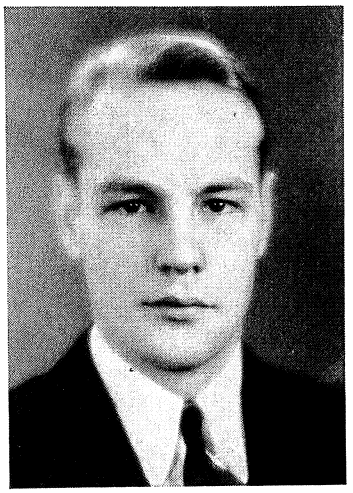
Rule-Making Completes Cycle

Away from Concentration of Power

By WILLIAM BURROW, *Member*
Journal Board of Editors

Tradition is a powerful thing. The Spanish custom of domination over courts has persisted in Texas for four hundred years, to the extent that the Legislature has controlled procedure. Even a Constitutional Amendment granting the courts rule-making power could not change subservient habits. Now the Legislature has tentatively returned the power to the courts. The history from pole to pole is here traced.



"For the lawyer—fair administration and full responsibility"

During the 250 years that Texas, then Nuevas Filepinas, was a province of Spain, the control of all Nueva España was vested in the Supreme Council of the Indies, sitting at Madrid. Its rulings with respect to the New World were supreme, unless changed by decree of the king.[1] From the beginning, judicial power depended on the will of this legislative body.

Likewise, in Nueva España itself, there was no separation of powers. In Mexico, a district, judicial matters were handled by a legislative council called the Audiencia.[2] Even the supreme judges, or Oidores, were but members of that body.[3] Subordinate executives controlling the provinces customarily exercised judicial powers.[4] Such was also true in division of the provinces, where the Alcaldes Mayores acted as judges,[5] and in the towns, where the Ordinary Alcaldes[6] acted as judges. At the same time their duties were primarily executive. Alcaldes were extant in Texas during the time of the Republic.[7] As it would have been impossible for any court to have changed the rulings of the Supreme Council of the Indies or of the Audiencia at Mexico City, under Spain, no complete court-made system of procedure could prevail.

This deference of courts to the will of the Legislature was carried over into the Constitution of Coahuila and Texas of 1827. At this time both Coahuila and Texas together were a state of Mexico. That Constitution provided:

> "Article 29. The supreme powers of the state shall be divided for its exercise into legislative, executive and judicial, and neither these three powers, or any two of the same, shall ever be united in one corporation or person . . ."
>
> "Article 32. The exercise of judicial power shall reside in the tribunals and courts of justice established by this Constitution."

This was the beginning of our Separation of Powers, aided by Article 168 providing that the judicial power should be exclusive. Nevertheless, these Articles did not mean all they said, for Article 171 gave to the Legislature complete power to prescribe all rules of court procedure.

The Constitution of the Republic of Texas was adopted March 17, 1836. It prescribed:

> "The judicial powers . . . shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish."

Nothing was said concerning court procedure. Nevertheless, the country was in the midst of a revolution. No Supreme Court functioned until 1840, and by that time full rules of court procedure had already been enacted by the Legislature. The procedure for the Supreme Court was provided in the Act of December 15, 1836; for the county courts in the Act of December 20, 1836; and for the district courts on December 22, 1836. The Texas Congress did not hesitate to vary or supple-

ment these rules of procedure at its pleasure,[8] as the Legislature has not failed to do since the Republic became the State. Thus, the Supreme Court acquiesced in the legislative assumption of power, and its rules, adopted in 1840, reprinted in *Dallam's Digest of Texas Laws* (1845) 225, did no more than weakly supplement the legislative prescriptions.

