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Procedure--Pre-Trial Conference

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The most dangerous disease prevalent among educated individuals is the lack of the drive to think.

Revolutions begin and reach their successful culmination because there are a sufficient number of persons who feel the spirit of freedom within them, and have the urge to fulfill that feeling regardless of personal hazard. Constitutions, which stand for centuries as the guides of millions, are the products of the thinking that men do in an effort to create workable codes by which all men, who come under the governance of such instruments may be assured of what is called "natural justice." Justice may be dealt swiftly or slowly. But though an honest attempt may be made to mete out justice, if the process is slow where speed is necessary, then no justice can be realized. In our society justice can be said to exist only when in every case the "golden mean" is reached between the rights of society and the parties litigant.

Pre-trial hearing is not a dream of idealists, nor is it a subject in which a technicality of law with diverging theories may cause classroom argument. It is a practical subject which affects directly the court, the attorney, and, above all, the litigant.

Simply stated, the rule of pre-trial conference (hearing), whether by court rule or by statutory provision, provides for a hearing at the discretion of the court (in some jurisdictions at the discretion of either litigant, also) a reasonable time previous to the actual trial of the case. At such hearing preliminary motions are allowed, pleadings are examined for possible necessary amendments, admissions and stipulations are sought, and the actual settlement of the case without trial is often suggested. Summary judgment is rendered where appropriate. At the conclusion of pre-trial an order specifying the results of the hearing is drawn by the court, which order precludes further examination of the same questions except where to so hold would work injustice. In a few jurisdictions a special pre-trial judge is assigned.

Pre-trial conference has no birth date; it was simply found one day as part of pre-trial procedure. Its recorded history goes back about a century to 1831 when an attempt to utilize a primitive pre-trial hearing seems to have been made on a limited scale in England. By statute the court could order the third party claimant, in an original two-party suit over property, to appear and state the nature and particulars of his claim, and the court would then hear the allegations of the rival claimants and frame the issues between them before proceeding to the trial. Here, for the first time, we have the plaintiff, the defendant, and the court preparing a case for the trial. Later, in 1868, the parliamentary revision of the Practice Court of Sessions in Scotland provided for hearing before trial and submission of issues to the judge to determine whether proof should

be allowed, and if so, how it should be taken. A somewhat similar procedure later was introduced in England, whereby a master heard the summons for directions, and held an ex parte hearing at the request of either litigant. Pre-trial procedure under the English common-law system consisted only of pleadings. Whatever the rules of pleading could accomplish in the way of defining and restricting issues contributed to the efficiency of the trial. What could not be done by the rules of pleadings could not be done at all. This advancement, however, did not provide for the ascertainment of the soundness of the evidence to support the averment which met the pleading requirements. In England, pre-trial hearings have been handled largely through masters. The "new procedure" in England now confers on the masters the power which formerly had been conferred only on judges in certain types of cases. Similar procedures were adopted in France and Germany and some other European countries between the two World Wars.

United States Attempts Reform By Simplifying Pleadings

The New World, too, pioneered in the movement to reform judicial procedure about the middle of the last century, but did not follow the English plan. On the theory that it was the technicalities of pleading, not the inherent weakness due to the provisional ex parte character, which accounted for the ineffectiveness in laying a foundation for trial, pleadings here were simplified rather than supplemented. In 1912, New Jersey adopted a rule very similar to the original English rules which made the use of summons optional with the parties. It remained for Wayne County Circuit Court of Michigan to unsuspectingly change the sow's ear into a silk purse. Under Michigan practice, a bill to foreclose a mechanic's lien enabled all other lienors to intervene making the issues cumbersome and trials protracted. The judge in each case called the attorneys of the interested lienors into conference, and a preliminary hearing of such case was had at which all parties were invited to lay their cards upon the table. Surprisingly, through the cooperation of the attorneys, many cases were settled at this preliminary hearing, others dismissed, and in still others some of the liens were eliminated and the issues of fact with respect to the remaining liens were reduced and then referred to commissioners to take testimony.

