Lawyers Ask Quick Reform

A number of legal institutes on the rules of civil procedure were held in various sections of the state between April 16 and May 18. Most of the lawyers favored use of the Federal Rules, where applicable, as a basis for the new Texas rules, and the meetings were almost unanimous in favor of abolishing the general demurrer, retaining the special issues statute, and adopting pre-trial procedure.

"The attitude of the Wichita County Bar Association was, I believe, typical of that of the lawyers throughout the state," Roy W. McDonald of S. M. U., advisory committee member who conducted the institute in Wichita Falls, points out. "They manifested a desire to reform our procedure at once, and not to take a timid attitude toward the problems. If reforms are needed, they are needed just as much on September 1, 1941, as they will be a year or two later. If the new rules of the Supreme Court do not make the desired reforms, it certainly will not be the fault of lawyers such as were present at this meeting and emphatically expressed their approval of far-reaching changes."

Other institutes were conducted by Preston Shirley of The University of Texas in Temple April 20 and Austin April 22, and by Judge James P. Alexander of the Waco Court of Civil Appeals in San Angelo April 29, Lubbock May 1 and 2, and Amarillo May 3. Mr. McDonald and Judge Alexander also were among the speakers at the three-day legal institute in Dallas April 18, 19, and 20. A local clinic of the Cameron County Bar Association in Brownsville April 16 discussed questions prepared by Judge Robert W. Stayton for a previous meeting in Corpus Christi, and eight members of the Plainview Bar assembled for a special meeting February 22 to discuss the rules of procedure.

Temple

Attendance was large at the Central Texas lawyers' institute in the Municipal Auditorium at Temple. After a thorough discussion, the following recommendations were made:

1. That the Supreme Court retain present Texas requirement that the facts constituting a cause of action or defense be pleaded.
2. That the general demurrer as it is now used be abolished and that every defect, omission, or fault in a pleading either of form or of substance, which is not specifically pointed out by motion or exception in writing and brought to the attention of the judge in the trial court before the instruction or charge to the jury or, in a nonjury case, before the rendition of judgment, shall be deemed to have been waived by the party seeking reversal on such account.
3. That some system of pre-trial procedure be adopted.
4. That special issue practice be retained.
5. That converse issues may be submitted disjunctively in one issue, or where two issues are submitted, the court may instruct the jury that an affirmative answer to one would preclude the necessity of answering the other.
6. That the "committee adopt some sort of rule that will enable service to be had in all district courts thirty days before Monday in a particular month and that the process have attached to it a copy of the petition instead of an attempted statement by the district clerk."
7. That a party complaining on appeal of the failure of the court to submit an issue which was a part of his case should be required to tender such issue as a predicate for appeal, but that the complaining party on appeal would be required only to object to the failure of the court to submit an issue which is a part of his opponent's case.
8. That it be within the discretion of the court to submit explanations and definitions as a part of the charge, regardless of whether such explanation under the present authorities might be considered as a general charge.
9. That an objection to the failure of the court to define the term is a sufficient predicate for complaint on appeal and that there is no necessity of tendering a definition.

The meeting rejected a motion to the effect that on appeal there should be no presumption of any finding on the omitted necessary issue by the trial court. This was assumed to mean that a majority of those present were in favor of a presumption on appeal of a finding on a necessary issue to support the judgment, Mr. Shirley said.

