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Salute

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THIS ISSUE OF THE SANTA CLARA LAWYER
IS DEDICATED TO

MARSHALL F. McCOMB

Wise in law and human nature; discerning, steadfast, imperturbable—as flexible as tempered steel but not more so—his undeviating purpose is not to make law, but to actualize justice under law, by making it certain and prompt and evenhanded.

The Santa Clara Lawyer is proud

to salute

the Man, his Ideal and his Achievement.

A SALUTE TO JUSTICE MARSHALL F. McCOMB

JUSTICE ACTUALIZED

B. Rey Schauer†

Thirty-two years ago Mr. Justice Marshall F. McComb, then a young superior court judge in Los Angeles, suddenly found himself the leading character in a story entitled "Justice Cracks the Whip," featured by a national magazine published in New York. Rare executive ability and tremendous effort had earned him the role. The title and story were by Jerome Beatty for the American Magazine, June 1934 (Vol. CXVII, No. 6, pp. 72, 73, 129-132). The news item heralded a startling achievement in the cause of justice: The largest trial court in the United States was adjudging cases within 30 days after the parties asked for trial. Mr. Beatty gave this account[1] of justice actualized, unemasculated by delay, and of how it was accomplished:

"Self-satisfied citizens of New York, Boston, Philadelphia, Detroit, Chicago, and other cities may poke fun at the Los Angeles climate, the wild women of Hollywood, and the earthquakes, but let these citizens try to get their rights in a court of law in their own town and they'll all wish they were native sons in the City of the Angels.

"For Los Angeles, city and county, has built a civil court system which delivers quick justice, a system founded upon the revolutionary idea that courts were devised for the people, not for lazy judges and dilatory lawyers. In Los Angeles cases are usually heard within 30 days after a motion is made to set the case for trial.

"New York and Brooklyn are from 2 to 4 years behind. In Boston, 59,500 cases are awaiting trial, and if not another one were filed the judges would need 4 years to clean up the docket. In Philadelphia the courts are trying some cases that were filed 6 to 8 years ago, although most of them get to trial in from 9 months to 1½ years.

"St. Louis is 2½ years behind. It takes 17 months to get a jury trial in Cleveland and 12 months or more in such cities as

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[1] Abbreviated for the purposes of this presentation.

Chicago, San Francisco, Atlanta, Pittsburgh, Miami, and Denver. Indeed, legal delays are not confined to any one city, but are general over the United States. Rare indeed are the large cities in which the average civil case reaches a judge in less than a year.

. . . . . .

"In most states the laws force criminals to quick trials but the state is unconcerned regarding delays in civil suits that cause untold suffering to you and me and the laborer and the shop girl whenever we seek justice from a defendant who doesn't want to give it to us.

. . . . . .

"In February, 1931, the 38 civil judges of the Los Angeles Superior Court were 4 years and 3 months behind in their work. Today, if there is real need for hurry, lawyers can take their witnesses to court and get a trial under way this afternoon. The average case waits 30 days. Quicker trials could be had, but Los Angeles judges have learned that it takes about 4 weeks for litigants to cool off and get set, so that justice may be done to both sides.

"This was brought about without any new laws. Young men, lawyers and judges, just decided to jump in and clean the stables voluntarily.

"The method was simplicity itself. Urged by a roused bar association, the judges selected Marshall F. McComb, one of their number, and voluntarily gave him the powers of a czar to cut red tape and set their houses in order. No new laws were necessary. Under the Constitution of the State of California, the presiding judge of the Superior Court had authority 'to distribute the business of the court among the judges and prescribe the order of business.'

". . . Judge McComb began to operate under that authority, which had been in the Constitution since 1879. He spent a few industrious weeks in consulting lawyers and judges, in studying systems, good and bad, that had been tried in other cities.

"He concluded that the very best way to catch up when you're behind is to roll up your sleeves and pitch in. When he took charge, the judges were trying an average of 9½ cases each per month. Last year they had increased that average by 37%.

