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THE WYOMING PRACTICE AND PROCEDURE ACT

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The 1947 Legislature of the State of Wyoming passed an Act which was approved February 15, 1947, purporting to give the Supreme Court of Wyoming power to adopt, modify, and repeal general rules governing practice and procedure in all Courts of the State.

By Section 1 the purpose of the Act is set out as promoting the speedy and efficient determination of litigation upon its merits. By Section 2 there is specified what said rules shall govern, to-wit: the forms of process, writs, pleadings and motions and the subjects of parties, depositions, discovery, trials, evidence, judgments, new trials, provisional and final remedies and all other matters of pleading, practice and procedure, with any review of or other supervisory proceedings from the judgment or decision of any Court, Board, Officer or Commission, when such review is authorized by law. It is herein also specifically provided that any such rule shall neither abridge, enlarge nor modify the substantive rights of any person nor the jurisdiction of any of the Courts nor change the provisions of any statute of limitations. By Section 3 it is provided that upon the adoption of any rule or form, the Supreme Court shall enter it in its proceedings and shall fix the date upon which such rule or form shall become effective, but that such effective date shall be at least sixty days after notice thereof has been published by the Supreme Court in such publication as it may designate, and that from and after the effective date of any such rule or form, all laws in conflict therewith shall be of no further force or effect. By Section 4 it is provided that the Supreme Court shall appoint an advisory committee to make recommendations from time to time with respect to pleading, practice and procedure, and that such committee so appointed shall hold hearings upon proposed rules in such manner and upon such notice as the Supreme Court prescribes and report to the Court from time to time such recommendations as it deems proper.

It will be noted that the foregoing Act is akin to that adopted by the Congress on June 19, 1934, giving the Supreme Court of the United States the power to prescribe by general rules the forms of process, writs, pleadings and motion and the practice and procedure in civil action at law which likewise prescribes that such rules shall neither abridge, enlarge nor modify the substantive rights of any litigants. The Federal Act also authorized the Court to unite in its general rules in civil cases those rules for cases in equity so as to secure one form of civil action and procedure for both, and preserve the right of trial by jury as the common law, as declared by the Seventh Amendment to the Constitution. The Supreme Court of the United

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States proceeded promptly under the authorized legislation by appointing a comprehensive and wide-spread advisory committee, selected with great care, from different branches of the legal profession, geographically distributed. This advisory committee organized and held hearings incident to the recommendations of rules to the Court and invited suggestions from the Bar generally throughout the country. This committee conferred from time to time with members of the Court itself and finally a set of rules was adopted by the Court, consisting of 86 in number, which were transmitted to the Congress by the Attorney General in January of 1938 at the incoming of the Congress on that date. They became effective after the adjournment of the Congress in that year without any objection having been made to them by that body and went into effective operation in September of that year. The Federal Courts have therefore been governed by these rules for a period of approximately nine years.

This Federal legislation created a widespread interest among the legal profession in the various states so that a considerable number of the states have adopted legislation authorizing their respective Supreme Courts to formulate rules governing practice and procedure.

The matter of the proper seat of responsibility for regulating practice and procedure in the Courts has been under discussion for many years. During that time, as we know, until a comparatively recent time, such matters were generally handled and controlled by the respective legislative bodies, State and National, although there were many capable and advance thinkers in the profession itself who contended it was within the inherent powers of the Courts to establish their own rules concerning the manner in which the business of the Courts should be conducted, reserving, of course, to the legislative branches of the respective governments, the right to control the substantive law concerning the rights and duties of litigants. Finally, as we have seen, after a great deal of discussion as to the respective powers of these coordinate branches of government the situation was solved by cooperative action in that the legislative branches have voluntarily turned over to the Courts, through permissive laws, the power and authority to adopt rules which shall govern practice and procedure. This appears to be a very happy solution of what might otherwise have developed into an argumentative problem.

