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SOME COMMENTS ON THE RELATION OF PRE-TRIAL TO THE RULES OF EVIDENCE

HARRY D. NIMS*

The term "Pre-Trial" is of such recent origin that it is found in few, if any, dictionaries. It seems to be used to describe conferences or hearings attended by counsel for litigants (and by litigants themselves, if they so desire) and a judge of the court to discuss the simplification of the issues to be tried, the sufficiency of the pleadings, the possibility of obtaining admissions and stipulations of facts and documents to avoid unnecessary proof, the limiting of the number of expert witnesses, and any other measures which may aid in the disposition of the case when it comes to trial.

In some jurisdiction, civil cases are called into conferences with a judge with the express and understood purpose of considering their disposition without regard for rules of evidence. Such conferences represent a method of ending lawsuits by negotiation rather than by trial, and they seem to coincide with public policy. The public and most plaintiffs, particularly in tort litigation, approve them because any layman can understand their purpose and the methods used in them.

In 1947 Judge Harry M. Fisher, of the Circuit Court of Cook County, Illinois, of wide experience with pre-trial, in a letter to the writer, made a statement that can hardly be repeated too often. It is this:

> "Since every lawsuit ultimately comes to an end, why not help the parties to reach that end by amiable businesslike arrangements? Settled the case will be, if not by agreement, then by imposition through judicial pronunciamento, leaving one and not infrequently both of the parties dissatisfied, disgruntled and with respect for judicial process considerably shaken."

The spirit of the pre-trial conference and the spirit of a trial in which the rules of evidence are used bear little resemblance.

The Tenth Circuit Court of Appeals, through Judge Huxman, once said:

> "The spirit of a pre-trial procedure is not only to call the parties together and ask them to stipulate as to all matters concerning which there can be no dispute, but to compel them to stipulate and agree as to all facts concerning which there can be no real issue. The court has a right to compel the parties to do this. . . . Unless the court has such power, the pre-trial conference is indeed innocuous and of little help. Without Rule 16, the court always had the power to ask the parties to meet and request them to try to get together on all such matter."[1]

*Member, Nims, Verdi & Martin, New York City; author, PRE-TRIAL (1950), UNFAIR COMPETITIONS AND TRADE MARKS (4th ed. 1947).

1. Berger v. Braman, 172 F.2d 241, 243 (10th Cir. 1949).

Rules similar to Federal Rule 16 exist in some 29 states.

The impact of pre-trial procedure on rules of evidence is illustrated by a report adopted by the Judicial Conference of the United States on September 26, 1951.[2] Judge E. Barrett Prettyman is the chairman of the committee preparing the report. It recommends various methods of simplifying the presentation of evidence, without full compliance with the rulse of evidence. For instance, it suggests, in the interest of economy of time and lessening of expense, that before the trial begins, counsel submit evidence to each other and supply each other with copies of documents proposed to be used as exhibits; that they confer and decide upon what is irrelevant material and eliminate it; that the court require succinct narrative summaries of depositions and that each party indicate any inaccuracies in it. The report refers to a deposition of 3000 pages which was condensed into 120 pages.

Judge Henry E. Ackerson, Jr., of the New Jersey Superior Court points out that, in the New Jersey courts, when counsel receive notice of a pretrial conference, they are advised to consult with each other in advance of the conference to agree on as many of the items which will come up there for discussion as they possibly can.[3] In this way in the pre-trial conference, the attention of the court can be focussed on the matters in which its aid is needed in reaching a satisfactory pre-trial order.

In 1945, Justice Linn of the Supreme Court of Pennsylvania said that:

> "While the rules for pre-trial conference provide a method of simplifying issues, and controlling trial procedure, there is nothing to indicate that they were intended to displace the bill of discovery; they do not provide for the compulsory disclosure of evidence by the opposing party under oath—one of the essentials of discovery."[4]

The decisions are not clear as to the powers of the courts to insist that the facts of a case be disclosed in a pre-trial conference.

