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After a Decade: The Reflections of a Trial and Appelate Judge

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LAW BOOKS FOR SALE

Mrs. Kathleen O. Cashel, widow of the late J. L. Cashel, a former member of this association, has for sale the law books hereinafter described. Anyone interested write her at Grafton, N. D.

1943 North Dakota Code.

L. R. A. (NS) 52 Vols. and 20 Annual Vols. and Digest, 10 Vols. and Desk Book.

Annotated Cases—Eng. and American, 21 Vols. and Digest.

North Dakota State Reports, Vols. 1—46.

1913 North Dakota Code.

AFTER A DECADE: THE REFLECTIONS OF A TRIAL AND APPELLATE JUDGE

Excerpts from an address delivered by United States Circuit Judge John D. Martin, of Tennessee, to the Judicial Conference for the Sixth Circuit on October 18, 1945.—December issue of American Bar Association Journal.

So many of you have served in the Federal judiciary so much longer than I, and those of you who have not are men of such keen discernment, that I hesitate to comment upon the obvious obliteration of many long-established principles and the sweeping revolutionary changes in Federal jurisprudence and procedure which have been wrought within the range of the observation and experience of a judge of merely ten-year tenure. The first revolutionary impact within the past decade was the pronouncement by the Supreme Court in 1937 that its predecessor justices had erred for one hundred years in construing the Constitution as conferring upon the courts of the United States power to declare substantive rules of law. With that single blast, out went the authoritative force of tomes of a century's carefully considered expression of juristic concepts of the common law and the reasons thereof. In came the judicial annotator to sit in the seat of the Federal judge in diversity of citizenship cases.

It is far from my purpose to sketch even in skeleton outline the death of the doctrine of stare decisis by referring to numerous recent decisions of the highest Court overturning long-established precedents, or to dwell upon the resultant confusion and conflict. You are all too familiar with the details; and dissenting justices have protested more robustly than in propriety would be permissible to a judge of a lower court. We all know that what the Supreme Court may declare to be the law in almost any close case was never more uncertain than now. The fact that one-sixth of its reported decisions at the last term were rendered by five to four votes offers no assurance of an early stage of greater certainty. Formerly, divisions in the Court resulted generally from fundamental differences in interpretation of the Constitution. But no such delimitation upon divergence of opinion seems to exist today, for the divergent views of the justices appear to range all

fields of statutory construction and the entire area of the subject-matter committed to the final jurisdiction of the Supreme Court.

Administrative Agencies vs. the Judicial Power

No more startling innovation has come about within the past decade than the widespread building-up of administrative tribunals in derogation of the judicial power, which some of us have thought was firmly vested by the Constitution in the courts alone.

So frequently have we been reminded of our inferiority in expertness to various administrative boards and agencies exercising more than quasi-judicial powers but still subject to our review upon petitions for enforcement of their orders, that some fortitude on the part of a circuit judge is necessary for avoidance of an inferiority complex. So steadily has our power of independent decision been curtailed by Acts of Congress and interpretative opinions of the Supreme Court, that we sometimes wonder whether we are considered inferior courts in an actual as well as in the comparative sense of the word "inferior" as used in the Constitution.

Too Limited Scope of Judicial Review

Our practical function in the review of rulings of administrative boards has been reduced to reading records for possible discovery of that rare case wherein there is no evidence, however slight, from which the Board could reasonably have drawn inferences upon which a finding of fact was based. We have been repeatedly and emphatically warned that we dare not substitute our own inferences from fact for those of the Board; and in tax cases, the mystery remains unsolved as to what constitutes a plain mistake of law made by the "better staffed" Tax Court, formerly the Board of Tax Appeals, whose decisions, upon petition, we must continue to review.

To my thinking, it is not in the public interest that the seal of a United States Circuit Court of Appeals should, by compulsion, become a rubber stamp for the approval of the all-too-often arbitrary action of an administrative agency. Unless, through Acts of Congress, the people restore to the United States Circuit Courts of Appeal a modicum of their former significance in the scheme of national government, their present partial eclipse may soon become total. A fair appraisal of the record of these intermediate appellate tribunals would impel the conclusion that they desire a higher degree of faith in their intelligence, efficiency and expertness in the administration of justice than has been evinced in the gradual divestiture of their right to reason and to render judgment with appropriate independence.