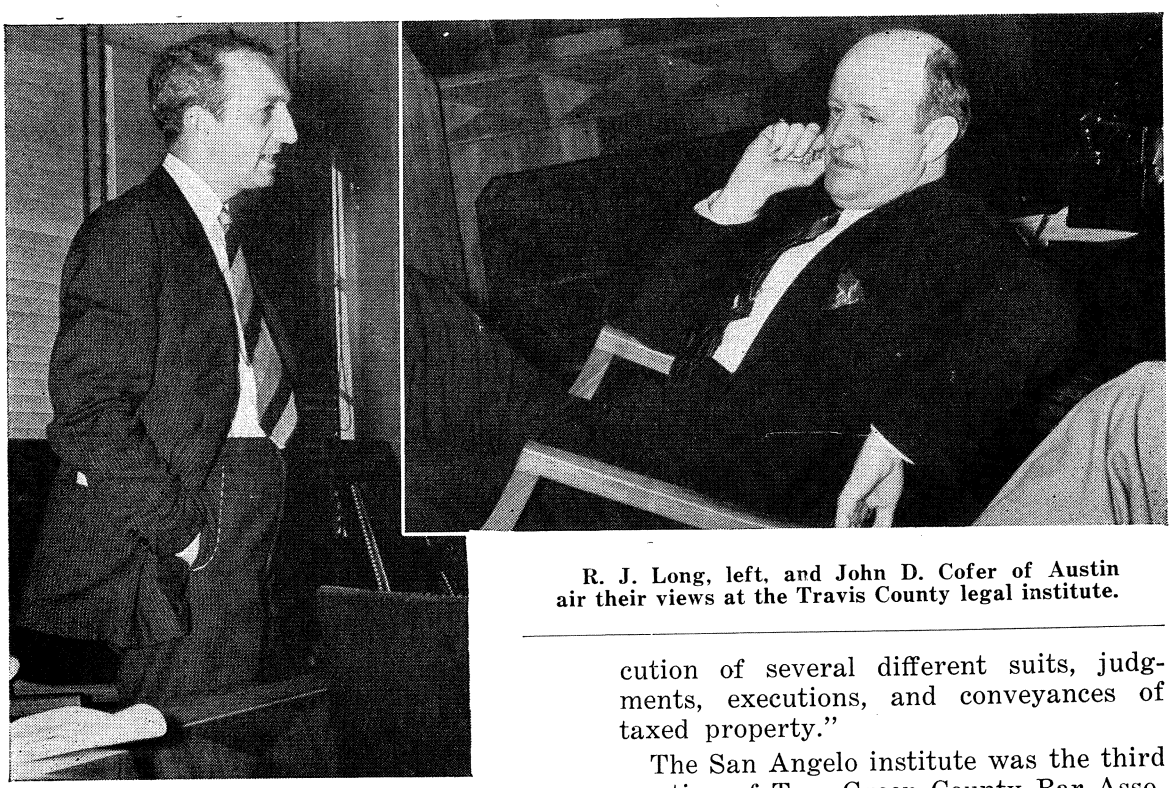
Austin

Probably no other branch of law needs reforming as much as does civil procedure, Judge Ralph W. Yarborough told lawyers attending the Austin institute. Pointing out that more than four and a half years are required from the time of filing a case in trial court until it goes through the State Supreme Court, he described the present procedure as a "burdensome and unsatisfactory way of settling disputes."

Sponsored by Travis County Bar Association, the institute was conducted by Mr. Shirley in the Fifty-third District Court room. The following recommendations were made:

1. That the present system of fact pleading be retained.
2. That notice of all pleadings, including the pleas of privilege, be served on opposing counsel and that service by mail as in the Federal Rules be sufficient. This does not include service of citation necessary to commence a proceeding.
3. That a party pleading a general demurrer be required to state specifically the reasons or grounds for the same.
4. That pre-trial procedure substantially as provided by Federal Rule 16 be adopted.
5. That where a ground of recovery or defense consists of more than one issue and where some of the issues are submitted but one or more are not submitted, and where there is no objection to the failure to submit said omitted issue, then the issue not submitted will be presumed to have been found in support of the judgment rendered, if there is evidence to sustain such finding; but where no issue is submitted or requested on a ground of recovery or defense, that ground will not be presumed as found in support of the judgment but will be waived.
6. That in the event an issue is supported by testimony and no testimony to the contrary is offered, the issue raised by such testimony will be presumed as found in support of the testimony unless the failure to submit an issue thereon is objected to.
7. That it shall not be the duty of the party objecting to the failure of the court to define a term, or to the giving of a defective definition of a term, to submit a correct definition in order to be able to complain on appeal of the action of the trial court.

Approximately seventy-five lawyers at the Wichita Falls institute, below, asked that civil procedure in Texas be reformed at once. They unanimously recommended that only minor amendments necessary to remedy defects that arise be made after September 1, 1941. At the left is Roy W. McDonald of Dallas, who conducted the institute.



R. J. Long, left, and John D. Cofer of Austin air their views at the Travis County legal institute.

8. That to raise on appeal either the omission of a necessary issue, or an error in an issue that was submitted, the objecting party shall be required to tender a correct issue.

