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THE SPIRIT OF THE NEW FEDERAL RULES OF PROCEDURE AND PROCEEDINGS

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THE Federal Judiciary Act of 1789 provided respecting the time for seeking review by the Supreme Court "and writs of error shall not be brought but within 5 years after rendering or passing the judgment or decree complained of." Time has indeed marched on since the adoption of that important act. The automobile has succeeded the ox-cart. Speedy self-propelled luxuriant liners and China Clippers have succeeded slow moving sailing vessels which depended on a vagaristic weather god who might decree wind or calm. Airplane and streamline train have succeeded pony express and stage coach. Telephone, telegraph, and radio encompass the globe. And with these tremendous strides in the means of travel and communication has come an increasing demand for a more expeditious, a more certain, and a more competent administration of justice. I sometimes ponder whether the instrumentalities with which we so speedily carry on our business and social intercourse today have any real advantage over the simple means afforded our forefathers. Be that as it may, we are living in an age that demands a speedy administration of justice.

Sensible to this demand, the American Bar Association more than thirty years ago took up the task of securing the enactment of a law by Congress giving to the Supreme Court the power to formulate and promulgate rules of practice and procedure in the district courts of the United States.

For many years its efforts were blocked by a ranking member of the Senate Judiciary Committee until the attainment of the objective seemed almost hopeless. Then a fortuitous event occurred. Honorable Homer Cummings became Attorney General in place of Senator Walsh who had been selected for the position and who had been a bitter opponent of the proposed measure. Attorney General Cummings sponsored and secured the adoption and approval of the act of June 19, 1934, authorizing the Supreme Court to prescribe rules of practice and procedure in civil actions and to unite rules at law and in equity so as to secure one form of civil action and procedure.

With the aid of an able advisory committee the Supreme Court has formulated and promulgated these rules and they are now effective.

It is my considered judgment that no greater achievement has yet been attained in our efforts which should always be constant to improve and make more certain and expeditious the administration of justice in our courts.

But mere rules are of little help. Unless they are administered by a competent, fearless, honest, and just judiciary, aided by lawyers with the same attributes who are mindful of their responsibilities as officers of the court, and of their duty to society as well as their obligation to their client.

To some phases of these new rules I want to address myself today.

First, they govern actions at law and suits in equity and they are to be construed "to secure the just, speedy, and inexpensive determination of every action."

Actions are commenced by the filing of a complaint. The pleadings allowed are a complaint, answer, a reply if the answer contains a counterclaim, an answer to a cross-claim, a third party complaint, a third party answer, and if ordered by the court a reply to an answer or a third party answer.

Pleadings are to be simple, concise, and direct. Demurrers are abolished. The following defenses only may be made by motion:

1. Lack of jurisdiction over subject-matter;
2. Lack of jurisdiction over the person;
3. Improper venue;
4. Insufficiency of process;
5. Insufficiency of service of process; and
6. Failure to state a claim on which relief can be granted.

Motions for a more definite statement or a bill of particulars and to strike redundant, immaterial, impertinent, or scandalous matter are allowed.

Liberal provisions are made for counterclaims and cross-bills and for the bringing in of third parties to the end that

all questions relating to the subject-matter of the action may be settled in one suit.

Liberal provisions are also made for amendments and supplemental pleadings.

No doubt, one of the most important provisions looking to expedition in the disposition of cases is found in Rule 16 dealing with pre-trial procedure. Under it the court may call the parties before it for a conference to consider

1. The simplification of the issues;

2. The necessity or desirability of amendments to the pleadings;

3. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

4. The limitation of the number of expert witnesses;

5. The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

6. Such other matters as may aid in the disposition of the action.

The rules requires that at the conclusion of the conference the court shall make an order which recites the action taken thereat, the amendments allowed, and the agreements made, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel. At the trial the court may modify such order to prevent manifest injustice.

Actual experience with this practice in the state courts at Detroit, Boston, Cleveland, and Los Angeles has demonstrated its practicality and its desirability.

Another important rule looking to the doing of full and complete justice respecting the subject-matter of the litigation is that dealing with permissive joinder. It reads:

"(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined

in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more demendants according to their respective liabilities.

"(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice."

Rule 23 is a substantial restatement of Equity Rule 38 as it has been construed by the courts respecting class actions.

Rules 26 to 32 prescribe a much needed plain and simple procedure for the prompt taking of depositions.

Rules 33 and 34 provide for interrogatories to parties and for discovery and the production of documents and things for inspection, copying, or photographing.

Rule 35 provides for physical and mental examinations of parties for good cause shown under order of court.

Rule 36 provides:

"(a) Request for Admission. At any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant document described in and exhibited with the request or of the truth of any relevant matters of fact set forth therein. Copies of the documents shall be delivered with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn state-

ment either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.