Judge Tuttle of the Eastern District Court for Michigan in *Meikle v. Timken-Detroit Axle Co.*,[5] once wrote that ". . . even with recalcitrant counsel, the rules of civil procedure give the courts ample power to call for a pretrial hearing under Rule 16, and to force an explanation of the issues. . . ." Judge McColloch of the District Court of Oregon has held that in making an order for a new trial, the court has power to direct the court reporter to certify to testimony of a witness in the first trial to be read at the second

2. PROCEDURE IN ANTI-TRUST AND OTHER PROTRACTED CASES (1951) (distributed by the Administrative Office of the United States Courts).

3. Ackerson, *Pretrial Conferences and Calendar Control: The Keys to Effective Work in the Trial Courts*, 4 RUTGERS L. REV. 381 (1950).

4. Peoples City Bank v. John Hancock Mut. Life Ins. Co., 353 Pa. 123, 44 A.2d 514, 518 (1945).

5. 44 F. Supp. 460, 462 (E.D. Mich. 1942).

trial, to save expense of bringing the witness from a long distance if the witness was not in the state at the time.[6] In a pre-trial hearing in the Northern District of Ohio, the court "limited to one witness on each side on each major classification of the property involved in the valuation."[7] Judge Kenison of New Hampshire once suggested that, in preparing for a jury trial, a complicated account, which could be understood by the jury only with great difficulty, might be simplified in pre-trial.[8]

Any appraisal of the effect of conference procedure on the rules of evidence should be made, having in mind the fact that a very substantial portion of jury cases in the courts in metropolitan centers are disposed of for sums too small to warrant most lawyers in trying them. In the disposition of such cases the use of rules of evidence, as contrasted with frank discussion of the case with a judge in an informal conference, has little value or significance.

The unfortunate effect on laymen, litigants, witnesses and jurymen of the atmosphere which often prevails in a court room during a trial, can hardly be exaggerated. The impressions gained there are responsible for much of the criticism of our courts; and these impressions are based largely on the use and abuse of the rules of evidence. Not infrequently, feelings closely akin to disgust are aroused in the minds of observers when they see obviously earnest, honest and sincere witnesses prevented by objections and motions based on rules of evidence from telling their story and from making what they believe, and most laymen would consider, to be an honest, helpful contribution to the solution of the issues involved.

The contrast between the atmosphere of such a court when evidence is being presented under the rules of evidence and that which prevails in perhaps an adjoining one where pre-trial hearings are held, or in a judge's chambers in the same building during a pre-trial conference, is striking indeed. The one is formal, sometimes merciless, governed by rigid standards, with little or no attention to human values which may be involved; the other is intensely human and normal, the approach to the problem involved is realistic, the discussion is not governed by formal rules or interrupted by technical objections, but usually is characterized by friendly courtesy on the part of all concerned.

Judge A. David Benjamin of the County Court of Kings County, New York, in the May 19, 1949 issue of the *Bar Bulletin* of the New York County Lawyers Association, tells this story:

6. Penn v. Automobile Ins. Co., 27 F. Supp. 337 (D. Ore. 1939).
7. United States v. Libby-Owens-Ford Glass Co., 14 F.R. Serv. 16.26, Case 1 (N.D. Ohio 1950). See also International Carrier-Call and Television Corp. v. Radio Corp. of America, 55 U.S. P.Q. 447, 449 (S.D.N.Y. 1942).
8. Murphy & Sons v. Peters, 95 N.H. 275, 62 A.2d 718, 720 (1948). See also Olearchick v. American Steel Foundries, 73 F. Supp. 273, 280 (W.D. Pa. 1947).

"Recently, I had before me litigation involving a landlord and a tenant. It was bitter litigation. It was a three-family house, owned by an old widow. The tenant was a woman whose husband was a wounded veteran of World War I, now an inmate of a mental institution; and she was bitter, she was hard; she had become a shrew. She spat venom. There had been altercations between her and her landlady, who owned this three-family house which represented the life savings of a poor family. They got into an argument, and the landlady hit the tenant on her hand with a broomstick and broke her finger. Probably she was provoked, for the source of provocation was there. I felt, as I heard the evidence, that maybe I too might have been tempted to strike. But what could be gained in that case by the continuance of litigation?