San Angelo

One of the best efforts on the part of the Legislature in 1939 to simplify procedure in tax suits was in the changes in Article 7345b, James Patrick Farrell of San Angelo declared at the institute on civil procedure April 29. Delivering a brief paper on "Sections Concerning Procedure under Article 7345b" before Judge Alexander began discussion of the proposed rules, Mr. Farrell pointed out that by the enactment of that Article, the remedies of the different taxing units were intended to be enforced in one proceeding, under one adjudication, through foreclosure of one lien, at one sale, subject to one redemption.

"Prior to the changes under this Article," he said, "each taxing unit was left to its own devices to fix a tax lien upon a particular piece of property, leaving each tax unit to select the time and means of establishing and enforcing its own tax lien against the property, with the frequent result of the institution and prosecution of several different suits, judgments, executions, and conveyances of taxed property."

The San Angelo institute was the third meeting of Tom Green County Bar Association on the subject of civil procedure.

"The lawyers in this section, speaking rather generally, are opposed to the special issue but do not know enough about the old general charge to be either for or against it," President Robert T. Neill declares. "They blame the appellate courts for the confusion incident to the special issues; but in every event they feel that some relief is absolutely essential."

The lawyers voted as follows on proposed amendments to civil procedure:

For short form pleading 7
For retaining present long form pleading.. 19
For long form pleading, modified 10

For retaining general demurrer 14
Against 21

For retaining general denial 19
Against 14

For pre-trial procedure .....no opposition
For pre-trial procedure for purpose of allowing defendant's doctor, on request of defendant, to examine plaintiff and his injuries in personal injury action 13
Against 16

For appointment of doctor by the Court, rather than defendant's doctor, in such personal injury action 5
Against 30

For making pre-trial mandatory on demand.. 28
Against 3

For abolishing present rule relative to setting aside verdicts on ground of misconduct of jury 4

For retaining present rule	9
For adopting proposed amendment to present rule	23
For adopting general charge	8
For retaining special issues	16
For submitting all special issues in affirmative with special charge on burden of proof	23
Against	1
For charging by Court on such additional matter as is necessary to a proper understanding of issues	24
Against	1
For rule requiring objector to define term objected to, by tender of correct definition	17
Against	12
For rule requiring one who objects to form of issue to tender issue in proper form, or waive such objection to form	12
Against	17
For rule that where ground of recovery is wholly omitted in a requested but unsubmitted issue, that issue shall be deemed waived	24
Against	2
For rule that where some elements of grounds of recovery were submitted, but not all, then all issues necessary to support of judgment shall be presumed to have been found in support of the judgment	22
Against	4

Lubbock

Vaughn E. Wilson was elected to preside at the Lubbock County institute, which was conducted by Judge Alexander. The meeting voted in favor of the following changes:

1. Abolishing the general demurrer.
2. Abolishing the general denial.
3. Requiring notice of filing of all pleadings after the first.
4. Requiring answer to citations after twenty days from service.
5. Requiring proof that misconduct of the jury resulted in injustice.
6. Returning to the general charge.
7. Submitting issues in the affirmative.
8. Requiring the complaining party in the Court of Civil Appeals to submit in trial court issues and correct definitions.
9. Requiring the party objecting to the form of the issue to submit a correct form.
10. Requiring the party objecting to the charge to submit correct issues.
11. Waiver, upon appeal, of all independent grounds of defense unless issue is submitted.
12. Presumed finding in support of the judgment as to the omitted element or elements where a defense consists of more than one element and one of such elements is submitted.
13. Submitting disjunctively two such issues as "Was plaintiff permanently or temporarily disabled?"
14. Authorizing the trial court to call pre-trial hearing.
15. Requiring submission by disabled person to physical examination.
16. Short form pleading.
17. Elimination of special issues.
18. Modification of the Special Issue Statute if it is retained.

Amarillo

Approximately seventy-five attorneys from Amarillo, Dalhart, Perryton, Pampa, Borger, Clarendon, Panhandle, Claude, Tulia, Farwell, and Vega attended the Amarillo institute conducted by Judge Alexander May 3. Robert Wilson and Charles H. Keffer of the local bar presided.