"(b) Effect of Admission. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceedings."

Rule 37 provides:

"(a) Refusal to Answer. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees."

Thus, it will be seen that adequate and workable machinery is provided for the elimination of all issues respecting which there is no substantial dispute.

This procedure if followed will simplify and silhouette the real issues, make their presentation more simple and clear to court or jury, save much time at the trial, and make more speedy and certain the attainment of a just result and the accomplishment of full and complete justice.

If time permits, I would like to discuss briefly some features of the rules relating to appellate procedure.

Appeals to the Circuit Court of Appeals are taken by filing with the District Court a notice of appeal.

The notice must specify the parties taking the appeal, designate the judgment or part thereof appealed from, and name the court to which the appeal is taken.

Notice of the appeal is given by mailing copies of the notice to all parties to the judgment other than those taking the appeal.

Promptly after taking the appeal the appellant must serve upon the appellee and file with the District Court a designation of the portions of the record, proceedings and evidence to be contained in the record on appeal. If he does not designate the complete record and all the proceedings and evidence, he must serve with his designation a concise statement of the points on which he intends to rely on the appeal. Within ten days thereafter the appellee may file and serve a designation of additional portions of the record, proceedings and evidence to be included. Rule 75 admonishes that all matter not essential to the decision of the questions presented by the appeal shall be omitted; that formal parts of exhibits shall be omitted; that only one copy of any document shall be included; and that documents shall be abridged by omitting all irrelevant and formal portions thereof.

Instead of serving designations as above provided the parties may by written stipulation filed with the clerk of the District Court designate the parts of the record, proceedings and evidence to be included in the record.

The clerk of the District Court is required to transmit to the Court of Appeals under his hand and seal a correct copy of the matter designated or stipulated. He must include, whether designated or not, copies of the material pleadings without unnecessary duplication, the verdict or findings of fact and conclusions of law, the master's report where reference has been made, the opinion, the judgment, and the notice of appeal with the date of filing thereof, the designations or stipulation of the parties as to the matter to be included in the record, and any statement by the appellant of

the points on which he intends to rely. The matter so certified constitutes the record on appeal.

It is not necessary that the record be approved by the trial court, but if any difference arises between the parties it shall be submitted to and settled by the trial court.

If material matter is omitted or misstated, the parties by stipulation, or the trial court or the appellate court on a proper suggestion or on its own motion may direct correction of the misstatement or the inclusion of the matter omitted.

When the questions to be presented by appeal can be determined without examination of all the pleadings, evidence and proceedings in the court below, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the District Court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions to be presented. The statement shall include a copy of the judgment, a copy of the notice of appeal with its filing date, and a concise statement of the points to be relied on by the appellant. If the statement conforms to proof, it together with such additions as the court may consider necessary to present fully the questions raised by the appeal shall be approved by the District Court and then filed as the record on appeal.

I now turn to the new rules of the Circuit Court of Appeals.

When the record is filed in the Circuit Court of Appeals the appellant must file with the clerk a definite statement of the points on which he intends to rely and the parts of the record he deems necessary to a determination thereof with proof of service thereof on the appellee. The appellee must within ten days thereafter file with the clerk a designation of additional parts of the record he deems material. The parts so designated are then printed under the supervision of the Clerk of the Circuit Court of Appeals. This permits abandonment of points found to be without foundation and elimination from the printed record of all matter not essential to a decision of the questions to be presented.

It is my personal view that under this rule new points may also be presented and application made by either party

for inclusion in the record of any omitted matter essential to a consideration of the new points. Frequently considered study of the record discloses new points or that points specified are without foundation. The whole purpose is to include all that is essential and to eliminate all that is immaterial and nonessential. Noncompliance with the spirit of this rule subjects the infringing party to the assessment of costs.

May I suggest that you give careful study to these new rules and make use of them, not for the purpose of gaining delay or technical advantage of your adversary, but as instrumentalities for the attainment of justice, as means to bring all questions relating to the subject matter of the action and all parties interested therein before the court, to cause all uncontroverted issues to stand as admitted, to eliminate all immaterial issues, and to cause the real and substantial issues to be presented simply, clearly and directly to the end that full, complete, exact and speedy justice shall be attained, for in the words of that great American statesman and lawyer, Daniel Webster:

"Justice, sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself, in name, and fame, and character, with that which is and must be as durable as the fame of human society."

You and I can contribute to the attainment of this high ideal so beautifully phrased by Mr. Webster, if in keeping with the true spirit and intent of these new rules we earnestly endeavor to use them as instruments to improve and make more certain and expeditious the administration of justice in our federal courts.