before them. Often, unfortunately, that number is fixed by the constitutions of such states adopted when there was about one-tenth of the volume of litigation that there is at present, and amendment to those constitutions in this matter is practically impossible. Appalled at the magnitude of the task of securing such an amendment on account of lack of popular support, the members of the bar simply make the best of a bad situation and the evil remains unabated.

But increase in the number of judges alone will not expedite the business of such courts, unless the judges, either by constitutional or statutory enactment or by simple rule of court, sit in *divisions*. This point is of vital importance, for it is natural to assume that doubling the number of judges will double the number of decisions rendered. Actual experience, however, has demonstrated that such is not the fact, and that, unless the judges sit in divisions,—preferably of three judges each,—there will be no substantial increase in output of decisions. Moreover, unless these judges sit in divisions, one of two results inevitably follows, either a

longer time is required to reach agreement upon the decision to be made, or the practice of what might be called "judicial courtesy" prevails and the judges approve each others opinions as a matter of course. In such case, while the litigant *appears* to be receiving the considered judgment of the entire court, in *reality* he is getting the deliberate judgment of a single member of the court.

In those states in which the number of the judges of the supreme court is fixed by their constitutions, the only practicable solution of the difficulty is the creation of Supreme Court Commissions of not more than three judges each, whose opinions when examined, approved and adopted by the Supreme Court itself are given constitutional validity. Such commissions may be created by the legislatures, without amendment to the constitution. Of course, the stickler for constitutional symmetry will view with alarm the creation of such an extra-constitutional judicial body, but a conclusive answer to such objection is that the system works well in the many states in which it has been adopted. This device has been frequently resorted to in Nebraska, with the direct result that its Supreme Court finally disposes of all appeals to it within four to five months after they have been filed. The constitution of the state of Washington wisely provides that the legislature shall have power to increase the number of judges of its Supreme Court, but, with equal wisdom, it, also, provides that such judges must sit in *divisions*. The result is that final decision of a cause in that state by its Supreme Court is made within eight or nine months after the cause has been commenced in the trial court. The experience of other states might be cited.

Investigation will disclose that the creation of intermediate courts of appeal is the most ineffective method that can possibly be adopted to relieve the congestion of judicial business. *Theoretically*, the decisions of such courts in many cases may be made final and this gives the idea a

superficial plausibility, but the defeated litigant in such intermediate appellate courts often, if not usually, makes application to be heard in the Supreme Court, and, as that question can be decided only by the Supreme Court, more time is consumed. Wherever intermediate appellate courts exist, they should be abolished, and the judges thereof be made members of supreme court commissions to be created simultaneously. The late Chief Justice Taft was right when he declared that a single trial and a single review of that trial by a higher court was best and all that any litigant had a right to expect.

It is astonishing to note that, in these day of stenographers and typewriters and rapid transit, the periods of time allowed, in many states for taking appeals and doing other acts in the course of litigation, correspond to the days of the ox-team, the pony express and the quill pen. In a few states, the defeated litigant in the trial court has one year in which to take an appeal; in many states he has six months. The mere statement of this absurdity is enough to condemn it. Not only does such practice keep the successful party in doubt as to what course to pursue, but it contributes to the general habit of procrastination. Three months at most is amply sufficient in which to appeal from an adverse judgment of a court of general jurisdiction. Legislatures have power to remedy this evil.

Let there be no misunderstanding of these remarks. When the cause comes on for trial or review upon its real merits, it must be given every consideration. All competent evidence, all arguments of counsel should be fully heard and seriously considered, and *deliberate* judgment rendered; but the preliminary skirmishing for unimportant tactical advantage should be made brief by judicial compulsion.

Delay in the administration of *criminal* justice has become a real menace to society. First of all, it chills the ardor of the police. Then it gives the criminal the oppor-

tunity not only to bribe and intimidate the witnesses against him, but, by the subsidence of popular interest, he may apply political pressure upon the law enforcement officials. If the apprehended criminal can but secure delay, he knows that he has a chance to defeat the law.

Finally, it is to be said that the substantive law of the United States is justly entitled to universal respect, but, in most states of the Union, the procedural practice needs to be made much more expeditious. This can be brought about by earnest co-operation of Bench, Bar and People, and then "the law" will be what Chancellor Kent, a century ago, said it was,—“the abiding glory of the American people.”