Depositions v. Trials
Going Hence II: The Aftermath

By Judge Jerry Buchmeyer

The Going Hence Without Day “et cetera” (January 1992) resulted in a Veritable Flood: 17 chuckles, 23 guffaws, 2 1/2 thigh-slappers, and a new generation of explanations of The True Meaning (If Any) of the stock general denial ending: “go hence without day.”

The Typo Theory: “...without delay”
The “typo theory” — that an early-day legal secretary “caused the whole thing” with a Classic Typographical Error — was first proposed to me in 1982 by Lyman Hughes of Dallas (Carrington, Coleman). His explanation:

...Since I have become a partner, I have had several occasions to explain to associates the meaning of the phrase “go hence without day.” My explanation is that the phrase is an obvious typographical error which has been perpetuated through the use of form books and the common practice of associates adopting without change the phraseology used in the last pleading prepared by the partner to whom the associate reports.

The phrase originally used and written prior to the perpetuation of the typographical error was “go hence without delay.” For fear of suffering default or reprimand (or even disciplinary action) I always used the phrase as mutated by the

The Anti-Verbiage Assumption
In 1983, Millie Kensinger of Dallas — although not an attorney, I have worked with and for them long enough to have absorbed some of the more aesthetic bombast — submitted this poetic postulation:

The letter from Bryan J. McGinnis emphasizes the “precise, poetic fruits of our vast labors,” and points out that simplicity is only achieved with great effort. Such precision, such simplicity should be applauded — and, of course, emulated. It surely was in the throes of such inspiration that the phrase “go hence without day” was conceived, cutting verbiage to the bare bone, omitting the obvious and unnecessary phraseology; so that rather than reading “go hence without the passage of another day,” the lovely purity of the simple wording “go hence without day” stands as a beacon highlighting the remainder of the similarly structured clear and precise language of the pleading.

Professorial Possibilities
In 1983, Prof. Colin K. Kaufman (then at St. Mary’s School of Law) made his contribution to the Going Hence Quest:

[Prof. Kaufman’s letter] begins (rather directly for a law professor, I thought) with these definitions from his first edition of Black’s Law Dictionary (1891):

“day” as used in pleadings and practice, was short for “day in bank” (from the Latin “dies en banco”) — and “days in bank,” according to 3 Blackstone’s Commentaries 277, means “certain stated days in term appointed for the appearance of parties, the return of process, etc., originally peculiar to the court of the common bench, or bench, (bank) as it was anciently called.”

(For the rest of Prof. Kaufman’s fascinating and witty — analysis, see the October 1983 “et cetera.”)

Prof. Rufus McKnight, who also contributed in 1983, sent a note in Jan. 1992 — see Black’s Law Dictionary: “without day” is the Anglicized version of “sine die” — with these definitions:

Without day — A term used to signify that an adjournment or continuance is indefinite or final or that no subsequent time is fixed for another meeting, or for further proceedings. See Sine Die.

Sine Die — Without day; without assigning a day for a further meeting or hearing. Hence, a final adjournment; final dismissal of a cause.

...and with this Query: “If the legislature adjourns ‘sine die’ — without a day to come
back — shouldn’t it have the same rights as an ordinary defendant, not to ever come back?"

In his January 1992 letter, Bruce K. Packard of Dallas (Locke Purnell) submits “the lowest form of hearsay — recollections from law school:"

Prof. Daniel Poolby, visiting the University of Michigan Law School in 1982, explained that the phrase is a remnant from English common law pleading. In the mid-18th century, English judges rode from town to town on their horse holding court proceedings. They were known as “circuit riders.” Court proceedings were scheduled in advance and were required to be completed in one day, so that the court could keep its schedule. The term “go hence, without day,” meant the claim was not meritorious and the plaintiff should not have his one day in court.

The Troll Hypothesis
In May 1982, Steven S. Maris of Dallas (Fulbright & Jaworski) first revealed his possible breakthrough on the Going Hence Question:

My favorite theory (primarily because it was espoused by myself) is that the phrase is not properly written “go hence without day,” but “go hence without Day.” Day, you see, is a small gnome-like creature with unruly orange hair and a somewhat frog-like body that, from time Medieval, has lurked about the basement of the Dallas County Courthouse. In times past, if a defendant were somehow found to have committed the atrocious acts alleged by the plaintiff, part of his penalty, in addition to recompense of plaintiff’s damages, was that the ne’er-do-well defendant must take, feed, and maintain Day until some other defendant was found guilty of acts of an equally heinous nature, in which event the subsequent wrong-doer must take over the maintenance of Day.

Then, in January 1992, Gregory R. Jacobs of Dallas (who is with the FDIC) offered a controversial refinement of the Maris Theorem:

It is indeed incredible that columns of “et cetera” should remain in my memory when More Important Things have been forgotten. Your recent [Going Hence Without Day] column is specifically one of those memories that will not go away.

In the case of “Day” however, I believe that it is the fantastic dread into which you put me by the explanation that “Day” is a troll, or similar gnome, who resides in the basement of the courthouse and with whom no attorney wants to leave? No plaintiff or defendant wants to leave with Day either? Further, for years I avoided going down into the bowels of the Dallas County Courthouse, fearful of encountering Day and being dismembered or, worse, having to take him home. Finally, I did happen to have to make that long, lonely, and very gloomy journey, and I encountered Mr. Day. He turned out to be a likable chap, who did not ever want to go home with an attorney because the very thought of that terrified him completely. He did allow, however, that he had a cousin, also named Day, residing in the basement of the federal courthouse. This particular Day is, apparently, a rather loathsome fellow and would probably love to go hence with each and ever, all and singular, the lawyers, plaintiffs, defendants, and other parties in interest who happen to frequent the federal courthouse. Federal Day does have a preference, however, for savings and loan executives and federal judges. Just thought that I would let you know.

The Final Word...
...may well be the entire letter I received in January 1992 from Kay Fulgham of Fort Worth:

I always thought “go hence without day” meant GET OUT OF TOWN BEFORE SUNDOWN!

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Which one is correct? Go hence without delay...without pay...without the passage of another day...State Court Day or Federal Day...or Get Out of Town Before Sundown Day? Who really knows? So, one thing is perfectly clear: it’s time for State Bar President Bob Dunn to meet this challenge — and appoint the “Going Hence” Task Force, without delay. Or without day. Or whatever.

2. Portions of this column are reprinted from the September 1983 and October 1983 “et cetera” in the Texas Bar Journal.
3. Lyman Hughes has, since a Truly Unfortunate Incident in the state courts when his very first case was Called to Trial, limited his practice “to federal district courts and above.”
4. Donald Fulton’s “Chicago Conjecture:” In spite of the logic of the “go hence without delay” analysis, it is also possible that some old-time Chicago lawyer, after proofreading a secretary’s typed answer saying “hence with his costs,” announced to her that it should read “hence with his costs, without da aye” (ala “Da Bears”). This is the so-called northern or “Ditka” rule as to the derivation and meaning of the phrase.

5. The word “then” is used out of an Abundance of Caution, because the January 1992 Going Hence reprint placed Frank Elliot at the Southwestern Legal Foundation. Frank, of course, is dean of the Dallas-Fort Worth Law School.

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