Following this experience, the first general use of the pre-trial technique in

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3 Gershenson, Pre-Trial Procedure, 26 Wash. U. L. Q. 348 (1941).
9 Note, Pretrial Procedure Under the New Iowa Rules, 29 Iowa L. Rev. 82 (1943).
10 Address of Honorable Arthur Webster before the National Bar Ass'n (1941). Furnished by Hon. H. Church Ford, Judge, Federal District Court for the Eastern District of Kentucky.
the United States was in the Circuit Court of Wayne County, Michigan, in 1929. Judge Joseph A. Moynihan has been credited with having given birth to the idea and is recognized at this time as one of its outstanding advocates and authorities. The calendar was hopelessly behind when the pre-trial conference was adopted by the court (without the aid of legislation and without reference to the English plan) as an experimental device for expediting its work. Appearance was made compulsory. Though not modeled on the English plan, "it enjoys the chief advantages now found in the English system, namely, that it is compulsory, that it is employed after pleadings are closed, and that the hearing is held before one of the judges." However, fundamentally the principle was neither novel nor new to the experienced trial judge. "Old in substance and new in form," the only thing essentially new was the rule which vitalized the practice and provided a modern vehicle for its utilization, where necessitated by volume of business or class of cases. In 1931 the law calendar in Detroit was over forty months in arrears. In 1938 the calendar was exactly ten months behind, with no increase in number of judges. This remarkable feat of efficiency was, in addition to Judge Moynihan's efforts, the result of a simple revision of a court rule in 1931 by the supreme court of the state. The terms of this revision were informally agreed upon by the bar and the judicial council. It provided in part that, "it shall be the duty of the judges of such circuit courts to classify cases, and to make regulations governing the calendar and the calling and setting of cases for trial." (Italics writer)"

The extent of pre-trial hearing as part of the pre-trial procedure in the state of Michigan was demonstrated by the Eighth Annual Report of the Judicial Council of that state which showed that in 1935 there were 4,965 cases ready for trial, and of these 40% were finally disposed of on the pre-trial hearing without trial. In 1936, out of 5,884 cases 49%, and in 1937, out of 5,798 cases 55.1% were eliminated without trial at the pre-trial hearing. The last check in Wayne County Circuit Court indicates that 75% of the litigation is disposed of within ninety days of the time that the same is at issue. From this speedy justice the only refuge some members of the bar could find was in the ancient cry of unconstitutionality. The pre-trial rule initiated by the court in the absence of legislative action was alleged to be unconstitutional, but the life of this needed rule was not to be cut short. The Supreme Court of Michigan declared in Konstantine v. City of Dearborn (1937) that pre-trial conference was legally established by rule of court by virtue of the inherent rule-making power of the

11 Note, Pretrial Procedure Under the New Iowa Rules, 29 Iowa L. Rev. 82 (1943).
12 Ballantrae, Address before Kentucky State Bar Ass'n, Proceedings Ky. State Bar Ass'n 81 (1941).
14 Ibid.
15 Murrah, Pre-Trial Procedure—Some Practical Considerations, 26 A.B.A.J. 592 (1940).
16 Note, Pre-Trial Hearings and the Assignment of Cases, 33 Ill. L. Rev. 699 (1939).
The trial judge’s refusal to permit an amendment to the pleadings where there had been a pre-trial hearing was held not to be an abuse of discretion. In another case, it is interesting to note that the Supreme Judicial Court of Massachusetts found no prejudicial error in the trial judge’s reading of the pre-trial report to the jury where the report contained an admission which bore directly upon the defendant’s liability.

The efficiency of the bench as a result of pre-trial hearing was recognized by the voters when in 1935 the entire slate of judges in Detroit came up for re-election at a time when the state had turned solidly Democratic. Of the eighteen judges, seventeen were Republican; nevertheless the voters returned almost the entire bench.

Not all who have eyes see the value in things; some see, and others merely gaze. Boston, Los Angeles, Cleveland and a few other cities followed the lead of Detroit. Boston modeled its system after the Detroit plan which worked miracles there. In 1937, the Superior Court in Suffolk County, Massachusetts (Boston) settled at the pre-trial call 1631 cases, sent 2921 to jury list, and made 1532 other dispositions; total dispositions 6084; percentage of total settled at pre-trial call, 26.7%. Even of the cases sent to the jury list, 1071 (or 34.2% of total) were settled before being sent to the trial session. While pre-trial cannot take credit for all settlements which occurred after pre-trial, without a doubt it had a great influence in bringing the parties together.

Federal Courts Adopt Rule 16, Thus Establishing Pre-Trial In The United States

The greatest impetus for pre-trial conference undoubtedly came from the inclusion of Rule 16 in the Federal Rules of Civil Procedure. The United States Supreme Court, exercising its delegated power in an effort to streamline the bogged-down vehicles of federal procedure, drafted Rule 16.