"Not just any judge could have brought about such reforms. It took a real executive, who sniffed at tradition and legal red tape and saw that his rules were obeyed.

. . . . . .

"I saw the system work in Los Angeles, just as I have seen New York courts lumbering along, with lawyers and judges indifferent to the suffering of litigants who, year after year, wait, wait, wait for a court to give them their rights.

"Taking Los Angeles cases at random:

"An insurance company refused to pay Mrs. Kate Ohowell $3,000 which she believed was due her upon the death of her husband. She was living in poverty, ill, and without any means of support. In Philadelphia, unable to wait a year or more for justice, she probably would have been forced to settle for what the insurance company wanted to pay. In Los Angeles, 44 days after her attorney asked for trial, a jury awarded her the $3,000.

"Otto K. Isensee was a school-teacher whose savings were invested in a small grocery business. He owed a food concern some money, and gave them a post-dated check which, he said, they promised to hold until he had money in the bank. They put the check through immediately, and the bank refused payment.

"The food company had Isensee arrested on a charge of issuing a check with intent to defraud, and he was in jail seven days before he could obtain bail. As a result, he asserted, he was discharged by the Board of Education of Los Angeles, his small business failed, his friends quit him, and he couldn't get work.

"Mr. Isensee sued for malicious prosecution. In Chicago or Cleveland it would have taken him so many months to vindicate himself that his life would have been ruined before a court could get around to his case.

"On January 21st he asked for trial. Exactly a month later a jury began to hear his case, and after two days awarded him a judgment of $18,000.

"I. Wells Spencer sued to recover damages because of the death of his 20-year-old son in an automobile accident. The father was crippled, and the entire family, including the mother and three children, were supported by the boy, who made $6 a day as a mechanic. It took 2½ months to get the case to trial, because the attorney for the defendant was engaged in trying another case. The jury returned a verdict for $5,000.

"Two and one-half months is considered slow justice in Los Angeles. Two and one-half years is fast work in New York.

. . . . . .

"Judge McComb has made enemies among lawyers who would like to go back to the good old days they could stall a case for

months. A few have lost cases that they might have won had they had more time to prepare, but almost invariably it has been shown that the lawyer who isn't ready when he is forced to trial has only himself to blame.

" 'I believe that any city in the United States can do what we have done,' Judge McComb told me. 'No new laws are needed. It just takes real cooperation between lawyers and judges and an enthusiastic effort for reform.'

"It takes, too, a hard-boiled young man who will not be swayed by politics or tradition, and who will sit on the job as a representative of the public."

Today, as a justice of the Supreme Court of California, Justice McComb is still "a hard-boiled young [for his years] man who will not be swayed by politics or tradition" and who still does "sit on the job as a representative of the public."

Mr. Beatty's report demonstrates that during 1931-1934 Judge McComb believed in—and given cooperation accomplished—justice *then* for the injured party rather than for the injured one's heirs in a distant future. This was a momentous contribution to justice for all persons. Search of court records for the 32 years which have elapsed since 1934 reveals no reason to believe that the Justice has changed his view that timeliness is an essential element of justice. And in the field of criminal law it appears from his perduring insistence upon expedition of finality of judgment that here too he believes that delay will sap the law of its efficacy in part if not in whole. Relativity is not confined to things of science; it permeates the social order as well.

The primary objective of all criminal statutes, Justice McComb urges, is protection of *all* law-abiding persons against all criminally lawless acts. Punishment of any guilty individual is not for revenge; it is not to inflict suffering, as such, but is by way of demonstration and example to deter not only the guilty person from further crimes but all other persons who otherwise might be tempted to follow the criminal course. Justice McComb by insisting upon strictness with the guilty defendant is not being hardhearted. By contrast, he is being *hardheaded* and *softhearted* for other people; by firm and prompt action he would protect them against their own weaknesses and at the same time shield their potential victims. In the mind of Justice McComb (as he has demonstrated by the consistency of his position in scores of cases on appeal) the weakness of the law as a preventative of both civil and criminal offenses comes in at least some substantial measure from its uncertainty; uncertainty spring-

ing from delays and concomitant wavering standards of enforcement, or vacillating procedures and sanctions.

