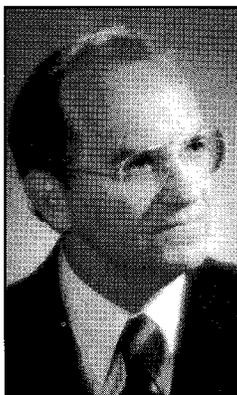


Going Hence Without Day

By Jerry Buchmeyer
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The first moment of Sheer Panic I experienced in practicing law¹ happened without warning.

I was working on the most important pleading I would ever prepare—the General Denial in My Very First Case—cautiously using Stayton's Texas Forms for assistance. After some initial difficulty,² the deceptively simple (or simply deceptive) denial paragraph flowed easily:

“Defendant denies each and every, all and singular, the allegations of the plaintiff's petition and demands strict proof thereof.”

But then, when I turned to the prayer for relief, there it was! A **blank!!** A truly awesome, even malicious blank: “and that _____ go hence without day.” And, Stayton left me without a hint as to what, or which, or who should be inserted.

Should I pray for the plaintiff to go hence without day (that seemed logical and it would certainly show the rascal for bringing such a spurious lawsuit). Or, should I demand that **the defendant** go hence without day (that seemed right, too, since My Client shouldn't even be bothered by such baseless claims). And, **what was I asking, what did it mean:** Go Hence Without Day?³ My tremulous choice, “that defendant go hence without day,” was later vindicated when Judge Richburg dismissed the case after the plaintiff failed to appear for trial.

But the concerns still lingered until, finally, **Frank Elliott**⁴ supplied a possible answer to the Going Hence Question—in the form of a letter from **Bryan J. McGinnis**,⁵ a Beaumont attorney. McGinnis gives a classic legal analysis of a pleading filed “after extensive legal research” in a suit referred to McGinnis by one of his former law school professors. The letter begins with an explanation:

defendant denies

“You will note that we began by saying ‘defendant denies.’ We were somewhat at a loss as to how to begin. However, after a discussion with Mr. Drayer this point became clear. He said—and this is significant—that there was no **truth** to the allegations. It was just a simple step of logic to ask him the important question—‘It is a fact, then, that you **deny** the allegations.’ He caught the point immediately—sharp fellow—and said, ‘Yes, yes, that is right. I deny the allegations.’ Rather clever, don't you think?”

each and every

“Of course, we then were faced with the rather hard question of what he should deny.

We have found, in our experience, that it is best in these cases not merely to deny an abstract, but to deny something. My associates and I decided that it would be best to deny each allegation. One of our younger members, who has had extensive experience in this area, then brought up the point that although this would be well, in order that there could be no misunderstanding, we should also perhaps deny **every** allegation. After extensive discussions and exhaustive briefing, we decided that this perhaps was best, so this explains the wording ‘each and every’ in the answer.”

all and singular

“Now, one might think that this could be the end of the matter. We do not wish to appear smug, but may I say, this is where the men are separated from the boys in this profession. To further clarify our position, we decided—a master stroke—to also deny ‘all’ of the allegations. Of course, we have now gone from the specific to the general. As aforementioned, our briefing and experience indicated that we should deny some specific thing. Therefore, we added ‘**singular**.’ The poetry of it is overpowering—‘each and every, all and singular’—and the precise simplicity refreshing.”

the allegations . . . and demands strict proof thereof

“By this time, we had forgotten what it was we were denying. After an extensive file review and further briefing, we determined that we were denying the allegations. But, the question arose, what allegations? Again, one cannot be too specific in these matters and you will note that we have tied it down to the allegations in the Plaintiff's Petition contained. At this point we had worked ourselves into such a frenzy at the apparent injustice of this cause, and the persecution which our client was being forced to suffer, that we decided to let them know, by God, exactly where we stood, and so we told them ‘**we demand strict proof thereof**.’ We feel that although this required a great deal of thought and investigation, such was worth it because such clearly expresses exactly where we stand. Doesn't such?”

