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Howard Johnson
Chief Justice of Montana Supreme Court

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Rules of Court

HOWARD JOHNSON*

The purpose of this paper is neither to repeat nor to explain the rules of the Supreme Court of Montana, for they are freely available to everyone in printed form and are self-explanatory. My purpose is to suggest and consider some ideas which the general subject suggests, including some questions presented by the dual authority of judicial and legislative branches over court procedure, and finally to discuss the present court's attitude toward its rules.

It is not necessary to explain to any lawyer that the orderly disposition of judicial business requires rules of procedure, and that he is entitled to have those rules definite and uniform so that he can follow them with assurance. Under any other system he will be like the base runner who was ruled out by the umpire for not running to third base first. Rules are not rules if they are changed in the middle of the game or are made effective without notice. For that reason it has long been the court's practice to announce changes in advance. Each lawyer is entitled to know what the rules are, so that he can follow them; and conversely he is entitled to have others follow them so far as their violation would prejudice his clients' rights. That is obviously the why and wherefore of rules of judicial procedure;—to permit the orderly, prompt and efficient disposition of judicial business in the public interest, which means in the interest of litigants and therefore of counsel who represent them.

Our court's feeling that its rules of procedure are primarily for the benefit of litigants and their counsel is fairly well known to Montana's lawyers, who have direct contact with the court, although there has been no occasion for its expression in decisions. The court's similar and equally realistic attitude

*LL.B., Montana State University, 1916. Chief Justice of Montana Supreme Court.

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toward the principle of stare decisis is of more general knowledge. For instance, the latter was expressly mentioned in an article by Frank W. Grinnell, Esq., of the Massachusetts Bar, in the American Bar Association Journal for September, 1944. With reference to the United States Supreme Court he said:

"I have recently suggested in the Journal of the American Judicature Society for April, 1944, and more fully in an earlier article in the same Journal for February, 1941, that the Court, when overruling a decision on which the community has relied, should follow the Montana and Kentucky practice as to stare decisis, of considering whether 'the principle of reliance' does not require that the new ruling apply only to the future. This practice was sustained by the Court in the opinion of Mr. Justice Cardozo in the Sunburst Oil case (287 U. S. 358). This practice was suggested by Wigmore in 1917 and has the old case of Gelpke v. Dubuque, 68 U. S. 175, in the background."

From our Anglo-Saxon point of view the principle that the rules should be clear, explicit, readily available, and not subject to change without notice or after the fact, applies no less to procedural law than to substantive law. Without that principle the term "due process of law" is relatively meaningless, and one's "day in court" perhaps a liability rather than an asset..

Rules and principles of procedure, like the common law itself, of course originated in custom. It was only natural to look to precedent for guides to both procedural and substantive law. It seems probable that rules of court first become necessary to change and supplement the customary rules, just as statutory law first became necessary to change and supplement the common law. Naturally, with the development of parliamentary government in England, statutory law fell within the province of the legislative branch; but the procedural rules remained largely within the province of the courts, where they belonged. They might have remained there had not the courts failed to attain as great freedom from the king and his advisers as parliament attained. That circumstance, as an element of the struggle between parliament and king, undoubtedly contributed to the third stage, the control of court procedure largely by statute. It was quite recently, in fact only about seventy years ago, and nearly a century after the Declaration of Independence, that court procedure in Great Britain reverted almost wholly to control by court rule.

Since the Britsh empire was in the third stage when the thirteen colonies broke away and set up their own govern-

ments, the procedure of colonial courts, now become state courts, naturally remained largely in that same stage, even though such control by the legislative branch was no longer necessary to prevent executive domination.

The new governmental principle of separation of powers would perhaps by now have brought us also to the fourth stage, control mainly by court rule, if it had not been for the movement out of which, about the middle of the nineteenth century, our present codes of civil procedure developed. The Civil Practice Act is the first Act in the volume of Bannack Statutes, which were enacted by the first legislative assembly of the Territory of Montana. But court rules were of course necessary to supplement the Practice Act. Volume 1 of the Montana Reports starts with the rules adopted at the January term, 1871. The first term of the court was held in May, 1865, and the first cases reported were decided at the December Term, 1868, some two years before the adoption of the rules shown. The reporter's preface states that prior to the December Term, 1868, the court's opinions were rarely in writing, its orders generally provided only that the judgment be affirmed or reversed, the court's records were imperfect, and the pleadings, briefs and papers in most causes could not be found. It seems very improbable that there were not some earlier rules of court, but the earliest ones I have found are those of 1871. At any rate, we know that at or near the beginning of Montana's judicial history, its court procedure was governed by a combination of legislative and judicial provisions.