"Rule 16: Pre-trial Procedure; Formulating issues. In any action, the court may in its discretion direct the attorneys for the parties to appear before it for the conference to consider

1. The simplification of issues;
2. The necessity or desirability of amendments to the pleadings;
3. The possibility of obtaining admissions of facts and of documents which will avoid unnecessary proof;
4. The limitation of the number of expert witnesses;
5. The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
6. Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings.

Note, Pre-Trial Hearings and the Assignment of Cases, 33 Ill. L. Rev. 699, 704 (1939).
Note, Pre-Trial Hearings and the Assignment of Cases, 33 Ill. L. Rev. 699 (1939).
and the agreements made by the parties as to any of the matters considered; and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."

The most prevalent comment regarding Rule 16 is praise for its flexibility in leaving the use of pre-trial to the discretion of the individual court. So far as formally promulgated local rules of courts indicate, the District Courts of Colorado, District of Columbia, Southern District of New York, and Western District of Oklahoma make pre-trial compulsory in all cases. In most courts which have adopted formal rules on the subject, a pre-trial conference in a particular case is had only at the option of the judge or on motion of a party. The result is that in 25% of Federal District Courts pre-trial is an accepted part of the regular procedure and is used in practically every civil case. Of the ninety district courts only fifteen seldom use pre-trial. Federal Rule 16 made these reports possible: Western District of Oklahoma: "Out of 189 cases heard at pre-trial since Sept. 1939 in my court alone, approximately one-third have either been settled or have been so simplified that only a few hours were required for the argument of the question of law presented by the agreed facts." Results published by Judge Laws of the United States District Court for District of Columbia show that between October 1, 1939 and May 31, 1940, the jury calendar was accelerated eight months (from 23 to 15 months); for non-jury cases there was an acceleration of thirteen months (from 22 to 9 months). The increase in settlements in that specified period over the same preceding period amounted to substantially 505 cases. Judge Sweeney of the District Court of Massachusetts reports that of 318 cases pre-tried in a three-week period, 130 were disposed of; these comprised of 6 defaults or nonsuits, 29 dismissals, and 95 settlements. He estimated that an additional 15% of the remaining cases were settled before they reached trial.

Many States Follow Lead of Michigan and Federal Courts

Following the successful use of the pre-trial conference by the federal courts, many states either by court rule or statutory provisions appropriated the Detroit Court Rule or Federal Rule 16, or one of the local federal rules, or from all the precedents the features best suited for their local set-up. Thus, today we find that Alabama (court rule in equity cases), Arizona, Connecticut (court rule of the superior courts in the largest cities), Delaware, Indiana, Iowa, Montana, New...
Hampshire, New Mexico, North Dakota, Pennsylvania, Vermont, Washington, New Jersey, Missouri, Nebraska, Florida, California, Colorado, Illinois, Ohio, South Dakota, Texas, and Wisconsin utilize pre-trial hearings to advantage. Pre-trial made these reports possible: Jefferson County, Ohio: In 1940, when pre-trial was first used, there were 270 cases for consideration; 103 were either settled, judgments taken, or the matters dismissed; amendments to pleadings were granted in 60 cases; admissions were agreed upon in 14 cases; settlements were considered in 102; juries were waived in 12 cases; depositions found to be necessary in 10 cases. Pittsburgh: "we estimate that approximately 43\% per cent of all cases were terminated without trial during pre-trial period." The percentage of terminations increased as the weeks of pre-trial period passed on, beyond even the expectations of the most ardent believers in pre-trial. Wayne County Circuit Court, Michigan: "Juries are waived in 65\% of all law cases now tried in the Wayne County Circuit Court." These percentages and figures do not show the time saved in cases that went to trial after they were streamlined during pre-trial hearing.

It is always painful to be told that you are wrong. To have short-sightedness pointed out, even though politely, is especially intolerable to judges and attorneys in the business of caring for the rights of government, society, and litigants. Consequently, what is to follow may shock some, but public interest demands that it be said. [Encouragement in this respect came from Commissioner Clay of the Kentucky Court of Appeals, an ardent advocate of pre-trial conference.] The law is not a game; rather it is an arbitral process. It will never be perfect, because it is human. But the striving for that goal is part of the destiny of the courts and the bar. It does not require a legal background or legal experience to know that the attitude of the public towards the courts and the bar ranges from suspicion through vexation, indignation and distrust, to active hostility.

