Institutes Encourage Discussion

Legal institutes, held at various points in Texas between March 23 and April 15, encouraged discussion by lawyers of the state on proposed rules of civil procedure. It was the general opinion that use of the Federal Rules as a whole was not advisable, although the Corpus Christi meeting favored their adoption *in toto*. Votes at all of the institutes asked retention of special issues in some form, and all except Nacogdoches favored adoption of pre-trial procedure.

Institutes were conducted by Preston Shirley of The University of Texas in Big Spring March 23; Judge James P. Alexander of the Waco Court of Civil Appeals in Tyler March 30 and Beaumont April 12-13; and Judge Robert W. Stayton of The University of Texas in Corpus Christi April 13 and Nacogdoches April 15.

Big Spring

Approximately thirty-five attorneys from Big Spring, Sweetwater, Lamesa, Colorado, Midland, and Snyder attended the Big Spring institute, which was pre-

Judge Robert W. Stayton, center above, conducted the Corpus Christi institute. At the upper left, Judge W. O. Murray makes a motion, and Senator Woodville Rogers listens attentively, upper right. A few of the other lawyers who returned to school for a day to study the proposed rules of civil procedure are shown in the lower pictures. Chief Justice Edward W. Smith of the San Antonio Court of Civil Appeals is sixth from the right.

Smith County Bar Association held its legal institute in Tyler, with Judge James P. Alexander of Waco conducting.

sided over by P. Edward Ponder of Sweetwater, director of the Texas Bar Association, and conducted by Mr. Shirley.

They defeated proposals to adopt the Federal Rules of pleading and to require that a party pleading a general demurrer point out the particular defect wherein he claims his opponent's pleading is deficient. Pre-trial procedure substantially as it is practiced in the federal courts and retention of the special issues law were approved. It was the opinion of the lawyers at the meeting that 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; that the defendant should present and request the submission of any issue constituting an affirmative defense to the plaintiff's cause of action; and that in either case the failure of the party to present such issue to the court and request its submission would constitute a waiver.

The general denial in all types of cases except proceedings in trespass to try title, it was held, should have the effect only of putting in issue the allegations of the plaintiff's petition, and it should not be a sufficient basis upon which to require the submission of such defenses as unavoidable accident or sole negligence of the third party.

Another suggestion was that if the court should fail to submit an issue of benefit to the complaining party, that party to complain on appeal should be required to tender an issue on the omitted question. If the tendered issue were correct in theory but incorrect in form, the tender of the issue should be sufficient compliance with the rule, and the burden should be on the trial court to submit a correct issue. The following resolution was defeated:

"When a party desiring an issue tenders the same and such issue presents a correct theory but is incorrect in form, and where the court before submitting such issue amends the form of the same, the party requesting the same cannot thereafter object as to form."

The West Texas lawyers asked that if, contrary to their recommendations, some rule of presumed findings were adopted, the objection by the opposing party calling the attention of the court to the omitted issue should be sufficient to prevent a presumed finding on the issue. A second defeated resolution was "That sufficient copies be filed in the trial court so that there will remain an original and duplicate thereof on file with the clerk and that such duplicate copies of all parts of the record necessary for the appeal constitutes the transcript on appeal."

Tyler

A round-table discussion of the rules of practice and procedure was entered into by members of Smith County Bar Association after an address by Judge Alexander on the problems confronting the Supreme Court's advisory committee. Emphasis was placed on the numerous special issues problems.

It has been suggested that the courts abandon special issues and return to the

general charge, the speaker pointed out, but the present practice puts the jury in the proper sphere and has the tendency to take from the jury the right to level off the issues. Remedies suggested to the advisory committee include grouping of issues or acts of negligence into one issue, and submitting all issues in the affirmative wherever possible.

Texas courts would be unwilling to adopt some features of the Federal Rules, such as the charge before argument or allowing the judge to comment on the weight of the evidence, Judge Alexander said. The general demurrer, he told the meeting, is a means of ambushing the court, and the committee and the bar generally favor eliminating it and requiring the attorney to plead specifically the defects he desires to complain about. Some sort of pre-trial procedure following the outline of the Federal Rules probably will be adopted, he added.

On the question of probate laws, Judge Alexander pointed out that there is so much substantive law and so little procedural law in them, and so little time remains before the rules must be submitted, that the committee has not undertaken to rewrite them. Appointment of a committee of probate lawyers to rewrite and iron out conflicts in probate procedure is being considered, he said.