I did not have the opportunity of hearing the debates which occurred upon the floor of the two Houses of the Legislature which passed into law the legislation here discussed. I have been advised, however, that there was very little discussion upon the merits of the bill and it seemed to be the general disposition of the legislators themselves to act upon the judgment of the members of the State Bar who were sponsors for the bill. I have made an effort to ascertain if there had been among the members of the Bar any opposition to the legislation and was advised that the matter had been discussed rather gener-

ally among the lawyers which brought out a few ideas of those who might be opposed to it. As nearly as I can gather, the objections suggested were: (1) that it was an effort to force the Federal practice upon the State Courts; (2) that the existing practice and procedure in the State Court was good enough; and (3) that on account of the long line of judicial precedents passing upon the legislative enactments covering practice and procedure, a system of new rules would disturb these precedents.

As to any effort being indulged to force the Federal procedure upon the State, I am not aware. The bill was evidently sponsored by members of the Wyoming State Bar who had had some experience in Federal practice, leading them to the conclusion that a system of rules established through the highest Court would be the most efficient method for the Courts to handle the business coming before them. Likewise, if the practice under Court-made rules would make for greater efficiency, it would simply mean that the rules of practice established by a legislature were outmoded. The objection of knocking down judicial precedents regulating practice and procedure could not be very logical if the practice and procedure under Court-made rules might be made more efficient and workable.

There are, of course, numerous arguments which have been and may be advanced in favor of the new method. In the first place, it stands to reason that the Courts whose business it is to administer justice, can with greater logic and more efficiency determine the method by which the business before them is to be transacted as against a method laid down by legislative bodies, composed very largely of laymen who know very little, or care less, about Court procedure. It would be about as logical for a legislature to adopt methods by which physicians should treat their patients. The adoption of rules governing practice and procedure by a legislative body, even though the members were qualified, allows no opportunity for study of efficient methods or the advice of those who are particularly skilled in the disposition of business before the Courts and, when such legislation is adopted, it is likewise difficult to secure remedial legislation when flaws and inaccuracies occur, while with the power of authority lodged in the Court, remedies and corrections may be much more easily affected by amendments upon which the Bar members may be easily and readily consulted. It brings the bench and bar into close relationship in devising the most effective manner in which their business may be dispatched. Rule-making is a much more simple method of handling matters coming within their scope than the complicated system of legislation. The rule-making power being lodged in the highest Court of the State insures the attention and supervision by the higher-class lawyers who have been elevated to their position on account of outstanding ability in their profession. The assumption of this grave duty by members of the high Court would seem at first blush to be a

burden which they might reluctantly assume, but when the feature of the Act authorizing the appointment of an advisory committee consisting of members of the Bar to make recommendations is considered, it will be seen that the most important function of placing the law in operation primarily rests upon the shoulders of the profession itself where it undoubtedly belongs. The use of rules is a much more flexible and elastic system than when matters of practice and procedure are regulated through statutory enactment. Many of these statutes covering the subject have undoubtedly become antiquated, requiring a new coordinated system which would be extremely hard to secure through an act or acts promulgated by the legislaitve body. So much for the potentialities and possibilities of revamping and reconstructing the metohds of pleading, process, practice and procedure made possible by the new Act.

It seems to be that no great apprehension may be had among the members of the Bench and Bar that the so-called "Federal Procedure Act" need be adopted or followed in its entirety as it need only be used as a starting point or framework in covering the various subjects which are logically the basis of rule-making.

I trust that I may be pardoned for adverting to some of the benefits which have come under my observation through rule-making for practice and procedure in the Federal Courts. Having practiced some twenty years in the State under the system which substantially exists today and having presided over a Federal Court where the practice and procedure under rule-making has been in operation for nine years, I have had an opportunity to make comparisons in the advantages or disadvantages of the two systems.

