Completed Rules Urge Liberal Interpretation

By ROY W. McDONALD, *Reporter*
Supreme Court Advisory Committee

Among the seventeen men gathered around the long table there was an obvious sense of gratification and relief. Outside, the mid-August heat was broken by a Texas thundershower, but in the air-conditioned Texas Hotel at Fort Worth the discussion raged so constantly that the conferees did not hear the thunder. The advisory committee appointed by the Supreme Court to assist it in the task of preparing rules of procedure for civil actions in Texas, to become effective September 1, 1941, was holding its final policy-fixing session. Neither storm nor politics nor personal fatigue could interrupt its drive to finish the job to which it had been assigned almost exactly seven months before.

Let the records show the work that this group of lawyers has done. Excluding the time which has been spent in sub-committee meetings and in office study of proposed amendments to the rules, the members of the committee have spent one working day out of every nine since January in conference concerning these rules. The sessions of the committee as a whole have consumed twenty-one days. To the professors on the committee this has not been a serious sacrifice, and as one of the professors I waive for them any credit. But to the practicing lawyers who have thus given freely virtually one month of their time to this work I claim the privilege of expressing the appreciation of the Bar of Texas.

With the meeting at Fort Worth August 13, 14, and 15, the committee completed its study of appellate procedure and of the rules which it will recommend to the Supreme Court. As finally drafted, there will be some eight hundred rules. Many of these will be statutes which have been carried forward; others will be present rules of court which have been adopted without modification. But there will be many that are new and yet others which come from the Federal Rules. Every Federal Rule has been carefully studied and its possible application to our procedural system has been considered. Of the eighty-six Federal Rules, thirty-five will be found wholly or partly adopted in the recommendations of the committee.

Appellate procedure proved a difficult subject, and required most of the time of the group at three separate meetings, one early in July at Fort Worth, another late in the same month at Austin, and the final meeting in Fort Worth. The result of these deliberations will be the recommendation of a system which embraces much that is good from the Federal Rules while adapting it to the basic outlines of our present State system.

The objective pursued in the suggestions has been the simplification of the record on appeal and the prevention of reversals upon unsubstantial grounds. To this end perhaps the most important provisions have been those which provide for extremely liberal amendment privileges in the appellate courts. Not only the briefs, but the appeal bond, the transcript, the statement of facts, and even the trial pleadings may be amended while the case is upon appeal, provided that thereby the ends of justice will be furthered. Parties may be dropped or added in the appellate court where this may cure an error of misjoinder or non-joinder "without detriment to the substantial rights of any of the parties." It is recommended that there be no reversal or dismissal for want of form without allowing a reasonable time to correct or amend such irregularities.

Appeal, under the suggestions of the committee, will be perfected by notice of appeal, rather than by notice and cost bond as is now required. Cost bond will of course be necessary, but not as a step in the perfection of the appeal. Supersedeas

bonds will, if the recommendations are adopted, be for the amount of the judgment, interest, costs, and damages, rather than for double the amount, and specific provision will be made for superseding the judgment as to specified property without superseding the whole of the judgment where the suit is for the recovery of or foreclosure upon real or personal property.

The briefing rules will not seem strange to attorneys who have properly construed the present practice. Two principal changes have been recommended. One is that the assignments of error need not be repeated in the brief. The other is the elimination of formal propositions, and the substitution therefor of a "statement of the points upon which the appeal is predicted, separately numbered, in short form and without argument, and germane to one or more assignments of error. Such points will be sufficient if they direct the attention of the court to the error relied upon and *should ordinarily be so concisely stated that they may appear, separately numbered, on a single page of the brief.*"

As an illustration of a "point" under this rule, the committee suggests, in a note, the following:

"First point. The error of the court in refusing the charge upon the issue of appellant's liability under the family purpose doctrine."

Obviously, such points are not "propositions" as now understood, and the technical arguments about whether particular propositions are sufficient to require consideration should be eliminated.

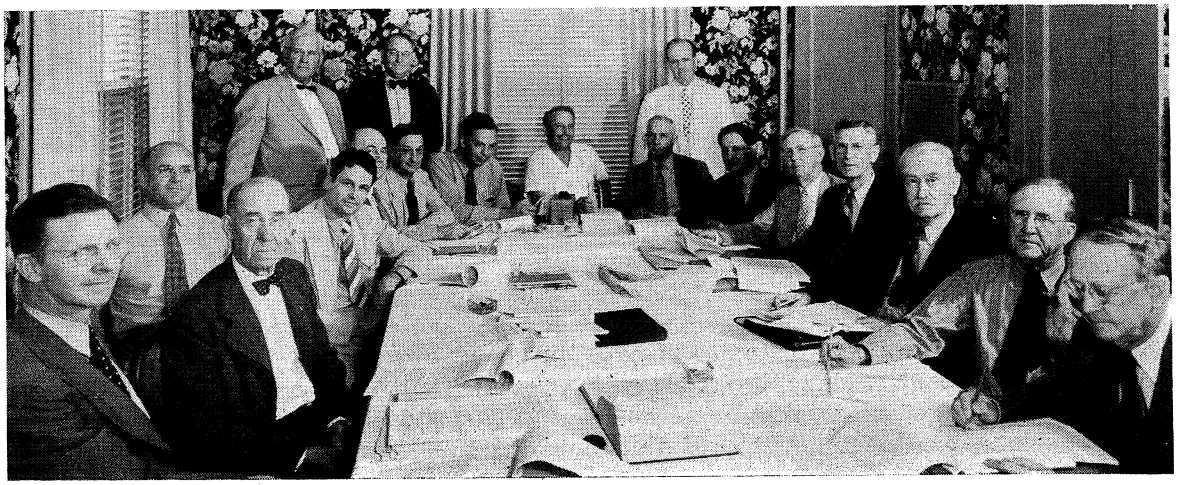
A further simplification which will have far-reaching effect upon the forms of trial is the recommended adoption of Federal Rule 46, which eliminates the necessity of formally noting an exception to the rulings of the trial court which are made over the objection of a party.

