Stayton Leads Houston Institute

Two hundred and fifty lawyers of Southeast Texas attended the legal institute in Houston conducted by Judge Robert W. Stayton of Austin on the rules of civil procedure June 21 and 22. Judge Stayton presented the problems being studied by the Supreme Court's advisory committee, and the lawyers took active part in the discussion of the rules.

Angus G. Wynne of Longview, chairman of the advisory committee and president of the Texas Bar Association, presided at the institute and William A. Vinson, member of the advisory committee, assisted with the proceedings. He was introduced by W. J. Howard, president of the local bar. A barbecue for local and visiting lawyers was given in Hermann Park on the night of the 21st.

Questions considered and action taken on them were as follows:

Pre-Trial Procedure

Should provision be made for pre-trial procedure?

Should the procedure be according to Federal Rule 16, or with added features of compulsion by means of penalties?

The resolution, by a large majority vote, was in the affirmative, except that it was considered that the following wording should be supplied by way of compulsion:

> If in the course of such hearing it shall appear to the satisfaction of the court that any party or his attorney is arbitrarily refusing to cooperate in disposing of questions of fact concerning which there is no basis for bona fide controversy, the court shall tax all expenses of providing such facts against the party refusing to cooperate; subject to review on appeal.

It was resolved that discretion be vested in the trial judge to decide whether trial procedure should be had in any case.

Plaintiff's Pleading

Should plaintiff's pleading of his ground of recovery be according to Federal Rule 8, or according to the present Texas statutes with the words "facts" and "legal" omitted?

The Institute voted 65 to 40 in the negative and asked that the statutory wording in the respects stated sheould be retained:

> . . . a statement in logical and legal form of the facts constituting the plaintiff's cause of action.

Joinder

Should the rule of joinder of parties be like Federal Rule 20a, which reads:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them

jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities?

By large majority, the vote was that the Federal Rule be not recommended.

Special Issues

1. Should submission on special issues be mandatory, on request, in accordance with the present rule in Texas as expressed in the following excerpt from Art. 2189 of the Statutes:

In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues. . . . . If the nature of the suit is such that it cannot be determined on the submissions of special issues, the court may refuse to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court?

The vote was in the affirmative.

2. Should the number of issues ordinarily required under the present practice be diminished?

The vote was in the affirmative.

Upon the following seven suggested measures to the end of diminishing the number of special issues, the vote was as indicated:

(a) If it be deemed advisable, the court may submit several issues disjunctively in the same question where an affirmative finding on either of such issues would be sufficient as an element for a basis of recovery or of defense. For example, the court may inquire in one question whether the defendant has committed any one of several alleged acts of negligence. Alleged acts of contributory negligence may likewise be grouped. (Disapproved.)

(b) If it be deemed advisable, the court may also submit disjunctively in the same question two or more inconsistent issues where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. For example, the court may, in a workmen's compensation case, submit in one question whether the injured employee was permanently or only temporarily disabled. (Disapproved.)

(c) Where practicable, all issues should be submitted in the affirmative, and in plain and simple language. It is proper to so frame the issue as to place the burden of proof thereon, but where, in the opinion of the court, this cannot be done without complicating the form of the issue, the burden of proof on such issue may be placed by a separate instruction thereon. (Approved.)

(d) The fact that an issue is multifarious or duplicitous shall not constitute ground for reversal except where it affirmatively appears from the ground that the complaining party was prejudiced thereby. (Approved.)

(e) When the court submits a case upon special issues, he shall submit the controlling issues made by the pleading and the evidence. (Approved.)

(f) Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. (Approved.)

(g) . . . . Except in trespass to try title, it shall not be necessary to submit any issue more specifically than it is pleaded. A party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised by a general deniel. (Disapproved.)

4. Is there need for clarification of the meaning of "definitions and explanations?"

The vote was in the negative and consequently that the amendment of the present statutory wording which is indicated below should not be made:

In submitting special issues the court shall submit such [explanations] *explanatory instructions* and *such* definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues.

5. Where an appellant seeks a reversal because the court has refused to submit a particular issue, shall it be necessary that such appellant

(a) Should have requested and tendered a correctly worded issue?

The vote was in the negative.

(b) Should have requested and tendered a substantially correctly worded issue?

The vote was in the affirmative, provided the issue be one "upon which appellant has the burden of proof."

(c) If the issue is one relied upon by the opposite party, should it be sufficient that such appellant objected to the omission of such issue?

The resolution in response to this question was as follows: An objection by the party having the negative of the issue will under all circumstances be sufficient provided it shall not be implied that he is obliged to object to the omission of an issue upon which he does not have the burden of proof as a condition precedent to his right to assail the judgment adverse to him as being insufficiently supported by the verdict, unless the court states in the record prior to the submission of the issue that the court expects to make a finding upon that issue.

6. Where an appellant seeks a reversal because the court has refused to submit a definition or explanation, should request of a correctly worded instruction be necessary, or should it be sufficient that an objection was made?

The vote was that objection should be sufficient.

7. Does the present objection and request practice lead to frequent abuses?

The vote was that the question should be rejected.

8. In case of omitted findings by the jury should the gap in the verdict be filled without new trial before the jury?

If so, is a presumption proper?

The vote was "No."

In this connection the following resolution was passed:

> The trial court before the case is submitted to the jury shall find and reduce to writing and file among the papers in the cause his findings of fact upon all controlling issues deemed by him to have been raised by the pleadings and uncontroverted evidence, and shall furnish such findings to the parties, affording them a reasonable opportunity to object thereto and request additional findings, and no presumption shall be indulged in the appellate court that any controlling issue of fact has been found by the trial court in favor of the party having the burden of proof thereon unless such issue was included in the trial court's findings of fact without objection thereto by the party not having the burden of proof thereon.

The following resolution was passed with the understanding that the answer to Question No. 8 would still be "No."

> . . . That an insert in Question No. 8 should be made after the first word, "jury," making Question No. 8 read as follows: "In case of omitted findings by the jury *on material issues* should the gap in the verdict be filled without new trial before a jury."

The meeting adjourned after passing a resolution of appreciation of the attendance of Mr. Wynne, Mr. Vinson, and Judge Stayton, of services of the rules committee, and of stenographic assistance at the meeting which was furnished by E. L. Mendenhall, Inc.

INSURANCE LAW—

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Decisions involving Workman's Compensation insurance were cited by Mr. Zellers of Weatherford. He reviewed the case of Southern Underwriters v. Gallagher, in which it was held that if the employe is hired or contracted within this state to go out of Texas to work, he cannot claim protection under our compensation law merely because the contract was made here.

"But if the person can show that he was hired to work in Texas, has worked in Texas, and was incidentally or temporarily sent out of the state to work by the Texas employer, his right of protection under our compensation law will not be defeated," Mr. Zellers explained.

He also cited the case of Rogers v. Traders and General Insurance Company, where the court held that an employe of a bakery who is working without a health certificate is illegally employed and is not entitled to recover compensation under the Workman's Compensation Act.

"An interesting question may arise in the future as to whether a health certificate which has been fraudulently obtained will constitute a defence in a suit arising under the Workman's Compensation Act," he said.

Speaking on suretyship, Albert Hall of Dallas considered liability of surety on contract bond for overpayments made by owner to contractor. Whether a sheriff or constable is liable for damages on account of injury caused by the negligence of his deputy, he said, would seem to depend on whether the injury was inflicted by, or during of the performance of, an official act.