"Legal principles say that if you use undue force to repel a threatened attack you are guilty of assault. Students will find that in the book. I didn't look in the books for the solution of the case. There was this poor old lady sobbing her heart out. In the front row was this landlady, who, if the judgment went against her for the broken finger, might lose the home, which she had worked for all her life. And the jury might so find. Yet, here was this poor lady whose finger had been broken. She had had medical expenses; she too was entitled to some compensation.

"How can lawyers resolve situations like that by trial? How can juries solve those torn human emotions which bring about such litigation? I brought them into my chambers. I felt that a little peace in the life and in the hearts of these people might be more valuable than merely dollars. Far more important, that they could live in harmony with each other and find common ground of mutual understanding. We settled the case for a couple of hundred dollars which paid the medical expenses, but more than that, they went out with their arms around each other, friends again, two human beings that were at last at peace with life."

If these litigants could have talked with this judge soon after the case was at issue, how much bitterness and expense in time and money might have been saved! To the solution of this problem, the rules of evidence could contribute very little.

Why should a judge advocate and urge settlement of a civil case, or even discuss it with counsel before a trial is begun? Is not a formal trial using the rules of evidence a better way?

When a plaintiff submits his cause to a court of law, he seeks a decision by the court—nothing more. He may insist that the decision be reached only after a formal presentation of his side under the rules of evidence. That is his right. His adversary has a similar right; but in the end, the decision rests with the court, with or without the aid of a jury.

As a first step in reaching that decision, the court has the right to require discussion with the parties of how and when such presentation shall be made and to be informed preliminarily of what the case involves and what the issues are; and once that is done, public policy becomes a part of the problem. That policy dictates that litigation should be discouraged and minimized; that quarrels and disputes should be ended just as speedily as possible; that the facilities of the tax supported courts should be not wasted or abused or

used to satisfy enmity and hatred. Why in this preliminary discussion, particularly in cases which obviously involve comparatively small amounts, a judge should not urge the parties to state the facts involved informally to him and with his assistance, trained as he is, in the decision of disputes, to settle upon an amount, if any, to be paid, or an adjustment to be reached, it is difficult for the average citizen to see. To him such a method of decision seems common sense.

Professor Edmund M. Morgan recently discussed the future of the law of evidence.[9] He spoke of the increasing growth of informality and less rigid adherence to the laws of evidence, and of the battle features of the lawsuit and then said: "The first device for eliminating the sporting features of a lawsuit is the pre-trial conference."[10] He then reviewed the history of pre-trial and the use of Federal Rule 16, (the pre-trial rule) and added:

> "The judge is able to eliminate the necessity of trial upon issues as to which there is no bona fide dispute. Of course, if the party and his counsel insist upon refusing to admit the truth of an allegation merely because they believe the proponent cannot produce admissible evidence, the judge is in no position to compel compliance with his suggestion. But there is a marked reluctance of reputable counsel to insist upon the technical requirements when the conference is conducted by an able and tactful judge."[11]

Courts have an inherent power to adopt any measures which will aid them in the proper disposition of their work.[12] It is therefore within the power of the court to call counsel in pending cases into conference and to require discussion of the rules which are to be applied during the trial as to evidence which counsel propose to offer.[13] This may mean stipulation of the issues to be tried, agreement as to facts regarding which there is no dispute and simplification as far as possible of the evidence each party proposes to offer.

Where, for instance, the issues involve the publication in different newspapers of advertisements or pictures, under the rules of evidence either party may demand authentication of each issue by the testimony of someone connected with the newspaper that published it. Today, in such cases, counsel for both parties can and often do examine and digest evidence of this sort before the trial under supervision of the court and stipulate the authenticity of much of it. Counsel who fail to do this and to simplify evidence before offering it, are not likely to receive much sympathy or consideration from an appellate court when the record is presented.