It would be impossible in the time alloted for a discussion of this subject, to review at length the Federal Rules of Civil Procedure with an idea in mind of selecting all the possible advantages gained by rule-making. What would seem to be a distinct and simple innovation is provided for in the issuance of summons which require a summons and complaint to be served together and directing that answer shall be made within twenty days after the service of the summons and complaint upon the defendant, permitting the Court to appoint a specially designated person for the service when substantial savings in costs may result. This seems to me to be a step forward in the elimination of the ever-forgettable "second Monday" and "third Saturday" as return and answer days now carried under our statutes.

One of the commendable features of the Federal Rules is the simplification of pleadings which, in my opinion, has operated very successfully in the elimination of long drawn-out and complicated statements often extravagantly indulged by the lawyer who sometimes seems to think that he is arguing his case to a jury instead of merely setting out the fundamental basis of his lawsuit. All technical ob-

jections may be contained in the form of a motion to dismiss, eliminating the various pleadings known as "demurrers", "special pleas", and the like. Affirmative defenses are required to be specifically asserted. Suggested forms are appended which illustrate the manner in which more common classes of cases may be pleaded, although these are intended for illustration largely and are not mandatory upon the pleader. Further pleading is unnecessary after the complaint and answer has been formulated unless there is a counter-claim or cross-claim.

A somewhat new procedure is presented by the bringing in of third parties where a controversy is involved requiring the settlement of conflicting claims arising in a single transaction by means of which the rights of all parties may be litigated in one lawsuit. This is akin to the interpleader which is permitted by statute in certain types of actions but the interpleader is carried into full force and effect in a separate rule. A very interesting paper by Mr. Trelease, one of the professors of law at the Wyoming University Law College, discusses pleadings under the Federal rules as compared with those under our State Statutes, is commended for your consideration.

One of the more important provisions relates to the acquisition of information for use at the trial provided for under depositions and discovery and closely related thereto is the permissive use of interrogatories attached to pleadings, requiring answer or admissions which, however, are under the supervision of the Court as to their relevancy and competency as to the party being required to answer. The production of documents and things for inspection by copies and photographing is provided in another section, as well as the physical and mental examination of persons.

The old custom of making eligible trials by jury to be classified as such is eliminated and either party is now required to demand a jury at times fixed or else will be held to have waived trial my jury. Parties are permitted to stipulate that a jury may consist of any number less than twelve or that a verdict of a stated majority may be legally sufficient.

The rules preserve the old custom in the Federal Court of having instructions at the close of arguments by counsel. In the State Court, instructions are given by the Court in advance of the arguments of counsel. My view of this feature of trial procedure is that the instructions following the arguments is far preferable. The submission of the case by the Court to the jury as the last word before they begin their deliberation, seems to be the more logical of the two methods. Coming from the unbiased arbiter of the trial, statements as to the questions of fact involved and the law governing the same should have the more lasting impression. My observation has been that where arguments are given last, a great deal of time is spent by counsel in attempting to explain, controvert or limit the legal propositions put

to the jury in the form of instructions which, in many cases, result in the jury being confused as to the law which the Court has previously given them. Any disadvantages to counsel in this respect are almost entirely removed by a rule which permits counsel to tender requested instructions in advance and take exceptions to portions of the charge of the Court before the jury retires, but out of the hearing of the jury. While it is a controversial question among lawyers, I feel that a Judge should be allowed to at least discuss the facts to a jury in outlining those that seem to be the most important as questions of fact for their determination so long as the Judge does not become argumentative in such presentation, and then applying the law to those facts, making it a concrete picture in the minds of the jurors both as to the facts and as to the law. A statement of abstract legal principles presetned to a jury are of little use to them in solving their problems.

A rule provides for a summary judgment in cases in which no question of fact or law remains to be determined, upon the face of the pleadings. Such motions may be supported by affidavits and opposing affidavits. Declaratory judgments are authorized in accordance with the statute which was passed some years ago. This permits determination of the rights of the parties in advance under contracts and other situations which permit a determination and a saving of expense before those rights could be litigated in the ordinary manner. Ample provision is made for appeals which greatly simplifies the methods formerly in force.

