

## Rule-Making Work Is Apportioned

Work of the Supreme Court's advisory committee on rule-making power was divided into five parts and referred to sub-committees at its second meeting in Austin February 16 and 17. At the suggestion of a committee headed by Judge Robert W. Stayton of The University of Texas, two sub-committees on trial practice and procedure and one each on appellate practice and procedure, ancillary proceedings, and special proceedings were appointed.

After considerable discussion, the committee voted to postpone consideration of the federal rules, and referred to the proper sub-committee the question of special issues. Use of the general demurrer was abolished. The committee voted to provide that defendants should be given twenty days within which to file an answer and decided that the trial judge should have the power to sign default and agreed judgments anywhere within his district. The matter of terms of court was passed without comment.

### *Eighteen Present*

Eighteen of the twenty-one committee members were present at the meeting in the Supreme Court room, Judges F. A. Williams of Galveston, Ben H. Powell of Austin, and W. R. Chapman of Abilene being unable to attend.

Judge Stayton's sub-committee submitted a list of statutes on practice and procedure in civil actions from Vernon's Texas Statutes for 1936 and the 1939 cumulative supplements under the following heads: order of practice and procedure in civil actions; titles as to which the sub-committee was in doubt; auxiliary proceedings; special proceedings; courts—jurisdiction, structure, personnel, administration, venue; and miscellaneous.

The sub-committee, composed of Judge James P. Alexander of Waco, M. N. Chrestman of Dallas, Judge James W. McClendon of Austin, and Roy W. McDonald of Dallas, had held two two-day meetings in Waco, reading all of the articles which members believed to contain procedure provisions. It suggested that the chairman of each of the five proposed

sub-committees apportion the work among its members and act, along with General Chairman Angus G. Wynne of Longview, as a coordinating committee to plan the work of the advisory committee as a whole.

The sub-committees will examine all of the articles of the statutes coming within their assignments and report back to the advisory committee by March 30 so that their suggestions may be studied before the next meeting in Austin April 5. The proposed rules of procedure must be filed by the Supreme Court with the Secretary of State by December 1.

### *Trial Practice and Procedure*

Mr. Wynne appointed Mr. Chrestman as chairman of the first sub-committee on trial practice and procedure, which will study and draft the rules for justice, county, and district courts up to and including the final step in the trial next preceding the actual trial of the case. Working with him will be Richard H. Burgess of El Paso, Robert W. Calvert of Hillsboro, Mr. McDonald, Judge Allen Montgomery of Wichita Falls, and Dallas Scarborough of Abilene.

To the second sub-committee on trial practice and procedure was assigned the task of considering every step in the trial of civil cases in the justice, county, and district courts, beginning with the first step in the actual trial of the case, including appeals from the certiorari to justice court, and concluding with the last step in the trial. Work of that committee will not include any step in the prosecution of appeal to the Court of Civil Appeals.

### *Night Session*

Judge Stayton, chairman, divided the work among his members at a night session February 16. He assigned Judge Alexander to the justice court work in Titles 45 and 27 of the report on the statutes, and Senator Olan Van Zandt of Tioga to Sub-divisions 3 and 7 and Chapter 8 of Title 42, dealing with trial and findings by the court in district and county

courts. Judge Chapman was given the subject of charge. To J. B. Dooley of Amarillo went Sub-divisions 5 and 6, dealing with cases to the jury and the verdict, and Chapter 9, Sub-division 1, relating to judgments. Remittitur and correction of judgments and articles dealing with new trial and arrest of judgments were assigned to Randolph L. Carter of San Antonio, and Judge Stayton will report on execution, fees of office, default judgments, and other articles included in the sub-committee's work.

#### *Appeal of Civil Cases*

The third sub-committee was appointed to consider every step in the appeal of civil cases beginning with notice of appeal or application for writ of error, appeals from interlocutory orders, all proceedings preliminary to appeal to the Court of Civil Appeals and all subsequent proceedings until final disposition of the case, issuance of mandate from the Supreme Court and enforcement of judgment of the civil appellate courts, and original proceedings in the civil appellate courts. Judge Powell, appointed chairman, will be assisted by Allen Clark of Greenville, Judge R. B. Levy of Longview, Judge McClendon, and W. A. Vinson of Houston.

