#J-600 2/27/82

Memorandum 81-14

Subject: Study J-600 - Dismissal for Lack of Prosecution (Policy Issues)

Background

Statutes requiring dismissal of a case for lack of diligent prosecution serve a number of functions. They promote the trial of the case before evidence is lost or destroyed and before witnesses become unavailable or their memories dim. They protect the defendant against being subjected to the annoyance of an unmeritorious action that remains undecided for an indefinite period of time. They also are a means by which the courts can clean out the backlog of cases on clogged calendars.

At present, the law places the burden on the plaintiff to move expeditiously to bring a cause of action to trial. Statutes of limitation are the principal means by which the law enforces the requirement that the plaintiff act diligently. If the plaintiff fails to commence suit on the cause of action within the time prescribed by statute, the plaintiff is thereafter precluded from suing the defendant.

If the plaintiff satisfies the statute of limitation by timely commencement of suit (i.e., by filing a complaint), there is still no assurance that the plaintiff will move the suit diligently to trial. Statutes requiring dismissal for lack of diligent prosecution enforce the requirement that the plaintiff move the suit along to trial. In essence, these statutes are similar to statutes of limitation, only they operate during the period after the plaintiff files the complaint rather than before the plaintiff files the complaint. See, e.g., Crown Coach Corp. v. Superior Court, 8 Cal.3d 540, 546, 105 Cal. Rptr. 339, 503 P.2d 347 (1972); Dunsmuir Masonic Temple v. Superior Court, 12 Cal. App.3d 17, 22, 90 Cal. Rptr. 405 (1970).

The California System

The California statutes governing dismissal for lack of prosecution are found in Code of Civil Procedure Sections 581a and 583, and in Rule 203.5 of the Rules of Court, copies of which are attached to this memorandum as Exhibit 1. The major effect of these statutes, in brief, is that:

(1) If the plaintiff fails to serve and return summons within three years after filing the complaint, the action must be dismissed.

(2) If the plaintiff fails to bring the action to trial within two years after filing the complaint, the action may be dismissed in the court's discretion.

(3) If the plaintiff fails to bring the action to trial within five years after filing the complaint, the action must be dismissed.

(4) If the plaintiff fails to take a default judgment within three years after summons is served or the defendant makes a general appearance, the action must be dismissed.

(5) If the plaintiff fails to bring the action to trial within three years after a new trial or retrial is granted, the action must be dismissed.

One might well ask why a plaintiff who had filed a complaint might not have summons served or get the case to trial within the statutory periods. The reasons are innumerable. Many of them appear to be excusable--the litigation was complex and the parties were gathering evidence, witnesses were unavailable, the plaintiff's damage had not stabilized, settlement negotiations were in progress, the courts were so congested it was not possible to get to trial. Others appear to be inexcusable--the plaintiff had an unmeritorious case and either abandoned it or hoped to force a settlement or that a key witness might become unavailable; perhaps the plaintiff's attorney was negligent or had other things to do. It may be stated as a general rule that the statutes and case law have developed exceptions to the rules requiring dismissal and have added court discretion in many cases where it appears that the delay is excusable.

The dismissal for lack of prosecution statutes fail to accurately reflect the current state of the law, however. In fact, since the California statutes were enacted around 1900 there have been hundreds of appellate cases interpreting, clarifying, and rewriting the statutes. Moreover, there are discernable trends in the way the courts and the Legislature have dealt with dismissal for failure to prosecute. From around 1900 until the 1920's the dismissal statutes were strictly enforced. Between the 1920's and the 1960's there was a continuing liberalization of the statutes to create exceptions and excuses. Beginning in

the late 1960's, in Breckenridge v. Mason, 256 Cal. App.2d 121, 64 Cal. Rptr. 201 (1967), and cases following the courts were strict in requiring dismissal. In 1969 an effort was made in the Legislature to curb discretionary court dismissals, but ended in authority for the Judicial Council to provide a procedure for dismissal which the Judicial Council has done in Rule 203.5. Then in 1970, beginning with Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970), the courts did an abrupt about-face and began an era of liberal allowance of excuses that continues to this day. The current attitude is summed up by the Supreme Court in Denham: "Although a defendant is entitled to the weight of the policy underlying the dismissal statute, which seems to prevent unreasonable delays in litigation, the policy is less powerful than that which seeks to dispose of litigation on the merits rather than on procedural grounds." 2 Cal.3d at 566.

The Commission's Study

The Law Revision Commission was authorized in 1978 to study whether the law relating to involuntary dismissal for lack of prosecution should be revised. The reasons for the authorization were the failure of the statutes to accurately reflect the exceptions and excuses and the existence of court discretion, the confusing interrelation of the statutes, and the generally unsatisfactory state of the law, requiring frequent appellate decisions for clarification.

The Commission retained Garrett H. Elmore as a consultant to prepare a study of this area of the law. Mr. Elmore was formerly counsel for the State Bar Committee on Administration of Justice and has been involved in legislative amendments of the dismissal for lack of prosecution statutes. He also was involved in the drafting of Rule 203.5, which states criteria for the exercise of the court's discretion in dismissing cases. A copy of Mr. Elmore's study, which analyzes existing law and suggests revisions is attached.

Some Relevant Considerations

The forces at work in this area of the law are fundamental and strong. On one hand is the drive for efficient administration of justice and on the other hand is the right of a person to have a legitimate claim ajudicated. Related is the question whether a client should be

penalized for the attorney's neglect. Personal injury cases, for some reason, are frequently caught up in dismissal fights. As a consequence, legislative activity tends to align trial lawyers in favor of liberality in the dismissal laws against insurance companies in favor of strict dismissal requirements.

To put the problem in some perspective, at present approximately 8,900 or 1.8% of superior court cases (exclusive of probate), 7,800 or 1.9% of municipal and justice court cases, and 14,600 or 3.2% of small claims cases are dismissed for lack of prosecution annually. In superior court, approximately 2,500 personal injury cases are dismissed annually for lack of prosecution, which represents 2.7% of all personal injury cases filed and 28.1% of all cases dismissed for lack of prosecution. (Personal injury filings are about 90,000 annually, or 18.4% of the approximately 488,300 total Superior court filings exclusive of probate.) These figures are supplied by the Judicial Council for 1978-1979.

Alternative Systems for Dealing with Delay

The California system of statutory limitations periods to enforce diligent prosecution is not the only available means of dealing with delay.

Federal model. Mr. Elmore refers to the system used in the federal courts, in which one judge supervises a case from the start, with the discretionary sanction of dismissal available but with no fixed time limits. In the Northern District of California, for example, a status conference is held about ninety days after the complaint is filed and periodically thereafter, at which the judge will review the activity on the case and will dismiss if necessary. Under this system a case is always calendared for something--status conference, pretrial conference, trial, etc. In the Northern District of California, the average case is disposed of within seven or eight months after filing. Mr. Elmore believes the California system of time limits is preferable to a system based on court discretion because of the diversified nature of civil litigation filed in California courts, because it is more economical for courts and litigants, and because it tends to provide uniformity statewide.

New York model. Mr. Elmore also discusses the New York system which, like the federal system, has no time limits and is based on court

discretion. The New York system also permits lesser penalties such as an award of costs payable by counsel for delay, in recognition of the drastic nature of dismissal. Mr. Elmore believes that the New York system is not suited to California. The staff also notes that penalizing counsel does not appear to be a particularly effective remedy and does nothing to help a defendant whose case has been prejudiced by the delay.