One of the most salutary and beneficial of the Federal rules is that providing for Pre-trial procedure in which it is provided that it may be directed by the Court, whether upon its own motion or on motion of counsel for either litigant, 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 prelminary 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 practice under this rule has worked out to the satisfaction of most of the counsel who have taken advantage of it as well as the Courts themselves. It eliminates before the trial many of the problems which confront the Court and counsel upon the trial in the orderly presentation of evidence and saves a great deal of time when the case comes before the Court for trial. Not infrequently at these conferences, where the opposing counsel and the Court collaborate on the setting up of a lawsuit, settlement is affected, dispensing with the necessity of a trial. Personally I have never attempted to use it as a weapon to effect a compromise but upon occasion an informal discussion of issues narrows down to the point where counsel can become convinced that it is to the great advantage of their

clients to compromise the litigation than to carry it on. The chief benefit to be gained is the understanding of the exact issues involved and so arranging them that the Court and counsel will fully understand the issues before the evidence is really presented and in addition, to permit the agreement in advance upon documentary evidence to be used without the necessity of formal proofs as to its authenticity when there is no question of this involved. The use of this rule has worked out wonderfully well in the preliminary preparation of cases for trial and is to be highly commended.

In the foregoing discussion only a few of what would to be distinct advantages under the rule-making system have been adverted to but it should be sufficient to stimulate an interest among the members of the Bar in realizing the importance of the opportunity which is now presented to take advantage of this form of regulating pleadings, practice and procedure which are the tools by which the Courts and lawyers perform the duties imposed upon the profession. It has been mentioned that this system affords more practical and speedy methods of correcting obvious loopholes which creep into any method of regulation. The Federal Rules are now being amended to cover discrepancies and inadequacies which have appeared after nine years of trial and these will go into force and effect this fall as they were lodged with the Congress at the beginning of the session which has recently ended.

It is interesting to note that both prior to and since the rule-making statute by Congress, the following States have taken similar action: Colorado, Maine, Washington, Delaware, Maryland, Wisconsin, Rhode Island, New Mexico, West Virginia, Alabama, Indiana, Pennsylvania, South Dakota, Arizona, Iowa, Idaho, North Dakota, Utah and Florida, and now added to this rather substantial list is our own State of Wyoming. Recent literature reaching my desk indicates that the metropolitan State of New York, which is recognized largely as the "Mother State in Code Pleading", has had recently introduced an Act of similar import to the one here being discussed, transferring the regulation of process, pleading and practice to the Court of Appeals which is the highest Court of that State. While this measure has not yet been enacted into a law, it would seem to have a fair chance of adoption. This would supercede what was at the time supposed to be a much needed reform through the enactment of the Civil Practice Act which took effect in 1921. This Act has become ponderous and complicated in that it has grown from time to time through remedial legislation so that it now contains some 1578 sections supplemented by 303 rules, as distinguished from the Federal Act containing only 86 rules. Texas is also having placed before its legislative body a new proposed judiciary act which will include the delegation of the rule-making power to the Supreme Court. This activity throughout so many of the States indicates that the members of respective Bars are alert to the situation that rule-making under the direction of the high

Court of the State is a forward step in simplifying and speeding the dispensation of justice and it is a wholesome gesture that it comes largely from the minds of the practicing attorneys rather than any prodding or extended influence exercised by the Courts themselves.

