Lawyers Tell Views on Rules

Considerable difference of opinion was expressed on proposed rules of civil procedure at the legal institutes held in Texas in March. The institutes were well-attended as a rule, and lawyers expressed themselves freely on the changes to be recommended to the Supreme Court's advisory committee. Questions of submission to the jury monopolized most of the discussions, the opinion being almost unanimous against return to the old general charge, although most of the lawyers favored some degree of amendment of the special issues statute.

Institutes on rules of civil procedure were conducted by Preston Shirley of The University of Texas in Eastland March 9 and in Big Spring March 23, by Judge James P. Alexander of Waco in San Antonio March 15-16 and in Tyler March 30, and by Roy W. McDonald of S. M. U. in Abilene March 16. Earlier in the month, meetings were held in Longview and Brownwood, with members of the advisory committee leading the discussions.

More than twenty legal institutes have been held in Texas since January, a record surpassed by no other state in a year, Angus G. Wynne, advisory committee chairman, has announced. Approximately twenty-five more will be held. Nueces County Bar Association plans an all-day institute to be conducted by Judge Robert W. Stayton of The University of Texas for April 13 in Corpus Christi. Mr. Shirley will lead an all-day session for Travis County Bar Association in Austin April 22. The three-day institute in Dallas April 18-20 will be given through the combined efforts of S. M. U. and the Dallas and Texas Bar Associations. Other April meetings will be conducted by Judge Stayton in Nacogdoches and Seguin, and Judge Alexander in Beaumont and San Angelo.

The Eastland institute asked that as few changes as possible be made in the procedural statutes. Federal rules as a basis for the rules in Texas were opposed in Brownwood and Eastland, and lawyers at the Abilene meeting voted that they be used only as far as practical in Texas, provided they are limited to trial court procedure. They were discussed at length in San Antonio, but no vote was taken. Pre-trial procedure was favored in Brownwood and San Antonio, but the Eastland institute opposed the pre-trial system followed in federal courts.

On the question of pleading, Abilene favored retention of distinction between statements of fact and legal conclusions. San Antonio voted 44 to 38 to retain the general demurrer and 49 to 33 against abolition of general denial. It was proposed in Eastland that the general denial should have the effect only of joining issue on the allegations of the plaintiff's petition and that all affirmative issues asserted to or to be asserted by the defendants by way of defense to the alleged cause of action must be specially pleaded by the defendants. A requirement that the general demurrer be filed to point out specifically the reasons relied upon was asked by the Abilene institute.

San Antonio lawyers were against limiting the plaintiff's reply argument to one-fourth of his opening argument time and opposed the suggestion that in pleas of privilege an appeal should suspend the trial on the merits, and that a speedy appeal as in temporary injunctions should be provided. It was the consensus at that meeting that granting of new trials because of misconduct should not be abolished, but that modification of the rule to provide that the court would grant a new trial only if it appeared from the record "as a whole" that the party complaining was injured by the misconduct should be incorporated in the new rules. Lawyers attending the San Antonio institute opposed requiring bond for costs or pauper's affidavit from plaintiff's attorney where he has a case on a contingent fee, and voted that filing of a pauper's oath should be *prima facie* evidence, the burden of proof to be on the plaintiff to establish by evidence his inability to secure the costs where contested.

Voting unanimously against returning exclusively to the old general charge, the lawyers at Abilene were opposed two-to-one to allowing the court to submit a combination general verdict and special issue charge, as under the federal rules. They

Lawyers at the San Antonio meeting, above and on Page 145, spent two days discussing federal rules, special issues, and pre-trial procedure. Judge James P. Alexander conducted the institute.

favored unanimously adding to the rule concerning definitions of legal terms a provision that no definition should reverse the case because it happened to be in the nature of a general charge if it were correctly worded. San Antonio concurred in this opinion.