Inactivity model. A number of states have a system that requires dismissal if there is no activity on the case for a period of time, typically six months or twelve months. This system is similar to California's in imposing statutory time limits for prosecution. However, it is considerably more restrictive than California's in that the case must be moving forward at all times, whereas under the California system the case may be quiescent at times so long as it goes to trial within the statutory period. The flexibility of the California system appears preferable to the staff.

Resolution of Policy Questions

The Commission must address at this time three policy questions--(1) whether to recommend that California adopt some other system for dealing with delay or that California keep and improve its existing provisions requiring dismissal for lack of prosecution; (2) assuming the Commission recommends that the California system be retained, whether fundamental changes should be made in the system; (3) apart from fundamental shifts, what specific clarifying changes should be made in the California statutes.

Keep basic California system. The discussion above of alternate methods of dealing with delay indicates Mr. Elmore's belief that the alternate methods are inappropriate for California. The staff agrees with this position. Although the federal system has much to commend it and many California practitioners will be already familiar with the system, it presupposes a lighter case-load per judge than California has the luxury to afford. Moreover, we cannot justify abandoning an existing and functioning system for one that is not demonstrably superior.

Fundamental change in statutes? Assuming it is the Commission's decision to recommend that the existing California system of dismissal

for lack of prosecution be kept and improved, should the statutes be revised to be substantially more liberal (or more strict), or should the status quo be maintained? The conflicting policies of preserving the plaintiff's right and protecting the defendant from prejudice have already been mentioned, as well as use of the dismissal statutes as a tool to clean out clogged calendars. As we have noted, there appear historically to be trends both ways on the resolution of these conflicts, and the current status in California is one of liberality to protect the plaintiff's rights.

The staff has no strong feelings on this point, although we do admit to a bias for stricter interpretation of the statutes and in favor of dismissal where the plaintiff is dilatory. We see no reason why a person shouldn't be able to serve summons in three years, and even with clogged calendars five years seems more than adequate at least to have the case at issue even if not brought to trial. We suspect that many cases that run up against the dismissal statutes are unmeritorious or they would have been diligently prosecuted from the start. Some cases may be meritorious, however, and run afoul of the dismissal statutes for reasons such that the litigation was complex and it was impossible to serve all parties and prepare the case on time, the plaintiff and defendant were negotiating and ran out of time, the parties made a stipulation for time that was inadequate, the calendars were too clogged to get to trial, or the plaintiff's attorney was simply negligent. A plaintiff who loses a cause of action due to an attorney's neglect will have a cause of action against the attorney, for what it is worth.

Mr. Elmore strongly favors liberality. He points out that when the dismissal for lack of prosecution statutes were first promulgated it was simple to serve summons and obtain a place on the trial calendar and that the very process of application of the involuntary dismissal statutes consumes undue time of the bench and bar. Mr. Elmore states that the defendant should be as responsible as the plaintiff to see that cases get heard on their merits; the burden should not be on the plaintiff. He sees the dismissal statutes as a technical trap for the plaintiff by which a defendant can avoid a meritorious claim. He points out that the existing law fails to achieve any sort of predictability and is difficult

to apply. He believes the best policy is one that favors affording an opportunity for trial on the merits over dismissal on procedural grounds, and that this policy should be effectuated by liberalizing the existing statutes. In essence, he would permit the existing time limits to be extended for six months to a year at a time upon affidavit of the plaintiff or order of the court. Mr. Elmore's specific proposals and his arguments in their favor appear at pages 10-12 of his study.

Clarifying changes. Whether or not the Commission decides to liberalize or tighten the basic California statutory scheme, there are a number of specific problems and possible clarifying changes the Commission should address. Mr. Elmore raises 20 issues involving the existing statutes at pages 12-24 of his study. We plan to go through each of these issues individually at the meeting.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

§ 581a. Dismissal; lack of prosecution; effect of motion as appearance

(a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of said action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has made a general appearance in the action.

(b) No action heretofore or hereafter commenced by cross-complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless, if a summons is not required, the cross-complaint is served within three years after the filing of the cross-complaint or unless, if a summons is required, the summons on the cross-complaint is served and return made within three years after the filing of the cross-complaint, except where the parties have filed a stipulation in writing that the time may be extended or, if a summons is required, the party against whom service would otherwise have to be made has made a general appearance in the action.

(c) All actions, heretofore or hereafter commenced, shall be dismissed by the court in which the same may be pending, on its own motion, or on the motion of any party interested therein, if no answer has been filed after either service has been made or the defendant has made a general appearance, if plaintiff fails, or has failed, to have judgment entered within three years after service has been made or such appearance by the defendant, except where the parties have filed a stipulation in writing that the time may be extended.

(d) The time during which the defendant was not amenable to the process of the court shall not be included in computing the time period specified in this section.

(e) A motion to dismiss pursuant to the provisions of this section shall not, nor shall any extension of time to plead after such motion, or stipulation extending time for service of summons and return thereof, constitute a general appearance.

§ 583. Dismissal; lack of prosecution; failure to bring action to trial

(a) The court, in its discretion, may dismiss an action for want of prosecution pursuant to this subdivision if it is not brought to trial within two years after it was filed. The procedure for obtaining such dismissal shall be in accordance with rules adopted by the Judicial Council.

(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.

(c) When, in any action after judgment, a motion for a new trial has been made and a new trial granted, such action shall be dismissed on motion of defendant after due notice to plaintiff, or by the court of its own motion, if no appeal has been taken, unless such action is brought to trial within three years after the entry of the order granting a new trial, except when the parties have filed a stipulation in writing that the time may be extended. When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from an order granting a new trial and such order is affirmed on appeal), the action must be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court. Nothing in this subdivision shall require the dismissal of an action prior to the expiration of the five-year period prescribed by subdivision (b).

(d) When in any action a trial has commenced but no judgment has been entered therein because of a mistrial or because a jury is unable to reach a decision, such action shall be dismissed on the motion of defendant after due notice to plaintiff or by the court of its own motion, unless such action is again brought to trial within three years after entry of an order by the court declaring the mistrial or disagreement by the jury, except where the parties have filed a stipulation in writing that the time may be extended.

(e) For the purposes of this section, "action" includes an action commenced by cross-complaint.

(f) The time during which the defendant was not amenable to the process of the court and the time during which the jurisdiction of the court to try the action is suspended shall not be included in computing the time period specified in any subdivision of this section.

Rule 203.5. Motion to dismiss

(a) A party seeking dismissal of a case pursuant to subdivision (a) of Section 583 of the Code of Civil Procedure shall serve and file a notice of motion therefor at least 45 days before the date set for hearing of such motion, and the party may, together with his memorandum of points and authorities, serve and file an affidavit stating facts in support of his motion. The filing of the notice of motion shall not preclude the opposing party from further prosecution of the case to bring it to trial.

(b) Within 15 days after service of the notice of motion, the opposing party may serve and file his written opposition thereto, together with a memorandum of points and authorities and a supporting affidavit stating facts showing why the motion should be denied. The failure of the opposing party to serve and file his written opposition may be construed by the court as an admission that the motion is meritorious and the court may grant the motion without a hearing on the merits.

