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The adoption by any state of the simple Federal Civil Procedure is an important milestone in the progress of law reform. Consequently, those who are interested in the advancement of the movement for simplification of judicial procedure, the elimination of unnecessary technicalities, and the reduction of the cost of litigation, are at this time directing hopeful eyes at North Dakota. They are ready to acclaim the entry of this great State into the ranks of those progressive jurisdictions that have already adopted the simplest civil procedure yet devised in this country, and perhaps in any place where the Anglo-American system of law prevails.

The Federal Rules of Civil Procedure became effective in the Federal courts in 1938. Since that time Colorado, New Mexico, Arizona, Nevada, Iowa, Utah, Delaware, New Jersey, Minnesota and Kentucky have made the new procedure applicable in their own tribunals. Several other States have adopted selected specific features of the Federal procedure. North Dakota and Missouri are now in the process of introducing Federal procedure.

It is earnestly hoped that North Dakota will become a member of this group during the current year. This State has always exhibited a forward-looking attitude toward the simplification of judicial procedure. Many years ago when code pleading came into vogue to supplant common law pleading, North Dakota was one of those that embraced the innovation. Now, another epoch-making step in the direction of further simplification has been taken in the Federal courts and in many of the States. It is fitting, therefore, that North Dakota should be among those to join the group of those jurisdictions that are in the front line of contemporary judicial reform. The bench and bar of North Dakota no doubt are interested in knowing that its neighboring State of Minnesota has adopted and promulgated the Federal Civil Procedure. The list of States that have accepted it comprizes States of various kinds, both in the East and in the West, in the North and in the South. Some are industrial, others are agricultural; some are small with a concentrated density of population, while others are large with very sparse population; some are urban, others are largely rural in char-

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acter. Yet the new procedure is suitable for jurisdictions of various types, and conditions of different kinds.

This far-reaching advance in the field of judicial procedure is based on two fundamental principles. One is that the procedure of the courts should be regulated by the courts themselves, as a co-ordinate branch of the Government, just as the Legislature likewise governs its own procedure. This is not a novelty or an innovation, but merely a restoration to the courts of their centuries-old power to regulate their own pleading, practice and procedure of which they were deprived during the Nineteenth Century. The second basic principle is that the procedure to be adopted by the courts should be simple, should eliminate technicalities to the utmost, and should lead to the disposition of cases on the merits as expeditiously as practicable, with the least expense to the litigants.

Many years ago, the American Bar Association initiated a movement to confer on the Supreme Court of the United States the rule-making power for the Federal courts, an authority which that tribunal had had continuously as to suits in equity, but not as to actions at law. This long campaign was brought to a successful culmination in 1934 under the leadership of Homer Cummings, then Attorney General of the United States, when the Congress enacted a statute vesting the rule-making power in the Supreme Court and empowering it to unite law and equity. The rules themselves were then drafted by an Advisory Committee appointed by the Supreme Court for that purpose. Its Chairman was former Attorney General William D. Mitchell of Minnesota. The eminent group headed by him, after considerable research and travail, with the help and after consultation with bar committees throughout the country, devised the simplest form of civil procedure yet produced in this country. The rules were promptly approved and promulgated by the Supreme Court and became efective in 1938. They have now been in operation for almost twenty years. They have been tried in the crucible and have met the test successfully. They have fulfilled their objective. They are so framed as to be suitable not only for Federal courts in dealing with litigation of the type that comes before those tribunals, but also for State and local judiciary. Perhaps a striking demonstration of this fact is found in the District of Columbia, where the Federal court handles not only Federal cases, but also those that elsewhere would find their way into State courts, in view of the fact that the District of Columbia

is a Federal area and, therefore, has no tribunals corresponding to State courts of general jurisdiction.

It is not surprising that on occasion the movement in the direction of spreading the new simplified procedure has had to overcome inertia, or has been confronted with skepticism, and antagonism and even with active opposition. It is natural for lawyers who have practiced for a great many years under procedure of a particular type, with which they have become thoroughly familiar, to be reluctant to learn a new type of practice, no matter how much simpler and how much more desirable it may be. This hesitancy is but a natural concomitant of the conservatism of human nature, a characteristic that appears very strongly in the legal profession. On the other hand, we must emphasize the obvious fact, for it is the obvious that is frequently overlooked and forgotten, that courts exist for the benefit of litigants and the public generally, rather than for the advantage of lawyers. Whatever makes the attainment of justice less technical, more expeditious, and less expensive, is desirable in the public interest. Moreover, the new generation of lawyers as they come to the bar will derive a personal advantage from the fact that instead of having to learn two types of procedure as their elders were compelled to do, one prevailing in the Federal courts, and another in their own State courts, they would be required to familiarize themselves with only one type of procedure if the same practice is in effect in both groups of courts.

