PRE-TRIAL IN THE UNITED STATES

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The settlement of civil disputes in a satisfactory manner is a necessary part of the economic life of all civilized communities. The procedure for the settlement of disputes can no more remain static than any other branch of the life of the community but must be adapted or altered from time to time to meet changing conditions. (The London Chamber of Commerce: Report on "Expense of Litigation" (1930) p. 1).

Pre-trial is a colloquial name for one or more conferences held prior to the trial of a case pending in a court, attended by a judge of the court, by counsel for the interested parties and occasionally also by the litigants themselves. The purpose of such conferences is to simplify the trial and to aid in the disposition of the action. Undoubtedly courts possess an "inherent power to provide themselves with appropriate instruments required for the performance of their duties".[1] Nevertheless, in various jurisdictions in the United States, statutes have been passed authorizing such conferences. In other jurisdictions, where courts possess rule-making power, pre-trial conferences have been authorized by court rule.

A statute of Illinois, passed in 1941, is an illustration of such legislation, while Rule 16 of the Rules of the Supreme Court of the United States regulating procedure in the Federal Courts is an example of a court rule of this sort. The Illinois statute reads: "Subject to such rules as the Supreme Court may promulgate, the court in any action may, in its discretion, direct the attorneys for the parties to appear before it for a pre-trial conference to consider any matter as may aid in the disposition of the action".[2]

The rule of the Supreme Court of the United States (September 16th, 1938) reads as follows:

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 a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to pleadings;

(3) The possibility of obtaining admissions of fact 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;

[1] Brandeis J., *Ex parte Peterson*, 253 U.S. 300 (1919).
[2] Ill. Rev. Stat. 1941, c. 110, s. 182(a).

(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, and the agreements made by the parties as to any of the matters considered, and which limits the issue 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.

This rule applies only to the Federal District Courts, which function in all of the states, in which courts there are, at the moment, some 185 judges. These are the courts of original jurisdiction in the Federal system.

The wide scope of the pre-trial conference may be seen from this Illinois statute which authorizes consideration at the conference of "any matter as may aid in the disposition of the action" and from the Supreme Court rule which authorizes consideration of "matters as may aid in the disposition of the action".

In the past eighteen years, or thereabouts, different types of pre-trial have developed, such as the following:

1. Where the court holds such conferences only when counsel request them and confines the conference to voluntary agreements or stipulations by counsel regarding documentary exhibits and other evidence. Occasionally settlements result from such conferences.

2. Where the court orders pre-trial in selected cases but at the conference makes little or no effort to do more than approve and record stipulations and agreements reached by counsel voluntarily and to obtain estimates of the probable length of the trial for calendar or docket purposes.

3. Where the court orders pre-trail, as a matter of course, in practically all pending cases, and the judge attending the conference examines the pleadings, discusses the issues with counsel, seeks to obtain stipulations reducing the number of witnesses and exhibits, removes non-essential issues, and explores and discusses the possibility of settlement.

In most jurisdictions where pre-trial is used the conferences are held about two to three weeks before the trial.

The theory of pre-trial is so simple, and legal literature contains so much regarding it, that little is likely to be gained by further discussion of the theory of it here. There seems to be,

however, a dearth of information as to the methods employed in using it and the practical results obtained from such use. Perhaps, therefore, it will be more helpful to offer statements from judges who use it, giving their impressions of it and their experience with it, than to add to the theoretical discussions that have already appeared.

Hon. Harry M. Fisher, one of the Judges of the Circuit Court of Cook County, Chicago, Illinois, describes pre-trial in his court thus:

> "The conferences are informal. The parties sit around the judge's desk in chambers; they may even smoke, if they desire. The plaintiff's counsel makes a brief statement of the nature of his case and the theory or theories upon which he predicates his claim. The defendant's counsel then states the nature of his defense. A discussion follows in which the judge participates quite freely. He often requires the production of exhibits, including photographs, X-rays, and, where those are available, doctors' and hospital records and bills. Police reports of accidents, writings, deeds, discovery depositions, and witnesses' statements are examined by the judge without regard to their competency or incompetency as evidence. Often, upon request of a party, the judge indicates his views upon the admissibility in evidence of a particular exhibit. If no final disposition of the case is made, the court certifies all matters agreed upon in order to obviate as much as possible the necessity of making preliminary or merely formal proof. But such certifications are exceedingly rare. The great majority of lawyers are cooperative and rely upon the promises of their adversaries with reference to the elimination of proof. But by far the most gratifying and valuable gains from these conferences are derived from the amazing volume of final dispositions brought about by amicable settlements."[3]

The Circuit Court of Michigan for the Third Circuit, located in Detroit, began use of pre-trial in 1929. Much has been written of its experience with this procedure. The advice of Judge Ira W. Jayne, Chief Judge of this court, and of Judge Joseph A. Moynihan has been sought by many as to the pre-trial methods used in their court.

