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THROUGH THE LOOKING GLASS OR HOW TO BE A JUDGE IN TEN EASY LESSONS

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Certain themes persist in the folklore of different cultures on far distant parts of the earth.

Among these are the "werewolf" or "vampire" themes; and (most pertinent to us here) the transposition of a person through a mirror or "looking-glass" into a new world, wherein everything is reversed. Aside from science-fiction, the most notable example, in this context, has been the immortal work of Lewis Carroll, of about a century ago, entitled:

Alice in Wonderland, or Through the Looking-Glass.

In Carroll's work, we read that:

> In another moment, Alice was through the glass, and had jumped lightly down into the Looking-glass room.

At that point, Alice had gotten through the mirror and into a new world, in which everything was reversed, and strange, and all values and judgments were reversed.

In many natural and biological processes, this sort of thing does occur. It is called metamorphosis and the best example is that of the homely grub or chrysalis turning into a butterfly

So it is for a trial lawyer suddenly becoming an appellate judge. On about two days' notice, this happened to me on March 30, 1966, and this new status continued for nine months. At the end of the term, the butterfly turned back into a grub. (The "Cinderella" theme, which likewise exists in many foreign cultures, need not be elaborated on here, as the two things are quite parallel.)

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To get down to brass tacks, I think it would be useful for the trial Bar, to know how it looks from the other side of the mirror, where everything is weirdly reversed, so that left becomes right, dark becomes light, and where that which was previously obscure becomes either more certain, or paradoxically, even more obscure.

I think we owe a duty to our Bar to draw aside the somber curtain of mystery, which hangs before the procedures of our appellate court. This dark curtain has hung for me, through over a quarter of century of practice before this court, and, in some respects, it should be drawn aside.

Some things, in our Supreme Court, should not be publicized. One of the obvious ones is: Which Justice has the decision assigned to him? I do not think, either, that anyone outside the Court should know who it is that is for or against a certain point, until the time that the opinion is issued.

In a representative form of government, we accept the principle of secrecy of the ballot, and this works for, rather than against, the true democracy There is a place for secrecy in our form of government, if a limited one. In the Germany of Hitler, namely the Third Reich, the secrecy of the ballot was violated, and it is violated today in any Communist country

I make this comment only to explain that complete publicity and knowledge, of inner government functions, often does not work for the benefit of our form of government, and we do not necessarily believe in it.

I now note that this Supreme Court does have Rules, and that they are contained at the back of Volume 76 of North Dakota Reports. They are often contained in the Directory of Attorneys, and the last one so containing them is the issue of 1965. I think the lawyers should read these Rules, and I know now that many of them do not do so.

Some things in these Rules create problems. For instance, I think it takes a marvel of semantic hair-splitting to determine the difference between "Facts" and "Ultimate Facts." In this regard, we must remember that, during the Middle Ages, lengthy debates were held upon the question of: "How many angels can dance upon the head of a pin?"

It is probable that a revision of the Rules of the Supreme Court will come forth in the next year or so. Meanwhile, they are there, and attorneys should understand and abide by them. In this world, we have to have rules.

For instance, there is a very good reason for giving a structural outline, or form, for an attorney's brief, by prescribing the form,

in these Rules. In this connection, any trial attorney who becomes a member of the Court, will quickly see that he was previously derelict in following the rules. I think attorney's briefs could be much better than they are. Some lawyers seem to have a talent for this, and I have marveled at the fine organization shown in some briefs — and I am cynical and critical, I imagine.

The same thing goes, for arguments. Some attorneys seem to have a faculty of explaining the facts in a very simple way It is much harder to do things right, in the short way, than the long way — appellate judges have learned this.

One nearly unique feature in our North Dakota practice does not receive enough attention.

This is the provision for a *trial de novo*, which was originally passed as Chapter 82, Session Laws of 1893,[1] and was sponsored by a Fargo attorney, Seth Newman. Hence, the common designation is "The Newman Law"

This apparent deviation from normal appellate court functions was sustained by our Supreme Court in the case of *Christianson v Farmers Warehouse Association.*[2]

This "Newman Law" places the North Dakota Supreme Court, in a sense, in the role of a jury I am quite sure that many attorneys do not appreciate this fact. It is unlikely that it will ever be repealed. Therefore, attorneys on appeal on a "trial de novo" case should recognize (which obviously many do not do) that there is a complete review of the facts on this type of appeal from a non-jury (court) case.

In such a situation, I think the attorneys should most carefully draft their briefs and their arguments which will thereby be more directed to the facts than would be the case in most appellate jurisdictions.

I would not want to adopt the theory that: "The Supreme Court does not know anything." (This suggestion has been made, I imagine, in the past, in an era of more vigorous attorneys than now)

However, I think the appellate attorney should proceed on this precise basis — that it is his duty to tell the court what he knows about his case, what the record shows, and that he wants to politely illuminate the dark caverns of their minds.