Pride in the Judicial Function

Though a natural born optimist, I agree with the cynic who said that nothing is permanent except change. Whether the existing eclipse of the courts of appeal is temporary or permanent, I am pleased and proud to sit upon a bench once adorned by Taft and Lurton, Jackson and Day, Warrington, Denison and Knappen

We of the present succession strive earnestly, within our natural limitations, to uphold the traditions which have been handed down to us by those great jurists and by our other predecessors who once sat so worthily in the places which we now occupy.

A Comparison of Duties and Approach

Friends who know how much I enjoyed my work as district judge frequently ask whether I like my present position as well. The question cannot be answered satisfactorily; for I have been happy on both jobs, and the work of the one is so different from that of the other as to make comparison difficult. The life of a United States circuit judge is that of a scholar; the law library is his workshop. He becomes increasingly addicted to deliberation and reflection, and, moreover, to philosophy. He must read more, study harder, and try to write better, than he did as district judge. He must take care that his long, solitary hours, day and night, devoted to records, briefs and legal authorities and opinion-writing do not diminish his interest in human affairs and in his fellow men. His life is more personally independent, and he is under less constraint; but he must beware that his fewer human contacts do not cause him to lose the common touch. Despite the restrictions upon his official independence which have been briefly noted, a United States circuit judge, once in a blue moon, enjoys a wider opportunity than he had as district judge, to contribute something of real value to American jurisprudence.

What he misses most is action. To me, the forum of the United States district court has always seemed the most interesting place in the world. How eagerly the judge ascends his bench each morning, never knowing just how difficult may be the decisions of the day or what he may be called upon to decide. He must be ever alert, keen in discernment, quick but unhurried in action, and unerring and immediate in detection of the panther tread. A purringly presented ex parte order, carelessly scanned by the judge who enters it, often contains concealed claws.

No judge can afford to forget that orders when entered are the orders of the judge and not of the attorneys who prepare them, even though entered by consent. No order, judgment, decree, or other official document should ever be signed by a judge before he has first carefully read it and has assured himself that he fully understands its meaning and effect. In my ten-year tenure, I have found no occasion for a single deviation from this self-imposed, inflexible rule.

Delay in the Decision Cases

Delay in prompt procedure and decision has been productive of severe criticism of the courts, and has, doubtless, been a weighty contributing cause to the curtailment of court jurisdiction and the building up of administrative boards as tribunals. Down my way, a gentleman and scholar of marked ability served as United States district judge more than forty years ago. His erudite opinions, written with the literary skill of a classicist, are good reading today. Doubtless they should be, for he often took

five years to write one. When I came to the bar in 1905, old lawyers told me that the judge had been known to delay the disposition of a demurrer for ten years; and that three years for the decision of any matter taken under advisement was his mean proportional. He once held a land case involving the law of accretions under advisement so long that, by the time he rendered judgment, the change in the current of the Mississippi River had washed the land away. True, this is an instance of extreme delay, fortunately rare; but, unfortunately, we judges of the present era have had to do extra time in our speed-cause effort to overcome the fixed belief of laymen and legislators that there is inherent infirmity in the procedure and processes of the courts toward seasonable disposition of litigation.

The Federal Rules of Civil Procedure

The most important development in Federal court procedure during the past decade was the promulgation of the Rules of Civil Procedure for the district courts. When I went on the bench in 1935, diligent effort to locate a collation of local court rules was fruitless. Various and sundry unindexed orders, some recorded, some unrecorded, in minute books, had been entered here and there, at this time or that, without respect to either orderly arrangement or logical relationship. These diversified orders were said to constitute the court rules. This confusing situation presented an intolerable trap to the unwary and a manifestly unfair advantage to the practitioner who happened to have personal or hearsay knowledge of the existence of some obscure court order adopting a certain rule. There seemed to be only one logical thing to do, so I did it; I abolished all local rules and appointed a committee of lawyers experienced in Federal practice to prepare and submit, first to the bar associations of the district and finally to the court, suggested local rules of procedure.

The Rules of Civil Procedure have contributed heavily to the cause of simplicity, brevity and clarity in pleading, liberality in the admissibility of evidence, human and documentary, and easier access to the discovery of evidence in the interest of truth. Service of process has been simplified and the necessity of noting formal exceptions to rulings abrogated. Reference to masters has been declared to be the exception and not the rule.

