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DURING the twenty-four years since the adoption of the narrative form for records on appeal in the federal courts under Equity Rule 75 (b),[1] there have been some printed comments and criticisms of the rule [2] as well as informal and unrecorded discussion by the bench and bar. The more recent comments on the working out of the rule vary little from the prophecies made soon after its adoption.[3] There is not much of value that can be added to the theoretical discussions of the rule either by its proponents or its opponents. But there remain certain highly important practical questions: How has the rule actually worked? If there are advantages to be derived from this practice, have they outweighed the accompanying disadvantages? The answers to these questions should be found in the experiences of thousands of lawyers who have prepared records on appeal under Equity Rule 75 (b) and under similar rules in the state courts; in the reactions of the judges who have examined these records; and in the pages of the records themselves.

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[1] "The evidence to be included in the record, except expert testimony, shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. . . ." This rule went into effect February 1, 1913.

[2] Griswold and Mitchell, "The Narrative Record in Federal Equity Appeals," 42 HARV. L. REV. 483 (1929); Lane, "One Year under the New Federal Equity Rules," 27 HARV. L. REV. 629 (1914); Lane, "Federal Equity Rules," 35 HARV. L. REV. 276 (1922); Dietrich, "The New Federal General Equity Rules," 76 CENT. L. J. 281 (1913); Amidon, "The New Federal Equity Rules," 77 CENT. L. J. 29 (1913); 7 TEX. L. REV. 423 (1929).

[3] Cf. statements in authorities cited in note 2, supra. The most recent edition of HOPKINS, FEDERAL EQUITY RULES [8th ed., p. 307 (1933)] still carries the statement made in the first edition [p. 197 (1913)]: "This rule is entirely new, and imposes a new burden on the bar in the preparations of appeal records. The difficulty of fairly reducing testimony to narrative form will probably impose an expense for counsel fees upon litigants which will more than counterbalance any saving of transcript and printing costs upon appeal."

I

EXPENSE

The first question that comes to the minds of lawyers and litigants probably is, what does it cost? Does restatement in narrative form decrease or increase the expense of an appeal? The practical answer is to be found in the hours and days spent by lawyers in preparing the record.[4] The following is a rough estimate of the hours devoted by lawyers in the firm with which the writer is associated to records recently prepared, taking into consideration only the time spent on the narrative statement of the testimony, and omitting the other parts of the record, such as, for example, exhibits, which also involve a considerable amount of time and effort.

It is necessary to bear in mind that a reliable and satisfactory narrative statement can be prepared only by a lawyer, and by a lawyer who is familiar with the case and who was present at the trial. In one instance, a lawyer of high standing, one of the senior members of a prominent firm and a man whose time, no doubt, is valuable, explained that he was doing the work on the record himself because when he tried to have it done by associates less familiar with the case he found it necessary to answer so many questions that he decided it was more economical actually to do the work himself.

The preparation of the record of a recent case, in which the trial lasted for a month, and where appeals were taken by both parties and the work divided as far as possible by having each side prepare the

[4] Lane, "Federal Equity Rules," 35 HARV. L. REV. 276 at 299 (1922), quotes Judge Morton of Massachusetts as follows: "The abstracting costs more than the printing of the complete record in most cases."

Sunderland, "Simplification of Appellate Procedure," 3 UNIV. CIN. L. REV. 1 at 21 (1929): "the labor involved in eliminating irrelevant portions and in substituting a narrative form for questions and answers, is out of all proportion to the advantages sought."

Second Report of the Judicial Council of Massachusetts, 12 MASS. L. Q. 7 at 35 (1926): "A vast amount of time is apt to be consumed by counsel in coming to an agreement with respect to the narrative statement, and, as a result, the expense to the client often exceeds by far the cost of printing the testimony as taken by a stenographer."

Report of the Committee on Law Reform for 1913, PROC. N. Y. CITY BAR ASSN. 163 at 165 (1914): "Under modern conditions the printer's time and work at fifty-five cents a page for thirty copies, is less costly to litigants than the service of competent counsel to narrative testimony and settle the case."