(c) Within 15 days after service of the written opposition, if any, the moving party may serve and file a response thereto, together with a supplemental memorandum of points and authorities and an affidavit stating facts in support of his motion.

(d) Within five days after service of the response, if any, the opposing party may serve and file a reply thereto.

(e) In ruling on the motion the court shall consider all matters relevant to a proper determination of the motion, including the court's file in the case and the affidavits and supporting date submitted by the parties and, where applicable, the availability of the moving party and other essential parties for service of process; the extent to which the parties engaged in any settlement negotiations or discussions; the diligence of the parties in pursuing discovery or other pretrial proceedings, including any extraordinary relief sought by either party; the nature and complexity of the case; the law applicable to the case, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case; the nature of any extensions of time or other delay attributable to either party; the condition of the court's calendar and the availability of an earlier trial date if the matter was ready for trial; whether the interests of justice are best served by dismissal or trial of the case or by imposing conditions on its dismissal or trial; and any other fact or circumstance relevant to a fair determination of the issue.

(f) The court may grant or deny the motion or, where the facts warrant, the court may continue or defer its ruling on the matter pending performance by either party of any conditions relating to trial or dismissal of the case that may be required by the court to effectuate substantial justice.

#J-600 3/4/81

REVISION OF CALIFORNIA STATUTES RELATING TO DISMISSAL OF CIVIL ACTIONS FOR LACK OF PROSECUTION*

*This study was prepared for the California Law Revision Commission by Garrett H. Elmore. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Revision Of California Statutes Relating To Dismissal Of Civil Actions For Lack Of Prosecution

- - - - - -

Background Report of Garrett H. Elmore,
Consultant

- - - - - -

INTRODUCTORY

Section 581a and Section 583 of the Code of Civil Procedure are the principal California statutes relating to involuntary dismissal of civil actions for lack of prosecution. The purpose of this report is to review these code sections and decisions interpreting them, to determine whether they should be revised and, further, whether an alternate statutory scheme or schemes should be adopted.[1]

Basically, the pattern of Section 581a is that summons on the complaint in the civil action must be served upon the defendant and return of summons made within three years after the action has been commenced or the action shall be dismissed. Certain exceptions are stated (a filed stipulation in writing of the parties that the time may be extended, a general appearance of the defendant and exclusion from the three years of the time the defendant was not amenable to the jurisdiction of the court).[2] In addition, decisional law indicates that under appropriate circumstances principles of estoppel or waiver may prevent application of the limitation.

Section 581a also states a time limit of three years for the entry of a default judgment after service of summons or general appearance of the defendant. Certain exceptions are stated (a filed stipulation in writing that the time may be extended and exclusion from the three years

---

1. Hon. Philip M. Saeta, judge of the superior court, Los Angeles, suggested the "failure to prosecute" sections of the Code of Civil Procedure be reviewed in a letter to the Commission dated March 26, 1976. Section 581a and Section 583 in particular were cited.

2. Code Civ. Proc. § 581a, subdvision (a), (d).

of the time the defendant was not amenable to the jurisdiction of the court).[3] In addition, decisional law indicates implied exceptions exist such as where entry of judgment is impossible due to a stay. Even where judgment is entered after the period, earlier case law has ruled such action as "error" and correctable only by appeal or timely motion to vacate the "default" under Section 473 of the Code of Civil Procedure. Finally, in present form the three-year limitation appears intended as a "cut off" or limitation upon routine time to plead extensions that the parties might otherwise agree upon. To this extent, the provisions are more than provisions imposing a time limit upon obtaining a true default judgment.

Basically, the pattern of Section 583 provides that the trial court, in its discretion, may dismiss a civil action if not brought to trial within two years after it was filed. The procedure for obtaining the dismissal shall be in accordance with rules prescribed by the Judicial Council.[4] Certain exceptions are stated (exclusion from the two-year period of the time during which the defendant was not amenable to the process of the court and of the time during which the jurisdiction of the court to try the action is suspended). The rules adopted by the Judicial Council under this part of Section 583 state that in ruling on a defendant's motion to dismiss the trial court shall "consider" various matters, when they appear from the parties' motion and opposition or the court file. These include "whether the interests of justice are best served by dismissal or trial... or by imposing conditions on its dismissal or trial."[5]

Section 583 also provides that the civil action shall be dismissed unless it is brought to trial within five years after it was filed. Certain exceptions are stated (a filed stipulation in writing that the time may be extended and exclusion from the time period of the time during which the defendant was not amenable to the process of the court and the time the jurisdiction of the court to try the action is suspended).[6]

---

3. Code Civ. Proc. § 581a, subdivision (c), (d).

4. Code Civ. Proc. § 583, subdivision (a).

5. Cal. Rule of Court 203.5, subdivison (e).

6. Code Civ. Proc. § 583(b), (d).

Decisional law adds the implied exception of excluding the time during which it was impracticable, impossible or futile to bring the action to trial. Decisional law currently indicates that a waiver or estoppel may be present under certain circumstances.

Section 583 also provides in substance that on new trial, the action must be brought to trial within a three-year period. The same exceptions are stated as are mentioned in the preceding paragraph,[7] except that no provision is made for a written filed stipulation of the parties extending time when the new trial results from or is affirmed by action of the appellate court.

Judicial Council rules governing particular procedures affecting civil actions, such as coordination of civil actions pending in different trial courts and judicial arbitration, sometimes provide for "time period" exclusions from the statutory time period.[8] The time for bringing a small claims court action to trial anew in the superior court by reason of appeal is entirely regulated by Judicial Council rules governing such appeals. The time periods and other provisions differ from those specified in Section 583.[9]

Some special proceedings provided by statute have their own provisions as to dismissal for failure to bring the proceeding to trial.[10]

In addition to the foregoing statutes and rules of court, California decisional law has recognized the inherent power of a trial court to dismiss an action for want of prosecution. However, statutes on the subject are generally followed.[11]

---

7. Code Civ. Proc. § 583(c), (d).

8. See, e.g., Cal. Rule of Court 1514(f), Cal. Rule of Court 1601(d), referring to the time period of Section 583. Compare Cal. Rule of Court 1233 (family law act) incorporating both code sections.

9. See Cal. Rule of Court 157(c) (fixing the normal time for bringing the action to trial as one year but providing that by written stipulation or upon a showing of the exercise of reasonable diligence by the appellant to bring the case to trial the time may be extended up to three years).

10. See, e.g., Civil Code § 3147 (discretionary dismissal of mechanic's lien action after two years), Rev. & Tax. § 3638 (contest of tax sale or tax deed, one year period to bring action to trial).

11. See Weeks v. Roberts (1968) 68 Cal.2d 802 (two-year discretionary dismissal statute limits court's power to order earlier dismissal),

The pattern of the present California statutory law is one that has existed for many years.[12] Section 581a and Section 583 have been amended frequently but in general the changes have not affected the basic structure. A possible exception is the 1969 amendment that authorized the Judicial Council to prescribe the procedure for a party to obtain a dismissal under the two-year discretionary dismissal provisions of Section 583(a).[13]

The Federal Rules of Civil Procedure do not contain time limits but state: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may have dismissal of an action or of any claim against him."[14] Consequently, dismissals are largely ad hoc, dependent upon the circumstances.[15] The federal courts have inherent authority to dismiss for delay in prosecution, and may do so without notice or hearing in an aggravated case, where no local rule requires notice or hearing.[16] Federal district courts sometimes have local rules stating time periods for service of summons[17] or providing

---

Oberkotter v. Spreckels (1924) 64 Cal. App. 470 (statute not in point), compare Blue Chip Enterprises, Inc. v. Brentwood Savings and Loan Assn. (1977) 71 Cal. App.3d 706.