There is a definite need for a short cut to the simple truth which will lend itself to the proper administration of justice. The courts and bar must coordinate their efforts to remove the cause of any just criticism relating to procedure. Self-preservation seems to demand that. We need to do something about the congested dockets in order to increase the capacity of the courts to hear controversies, and thus to increase the confidence of the litigant in his ability to get speedy justice. We need to eliminate unnecessary days in court caused by unnecessary authentication of evidence and unnecessary expert and non-expert witnesses. Law suits should be stripped to essentials. Surprise, both as a weapon of attack and defence, should be eliminated so that the real issues will be tried. Thus the administration of justice would become a positive thing. It is urged that the
judiciary administer justice with all that the word, administer, implies. That
function of the judiciary cannot adequately be exercised by sitting on the bench
and watching justice float by. The age-old attitude of the courts that if the
case lacks substance the trial will disclose it is without merit in the light of
modern business efficiency. Judges should no longer be expected to sit as um-
pires totally unconcerned with anything but the admittance or rejection of evi-
dence on the points shown to be in dispute.

To quote John Locke, "New opinions are always suspected and usually op-
posed for no other reason than because they are not already common." It has
been noted that confidence is one of the prerequisites for acceptance. Although
pre-trial is not prevalent in Kentucky, as has been shown, it is not an infant
struggling for life; it is full grown. Trial and error are necessary in localities
where pre-trial is first used. There is much precedent as to its mechanics. The
procedure and the results are substantially the same whether used in federal
jurisdictions, in states where established by rule of court, or where established
by statute.

The advantages of pre-trial hearings are myriads. The more outstanding
advantages, some of which have been realized in other jurisdictions, are that it
(1) acquaints the judge with the facts and issues of the case by requiring parties
to file evidence with the judge in advance of pre-trial; (2) settles the question
of the court’s jurisdiction; (3) strips the case to its bare essentials by eliminat-
ing irrelevant material thus simplifying issues for the jury; (4) forces parties to state
their case in a manner not vague and ambiguous; (5) gets the case ready for
a speedy trial by stipulation of facts, stipulation of number of expert and non-
expert witnesses, use of witnesses only where parties are in bona fide disagree-
ment, stipulation of authenticity of evidence, limitation of issues to actual bona
fide controversy, amendment of pleadings to meet controversial issues as of pre-
trial, reference of issues to master (when appropriate) for findings to be used at
trial; (6) determines whether a jury will be needed and if not, saves the expense
of impaneling; (7) prevents a harassing party from demanding a jury to stall
off a just claim; (8) dismisses a case where no cause of action exists; (9) tends
to prevent law suits from being made the subject of a contest of wits between
counsel; (10) saves time for court, jury, attorneys, and witnesses; (11) saves
expense in case of appeal by curtailing the records; (12) reduces risk of error
by simplifying proceedings; (13) elevates the judicial process of our nation from
the traditional strategy of concealment and disguise to a business-like efficiency
in rendering justice; (14) makes estimation of when the case will be heard more
exact, so that attorneys do not have to be on call for days until the case comes
up; (15) strikes cases from the docket upon failure of either party to appear;
(16) forces attorneys to have the case prepared some time before actual trial,
instead of resorting to a last-minute rush which results in a haphazardly pre-
pared brief; (17) provides the defendant opportunity to concede liability, and if
he is unable to pay all at one time except under process of execution, the plaintiff
would be more likely to agree to an installment payment of the judgment, since
the plaintiff is saved the trial expense; (18) makes possible one of the most
important by-products of pre-trial hearings, the settlement of cases at pre-trial or
the laying of a foundation for settlement before the case reaches the trial date.

Quilan, Pre-Trial Procedure, 13 CONN. B. J. 233 (1939).
Judge: Good morning, gentlemen.

Attorneys: Good morning, Your Honor.

J: Well, let's see what you gentlemen have on my docket this morning. Oh yes. "Russell v. Smith, No. 6894." I see this suit is for damages. A canoe collision case.

Defendant's Attorney: A motorboat accident case, Your Honor.

Plaintiff's Attorney: Now, if that's the attitude!

J: Now, now, gentlemen; this is hardly the time and place for that. This is your first pre-trial conference, Mr. Palmer?

P: Yes, Your honor.

J: This is a negligence collision case and though from the pleadings there is some clue as to the real issues, I thought that it might be well to call this conference and determine what the genuine controversies as to issues and facts are, and possibly eliminate the necessity of making proof of matters not in controversy. As you know, this case comes up for trial in three weeks. The docket is only three months in arrears now.

D: I am glad you called it, Your Honor. I think we may be able to save time and expense for all of us if we can eliminate the necessity for the authentication of all evidence where there is no controversy, and also weed out all immaterial issues.

P: This is all new to me but it looks as though it has merit.