The meeting voted against the short form of pleadings and the general demurrer, but approved retention of the general denial. The lawyers favored changing the answer date to twenty days after service and giving notice to the opposite party with respect to the filing of pleadings.

Vaughn E. Wilson, president of Lubbock County Bar Association, second from the left, and Judge James P. Alexander of Waco, third, discuss proposed reforms with out-of-town lawyers at the Lubbock institute.

They believed that pleadings should be settled before trial, but voted against admission of facts where not specifically denied.

After much discussion of the form of the charge, a vote of more than two to one was cast for retention of special issues, with the submission of special issues discretionary with the judge. The meeting was unanimous in the recommendation that all issues be framed in the affirmative where practicable, with special charges on the burden of proof. Vigorously opposed was the suggestion that failure to submit requested issues would not be reversible error if an answer in favor of the complaining party would have been in conflict with the answers made to the issues that were submitted. The lawyers favored the proposed rule compelling the tender of a proper definition where exception was taken to the Court's charge for failure to define a term used therein.

It was recommended 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; but the assembly was against a rule which would provide that "where there is an omission of a finding on an essential fact and the issue therefor has not been requested, the trial judge, on demand, shall make an express finding thereon if the issue is controverted under the evidence."

Those present were almost unanimously against changing the present rule with respect to impeaching the jury's verdict, and voted against a rule that would place the burden on the complaining party to show that misconduct occurred and that it resulted in injury to the complaining party.

Wichita Falls

Judge Allen Montgomery, member of the Supreme Court advisory committee, presided at the Wichita Falls institute in the Kemp Hotel, and Mr. McDonald led the discussion. Approximately seventy-five attorneys attended the afternoon session, and forty remained for the dinner and evening discussion. Out-of-town guests included lawyers from Vernon, Graham and Henrietta.

On the question of Federal Rules, the institute was unanimously against their adoption as a body, but voted 5 to 1 in favor of using them where applicable. The vote was 2 to 1 against requiring allegations of fact in pleading; 6 to 1 against requiring the pleading to state elements of a cause of action; and 5 to 2 in favor of a modified form of notice pleading similar to, but somewhat more specific than, the Federal Rules.

A 6-to-1 majority approved compulsory pre-trial procedure at the request of either party or the court in every jury case. They were 9 to 1 in favor of compulsory admission or denial of facts and production of documents, 5 to 1 for compulsory physical examinations for the plaintiff, and 4 to 1 for making pre-trial effective by allowing the judge to tax costs, expenses, and attorneys fees against a litigant who refuses to coöperate, and even to punish by contempt of court where actions are particularly obnoxious. On motion of instructed verdict, they were 3 to 2 in favor of requiring a specific statement of grounds.

The meeting was unanimously against abolishing special issues, 6 to 1 against making a general charge optional with the court, and 7 to 1 against a combination of general and special issue charges. On the question of whether Texas should require the submission of merely general issues, instead of specific issues, the vote was 13 for and 18 against, a number of those present not voting. They unanimously favored requiring that a special issue when requested be tendered in correct form at the peril of the party making the request, and that the party who requested a definition tender a correct definition.

Opposing submission of such issues as unavoidable accident and sole proximate cause unless specifically pled, the lawyers voted against the present requirement that so-called "converse" issues be submitted under a general denial. They were 7 to 1 in favor of allowing the trial judge to condition fully the submission of issues, and to provide that there be no reversal because an issue so conditioned might be technically on the weight of the evidence unless actual prejudice is shown.

Dallas

The liberal spirit of the pioneer Texas lawyer is needed in drafting the new rules of civil procedure, Charles T. McCormick of Northwestern University declared at

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LAWYERS ASK—

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the opening session of the three-day institute sponsored by S. M. U., the Bar Association of Dallas, and the Texas Bar Association.

Member of a pioneer Texas family, Professor McCormick told the lawyers that the early procedural system was based partly on Spanish law, partly on Louisiana law, and "perhaps also, ignorance was a great law reformer." About 1900 the tendency toward more strict procedure began, he pointed out, and the present rule-making power points to a swing back to more liberal rules.