Griswold and Michell, "The Narrative Record in Federal Equity Appeals," 42 HARV. L. REV. 483 at 504 (1929): "Experience has shown, it is said, that this process of reduction is one of endless bickering, requiring enormous amounts of time from counsel, and large expense for clerk and stenographer hire."

testimony of its own witnesses, took approximately 475 hours, or nearly twelve weeks, of the writer's time alone, and well over 500 hours of the time of other lawyers associated in the case. Opposing counsel probably put in as much time, and many hours were spent in conferences between the two sides. This means that the equivalent of half a year of the normal working hours of one lawyer went into the preparation of the record of a one month's trial.

In a more recent case, where the trial lasted for a little over a week and our opponents appealed, we spent, on the reading and correcting of the narrative statement, time amounting to about three normal weeks. Our opponents, who had the major responsibility for the record, probably put in even more time. Conservatively estimated, the equivalent of two months' time of a lawyer was spent in preparing the record of a week's trial.

While these estimates are based on the records of a single firm, it is safe to say that our experience is not extraordinary, and that any conservative attorney will find it necessary to spend as much time on this task. This conclusion is the result of discussions with numerous lawyers on the subject and observation of the work of opposing counsel.

The rule places the responsibility for the record on the appellant,[5] but what makes the situation particularly unfortunate is that the labor and expense are almost as great for the appellee. Reading and checking a narrative statement prepared by an opponent is perhaps more difficult than preparing such a statement for one's own appeal, and in cases where opposing counsel are inexperienced in this work or are not cooperative the burden on the appellee is heavy indeed.

These figures may be compared with the time that would be required for the preparation of these records if a restatement in narrative form were not required. If such a record were printed in question and answer form, eliminating only long arguments of counsel, and obviously immaterial matter, a day or two or, at the most, a week's time might be spent by lawyers in preparing the material. All other work could be taken care of by the clerical staff. The difference in expense to the litigant is obvious.

II

DELAY

The law's delay has been a favorite topic for discussion by bench, bar and public for many years. Does the narrative restatement rule

[5] Equity Rule 75 (b): ". . . The duty of so condensing and stating the evidence shall rest primarily on the appellant. . . ."

help or hinder the solution of this problem? The figures submitted above on the time spent by lawyers suggest the answer.[6] Moreover, in estimating the delay which may be caused by the narrative restatement, there should be considered not only the actual time, in terms of hours, which a lawyer finds it necessary to put into such a record, but also the fact that this work can be done only by counsel who tried the case, or by an associate who has taken active part in the trial, that is, by busy men who cannot devote their complete time for days and weeks on end to this slow task. Even where a lawyer is anxious to press an appeal and where his client's interests require speedy action, he knows that he must grant extensions of time to his opponent, and that if he does not agree to them a court will order reasonable extensions and will rightly do so, since a properly prepared record is of vital importance to all parties.

In the case referred to above, which took twelve weeks of the writer's time alone, the printed record was filed about nine months after the actual work of preparing our share of the testimony had begun. In the other case, in which the record was shorter, over a year elapsed between the time the appeal was taken and the time when copies of the printed record was filed, and in both cases there would have been an even greater delay if many nights and holidays had not been spent on the slow work of preparing and reading the narrative statement.

The delay which this represents cannot be blamed on the lawyers. The work is too important to permit them to take any risks. They have to take care of it or supervise it themselves, and yet no active attorney can retire for a period of weeks and months in order to devote himself to one record on appeal. If he did, the cost to his client, which already is burdensome, would be too great to be even considered. From the point of view of effectiveness of the work of the courts, this matter of delay is, perhaps, even more important than the question of expense.

III

SAVING OF TIME OF THE COURT AND OF SPACE, IN TERMS OF PRINTED PAGES

It may be that, even with the increased expense and added delay, the narrative restatement form should be retained if it achieves its

[6] Griswold and Mitchell, "The Narrative Record in Federal Equity Appeals," 42 HARV. L. REV. 483 at 504 (1929): "In addition, this process takes a long time, so that any time which the appellate court may possibly save in its consideration of the case is lost many times over in getting the case ready for presentation to that court."

main purpose, namely, to save time for the court.[7] The members of the federal circuit courts of appeal and of the Supreme Court could give the best evidence on this subject. The next best evidence is to be found in the records on appeal. Is it a fact, in most cases, that the change into narrative form results in the reduction of the evidence "in volume two-thirds or more"? [8] To what extent is the reading matter set before the court in a record of appeal actually reduced, in terms of number of pages?