J: I presume, gentlemen, that the jurisdiction of the court is not disputed, parties being citizens of this state and subpoenaed according to law. Now about the pleadings. Your petition is based on several grounds, including the "family purpose" doctrine. Are all your specifications of negligence now contained in your pleadings?

P: Yes, Your Honor.

J: You don't expect to amend?

P: With Your Honor's permission I ask leave to amend for additional damages of $165.00 for dental expense.

J: Mr. Stanley, you have filed a general denial?

D: Yes, Your Honor.

J: Now, Mr. Stanley, just what is your specific defense? Let's all lay our cards on the table.

D: Well, Your Honor, first that defendant's son was not negligent, and secondly that the "family purpose" doctrine does not apply to motorboat cases. It is restricted to automobiles.

J: Have either of you gentlemen any cases to support your own theory on this matter?

P: I found no cases in this jurisdiction in point, Your Honor. Only automobile and truck cases.

D: Of all the jurisdictions that apply the "family purpose" doctrine only two had to decide the point in question as to whether the "family purpose" doctrine applies to motorboats and both held that the doctrine did not apply.

J: The issues on the pleadings are clear. We will consider that no further amendments are contemplated—that each of you is satisfied with the other's pleadings. You charge that defendant's son negligently ran into the canoe on July 4, 1948, on defendant's lake, on the Sunway Road, Woodford County, Kentucky, about the center midway through the passage connecting the two parts
of the lake; that the boats were traveling in opposite directions. Can you admit those facts, Mr. Palmer?

D: Judge, I can’t admit that the impact took place in the center of the passage; otherwise I think his statement is correct, as far as it goes.

J: Well, it’s agreed that the collision took place on date specified, half-way through the channel on defendant’s lake; that defendant’s son was operating the motorboat and that the canoe was traveling in the opposite direction.

Both: That will be agreeable.

J: Now about defendant being the owner of the motorboat, and the infancy of the son.

D: We admit those facts. The boy was born January 1, 1937.

J: Now about physical conditions.

P: It was a dry and clear day. The accident occurred at 8:00 a.m. The width of the channel is about 80 feet.

D: We will admit the channel width and time, but nothing else. Our witnesses say it was misty around the channel at that time.

J: Now about damages. Mr. Palmer, you claim $400.00 doctor’s bill, $700.00 hospital bill, $20,000.00 for loss of use of the right arm, $165.00 dental expense, and $900.00 loss of earnings during incapacity as the result of the accident. What about this, Mr. Stanley?

D: We admit the doctor bill, hospital bill, and dental bill. We also admit that the plaintiff’s weekly earnings were $90.00, but we can’t agree that he lost as much time as he claims. And certainly, we cannot agree on $20,000.00 permanent disability damages.

J: Now as to injuries.

D: We don’t think that plaintiff’s injuries are as claimed. We want an examination.

J: Can you agree on a physician?

Both: We think so, Your Honor.

J: Medical examination to be had within eight days, at time and place agreed upon by counsel. Plaintiff’s physician to be present if desired. Report to be furnished to plaintiff’s counsel and to the court at least four days before trial. Now is there any other point?

P: Is there to be a limitation on the number of expert witnesses who will testify as to the speed of the motorboat at time of the accident? I have three I wish to place on the stand.

D: I only have one.

J: Four witnesses will probably not take too much time. Finally, gentlemen, have you considered settling the case out of court?

Both: We cannot come to any satisfactory agreement on the permanent disability claim.

J: If that’s all, gentlemen, I’ll dictate to the reporter a memorandum of the conference and see if there are any corrections to be made. Nothing having been said about a jury, I assume that you desire one. (Dictating).
ORDER ON PRE-TRIAL CONFERENCE

On this date the plaintiff by his counsel, R. S. Palmer, and the defendant by his counsel, W. C. Stanley, met with the court in chambers for pre-trial conference on an action at law for personal injuries allegedly arising out of collision between a motorboat driven by defendant's infant son, and a canoe propelled by plaintiff. The pleadings set forth contentions to be relied upon by the parties except that plaintiff has leave of court to amend to include $165.00 dental expense.

It is agreed as follows:

1. Defendant's infant son, born January 1, 1937, was piloting his father's motorboat through the channel connecting parts of the lake on his property on Sunway Road, Woodford County, Kentucky, about half-way through the channel, at about 8:00 a.m., July 4, 1948. Plaintiff was in a canoe. The motorboat and canoe were traveling in opposite directions.