12. As to the three-year period for serving and making return of summons in present Section 581a, see former subdivision 7 of former Section 581 of the Code of Civil Procedure (1889 Cal. Stats. ch. 259, p. 398). As to the two-year and five-year dismissal provisions of Section 583, see 1905 Cal. Stats. ch. 244. As to the three-year period for entry of judgment where no answer is on file, see 1933 Cal. Stats. ch. 744, Section 89.

13. See 1969 Cal. Stats. ch. 958. Rule 203.5 lists numerous matters that may "temper" a dismissal but the trial court is only required to "consider" them, where applicable. See Lopez v. Larson (1979) 91 Cal. App.3d 383, Blue Chip Enterprises, Inc. v. Brentwood Savings and Loan Assn, supra, note 11.

14. F.R.C.P. 41(b).

15. See G. Wright and Miller, Federal Practice and Procedure (1971) § 2370 particularly at p. 204.

16. Link v. Wabash R. Co. (1962) 370 U.S. 626.

17. See Pearson v. Dennison 353 Fed.2d 24 (1965-9 cir.) (order fixing time to serve alias summons), Adams v. Jarka Corporation 8 Fed. R.D. 571 (1948- S. Dist., N.Y.) (summons to be served within three months but ex parte extension could be obtained).

for dismissal by the clerk of cases in which the file shows no activity for a stated period.[18]

In federal district courts where cases are assigned to individual judges from the outset, the opportunity exists for informal judicial supervision of the progress of the case by the judge. One federal district judge has observed: "I think the individual calendar (system) is much more demanding because it's your obligation to process the cases and see that they are brought to a conclusion."[19]

In one jurisdiction, award of costs to the adverse party are considered a lesser sanction that may be appropriate to impose upon counsel, instead of dismissing the client's cause of action. Moreover, rules prevent dismissal for failure to file a "note of issue" (to obtain a trial date) unless the case was at issue for one year and unless a notice is given to the plaintiff requiring a note of issue to be filed within 45 days, and stating that default in complying with the demand will serve as the basis for a motion for dismissal for unreasonably neglecting to proceed.[20] A procedure in New York permits a defendant by motion to seek a dismissal if the plaintiff has delayed in serving the complaint upon the defendant after the latter's appearance and demand.[21]

I

THE INADEQUACY OF PRESENT SECTION 581a AND SECTION 583

A. General

Section 581a and Section 583, as supplemented by Rule 203.5, provide inadequate, conflicting and sometimes complex standards. Moreover, in the light of modern concepts of fairness in litigation, the

---

18. Sykes v. United States 290 Fed.2d 555 (1961-9 cir.) (six months), Burns Mortgage Co. v. Stoudt 2 Fed. R.D. 219 (1942, E.D. Pa.) (no proceeding has been taken for a period of three consecutive years), see G. Wright and Miller, supra, note 15, § 2370, at p. 202.

19. News interview with Hon. Howard B. Turrentine, former judge of the superior court and currently judge of the United Stated District Court, Southern District of California, Los Angeles Daily Journal, April 18, 1980, page 1.

20. See New York CPLR 3216, Cohn v. Borchard Affiliations (1969) 250 N.E.2d 690 (N.Y. Ct. App.), Moran v. Rynar (1972) 332 N.Y.S.2d 138.

21. McAuliffe v. Baley (1972) 322 N.Y.S.2d 134. Under New York practice the complaint is not served with the initial process.

present statutory provisions may be viewed, first, as undesirably promoting "gamesmanship" in civil litigation, second, as unduly favoring one party by presumptions of prejudice and what amounts to a shifting of the burden of proof, and, third, as undesirably disposing of civil claims on the basis of technical rules, rather than on the merits.

Apart from the scope of amendment or revision (see Part II, infra), the need for statutory change is indicated by the conflicts in and uncertainties as to rulings. In one recent case, where the motion to dismiss was directed to failure to serve summons in a period shorter than the statutory period, the trial court, upon motion for reconsideration, granted the motion to dismiss, saying it had changed its mind on the original motion "seven times." The ruling of the appellate court affirming the dismissal of the cause of action noted several appellate court decisions that on the facts had declined to uphold or grant discretionary dismissals for delay.[22]

Recent decisions of courts of appeal take opposite approaches on the effect of Rule 203.5 and of guidelines as to discretionary dismissals stated by the California Supreme Court.[23] The high court in 1970 disapproved a line of court of appeal cases decided in the late 1960's that in effect declared that it was the duty of the trial court to grant a motion for dismissal for delay beyond the two-year period unless the opposite party made an "adequate showing" of diligence or cause for delay. The decision notes that the discretion vested in the trial court could be based on judicial notice, that there was not an "entire absence" of "any showing constituting cause" in the case, that the policy of preventing unreasonable delays in litigation is less powerful than that which seeks to dispose of litigation on the merits rather than on technical grounds, and that denial of the motion for discretionary dismissal (made

---

22. Lopez v. Larson (1979) 91 Cal. App.3d 383.

23. Upholding dismissal under the "discretionary" provisions of Section 583 are such cases as Dunsmuir Masonic Temple v. Superior Court (1970) 12 Cal. App.3d 17, followed in Kunzler v. Karde (1980) 109 Cal. App.3d 683, Lopez v. Larson, supra, note 22; reversing or denying dismissal are such cases as Garza v. Delano Union School District (1980) 110 Cal. App.3d 303 United Farm Workers v. Intern. Bro. of Teamsters (1978) 87 Cal. App.3d 225, City of Los Angeles v. Gleneagle Dev. Co. (1976) 62 Cal. App.3d 543.

about 4-3/4 years after the action was filed) was not an abuse of discretion.[24] The high court's ruling was re-affirmed in 1971 in a decision reversing a dismissal for failure to file promptly an at issue memorandum coupled with the opposing party's failure to make an "adequate" showing of cause for the delay. In reversing, the decision noted that the court had previously in certain decisions "called an abrupt halt" to a certain line of court of appeal decisions (favoring dismissal).[25]

The effect of an "open" stipulation between the parties that (after service of summons) the defendant's time to answer or otherwise respond to the complaint was extended without date, subject to termination by the plaintiff on ten-days written notice, is unclear. By four to three decision, a majority of the high court concluded that such a stipulation while in effect excused diligence on the part of the plaintiff and constituted a "general appearance" within the three-year "mandatory" time limit for filing return of summons unless a general appearance is made. The decision notes that the parties by the terms of Section 581a are permitted to file a written stipulation that the "mandatory" time limit be extended. Hence, it concluded, the policy of encouraging diligence is subordinate to the parties' own agreement in writing. In the minority view, treating the "open stipulation" as excusing diligence by the plaintiff while it was in effect defeats the purpose of the statutes requiring diligence in prosecution.[26]

The case law on waiver is unclear in various settings, because of the basic policy conflict as to strict or lenient enforcement of the statutes against delay in prosecution.[27]

---

24. Denham v. Superior Court (1970) 2 Cal.3d 557, see also Martindale v. Superior Court (1970) 2 Cal.3d 568.

25. Woolfson v. Personal Travel Service, Inc. (1971) 3 Cal.3d 909.

26. General Insurance Co. of America v. Superior Court (1975) 15 Cal.3d 449, followed in Meraia v. McCann (1977) 83 Cal. App.3d 239.

