Conciliation as a Function of the Judge

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CONCILIATION AS A FUNCTION OF THE JUDGE

Our courts are congested, and to such an extent is justice delayed that it is often denied. This is due to several reasons, some of which have been subjects for frequent discussion. Notice pleading, declaratory judgments, rules of courts, small claims courts, unified courts, and other matters of evidence and pleading are reforms accomplished or proposed. All these are of vital importance, but generally they deal with means of expediting litigation or securing a greater measure of justice therein. There is a coordinate subject of equal worth. It deals not with better conduct of trials, but the avoidance of trials. This subject has received some attention but not that study its importance warrants.

In general, settlement of disputes may be aided in two ways; either in the regularly constituted courts, or separate tribunals created for that purpose. These conciliation tribunals have been established in Topeka, Leavenworth, Kansas City, Minneapolis and New York City. North Dakota and Iowa have passed statutes of state wide application. All these deal usually with small claims and so far as the conciliation feature is concerned, have not been notably successful, but this failure is due probably to the fact that conciliation has been entrusted to special tribunals "limited to this one method,"—to those inferior courts in which the people rightly or wrongly repose little confidence as compared with the regularly constituted and familiar courts of justice.

By conciliation then, is meant the reconciliation of parties to litigation and settlement of their disputes, as distinguished from industrial conciliation thru arbiters and boards for that purpose. Likewise, conciliation as a method of settling private controversy, otherwise adjudicated by litigation, should be con-

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2See Reginald Heber Smith's Article in Legal Aid Review, Apr. 1924.
3Cit. at note 2.
stantly distinguished from conciliation tribunals and small claims courts.⁴

The beneficial results to flow from the general adoption of a serious attempt at conciliation, are apparent, and are discussed in the reference.⁵ The opinion of those who have given thought to the matter, is expressed in the following sentence by Judge Parry: "In all legal reforms, I place in the forefront, conciliation."⁶

It has been pointed out that the practical way to forward the cause of conciliation is to entrust it to the established courts and to encourage its greater realization.⁷ Believing this to be the correct path to follow, it is worthwhile to fix the fact that the courts do have the power to suggest and supervise conciliation, lest, as in the case of the rule making power, the lack of exercise of the power generally serve as an excuse for going to the legislature for an authority already possessed by the courts.

It is a matter of common knowledge that judges in England and the United States employ their good offices, upon some occasions in effecting settlements.⁸ Necessarily, these instances are seldom of record, but every lawyer knows the fact from his own experience. It seems then not unreasonable to suppose that it is an inherent power of the court to encourage, suggest, and if necessary, supervise conciliation.⁹

This conclusion is in agreement with the meager authority to be found in the present day decisions. Indeed, a note in 2 A. L. R. 1068, says that there appears to be only one case which passes directly upon the question. The reference is to Harrington v. Boston Elevated Railway ¹⁰ in which it appeared that the presiding judge, during the trial below, suggested compromise to the defendant's counsel, even naming the amount defendant should be willing to pay. It was urged on appeal that this showed partiality and violated "the right of every citizen to be tried by judges as free, impartial and independent as the lot

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⁴ 22 Legal Aid Review, 21 Apr. 1924.
⁵ Note 1, supra.
⁶ Law and the Poor, (p. 187) by E. A. Parry.
⁷ Citation at note 2.
⁸ See the London Times, Nov. 16, 1927, p. 5, for a case where the settlement of an important libel case was due to the efforts of the presiding judge.
⁹ "Boni judicis est litea dirimere." It is a function of a good judge to adjust disputes. 4 Coke 15b; 5 Coke 31a.
¹⁰ 229 Mass. 421.
of humanity will admit," as provided by Art. 29 of Declaration of Rights. In response to the foregoing, Rugg, C. J., said "The conduct of the presiding judge did not violate the justly strict and lofty standard of our Constitution. It is not necessarily a transgression of judicial propriety to suggest to parties in appropriate instances the wisdom of a compromise of conflicting contentions. It is a suggestion which always should be ventured from the bench with caution." In the opinion, the court refers to In re Nevitt, in which a Federal judge had for several years tried to "persuade the parties to the controversy to compromise the litigation." Later, he rendered a decision in the cause, and his conduct was urged as a disqualification, in answer to which the Federal Court said that the judge's "earnest and systematic endeavor to effect a compromise of this controversy bespeaks for him emphatic commendation." Commenting upon this in the Harrington case, supra, the court said "this laudation goes rather far. But it shows that an intimation as to the practical sagacity of harmonizing adjustable differences is not of itself an impairment of the judicial function."