The following estimate is based on the two cases referred to above in connection with the subjects of expense and delay. It is an estimate made in round figures but sufficiently accurate for this purpose.

In the longer trial, the stenographer's minutes of testimony and depositions amounted to about 3,475 typed pages. The printed record consisted of eight volumes, of which six contained exhibits, pleadings and the like, and two volumes, or about 950 pages, were testimony and depositions, both in narrative form. If this testimony had been printed in question and answer form, omitting long arguments by counsel, about 950 pages or two volumes more might have been added to this eight volume record. This is a very conservative estimate, and the amount of space saved in terms of printed pages was probably above normal. Even so, it means a saving of only fifty per cent.

In the other case, the testimony and depositions amounted to about 1,525 typewritten pages. The printed record was contained in five volumes, of which 800 pages were testimony and depositions in narrative form. Using the same method of estimating the number of printed pages that would have been required if the testimony had been printed in question and answer form, and again omitting long arguments by counsel, the number of pages would have been about 850. The space saved by the narrative form in that case was infinitesimal—less than three per cent.

It is interesting to compare these figures, because in both cases an

[7] In Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., 275 U. S. 372, 48 S. Ct. 183 (1928), where failure to conform to the rule resulted in remission of the transcript for compliance and the penalizing of the appellant with heavy costs, Justice VanDevanter estimated (p. 384) that if the rule had been complied with, "the evidence would have been reduced in volume two-thirds or more" and "the charge for printing would have been proportionately less—probably more than enough to offset the cost of compliance," adding that failure to observe the rule "materially augments the task of examination and decision by the court. Repetition of it in other cases would soon congest the dockets of the appellate courts."

[8] Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., 275 U. S. 372, 48 S. Ct. 183 (1928).

honest effort was made to comply with the rule. The extent of the reduction through the narrative form depends to some extent on the method used in making up the record. The method which probably is most widely used is to take the typed testimony and mark it with a pencil so as to twist the sentences into narrative form. The result is bad English and practically no saving of space. The alternative is to redictate the entire record. This adds to the expense, because, of course, it means a considerable amount of stenographic work, but the results seem to warrant it.

In one case where the testimony for the plaintiff amounted to 1,525 pages in the stenographer's minutes and the testimony for defendant amounted to about 1,950 pages, when the record was printed the testimony of each in narrative form amounted to exactly 475 pages. The testimony for plaintiff was reduced to narrative form by our opponents, who used the method of interlining the typed pages of the stenographer's minutes. By this method the testimony was reduced by about forty-two per cent. The testimony for defendant, which we ourselves prepared, redictating it from beginning to end, was reduced by about fifty-five per cent. Few lawyers, however, seem willing to take the trouble to redictate an entire record, and for many, no doubt, the method would be too costly.

The reason why restatement of the testimony results in so small a saving of space in terms of the printed page is apparent upon examining the stenographer's minutes and comparing them with the restatement. Here are a few examples taken from these same cases:[9]

> "Q. What records have you for that statement? A. It is referred to in a lot of our printed matter, circulars, and I presume some of the original documents.
>
> "Q. You know as a matter of fact that the North Louisiana Company organized a corporation subsequent to the beginning of 1862 which they called the Doe, Smith & Company? You know that, don't you? A. The Doe, Smith & Company concern in Hartford went out of business and it was reorganized in New Haven."

The same passage as printed in narrative form reads as follows:

> "The records that I have for that statement are that it is referred to in a lot of our printed matter, circulars, and I presume some of the original documents. As to whether or not I know as a matter of fact that the North Louisiana Company organized a corporation subsequent to the beginning of 1862 which they called

[9] Only names have been changed.

the Doe, Smith & Company, I state that the Doe, Smith & Company concern in Hartford went out of business and it was reorganized in New Haven."

By actual count, there are in the original question and answer form 83 words; in narrative form 85 words.

"Q. You were not trying to conceal the fact that the South Massachusetts Company purchased the J. Doe Company? A. I had no official information on that point. Incidentally I heard the Massachusetts did do something about taking it over, but I had no official information on the thing.

"Q. You didn't think it was worth while to find out what happened to J. Doe, even though you made pretty careful examination of the history of all these other companies? A. J. Doe never made a very strong impression upon me as a going concern in any shape or form.

"Q. Did you know J. Doe did business since 1901 continuously up to 1930 in New York City? A. I knew there was a small business in New York by that name."