The tenor of Justice McComb's thinking appears to be that the law is intended to—and that judges have and should exercise the power to make it—afford a more potent protection of the public in their homes, in their places of employment, and while going and coming, than he believes has been provided. Certainly we cannot dispute his view that the courts as well as the police must share responsibility for law enforcement or its failure.

It is not within the scope of this salute to Justice McComb to consider whether his dissent in any case is sound in law or otherwise. We note, however, his industry in entering dissents from majority decisions in more than 300 cases and observe that the greater number of those dissents have been against majority *reversals* of judgments. In addition to his dissents he has produced more than 200 majority opinions. We can properly, and we do, acclaim his long sustained dedication to the actualization of justice.

In a large proportion his dissents have been based on the theory that reversal was not warranted under California's Constitution, article VI, sections 4 and 4½; that such sections grant and strictly delimit the power of a reviewing court to reverse; that such provisions are designed to expedite finality of trial court judgments by precluding technical reversals on appeal; and that no reviewing court has power or tenable cause to reverse a trial court's judgment for any error unless "after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Art. VI, § 4½).

Statistically, it may or may not be regarded as significant, that examination of more than 150 cases in which Justice McComb has dissented from majority reversals, reveals that the reviewing court's division tends to indicate that the justices who had served as trial court judges were more inclined to construe records as supporting trial court judgments on factual issues than were those justices who had not so served. The term "factual issues" as here used includes determination of the inherently factual conclusion essential to reversal, that a miscarriage of justice is shown.

Justice McComb, who served some 10 years as a judge of the superior court, has consistently supported the view that evidence *as seen* in a courtroom, complemented by what has been heard, may be overwhelmingly more demonstrative of truth than the typical record on appeal; *i.e.*, a printed record of what a transcriber has typed from what a reporter read from notes he made of words he

believed he had heard. Justice McComb, therefore, while he will examine a record with scrupulous care for legal *sufficiency*, does not hesitate to accept the trial court's determination of fact issues on evidential weight questions. Seemingly supportive of Justice McComb's view is the common knowledge that many persons find that the motion picture's or television's portrayal of both sight and sound is often more elucidative of the facts of the drama than would be sound alone.

The young Superior Court Judge McComb obviously realized that mere possession of a right of action was not justice for a person who had suffered civil injury; that a lawsuit was in fact an ordeal; that nothing less than a prompt trial and judgment could provide justice. As related by Mr. Beatty, Judge McComb, while acting as executive head of the large trial court, received splendid cooperation from his fellow judges; justice, so far as it was within their power, was prompt and therefore substantial. However, superior court judgments are not final; they can be appealed. The right of appeal, on some basis, is doubtless an essential safeguard of justice. But as trial judges and litigants learn, unrestricted appeals can defer, and sometimes forever preclude, actualization of justice.

Judge McComb as a justice of the District Court of Appeal from 1937 to 1955, and since January 3, 1956, as a justice of the Supreme Court, appears to have consistently approached the review of records on appeal with substantial respect for the findings and conclusions of the trial judge; if the essential findings of fact and conclusions of law were tenable in his view, his vote for affirmance would be prompt. He has carried on unceasingly for timely disposition of appeals to the end that just judgments may be made final and the occasional miscarriage of justice promptly rectified.

We carefully use the term "miscarriage of justice" rather than "erroneous judgment" because, as already mentioned, but meriting further emphasis, California's Constitution (amended by vote of the people in 1911, as affecting criminal cases and in 1914 to cover civil litigation) forbids reversal of any judgment for mere technical errors; *i.e.*, errors which do not result in a miscarriage of justice. (Cal. Const., art. VI, § 4½; *People v. Watson* (1956) 46 Cal. 2d 818).