Naturally again, since all history is a procession of cause and effect, that system was crystallized in the state constitution. It provided that none of the three separate departments of government should exercise any powers properly belonging to another "except as in this constitution expressly directed or permitted" (Art. IV, Sec. 1), and that the courts' jurisdiction should be subject to "such regulations as may be prescribed by law" (Art. VIII, Secs. 3, 15, 23 and 26). The people thus recognized and confirmed the established legislative practice of enacting procedural statutes. The legislature in exercising that authority recognized the courts' right to make rules not inconsistent with statute, and the courts have of necessity continued to exercise that right.

The fact is that no statutory code can eliminate the necessity for court rules. Since that is true, it might well be considered whether the legislative control over procedural matters should not be abolished, and all procedure governed by

court rule. Theoretically the dual system has possibilities of serious difficulty, especially in a republic, which is based upon the principle of the independence of each of the three divisions of government. That independence is not for the benefit of the officer, but to ensure the freedom of the individual. It is to guarantee that no officer or governmental body shall exercise more than one of the three great powers, legislative, executive and judicial. Yet the existence of courts theoretically independent of the legislative branch may do the citizen little good if the legislature so limits his access to the courts that it is of little avail. We have numerous examples in the ever increasing establishment of so-called administrative boards with what is called quasi-judicial power, and with judicial review of their decisions denied upon the facts and often practically nullified upon the law. The trend is especially dangerous in view of the ever expanding activities of government, the consequently ever increasing numbers of employees to be appointed by the executive, and therefore the executive's ever increasing influence over, and sometimes virtual control of the legislative branch. Although the fashion has not gone so far in state government as in federal, the states tend more and more to imitate the federal system, partly even in self defense against the total centralization of power at Washington. The trend toward governmental control of virtually every detail of the individual's life will fall of its own weight when our citizens become sufficiently tired of being pushed around. But until that time comes the executive branch will gain more and more control over the legislative. Unless the executive is thereby also to control the courts, their procedure, the manner of access to them, and the scope of their effective jurisdiction should be made more nearly independent of legislative control. The suggestion may seem groundless or at least premature. But when, if ever, it becomes obvious and immediate, the hope of a practicable remedy will have passed. The foundation of free government is a legislative branch independent of the executive. But historically the final bulwark of freedom has been a judiciary independent of both executive and legislature. The judiciary has failed to supply that bulwark only to the extent to which it has failed of independence. Sometimes despotisms have arisen out of parliaments, usually because executive leaders have arisen out of them; but never yet have despotisms arisen out of courts. Why, then, should the judicial branch be the least independent of the three departments of government? Certainly that is the situation when its procedure is fixed by another branch, and when access to

the courts is authorized and limited by a power other than by the people themselves through direct constitutional provision.

I do not propose to raise a crusade toward making the three branches of government really coordinate and independent. But certainly there is something here for lawyers to consider, not in the interest of courts and judges, but in the interest of the citizen.

There are further considerations to be noted. For instance, there are the considerations of efficiency, uniformity and elasticity. In the first place, there can be no doubt that a court, composed as it should always be of lawyers experienced in the practice of law, is peculiarly fitted to control judicial procedure. This is obviously not true of the legislature, the great majority of whose members have little or no knowledge of, experience in, or concern with such matters.

In the second place, there should be no such lack of uniformity of procedure as inevitably results from piecemeal legislative enactment and amendment. All lawyers recognize that defect. For instance, there is no apparent reason why there should be three separate procedures for publication in quiet title suits; one in actions to quiet title to personal property (secs. 9117 ff.), another in the ordinary actions to quiet title to real estate (secs. 9482 ff.), and a third in actions to quiet the heirs' title to lands patented by the federal government in blank to unascertained heirs of deceased entrymen (sec. 9505). There is no apparent reason for the divergencies, and no excuse except that the three provisions were enacted at different times and without reference to each other. They should be harmonized in the interest of simplification and efficiency.