The same passage as printed in narrative forms reads as follows:

"As to whether I was trying to conceal the fact that the South Massachusetts Company purchased the J. Doe Company, I had no official information on that point. Incidentally I heard the Massachusetts did do something about taking it over, but I had no official information on the thing. As to whether I didn't think it worth while to find out what happened to J. Doe, even though I made pretty careful examination of the history of all these other companies, J. Doe never made a very strong impression upon me as a going concern in any shape or form. As to whether I knew J. Doe did business since 1901 continuously up to 1930 in New York City, I say I knew there was a small business in New York by that name."

By actual count, there are in the original question and answer form 132 words; in narrative form, 134 words.

"Q. Do you know that Mr. Hoe was requested to go through all the advertising which was produced by the South Massachusetts Company on that hearing, and do you know that he had assistance in doing that, and that he did go through such advertising? Did you know that? A. Well, I knew he and others did, yes.

"Q. And you knew they found no existence of the use of the term 'genuine original brownstone' by the South Massachusetts

Company for a 14-year period prior to 1929, don't you? A. I know that, yes."

The same passage as printed in narrative form reads as follows:

"As to whether I know that Mr. Hoe was requested to go through all the advertising which was produced by the South Massachusetts Company on that hearing, and as to whether I know that he had assistance in doing that, and that he did go through such advertising, I knew he and others did. I know they found no existence of the use of the term 'genuine original brownstone' by the South Massachusetts Company for a 14-year period prior to 1929."

By actual count, there are in the original question and answer form 94 words; in narrative form, 82 words.

"Q. So in order to warn the gasoline stations and the operators of that type throughout the country you published a notice in the Jewelers Circular, which has a circulation of some 15,000 jewelers, in order to advise these gasoline stations and similar companies, that you had no connection with redemption bureaus, is that the fact? A. In the smaller towns there are small jewelers where this particular magazine goes, and we wished to bring it to the attention of the trade in general who, lots of times, are so situated that these various individuals trade with them. We did notify these jewelers that we had no connection with redemption bureaus."

The same passage as printed in narrative forms reads as follows:

"As to whether in order to warn the gasoline stations and the operators of that type through the country we published a notice in the Jewelers Circular, which has a circulation of some 15,000 jewelers, in order to advise these gasoline stations and similar companies, that we had no connection with redemption bureaus, I reply that in the smaller towns there are small jewelers where this particular magazine goes, and we wished to bring it to the attention of the trade in general who, lots of times, are so situated that these various individuals trade with them. We did notify these jewelers that we had no connection with redemption bureaus."

By actual count, there are in the original question and answer form 111 words; in narrative form, 111 words.

"Q. How does the Idaho Rayon Company distinguish its Rayon from other competing Rayons in its advertising? A. If I

understand your question correctly, we simply distinguish it the way any other advertiser does, by using our name.

"Q. By using the expression 'Idaho Rayon'? A. Various expressions, I would think. I am not familiar with each advertisement, I can not say whether the expression 'Idaho Rayon' is used in absolutely every advertisement or not. Here is one that it is in and I presume there are more."

The same passage as printed in narrative form reads as follows:

"You asked 'How does the Idaho Rayon Company distinguish its Rayon from other competing Rayons in its advertising'? If I understand your question correctly, we simply distinguish it the way any other advertiser does, by using our name. Various expressions are used I would think. I am not familiar with each advertisement. I can not say whether the expression 'Idaho Rayon' is used in absolutely every advertisement or not. Here is one that it is in and I presume there are more."

By actual count, there are in the original question and answer form 86 words; in narrative form 82 words.

"Q. How long have you purchased the product like the product you have purchased from California? A. Since 1919.

"Q. Now, do you recall from whom you first purchased that product? A. H. D. Vermont Company, New York.

"Q. And can you give us the names of any other concerns from whom you subsequently purchased the product like that product? A. Texas Company, New Mexico Company, North Carolina Company, Idaho and California.

"Q. Do you recall what terms you have used in purchasing that product from those other concerns in your orders? A. I think H. D. Vermont and Texas Company, it was XYZ; New Mexico Company came along and we called it their trade name, which was MNO, I believe. However, we considered it the same as XYZ. And then the North Carolina Company, I have forgotten what they did call theirs; and Idaho, of course, we always ordered as XYZ, and California we always ordered as XYZ.

