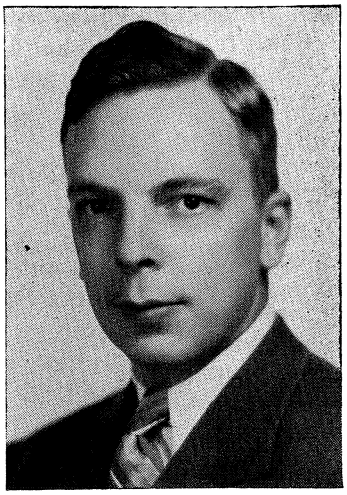
Civil Rules Begin to Take Form

By ROY W. McDONALD *of Dallas*

Any lingering belief that the revision of the Texas rules of civil procedure would be a simple task was quickly dispelled when the Supreme Court's advisory committee met in Austin April 5 and 6 to undertake the study of the reports of its sub-committees. With eighteen of the twenty-one members present, and with Marion N. Chrestman of Dallas, president of the Texas Civil Judicial Council, presiding in the absence of Mr. Wynne, the committee began its discussions at 10 o'clock on the morning of April 5. Members continued their study until almost 10 o'clock that night, and worked from early Saturday morning until 6 o'clock in the afternoon.



"Far-reaching changes are certain to follow"

Appointed by the Court January 12 to aid in revising Texas civil procedure, the committee had held organization meetings January 20 and February 16-17. At the second meeting Chairman Angus G. Wynne of Longview had appointed five sub-committees to study the various aspects of the proposed reforms.

Winbourn Pearce of Temple, chairman of the group studying special proceedings, reported that his committee had considered forcible entry and detainer, partition, trespass to try title, and a number of other special proceedings, and that at the present time no changes in these proceedings would be recommended. The applicable statutes which are procedural will be carried forward into the final draft of the recommended rules. Mr. Pearce's report was accepted and his committee continued to draft the proper rules to effectuate his recommendations.

The report of the sub-committee on ancillary proceedings was by consent deferred to a later meeting. Judge F. A. Williams of Galveston, originally chairman of the committee, had resigned because of illness, and other members had been working on other sub-committees. It was considered advisable to delay this report until further discussion had indicated the trend of the advisory committee's work.

The report of the sub-committee examining procedure prior to trial contained thirty-one single spaced, legal-sized pages, and consisted of a first draft of approximately two hundred rules. In addition to a number of general rules, it included, as related to justice, county, and district courts, rules covering the institution of suit, parties, joinder, pleadings, citation, pre-trial procedure, abatement and discontinuance, continuances, change of venue, trial preliminaries, and costs. The remainder of the two-day meeting was devoted to a consideration of approximately two-thirds of this report. Reports by the sub-committees on trial practice and appellate practice were tendered but not considered.

It is obviously impossible to review in detail the discussion. A brief summary, however, may dispel any mistaken apprehensions about the understanding of the advisory committee of its responsibility. I believe that this summary will convince everyone that the rules which the committee will suggest for consideration by the Supreme Court will reflect careful study of every constructive suggestion made by the lawyers of Texas and will be a forward step in Texas procedure.

In this connection I am impelled to remark that this summary will also reassure those who may have been made apprehensive by the article, "Procedural Reform and the Apostles of Status Quo," by Franklin Jones, in the April issue of the JOURNAL. Based upon fragmentary newspaper accounts, and upon statements made

during a very short period while Mr. Jones was visiting the meeting of the advisory committee, his very ably worded article entirely missed the point in discussing the committee's attitude. I do not propose to labor a point which will be obvious from a consideration of the following summary.

The proposed change which elicited the most discussion related to the definition and system of pleading. Under the suggested rules pleading will "consist of a statement in plain and concise language of the plaintiff's grounds of recovery or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be ground for objection when fair notice to the opponent is given by the allegations as a whole." The effect of this change is to sweep away at one time the unworkable requirement of "fact" pleading and the technicality incident to requirement of the statement of a "cause of action."

By an almost unanimous vote the committee refused to substitute "cause of action" for "grounds of recovery," thus recording its interpretation of the latter phrase as something less than the technical cause of action concept. Thus the emphasis in pleading will be upon whether the allegations give notice of the general scope of the controversy to the opponent. If the pleading is sufficient to permit him to prepare for trial, it will no longer be defective because its allegations contain conclusions of law, evidentiary statements, or other formal defects, although the trial judge may require a repleader to avoid prejudice or undue length.

Another important recommendation proposed adoption of Federal Rule 15(b) with minor changes. Where issues have been fully tried by express or implied consent, though not technically raised by the pleadings, the pleadings may be amended at any time, even after appeal, if justice will thereby be served. This will eliminate reversals because of defective pleadings where the parties have without objection fully litigated an issue. No longer must the judgment be based on pleadings previously filed if the issues were fully developed on the trial.

