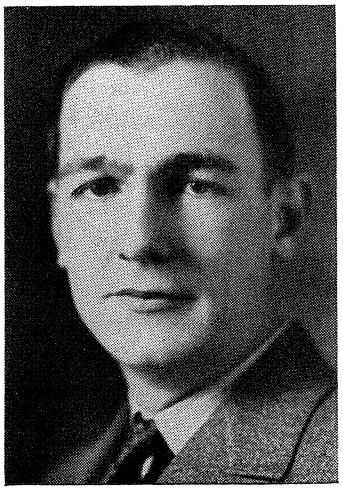
REMEDIAL PROCEDURE

Federal Rules Would Remove Abuses

Recent statistical investigation confirms the common knowledge that the average time required to carry a case from date of filing through the Supreme Court is more than four years. That while there has lately been a sharp decline in the time required for final disposition of cases in the district court, and a less pronounced shortening of the time of pendency in the Supreme Court, the average time of pendency in the Courts of Civil Appeals has actually increased. *Texas Law Review,* Vol. XVIII, No. 1, December, 1939, Page 1, et seq.)



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In a study of cases for the year 1931 Professor Robert W. Stayton concluded, on the basis used by him, that an average of 55 per cent of the reversals of cases by such courts were based on procedural grounds. (14 *Texas Law Review,* Page 2.) Although it is assumed from as complete an investigation as could be made by this committee that during the year 1939 this percentage of reversals has decreased, there still remain an appalling number of reversals for trivial technicalities. As stated by a member of the advisory committee to the Supreme Court, "During the last ten or fifteen years, there has been a field day of technicality in our appellate courts beyond the worst imaginings of a sane man's nightmares * * *." (Roy W. McDonald, before Dallas institute on civil procedure, as reported in *Dallas News,* April 19, 1940.)

The above suggests that there has been a partial, if not complete, breakdown in the prompt administration of justice in Texas. That, without radical reforms in our procedural system, the situation will grow worse, rather than improve. When the power of changing rules of procedure rested with the Legislature, for this committee to recommend a proposed change was to bestow upon it the "Kiss of Death." With its suggestions aimed at an advisory committee, selected from the Bench and bar, it is hoped that the results may be different.

Recommendations:

I.

Apparent appellate distrust and suspicion of *all* proceedings in the trial court should be destroyed by:

1. Abolishing the unjust and absurd doctrine of presumed harm from errors in the trial court.
2. Giving greater power and discretion to the trial judge.
3. Ending the hypocrisy of tendering trial by jury under procedural rules deliberately calculated actually to abridge or destroy its effect by causing repeated reversals.
4. Adopting rules which place substance above form.

II.

Elimination of unnecessary delays in finally disposing of litigation should be achieved by establishing:

1. Continuous terms of court.
2. Simpler methods of service and notice.
3. More liberal rules of joinder of parties and causes of action.
4. Pre-trial practice.
5. A method of disposing of pleas of privilege without the possible necessity of two trials on the merits.
6. More effective rules for discovery, examination and admission of facts.
7. A means of condensing the record on appeal, preferably by requiring the opposing attorneys to condense the statement of facts to narrative form and include therein, and in the transcript, only material matters, on penalty of costs being taxed against the party whose counsel forces inclusion of matters deliberately calculated to encumber the record, or found to be repetitious or immaterial on

appeal. For example, where several witnesses testify on one subject, a short statement of the matters on which they respectively agree and disagree with a statement of their respective means of knowledge of the subject should suffice.

8. A rule permitting and suggesting that the appellate courts refuse to consider or order condensed a record, brief, or any part thereof found to be unnecessarily voluminous.

III.

The injustice and delay incident to the preparation and giving of a charge in the trial court under existing practice prompts special consideration thereof. Believing it is the purpose of the charge to enlighten rather than confuse the jury, we recommend:

1. Retention of special issue system.
2. Providing that it shall not be reversible error for the jury to know the effect of their answers on the judgment to be rendered thereon.
3. Permitting the trial court to embrace more than one issue, or alternative issues, in a single question, provided the form of answer thereto shall require the jury to designate on which issue or issues they find.
4. Allowing the trial court to instruct the jury as to the law applicable to the issues, and to charge generally, but requiring the verdict to be in the form of answers to special issues.
5. Making the timely request in the trial court of a proper instruction or definition on any subject desired covered, a prerequisite to later complaint on appeal.
6. Abolishing the so-called distinction between "opposite" and "converse" issues, by restricting submission of issues to those raised by the evidence and actually pleaded as a part of the cause of action or true affirmative defenses.
7. Applying to all issues the rule that issues omitted without demand shall be deemed found to support the judgment irrespective of whether they constitute so-called "independent grounds of recovery or defense."

IV.

Also entitled to special consideration is the need for the re-establishment of the rule of harmless error. Courts, appellate and trial, should be required at every stage of the proceeding to disregard any error or defect in the proceeding which does not affect the substantial rights of the parties and which does not affirmatively appear to have prevented the attainment of substantial justice.

V.

Consideration of the objectives desired and recommendations made leads to the conclusion that they can best be attained and fulfilled by the adoption of the Federal Rules of Civil Procedure insofar as they are consistent with the State Constitution. In addition to finding many of the good features of our present Statutes of procedure therein, it will be observed that the abuses of the State practice have been omitted through the adoption of methods reflecting simplicity itself. Only eighty-six Federal rules are required to cover the entire field of procedure adequately, as opposed to the report of a sub-division of the advisory committee submitting a first draft of approximately two hundred rules covering procedure prior to trial only. *(Texas Bar Journal,* Vol. III, No. 5, Page 179.)

The objection, sometimes made, that the assimilation of the Federal rules in the State practice will force the practitioner to begin his legal education anew, or to learn two distinct systems of practice, is without foundation. The attorney who seriously objects to studying some eighty-six rules will likely not have occasion in his practice to use rules of procedure. Rather than establishing two systems of practice, adoption of the Federal rules will afford one uniform system for State and Federal jurisdictions; in that the Conformity Act has been partially or completely repealed, thereby making exclusive the use of the Federal rules in the United States courts.

The present bench and bar of Texas will be unable to shift to the Legislature the blame for any possible shortcomings in the forthcoming rules of practice. The opportunity to give the State a simple and integrated system of procedure can best and most safely be attained by taking advantage of the research and learning of the highly competent formulators of the Federal Rules of Civil Procedure.

This committee recommends the adoption of such Rules to the State advisory committee and the Supreme Court.

Respectfully submitted,

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Larry W. Morris, Rogers Kelley, Barksdale Stevens, and Vernon B. Hill concur in the recommendation that the Federal Rules of Civil Procedure be adopted, insofar as consistent with the State constitution, but do not agree with every other recommendation in the report.