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9. Morgan, *The Future of the Law of Evidence*, 29 TEXAS L. REV. 587 (1951).

10. *Id.* at 607.

11. *Ibid.*

12. *Ex parte* Peterson, 253 U.S. 300, 40 Sup. Ct. 543, 64 L. Ed. 919 (1919).

13. See Venn-Severin Machine Co. v. John Kiss Sons, 2 F.R.D. 4, 5 (D.N.J. 1941); also Carlock v. Southeastern Greyhound Lines, 8 F.R. Serv. 16.261, Case 1 (E.D. Tenn. 1944); United States v. Certain Parcels of Land, 63 F. Supp. 175 (S.D. Cal. 1945).

Arrangements of this sort can be and should be handled through conferences before the trial and the sooner after issue is joined the better. Judge Arthur F. Lederle of the United States District Court in Detroit does not delay his conferences until the eve of trial as is the practice in most courts. In his court, notice of pre-trial hearings go out as soon as a case is at issue. The hearings are usually held about ten days later. He is obtaining remarkable results. Of his methods, Judge Lederle states:

> "After the pleadings are in proper form, it then becomes necessary to consider the means by which the necessary allegations are to be proven. In non-jury cases I normally ask the attorneys to prepare proposed findings of fact in advance of the trial. After considering the proposed findings about which there is no genuine issue of fact, it is possible to arrive at rather definite ideas as to the proof necessary to establish the respective claims as to the existence of the facts that have been proposed. In complicated jury cases I have found it helpful to ask the attorneys to prepare special questions during the course of the pre-trial hearings on the assumption that I may later decide that it is advisable to submit the case to the jury for a special verdict or a general verdict accompanied by answer to the interrogatories. If it is ultimately determined that a general verdict will be sufficient, the time spent in preparing the special questions is not wasted for the reason that the study necessitated for the preparation of special questions helps to clarify the issues for the attorneys and the judge. In such complicated jury cases I also ask the attorneys to prepare their requested instructions in advance of the trial. If these matters are taken care of during the pre-trial hearings, the judge is prepared to rule properly on objections to the evidence with reference to its relevancy. Conceding that the matter of relevancy is primarily a question of logic, it is nevertheless important to remember that judicial logic is not always the same as theoretical logic, and the courts are bound by precedents in this field as in other fields."[14]

In *United States* v. *Parker-Rust-Proof Co.*,[15] at pre-trial hearings in Judge Lederle's court, stipulations of 98 pages were used identifying documents, the authenticity of which was not disputed.[16]

One of the principal reasons for the comparatively slow spread of the use of conferences procedure is found in misunderstanding on the part of lawyers and judges of its true character and its possibilities of usefulness. Not long ago the writer heard a distinguished lawyer condemn the use of pre-trial conferences in rather unmeasured terms because (so he said) they are used to force settlements. Yet he had never attended a pre-trial hearing in the courts which he criticised for using the procedure. There may be an occasional judge who is over-impressed with the advisability of ending civil disputes without trying them and who may make it difficult for lawyers who refuse in pre-trial, to accept the terms of settlement which he suggests. But these instances reflect not on the conference system but on the judges who use such methods.

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14. Letter to writer, January, 1952.

15. 61 F. Supp. 805 (E.D. Mich. 1945).

16. See also United States v. Certain Parcels of Land, 63 F. Supp. 175, 187 (S.D. Cal. 1945); Volk v. Paramount Pictures, 86 U.S.P.Q. 201 (D. Minn. 1950).

The public generally and litigants who seek the aid of the courts to obtain a quick disposition of their controversies are becoming acquainted with the conference system and many find difficulty in seeing why their cases cannot be disposed of in the quiet of a conference between counsel and a judge of the court without the use of rules of evidence and the formal methods of a trial; and why also if their opponent seeks to use the facilities of the court for delay, expense and embarrassment, he should not be compelled to attend such conference and also to stop such tactics and to cooperate in reasonable measures to save time and expense.