In an address before the conference of Federal Judges of the Sixth Circuit, in 1941, Judge Arthur Webster of this court outlined its procedure thus:

[3] Judicial Mediation: How It Works Through Pre-Trial Conference, 10 Univ. Chic. Law Rev. 453.

" . . . Instead of holding the pre-trial as a formal court matter, in each separate case, the attorneys with the judge repair to the judge's chambers, where a very informal discussion between the court and the attorneys takes place. There is no objection to clients being present though they seldom are. The pleadings are examined and a brief history of the case obtained. The first endeavor on the part of the judge is to ascertain whether any attempt at settlement has been made; whether in the opinion of the attorneys it may not be possible to reach a settlement. This phase of the case is discussed at length. Many of these cases are damage cases, and it is quite likely, as preliminary to a possibility of settlement, that a medical examination may be ordered. In such an event, the case is adjourned for the medical examination and set for a future date to take up the further discussion of a settlement after the medical examination. If it is determined that the possibility of settlement is remote, then the next question presented is whether the pleadings are in order. We have stressed the necessity for having all pleadings in their final form before they leave the Pre-Trial Division. If attorneys on both sides express themselves as satisfied with their pleadings, then they must abide by this decision at the time of trial, except in very rare instances where something has occurred subsequent to the pre-trial hearing. Also, by local rule it is provided that 'all depositions shall be taken and filed before the case is passed from the Pre-Trial Docket.'

"The pleadings having been found in order, the court then endeavors to get from counsel any concessions or admissions which will avoid the necessity of proof at the time of trial . . . All of this is calculated to save time of the court and jury at the trial. Finally, it has been my practice in the last eight or nine months to attempt to dictate to the stenographer a concise statement of the issues involved in the trial of the case. After listening informally to counsel on both sides, the judge dictates this statement in the presence of counsel, who correct the statement as it is being made, if necessary; and at the conclusion, the attorneys are asked to signify their approval or suggest any changes."

In this court, if at the pre-trial stage the defendant's case seems hopeless, legally, and he is justifiably defending to gain time, as in the case of a small merchant whom a judgment would put out of business, the judge suggests a consent judgment entered

on defendant's agreement to make periodic payments into court. The case is then held on the pre-trial calendar and on the adjourned day the defendant appears, makes his payment and obtains further extension — a practice far more elastic than the statutory installment plan.

Reports of the court show the percentage of civil cases ready for trial which this court disposed of on the pre-trial hearing: 1939 — 57.6%, 1940 — 64.2%, 1941 — 54.3%, 1942 — 61.9%, 1943 — 52.3%; 5 year average — 58.1%.[4]

In 1946 this court actually tried only 649 law cases, while 754 were settled at the pre-trial hearing. On the chancery side 330 were tried and 5224 disposed of at pre-trial. The last figure reflects the increased number of divorce cases settled before trial. This is in addition to 8954 *pro confesso* divorce cases. The pre-trial work, on the law side, took the time of one judge; the chancery pre-trial took the time of four judges. This court disposed of 23,839 cases in 1946.

In *Burton* v. *Weyerhaeuser Timber Co.*,[5] Judge Claude McColloch, United States District Judge of Oregon, describes pre-trial as used in his court:

> "1. Parties are expected to disclose all legal and fact issues which they intend to raise at trial, save only such issues as may involve privilege or impeaching matter. As to these two exceptions disclosure may be made to the judge conducting the pre-trial hearing without disclosure to opposing counsel, and a ruling will be made on the exception claimed.
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> "2. The test to be applied on impeaching matter or any factual issue, which counsel feels should not be disclosed to his opponent in advance of trial, is the simple one — whether disclosure or non-disclosure will best promote the ends of justice. That is for the judge conducting the pre-trial hearing to determine.
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> "3. Pre-trial orders should be agreed on by counsel and presented to the court for signature and filing a reasonable time before trial. In the rare cases where counsel are unable to agree on the form of the pre-trial order, the court should be advised well before the trial date, and pre-trial orders representing the views of both sides submitted.
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> "4. At least one of the attorneys on each side appearing at pre-trial should also participate in the trial.