It is but natural that slight deviations should creep into the rules in different States adopting the Federal procedure. The proposed draft of the Rules, which North Dakota has under consideration, contains a few differences though of only secondary importance, from the Federal rules. It may be of interest to consider them briefly.

There is a difference between the Federal and the proposed North Dakota procedure as to the manner in which an action may be commenced. In the Federal courts this is done by filing a complaint in the Clerk's office. Service of the summons and complaint on the defendant is then made by the marshal.[1] On the other hand, it is contemplated in North Dakota proposed Rule 3 that an action shall be instituted by the service of a summons, either with or without a complaint. The former mode has been traditionally used in the Federal courts, as well as in many of the States, as for instance,

1. Rules 3 and 4, F.R.C.P.

Minnesota. Some of the Code states, such as New York, have employed the latter method. Actually there is not much to choose between them, as no question of principle is involved. Both are equally simple. The draftsmen of the Federal Rules gave the subject thorough consideration and chose the course of filing a complaint in the Clerk's Office. The only disadvantage of the proposed North Dakota rule is that lawyers practicing both in the Federal and State courts, might occasionally thoughtlessly confound the two ways of commencing suit. If the statute of limitations is about to run, such a confusion might result disastrously.

Both under the Federal procedure and under the proposed North Dakota practice, the plaintiff may join two claims in a single action, even if the second claim is cognizable only after the first claim has been prosecuted to a conclusion. Thus a claim for money damages and a claim to set aside a fraudulent conveyance, may be joined in the same action, without first obtaining judgment establishing the claim for damages. The proposed North Dakota Rule 18(b) has added an express limitation that the Rule shall not be applied to tort cases so as to permit the joinder of a liability or indemnity insurance carrier, unless the carrier is by law or contract directly liable to the person injured or damaged. This express provision seems desirable. Actually, however, Federal courts do not permit joinder under the circumstances set forth in this limitation, thereby avoiding disclosure of the fact that the defendant is carrying liability insurance.

In actions by or against a public officer, a constructive change is made in the Rule relating to substitution of a successor to the public officer. Considerable hardship, injustice, and delay has resulted from the present Federal Rule, which requires the substitution to be made within a period of six months.[2] A pending amendment to the Federal rule would abrogate the six months' limitation and would also permit an officer to sue or be sued by his official title instead of by name. The draftsmen of the proposed Rules for North Dakota have anticipated this amendment. This is an important advance in the field of civil litigation involving the Government.

The Federal rule relating to discovery and production of documents[3] would be extended in North Dakota by authorizing motions to direct a party to file a verified list of documents or objects which constitute or contain evidence and which are or have been

2. Rule 25(d), F.R.C.P.
3. Rule 34, F.R.C.P.

in the possession, custody, or control of the party. The usefulness of this provision is obvious.

An ingenious provision is contained in the Rule relating to the service of subpoenas by adding options permitting service by registered mail, by telegraph, or by reading the subpoena over the telephone.[4] After all, the traditional form of service of process originated in days before postal service was on a well organized basis and before modern media of communication were even imagined. No reason is discernible why the courts should not make use of new social and scientific advances in this respect as they have done in others. If it should be found in the future that this provision operates successfully, the Supreme Court Advisory Committee might well consider introducing it into the Federal Rules. The States are in a position to act as laboratories for experimentation and trial of innovations. If they prove successful, they can be introduced from time to time into federal procedure.