"Q. What was the name of the material that you purchased from Vermont and Texas? A. XYZ paper.

"Q. What was the name of the material that you purchased from New Mexico Company? A. Well, we may have called it XYZ, but they called it MNO."

The same passage as printed in narrative form reads as follows:

"The Witness: We have purchased the product like the product we have purchased from California, since 1919. We first pur-

chased that product from H. D. Vermont Company, New York. The other concerns from whom we subsequently purchased the product like that product were Texas Company, New Mexico Company, North Carolina Company, Idaho and California. The terms we have used in purchasing that product from those other concerns in orders, are as follows: I think H. D. Vermont and Texas Company, it was XYZ; New Mexico Company came along and we called it their trade name, which was MNO, I believe. However, we considered it the same as XYZ. And then the North Carolina Company, I have forgotten what they did call theirs; and Idaho, of course, we always ordered as XYZ, and California we always ordered as XYZ. The name of the material that we purchased from Vermont and Texas was XYZ paper. As to the name of the material that we purchased from New Mexico Company, we may have called it XYZ, but they called it MNO."

By actual count, there are in the original question and answer form 202 words; in narrative form 178 words.

IV

TRUTHFULNESS AND ACCURACY OF THE RECORD

Probably no written or printed record, even though it be a complete transcript of stenographer's minutes, can reproduce the atmosphere of a trial or impress the members of the appellate court in the same way that they might have been impressed had they heard the testimony. The testimony of a fumbling and uncertain witness can read convincingly, while another witness, whose oral testimony would convince any court, might make a poor impression when his statements appear in print. The narrative form removes the appellate court a step further from the evidence.[10]

[10] Griswold and Mitchell, "The Narrative Record in Federal Equity Appeals," 42 HARV. L. REV. 483 at 504 (1929): "The particular phraseology is often important in forming the correct impression of a witness's testimony, and this, of course, is lost in the narrative record. The exception provided in rule 75 (b) is far too narrow to alleviate this difficulty." See also note 1, supra.

The Second Report of the Judicial Council of Massachusetts, 12 MASS. L. Q. 7 at 35 (1926), stated: "A judge of experience on an appellate court in another state has said, as reported to us, 'that he did not think that a judge ever got the true spirit of a case unless he could read what the witness testified to, rather than what the lawyers said the testimony was.' "

The Report of the Committee on Law Reform, PROC. N. Y. CITY BAR ASSN. 163 at 164 (1914), in discussing the New York practice, said that the paraphrasing of questions and answers into narrative form "raises a film of misconception between

The extent to which the true picture of a trial is changed by translation into the narrative is best shown by comparing the stenographer's minutes with the appellant's proposed restatement in narrative form. The following examples are instances detected in the course of reading manuscripts and printers' proofs and not permitted to appear in the record as submitted to the court. No doubt, every narrative restatement contains at least a few similar instances which escaped attention and became a part of the record set before the appellate court.

Perhaps the most common way in which testimony is altered when it is translated into narrative form is by putting into the mouth of the witness the language of the examining lawyer, as well as the witness's own answer.

> XQ . . . when did you first hear of the fact that Idaho Company claimed the word 'XYZ' as a trade-mark, just now?
>
> A. Well, I may have heard of it before, but I would not go on record."

The proposed restatements read somewhat as follows:

> "I first heard of the fact that Idaho Company claimed the word 'XYZ' as a trade-mark just now. Well, I may have heard of it before but I would not go on record."

At our request this was printed in question and answer form.

In many instances the actual changing of the testimony of the witness through restatement is not apparent unless the reader is familiar

the Appellate Court and the witnesses. It is in fact a translation from one language into another, and by reason of this the precise meaning of the original language was frequently lost, with violence to the truth, and the atmosphere in which the case was tried frequently disappeared."

Lane, "One Year under the New Federal Equity Rules," 27 HARV. L. REV. 629 at 642 (1914), says: "To some courts, and a great many attorneys, the advantages of the reduction of the appeal on record by abstracting are not apparent, for evidence appearing in narrative form has an entirely different probative force than when appearing in the proper setting of question and answer with the objections noted, and may cause the Appellate Court to reach an entirely different conclusion than if it had examined the record in question and answer form."