The various Constitutions of the State of Texas, being those of 1845, 1861, 1866, 1869, and 1876, have not mentioned the rule-making power of the courts; nor have they given to the Legislature the power to make those rules. Each of these Constitutions, however, has contained the following control of the purse strings:

> "The Legislature shall provide for deductions from the salaries of public officers who may neglect the performance of any duty that may be assigned them by law."[9]

From this review, it is thus apparent that prior to 1891, there were no court rules of any importance made by the courts of Texas. In that year, during the great reform movement in this State, a long series of amendments to the Constitution were enacted by the people. Among these was the following apparently full and complete grant of rule-making power to the courts:

> "The Supreme Court shall have power to make and establish rules of procedure not inconsistent with the laws of the State for the government of said Court and the other courts of this State to expedite the dispatch of business therein."

It is difficult to see how more plenary power could have been given. The provision "not inconsistent with the laws of the State," could easily have been construed to have meant the fundamental or constitutional laws of the State. The courts, however, did not grasp the power the people had so clearly given them, and in a long series of decisions have since held that any court rule which contradicted a statute was void.[10] The Supreme Court, for example, in 1913 held that a court rule limiting appellate review to grounds specified in a motion for new trial, was void insofar as it failed to conform with the Legislature's law.[11] The holding of the Court of Criminal Appeals was similar.[12] No reasons were assigned, for the lack of judicial power was assumed.

In recent years the courts have not been so weak, and the Supreme Court, as evidenced by the rules set forth in Volume 99 of the Second Series of the Southwestern Reporter, has prescribed in specific language the very rule that in appellate review the grounds must be raised by motion for new trial. Likewise, Dallas County formulated its rules of pre-trial procedure. We regard these instances in part the results of national and local Bar Association work, which achieved some reform in the face of all the history and tradition of this part of the country.

These would be paltry victories if the only success attained. By Article 1731a of the Texas Revised Civil Statutes, the Legislature has in effect acknowledged that the judiciary has the power to make its own rules. Thus the cycle away from the Spanish concentration of power is complete. The lawyers who use the Texas courts, and the judges thereof, have now the privilege of progressing towards the speedy and fair administration of justice, and the full responsibility for its faults.

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[1]LEYES DE INDIAS, Lib. II, Title 1, Laws 2-4. (Hereinafter cited as LEYES).
[2]LEYES, Lib. III, Tit. 3, Laws 36 and 37.
[3]LEYES, Lib. III, Tit. 2, Law 1.
[4]LEYES, Lib. III, Tit. 2, Law 70.
[5]LEYES, Lib. III, Tit. 2, Law 1.
[6]LEYES, Lib. III, Tit. 2, Laws 1 and 4.
[7]*Tompkins vs. the Republic,* Dallam 488; 1 Texas Laws 198, Section 31.
[8]Thus, the Act of January 14, 1841, prescribed rules for changing of venue in criminal cases in the district courts. See also Act of May 3, 1838.
[9]1845, Article 7, Section 12; 1861, Article 7, Section 12; 1866, Article 7, Section 12; 1869, Article 12, Section 8; 1876, Article 16, Section 10.
[10]Conn vs. Rosamond (Civ. App. 1913) 161 S. W. 73; Missouri, K. & T. Ry. Co. of Texas vs. Beasley, 106 T. 160, 155 S. W. 183 (1913), rehearing denied 106 T. 160, 160 S. W. 471; St. Louis, I. M. & S. Ry. Co. vs. West Bros. (Civ. App. 1913) 159 S. W. 142; Lingo Lumber Co. vs. Garvin (Civ. App. 1916) 181 S. W. 561. See Tyler vs. Sowders (Civ. App. 1914) 172 S. W. 205; E. F. Rowson & Co. vs. McKinney (Civ. App. 1913) 154 S. W. 603; Sessions vs. State, 81 Cr. R. 424, 197 S. W. 718 (1917); Durham vs. Scrivener (Com. App. 1925) 270 S. W. 161.
[11]Missouri K. & T. Ry. Co. vs. Beasley, *supra.*
[12]Sessions vs. State, *supra.*