27. Compare Regan Distributors, Inc. v. Yurosek and Son, Inc. (1979) 88 Cal. App.3d 924 (open extension of time for hearing on demurrer granted to plaintiff's counsel by defendant's counsel excused a two-year delay in procedural phase in a discretionary dismissal proceeding) with Hastings v. Superior Court (1955) 131 Cal. App.2d 255 (stipulation to reset trial for convenient date because of conflict of trial date for both counsel, construed as not an extension beyond five-year dismissal date).

B. Specific Inadequacies

Section 581a and Section 583 are placed in a chapter headed "Judgments in General" in a title headed "Trial and Judgments in Civil Actions." Preferably, a separate chapter should cover the subject matter. Moreover, the provisions of the two code sections could be reorganized and stated in an integrated manner. For example, the two-year discretionary dismissal provisions that are stated in terms of "trial," by judicial construction, apply to delay in service of summons, at least where the two-year period has elapsed.[28] Wording differences in the two code sections exist in respect of cross-complaints and exclusion of time when the defendant was not amenable to the process of the court or the jurisdiction of the court to try the case is suspended.[29]

Various other points for clarification or improvement of procedure or for granting the trial court greater flexibility in permitting the opportunity for trial on the merits are discussed, infra, under Part III.

II

POLICY QUESTIONS AS TO THE BASIS OF AMENDMENTS

First. Should the present California framework be replaced by a new method of regulating delay in civil actions?

In the opinion of the writer, the present California framework (with or without substantive revision) is better suited to California trial courts than other systems.

The California framework is based on statements of time limits with provisions for discretionary and mandatory dismissals. In some respects, the time limits are jurisdictional. The doctrines of implied exceptions, waiver and estoppel as declared in recent decisions give flexibility. As later noted, in theory, at least, perhaps more should

---

28. See Black Bros. Co. v. Superior Court (1968) 265 Cal. App.2d 501 (disapproved in other respects in Denham v. Superior Court, supra, note 24), City of San Jose v. Wilcox (1944) 62 Cal. App.2d 224.

29. As to cross-complaints, compare subdivision (b) of Section 581a with subdivision (e) of Section 583; as to exclusion of time, compare subdivision (d) of Section 581a with subdivision (f) of Section 583.

be done in exploring the feasibility of local rules to be used by courts and not litigants for ferreting out on a "mass" basis and disposing of "sleeper" actions, namely, those that have been instituted but for which enthusiasm has been lost.

The federal district court practice is based upon the court's discretionary authority under F.R.C.P. 41(b) and its inherent power. This is supplemented, as indicated, by local rules providing for special calendars for cases in which the file shows no movement.[30] Also, the assignment of cases to particular judges from the beginning permits informal supervision for expedition.

Federal court civil litigation and civil litigation in the superior, municipal and justice courts differ. For reasons based on the diversified types of civil litigation filed in California state courts, a system with time limits (even though flexible) is more desirable than one based on the court's discretion, supplemented by aids supplied by local rules or practice. The "time limit" system is more economical for courts and litigants. Moveover, it tends to provide a uniform statewide system in basic provisions.

The New York practice has features that in effect serve as "brakes" on the trial court's discretionary authority to dismiss. Thus, the defendant may not make a motion to dismiss for unreasonable neglect to proceed until the case has been at issue for one year and also until plaintiff has been given a written notice to file a "note of issue" within 45 days, failing which a motion to dismiss could be made. As to delay in the service of a complaint, the New York procedure as to the beginning stage of a civil action differs from that of California. However, a defendant who is before the court through service of a precipe can move the court to require plaintiff to take the next step by serving the complaint within a specified time.[31] There are, however, no overall time limits for bringing the action "to trial."

The New York system also recognizes the drastic nature of a dismissal and permits imposition of lesser penalties such as a fine payable by

---

30. See, supra, notes 17, 18.

31. See, supra, notes 20, 21.

counsel for delay. However, the system basically depends upon the discretion of the court, within the foregoing limits.

In the writer's opinion, neither the federal nor the New York system is suited for civil cases in California trial courts.

Second. Should proposals of radical departure from past concepts be included in the contemplated measure?

Specifically, should the concept that the burden is upon plaintiff to exercise diligence at every step of the proceeding under risk of suffering dismissal of the action be re-examined, and the involuntary dismissal rule substantially curtailed?

Two assumptions are behind this suggestion. First, when the concept originated it was comparatively simple to make service of summons within this state and to obtain a place on the trial calendar. Now, the civil action itself is more complex with liberality as to parties and pleadings. In congested trial courts, the state is not able to provide a reasonably early trial date for civil litigation. In such courts the procedure for proceeding to trial is exacting under normal rules. The special motion to advance the trial date to avoid an involuntary dismissal is not well understood. Second, it is questionable whether the present law in this state on involuntary dismissal can be applied without undue expenditure of time and effort.

In general outline, the proposal for "radical departure" is:

The present 5-year period for bringing an action (by complaint or cross complaint) to trial would be required to be extended for all purposes when (i) the plaintiff or cross-complainant files an affidavit (or certificate under penalty of perjury) in prescribed statutory form, or (ii) the court, upon application of a party, orders the period extended. An extension would be for not less than six months nor more than a year. The end of the extension period would be the end of the 7th year. Granting a trial date and an available court within the period of extension would be mandatory unless the plaintiff or cross-complainant without cause did not bring the case on for trial on a date assigned under a previous extension. The extension could be by affidavit or order filed before or after the five-year period provided no order of dismissal was outstanding.

The time for serving summons could be extended for up to one year (after expiration of the 3-year statutory period) by a similar procedure.

The time for bringing a case to trial after order for new trial or jury disagreement could be similarly extended (3-year statutory period plus one year).

A motion for discretionary dismissal could be made after two years if directed to failure to bring on the case for trial. The time could be extended for up to one year by a similar procedure unless the court upon a noticed motion by a defendant (or cross-defendant) determined either of the following: (i) that the moving party had previously requested the plaintiff (or cross-complainant) in writing to proceed with particular steps in the action and plaintiff (or cross-complainant) had not done so prior to the notice of motion, or (ii) that the moving party was suffering prejudice of a specified kind by the delay in proceeding with the action.

If directed to service of summons, the motion for discretionary dismissal could be made after one year but the time for service could be extended up to one year by similar procedure subject to the qualifications stated in the preceding paragraph.

Other provisions would include those discussed infra under Part III that provide for greater flexibility in ruling on motions for dismissal, for local rules to ferret out "sleeper" cases upon a mass basis, and for a statement of "policy" as to providing litigants with an opportunity for trial on the merits, instead of dismissing cases upon procedural grounds.

