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THE LAW'S DELAYS—SOME PROCEDURAL CHANGES

C. V. RIDGELY*

“Then, too (in law), there are a thousand causes of disgust, a thousand delays to be endured.”—*Juvenal*.

“Lawsuits consume time and money and rest and friends.”

“The law is a sort of hocus-pocus science that smiles in your face while it picks your pocket, and the glorious uncertainty of it is of more use to the professors than the justice of it.”—*Man of the World*, Act 2, Scene 1.

It is a common belief and report that the administration of the law in civil cases is slow, uncertain and expensive. The newspapers, lecturers and individual litigant unite their voices in complaint. The legislative branch of the government lends its ear, and hasty and ill-considered legislation adds to the confusion, and, as in the case of injuries arising out of employment, the subject matter has been removed from the realm of individual liability and judicial investigation, and settled by legislation on the basis of policy.

It is not the purpose of this article to consider to what extent these complaints are justified, or the underlying and fundamental changes in our judicial system necessary to make it conform to and meet the economic and industrial movement that now dominates our political and social life. I am sure that the body politic is not ready for the modification of our jury system, or for the coordination of the officials having to do with the administration of the civil law, or for the radical modification of the laws of evidence, nor would it permit of the changes now in common practice in England. It is but natural that this is so. We have grown in numbers and wealth under the present system, and it is difficult to persuade the people that any fundamental change is necessary.

It is to be admitted that there is reason for the complaints, and that the cure lies, for the most part, in fundamental changes, that will not now be permitted. But it can also be safely said that a very material improvement can be had by means of a few changes in methods of procedure, which changes will not conflict with any of our basic policies or fundamental rights. It is not

* See p. 454 for biographical note.

to be hoped that all the changes advisable can be covered in this article, but it is hoped that the attention of the profession will be called to the review of the subject, and that it will contribute its knowledge and energy to the elimination of waste motion and energy now prevalent in our methods. With this in mind, I venture to suggest these changes:

(A) In all appeals from a money judgment, the bond should be so conditioned that the court finally trying the cause should have the right to render judgment against the surety. On appeals to the Appellate or Supreme Court, it should be so conditioned that the court, on affirmance, could remand to the lower court, with instruction to render judgment against the surety. The same method should apply to sureties on bonds given to release mechanics' liens. Why should a litigant with a judgment be subjected to a second suit? Often the surety has moved to another county or state, and oftentimes the costs of the two suits and the various appeals exhaust the money in controversy.

(B) Sec. 399, Burns 1926, should provide that, in all actions in rem, personal service outside of the state should be equivalent to personal service within the state, and further provide for a method of proof of such service, to which proof would attach the same verity that is now given a return which is made by the sheriff. It has been held by our courts that they will deny an application to open up such judgments where the defendant has actual notice given as now provided, but, until such application is made and the question determined, the title is under cloud. With the present statute making such service equivalent to service by publication, there is no incentive for the plaintiff to give actual notice to the defendant. Such an amendment, and service under it, would eliminate questions of minority, death, marriage, etc., in addition to making merchantable title to the property involved. It would be invaluable in mortgage foreclosure, mechanic's lien, special assessment and quiet title cases. In these days of rapidly changing values, a title clouded for five years is almost worthless.

(C) In mortgage foreclosure (1) the time for redemption should run from the institution of the action, and (2) the sale should be had at the end of the redemption period, and should then be absolute. It is difficult to see why an owner in default should first have time to litigate the question of his default, and then have an additional year to redeem. This, of course, is a

question of legislative policy that probably does not lie in the province of the lawyer. Why should there be a sale prior to the year of redemption? No one but the judgment creditor will buy, as a purchase is nothing but a loan for the year. This operates as an injury to both the creditor and the debtor. If the sale is at the end of the year, actual purchasers can be obtained, competitive bidding will ensue, and the owner, if he cannot pay, will obtain something near the fair value of his land, and the holder of the mortgage has a much better chance of recovering his loan. If, during the year, the owner can redeem, the sale and consequent expense are avoided, and the holder of the judgment relieved of the necessity of such advancement.