2. Defendant was the owner of the motorboat, and his infant son used said motorboat with his father's consent.

3. That channel is about 80 feet wide.

4. Plaintiff's dental bill was $165.00, doctor bill $400.00, and hospital bill $700.00.

5. Plaintiff's average weekly earnings were $90.00 before the collision.

6. Plaintiff is to submit to a medical examination by a physician to be agreed upon, such examination to be made not more than eight days from now and report to be turned over to plaintiff and court at least four days before trial. The plaintiff's physician may be present if desired.

J: Will you please read that back?
Reporter: (reads entire dictation).
J: Is that satisfactory?
P: I almost forgot. I should like to submit these photos of the channel where the accident occurred and of the canoe and the motorboat after the collision.

D: Granted, but not as evidence of the weather conditions.

J: (dictating). Insert as No. (7). Photos of channel, canoe and motorboat will be permitted as evidence at the trial without further authentication. Photos of channel are not to bind defendant as to weather conditions.

Very well, gentlemen, as soon as the reporter gets it typed I shall read it to you before signing it. Each of you will receive a copy. The case remains on the docket for trial as originally planned. I shall be thinking about the questions of law that your case presents in the meantime. Of course, you'll both be ready.

Both: Thank you again for assisting us in this matter, Your Honor.

ACCOUNTS OF PRE-TRIAL HEARINGS

Though the complete pre-trial proceeding is not recorded, there are numerous accounts by judges, attorneys, and other eye witnesses. In one instance the plaintiff claimed to be a citizen of Tennessee. The defendants, citizens of Texas, strenuously contended that the plaintiff was a citizen of Texas also. This pre-
sent a question of citizenship directly affecting the jurisdiction of the court. At pre-trial hearing it was proved that the plaintiff was a citizen of Texas. Therefore, the United States District Court had no jurisdiction. T. M. Kennerly, the pre-trial judge, writes, “But for the pre-trial hearing, the court would probably not have discovered this contest of jurisdiction until parties, their counsel, and witnesses had appeared for trial before a jury, involving large expense to litigants and expense to the government for jurors.” Another example is one which the author witnessed personally in the chambers of the Hon. H. Church Ford, Judge for the Eastern District of Kentucky (Lexington). The plaintiff, administratrix of the deceased, while a citizen of Kentucky qualified as suer, and later moved to Illinois. Pursuant to Kentucky law an order revoking the letters of administration of this foreign citizen as administratrix of property in Kentucky was submitted to the probate court. On the same day that the removal order was signed, the outgoing administratrix filed the present suit which was consolidated with an action by the heirs-at-law against a coal company alleging an unlawful removal of coal. At the pre-trial, the defendant pointed out that the outgoing administratrix should not be allowed to file an action on the date of her removal. The plaintiff moved the court for a continuance of the case on the pre-trial docket until a successor to the administratrix could be appointed and until he should have an opportunity to find authorities which he believed would make the successor’s appointment effective ab initio and would thus continue the court’s jurisdiction. All this took place in the judge’s chamber in about twenty minutes, without any witnesses or jury having to waste time listening to something which the court would have to decide alone. All of the pre-trial hearings on this particular day started within five minutes of the appointed time.

Thomas A. Ballantine, a Kentucky attorney, gives an account of a case which was dismissed for lack of a cause of action. The defendant correctly put in issue the existence of any cause. Under the facts admitted at the pre-trial hearing it was shown that there was no cause of action and so the judge dismissed the complaint sine die. The preview had demonstrated that the trial was not worth having, and each party received all that he would have received had there been an exhaustive trial. In addition, each litigant was saved the time, trouble and expense of a trial. However, in the absence of a pre-trial, whether a cause of action is presented by the plaintiff, or whether the defense thereto is fictitious is of no concern to the judge until trial. The courts too often have taken the attitude that its duty is only to try the case as presented by the parties.

The following noteworthy case illustrates a method of preparing for trial. The plaintiff, a trucking contractor, sued on a warranty arising out of the sale of 277 tires, asking five thousand dollars damages. The tires were stored sixty-five miles away. At the pre-trial, by agreement, the judge picked one of six experts nominated by the litigants to travel to the place where the tires were stored and to examine each one individually. His report showed that the plaintiff was entitled to approximately three hundred dollars. The arbitrator, oddly enough, was one of the three nominated by the plaintiff. At the trial, judgment was rendered in accordance with the arbitrator’s report, fully given on the stand. This case was tried and decided in about two hours. “If the court had listened