"The dominant role of the pioneer practice was the exaltation of substance over form," Mr. McCormick said. "Another marked feature of the pioneer Texas practice, a feature never lost through the years, is the flexibility of pleading which results from the unique freedom of amendment." Submission of special questions to jurors for answers in lieu of a general verdict is a common-sense way of focusing their attention upon the crucial facts of the case, he declared, but it can work successfully only when the questions are few and phrased in simple language.

Roy Ledbetter, chairman of institute committees, presided at the morning session in the Adolphus Hotel, and Mr. McDonald discussed the simplification of pleading by eliminating the technicalities of fact and cause of action pleading, liberalizing provision for amendments, and requiring the reasons to be stated in connection with general demurrers.

Practices of some trial judges in virtually turning over to the plaintiff's attorney the preparation of charges to the jury were condemned by Judge Alexander in his address on "Attitude and Responsibility of the Trial Judge" Friday night. He discussed problems of whether the Court should be allowed to comment on the weight of the evidence, and the assistance which should be expected from attorneys in preparing the charge.

"There ought to be a middle ground," Judge Alexander asserted, "where the judge could be permitted to render reasonable aid to the jury and at the same time not violate the rule of fair play by using his official position to make an argument to the jury in favor of one or the other party." J. Cleo Thompson of Dallas, chairman of the Texas Bar Association Board of Directors, presided at the session, and Judge Tom Suggs of Denison discussed summary judgment, improvement in default judgment practice, and the attitude of appellate courts toward reversals for immaterial defects.

Saturday morning the institute met on the S. M. U. campus for a debate on special issues, presided over by Paul Carrington, president of the Dallas Bar Association. Judge S. P. Sadler of Dallas, former member of the Commission of Appeals, recommended return to the general charge, and F. B. Walker, president of the Fort Worth Bar Association, favored retaining special issues. Professor William W. Dawson of Western Reserve University Law School at Cleveland, Ohio, compared the two sides and suggested a compromise of improvement.

Speaking on "The Federal Rules and State Procedure," Mr. Dawson expressed his confidence in jury trials as bringing to jurisdiction a practical, though intangible, element which otherwise would be lacking. A basic reason for the confusion and uncertainty in Texas is the effort to apply coldly logical rules to jury deliberation which does not follow such logical lines, he suggested. Tracing the evolution of the jury system, Mr. Dawson commend-

ed the practice of special verdicts, when properly simplified, as the best means of securing a true verdict.

Brief addresses were given by Dr. Umphrey Lee, president of S. M. U., Angus Wynne, president of the Texas Bar Association, and Associate Justice Richard Critz of the State Supreme Court at the annual lawyers' luncheon in Virginia Hall. Dean C. S. Potts presided. Participating in the Senior Case Club argument that afternoon were Harvey Davis and Cornelius Ryan, the winners; and Scott Miller and John Ennis. The nine-judge court was composed of Judges Critz and John H. Sharp of the Supreme Court; C. S. Slatton and W. M. Taylor of the Commission of Appeals; Joel R. Bond, B. F. Looney, and Towne Young of the Fifth Court of Civil Appeals; Attorney General Gerald Mann; and Judge Sarah T. Hughes of the Fourteenth District Court.

Climaxing the three-day institute was students' gridiron banquet in the Adolphus Hotel, where Mr. Ennis, president of the Students' Association, presided. Addresses by Judge Sharp and Professor Dawson were followed by the gridiron program, in which members of the faculty were "roasted."

Brownsville

A. M. Kent, president of Cameron County Bar Association, acted as chairman at a meeting of sixty members of the association in the civil district court room. F. W. Seabury, chairman of the local committee on the rules of civil procedure, presented the committee's report.

The bar took the following action on questions prepared by Judge Stayton and members of the association:

1. Adopting the new Federal Rules: approved as a basis for the Texas rules, with necessary changes and additions.

2. Abolishing the general demurrer: approved.

3. Abolishing the general denial and requiring the defendant to admit or deny specifically, not under oath, the plaintiff's allegations: approved, but only to the extent necessary to conform to the Federal Rule.