I think the most vitally beneficial rule is that the trial judge must file findings of fact and conclusions of law in all cases tried without a jury. This rule operates best when opposing counsel are directed to prepare in advance of the trial their proposed findings and conclusions and to submit them to the judge for examination and consideration as the trial progresses. The advantage gained is that the judge, when hearing the evidence, has before him in concrete form the opposing theories of fact and of law which will enable him, while the evidence in its relationship to the legal propositions presented is fresh in his mind, to adopt, reject or modify each finding of fact or conclusion of law submitted. He may wisely elect to hear argument for and against the adoption of any proposed finding or conclusion.

DIVERGENCES OF OPINION AS TO RULE 49(b)

It is inevitable that there should be divergence of opinion upon the efficacy of some of the rules. Personally, I do not like Rule 49(b), pertaining to the submission to the jury of interrogatories upon issues of fact. The jurors' answers to specific questions propounded are often inconsistent, inter sese, as well as with the general verdict, in consequence of the compromising of individual opinions in the course of discussion and deliberation in the jury room. I believe in the inviolability of the jury system; and in my judgment whenever twelve jurors join in a general verdict, that verdict, if supported by substantial evidence, should be upheld unless reversible error in law has been committed upon the trial or during the procedings. I have never believed that the trial judge should be rated as a thirteenth juror, though that doctrine has long prevailed in Tennessee.

RULE 50(b) AND JUDGMENTS NON OBSTANTE VEREDICTO

Naturally, one who does not approve Rule 49(b) would disapprove Rule 50(b), whereby within ten days after the verdict the losing party may renew and the court may grant a motion for directed verdict made and denied at the trial. The vesting of such discretionary power in the district judge, however, is no indication that the rule-makers intended its too free and frequent exercise. A true believer in the sanctity of trial by jury would not incline toward entering judgments non obstante veredicto, except in the rarest cases. The argument that causes are brought to finality with greater dispatch when the trial judge makes free use of his power is, to my mind, offset by the danger that the judge may too readily assume himself to be the final trier of facts in jury cases and form the habit of substituting his own inferences for those drawn by the jury. Let the trial judge, according to the best of his ability and understanding and with time out, if necessary, for hearing elaborate argument and for due deliberation, concentrate on appropriate judgment upon the motion for a directed verdict before he submits the case to the jury.

Nor does the argument seem valid that the judge should be accorded additional time for consideration of the motion, after the jury has resolved the fact issues. Procrastination is not a dependable guidepost to correct decision. Moreover, clear understanding by the jurors of all that has transpired during their term of service tends to establish good will and respect for the United States District Court in which they have been called to serve. When a judge directs a verdict, he wisely explains then and there his reasons for doing so. Jurors do not easily comprehend why, after the fact issues have been submitted to them, the judge should set their verdict aside and enter a diametrically opposite verdict of his own.

RULE 61 IS HEARTILY APPROVED

In closing comment upon the Rules of Civil Procedure, I would join in a mighty cheer for Rule 61. Certainly a trial court should at every stage in the proceedings disregard any error or defect

which does not affect the substantial rights of the parties. How wise were the rule-makers in vesting the district judge with broad discretion in his conduct of the trial! There can be no streamlined substitute for sound common sense.

Not only should a district judge be expert in statutory construction and profoundly versed in tents of the common law and principles of equity jurisprudence, but he should be endowed with fervor for substantial justice and possessed of a warm heart controlled by a cool brain.

Safe and Solid Ground Must Be Found and Kept

In the most progressive era in world history, my faith is in fearless progress. I believe neither in adhering to hoary but unsound precedents because they are hoary nor in damming up fresh currents of new ideas because they are new. But safe and solid ground always lies between swiftly moving currents of new ideology.

The re-establishment of justice and tranquitly among the peoples of a bewildered world confronts and challenges us all. The grim determination, courage and unstinted self-sacrifice of the fighting young manhood of America, aided by brave nurses and service women, have assured us that law and order, religion and civilization will prevail in the United States. Our returning soldiers, sailors, airmen and marines will see to it that our institutions and our way of life shall be preserved. The President, the Congress and the courts must uphold the principles for which they fought. To that end, may the balance of power among the three great departments, which constitutes the distinctive genius of our form of government, be maintained as an eternal safeguard against tyranny. May the Federal courts, bounden within their appropriate sphere, ever adjudicate wisely and justly. After a decade on the bench, I have firm faith that they will.