[4] 4 Fed. Rules Dec., 82.
[5] 1 Fed. Rules Dec., 571.

"5. 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 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 view of the known (and one of the primary) objectives of the New Rules of Civil Procedure, to eliminate surprise as a trial tactic, one can hardly imagine a greater breach of the spirit of the New Rules than to deny to an injured man the right to show by the doctor attending him the fullest circumstances of his case.

"Faithfully administered in spirit, as my senior colleague and I are endeavoring to administer them, the new rules outlaw the sporting theory of justice from Federal courts."

A statement of Judge Cornelius J. Harrington, of the Circuit Court of Cook County, Illinois, is of particular interest as it relates to negligence cases, which make up a very large percentage of all modern litigation:

"In the last court year which ended in July 1946, . . . approximately 600 cases were settled with amounts paid in tort and contract cases aggregating from $200.00 to $65,000.00. I would venture to say approximately $1,200,000.00 was paid in settlement of the 600 cases that were disposed of. Since September of 1946, . . . we have disposed of approximately 350 cases with settlements in excess of $500,000.00. . . .

"The procedure that is followed is to have the counsel, and the litigants in some instances, appear in my chambers and an informal discussion takes place between court and counsel. A memorandum . . . is required to be filled out by counsel for the plaintiff before the hearing. At the hearing I examine the pleadings and the police and accident prevention reports which are public records. I, also, examine the statements of witnesses which are submitted by both counsel and any other data either counsel wishes to submit. I do not disclose to either counsel what is contained in the file of the other. If it is a case that I conclude would go to a jury at the close of the plaintiff's case I so advise counsel and then request an expression from counsel for plaintiff as to the amount for which he would settle and adjust his case, and inquire if there were any offers of settlement prior to the court hearing. Then inquire of the defendant's counsel as to what figure he values the case.

"Any disclosure of evidence is made by counsel between themselves during the course of the hearing so that the hearings cannot be used as a basis of a 'fishing' expedition by either side. After a frank discussion by counsel as to the value of the case, I give expression as to what, in my judgment, the case should be settled for. I would say that in approximately 90% of the cases the counsel agree on a figure approximating the court's recommendation. The figure the court expresses is not compulsory and if counsel cannot agree then the case is reassigned to the head of the assignment division for an immediate jury trial.

"The cases assigned to me are all cases that are ready to go to jury courts for trial. The average personal injury case takes from two to five days to try with a jury. The jurors receive $5.00 a day each and striking an average of two days for each case for the 600 disposed of last year has effected a savings to the County of approximately $72,000.00. In addition to the foregoing savings, there is, also, a savings effected by the elimination of medical testimony; the time of witnesses and counsel, as well as the time of the court; and the cost and expenses necessarily entailed in prolonged jury trials.

"Members of the Bar were a little skeptical at the outset of the practicality of this type of hearing, but after observing its operation for several months they have given expressions of favor to the work being done by the court. Counsel have been very cooperative and have contributed much toward the success of this type of practice." [6]

Judge Harrington reports that in this court, in the court year ending July 1947, some 500 cases were settled through pre-trial in amounts which totaled about $1,000,000.

In the United States District Court of Nebraska a pre-trial conference is ordered in practically every case, whether to be tried by jury or by the court. Only the judge and the attorneys are present. Judge John W. Delehant of this court characterizes the benefits of pre-trial as "almost inestimable" and suggests the following practical results of its use, "all of which I have seen in many instances":

1. *Economy,* namely, saving of expense to litigants in dollars and time and saving to the court in the elimination of unnecessary details of proof.

[6] This quoted statement, and others following where it is not otherwise indicated, are excerpts from letters to the author. They are reproduced here with the writers' permission.

2. *Time,* since, by the use of pre-trial, cases are tried more expeditiously than would otherwise be possible.

3. *Removal of Surprise.* On this point Judge Delehant states: "One who really serves the ends of justice can get comparatively little satisfaction out of victories achieved through artifice or surprise". He points out that, except in rare instances, no advantage accrues from a concealment of facts until the trial in view of the liberal rules of the Federal Courts with respect to amendments.