(D) The right to change of venue from the county in causes triable only by the judge should be abolished. So long as the litigant is permitted a change of the trial judge, his rights are all protected. We all know that in mortgage foreclosures, mechanic's lien cases and other causes of a similar character, change of venue from the county is either for the purpose of delay, or a polite way of getting away from the trial judge.

(E) Instructions. It may be thought that with all the statutory law and decisions on how instructions should be prepared, tendered, given and made a part of the record, there could be no mistake made. Yet the hundreds of decisions by our courts of appeal attest to the confusion. The trial judge is confronted with a request for a bill of exceptions by one party, and the other insists that the instructions be made a part of the record by order—instructions must be numbered consecutively. Why? There seems to be no requirement to give them in numerical order. They shall be "plainly written." This requirement is rarely complied with by counsel and, perhaps, never by the judge, assuming that the judge actually writes them. One of the methods used must be the best. Let us determine which is the best and then abolish the rest of them. In other words, we have a mass of conglomerate laws on a question of practice that should all be repealed, and a simple law, requiring instructions to be in writing, and the action of the judge in giving instructions and refusing to give instructions tendered, to be made part of the record by a bill of exceptions.

(F) Terms of court and vacation:

It seems anomalous that in this age we have fixed and predetermined periods for court vacations, and that practically ten or

twelve weeks are devoted to that purpose. No other profession, and certainly no other business, could survive such a system. Certainly, a vacation is proper and necessary, but to suspend the functions of the Court does not seem proper. Let provision be made for the judge to have the privilege of absenting himself from duty not to exceed a fixed number of days. Then the questions of writs returnable in vacation, the right of the judge to act because of vacation period, and, principally, the total suspension of the functions of the Court, would be avoided. There is no excuse for a Court, with jurisdiction over several hundred estates and wards, having ten weeks' vacation. I am aware of the provisions for special terms, but it is too much to expect the judge, subject to the pressure of those litigants desiring delay, to constantly disregard statutory requirements for vacations. There should, where there is one circuit to the county, be but one term each year. Provision could be made so that causes would remain in fieri for a fixed period, say thirty days. As it now is, a cause tried on the first day of the term is within the jurisdiction of the judge for a period of ten weeks, while, in the case of a cause tried on the last day, no opportunity is afforded for correction of errors.

(G) In the administration of estates:

(1) Proof of heirship should be required to be made and should be determined shortly after letters are issued. Within 18 months, the writer has had seven estates where heirship is in dispute—cases where husband and wife were killed in the same accident—cases of validity of divorce and subsequent marriage, etc. In all these estates, administration has been difficult and expensive because the question was not initially determined, thereby resulting in the employment of two or three sets of attorneys, service of notice on different claimants, the involvement of titles, delay in the determination of the amount of inheritance tax, and, finally, the delay in final settlement.

(2) Where there is a will, the widow should be required to make her election within 30 days after probate thereof. The disposition of property for the payment of debts, the payment of mortgage, and many other questions of administration are affected by the widow's election to take under the law, yet at present she can wait until the end of the year before acting.

(3) Likewise, the time for contesting the will should be materially shortened, for the same reasons.

(H) In 1927 the General Assembly provided for the commitment of the insane to hospitals for the insane, by judges of the Circuit and Superior Courts. The hearing contemplated is summary—examination by and reports from medical examiners are used, and the hearing is held in chambers. If the party has property, an entirely different procedure is prescribed for the determination of the question of whether or not a guardian should be appointed. In the latter case, the prosecuting attorney must appear, the Clerk must file answer and a jury can be demanded. Aside from the possibility that a judge may determine the party insane and the jury find him sane, or vice versa, under the present practice there must be two hearings to determine the one question.

May I again urge action on the part of the bar? Let the proper committee of the State Bar Association publicly invite proposals looking to an improvement in procedure. When, and if, there is a response, let the committee sift the suggestions, and those that are deemed worthy should then be submitted to a referendum of the entire membership. Should any be approved, let the committee, at the expense of the Association, employ draftsmen to prepare the necessary bills and, when they are prepared, see that they are introduced and passed. Can we not spend time and money for something other than our annual meeting?

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