In a later article [Lane, "Federal Equity Rules," 35 HARV. L. REV. 276 at 299 (1922)] the same writer quotes Judge Killits of Ohio: "To put a second mind (that of the abstractor) between the witness and the reviewing judge doubles and more than doubles the chances for wrong impressions of the actual testimony." Also Judge Mayer of the Southern District of New York: "Where a witness has been evasive, the exact reproduction of his testimony is the only method of displaying to the appellate court what occurred below and sometimes even that is not effective in a cold record."

with the issues involved in the particular case. For example, here is an extract from the stenographer's minutes:

"Q. Isn't it a fact that in the little national consumer advertising that you have done of any Doe lines you have left the name Maine Company off?

A. I believe we have."

Appellant's restatement of this testimony was as follows:

"I believe that in the little national consumer advertising that we have done of any Doe line we have left the name Maine Company off."

The effect of thus putting counsel's question into the mouth of the witness is clear only when you know that the examining lawyer tried to establish in this case that there had been "little national consumer advertising," a proposition which this witness never would have accepted and certainly would not have stated. We objected to this form of restatement and the question was settled by printing this passage in question and answer form.

Here is another example. The stenographer's minutes read:

"Q. You have twice stated that the letter was intended to show that your business relations with R. S. D. Co. had been satisfactory. I ask you whether it was not also intended to be used to show that this defendant approved the business building campaign that the R. S. D. Co. had been carrying on for some years?

A. I don't know."

The proposed restatement of this passage read somewhat as follows:

"I have twice stated that the letter was intended to show that our business relations with R. S. D. Co. had been satisfactory. I don't know whether it was not also intended to be used to show that this defendant approved the business building campaign that the R. S. D. Co. had been carrying on for some years."

We objected to this restatement and the passage finally was printed in question and answer form.

Long argumentative questions lend themselves peculiarly to such alterations of testimony. As, for example, the following taken from a cross-examination:

"XQ. Was it discussed between you and Mr. Martin at all before these letters went out that first the defining of a trademark and calling for a conclusion, so to speak, and then the offering of an inducement for the replies, would tend rather to put

pressure on the recipient of the letter to pick out trade-marks wherever she could; was that subject discussed between you at all?

A. No, sir."

The proposed restatement read somewhat as follows:

"It was not discussed between me and Mr. Martin at all before these letters went out that first the defining of a trade-mark and calling for a conclusion, so to speak, and then the offering of an inducement for the replies would tend rather to put pressure on the recipient of the letter to pick out trade-marks wherever she could; that subject was not discussed between us at all."

At our request the question and answer form was used instead.

Sometimes when the answer of a witness is no more than a denial of knowledge and information on the subject, the restatement has the effect of making the witness appear to admit the very facts about which he claims to be uninformed. For example, the stenographer's minutes read as follows:

"XQ. Do you happen to know why it was a part of your company's policy at one time, at any rate, to ask your customers rather urgently, as indicated in these labels, to use the registered trade-mark name 'XYZ' on labeling for resale, while no comparable policy was adopted with reference to customer advertising? Do you know why there was that apparent discrimination?

A. I don't know. I have no knowledge of it."

The proposed restatement of this was somewhat as follows:

"I don't know why it was a part of our company's policy at one time, at any rate, to ask our customers rather urgently, as indicated in these labels, to use the registered trade-mark name 'XYZ' on labeling for resale, why no comparable policy was adopted with reference to customer advertising. I don't know why there was that apparent discrimination. I have no knowledge of it."

At our request the passage was printed in question and answer form.

Here is another example:

"Q. Do you know why that change of policy was put into effect?

A. Well, I have no distinct recollection of it at all."

The proposed restatement was somewhat as follows:

"I have no distinct recollection of why that change of policy was put into effect."

Again at our request the passage was printed in question and answer form.

A trick in the method of restatement may run through the entire record. A good example of this was found in a recent case in which the main issue was the validity of the plaintiff's trade-mark. The defendant claimed that the word was merely descriptive or generic, and its counsel, when examining witnesses, used the disputed word as though it were descriptive or generic rather than a trade-mark. Defendant, being the appellant, prepared the record, and, by putting into the mouths of the witnesses the questions asked by defendant's counsel, made it appear as though everybody who testified, including plaintiff's own witnesses, used the word normally, and perhaps even instinctively, as though it were merely the common name of the product. For example, in the course of comparing plaintiff's and defendant's products, the defendant's counsel, in cross-examining one of plaintiff's witnesses, asked:

"Can you tell apart these two species of 'XYZ' by taste?"

and the answer was simply, "Yes."