Ancillary proceedings, such as attachment, distress warrant, execution, garnishment, injunctions, sequestration, trial of right of property, and the appointment of auditors, masters, and receivers, were assigned to the fourth sub-committee, headed by Judge Williams. Assisting him will be Judge Levy and Mr. McDonald.

#### *Special Proceedings*

Winbourn Pearce of Temple was appointed chairman of the fifth sub-committee. It will consider special proceedings such as forcible entry and detainer, partition, and trespass to try title. The other twenty-five or more special proceedings found in the statutes, such as adoption, condemnation, and probate matters, were omitted because the advisory committee believed that they did not come within the purview of the rule-making power act.

"We thought it would be the best policy to center on what the lawyers all know to be practice and procedure," Judge

Stayton explained in making the recommendation.

Serving with Mr. Pearce will be Judge Alexander and Will Orgain of Beaumont.

Mr. Scarborough's committee on declaration of policy, appointed at the last meeting, made no formal recommendation but reported sixteen suggestions made to it by lawyers and judges throughout Texas. Recommendations of several local bar associations that the committee adopt or reject the federal rules as a basis were considered at length. Resolutions by Lubbock Bar Association and the Valley lawyers, and unofficial reports of Travis and Bell-Lampasas-Mills County Bar committees favored their adoption. Franklin Jones of Marshall, chairman of the Texas Bar Association's committee on remedial procedure, told the advisory committee that the Association at its last annual meeting recommended that the federal rules be used as far as possible. Mr. Scarborough reported, however, that a majority of the lawyers did not favor them.

"The ones who practice in the federal courts do," he said, "but the others do not."

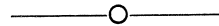
#### *Improve on Them*

"I would be willing to take the federal rules, but I think we can improve on them," Mr. Vinson declared.

In discussing the scope of the advisory committee's work, several members urged that no radical changes be made.

"We should not do anything radical, but we should do something constructive," was the opinion of Judge McClendon. "We should reduce the size of records on appeal. Our objective should be to cure the procedural evils in our system as far as possible and to eliminate needless reversals on technical grounds."

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## RULE-MAKING—

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"We have been fighting a long time and should not just adopt a rule or two and go home," declared Judge Alexander. "If we do this, the Legislature can well say we have been urging the adoption of this legislation for years and now we have done nothing to warrant the transfer of rule-making power."

On motion of Judge Alexander, amended by Judge Stayton, the committee voted that every defect, omission, or fault of pleading, either in form or substance, should be deemed waived unless specifically pointed out and brought to the attention of the trial court.

Most of the second day of the meeting was devoted to the discussion of Special Issues Statutes, although no definite action was taken. All proposals were referred to the sub-committees for consideration.

Judge Alexander suggested that failure to submit an issue or define a term should not be deemed grounds for reversal of a judgment unless the complaining party has tendered a proper and substantially

correct charge to the attention of the court.

"The trial should not be a contest between lawyers to see which is the best," he asserted, "but an effort to administer justice. I suggest that after the lawyer has offered a charge or issue, the opponent should be required to point out what is wrong with it."

Judge McClendon submitted a substitute for Judge Alexander's proposal, providing that where the charge fails to submit an element essential to support a judgment, it shall be necessary only to point out the omission and request an issue thereon.

Called to the attention of the committee by Mr. Orgain was the habit of trial judges of letting the plaintiff's lawyer write the charge, telling the defendant to file his objections, and handing them to the plaintiff's lawyer.

"If a man is in earnest," said Judge Stayton, "he wants the charge corrected and ought to tell the court what is wrong. Our rules should be written from the standpoint of obtaining justice."

Believing that argument of counsel would provide means for discussion of the alternative theories, Judge Alexander suggested that Article 2190 be amended by the addition of: "provided that failure to submit a requested issue should not constitute reversible error on appeal where an answer to the requested issue would be in conflict with any finding properly made by the jury in answer to some other issue." He proposed also that the following clause should be added to Article 2189: "provided that if it shall be deemed advisable, the court may submit two or more issues disjunctively on the same special issue."