Another example is the kaleidoscopic variety of procedure in probate matters, as shown by the 1935 Codes. Hardly any two kinds of proceedings, even of essentially similar nature, require the same manner and kind of notice. There are entirely separate and varying provisions for notice of applications to borrow money (sec. 10196), to sell personal property, including stock in corporations generally (sec. 10204), to sell mines, interests in mines and stock in mining corporations (sec. 10207), to sell real estate (secs. 10212, 10213), to mortgage real estate (secs. 10251, 10252), to lease real estate (sec. 10256), and to complete decedent's contract to sell real estate (sec. 10269). Some guardianship procedure is harmonized with the probate procedure, but some, for instance that for the sale of real estate (sec. 10433) is not. Sometimes the notification is by notice of hearing, and sometimes by order to show cause;

sometimes the required service is personal or by publication, sometimes by posting or publication, sometimes personal or by mailing or publication. Sometimes the period for personal service is not stated but the alternative publication must be for four weeks; sometimes the period for personal service must be ten days, sometimes fourteen, sometimes twenty before the hearing; sometimes there must be service by either posting or publication ten days in advance; sometimes the order to show cause is returnable in four to ten weeks, sometimes four to eight weeks, sometimes two to four weeks, sometimes fifteen to thirty days; in most cases personal service of the order need be only ten days, but in one case fourteen, before the hearing; the required publication may be ten days, two weeks, three weeks, or four weeks; it may be simply "in a newspaper," or "in a newspaper of general circulation published in the county," or "in some newspaper published in the county;" or "in a newspaper of general circulation published in the county, and if there is none, then in some newspaper of general circulation in an adjoining county," or "in a newspaper printed in the county, or if there be none printed in the county, then in such newspaper as may be specified" in the order; or "in such newspaper," "such newspaper published in the county," "such newspaper in the county," or "such newspaper in the state" as the court or judge may designate. Many more such examples in the probate and guardianship procedure will readily come to mind.

Subsequent amendments have removed some of these variations only to add further complications. Chapter 84, Laws of 1941, amended the provision for the sale of personalty interests in mines, including capital stock in mining corporations, by providing that sales should be made in the same manner as other personal property. It amended the provision for the sale of realty interests in mines by authorizng the giving of options and by providing that sales should be made in the same manner as other real estate or real estate interests. The new Act became effective on March 4, 1941.

But by Chapter 170, effective just two weeks later, the legislature set up complete new procedure for obtaining an order to sell or option "a mining claim or claims, or real property worked as a mine." The new procedure fills three pages in the published volume of session laws, and the differences from the procedure for probate sales of realty in general are just enough to indicate that they are purely accidental; the chief difference is that the order to show cause must be returnable in "not less than two *or* more than four weeks," rather

than "not less than fifteen, nor more than thirty days." A further complication is added by another provision making this procedure applicable to proceedings "for the sale of or for an option to purchase *an undivided interest* in real property." Thus the sale or option of realty interests in mines, and of undivided interests in other real estate, is governed by the new section 10256.1 and the sale of other real estate by sections 10211 to 10231, inclusive.

Why should the bar's energies be dissipated by the necessity of complying with all those varying jurisdictional requirements? Why should an application to borrow money require four weekly publications, but an application to borrow money and give a real estate mortgage only two; why should the law ever have required four weekly publications before an order to sell mining claims but only two before an order to sell other real estate; why four weekly publications before an order to sell mining stock, but only ten days' publication before an order to sell other corporate stock? Why must one set of procedural provisions relating to sales now be followed for mining claims, and another for other real estate; why the one procedure to sell an undivided interest in real estate, and the other to sell the full title to the same real estate? Certainly there is little justification for separate sets of procedure differing so little as to add complications without any apparent purpose. All or most of the procedural requirements should be harmonized, but if by legislation the very next or perhaps the same session, as in the instance shown above, may undo the good work, perhaps by another minutely detailed statute, drafted without reference to any other, or with just sufficient changes to complicate the lawyers' work. It would be a very simple matter to standardize all those procedures by court rules setting up the entire procedure as a coherent system rather than as a disjointed compilation of discordant and unrelated items.

