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P. W. Lanier Sr.

SHOULD NORTH DAKOTA ADOPT THE FEDERAL RULES OF CIVIL PROCEDURE?

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TO UNDERTAKE to discuss all the Federal Rules of Civil Procedure, some eighty-six, would take volumes. Many have to do with appeals to the Circuit Court and with phases of the Federal Courts that make them inapplicable to situations in the several states. So, I shall try to give effects as they have been observed by me in actual practice in my close contact with these rules since their adoption.

Some preliminary observations might be in order. The supreme need is justice rendered quickly and with the least possible expense. The American way is based upon a government of laws and these laws must be made to work or the hoi polloi will become a law unto themselves. When justice is defeated, or comes so slowly as not to be recognized when it arrives, real national citizenship is undermined.

Laymen, and lawyers particularly, know there is too much law and too much conflict in the law and that there is need for quicker application of our laws.

American law is a mass of statutes, decisions, rules and regulations running into all of the states and into the national capitol and administrative boards where the practice of law today is one of the big businesses of the legal profession.

I do not think it amiss just here to quote from the Handbook on Improvement of the Administration of Justice of the American Bar Association:

"There is little doubt that we are facing a threat to our democratic way of life, greater perhaps, than any we have experienced in our history. This common danger has aroused a united will to defend our institutions. Something more, however, than a mere enthusiasm for democracy must animate its defenders or they will fail."

Quoting further:

"To correct this situation is peculiarly the duty of the bench and bar. They alone have the requisite knowledge and experience to make practical reforms. Moreover, improvements in procedure will benefit the lawyer by saving time and by attracting back into the Courts some of the litigation now disposed of in other ways. Undoubtedly the resort to administra-

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tive agencies and tribunals is in part due to the inefficiency of the judicial process."

The more I see of the congestion and delays in litigation in other states, the more I appreciate much of our code of civil procedure. But at times, we have, even in North Dakota, congestion and delay. Sometimes congestion caused by delay, and sometimes delay caused by congestion. When motions and decisions are held in the bosom of the District Judges for months and years and sometimes opinions from our Supreme Court are long delayed, we realize that even we are not perfect.

The introduction of uniform civil procedure in the Federal Courts on September 16, 1938, recorded a highly noteworthy step forward in law reform. This was made possible by the Act of Congress of June 19, 1934. This Act empowered the Supreme Court to regulate by rules the pleading and practice in the District Courts of the United States in actions at law. Corresponding authority in respect to suits in equity and admiralty had existed since 1789.

Arizona, New Mexico and Colorado promptly and fully adopted the spirit of progress evidenced by the New Federal Rules of Procedure, Civil and Criminal, which were brought into reality mainly by the efforts of Judge Charles E. Clark of the United States Court of Appeals, Second Circuit, and Attorney General Homer E. Cummings. The Nebraska Supreme Court endeavored to get in line, but a reactionary bar resisted and a reactionary legislature finished the kill. Missouri and Texas got on the main highway but in a short while detoured. South Dakota, Pennsylvania and New York have been tasting this new progresive morsel. Last year, Maryland, Delaware and New Jersey went the limit in adopting this supreme progress of the century in court procedure.

The Federal Rules have changed the trial of a law suit from a contest to avoid trial on the part of one side or the other and usually by the defendant, to an attempt to find out who is right and who is wrong, and to do this inexpensively and speedily. And as lawyers generally know, it is usually the defendant who profits by delay because the plaintiff has to make the forward moves, and plaintiffs are unorganized and most of them will have only one law suit in a life time.

Since the new rules of civil procedure, decisions have come down from the different courts as to all of such rules, and opinions have been written and recorded in Federal Rules Decisions which are available to the bar. A reading of such

decisions will give the effects and the operation of such rules and will, in my humble opinion, show that the adoption of the Federal Rules of Civil Procedure by the State of North Dakota, or by the several states will:

(1) Simplify procedure.
(2) Enable lawyers whose practice is mainly in the State Courts to appear in any Federal Court in any State with confidence and understanding.
(3) Will eliminate delays both in getting cases to trial and loss of time in the trial of same.
(4) Will, by the many means of discovery, bring speedy, substantial justice.

All lawyers should examine these rules which are found in Title 28, Sec. 723, *et seq.* and the new criminal rules in Title 28, Sec. 541, *et seq.* U. S. C. A. and, after such examination, lawyers should ask themselves the question: "Will the adoption of such rules by North Dakota do all that is promised by paragraphs (1) to (4) inclusive, above?" and then honestly answer the question. I feel sure that the answer must necessarily be "Yes." Of course, if such rules are adopted by this State, it means lawyers will have to do a little extra work to more fully familiarize themselves with such rules, but certainly in the interest of progress, and in the promotion of the general welfare, lawyers should get in line as part of this movement.

Certainly, it is axiomatic that such rules will (1) simplify procedure, and (2) enable lawyers whose practice is mainly in the State Courts to appear in any Federal Court in any State with confidence and understanding.

Will (3) they eliminate delays in getting cases to trial and loss of time in the trial of same, and (4) will the rules by the means of discovery bring speedy, substantial justice?

Under Rule 34, Civil, upon motion of any party . . . upon notice . . . one may (1) order production and leave for inspection and photographing of documents, papers, etc. and for permission to go on designated land for inspection, measuring and photographing.

Rule 36 provides that a party upon written request may ask for admission of genuiness of any material document, and such admission will either be forthcoming, or for the failure to be forthcoming pursuant to the rule, the effect is an admission.