In support of a "radical" approach that "minimizes" the "defense" of "failure to prosecute," it may be urged: First, the concept that because the plaintiff brings the action, the burden rests upon the plaintiff to excercise diligence at every step does not appeal to one's sense of fairness. For example, in many cases plaintiff is compelled to take this action because of the prospective defendant's conduct or position. Moreover, it is more consistent with today's litigation realities that responsibility be placed upon the parties jointly to bring a civil case to a conclusion. Second, present law on involuntary dismissal has several aspects and is difficult to forecast or apply. Third, the burden of a rule requiring review of the history of particular

litigation and assessment of "fault" as between plaintiff and defendant for delay is a substantial one. Simplification is needed.[32] Fourth, the "radical" approach outlined does not purport to take away the right of the adverse party to move for a discretionary dismissal. However, it imposes a duty to make an advance request or to show that specific prejudice is being suffered.

Against the "radical" approach it may be argued: First, the system encourages delay whereas the emphasis should be on expedition. Second, the savings in court time and litigation expense, if any, are conjectural. Third, the present system represents a proper balance between the competing interests.

In the writer's opinion, the "radical" approach is one that is justified from the long range point of view. Moreover, it can be adopted on a "limited life" basis, if there are doubts as to its workability.

III

AMENDMENTS OF A CLARIFYING OR TECHNICAL NATURE WITH LIMITED SUBSTANTIVE CHANGES

Note: The amendments for consideration are stated only generally. They appear under "General," "Section 581a" and "Section 583." They are numbered arbitrarily. This report does not consider the format of a measure.

General

No. 1. Policy As To Trial On Merits. Should the statute contain a policy statement such as the following: "The Legislature hereby declares that it is the policy of this State that the party asserting a civil cause of action or claim for relief shall proceed with reasonable diligence in its prosecution but that all parties shall cooperate in bringing such litigation to trial or other disposition; further, in case of conflict, the policy favoring the right of parties to make stipulations in their own interests and favoring a trial on the merits is generally to be preferred over the policy that requires diligence in prosecution."

---

32. Examples of simplification in civil procedure are found in the automatic disqualification of judge legislation, standard procedures for filing claims against public entities or employees, and substitution of request for inspection of records for motion for such inspection in the state's civil discovery act.

Comment. Such a type of provision has sometimes been used where judicial thinking is sharply divided on an important procedural statute, e.g., subdivision (g) of Section 2016 of the Code of Civil Procedure relating to "work product." Such a provision would be proper only where the conclusion reached on the "policy" issue favors less stringent enforcement of "diligence" statutes than declared by some decisions.

No. 2. Conditions Upon Granting Or Denial Of Motion. Should the statute contain a provision like the following: The court may impose conditions upon

(a) the granting of a motion to dismiss, and

(b) the denial of a motion to dismiss?

Comment. See Rule 203.5, Cal. Rule of Court, to the above effect. The court should have flexibility to condition a denial upon payment of expenses and counsel fees to the adverse party when such result from unreasonable delay. Conversely, it may be equitable to require the plaintiff to make a limited waiver of the statute of limitations, to permit re-filing. The statute itself should be more explicit in these respects, if the principle is approved.

No. 3. Imposition Of Civil Penalty Upon Party Or Counsel. Should the statute contain a provision like the following: The court may, as an alternate to dismissal of the action, impose a civil penalty upon the party or the party's counsel, or both, for unreasonable delay in the prosecution of the action?

Comment. See New York Practice. Sanctions of this nature generally have not worked well because of procedural challenges or the feeling that they are not capable of being applied on a fairly uniform basis. However, such provisions vindicate the authority of courts generally to control their calendars and manner of conducting judicial business.

No. 4. Matters To Be Considered In Determination Of Motion. Should the statute contain provisions that state in substance that the Judicial Council shall prescribe by rule the procedure for a motion for dismissal, either mandatory or discretionary, and the criteria to be considered by the court in the determination of the motion?

Comment. Under present law, only Section 583(a), relating to discretionary dismissal, gives authority to the Judicial Council, and then, only in terms of "procedure." See Rule 203.5, Cal. Rules of Court. Expanding the rules to apply to other than "discretionary" dismissals appears unnecessary and possibly unwise. However, the present statutory authority of the Judicial Council should be expanded to include: "criteria to be considered in determination of a motion pursuant to (appropriate section)."

No. 5. Vacation Of Order Of Dismissal. Should the statute contain provisions that state in substance that the (trial court) shall retain jurisdiction for a period of 60 days after order of dismissal to grant reconsideration upon its own motion or motion of a party with or without new evidence.

Comment. Generally, such a provision serves the interests of justice, since it permits the "late" filing of such matters as return of summons and additional information as to reasons for delay. The general rule on reconsideration is not satisfactory in this setting.

No. 6. Court Dismissal Under Local Rule. Should the statute contain a section outlining a way for a court, under local rule, to use procedures to dispose of dormant cases, after notice given on a "mass" basis? For example: "A superior, municipal or justice court, by local rule, may provide for periodic lists of civil actions in which the files of the court disclose no activity for a period of more than one year and the lapse of two years since commencement of the action, for obtaining information by questionnaire or otherwise from counsel or, if none, or if counsel does not make timely response, from the party, if practical, as to the intent of the party that the action shall proceed, for compilation of a list known as a tentative dismissal list, by computer or otherwise, for service of such list by mail by the clerk of court upon counsel or the party, if not represented by counsel, with a notice by such clerk that the cases thereon will be dismissed by the court on its own motion, without prejudice, within 60 days from the date of mailing as shown on the list, unless information is timely given to the court in writing objecting to such dismissal with reasons for such objection, for

dismissal of the cases as to which no timely objection was made, on or after the date stated in the notice, and for setting aside the dismissal and restoration of the case to its former status by the court upon its own motion or application of a party upon a showing of mistake or inadvertence or any cause deemed sufficient by the court."

Comment. On principle, the above suggestion seems to have merit in clearing the files of cases that have been settled or dropped or in which the plaintiff or cross-complainant has lost interest. The proposal for mass notice by mail though perhaps unusual is not unlike published notices of bank accounts and other funds about to be paid over to the State under abandoned property law. The Mullane case involved a published notice to beneficiaries of common trust funds. Mullane v. Central Hanover Bank and Trust Co. (1950) 339 U.S. 306. If there is a reasonable doubt as to the validity of such notice individual notices might come from a computer. Those who are active in the field of judicial administration at state or local level should be contacted if this proposal is to be followed up.

Section 581a

No. 7. Time For Filing Return Of Summons. Should the statute be amended to relax provisions for making return of summons within the three-year period?

Comment. Decisional law generally applies the statute as written, namely, that both service and return must be made within the time limit. See, e.g., Kaiser Foundation Hospitals v. Superior Court (1975) 49 Cal. App.3d 523, Bernstein v. Superior Court (1969) 2 Cal. App.3d 700, Beckwith v. Los Angeles County (1955) 132 Cal. App.2d 377. See also Highlands Inn, Inc. v. Gurries (1969) 276 Cal. App.2d 694 (risk of loss in mail on plaintiff). This case law is unduly severe. The trial court should be required to receive proof of service at any time before dismissal and upon reconsideration granted within 90 days after dismissal order.

No. 8. Stipulation Of Parties Extending Time. Should wording referring to a "filed" stipulation of the parties extending time be

changed to read: "except where the parties have filed or present to the court a stipulation in writing that the time may be extended."

