Rules Committee Studies Appeals

Changes Involve Abridging the Record and Simplifying Briefs

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For members of the advisory committee working with the Supreme Court on the rules of practice and procedure in civil cases, the week of July 1 was packed with activity. On July 1, 2, and 3, they remained in session from early morning until late afternoon at the Worth Hotel in Fort Worth, working on the reports of the sub-committees on appellate procedure and procedure prior to trial. The balance of the week they spent at the convention of the Texas Bar Association and the State Bar of Texas.

The sessions at the Worth Hotel brought forth a number of material procedural changes which will be recommended to the Supreme Court. Approximately two-thirds of the time was devoted to a review of general recommendations presented by the appellate procedure sub-committee composed of Judge Ben H. Powell, Judge James W. McClendon, William A. Vinson, R. B. Levy and Allen Clark, and the balance of the time was given to completing the consideration of the supplemental report of M. N. Chrestman's pre-trial committee.

Not Materially Changed

Appellate practice will not be materially changed by the recommendations of the advisory committee. The principal changes with which the committee is now working involve the difficult problems of abridging the appellate record and simplifying the briefing process.

Efforts to shorten the record and to decrease the cost thereof are being directed along several lines. The transcript may be shortened by providing for the omission by agreement of counsel of all immaterial matter. Inducement to generous agreement will be found in a possible rule that the cost of bringing forward unnecessary matter will be taxed against the party whose attorney refused to agree to its omission. A further inducement will be found in a liberal protective rule which will permit the transcript to be amended to include any proceedings that have been omitted and have been later found necessary or desirable for full presentation of the case to the appellate court. Such amendment will probably be allowed even after submission of the case to the appellate court.

Reducing Cost

Another method of reducing the cost of appeal which is under consideration is a requirement that one extra copy of each paper be filed with the clerk, and that the transcript consist of a bound set of these original papers, properly certified. The principal argument in favor of this proposal is that the cost of copying all the instruments necessary for a transcript will be eliminated. The principal argument against the suggestion is based upon the increase in the work of the attorneys' offices in all cases to take care of the small percentage appealed.

No great amount of progress has been made in the difficult problem of shortening the statement of facts. A broadened provision for sending to the appellate court the original exhibits, or photostatic copies of them, instead of stenographic copies on the statement of facts, will undoubtedly decrease the expense and length of the statement in many cases. But no method of reducing the amount of space consumed by the statement of the oral testimony has yet received the approval of the advisory committee, even in principle.

Assignments of Error

In the rules of briefing, more progress is being made. The briefs will be materially shortened in many cases by the elimination of the requirement that the assignments of error be copied verbatim. The assignments of error may, under proposed rules, be filed in a separate instrument in the appellate court, or the grounds stated in the motion for new trial may be adopted

by reference. It should not be understood by this statement, however, that there is any proposal under consideration for the change of the present requirement that a motion for new trial shall be a pre-requisite to appeal except in a limited number of situations.

The discussion at Fort Worth indicated a general agreement that at present the briefs filed in most appealed cases are more formally restrained than is either necessary or desirable. Whether this ritualism is the result of the rules or the misunderstanding of the lawyers was a matter on which opinion differed, but there seemed no material opposition to rules which will provide that the emphasis in briefing shall be upon aiding the appellate court to understand and dispose of the controversies instead of complying word by word with a pre-ordained arrangement of formal sub-headings.

Problem of Judges

Except as the result of shortening the record will indirectly speed up the disposition of cases upon appeal, the committee has not yet suggested any rules which will materially decrease the time now consumed in disposing of cases on appeal. There has been no manifestation of any tendency to shorten the time allowances for the various steps on appeal. Under the recommendations of the advisory committee it will remain true, as it is true now, that the problem of clearing the dockets of our appellate courts rests upon the judges themselves, and not upon any rules which may be prepared by either the Supreme Court or the Legislature.

To the preceding paragraph perhaps one exception should be noted: the proposal to embrace all interlocutory appeals in one general rule. This will have its most important effect upon appeals from orders sustaining or overruling pleas of privilege. If the appeal in such cases is required to be perfected in twenty days and is given precedence in the appellate court, there will be no occasion for a rule allowing the case to proceed to trial before the appeal is disposed of, thus risking the expense and delay of a complete retrial in event the order of the trial judge is reversed.

Since the report of the sub-committee on appellate procedure was largely tentative, and sought rather a declaration of policy of the advisory committee than final action upon any proposed rules, it is probable that the most important action of the advisory committee during its three-day session was the final adoption of a number of very important procedural changes recommended by the sub-committee dealing with procedure prior to trial. Three of these changes will be mentioned as typical.

a. *Counterclaims and cross-claims.* With but minor textual amendments, necessary to adapt the Federal Rules to our State practice, the advisory committee decided to recommend the adoption of Federal Rule 13. Under the proposed rule a party will be *required* to "state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action," which he has against his opponent; and he will be *allowed* to state any counterclaim he has against his opponent which does not arise out of the same transaction. Gone will be the distinctions between liquidated and unliquidated claims found in our present rules. Instead we shall see the material broadening of the subject matter of our controversies, with the tremendous advantage that under the proposed rules the parties may dispose of all their differences in one law suit, instead of spreading them among a number of disconnected hearings. Provision is made for allowance of separate trials, where that is necessary to avoid prejudice, and for bringing in additional parties necessary to full disposition of the issues.

b. *Joinder of claims.* The advisory committee approved a recommendation that Federal Rule 18 be adopted. This rule will permit the plaintiff in his petition or the defendant in his answer setting forth a counterclaim to "join either as independent or as alternative claims as many claims either legal or equitable or both as he may have against an opposing party." The result will, here again, bring into one law suit the controversies between the parties. Gone will be our astute learning concerning misjoinder of causes of action. Here again separate hearings are authorized where necessary.

c. *Pre-trial and discovery procedure.* Although the advisory committee was not ready to follow the recommendation of the committee on pre-trial procedure of the Texas Bar Association and make pre-

trial compulsory in all jury cases, its suggested rules will be found to give to Texas for the first time a system of pretrial procedure which can be as effective as the trial judge wants to make it. Pretrial, as recommended by the advisory committee, will be optional, and its success or failure therefore depends upon the trial judge. If it is effectively administered by the trial judges, it will bring all the advantages incident to the adoption of Federal Rule 16. Federal Rules 34, 35, 36, and 37 have, with some changes, received the approval of the advisory committee, and should they be finally approved will place in the hands of the trial attorney new weapons for the simplification of his trial and the settlement of his disputes.

The final report of the advisory committee begins to take form. It is clear that the extremists will not be satisfied. Neither will those who, without careful study, have recommended the adoption of the Federal Rules *in toto* to guide the procedure of our county courts, nor those who, precedent-bound, oppose with natural inertia the change of any rule. The rules will not be short nor will they be so simple that a first-year law student could practice under them. Their changes will not always wear a red flag or sound a siren to attract attention. But there will be changes—important changes—which, if properly interpreted by the appellate courts and properly applied by the lawyers, will bring great benefits to our procedure.