Rule 16 provides for a real pretrial that has proven to be

a great saving of time to courts, litigants, jurors and witnesses.

Rule 33 provides for interrogatories that go far to speeding the cause inexpensively.

As stated before, to cover the rules fully to show how they, as a whole, support the claim above made for them, would take too much time and too much space. But the rules are well considered and designed to do all that is promised under (1) to (4) above set forth. To amplify the rules above specifically referred to would show conclusively that a litigant with a meritorious civil case through his attorney could reach out and bring in before trial evidence that he would never reach under present rules, and if so, not in time to consider same for proper use on the trial. And, of course, this in the event the case is tried, shortens the trial; and oftentimes after the party seeking discovery has such evidence, there will be no trial, due to the fact that such evidence clearly defeats one side or the other. To one seeking substantial justice, this is satisfactory, and to lawyers who want the legal profession to operate on the highest plane possible, this should not be objectionable.

Under the Federal Civil Rules, accounting cases which heretofore have sometimes taken weeks and months to try, may be quickly reduced to material issues and evidence which heretofore to take would require weeks and even months is stipulated into the record in the forms of conclusions based upon admissions and records, and the controverted legal questions are brought to the forefront quickly and presented to the Court for determination. What applies to accounting cases applies to many, many other types of litigation.

Insurance companies and insurance company lawyers are in the business of defending. Many, if not most, of the cases in which they defend, are brought by plaintiffs who never had a case before, and many times by a lawyer, even though able, who has had little experience with negligence cases and who is employed long after an accident has happened, and at a time when he does not know who the witnesses are, has no pictures of the scene, and no measurements of the grounds where the accident occurred, and the insurance companies, through their claim agents and adjusters who sometimes are lawyers, have all of these. Now, mind you, I am not criticizing either the insurance companies or the lawyers that represent

them for being diligent in the preparation of their case, but I am referring to what amounts to a flagrant miscarriage of justice due to the inability of an inexperienced or one-time litigant in connection with his one-time law suit, to have his case fairly tried.

Now, let's say the lawyer upon the statement of his client brings a suit. He then may use the rules for discovery and get the names of the witnesses, get to see and make copies of the pictures and measurements of the scene of the accident; when all of this is done, he may reach the conclusion that his client has no case, and the case will not be tried but will be dismissed. On the other hand, if it appears that this is a case which should be tried, then substantial justice will be served if the facts are fully and fairly presented. This innovation and aid to justice follows through generally in the New Federal Civil Rules.

Simplicity of pleading is emphasized under Rule 84 and forms for complaints and answers in all usual types of cases are prescribed and recorded in Section 723 C, Title 18, U. S. C. A. To illustrate, the following are two forms that are prescribed:

Form 5 is the complaint in an action on an account:

"Defendant owes plaintiff the sum of Ten Thousand Dollars according to annexed Exhibit A.

Whereupon plaintiff demands judgment, etc."

Form 9-10 recommended is a negligence case:

"On June 1, 1936 in a public highway called Boyleston Street, in Boston, Massachusetts, defendant C. D. or defendant E. F., or both defendants C. D. and E. F. negligently drove, or caused to be driven, a motor vehicle against plaintiff who was then crossing said highway.

As a result plaintiff was thrown down and had his leg broken and was otherwise injured.

Wherefore plaintiff demands judgment, etc."

The demurrer has been abolished under these rules and a demand for bill of particulars is not looked upon with favor, the reason being that the many means of discovery take the place of bills of particulars. So we can readily see that short pleadings, abolishment of the demurrer, and non-use of the demand for bill of particulars, all come about naturally with the adoption of these Rules.

If we lawyers wish to maintain our position in the business life of the country, we must look to the improvement of the

administration of justice in which we form the most essential part. If we listen to the song of that siren about which Patrick Henry orated, until she transforms us into ostriches who stick their heads in the sand to escape trouble, we are deluding ourselves.

Workmen's Compensation laws are the direct result of inefficient handling of claims growing out of industrial accidents, and such laws are not in existence just because they make the careful pay for the negligent. Business corporations will suffer much injustice rather than be drawn into Court with expense, delay and uncertainties of litigation. With ever increasing frequency throughout the land, arbitration agreements are inserted in contracts which evidences a belief that lay agencies are more efficient than the Courts.

Let us be reminded that the administration of the law is the business of the lawyer even more than it is of the Court, and if we are to prevent business that properly belongs in the Courts from getting away, we must see that such business is attended to efficiently and in a businesslike way.

Lassitude on the part of lawyers breeds lassitude in Judges. Diligence and energy by the lawyers tends to speed up the wheels of the machinery for the administration of law. The Federal Rules of Civil Procedure are calculated to put new ambition and incentive in the lawyer who oftentimes finds himself discouraged by the many delays against which he is helpless.

Science and invention have outrun government of which the administration of laws is a most essential part. Lawyers are the best qualified citizens of our country to bring government up to date, and in my humble opinion, the adoption of the Federal Rules of Civil Procedure by the several states would be a move that would bring government from the horse and buggy days up to date.

Little has been said, or will be said, of the criminal rules, which are excellent, because in North Dakota, our criminal procedure is speedy and effective and our rules of procedure are much more modernized than those of many other states. Furthermore, North Dakota is fundamentally law abiding, and public officials charged with the duty of enforcing our criminal laws are generally honest and sufficiently efficient to get the desired results.