On another tack, I think attorneys should not make any assumption about which Justice has the case, which assumption is based upon questions asked. The Justice to whom the opinion is assigned — and it was assigned in advance — may be as silent

1. See N.D. Cent. Code § 28-27-32 (1960).
2. 5 N.D. 438, 63 N.W.2d 893 (1895).

as the Sphinx of Egypt during the oral argument. And I would not worry, either, about raising any other inference, based upon questions or lack of questions, by a Justice or the Justices. I think attorneys should welcome questions. I believe the most discouraging situation is to argue a case with great vehemence before a Court and then sense an aura of stagnation or apathy up there on the appellate bench.

As a sort on interregnum or *non sequitur*, I would like to admonish the younger members of the Bar not to get "cold feet" in arguing before the Court — this is something I have sensed at times. Your inexperience factor may work in your favor, as much as against you. No member of the Court will worry about your inexperience. They were all young once, too. As an officer of the Court, you deserve and will get their respect and attention as they have yours.

Now, I think the Bar should know just what does go on when the Justices file back out of the Court into their conference chamber The cases have been assigned in rotation and it is known which Justice has the decision.

A preliminary discussion is held at this time, which probably is not very long, but may be. There will be many discussions later But the Justice to whom the case is assigned will thereafter retreat to his lair to work on the case.

Ultimately, this Justice will cause copies of his opinion to be distributed to the other Justices, and they normally have days to work at it, and pick at it. The word "pick-at" is a slang phrase used to describe minor criticisms of the opinion. Major criticisms involve lengthy, subsequent conferences.

Within the deliberative and opinion-writing phase of our North Dakota Supreme Court, corrections and discussions are virile and vigorous. I know nothing of other courts; but there have been no one-judge opinions in this Court, during my brief time, nor during the time which I specifically examined retrospectively through what I learned up there. I think this relates to a misconception which I had as a trial attorney, and this misconception was just exactly what the word means.

I want to mention now, the office of Chief Justice. I think there is a developing trend to recognize the Chief Justice as someone other than merely the Justice who sits at the center of the bench, by virtue rotationally of his term status.

There are inherently definite administrative and supervisory responsibilities in this position, and they are gradually becoming more recognized and used.

Many states distinctly elect a Chief Justice, pay him more, and provide him with more administrative assistance. The necessary constitutional and statutory changes to accomplish this, are things we must aim for The Bar generally does not realize the constant calls for additional time and administrative functions, that descend upon the Chief Justice.

At times, there are dissenting opinions. There are also special concurring opinions.

This is a difficult thing to evaluate, and this question can only be considered in the light of real trial and appellate experience. This thing is: Should there be more dissents, or more unanimity, in a given court? I have continually examined the decisions of the recent United States Supreme Court, for example, and think that there are too many rambling and hair-splitting dissents and concurring opinions. This is a quite subjective observation. But I would not want our Court to follow in this path. A Court should decide things. If they have the diligence and energy to sit down and thrash it out, then they should do this. This is done in the Court here.

Through the processes of our form of government, we should ultimately get a divergence of opinion on our State Supreme Court. This is right. We do not want five people who all believe the same way The more divergence that exists in personal, psychological, and political attitudes, the better This is the core of our system of government.

In this connection, I am very sure that the public at large does not need to worry about "political" decisions by our highest court. As an attorney, I have practiced repeatedly before the Court on this type of case, and I think I know We all realize that, in a prior time in North Dakota, when politics were more vigorous and partisan than now, the public might have had this idea or suspicion. But there is surely no grounds for it now, as of the period that have practiced before the Court, which means since the year 1939.

Near the close of my short term, one of my colleagues joked with me by saying that he supposed I would tell in this article what he, Judge A, said to Judge B, on such and such a conference. This was a deliberately facetious remark, given and taken with the spirit of humor It does, however, have a serious aspect, as it proves that: (1) Any judge should have, and ours do, a sense of humor and not take himself too seriously, and (2) that courts as entities are permanent and continuing in nature, that they do not relate to the nature or characteristics of individual judges; so that the fire that might flare at discussion of a decision by appellate judges is a good thing for attorneys to know about, so that they

know nothing is "cut-and-dried" up there.

My time on this Court has convinced me that North Dakota attorneys are very good and that they will compare favorably with the Bar of any other jurisdiction.

Through many years of experience in military and civilian activities, I have been able to observe the lawyers from other states. I think our Bar comes out very well in comparison.

Having been perched on this Bench with some air of temporary, black-robed omnipotence for nine months gave me more time to confirm that which I already knew, in this regard.[3]

3. The writer strongly recommends the reading of two articles. They are: Burr, *Procedure in the North Dakota Supreme Court*, PROCEEDINGS OF ANNUAL MEETING OF STATE BAR ASSOCIATION 1941 Pearce, *Appellate Procedure*, REPORT OF SECTIONAL ASSEMBLIES, STATE BAR ASSOCIATION MEETING 1958.