Comment. The new wording will make it clear that an "unfiled" stipulation will be recognized. It must be brought to the court's attention. The manner of doing so varies and in part involves "time" questions. The amendment suggested is therefore intentionally devoid of detail, leaving questions for each situation, or "policy" decisions of the appellate courts.

No. 9. Broadening General Appearance Exception. Should wording as to a "general appearance" in place of service of summons be amended, in substance, as follows: "or (unless) the party... has ~~made a general appearance~~ filed an answer or other document or entered into a stipulation in writing or done other acts that constitute a general appearance."

Comment. The purpose of the suggested change is to give notice in the statute that the "general appearance" excusing service and return of summons within three years is not confined to documents filed in the action commonly regarded as a "general appearance." The change would codify the decision in General Insurance Co. of America v. Superior Court (1975) 15 Cal.3d 449 (majority). See also Botsford v. Pascoe (1979) 94 Cal. App.3d 62.

No. 10. Exclusion Of Certain Time Periods. Should a broader "exclusion" than the "amenability to process" exclusion be stated for subdivisions (a) and (b) of Section 581a (time for service of summons or cross-complaint)? Following is a rough draft:

"There shall be excluded from such three years, on a non-duplicative basis, the time within such three years during which

(i) The defendant secreted himself, within or without the state, to avoid the service of process.

(ii) The whereabouts of the defendant were unknown to the plaintiff and could not be ascertained by the exercise of due diligence.

(iii) A statute, rule, regulation or court order stayed the prosecution of the action or particular proceedings therein affecting the service of process.

(iv) The validity of purported service of process on the defendant was being litigated by the parties.

(v) The service of summons, for any other reason, was impossible, impracticable or futile."

Comment. Subparagraph (i) is based on an exception in Section 581a from 1907 until 1970 when "amenability to the process of the court" was substituted. Subparagraph (ii) reflects problems caused by increased mobility throughout the United States and the world of families and individuals. Work or pleasure may involve constant shifting of locale or substantial periods of travel. It probably is desirable to add a limitation on this exclusion to prevent it from being overly broad (e.g., the period of exclusion under this subparagraph shall not exceed six months). Subparagraph (iii) is intended as a specific statement of the "stay" situation. However, here also the draft wording may require limitation (e.g., substitute for "affecting the service of process" the words "and service of summons would violate or probably violate such statute, rule, regulation or court order"). Subparagraph (iv) is intended as a specific exclusion. For example, it may be held on a motion to quash proceeding or in a proceeding to set aside a default or default judgment that service was technically defective under one or more of the applicable statutory methods for serving summons. It seems an unnecessarily harsh rule that requires valid service within the three years. Under this proposed exclusion, only the time of litigation is excluded. Normally, the party knows of the action and complaint at this stage. Again, the wording is subject to review. For example, it may limit an exclusion that seems sound in principle, i.e., the period during which a default judgment based on an apparently valid service remains unchallenged by the defendant. It has been held that plaintiff cannot obtain an "exclusion" for the time the default judgment is on file when no actual service was made and it was found the process server had filed a fraudulent return. See Ippalito v. Municipal Court (1977) 67 Cal. App.3d 682. On principle, the wording could refer to an "apparently valid" service or "purported service made in good faith." This would modify the Ippalito opinion that charged the plaintiff with

responsibility for the wrongful acts of the process server. Subparagraph (v) is based on the "implied" judicial exceptions stated in appellate decisions. Since some are probably covered by subparagraphs (iii) and (iv), it is necessary in subparabraph (v) to refer to "for any other reasons."

No. 11. Discretionary Dismissal For Failure To Serve Summons. Should there be a reference in the statute to the use of a discretionary dismissal motion (in terms directed to bringing the case to trial within two years) to seek a dismissal for failure to serve summons?

Comment. In the writer's opinion, this would be desirable. Case law recognizes subdivision (a) of Section 583 can be so used, since section 581a expresses only a maximum time limit. However, the general form of amendments will determine placement and wording.

No. 12. Requirement For Notice Of Motion For Dismissal. Should provisions be added to subdivision (a) and subdivision (b) of Section 581a that state in substance that, except as provided in Section _____ (relating to "mass" dismissals under local rule), a dismissal may be ordered only upon noticed motion by the defendant or by the court acting upon its own motion.

Comment. Though this appears to be the practice, for mandatory as well as discretionary dismissals, Section 581a is silent. The computation of the three-year mandatory period may be subject to differences of opinion. There should be opportunity for hearing. Also, notice of motion may be valuable to aid the plaintiff to assemble evidence that amounts to a "general appearance" by the defendant or that tends to show waiver by or estoppel of the defendant. As to the length of notice, a discretionary dismissal motion under Rule 203.5 normally requires 45 days' notice. To avoid inconsistency, a reference should be made in the case of discretionary dismissals to rules of the Judicial Council. As to mandatory dismissals, it is the writer's view that no special notice of motion provisions should be included.

No. 13. Repeal Or Narrowing Of Subdivision (c) Of Section 581a. Should subdivision (c) of Section 581a (relating to dismissal for failure

to have judgment entered three years after service or general appearance if no "answer" is on file) be repealed or narrowed?

Comment. In the writer's opinion, subdivision (c) of Section 581a is not backed by compelling reasons of orderly judicial administration. The requirement is not well understood. It should be repealed in the interests of simplifying procedural law. If subdivision (c) is repealed, the problem of a plaintiff who unjustifiably withholds entry of default judgment to prolong his claim against a defaulting defendant will be left to the operation of general provisions on "failure to prosecute" such as subdivision (a) of Section 583 and the proposed "mass dismissal" procedure under local rule.

Subdivision (c) provides for a filed written stipulation of the parties that the provisions may be extended. It is believed that the bar generally does not understand the norm that a pleading must be on file or a default judgment must be entered within three years unless a filed written stipulation of the parties extends time for compliance. Moveover, this provision in the law can easily be overlooked or ignored because of inadvertence unless a law office is highly organized in the keeping of calendars and calendar dates.

The decisional law under subdivision (c) is uncertain. By a four to three decision, the California Supreme Court recently held that an unfiled "open" stipulation extending time to a defendant to answer or otherwise respond to the complaint, terminable upon 10 days' notice, excused compliance with subdivision (c). The majority opinion notes that in 1949 the Legislature permitted the parties to stipulate in writing for an extension. Thus, the policy of expedition became subordinate to the right of the parties to make agreements in their own interests. The minority opinion stresses the fact that the plaintiff could have terminated the stipulation and complied with subdivision (c). See General Insurance Company of America v. Superior Court (1978) 15 Cal.3d 449.

Earlier cases under subdivision (c) include holdings that entry of a "default" (not default judgment) within the period is insufficient (Jacks v. Lewis (1943) 61 Cal. App.2d 148), that the

parties could not stipulate to an extension of time (prior to the 1949 amendment) (Rio Del Mar Country Club v. Superior Court (1948) 84 Cal. App.2d 214), and that a judgment entered after the three-year period may not be set aside on collateral attack but may be challenged by appeal from the judgment or by timely motion to set aside the default (Phillips v. Trusheim (1945) 25 Cal.2d 913, Taintor v. Superior Court (1950) 95 Cal. App.2d 346, Pavlovich v. Watts (1941) 46 Cal. App.2d 103). More recent cases indicate that entry of a response before dismissal makes dismissal improper (Mustalo v. Mustalo (1974) 37 Cal. App.3d 580--domestic relations proceeding) and that the provision does not apply where the default is that of a co-defendant and another defendant has answered and the case is progressing (AMF Pinspotters, Inc. v. Peek (1970) 6 Cal. App.3d 443).