If those who are critical of conference procedure could attend the county court or the superior court in New Jersey on one of the days devoted to pre-trial hearings, they would be impressed with the dignity of the proceeding, the cooperation of the bar and the lack of effort on the part of the judges to bring about settlement except with the cooperation of counsel. In these hearings, the rules of evidence are not forgotten or disregarded. They are used only when necessary to elicit the true facts. Their use for other purposes is not permitted.

If these same persons were to attend hearings in open court in King's County in New York, the Supreme Court in which jury tort cases are called with the object of settling them or sending them to a lower court if the amount involved is small, they would appreciate the common sense of the process, for most of the cases called, if tried, would be disposed of for sums too small to justify the use of the complicated machinery of a jury court, a fact which is realized by both court and counsel. The judges of these courts settle from 30 to 50% of such cases in these hearings.[17]

There are two sides to a lawsuit. Usually one side is seeking a quick inexpensive decision of the issues. The other, in most instances, the defendant, may seek delay and use delay and expensive procedures to wear out his opponent in the hope of facilitating a favorable settlement. The rules of evidence play into the latter's hands. Conference procedure can be used to prevent him from misusing the court's rules and facilities.

The business world has learned to dispose of many claims and disputes without rules of evidence. In 1950 between $7,000,000 and $7,500,000 of claims on fire insurance policies were settled without litigation. About 150,000 claims arose out of the storm of November 25, 1950 in the northeastern states and practically all of them were settled without resort to the courts.

Perhaps the most serious error of bench and bar in the past many years has been the attempt to make court procedure an exact science, to force litigants

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17. The dissenting opinion of Judge Cardozo in Graf v. Hope Bldg. Corp., 254 N.Y. 1, 7, 171 N.E. 884, 886 (1930), in which Judges Lehman and Kellogg concurred, is of interest in this connection.

to conform to rules rather than to use the rules to meet human needs; to put form above substance; the system above the service it can render. We must have rules but by this time we ought to use them more wisely and mercifully. Perhaps pre-trial has a contribution to make to this end.

In most of our civil litigation, the rules of evidence are not used. Particularly is this true in the run-of-the-mine cases in our cities, most of which do not involve more than $1000. In most courts not over 10% of all civil cases are even tried or such rules used. Only a very small proportion of commercial disputes reach the courts, due largely to the feeling in the business world that there are better ways of reaching a decision of such disputes than by trial under these rules.

It is now clear that by use of conferences between the court and counsel, the parties to such disputes can have the aid of trained judges in disposing of their cases without the use of these rules; and incidentally as taxpayers they are entitled to such court facilities if they so desire, and the courts should furnish them. The courts were made for man, not man for the courts.

If it were possible by use of conference procedure to dispose of most of the smaller cases without trial, the courts would have time to try the cases that must be tried without haste or pressure using these rules where they are needed to elicit the necessary facts.

Judge Paul W. Alexander of the Domestic Relations Court in Toledo, Ohio, recently wrote in The New York Times Supplement of a plan for handling divorce problems which is sponsored by the American Bar Association.[18] He speaks of it as "a healing process." He says that many husbands and wives who seek divorce are heartsick over their failure to agree and adds that: "In this upset state they turn to the law for help. But the ponderous, judgmental, heavy-handed law gives them not help—but hell. . . . As if they had not had enough bickering, and battling, the law intensifies their antagonism. . . . We lawyers call this 'adversary litigation.' "[19]

Much of the "hell" in litigation ean be caused by the rules of evidence, for under the adversary system, they can be used by a vindictive opponent to create expense, delay, bitterness, hardship and disrespect for the courts—for the law itself.

Is it too much to hope that our judges may find satisfaction in the use of their power and influence to make much of our civil litigation "a healing process"?

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18. Alexander, *Divorce Without "Guilt" or "Sin,"* N.Y. Times Mag., July 1, 1951, p. 14.
19. *Id.* at 14.