Eastland wanted to have the jury pass on fact questions alone and dispense with definitions by the court of legal propositions. It was argued that we have a joint submission rule resulting from distortion of the law providing for special issues and general charge. The law must be amended, the lawyers believed, to restore its original meaning. They asked also that uncontroverted issues of fact, as found by the court, be submitted to the attorneys by the court before the case goes to the jury. Should either party contend that the evidence on any one or more findings is not uncontroverted, it was the consensus that the opposing party should object to such finding of the court, and the proponent, having the objection, must present to the court a proper issue upon the point and request its submission.

It was proposed at the Eastland meeting that on the submission of special issues, the court should submit all material issues, as under the present statute, but that if any material issue should not be submitted, the duty should be upon the plaintiff to present and request the submission of a proper issue, should it be necessary to his cause of action, and that the defendant should present and request the submission of any issue constituting an affirmative defense to the plaintiff's cause of action. In either case, failure of the party to present such an issue to the court and request its submission would constitute a waiver.

The part of Article 2190 of the Revised Civil Statutes dealing with presumed findings in support of the judgment should be repealed, Eastland lawyers believed, taking along with it the recent case of Railway v. Pepper. San Antonio took the opposite view, accepting the interpretation of the case as stated by Judge Alexander. It was to the effect that if a ground of recovery or ground of defense is wholly omitted, it is waived, but if any issue is submitted that is necessarily referable to a ground of recovery or ground of defense, and one or more issues are omitted, the omitted issue or issues is not waived, so that if the court determines to render judgment on the ground of recovery or defense involved, the judgment can stand upon the presumption that the court found the facts involved in the omitted issue or issues in such manner as to support the judgment rendered.

A thorough discussion of Article 2190 was entered into at the San Antonio institute, with numerous amendments suggested. Lawyers opposed grouping into one question several ultimate issues in negligence and compensation cases, but approved submission of two inconsistent issues in one question, such as whether the defendant is totally or partially disabled. They wanted to amend the Article to require a party complaining of the failure to submit an issue or define a term to tender a correct issue or definition, but opposed amendment to provide that failure to submit a requested issue should not constitute reversible error on appeal where an answer favorable to the appellant to the requested issue would be in conflict with any finding properly made

by the jury in answer to some other issue properly submitted.

Unanimous approval was given to the suggestions to amend Article 2190 to avoid submitting issues in the double negative, and to retain the part of the Article which permits a party to object that an issue is not supported by any evidence, even where he has requested the issue.

"As I see it, there are two reasons for our presence at this legal clinic," V. T. Seaberry told the lawyers at the Eastland meeting. "The first is self-preservation. The second is pressure from public sentiment. We are trying to make the practice by the average lawyer a smoother job, to boot the shyster out of the profession by raising the standard of the entrance requirements and by having disbarment proceedings with teeth in them, and to stimulate and retain public sentiment favorable to our work as public servants, to the end that the tax-paying citizens may again respect the courts, the judges, and the lawyers and look upon courthouses as sanctuaries of law, order, and timely justice rather than playgrounds for lawyers.

"We have learned by bitter experience that if ours is to be a profession rather than a trade, we must, as thinking professional men, preserve it as such." Mr. Seaberry, an Eastland attorney, was introduced by Chairman P. Edward Ponder of Sweetwater, director of the Texas Bar Association.

The Sweetwater meeting for lawyers of the central part of the Eleventh Supreme Judicial District also was presided over by Mr. Ponder, and E. M. Overshiner was elected secretary. Speakers were Mr. McDonald, who conducted the institute, J. M. Wagstaff of Abilene and J. Cleo Thompson of Dallas, members of the advisory committee on the State Bar Act, and Dallas Scarborough of Abilene, member of the advisory committee on rule-making power. Mr. Thompson spoke briefly on the objects and aims of the State Bar Act, and Mr. Wagstaff reminded the lawyers of the importance of returning the ballots.