The proposed restatement was,

"I can tell apart these two species of 'XYZ' by taste."

This witness never would have made such a statement for he knew that there were not two species of "XYZ." If he had stated it himself, he would have used the descriptive word instead of the trade-mark "XYZ". One such instance might not have been of importance, but the method was applied to the whole record and affected it to a considerable degree. Wherever we noticed it we had it corrected, usually by adopting the question and answer form.

Sometimes it is difficult, if not impossible, to make a simple restatement without slightly changing the testimony. For example, the stenographer's minutes read:

> "Q. Mr. Roe, has the plaintiff ever made any mistakes in the use of its trade-mark 'XYZ'?
>
> A. Yes, sir."

The proposed restatement read:

> "'The plaintiff made mistakes in the use of its trade-mark 'XYZ'."

This might have been brought a little closer to what the witness had in mind if it had read:

> "The plaintiff has made some mistakes in the use of its trade-mark 'XYZ'."

The form in which this passage was printed was as follows:

> "You asked whether the plaintiff ever made any mistakes in the use of its trade-mark 'XYZ'. My answer is Yes."

This contains more words than the question and answer form.

The same difficulty was presented by the following:

> "Q. Do you ever put in those orders personally?
> A. I do."

The proposed restatement was,

> "I put in those orders personally."

At our request this was printed in question and answer form.

In a conference between opposing counsel, when objection was made to a restatement of testimony on the ground that it was not what the witness actually said, one lawyer replied that after all it did not matter what the witness actually had said; that the testimony of that witness was what counsel for the parties agreed that it should be.[11] While there can be no objection to agreement between counsel as to the contents of the record, one must wonder whether the courts are content with records which, by consent of counsel, misstate the testimony of the witnesses. No doubt the appellate courts guard themselves against being affected by what they imagine the atmosphere of the trial may have been and are well aware of the difficulty of getting a true picture from a printed record, whether it be in the original or in the narrative form. Even so, it seems likely that the change which comes over a record when it is reduced to narrative form at times may affect a decision, particularly in a case which involves fraud and deception.

Briefly summarized, these seem to be the practical results of narrative restatement of testimony under the rule: a heavy financial burden on litigants, considerable delay in bringing a case before the circuit court of appeals, a very small reduction of the number of pages of testimony (in some cases perhaps none at all) and, finally, a record of

[11] In 7 TEX. L. REV. 423 at 429 (1929), it is said, citing the report of the Committee on Jurisprudence and Law Reform (1907) of the Texas Bar Association: "A greater danger exists in destroying the truth when the attorneys agree to the statement of evidence in the narrative form. Frequently, concessions are made to reach an agreement; so material facts that were in the stenographer's transcript will be left out, resulting in a different statement of facts on appeal."

doubtful accuracy and truthfulness. If any benefit is derived from the practice, it is doubtful whether it can be considered worth its cost.

What is the alternative? Various plans have been suggested. Typewritten copies of the testimony in question and answer form might be submitted to be available for reference purposes. Appellant and appellee each would prepare a statement of the evidence referring to pages of the original record, which would be needed only in case of doubt or difference. That original record might even be printed without an increase of expense, since it seems the number of pages would not be appreciably increased and, furthermore, there would be a considerable saving in proof corrections, which are numerous under the present system. There are advocates of the English practice, which still relies on the judge's notes, the stenographic transcript to be referred to only where the contention of one side or the other needs support. These systems have been tested in the courts, and the practical results are available for comparison with the present federal practice. It may even be possible to procure far more satisfactory records at less cost by taking advantage of mechanical improvements and inventions which might eliminate some of the many steps that must be taken from the time the stenographer makes his minutes to the time the printed page comes from the press. In this way it may become possible to furnish each member of the appellate court with an accurate printed copy of the actual testimony to be used for reference purposes only, together with statements of the evidence by counsel, all at less expense than under the present rule and with considerably less delay. Improvement in this direction in these simple mechanics of procedure may mean not only a lighter burden for judges, lawyers and litigants, but also in many cases a closer approximation to absolute justice.