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51 Ballantine, Address before Kentucky State Bar Ass’n, Proceedings Ky. State Bar Ass’n 81, 85 (1941).
to expert testimony on either side and had each expert witness testified as to
each of the 277 tires, it probably would have required two or three days to have
tried the case and from that maze of conflicting testimony the court would in
some way have arrived at a judgment.""}

Judge Moynihan states that in a Detroit case in which there was a claim of
some seven hundred fifty thousand dollars as damages sustained by reason of
an alleged construction of a sewer, the court was able to eliminate expert testi-
mony of several engineers on both sides by suggesting that each side appoint an
engineer to serve virtually as a friend of the court in informing the court on the
questions of engineering science which were at issue. "The result was that the
two engineers, in time exclusively after regular hours, made up a record in a
total of three hours, in an issue which otherwise would have probably required
some three weeks upward to prepare and present in the usual form of intro-
duction.""

In Burton v. Weyerhaeuser Timber Co. the plaintiff alleged that he was
injured by muriatic acid burns while in the employ of the defendant. At the
pre-trial hearing the defendant demed that the plaintiff was injured by muriatic
acid as alleged. At the trial, defendant submitted evidence that muriatic acid
was not harmful when in contact with the hands for the time indicated by plain-
tiff, and that his burns were caused by sulphuric acid. In allowing a new trial
the court said: "I can sympathize with the desire of counsel, experienced in the
older forms of practice, to withhold disclosure of such dramatic issues until the
midst of the trial, but it must be made clear that surprise, both as a weapon of
attack and defense, is not to be tolerated under the new federal procedure."" In
almost all cases where pre-trial is held, surprise as a ground for new trial is
eliminated because each party is made fully aware of the position to be taken by
his adversary. It is not certain that the court may compel disclosure of evidence,
although Ex Parte Peterson indicates that the court has such inherent power.
Though it takes some of the drama out of the trial, the object of the trial is not
to entertain, but rather to arrive at a just solution of disputes. However, there is
no need to compel counsel to disclose the details of proof in any case in which
counsel prefers not to make such disclosure before trial, for the success of the
rule depends upon cooperation between court and counsel.

In another case which was three-cornered, the pre-trial judge saw that each
of the three judgment-proof litigants had suffered loss in an unsuccessful joint
venture, and that the most that any of the parties could get after several days
in court would be an empty moral victory. At his suggestion the case was
dismissed.

Most cases settled at pre-trial concern non-corporate litigants with not
more than two thousand dollars at stake. But reports show that occasionally
greater amounts are involved. A Detroit case involved a claim of fifteen thou-

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"Mulrah, Pre-Trial Procedure—Some Practical Considerations, 26 A.B.A.J. 592, 593 (1940).
"Ballantine, Address before Kentucky State Bar Ass'n, Proceedings KY. STATE
BAR ASS'N 81, 87 (1941).
"Id. at 573.
"253 U.S. 300 (1919).
sand dollars. At the suggestion of the pre-trial judge the parties agreed to a settlement for five thousand five hundred dollars after a two hour conference with the judge. The judge estimated it would have taken two weeks to have tried the case. A settlement agreement at the pre-trial stage is constituted a final disposition of the case by the entering of a consent judgment. There can, of course, be no appeal from a consent judgment.

**Use of Pre-Trial in Criminal Cases**

There have been experiments with criminal cases as well. A Kansas pre-trial disclosed an assault with a dangerous weapon. A jury was waived and trial was set for the following week in the county in which the altercation occurred, thus affording a saving of about three days of the court's time and also witnesses' fees and mileage. It was also disclosed that the injury grew out of a line fence boundary dispute, and trial to the judge permitted of a more satisfactory solution than would have been possible otherwise. Judge Grimson of North Dakota advocates pre-trial hearing of any and all criminal cases. He says that the defendant should be required to state his defense. Proper investigation following such disclosure results either in the defendant's pleading guilty or in abandonment of the prosecution. When insanity is alleged the pre-trial may obviate the need for trial.

Judge Paul C. Leahy of Delaware, in reference to pre-trial in criminal cases, said of a mail fraud conspiracy case involving seventeen defendants, that the case would have taken seven months to have tried since the exhibits alone numbered 6,700. He called the attorneys into his chamber for pre-trial. With the exception of about a dozen particular writings the parties agreed upon all matters of authenticity and materiality before the trial commenced. The point is, the trial was cut down to four months. The only judge or attorney that the writer has found who voiced his protest against pre-trial in criminal cases is Federal Judge Paul J. McCormick when in the Report of the Committee of Pre-Trial Procedure, September 15, 1948, page 9, he said: "I wish to go on record unqualifiedly as being opposed to pre-trial procedure in criminal cases in the federal courts."