Beaumont

The two-day Beaumont meeting, presided over by Lamar Cecil and conducted by Judge Alexander, began on the afternoon of April 12. A banquet was given that night at Hotel Beaumont, where Judge Alexander spoke an "How to Brief a Case in the Court of Civil Appeals."

It was the consensus at the meeting that adoption of the Federal Rules as a whole would not be advisable. After considerable discussion, the lawyers decided in favor of retaining factual pleadings and eliminating the general demurrer. Special exceptions should be sufficient if the court's attention is called to the error, Ewell Strong pointed out. A motion for abolishing the general denial also prevailed.

"There is nothing wrong with the general denial except the company it keeps," Mike Daughtry declared. "If it were properly confined to putting the plaintiff on proof, it would be all right, but under our present decisions it raises many extraneous issues, especially in negligence and Workmen's Compensation cases."

The proposed rule that if issues not raised by the pleadings are tried by express or implied consent of the parties, they would be treated as raised by the pleadings, was adopted with the amendment suggested by W. E. Orgain that the rule be limited to issues that are incidental to some part of the cause of action or defense. The bar was unanimously in favor of pre-trial procedure and of allowing interrogatories to be propounded by one party to the other to admit or deny certain facts.

Members voted also to retain special issues in some form. Caldwell McFaddin suggested that issues be determined as nearly as possible at pre-trial conferences;

Judge J. M. Combs, upper right, speaks at the Beaumont meeting. Left to right below are Lamar Cecil, president of Jefferson County Bar Association, D. L. Broadus, W. E. Orgain, member of the Supreme Court's advisory committee on rule-making power, Mike Daughtry, J. R. Beck, Judge James P. Alexander of the Waco Court of Civil Appeals, conductor of the institute, W. T. McNeill, and Judge Daniel Walker.

that the court advise the jury of the nature of the case and the issues to be determined; and that it be discretionary with the trial judge to submit the case on special issues or a general charge, depending on the complications of the case.

The lawyers believed that a party complaining of the failure of the court to define a term should tender a charge defining the term; that issues should be required to be framed in the affirmative wherever possible, and that the court should be allowed to instruct the jury upon phases of the law necessary to enable the jury to answer an issue properly. Rules requiring the party objecting to an issue to submit a correct form and a substantially correct issue were not approved. Voting favored retaining some provision for setting aside the verdict because of misconduct of the jury where there is reasonable evidence that injury resulted to the complaining party.

The Beaumont Bar approved of the rule that upon appeal all independent grounds of recovery or defense not conclusively established by the evidence and upon which no issue was given or requested shall be deemed as waived. It was voted, however, that where a part of the grounds of recovery or defense are submitted, the other issues may be found by the trial judge in favor of the judgment, and the court should be allowed to make such finding in writing before the judgment is rendered, though the jury may have been discharged.

Corpus Christi

Lawyers of the Fourteenth Congressional District were guests of Nueces County Bar Association at an all-day institute in Corpus Christi and a banquet on the Plaza Hotel Deck. Judge Stayton conducted the institute, which favored the adoption of the Federal Rules *in toto*. Woodville Rogers of San Antonio addressed the lawyers on adoption of the Federal Rules in Texas, and Tom Gassaway of the State Police solicited assistance on the safety program.

Speakers at the banquet were Judge J. R. Norvell of the San Antonio Court of Civil Appeals, Judge C. S. Slatton of the Supreme Court Commission of Appeals, and William B. Carssow, executive secretary of the Texas Bar Association, who substituted for President Angus G. Wynne.

The meeting favored in particular the adoption of Federal Rules concerning pleading, pre-trial procedure, abolishing the general demurrer, and covering demands for admission, and those wherein a variance in the pleadings and evidence appears in the trial of the case without objection. A motion of Judge W. O. Murray of the San Antonio Court of Civil Appeals that grouping of inconsistent issues such as total and partial disablement be recommended, was carried. The meeting also proposed adoption of the rule wherein issues conflicting with other issues in a case be submitted conditionally to avoid conflicts in verdict.