There should be added to the above cases that of Atherton v. Atherton. There, the trial judge, during the progress of a divorce action, urged the parties in presence of their counsel, to settle their differences. On appeal, in answer to complaint of this conduct, the court said "We find nothing in the case which aids the contention of the appellant that the learned trial judge committed any indiscretion or violated any rule of law."

Of course, it is not to be contended that one in a judicial position should so far forsake his position as to become an active agent for settlement as in Livermore v. Bainbridge, where a referee went to the office of counsel for one of the parties and there had conversation as to counsel's client paying a certain sum in settlement, the referee suggesting that otherwise, if it were necessary to render judgment against the client, it might be for a large amount. The court held such negotiation improper but suggested "It may be commendable in referee or court, in presence of both parties, to recommend and urge a settlement between themselves of their litigation."

Looking at the legal history of the subject, there is seen a

11 54 C. C. A. 622.
12 82 Hun 179, 193.
13 Abbott's Practice Reports N. S. 227, 231.
marked illustration of the court's control over amicable adjustment of litigation, in the old common-law fine. Blackstone says "a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious by leave of the King or his justices, whereby the lands in question become, or are acknowledged to be the right of the parties." After the action was brought, there was the *licentia concordandi* (leave of court to compose the suit), and following this, the agreement itself, all being under close supervision of the court.

Nor was this action resulting in a fine, or "acknowledgement of feoffment on record" (as Blackstone terms it), solitary as illustrating concord or settlement upon permission of and under the eye of the court: it was rather a development along one line of a general situation which may be seen in Glanville in the following excerpt,

"It happens indeed many times that suits raised in the court of the King are terminated by an amicable composition and a final concord, with the consent however, and licence of the lord the King or of his justices, whatever may be the subject of the plea, whether concerning land or any other thing." Holdsworth shows that "In some of the earlier precedents, it is difficult to distinguish a fine in the strict sense and a composition dealing with many matters settled by the leave and with the sanction of the court;} and also that "In the case of both land and chattels, difficult cases could be settled, and complicated dealings were rendered possible, by a *finalis concordia*, or fine, in the royal courts."

"Compromising a suit without leave of the court is an offense to be punishable by amercements."

Throughout the Middle Ages, the justices exercise a certain supervision over the fines that are levied before them.

A writer in the English Historical Review expressed the opinion that "There is no evidence that any fines prior to the reign of John were anything more than the composition of

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14 Bk. II, 349.
15 Note 14, supra, et seq.
16 Glanville, Book Eighth ch. 1.
18 Ib. II. pp. 265-6 citing Bracton's Note Book, Cases 520, 546, 1834, 1867.
19 II Pollock & Maitland 98.
20 II Pollock & Maitland 99; III Holdsworth, 252-253.
genuine suits; it was only after they had become common that
the idea of using them as a means of securing permanent legal
evidence of the transference of property gradually grew up."

Even back in Anglo Saxon times there is evidence of these
compromises. Holdsworth writes "Perhaps in the accounts of
compromised or decided lawsuits, we can see the germ of what
will become, when the courts begin to keep records, the fine and
recovery of later law." 22

Cruise has it 23 "a fine was but a covenant of record
from whence it may be contended that the fines were at first
exactly similar to the agreements which in the time of the Anglo
Saxons were entered into at the county courts. But a fine is
distinguished from those agreements by two very material cir-
cumstances; first, nothing appears to have been paid for per-
mission to enter into such a contract and secondly, it was not
enrolled among the records of the court."

