Clear Away the Brush

By JUDGE J. T. SUGGS Jr. *of Denison*
Fifty-ninth District Court

In the current revision of the rules of civil procedure, the responsibility of the bench and bar is obvious. While the power to revise the rules has been granted only to the Supreme Court, that body has designated an advisory committee, the members of which are contacting various members and associations within the profession for suggestion and criticism. The bar fought for the measure placing rule-making authority in the judicial branch of the government. Justifiably, the people now expect improvement in court procedure. Every member of the association is under obligation to submerge selfish interest dictated by the character of his practice or the identity of his clients in an unbiased effort to improve the accurate administration of justice.

"Establishment of facts presents the problem"

Discussion of the problem has become widespread throughout the bar, of course. Unfortunately, in much of the argument pro and con, it is only too easy to detect bias and personal interest. One faction complains that any simplification of procedure is a backward step, tending to level off legal talent at the lowest level; that any simplification and speeding up of the court's work will result in careless dispensation of justice; that any simplification of the jury submission must result in verdicts based on prejudice; that the appellate courts will do substantial justice, regardless of trial court procedure. To refute these contentions seriatim: will any set of procedural rules either produce or destroy deep knowledge of the law, skill in exposition of evidence, and in examination of witnesses, or persuasive and convincing advocacy? Are deliberately produced surprise, confusion and delay essential parts of deliberate judicial procedure? Though the jury need not comprehend the legal effect of their fact-finding, must they be prevented from understanding the questions propounded to them?

Shall the appellate courts proceed in effect to trial de novo on the record, deciding each cause on expediency? Another extremist faction, expressing itself freely and frequently, contends for the ultimate in simple procedure. Return to the general charge is strongly championed by many a practitioner who never saw one, and whose real desire on analysis is found to be substantial elimination of the charge to the jury. Resolutions have been passed and circulated advocating adoption of the federal rules, with apparently careful and specific exception of some provisions which require full and frank disclosure of the facts in a case ahead of trial. One practitioner, speaking in a humorous vein, but nevertheless expressing the perhaps subconscious desire of a number of lawyers, says that the pleading should consist of a "short, concise statement of the name of the defendant and the amount demanded, and the issues for the jury should be innocence, ignorance and sympathy."

Obviously enough, these extreme views reflect partisanship on the one side for the defendant, on the other side for the plaintiff, as a class. Equally obvious it is to an unbiased observer that neither extreme view will lead to the ultimate objective which the rule-making power is designed to accomplish: a simplified, more efficient system of procedure, which is still accurate in dispensing even-handed justice. Finally, the current discussion among our brethren has shown a strong tendency to centralize on the *method by which the trial court shall charge the jury,* (i. e., special issues, general charge,

or a mixture of the two) excluding from consideration other phases of trial procedure where real progress is demonstrably possible.

The new federal rules have achieved wide and doubtless deserved notoriety as a means of successfully accomplishing increased efficiency in the trial of lawsuits. It should be particularly noted that while extensive changes were made, the new federal rules *did not substantially change the method of charging the jury in the federal courts*. Is it not reasonable to suppose, then, that the widely publicized increase in efficiency resulted from improvement in other phases of trial procedure? In attempting to improve our own system, would it not be well to try to determine just what *did* bring about the improvement in trial work in the federal courts? Of course, abolishing the distinction between procedure on the law and the equity sides respectively was helpful; but Texas did that long ago. Let us consider specifically the effect of some of the other innovations in the federal rules.

In the matter of pleading: Counsel is required to serve his adversary (permissibly by mail) with copies of his various pleadings as they are filed. (Rule 5). The fairness and merit of this procedure in avoiding surprise and delay is so well recognized that in many sections of our bar the members customarily follow the practice as a matter of courtesy. Our latest statute on filing pleadings recognizes the soundness of the principle, but falls a little short of the federal rule, requiring only filing of extra copies. Analysis of federal rules 7 to 15 inclusive discloses that while there is some difference in detail and terminology, the system of pleading provided for is quite similar to our own. Striking innovations are that denials must be specific, and must be founded either in good faith or want of information (Rule 8b); and that the required signature of counsel on the pleading warrants on his professional integrity that he has read the pleading, that he believes there is good ground to support it, and that it is not filed merely for delay. (Rule 11).

