Committee Studies Pre-Trial

By JUDGE ROBERT W. STAYTON *of Austin*
Advisory Committee Member

Aided by the resolutions of twenty-two lawyers' institutes, held in substantially all parts of the state, and a generous contribution of suggestions from members of the bench and of the bar in every line of practice, the Supreme Court's advisory committee on the rules of civil procedure continued its work on April 26 and 27 at Fort Worth. A report from a committee of the Texas Bar Association and two reports of subcommittees furnished the material for the proceedings.

The Bar Association committee's report was on the subject of pre-trial procedure and was presented by Judge John T. Suggs, Jr. It followed Federal Rule 16 literally. It differed from the reported rule previously considered by the advisory committee with respect to the means of insuring coöperation on the part of attorneys. At the meeting of April 5 the advisory committee had considered and re-referred to trial procedure subcommittee No. 1 the advisability *vel non* of enforcing good faith assistance upon the part of attorneys in pre-trial proceedings by means of imposed admissions and contempt in instances of arbitrary non-coöperation. The Bar committee would eliminate these features and leave the proceeding to the ordinary inducements incident to the relation between trial judge and trial attorney.

In addition, and as adjunct to pre-trial procedure, the report of the Bar committee advocated the substantial adoption of Federal Rules 34 through 37, looking to the production of documents, physical examinations, and requests for admissions, and providing means of obtaining results in such respects.

Judge Suggs, in presenting the report, favored the advisory committee by expressing some of his views thereon and by answering numerous pertinent questions that were put to him. The report was referred to the same subcommittee for consideration in connection with its work on pre-trial procedure.

The bulk of the report of that subcommittee had been considered at the meeting of April 5 and 6, and is the subject of an article by Roy W. McDonald in the May issue of the JOURNAL. At this present meeting of the advisory committee the remainder of the report was considered. Most of the recommendations were adopted, though some were rejected and some re-referred.

Space will permit the mention of a few items only. The advisory committee was of the view that pleadings in the justice court should remain oral. It agreed to a recommendation, in accordance with the previous recommendation of the Judicial Council and of the District Judges Association before it, that the trial court, in district and county court cases, should have the power to change venue in appropriate instances on its own motion.

It will be recalled that the same subcommittee, with the unanimous approval of the advisory committee, is endeavoring to work out a system of rules whereby uncontested business in the district courts, such as judgments by default, may be attended to without the present restrictions which are pinned to appearance day. A main feature of this reform is that cases be subject to default on the first Monday following twenty days after service. In line with the reform there was referred to Judge Allen Montgomery, a member of the subcommittee, the question of whether default judgments, with due protection, might be taken in vacation. The report of the subcommittee favoring the Federal Rules on depositions was rejected, and the subcommittee was requested to consider and report upon the deposition statutes now in force in Texas.

The report of trial procedure subcommittee No. 2 was considered in extent. As in the other instances, many of the recommendations were adopted, and some rejected. A number were re-referred, notably in connection with the subject of default judgments pursuant to the new plan already explained. A recommenda-

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urer; Mrs. Martin Arnold, parliamentarian; Mrs. C. K. Quin, historian; Mrs. Harper Macfarlane, auditor; and Mrs. Theo Weiss, publicity chairman.

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tion invoking greater liberality in the granting and refusing of new trial, in the light of the facts proven, was rejected. It was the view of the advisory committee that in justice court twelve men, instead of six, as now required, should be in the jury box before pre-emptory challenges were made. Doubtless, an analogous principle will be recommended in connection with district and county court cases, the number to be twenty-four instead of twelve.

In accordance with the federal rule it was the consensus that a motion for instructed verdict should reveal its grounds and that, on motion for new trial because of misconduct of the jury, the burden to show harm should be upon the appellant and injury should not, as now, be presumed. A shifting of the burden was also favored in connection with pauper's oath practice. The view was that, upon contest, the burden should be upon affiant to show his inability by other evidence than the affidavit. Inconvenience was seen in the practice, in some courts, of polling the jury as to *each* special issue finding, and the remedy resolved upon was that, on demand, the jury be polled as to the special verdict as a whole.

The matter of opening and closing also received attention. The view was that if a party should have the burden under the charge, as distinguished from that under the pleadings, as heretofore, such party should have the right to open and close the argument. The uncertainty and confusion of the related rule as to admissions for obtaining the opening and close in the adduction of evidence and the argument of the case to the jury were the subject of consideration. The advisory committee approved a rule designed to remove the difficulty. Its central idea is that in making the admission to open and close, the defendant may stand upon any plea that places upon him the burden and that his admission does not concede facts contrary to those involved in such plea. See *Smith v. Traders National Bank,* 74 Tex. 541, and *Meade v. Logan,* (Civ. App.) 110 S. W. 189.

At the previous meeting of the advisory committee Judge Richard Critz of the Supreme Court had favored the body with a conference respecting special issues. It will be recalled that trial procedure subcommittee No. 2 having that subject under study, had not reported upon it and had asked for further time. Report, moreover, was not forthcoming at the present meeting of the advisory committee. The subcommittee explained that it was having great difficulty in formulating a proper set of rules upon the subject.

By aid of the resolutions from the institutes, the conference with Judge Critz and letters in great number that have been received from judges and lawyers, all of which have been mentioned, and in accordance with a questionnaire circulated among the members of the advisory committee, the subcommittee at a meeting at Fort Worth early in May finally drafted a tentative set of rules respecting the whole subject of the charge of the Court. Report of these will be presented at the next meeting of the advisory committee in Austin on June 6.

At that time, also, it is hoped that the Bar Association committee on pre-trial procedure will again be represented, in connection with the consideration of that subject. Members of the Bar Association committee are Carlton R. Winn, chairman, Joe Estes, vice-chairman, S. Moss Adams, Bowlen Bond, Cullen W. Briggs, Joe Brown, Winbourne B. Collie, R. S. Crawford, R. R. Donaghey, Thornton Hardie, Roy C. Ledbetter, J. C. Looney, C. E. McGaw, Byron Skelton, and Judge Suggs.