The elaboration of the changes which have been suggested in appellate procedure could be continued beyond the permissible bounds of this brief report, but they would be fragmentary in any event, and those which have been mentioned have been suggested as examples of the type of work the committee has attempted, rather than as an effort to note all the differences.

The final report of the committee will be handed to the members of the Supreme Court in September. It will consist of a mimeographed book of some 250 pages, containing the body of the rules recommended, the source of each one, and a notation of the changes made in the source material. There will be a parallel refer-

---

Seventeen of the twenty-one members of the Supreme Court's advisory committee on rules of civil procedure attended the final meeting in Fort Worth. Seated, left to right, are Judge Allen Montgomery, Randolph L. Carter, Alonzo Wasson of the Dallas News, Allen Clark, J. B. Dooley, Judge Robert W. Stayton, Roy W. McDonald, Chairman Angus G. Wynne, Richard F. Burgess, Senator Olan R. Van Zandt, Marion N. Chrestman, Judge W. R. Chapman, Judge R. B. Levy, Winbourn Pearce, and Judge James W. McClendon. Standing are Dallas Scarborough, Will R. Vinson, and Judge Ben H. Powell.



ence table, offering an easy bridge from any present statute or present Texas or Federal rule to the recommended rule which either incorporates the present statute or rule into the proposed system or supersedes it. There will be a complete alphabetical index, which will require more than twenty typewritten pages, furnishing easy access to the rules on any subject.

The size of the report will indicate the magnitude of the task which the advisory committee has completed in the last seven months. Snap judgment upon the effectiveness of its work will be dangerously inadequate. One who undertakes to evaluate the contribution of the Rule-making Power Act to the procedure of Texas will have, of necessity, to study carefully the changes which have been made. Not all of them will stand forth like red flags, challenging attention. Many forward steps will be found to have been taken by the mere change of wording in a given rule or statute. It is the sincere hope of the committee that its work will be satisfactory to the Supreme Court of Texas, the body which, in the final analysis, must bear the responsibility for the rules which are announced.

It is the further hope of the advisory committee, often expressed in its meetings, that the history of the Field Code in New York in 1848 will not be repeated in Texas in 1941 and the following years. It will be recalled that in the years following the Field reforms, the code was emasculated by the failure of the judges of New York State to receive and apply it in the spirit in which it was written. The success of any reform in procedure rests not upon an advisory committee appointed by the Supreme Court, nor upon the Supreme Court itself, alone. It rests upon the judiciary of Texas, from the county judge of our least populous county to the Chief Justice of the Supreme Court, and it goes without saying that unless the rules which are announced by the Supreme Court at this time receive the liberal interpretation which has been presumed in suggesting them and has been repeatedly solicited in the rules themselves, the opportunity of reform will be lost. I am confident that if the advisory committee were asked to make one request in connection with its work, this request would be:

"The proper objective of rules of civil procedure is to obtain a just, fair, equitable, and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the State as may be practical, *these rules shall be given a liberal construction.*" (Suggested Rule Number One.)

Law Students Trail Doctors In Pre-License Exams

Members of the legal profession in Texas are trailing the medical group in the number of applicants passing prelicense examinations, a comparison of official statistics reveals. Although figures were chosen from 1935 to 1939, it must be remembered that during this five-year period doctors were taking medical examinations after years of strenuous preparation, while the majority of lawyers who were best qualified to pass the bar examinations were being exempt.

Of the 357 medical students applying for examinations in 1935, 343 passed; 333 out of 358 passed in 1936; 437 out of 455 in 1937; 365 out of 410 in 1938; and 391 out of 413 in 1939.

Only 222 of the 518 lawyers admitted to the Texas bar in 1935 passed the examinations, the rest being admitted by exemption from approved law schools. Exempt in 1936 were 331 out of 469; 389 out of 576 in 1937; and 112 out of 488 in 1938. In 1939, the first year exemptions were ruled out, 356 were admitted to the bar by examination.

Thirty-three per cent of those taking the State Bar Examinations passed in 1937; 41 per cent in 1938; and 46 per cent in 1939. Forty-five per cent of the 768 applicants for licenses in 1939 had taken the examination before. The passing average for the United States that year was 51 per cent. States having a 70 per cent passing average or above for the three-year period were Colorado, Illinois, Iowa, Kansas, Kentucky, Mississippi, Missouri, Nebraska, North Dakota, Vermont, Wyoming, Washington, and Utah.