This is not a criticism of the legislative process as such, but of its incongruous application to the detailed regulation of the multiple phases of court business. It is simply not fitted for such work. The legislative effort should be freed from these purely procedural matters so that it can be directed toward its proper sphere of substantive law.

In the third place, there can be little elasticity in judicial procedures specified by statute, as contrasted with that specified by the court. Court rules prescribe the time for filing transcripts and briefs, just as statutes prescribe the time for presenting and settling bills of exceptions. The court is able and willing, when justice requires, to relieve parties from

strict compliance with its rules. But it is not able to give relief in the case of statutory provisions; and many litigants have had to be denied a real review upon the merits because their bills of exceptions have not been presented and settled within time. The trouble is that the statutory provisions are jurisdictional, since the court's jurisdiction is "subject to such limitations and regulations as may be prescribed by law" (Mont. Const., Art. VIII, section 3), and the courts have no power to vary them except in the few instances in which that power is expressly given. But I know of no instance in which this court has refused further time for transcripts or briefs on proper showing, or in which it has dismissed an appeal without giving the party a chance to comply with rules. In fact, Rule VI provides that while an appeal is subject to dismissal on motion of the adverse party for delay in filing the transcript, the appeal will not be dismissed until reasonable time has been allowed for filing it, where the relay has been without laches. Similarly, Rule X provides that when appellant is in default in filing his brief, "the case may be dismissed on motion." But in the case of neither brief nor transcript is the default considered jurisdictional or punished on the court's own motion.

It seems clear that in the interest of efficiency, uniformity and elasticity, procedure should be regulated entirely, or at least so far as possible, by court rules rather than by statutes, and that the members of the bar should in their own interest work toward that end. The problem is theirs and they can solve it if they will.

It is true that courts have not always been liberal with respect to their rules. Volumes 22 of the Montana Reports includes the revision of rules made in May, 1899, shortly after the accession to office of Mr. Chief Justice Brantly. Section 6 of Rule VII, which related to contents and form of transcripts, provided: "A strict compliance with the foregoing requirements will be exacted in all cases, *whether objection be made by the opposite party or not;* and for any violation or neglect in these respects which is found to obstruct the examination of the record, the appeal may be dismissed," etc. Apparently out of an excess of caution, the last rule, No. XXIII, provided: "Strict compliance with the foregoing rules will be required."

Apparently the court was somewhat severe in its enforcement of the rules. This was due perhaps to the fact that it could not keep up with its work and that primary consideration seemed due to those whose compliance with the rules permitted the efficient dispatch of its business.

On February 6, 1904, in a letter to the Montana Bar Association, that fine old pioneer lawyer, Col. W. F. Sanders, wrote:

"Rules of court are of advisory and subordinate consequence if given their true scope and mission, and are not criminal laws, the violation of which is to be punished by penalties. * * * The court should be eager to grasp the merits of the controversy and look with scant approval upon the nice sharp quillets of the law which adroit lawyers can resurrect from the wilderness of single instances to deny to the complaining litigants absolute, ultimate and final justice."

The protest seems not to have been immediately effective, perhaps because not addressed directly to the court. For the two rules in question appear unchanged in the rules of February 1, 1905, set forth in 30 Montana. But in the revision of January 4, 1909 (37 Mont.), while section 6 of Rule VII remained as before, its teeth were filed down by the change of Rule XXIII to read: "Substantial compliance with the foregoing Rules will be required; Provided, however, that any departure from the Rules regarding the arrangement of transcripts and briefs that is not substantial in character and not such as to retard or embarrass the Court in the consideration of the cause, will not be regarded, * * *."

No further change was made in those rules until the revision of 1941, when the effect of Rule XXIV, replacing old Rule XXIII, was enlarged to include all the rules and not merely those relating to the arrangements of transcripts and briefs. From counsel's point of view that is perhaps the most important rule in the book.

The rules concerning transcripts and briefs are clear and explicit, and there seems to be no reason why they cannot be complied with. But as Colonel Sanders correctly said, they are not criminal laws, the violation of which calls for punishment. He might well have added that if they were criminal laws, we should make the punishment fit the crime, and inflict it upon the depraved malefactor and not upon his client who sinned, if at all, by proxy. I think we will all agree that the Colonel was right, and that the purpose of the rules is procedural rather than reformational or punitive. Certainly the purpose of the court, and therefore of its rules, is to effect justice, and obviously that can be done only if each counsel is enabled to represent his client most effectively. The rules should contribute to that result by ensuring an orderly, efficient and effective presentation of the client's case by counsel, and like consideration by justices.