In the discussion of adoption of the federal rules, T. J. McMahon of Abilene expressed strong opposition to their use in appellate courts. Federal procedure is expensive and virtually prohibits appeals by poorer persons, he declared. E. C. Yates spoke in favor of the rules, emphasizing the desirability of uniform procedure in state and federal courts. The meeting adopted the following resolution previously passed by Travis County Bar Association, but added the clause in italics:

"It is the sense of this association that the Supreme Court's State-wide Rule-making Committee give careful study and thought to the rules of civil procedure heretofore promulgated by the U. S. Supreme Court to the end that the State rules be made to conform thereto, with such changes, eliminations, and alterations as said State-wide Committee may consider an improvement thereon, *but that such adoption be limited to procedure in the trial court.*"

The San Antonio meeting began with a luncheon in the Gunter Hotel, where Mr. Wynne spoke on "The Proposed New Rules for Governance of the State Bar."

The institute was held on the afternoon of March 15 and the morning of the following day. Numerous opinions were expressed on the subject of abolishing the general denial at the first session, some of the members contending that adoption of the federal practice would result in cutting down the size of the record by eliminating much evidence and testimony on uncontested fact issues which result if one is required to admit or deny specifically the averments in his opponent's pleading. Others believed that the general denial should be retained but that the federal rule permitting one party to call on the other for admissions should be adopted. Prevailing opinion, however, held that the present form should be retained, the situation having been found to be unacceptable when the general denial was abandoned from 1913 to 1915.

Much of the San Antonio institute was devoted to special issues discussions. The lawyers voted against making any changes in the manner in which the issue of unavoidable accident or sole cause is raised by the pleadings in evidence or as to the form of submission of such an issue to the jury. It was brought out that the plaintiff would argue to the jury that it was unreasonable and ridiculous to consider that the accident was unavoidable if the court did not submit the question to the jury for determination. Other arguments against changing the present system were that it would be a temptation to the court deliberately to refrain from submitting such issues in the event that affirmative findings were made by the jury on submitted issues that were inconsistent with the omitted issues.

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Courts Adjourn April 22 For Austin Institute

Austin's three district courts will adjourn April 22 for the Travis County Bar Association institute on rules of civil procedure, Judge Ralph Yarborough, president, has announced. They have rearranged their dockets to be called the following Tuesday.

Preston Shirley of The University of Texas School of Law will conduct the institute, which begins at 10 o'clock. The date was set for Monday instead of Saturday to enable lawyers from surrounding counties to be present.

Corpus Christi Meeting Is Set for April 13

Judge R. W. Stayton, professor of law at The University of Texas, will conduct an all-day institute on rules of civil procedure in Corpus Christi April 13. Sessions will be from 9 to 12 and from 2 to 5 o'clock. All lawyers of Nueces and surrounding counties have been urged to attend the institute and the banquet that night.

The tentative program for the morning session provides for discussion of adopting the new federal rules, abolishing the general demurrer, abolishing the general denial and requiring the defendant to admit or deny specifically (not under oath) the plaintiff's allegations, requiring the defendant to answer twenty days after service, adopting some form of pre-trial procedure, providing that an appeal in a plea of privilege case shall suspend a trial on the merits, and providing for the advancement of the hearing of appeals on pleas of privilege in the appellate courts.

A general discussion of the special issues question will take place at the afternoon meeting, with particular attention to the following amendments to Article 2190: to abandon special issues; to allow grouping in one issue of several alleged acts of negligence or contributory negligence where an affirmative finding on either one will determine liability; to group inconsistent issues, such as whether the employe was totally or partially disabled; to allow the court greater latitude in charging on the law applicable to special issues without violating the rule against giving a general charge.

Also, to require the party complaining of failure to submit an issue or define a term to tender a correct issue thereon; to provide that failure to submit a requested issue shall not constitute reversible error on appeal where an answer favorable to the appellant to the requested issue would be in conflict with any finding properly made by the jury in answer to some other issue properly submitted; to provide some solution of the question raised in Ormsby v. Ratcliff and Wichita Falls Railway Co. v. Pepper; and to provide some manner to avoid submitting issues in the double negative.