In the foregoing presentation of the subject concerning the Wyoming enabling Act and the Act of Congress of similar nature, only the matter of civil practice and procedure has been discussed. The Wyoming Act does not mention specifically civil and criminal pleading, practice and procedure as disinguished one from the other, while the Congressional permissive Act first applied to civil procedure only. Previous to this, authority was given by Congress to the Supreme Court to provide for rules governing criminal practice and procedure prior to verdict or pleas of guilty and later the matter was extended to cover all criminal practice and procedure from the beginning to the end of a criminal case. Under this authority the Supreme Court adopted a comprehensive set of criminal rules entirely separate and distinct from the civil rules which went into effect September 1945 and are embodied within the scope of sixty numbered rules. In my opinion, these have worked out to the substantial advantage of practice and procedure in criminal cases, particularly in respect to simplifying the methods which were previously in use. Notable is the rule which permits a defendant charged with a criminal offense to waive indictment and consent to be prosecuted by information filed by the United States Attorney. In addition to many other advantages, this avoids the long delay which affected the disposition of cases where defendants were required to await the action of a grand jury when it was the desire to enter plea of guilty and there is great saving of expense in the matter of calling grand juries. As a practical illustration of this, the third Court term, covering one and one-half years, has now gone by without the necessity of summoning a grand jury in the Wyoming Federal District. Of couse it must be recognized that under the Wyoming law there is no requirement that a defendant must be indicted, and charges of law violation are generally made through information filed by the respective County and Prosecuting Attorneys. Under the Federal Constitution, however, it became necessary to circumvent the provision under the Fifth Amendment, that no person should be prosecuted for crime except upon the indictment of a grand jury. While this right to the defendant has still been preserved, it permits him, when sufficiently and intelligently advised, to waive his right to such indictment and consent to be prosecuted through information, under which he has the identical protection for pleas, trial, etc., as he would under indictment. As to whether the Supreme Court under the Wyoming Act has the right to formulate rules of practice and procedure in criminal cases, I will not hazard an opinion, although it would seem that the permissive adoption of rules governing practice and procedure in all the Courts of the State is very comprehensive.

It is not, and should not be, too easy a task to develop rules which will cover the situation for practice and procedure in Wyoming and sufficient time should be taken by a committee in charge of recommendations to the Court to thoroughly cover the ground and give ample opportunity for the consideration of all members of the Bar, whether on the committee or not, by adequate methods of communication and reference. Obviously the peculiar conditions existing, of a local nature, should be covered by rules which are especially adapted for the purpose but it is not too early to begin the task which the Bar of Wyoming may reasonably hope will end in a much needed reform.

EXPERIENCES OF A TRIAL ATTORNEY

T. F. HAMER*

Mr. Loomis, ladies and gentlemen of the Wyoming State Bar:

It was a distinct pleasure for me to receive an invitation to come to Sheridan and talk to this Bar Association. Now that isn't because I particularly like to talk, for I think a lawyer, just as anybody else, looks forward with a little bit of dread to the necessity of making a speech. The pleasure I got was because I like to come out here and meet the good Wyoming people—the good fellows and lovely ladies. I never come without a feeling of pleasure and without feeling more or less exalted. I don't know just what I am going to talk to you about. When I got the word that I had been invited to come out here I said to myself: "I don't want to go to the labor of preparing a paper; I am just too busy. That's a bunch of lawyers, Tom Hamer, that you have to talk to. If you talk on some subject of the law, and about the law, remember, that is sure to be a critical audience." I said to the boys in my office: "What shall I talk about?" One said: "I attended a meeting of that kind not long ago and a lawyer spoke who had had a wide trial experience. He talked about some of the cases he had tried, insurance, accident, and other cases, giving some of the quirks of fortune. You have tried a good many cases, some of them rather unusual cases, and I suggest that you talk to the Wyoming Bar on that subject. Speak in an informal sort of way about the rather unsual experiences you have had." And so I think I will do that. I think I will talk about some of the cases that I have tried as a representative of the Company—the Union Pacific—that I represent, also some of the cases that I tried when in general practice and represented miscellaneous clients.

John Loomis, a moment ago, reminded me of a case he and I tried which was in a way a lesson in the force of collateral facts. We had an accident case—a crossing case—that we tried in Kearney. The case was twice tried; the first time we got a verdict from the jury.

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