There is some interesting history in the court rules. For instance it appears that in the promulgation of its rules in 1871 the court was concerned with economy rather than efficiency; for it provided that "the transcript shall be written in a fair, legible hand" (Rule VII), and that while the appellant might instead have it printed, "the expense of printing shall not be allowed or taxed as costs" (Rule VIII). The latter inhibition was retained in the 1887 compilation (6 Mont.), but the inexorable hand of progress and invention was expressed by the modification of Rule VII to provide that "the transcript, if not printed, shall be written on a caligraph, or typewriter." Thus the typewriter seems to have found its niche; but the rule should have said "by" rather than "on"; for Webster says that "caligraph," properly spelled "calligraph," means "one who writes beautifully; a good penman," "a professional copyist or engrosser." By the 1899 revision of rules (22 Mont.), the calligraph had apparently become extinct, or at least dormant until the later appointment of that renowned calligraph, or calligrapher, J. T. Carroll, as clerk. Transcripts in civil cases were required to be printed, but transcripts in criminal cases might be either printed or typewritten. In the 1905 revision (30 Mont.), no alternatives were provided; in all civil appeals based upon insufficiency of evidence to justify judgment the transcripts were required to be printed, and in all other cases, civil and criminal, to be typewritten, but no carbon copies could be filed. Later it was provided that all transcripts should be typewritten except those exceeding one hundred pages upon appeals in which insufficiency of evidence was assigned, which must be printed. That rule remained until the 1941 revision (111 Mont.), in which it was provided that in all cases transcripts might be either printed or typewritten.

Until the latter revision briefs were required to be printed. It was then provided that briefs of not more than fifteen pages might be either printed or typewritten, and even that rule is relaxed upon proper showing of financial hardship, to permit the filing of typewritten briefs of greater length.

Because of the carelessness with which typewritten papers are often prepared, and the frequent illegibility of many copies, as well as the desire to have permanently legible copies for preservation in both the clerk's office and the law library, it was then provided that if typewritten papers are filed two copies must be original ribbon copies and the others "plainly legible carbon copies." The requirement that two runs be made of typewritten papers is not nearly as burdensome as the alternative, formerly the mandatory requirement, that briefs

be printed; but it is necessary if the justices's eyes are to perform the necessary work.

In view of the present shortage of paper and of stenographic services the rule requiring six copies of transcripts and briefs has temporarily been relaxed to require only one original and three carbon copies to be filed. However on January 1, 1946, the full six copies will again be required.

Meantime, in spite of the temporary relaxation of the rule, counsel will do well to supply six legible copies of every transcript and brief. For the chief reason for the requirement was to permit the delivery of a copy to each justice for reading before oral argument, and for reference during oral argument, and for study afterward. Perhaps this independent original study by more justices results in more dissents; but at any rate it removes the danger, often suspected in the past, of one-man decisions. When fewer than six copies are filed it is virtually impossible to get them to all the justices before oral argument, and difficult to get them to all members afterwards. Wise counsel will therefore continue to file the full number of copies in spite of the temporary relaxation of the rule. If necessary the additional copies may be filed later than the required four. But in any event all copies should be clearly legible throughout. Oftentimes it has been impossible to find one copy of any paper, which was clearly legible throughout. Under that condition the best work is impossible, even if eyes could stand the strain.

For more than forty years before the rules revision of 1941 testimony was required to be in narrative form with the result that it often appeared like this: "As to whether I want the jury to believe that the defendant signed this contract my answer is 'yes';" or perhaps as an alternative: "I want the jury to believe that the defendant signed this contract." Aside from the possibly misleading and certainly obscure meaning, the system necessitated an extra operation and precluded the direct use of the reporter's transcript of testimony. The 1941 revision therefore provided for testimony in question and answer form, to the benefit of both counsel and justices.

Other effects of the last revision were to bring together and unify the requirements as to the preparation and filing of the various papers; to indicate more clearly the original proceedings of which the court would accept jurisdiction, the necessary contents of applications, and the procedure to be followed.