4. *Judicial Certainty.* On this count Judge Delehant says: "The pre-trial conference affords the judge an excellent opportunity, which the pleadings themselves do not always furnish, to learn exactly what the ideas of opposing counsel are touching their case. Then, if the judge is in doubt about any legal problem which is to come before him on the trial, he is warned sufficiently in advance of that occasion to enable him to demand briefs upon the question. It is not desirable that a judge approach a trial uninformed, or even dubiously informed, either about what the issues are or concerning the law upon those issues."

5. *Adjustments and Settlements.* "Several considerations must be borne in mind. A judge must never coerce settlements or adjustments. . . . not infrequently lawyers welcome an informal suggestion or invitation to explore the possibility of adjustment."

6. *Attitude of the Bar.* "In the inception of the pre-trial service, a great many of our attorneys, particularly in the rural communities, were extremely suspicious of it and reluctant to participate in it. As it has been employed through the years, I have observed a definite inclination to support the practice and to look forward to it favorably."

Judge Delehant has summarized his opinion of pre-trial thus:

"Pre-trial service is one of the greatest contributions within my knowledge to the ministry of justice. . . . The pre-trial service will be most effective in proportion as it is kept informal and simple, and confined within its own proper sphere. . . . A judge should not allow one attorney to place his adversary at a disadvantage by making demands or interrogatories in substance within the contemplation of the other rules, though in method within the framework of Rule 16.

"With that in mind, I uniformly intercept the making of *formal* demands for admissions . . . , while I encourage informal discussion about the possibility of admissions.

"I uniformly and expressly allow exceptions to be presented to it [the pre-trial report] and hearing before the judge on exceptions, if any. Exceptions are almost never tendered, but the allowance of their possibility serves to satisfy counsel that they are in no danger of having a record compiled by either an inadvertent or a malicious judge by which they will be embarrassed."

The Superior Court of Massachusetts for Suffolk County (Boston) began the use of pre-trial in 1935 and has continued to do so. In 1938 it adopted the following rule:

RULE 57A (APPLICABLE TO CIVIL CASES AT LAW).

A justice specially assigned therefor may establish a pre-trial list of cases and request parties or direct their attorneys to attend a call of said list, at which call continuances, non-suits or defaults may be entered and also the following matters may be considered: (1) simplification of issues; (2) amendments of pleadings; (3) stipulations of parties, admissions of facts or as to documents, records, photographs, plans and like matters which will dispense with formal proof thereof; (4) limitation of the number of expert witnesses; (5) reference to auditor; (6) possibility of settlement, and (7) such other matters as will aid in the disposal of the case.

Upon consideration of the above matters the justice shall make an appropriate order which will control the subsequent conduct of the case unless modified at the trial to prevent manifest injustice.

In this court, in the 1945-46 court year, 1,677 of its cases were sent to trial after having been pre-tried, while 1,923 were disposed of on the pre-trial list or before they were sent out for trial.

This rule has been discussed by the Massachusetts Supreme Judicial Court of Judicature in several decisions.[7]

In the *Fanciullo* case the court said of the Superior Court's pre-trial order: "The promulgation of this order was within the power of the judge having charge of the jury list. . . . The Superior Court is a judicial tribunal of superior and general jurisdiction. Inherently it has wide power to do justice and to adopt procedure to that end. [Citing cases] The making of the pre-trial report was an appropriate function of the presiding judge."

In the *Dunkel* case, the court held that "The parties are bound by the issue established by the pretrial report".

[7] *Fanciullo* v. *B. G. & S. Theatre Corp.*, 297 Mass. 44 (1937); *Capano* v. *Melchionno*, 297 Mass. 1 (1937); *Silver* v. *Cushner*, 300 Mass. 583 (1938); *R. Dunkel Inc.* v. *V. Barletta Co.*, 302 Mass. 7 (1938); *Gurman* v. *Stowe-Woodward Inc.*, 302 Mass. 442 (1939).

In the *Gurman* case the court said that "The pretrial procedure has been extended to five counties in Massachusetts in addition to Suffolk County, and according to the testimony of the judges in charge, the Bar and the statistics, it has met with a fine reception and uniform success".