In the year 1861 the Supreme Court of California in *People v. Williams*, 18 Cal. 187, 193-194, explained why it then felt constrained to reverse judgments in capital cases upon discovery of *any error* in the trial court proceedings, regardless of how inconsequential the error may have been as to result. That 1861 explanation, and the subsequent attempts of the people by constitutional amend-

ments to eliminate the basis for such obnoxious reversals, are recounted and in part quoted in a dissenting opinion, specially concurred in and augmented by Justice McComb in *People v. Price* (1965) 63 A.C. 388, 398-404.

The *Price* opinion was filed October 1, 1965. (We, of course, do not re-argue any issue in that case; we quote relevant historical facts from the main dissent and further from Justice McComb's elucidation of his position in the 4 to 3 decision of the court reversing the judgment. It is the fact of his assertion of his position, not the soundness of it, that is here material.) The historically significant part of the dissent, page 398, is this: "One hundred and four years ago [in 1861] this court ruled: 'In capital cases, almost every case is appealed.[2] We do not complain of this, even when the grounds of appeal do not present a plausible reason for the reversal of the judgment, since a natural sense of responsibility in the counsel to whose hands the life of a fellow being is confided may well influence him to exhaust every legal resource to save his client from the last penalty of the law. But still it is important that the laws should be enforced, so as to render as certain as possible the conviction of those guilty of their infraction. With every disposition on the part of the Judges to do this, the effort frequently fails, because something is done or omitted which contravenes some arbitrary or technical right of the prisoner. Courts have no power in criminal cases to affirm a judgment, merely because the Judges are persuaded that upon the merits of the case the judgment is right. If any error intervenes in the proceeding, it is presumed to be injurious to the prisoner, and generally he is entitled to a reversal of the judgment, for it is his constitutional privilege to stand upon his strict legal rights, . . . And yet it very often happens that the matter of exception taken by him serves no other purpose than to defeat justice.' (*People v. Williams* (1861) 18 Cal. 187, 193-194.) Today's [1965] majority decision reaches precisely the same result which would have been reached 104 years ago. Yet in the meantime (in 1911) the People of California in order to preclude such technical reversals added section 4½ to article VI of our Constitution.

"In its present form, article VI, section 4½ provides: 'No judgment shall be set aside, or new trial granted, in any case, . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' This court heretofore carefully defined the circumstances under which it could tenably find that there had been a 'miscarriage of justice.' In *People v. Watson*

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[2] Currently, California has automatic appeals in every death penalty case.

(1956) 46 Cal. 2d 818, at page 836 [299 P.2d 243], we held that 'a "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' "

In concluding his dissent, Mr. Justice McComb says [p. 403]: "Our court has no power to create a ground for *automatic* reversal. . . .

"[p. 404] The issue is important to the defendant because his life is at stake; it is more important to the people of California because their lives are at stake every day and every night, in their jobs, in their homes, and upon the streets, unless potential killers are deterred by fear of the law. They will fear the law only in proportion to the fidelity of its enforcement."

Long ago Marshall McComb perhaps read Gladstone's immortal declaration, "Justice delayed, is justice denied." Mayhap also he saw (or conceived in his own wisdom) Corneille's observation: "Justice advances with such languid steps that crime often escapes from its slowness. Its tardy and doubtful course causes many tears to be shed."

In any event, by his forthright recognition that delay is the real roadblock to both justice and respect for the law; that such delay is principally a by-product of the judicial process rather than of the law itself; and by devoting his career to diminution of delays, he has well served the cause of justice. Indeed, since the people of California added section 4½ to article VI of their Constitution, what greater contribution has been made toward actualization of justice than that of Marshall F. McComb?

Long may he serve!