4. Requiring the defendant to answer twenty days after service: approved for all trial courts.

5. Adopting some form of pre-trial procedure: approved.

6. Providing that an appeal in a plea of privilege case shall be advanced for hearing in the appellate court: approved.

7. Providing that where the verdict on general charge or special issues requires any kind of mathematical calculation, the jury may take with them when they retire to consider the verdict simple tabulated forms prepared by counsel for each side, but without argumentative matter, showing by what computation the verdict or answers desired by counsel could properly be arrived at: approved.

8. Abandoning special issues: rejected.

9. Making submission on special issues discretionary with the trial court as under Federal Rule 49: approved by a vote of 16 to 5, provided discretion can be adequately controlled by the new rule.

10. Grouping in one issue several alleged acts of negligence or contributory negligence where an affirmative finding on either will determine liability: approved.

11. Grouping inconsistent issues, as whether employe was totally or partially disabled: approved.

12. Allowing the Court greater latitude in charging on the law applicable to special issues without violating the rule against giving a general charge: approved.

13. Requiring the party complaining of failure to submit an issue or define a term to tender a correct issue thereon: approved, provided the requirement apply only to the party having the burden of proof on the issue.

14. Providing 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: approved.

15. Providing some manner to avoid submitting issues in the double negative: approved.

16. Permitting the Court or counsel to inform the jury of the legal effect of their findings: approved.

17. Providing some solution of the question raised in Ormsby v. Ratcliff and Wichita Ralls Railway Co. v. Pepper: necessity conceded.

The solution adopted, as proposed by Mr. Seabury, was that failure to request submission of a particular issue waives nothing but the right to a jury trial on that issue, leaving its determination to the Court; that if one party thus waives, the other may require its submission to the jury; that request for submission of an issue need not embrace a correct legal form for question and answer unless the party requesting has the burden of proving the particular issue; and that all issues not submitted to the jury and not requested are deemed as found by the Court in such manner as to support the judgment if there is evidence to sustain such a finding.

Plainview

Meeting in the county attorney's office February 22, the Plainview Bar Association made the following recommendations:

1. That the Federal Rules be used as a general policy to guide the advisory committee in writing the Texas rules, provided the blended system of law and equity is unaffected, and that Texas rules be retained when they are deemed simpler and more efficient.

2. That the present method of obtaining service by citation upon defendants upon the institution of suits be preserved, but that the method of service of all subsequent pleadings or motions be as prescribed by the Federal Rules.

3. That the present provisions for depositions and discovery be preserved.

4. That rules be adopted permitting the summary entry of judgments by default in all civil actions except divorce, where the defendant has failed to answer within twenty days after service of process is completed.

5. That "no decision reached or opinion rendered by any appellate court of this State inferior to the Supreme Court shall establish any legal precedent or be regarded as the law of this State in any case other than the one in which decision is reached or opinion rendered, nor shall such decision or opinion be released for publication, be published, be quoted as binding or persuasive authority, or be regarded as the law of this State by any court, unless and until the Supreme Court of this State shall have approved the result and reasoning of the same; and when such decision or opinion shall, in result and reasoning, have received the approval of the Supreme Court, such decision or opinion shall be published as the opinion of the Supreme Court, and shall have equal dignity with all other opinions of that Court."

6. That the foreclosure of real estate be by judicial process only, held in the county in which the real estate is situated.

7. That justice of the peace courts be eliminated, and their jurisdiction in law matters transferred to the county court.

8. That the county judge be a licensed attorney, with at least two years of actual practice.

9. That no case be reversed because of so-called "fundamental error."

10. That no case be reversed by any appellate court except for error specifically and concisely raised and presented to the trial court at the time such error was committed.

11. That the court in which any case is filed and heard be held conclusively to have jurisdiction, in the absence of special pleading showing why the court is without jurisdiction and pointing out what court does have jurisdiction.

12. That the general demurrer be abolished and all objections to pleadings be made by special exceptions or else such objections shall be conclusively deemed to have been waived.

13. That the general denial be abolished and the facts alleged be deemed established conclusively in the absence of special denial, which should be allowed upon information and belief, provided the party making it has an actual and *bona fide* belief that the pleading denied is not true.

14. That all appeals be made from the action of the trial court in granting or in failing to grant a motion for a new trial, and that no ground or error be presented to or considered by an appellate court except such as contained in the motion for new trial.

Ample time, it was agreed, should be given for filing and ruling upon the motion for new trial.