Henry Adams in Essays in Anglo-Saxon Law writes, p. 26,
"A very slight examination of the law cases will show how
rarely the parties were allowed to push their differences to a
final judgment. A compromise was always effected where com-
promise was possible."

Permission of the magistrate seems likewise to have been
necessary in the local courts. In the 15th century, an old record
reads, 24 "Also it is used before the law don on the ple declared
by the consent of the parties here they may accord, and also yf
they wyll co(n)tenew by lycence of the bailif and the court, and
then shall one of hem sey in thys maner 'Syres, leve for to
acorde; after they shall goo owt and make acorde betwene hem,
and peraventure one of hem shall wage amends; after that the
parties shall come in, ande one of hem shall sey thus 'Syrs T.
de F. and W. de R. shall yeve to T. de F. ii s. or more or lesse, for
to have hys love, and he shall foryeve all manner contractes
betwene them than for to pay ii s at swych a day; and W. de R.
shall withdrawe the court."

And "It is our wont in every plea to give a love-day at the
prayer of the parties." 25

22 II Holdsworth 78, citing Essays in Anglo Saxon Law, App. nos. 2,
3, 6, 7, 10, 30. See also Bigelow's Placita Anglo-Normannica p. 265.
23 Cruise, Fines p. 15. (3rd Ed.)
24 Selden Society, Borough Customs, Vol. 18, pp. 89-90, quoting Lydd
cap. 49, and Romney, c. 38.
25 Ibid p. 90, quoting Fordwich cap. 76.
In discussing the origin of trespass, Professor George E. Woodbine says "Though the idea of an action for the recovery of damages was seemingly foreign to the legal consciousness of the Anglo Saxon race, another idea took its place, and through a different procedure, produced the same general result. This was the compromise, one of the most fundamental ideas in Anglo Saxon law and procedure as we know it." And it is his opinion that the method of compromise was the "habitual way of settling disputes well into the 13th century," both in civil and criminal actions. In an illustrative case quoted in the article above, the compromise began "By the King's license it is covenanted etc.," and concluded "And Thomas gives the King forty marks for the license to compromise." 

It is the opinion of the above named writer, that this case, among others, shows that it was taken for granted that the parties would need counsel of the judges in arriving at an agreement and that it was their duty to see that agreements were not made without their consent, and that the royal revenue was increased by the money payment made for the permission to agree.

The cases set out in Healey's Somersetshire Pleas, Maitland's Select Pleas of the Crown, Baildon's Select Civil Pleas and Bigelow's Placita Anglo Normannica, together with the other authorities, supra, make it certain that in Anglo Saxon and Norman times, not only were there frequent compromises between the parties, but these compromises were authorized by and under the control of the judges.

The reason why compromises were so common in these early times, is no doubt found in the fact that parties wished to avoid the expense, the uncertainty and delay which came to be the inevitable consequences of litigation in the crude system which prevailed. As time went on, and the system increased in efficiency it was necessary to use compromises in smaller measure.

In our own country, the common law and the judicial system transplanted in part from England served fairly well the needs of a pioneer community with its small amount of litiga-
tion. The local court sessions were social and educational events, and tho, even then, the litigants had done well to compose their differences and avoid legal strife, the volume of business was not such that it was necessary to find some means of lessening it to avoid delay, denial of justice and unbearable expense, a situation that confronts us today. So, then, as the crude legal system of our Anglo Saxon forefathers necessitated employment of conciliation, so now the enormous increase in the amount of litigation and the change in the character of this legal business impel us to seek some method of decreasing the amount of litigation and expediting that litigation when carried to its conclusion. Conciliation should prove a worthy complement to procedural reforms necessary to bring about expedition required in our complex industrial communities. In this connection, particularly as bearing upon the rule making power, there is a significant statement by Dean Pound in an address before the American Bar Association. "Apprentice-trained, rule-of-thumb-trained lawyers have been unable to think of administration of justice without a hypertrophy of procedure. But we cannot go on in the urban industrial America of today under the heavy weight of procedural detail with which our courts are struggling. If we demand that our courts do things we must give them power to do things—we must set them free to do things. We must hold them to the substantive law indeed. But we must not make the substantive law nugatory by loading the courts with procedural requirements. We must cease to prescribe the details of procedure by legislation."