There are also problems in determining when time under subdivision (c) is extended because of an injunction under the Bankruptcy Act. (11 U.S.C. 32(f)). For example, it has been held that such an injunction, though preventing the plaintiff from proceeding against the bankrupt, did not prevent the plaintiff from obtaining a judgment against the bankrupt for the purpose of asserting a claim against the bankrupt's insurance carrier. The plaintiff did not obtain a default judgment against the bankrupt for this purpose within three years. The action was dismissed under subdivision (c). Matthews Cadillac, Inc., v. Phoenix of Hartford Insurance Co. (1979) 90 Cal. App.3d 393.

Practical reasons for not taking a default judgment within three years may not be held sufficient under the "implied exception" test. Where lesser defendants are involved and the main parties engage in extended litigation before reaching the trial stage, it is often economical to give an "open" stipulation of time to plead to lesser defendants, thereby saving counsel fees. Again, arrangements are sometimes made that a defendant need not plead pending performance of conditions that will result in dismissal of the action by a plaintiff-creditor. See Merner Lumber Co. v. Silvey (1939) 29 Cal. App.2d 426.

No. 14. Clarification Of Subdivision (c). Alternatively, should wording of subdivision (c) be substantially amended for clarification?

Comment. In the writer's opinion, if subdivision (c) is to be retained, wording such as "if no answer has been filed" requires modernization and the entire subdivision should be recast.

No. 15. Rewording Of Subdivision (e). Should subdivision (e) that states in effect that a motion to dismiss under Section 581a and certain other acts shall not be a general appearance be amended?

Comment. Present wording does not reflect that there may be a filed extension of time for service of a cross-complaint upon which no summons is needed; that a motion to vacate a default could be pursued with a motion to dismiss (compare CCP § 418.10 (d)--motion to quash service of summons), and that a motion to quash service of summons could be pursued with the motion to dismiss. The words "general appearance" should be supplemented by "for purposes of this subdivision."

No. 16. Rewording Of Subdivision (b). Should subdivision (b) that relates to diligence in serving a cross complaint be amended?

Comment. Certain "smoothing out" seems desirable. There is no requirement proof of service of a cross complaint be filed (when the cross complaing does not require a summons). The words "unless that party ...has made a general appearance in the action" should be restricted by wording such as "for purposes of the cross complaint." Changes in wording applicable to a complaint discussed above should apply also to a cross complaint, where apt.

Section 583

No. 17. Extension Of Time--Subdivision (c) Of Section 583. Should subdivision (c) of Section 583 that relates to the three-year period for new trial be amended to provide for an extension of time by the parties in the situation where action by an appellate court was involved?

Comment. This is the only situation where the present statute does not authorize a stipulation. The time cannot be extended by agreement. Good v. State (1969) 273 Cal. App.2d 587. It is submitted

the interests of uniformity outweigh possible distinctions that could be drawn.

No. 18. Exclusion Of Certain Time Periods From Mandatory Time For Trial. Should a broader "exclusion" than "amenability to process of the court" and "suspension of jurisdiction of the court" be stated for subdivision (b) and subdivision (c) of Section 583? Following is a rough draft:

"(a) There shall be excluded from such five years (three years) on a nonduplicative basis

(i) The time during which the jurisdiction of the court to try the action was suspended.

(ii) The time during which prosecution or the trial of the action, was stayed or enjoined by order of court, operation of law, statute, rule or regulation.

(iii) A period of delay of more than ninety consecutive days, in each instance, reasonably attributable to causes beyond the control of the party, such as death, illness or necessary absence of a party or counsel for a party, cessation of law practice by counsel, disqualification of counsel, disbarment or suspension of counsel, abandonment of the interests of the client by counsel without the participation or acquiescence of the client, and by a congested trial calendar.

(iv) A reasonable allowance for delay occasioned by numerous parties or pleadings, or by the severance of a cause of action or issue for separate trial.

(v) A reasonable allowance for delay occasioned by the requirement for or pendency of arbitration.

(vi) A reasonable allowance for delay occasioned by economic desirability of awaiting determination of an issue or issues in another case.

(vii) A reasonable allowance for delay occasioned by the prior entry of judgment in the action by default or by action other than trial.

(viii) A reasonable allowance for delay during a period when, from any cause, bringing the action to trial would be impossible, impracticable, or futile.

(b) The court may make reasonable estimates of the period or periods of delay for the cause or causes specified in subdivision (a). In the interests of justice, the court, upon determination that a party has unreasonably contributed to a particular delay, may impose conditions upon such party or may decline to exclude all or part of the period in question, or both.

Comment. The above draft in rough form is intended as illustrative, and to serve as a basis for consideration. Generally, this form favors the preservation of the cause of action. To that extent it provides a legislative basis for the present "balancing" of factors under the general "impossible, impractical, or futile" test. In effect, this type of statute would make the five-year and three-year "mandatory dismissal" provisions less rigid. Subdivision (b) is intended to give the trial court some control over unreasonable delays attributed to the "client." The proposal would modify the concept generally stated that the client is bound by the attorney's inadvertencies and omissions. Further comment is deferred at this time.

No. 19. Waiver Or Estoppel. Should the proposed statute expressly incorporate or refer to the rules of waiver and estoppel?

Comment. It is a question of "policy" whether to attempt to incorporate statutory provisions on these subjects. It does not seem practicable to attempt to restate the law of estoppel and waiver in the present context. In the writer's opinion, two types of lesser provisions would clarify the statutory law. One type would refer to the law of waiver and estoppel generally. Example: "The provisions of Section ("exclusions") do not modify or otherwise affect rules pertaining to waiver and estoppel of a defendant." Another type would state in a little more detail: "The provisions of this (chapter) may be waived by a writing or other act of the defendant that manifests an intent not to rely upon the requirements (particular section or this chapter) or a particular requirement. If a defendant, by writing or other act, leads the plaintiff reasonably to believe that the provisions or this chapter or a particular provision therein need not be complied with by the plaintiff, the

defendant may not thereafter require compliance with such provisions, except upon reasonable conditions approved by the (trial) court."

No. 20. Application To Pending Cases. Should there be express provisions as to application to pending cases; if so, what type of savings clause should be considered?

Comment. In the writer's opinion, the statutory changes should have as broad effect as possible. However, there are legal problems where the time for serving summons or bringing a case to trial has apparently expired. Similarly, a question of fairness may be raised as to pending cases in which delay has occurred but as to which the opposing party has not moved for discretionary dismissal. Until the nature of the changes becomes better defined, the writer makes no recommendation as to form of "saving" clause. Tentatively, the writer believes that as a matter of drafting and simplicity in operation, first, the new statute should not have a postponed operative date, second, cases in which orders of dismissal have been entered at the effective date should be excluded, and, third, a comparatively short period, such as 90 days should be given for a party or the court to give notice of motion to dismiss under grounds available under former law (including statutes, rules and decisions).

Respectfully submitted, February, 1981

Garrett H. Elmore
Consultant