Many practitioners have found that the admissions resulting from restriction of denials to good faith or want of information by no means "admit the case out of court," and actually are not at all damaging to the good cause of action or the good defense. And obviously here is the first step in narrowing the issues, settling the undisputed points, and stripping down the trial to the real points of controversy. Before trial in the federal court, by the very simple device of leaving a list of questions with him, a party may interrogate his adversary with regard to the merits of his cause or defense. (Rule 33.) He may secure preliminary inspection of his adversary's tangible evidence. (Rule 34.) If physical or mental condition is an issue, he may avail himself of an examination of his adversary by experts, before trial. (Rule 35.) By a simple written request, he may resolve the validity and truthfulness of a written document either into admitted facts, or good-faith controversy. (Rule 36.)

And the party who will not, without conscionable excuse, make such fair disclosure to his adversary of what he intends to meet him with on trial may be precluded from offering the concealed evidence, may suffer adverse admission of the ignored question, may be forced to bear his adversary's expense of proving the undisputed fact, or may be penalized otherwise for refusing to conduct his cause openly and fairly. (Rule 37). When the pleadings have been made up, and each litigant has advised himself so far as he legitimately may regarding his adversary's contentions and proof, the Court may then hear the cause on the pleadings and the established facts, and may interrogate counsel and determine to what extent the controversy has been resolved and precisely what points remain on which there is a real dispute. He

(Continued on Page 158)

CLEAR AWAY THE BRUSH—
(Continued from Page 134)

then has the authority to limit the trial to the actually controversial elements so isolated. (Rule 56d.)

Finally, under Rule 16, he may call a conference of counsel to accomplish all of the foregoing, as well as to put the pleadings in final form for trial. Since either party has the *right* to compel a fair disclosure of his adversary's side of the case under the foregoing rules, *and since obstinate or groundless denials of fact may result in bearing the expense of their proof or even more onerous consequences,* as indicated, at this conference the trial judge can effectively request and *obtain* admissions and agreements which will greatly simplify the issues and narrow the trial to the really substantial matters in controversy.

Pre-trial procedure actually is a comprehensive term. It has been bandied about not only in discussions in the profession, but also in the public press. Many of the members of the bar, even, use the term without an accurate conception of all that the term implies. The meaning of the term under our present state practice is quite different from that under the new federal rules, although some state courts have established a routine of holding preliminary conferences before trial. The routine is similar in both state and federal practice. The sharp difference is found in the results which may be obtained at the conference. *In our state practice there is no machinery for simplifying the fact element in a lawsuit.*

The Texas judge can obtain amendment of pleadings, disposition of preliminary motions, pleas, and exceptions, and he can render his settings somewhat more certain and definite, all of which is advantageous. But there is no penalty for obstinate or groundless refusal to concede facts, however clear and undisputed they may be. Indeed, there is no procedural machinery even to indicate the propriety of an effort along that line. In short, the state practice does not permit the judge to simplify the *proof of facts,* which constitutes the major portion of the trial proper. Under the present state practice, we have only *half* the machinery necessary to "clear the brush away" in the trial of a lawsuit. While some of our state courts have instituted pre-trial procedure, under the present state practice it is not possible for them to accomplish all that should be included within the term.

Little reflection is necessary to perceive that securing decisions of substantive law on established facts does not present a major need for relief in our court procedure. Establishment of the facts presents the problem. Rules pertaining to that phase of the trial are the major source of confusion. That is the phase of the trial wherein the jury functions. Presentation of facts is the primary function of pleading—it is an adjunct to establishment of the fact situation.

It will be unfortunate if the broad aspect of the problem of simplification of the fact element in litigation is lost sight of by reason of intense controversy over detail, such as the *method* of presenting the case to the jury. The broad objective of rendering administration of justice more efficient, more accurate, and less tedious must be kept in view, unobscured by excessive pre-occupation with a single step in the proceedings, and unwarped by partisanship. Certainly our method of charging the jury permits and demands improvement. Various specific defects can be isolated, and their correction can be devised. However, if good faith and reasonable belief are made necessary ingredients of pleading, and if the revised practice will provide for pre-trial procedure adequately implemented with machinery for the simplification of the fact element —provision to require fair disclosure of facts, and to prevent obstinate or groundless denials—then in all probability in the great majority of cases the controversy will be sufficiently narrowed so that it may not be of paramount importance whether the case is presented to the jury on special issues, on the general charge, or on a blend of the two.

It is submitted that the provisions above outlined constitute some really forward steps taken in the new federal rules, which have been of substantial importance in rendering court procedure more efficient. They are not now available in our state practice. In the current revision of our rules, if we do not avail ourselves and the public of these provisions, we shall fall short of the task entrusted to us, regardless of how we provide for charging the jury.