Courts once had the rule making power, and it is their own fault if thru lack of use, they may be considered to have lost it, and must now look to the legislature. Likewise with the power of the judges to effect conciliation, they have had such power and have used it—they still use it on occasion, but there seems to be no conscious effort of active participation on their part such as their power and their duty warrant. Let the judges not wait for the legislature either to set up tribunals of conciliation—of doubtful efficacy here in the United States;—or to grant them in general terms the power they already have of becoming an active force in conciliation. In other words it is not necessary for the legislature to tell the judges: "Bestir

yourselves to bring about settlements wherever possible. At least be wide awake to occasions when you may suggest amicable adjustments. They already possess this power, but the duty rests lightly on some magistrates. We know, as before suggested, that judges do upon occasion use their good offices to bring causes to an amicable conclusion, but it is urged that it become a uniform course of action, rather than an occasional suggestion. Compulsion, of course would be out of the question, but aid and counsel and sympathetic understanding on the part of the magistrate would do wonders, for by the virtue of his office, suggestions from him often would lead to a satisfactory amicable conclusion, when advice from friends or counsel would go unheeded.

**Conciliation in Europe:**

In Denmark, conciliation has been for several centuries a part of the judicial machinery, and in one form or another has been marvelously successful down to the present time. It is effective both by commissions for that purpose, and thru mediation of the court with emphasis recently on the latter.²²

A similar situation is found in Norway where again the recent trend is toward judicial conciliation as distinguished from that performed by commissions. It was the opinion of Attorney General Getz of Norway that conciliation could best be submitted to judges in the ordinary courts of law.³³

In both Norway and Denmark the number of cases disposed of thru these peaceable efforts is almost incredible and the consequent saving in time and money incalculable.³⁴

In both of these countries, generally, a conciliation proceeding is a prerequisite before suit can be instituted.

By legislation in Sweden dating from the 17th century it is incumbent upon the judge, in both upper and lower courts, where both parties appear, to endeavor to effect a settlement.³⁵

In Germany, under the Code of 1877, a preliminary hearing for conciliation was not obligatory, except in matrimonial

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²³ Cit. at note 32, June, 1926.

²⁴ Cit. at notes 32 and 33.

causes, but under the Code of 1924, conciliation was adopted as a general measure for ordinary causes. In the collegial courts, the only provision is that in the preparatory proceeding, the president or officiating judge "shall at the outset, attempt to effect an amicable adjustment of the controversy," while in the Amtsgericht, a definite mode of procedure is established. In this court there must be a special conciliatory proceeding before the commencement of the action proper, except in certain specified cases and others which the court, in the exercise of its discretion, may exempt from the requirement. The procedural steps are:

1. Petition for conciliation;
2. Appointment by the court of a day for hearing in conciliation, notice of which must be served upon defendant;
3. Hearing by the court at time appointed, and discussion of the whole matter with the parties in an endeavor to bring about a settlement;
4. Entry of the settlement agreement effective as any other judgment, or the conciliation failing, the trial of the cause (on motion of either party) as any other contested cause. "If no such motion is made and the petition is not withdrawn the court grants a certificate evidencing the failure of conciliation, which enables the action to be brought afresh within one year without renewal of the conciliation proceeding." In the conciliation proceeding if there is default of appearance by both sides, the petition is treated as withdrawn, if on the part of one side only, the cause proceeds as in the ordinary case of default.

In Austria, too, in some courts there is provision for summons of defendant for reconciliation.

