A Declaratory Judgment for Procedure

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A Declaratory Judgment for Procedure

The writer has made the suggestion to the Advisory Committee on Rules for Civil Procedure charged with drafting the proposed new Federal Rules that those rules should include a provision for a declaratory judgment as to procedure. The substance of such a provision would permit any party to request a ruling from the judge as to the proper procedure to be followed in the case then pending. After notice to other interested parties (unless the question involved was one as to the issuance or service of process, where the matter would have to be decided ex parte) the judge should enter an order prescribing a rule for the situation presented, which would be reviewable on appeal only where an outrageous result was reached and a party deprived of some substantial benefit to which he was clearly entitled.

The necessity for such a provision in a new code of procedure, which to a great many lawyers will constitute a wide departure from a familiar procedure, appears obvious. Its desirability in any code of procedure seems demonstrable.

A new code is bound to be ambiguous and its exact meaning in the course of its administration will be subject to controversy. There is every reason why such controversy should be definitely settled during the pleading stage of the proceeding. It is true that the proposed rules seek to minimize the effect of procedural errors, and to give the trial judge power to compel compliance with the rules there announced. Those provisions, however, relate always to an attempted administration of the rules therein promulgated. Over and above those rules the trial court should have the power in case of doubt, or in a case where the situation is not covered by one of the rules promulgated by the Supreme Court, to make a rule for the case at hand which would not be a purported administration of any of the promulgated rules.

It will, of course, be found that situations will develop where no rule is provided. The Supreme Court when such defect is found may well take care of the situation by an amendment to the adopted rules. In the meantime the trial courts should be given express power to deal with such a situation in the manner suggested and thus avoid a great deal of prolonged litigation over strictly procedural matters.

The proposed rules are purposely stated in broad terms. Language being what it is there will at the beginning at least be considerable controversy as to its exact meaning. Power to define the terms used for the purposes of a pending case should be given the trial courts, not as an administration of the rules, but as a power to prescribe a rule for the case at hand.

Where the rule is in terms broad, but intelligible, its specific application will cause difficulty. For example, proposed rule 13(b) provides for the pleading of "affirmative defenses." In the cases of contract and statutory rights this presumably continues the distinctions between a condition precedent and a condition subsequent, between limitations and an exception or a proviso. Before the case is disposed of the trial court will be called upon to rule whether the situation presented involves one or the other. A plaintiff or a defendant must now take chances on what that ruling will be when the question is raised during the trial. There is every reason why some method should be provided whereby such questions, and other similar ones, can be finally settled before trial.

The same considerations which support a declaratory judgment as to substantive rights support a declaratory judgment as to procedure.

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