Another change was the provision that the clerk mail a copy of the decision to counsel for each party along with the

notice. Theretofore counsel had received only a notice that the judgment had been affirmed, reversed or modified, although he had only ten days from date of decision in which to file a possible petition for rehearing. Certainly counsel is entitled to have a copy of the complete decision as quickly as it can reach him. The rule could properly be changed to provide that the time runs from date of receipt of notice, but the clerk seems to have been unable to get counsel generally to give prompt acknowledgement of such receipt.

Few petitions for rehearing comply with the requirements of the rule; in fact, there is some indication of a general feeling among counsel that unless such petition is filed they have failed to take advantage of a final chance to reargue the case after its decision. For many years the only grounds were that some question decisive of the case and submitted by counsel was overlooked by the court, or that the decision was in conflict with either an express statute or a controlling decision to which the court's attention had not been directed. But since there should be a remedy where some fact material to the decision had been overlooked, that ground for a rehearing was added in our revision of 1941. It should still be recognized, however, that there is no point in filing, as a matter of form, a petition merely seeking to repeat the arguments upon which the cause was submitted, considered and decided.

Many counsel have expressed their doubts concerning the value of oral argument, a doubt which I shared while in the active practice. Its necessity is perhaps not so great as formerly, since now (except for their temporary relaxation) the rules require sufficient copies of transcripts and briefs so that each justice is given a better opportunity to make a real study of each case, and usually does so. On a few occasions counsel have been heard to request additional time for argument on the ground that they could not read their briefs to the court in the regular time. Perhaps the suggestion resulted from a belief that the justices could not read the briefs, or at least that they might not do so. Or was it an admission that the copies furnished the court were illegible? Certainly the proper function of oral argument is not to penetrate the consciousness of persons classed by psychologists as of the auditory rather than the visual type. The purpose is to outline briefly and clearly the nature of the case, the questions presented and how they arise, and the contrasting views of the litigants. A good oral argument tries to recite neither the transcript nor the briefs, but only to give the justices a bird's eye view of the issues and contentions.

The oral argument is not, of course, the determining factor, for it is followed by an intensive study of record, briefs and authorities preparatory to the writing of a decision. Personally I have started such study with a definite impression gained from oral argument and preliminary reading of record and briefs, only to arrive finally at the opposite conclusion. Nevertheless I believe that oral argument is, or can be made, of value if properly prepared and presented.

It has long been the belief of some of us that the members of the bar were entitled to more for their annual license fees than the mere right to make infrequent use of the excellent law library at the capitol, perhaps five hundred miles away. The marshal therefore now prepares each week and mails out to lawyers and press a brief resume of the week's decisions. A legislative reduction of the appropriation needed for postage may necessitate a reduction of this service to a bi-weekly basis, but an attempt will be made to continue it as at present. The marshal's digest has the purpose of acquainting lawyers with decisions perhaps bearing upon problems confronting them, and at the same time of informing the public concerning the work of the court.

There are other matters not treated in the rules but of interest to counsel. One is the court's practice of hearing on Mondays the oral argument of causes in which the lawyers come from a distance, so as to minimize the number of week days necessarily spent away from their offices. For the same reason, and to lessen expense, two or more causes involving the same counsel coming from a distance are set for the same day if ready for setting.

In the interest of efficiency the court's present practice is to hear not over ten causes in any group of sittings. Thus the sittings are frequent and decisions are usually rendered more promptly after oral argument than if a greater number of causes had been submitted at about the same time. Our frequent sittings, made on relatively short notice, sometimes conflict with prior sittings of other cases of the same counsel in district court, perhaps for jury trial. In such instances the flexibility of our arrangements is such that we can easily vacate or postpone sittings, and our practice is to do so upon request of counsel.

I hope that this paper has accomplished its main purpose, which is to assure the bar that the court regards its rules and procedure not as sacred cows but as means to the ends of justice. It is for the latter reason that the procedure should be as fully within the court's control as possible. If members of the

bar have any suggestions for the improvement of rules or procedure toward that end, the court will gladly receive and consider them. Certainly the procedure should conform as closely as possible to the needs and ideas of those most directly concerned and best fitted to understand its purposes.