the prayer for relief

“But how to conclude? The precise, poetic fruits of our vast labors—simplicity is only achieved with great effort—must be highlighted. Shall we ask the court to protect the innocence of our persecuted client? No, much

too mundane. With tears of righteous wrath rising in our eyes at the attempted perpetration of this gross injustice, turning to tears of exuberation upon realizing that all of the great machinery of justice was at the disposal of our cause, however small and insignificant might be our client, we found our answer. We would not merely ask redress from the justice court, however marvelous and august that institution might be. We would not merely petition the State to redress our grievance. We would lay our case at the feet of liberty. Our client would put himself **upon the country!** And, of course, we felt it necessary to ask the court, premises considered, to enter judgment for our client, because what else might the court **consider** save and except the **premises.**"

going hence without day

"And, of course, should we prevail, it would be necessary for our client to go somewhere, for one cannot stand forever cluttering up the justice court. And where to go? Where else, but **hence.** And it has been our experience that it is most unjust that one go hence empty handed. Therefore, you will note that our client go hence **with his costs.**

"I must admit to one curious aspect of what, I am sure you will admit, is a masterpiece of pleading arrived at after long hours of briefing and discussion by our several partners and associates, and that is the phrase at the end of the pleading 'without day.' I must admit, rather shamefacedly, that I don't really understand this as incongruous as this may seem considering the beautiful logic of the balance of the answer and the apparent

labor that went into its preparation. However, an explanation of how it happens to be there, may partially explain this dilemma.

"When we held our final conference of all the partners and associates, following our several days of briefing concerning the preparation of the answer, to arrive at the final wording of our pleading, and when we arrived at the end, after having decided on the precise wording after much deliberation and discussion, we felt that something should be added after the word 'cost,' but were at loose ends as to exactly what would best serve our purposes at that point. When we were all to the point of exhaustion with the matter, T. Fortesque Clemmons, one of our more brilliant young associates, endowed, however, with an irritating streak of irony, rose and said that it was simple. We had said that he was to go hence with his costs, and certainly, balance the pros, he should also go **without** something. Therefore, we could say that he should go **without day.** Brilliant!, we all agreed.

"As we were leaving the conference, however, Forgous Clampton asked me privately 'What day was T. Fort talking about — Monday, Tuesday, Wednesday?' I said, 'I don't know, Forg, but I don't think he had reference to days in that sense. I think he meant persons, like Doris Day, Lorraine Day, having a significance of going it alone.' So, to be succinct, I cannot explain the significance of **without day,** but T. Fortesque Clemmons being as brilliant as he is, I am certain that whatever the reason is, it is a brilliant one."

Wherefore, premises and at least one pos-

sible answer considered, this **et cetera** column shall, of course, Go Hence Without Day.

1. Which according to Usually Reliable Sources — i.e., **the Belo Tuesday Night Irregulars** (who "meet," weekly or otherwise, after work in the bar at the Dallas Bar Headquarters) — is still being experienced by many fledgling attorneys.
2. Should the answer begin "**Now Comes** the defendant" or "**Comes Now** the defendant"? I never resolved this issue satisfactorily and it has continued to plague me for the rest of my legal career.
3. Any thoughts I had of just deleting the "Going Hence" phrase were quickly discarded; for all I knew, that would make the General Denial fatally defective — and would result not only in a default judgment against my client, but also in a severe reprimand for Wasting the Court's Time ("Counsel, what do you mean by not praying for someone to go hence without day?"). Disciplinary action was even a possibility.
4. **Frank Elliott** is now president of The Southwestern Legal Foundation; he taught for years at the University of Texas School of Law, and was dean of Texas Tech Law School.
5. The letter has been reprinted, with some editing, in 9 West's Texas Forms — Civil Trial and Appellate Practice at Section 5.41.
6. Any other explanations, plausible or otherwise, should be submitted to footnote one.

More et cetera

Jerry Buchmeyer is a federal district judge in Dallas. If you have a contribution to the et cetera column, send it to Judge Buchmeyer, U.S. District Court, Northern District of Texas, Dallas 75242

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