**Pre-Trial in Kentucky**

Recently, the author canvassed circuit court judges in Kentucky and attorneys strategically located throughout the state on the use of pre-trial hearing. Only five per cent reported that pre-trial was used quite often. Six per cent reported that it was used only at the request of the parties. In view of the remarkable success of pre-trial where used in other states, it is disappointing to note that 89% of circuit courts do not use it at all. However, 84% expressed their desire to use pre-trial if it were established. In view of the successful record of pre-trial wherever used (Los Angeles is the only place where it has failed),

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47 Ibid.
42 Ibid.
40 Sunderland, Procedure For Pre-Trial Conference In Federal Courts, 28 J. AM. JUN. SOC'Y. 46 (1944).
52 Note, Trial; Pretrial Hearings, 30 CALIF. L. R. 212 (1942).
in view of the overwhelming majority of judges and attorneys in Kentucky who desire its establishment it is urgently recommended that Kentucky adopt a pre-trial rule. For the sake of uniformity, a general Pre-Trial Rule should be adopted by the Court of Appeals or by the General Assembly. The Kentucky courts have the inherent power to make such rules which in their judgment, may be necessary to facilitate the transactions of business.\(^{30}\)

It is recommended that in order to further promote and expand the use of pre-trial hearing that the following methods be adopted: (1) that there be appointed, preferably initiated by the local bar with the cooperation of the court, a pre-trial committee in each Circuit to foster a wider use of the pre-trial conference and to study the most efficient method of applying it; (2) that demonstrations of pre-trial conferences be conducted by the use of pre-trial clinics wherever and whenever feasible; (3) that the Court of Appeals adopt a general rule of pre-trial conference as a model, and urge every Circuit Court to make every effort in cooperation with the bar to adopt a local rule which will meet their needs more precisely, and make every effort to promote a wider and more effective use of this device. To inaugurate the procedure, there is needed a committee of lawyers, carefully chosen, who will cooperate with the court in preparing the necessary rules and in planning the means for making known generally the advantages of the proceeding to the bar, courts, and public-minded population through appropriate publication.

The pre-trial judge should be vested with power to impose necessary sanctions. For example, he should have complete control of both pre-trial and final trial calendars with power to dispose of motions lately filed, to enter summary judgments, to enter judgments by default or to dismiss for non-appearance, to bring litigants and witnesses to pre-trial sessions in exceptional cases where it apparently would be helpful, to obtain documents not voluntarily offered by counsel, and to recommend to the trial court that costs be assessed against counsel reluctant to cooperate.

Suggested Pre-Trial Rule for Kentucky Courts:

A. In any action, the court may, in its discretion, direct the attorneys for the parties and/or the parties themselves or any witnesses, to appear before it for conference (not less than one week and not more than three weeks before trial) to consider:

1. The simplification of issues (same as in Federal Rule 16);
2. The necessity or desirability of amendments to the pleadings (same as in Federal Rule 16);
3. The possibility of obtaining admissions of facts and of documents which will avoid unnecessary proof (same as in Federal Rule 16);
4. The limitation of the number of expert witnesses (same as in Federal Rule 16);
5. The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury (same as in Federal Rule 16);

(6) Dismissal for nonsuit default, or lack of cause of action;
(7) Summary judgment where warranted;
(8) Forcing parties to state their proposition in definite terms;
(9) Such other matters as may aid in the disposition of the action (same as in Federal Rule 16).

B. The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered. Such order shall limit the issues for trial to those not disposed of by admissions or agreements of counsel. Such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions. (Same as in Federal Rule 16).

C. At the discretion of the court a case shall be continued on the pre-trial docket until ready for trial.

A word of caution is that pre-trial hearing will not be successful if made mandatory in every case; its success is conditioned upon its being an instrument of convenience reserved for use at the discretion of the court whenever justice demands it.

To conclude when one first encounters the pre-trial hearing procedure its intrinsic worth is immediately apparent. A thorough study of the method, noting its ease of formulation, its simplicity of process (a normal fifteen-year-old can understand its function), and its astoundingly quick results, justly and legally arrived at, makes it apparent that pre-trial hearing is the greatest legal advance of the century. It is earnestly urged therefore, that judges and attorneys make an earnest effort to see pre-trial in operation, to study and to understand its function and value, for then assuredly they will find a method of procedure best suited to local conditions which will greatly enhance the prestige of the court and the bar in the eyes of the public and will strengthen the confidence of the people in their legal system.

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