Rules requiring both plaintiff and defendant to plead specifically to be entitled to special issues, and allowing the court greater latitude in changing the law applicable to special issues without violating the rule against giving general charges, were approved. A recommendation that trial judges in Texas be given the right to comment on the weight of the evidence was voted down, and in its place was adopted a motion recommending that the Texas statutes restricting such comment be retained. Other Federal Rules requested for adoption were those dealing with submission of cases on special issues, general charge, or both, with the exception of comment on the weight of the evidence by the judge; requiring that a motion for instructed verdict should specify reasons; and providing that to prevent presumptive findings the party having the burden of proof on that issue must make a proper request.

Twenty-four lawyers at the meeting answered "Yes" to the query, "Are you in favor of presumed findings?" Fifteen approved the Ormsby v. Ratcliff question. It was recommended that express findings be made by the trial judge on request before final judgment, and the motion of L. Hamilton Lowe, secretary of Texas Bar Association, that a rule be adopted wherein a substantially correct request would be sufficient to save the error if the request for submission of the error was overruled, was carried.

Judge Murray moved that the institute recommend adoption of the rule wherein a litigant requesting an issue is precluded

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from claiming insufficiency of the evidence on that issue, but his motion was amended to read, "move that we strike the last part of the last sentence of Article 2190," which says, "regardless of whether the submission of such issue was requested by the complaining party."

Nacogdoches

Arthur A. Seale presided at the Nacogdoches institute, which was attended by lawyers from five counties and conducted by Judge Stayton. S. M. Adams, committee chairman, spoke briefly on the purpose of the meeting, and Mr. Carssow was elected secretary. Judge Stayton told the lawyers that he would express no opinions on the questions of procedure, but would explain and submit them for discussion.

The motion against adoption of pre-trial procedure was carried *viva voce* after a vote of 16 to 13 had defeated the substitute motion of Ned Shands of Lufkin that pre-trials be adopted without the master of chancery provision. Judge Stayton pointed out that the Federal Rules provide for calling the litigants' attorneys together to secure as many admissions as possible and ascertain what the uncontroverted issues are, reduce the number of expert witnesses, determine which matters may be more effectively handled by masters whose reports may be given to the jury, determine the necessity of amendments to the pleadings, and effect conciliation for conference.

It was the opinion of S. M. Adams of Nacogdoches that the personnel of the court is insufficient to take the extra authority. He had no patience, he said, with a lawyer who could not anticipate what the other fellows were going to do. E. J. McElroy of Center declared that the United States District Court is a rich man's court, and he strenuously opposed submitting any matter in a law suit to masters. Judge T. O. Davis of Center opposed delegation of any part of a law suit to any fact-finding body or group of men other than a jury.

Speaking in favor of pre-trial procedure was Mr. Orgain of Beaumont, member of the advisory committee, who admitted, however, that he did not believe the court could force the litigants to admit, but could determine what the issues were. The courts are criticized extensively, he pointed out, and lawyers will have to coöperate in dispatching litigation.

The meeting voted to recommend retaining the rules of pleading in Texas as they are. Should the Federal Rule of notice pleading be adopted, the statement of cause of action would become immaterial, Judge Stayton pointed out, and fair notice and proof would be the important things in a law suit. The Federal Rule merely provides that the plaintiff give notice of what his complaint is, similar to the practice in Texas justice courts, he remarked, but the defendant is entitled to more definite allegation or notice by the plaintiff and may require it in his answer. His pleading would have to admit, deny, or disavow knowledge of each allegation. The lawyer is honor-bound to plead truthfully, Judge Stayton added.

After considerable discussion of special issues, the meeting voted to recommend that if a ground of recovery or defense is submitted in part and an issue incidental thereto omitted, the presumption be that such issue is found in favor of the judgment. The present wording of Article 2190 was approved, the lawyers voting to retain the words "not requested" instead of "not properly requested," "not objected to," "not properly objected to," or "not requested by party having the burden of proof thereof."

An amendment to the Article was adopted, however, providing that "where there is an omission of a finding and the issue therefor has not been requested, the trial judge, on demand, shall make an expressed finding thereon if the issue is controverted under the evidence." The meeting adopted the motion of C. S. Williams of Lufkin to recommend that the trial court at its option might submit on general charge.

Approved unanimously was an amendment to the present law to allow grouping in one issue of several alleged acts of negligence or contributory negligence where an affirmative finding on either will determine liability, and grouping inconsistent issues. The motion of Ralph McAlister of Nacogdoches that "if the defendant wants an issue submitted, all defensive matter must be specially pled" was lost.