The committee approved the elimination of unqualified general demurrers, and the requirement that demurrers point out specifically the defects in the opponent's pleading, on penalty that those not specifically pointed out will be waived.

Drastic changes have been recommended in citation practice. It is proposed

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Committee Asks Pre-Trial Hearings

State-wide pre-trial procedure on a uniform basis in all civil cases, particularly those requiring juries, was recommended to the Supreme Court's advisory committee by the Texas Bar Association committee on pre-trial procedure, meeting in Austin April 6. Adoption of a rule similar to those in the federal courts was sought to impose penalties on refusal to admit undisputed facts, or refusal to make frank disclosure of facts relied on, by parties to a suit.

Attending the meeting of the Bar Association committee were Carlton R. Winn of Dallas, chairman, Judge C. E. McGaw of the 124th District Court in Longview, Judge John A. Rawlins of the 116th District Court in Dallas, Bowlen Bond, representative from Fairfield, Senator Wilbourne B. Collie of Eastland, and Judge Tom Suggs of the Fifty-ninth District Court in Denison. All judges on the committee had adopted pre-trial hearings in their respective courts some time ago, and reported substantial public benefit from its use.

It was the consensus that the functions of the hearings should be to dispose of formal matters of pleading well before trial date and to simplify the fact issues to be tried, so that the actual trial time would be shortened. Present rules permit disposition of matters of pleading at pre-trial hearings, but there is no provision for enforcing simplification of the fact issues. Committee members believed that each court should have some latitude and discretion in setting up its pre-trial calendar to dispose of its business to the best advantage, with due regard for the length of the term and the number of cases on hand.

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that the citation be directed to the defendant, wherever found, to be served anywhere in Texas by the sheriff or any constable of the county in which the defendant may be found, or outside of Texas as now authoried in our statutes relating to Non-Resident Notice. This eliminates the necessity of directing the citation to a particular county and will avoid the expense of alias citations. All citations would, under the proposed rules, be returnable the first Monday after twenty days after service, provided that no judgment would be granted until the citation, with proper return shown, had been filed with the court ten full days. This proposal requires the defendant to answer some three weeks after service, regardless of the date of the next term of court in the particular county or district.

Several sub-committee recommendations were deferred for further study. Among these were recommendations that Texas adopt with minor changes Federal Rules 13, 14, 19, 20, 21, 22, and 23, relating to counter claims and cross claims, third party practice, the necessary and permissive joinder of parties, misjoinders, interpleader, and class actions. Consideration of Pre-Trial Procedure was postponed until receipt of the report of the committee of the Texas Bar Association on pretrial procedure.

A number of important recommendations were to be considered when the advisory committee met in Dallas April 25 to 27. The sub-committee has suggested that the Court be authorized to change venue on his own motion, that the counties to which venue is changed be determined by the Court, and that pleadings in the justice courts, though entirely informal, be in all cases written. There are two outstanding recommendations yet to be considered. One involves practice in counties having two or more district courts, some of which now operate under Special Practice Acts. The sub-committee has proposed that virtually all procedural rules be uniform in all counties, and that only those rules peculiarly necessary because of a multiplicity of courts be continued for such counties. The other proposal is that Texas adopt, with minor changes, Federal Rules 26 to 37 inclusive and continue Arts. 3746, 3769, 3769a, and 3769c of the Statutes as rules. Such a change would make applicable to Texas the Federal Rules relating to deposition and discovery, and of the present statutes Arts. 2002, 3738-3745, 3747-3768, and 3769b would be discontinued.

It is thus evident that the advisory committee is making a thorough study of the procedural problem, and that many far-reaching changes are certain to follow. The committee does not feel, however, that all of the procedure Texas has evolved during the last hundred years must be discarded. Most of the spots where difficulty has developed are capable of being removed within the framework of our present procedural system, and it seems to be the general desire of the lawyers of this state that the reforms be carried out along these lines. The committee has repeatedly invited suggestions, and this invitation has been generously accepted. A standing committee to receive and distribute such suggestions is headed by Dallas Scarborough of Abilene.

In attendance at the Austin meeting were Judge James P. Alexander of Waco, Robert W. Calvert of Hillsboro, Randolph L. Carter of San Antonio, Judge W. R. Chapman of Abilene, Mr. Chrestman, J. B. Dooley of Amarillo, Allen Clark of Greenville, Judge R. B. Levy of Longview, Judge James W. McClendon of Austin, Allen Montgomery of Wichita Falls, W. E. Orgain of Beaumont, Mr. Pearce, Judge Ben H. Powell of Austin, Mr. Scarborough, Judge Robert W. Stayton of Austin, Senator Olan R. Van Zandt of Tioga, W. A. Vinson of Houston, and Roy W. McDonald of Dallas.