An important deviation from Federal procedure is found in the proposed North Dakota Rule relating to the examination of jurors on the *voir dire*.[5] The corresponding Federal rule vests discretion in the trial judge either to permit counsel to conduct the interrogation, or to do so himself. This rule has proven successful in actual operation. In a great many Federal courts, possibly in a majority, the questioning of the panel is now conducted by the judge, who, of course, permits counsel to suggest additional questions to him, which he, in turn, propounds to the jurors to the extent that he deems the queries appropriate. Most judges, who use this method, interrogate the panel en bloc instead of pursuing the ponderous, old-fashioned method of interrogating each juror separately with the resultant waste of time. The consequence has been that in the Federal courts, one no longer finds the selection of a jury taking days or weeks, as frequently happens in State courts, especially in cases that have attracted public notice. For example, in a notorious murder case that was tried in a large Middle Western city about a year ago, several weeks were consumed in selecting a jury. A similar occurrence took place in one of the big Northwestern cities last fall. State judges do not actually like this time consuming process and most of them would be glad to eliminate it, but under existing law in most States they are powerless. This useless consumption of time and the laborious interrogation of jurors individ-

4. North Dakota Rule No. 45(c) (2).
5. North Dakota Rule No. 47(a).

ually, sometimes of an almost humiliating nature, has been a reproach to the administration of justice and has cast discredit upon it in the eyes of thinking laymen. Moreover, this process is entirely unnecessary to achieve the ends of justice. Every party is entitled to a fair and impartial jury. No one has a right to a favorable or an ignorant jury. Experience has shown that fair and impartial juries are obtained by the system so largely prevailing in the Federal courts at this time, with no waste of time. It is, therefore, to be regretted that the proposed North Dakota rule preserves the outmoded procedure by an express provision that although the trial court may at its option conduct a general examination of prospective jurors, "any such action on the part of the trial court shall not in any manner limit the right of the parties or their attorneys to conduct such examination."

The proposed North Dakota rule (Rule 59) regulating motions for a new trial differs considerably from the corresponding Federal rule in two respects. The Federal rule authorizes the trial court to grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." This provision in effect preserves the common law doctrine empowering a trial judge to grant a new trial in his discretion, whenever in his judgment a miscarriage of justice may have resulted, or if the verdict is against the weight of the evidence, or an allowance of damages is excessive, or for any other reason required to achieve the ends of justice.[6] The proposed North Dakota rule contains an express enumeration of eight specific grounds on any one of which a new trial may be granted. The danger in such an enumeration is that there is a possibility of a contingency arising in which justice requires the granting of a new trial, but which may not have been foreseen by the draftsmen of the rule. There is always an advantage in a general formula.

The second and perhaps even more important divergence between the Federal and proposed North Dakota rule as to motions for a new trial, is found in the time within which such a motion may be made. Under the Federal rule such a motion may be made only within ten days after the entry of judgment. The proposed North Dakota rule would authorize such a motion at any time within six months after verdict if it is made on the ground of newly

6. Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350, 325 (4th Cir. 1941); Garrison v. United States, 62 F.2d 41, 42 (4th Cir. 1932); Applebaum v. United States, 274 Fed. 43, 46 (7th Cir. 1921); Mt. Adams & E. P. Inclined Ry. Co. v. Lowery, 74 Fed. 463, 470, 472 (6th Cir. 1896); United States v. Robinson, 71 F. Supp. 9 (D.D.C. 1947).

discovered evidence, or within 60 days if made on any other ground. There seems to be sound basis for not limiting motions for a new trial to the short ten day period when made on the ground of newly discovered evidence, for it is reasonable to assume that newly discovered evidence in most cases will not be found within ten days after verdict, but if at all, at some later period. It may perhaps be cogently argued that the Federal rule is defective in this respect. On the other hand, to allow 60 days instead of ten days for the making of a motion for a new trial on the customary ground that the verdict is against the weight of evidence, seems contrary to the public interest. All those desirous of advancing the administration of justice are endeavoring to take all steps reasonably possible to reduce delays to a minimum. The writer is not aware of any hardship that has resulted from limiting an ordinary motion for a new trial to the ten-day period in the interests of expediting disposition of cases. If, for example, a plaintiff in a personal injury case recovers damages, why should he be required to wait before collecting the judgment, until defendant's counsel makes a motion for a new trial, which is generally perfunctory and which is usually denied, on the 59th or 60th day after verdict? The question answers itself.

The writer has endeavored to analyze the principal differences between the Federal and the proposed North Dakota rules. It will be perceived that they are few and most of them are not of major consequence. There are a few others of such a minor character as to require no comment. It is hoped that before long the proposed Rules will be adopted in North Dakota, and that great State will join the group of those that have adopted the simplest civil procedure yet devised in the United States.