In France, the action proper must be preceded, in most cases, by a conciliation hearing before a judge de Paiv. The proceeding is begun by citation, unless the parties voluntarily appear. It is informal and the Justice is merely a mediator between the parties, tho he may put questions and elicit necessary explanations. At the end of the proceeding the Justice draws up a minute (proces verbal) recording the terms of the settlement if the conciliation was successful, and if not, then, recording the failure of the proceeding.

Of the tribunals of Italy, in which civil jurisdiction is

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"Ibid. pp. 622-623 citing Code of 1924 Z. P. O.
vested, one is called Conciliator, who resembles the French Justice of the Peace. "The Italian law, unlike the French, has no general requirement of resort to conciliation proceedings as a precondition of suit. The Conciliator however is charged with the duty of attempting to effect conciliation of any controversy admitting of settlement, whenever requested by the party." The Conciliator also acts as judge in certain small cases.\textsuperscript{40}

It is the duty of the Praetor (whose jurisdiction is different from that of the Conciliator) to attempt a conciliation, and failing, then to try the case.\textsuperscript{41} This resembles the procedure before the Conciliator who, before assuming to act in a judicial capacity, hears the parties as a conciliator and attempts to compose their differences.\textsuperscript{42}

The foregoing brief references to the status of conciliation in Europe indicate that it has there an important and apparently permanent place in the administration of justice. The trend is, in general, away from special conciliation tribunals to regularly established courts which try the cases in usual fashion if conciliation fails. As might be expected in such Code Countries, the matter is covered by statute.

**CONCLUSION**

What then of the proper method in the United States? First, should there be statutes upon the subject? We think not, and for the reason, as we have shown, that it is unnecessary, the power to act already lying with the judges.

On the other hand, if it were thought advisable to establish special conciliation tribunals or make conciliation a precondition of suit, legislation would be necessary but we doubt the advisability of either and we see therefore no necessity for legislation.\textsuperscript{43} Our judges already have the power to act whenever they deem it advisable. Let them do so. Many judges remonstrate that they do lend their aid whenever occasion offers. We venture to say, that, with few exceptions, they do little more than maintain a sympathetic attitude toward parties and their attorneys. They are passive and receptive. They do not initiate, and they are not

\textsuperscript{40} Ibid. 804-6.
\textsuperscript{41} Ibid. 804-6.
\textsuperscript{42} Ibid. 830.
active. This is the principal reason that more has not been accomplished in conciliation. It is not a matter of power. It is a matter of mental attitude. Instead of mere casual assent on the part of the judge, there should be a conscious definite policy to bring about conciliation. Both counsel and parties would in most instances welcome the good offices of the judge. Of course, there should be no compulsion or intermeddling from the bench, nor need we fear this. Tact and discretion are necessary but no more so than in many other relations of the court.

Each judge, for himself, knows best the manner and method of conciliation. Some have suggested certain days when particular attention would be paid to it in addition to lending aid whenever occasion offered. In those courts where the number of judges is large enough to permit a choice, such work might well fall more heavily upon those best adapted for it.

These conclusions are borne out by several years experience in practice, and in the main, by the views contained in many letters from trial judges in all parts of the United States.

Experience and investigation permit the conservative statement that some judges consistently do all in their power to bring about conciliation and others do very little, though practically all are acquiescent and sympathetic if settlement is suggested by counsel. But on the whole, little is done in comparison with possible accomplishment.

The widespread use of conciliation in foreign countries for hundreds of years, and the persistent attempts in one form or another in the United States show that it is a matter to be taken care of. The demand will be met either by independent tribunals or by the more extended and consistent employment of the method of conciliation by the judges of our present courts. The power is theirs. The opportunity is theirs.

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“See statement of Justice Edgar J. Lauer in Annals of American Academy of Political and Social Science, Vol. 136, p. 57, Mch. 1928, to the effect that “153 cases out of 272 were settled and 109 cases were tried. In addition to these, 212 cases were settled by the attorneys or parties without the aid of the judges.”