In 1946 Judge Vincent Brogna of this court wrote in the Boston Bar Bulletin for May 1946:

> "The chief aims of a pre-trial (see Superior Court Rule 57A) are: (1) Simplification, clarification and definition of issues; (2) Dispensation of formal proof of all matters concerning which there is no genuine controversy; (3) Conciliation — encouragement of and assistance to bring about settlements.
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> "Pre-trial is a part of the trial, and failure to appear or to be represented by one with full authority to bind the litigant in all matters within the scope of pre-trial may subject such litigant to all the sanctions which may be imposed on a party who fails to appear at a trial.
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> "A pre-trial hearing at which the parties are unwilling to disclose to the court in good faith not only their claims and contentions but also their evidence (not the source) in support of them is a sham and waste of time.
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> "Before delving into the pre-trial, the judge should determine whether the matter is ripe for hearing. Some of the inquiries made before pre-trying are: (1) Is there any other pending or impending suit arising out of the same incident? If so, appropriate order for consolidation should be entered, and the matters continued to be pre-tried together. (2) Is the case ready for actual trial? In this connection, some of the matters inquired into are: availability of witnesses and evidence, interrogatories, motions for specifications and motions for summary judgments and the like. (3) Have the parties seriously discussed and exhausted the prospect of settlement?
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> "If the matter appears to be ripe for pre-trial, the judge proceeds to explore: (1) Claims and contentions of the plaintiff. . . .
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> (2) Statement of defendant's contentions. . . . Some of the stock answers contain every conceivable defense whether applicable or not. . . .
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> "After the pleadings by waver or amendment are made to fit the case, the judge proceeds to eliminate issues con-

cerning which there is no real dispute. . . . He then marks for admission, without further formal proof, writings, records, plans, deeds, photographs, statements of unavailable witnesses, etc., and notes where there is to be a view.

"No one should be or is coerced to waive any issue which on the evidence he is entitled to raise.

"The judge then in the presence and within hearing of counsel, dictates the pre-trial report, incorporating a statement of the nature of the suit and all the matters, conceded, agreed or stipulated.

"While the report is being typed and before the hearing is closed and the parties are dismissed, the judge, if in his opinion the case is one which should and with reasonable effort may be settled, or at the suggestion of one of the parties, inquires into the details of liability and into the extent of injury and damage; and unless he senses that settlement is remote and that further negotiations are futile, he continues the matter for a week or two to give the parties further opportunity to negotiate and report to him.

"If on the report it appears that a suggestion or other assistance from the judge may bring about a settlement he proceeds accordingly. He reminds counsel that every case assigned for trial or placed on a trial calendar carries with it the implication that it is going to be tried and that counsel should not use a trial list for trading purposes. The case being ready for trial the judge consults counsel regarding an agreeable date within about four weeks."

Pre-trial procedure was adopted by the United States District Court for the District of Columbia in September 1939 and has been used continuously since that date. One judge out of the twelve judges of that court is assigned for a full year's exclusive service in pre-trial of civil cases. Pre-trial is mandatory in all civil cases except those involving divorce, maintenance or nullity of marriage, or in cases involving patents, War Risk or other life insurance. However, a pre-trial may be ordered in any civil case.

Judge Bolitha J. Laws, Chief Justice of this court, states:

"The Judges of our Court have found the procedure to be effective. The clarification of the issues has been an important phase of the work, as has been the bringing about stipulations of testimony and documents, and compromise of cases. . . .

"I think there can be no question but that pre-trial procedure has become very popular in this jurisdiction. Occasionally we hear complaints but they are usually directed against the manner of handling certain phases of the procedure, rather than against the procedure itself. Wherever the Judge has performed the work efficiently and has co-operated with the lawyers, I think the overwhelming sentiment has been in favor of the procedure."

In a recent address Justice Laws said:

"The first thing which a judge should do at pre-trial is to require counsel for both sides to make a full and complete opening statement, precisely as he would at the final trial, as to what he expects to prove. When these statements are made, the pre-trial judge will ask a number of questions and will comment freely upon some of the points. . . .

"After these discussions, which seldom last over 15 or 20 minutes, I undertake the task of dictating the controlling issues to a typist in open court.

"After dictating the issues about which the case was to be tried, the court uniformly would ask counsel the basis upon which they would settle the case.

"The next topic to be covered has to do with obtaining admissions and stipulations. It is common practice to stipulate with respect to many items of evidence. The stipulations generally relate to such matters as ownership of premises, condition of weather, hospital records, medical expenses, photographs, and plates, whether the party is a corporation or a partnership, whether the party was the agent or servant of another, and many other points as to which there is no real controversy. In this connection, in actions for personal injury a notation at pre-trial is always made as to whether or not the plaintiff claims permanent injuries and, if he does, what is the nature of the permanent injury claimed.

"These stipulations should be definite. The exhibits should be brought to the pre-trial identified by the initials of the Court. All points such as waiving production of originals, proofs of signatures, proof of regular course of business, and other technical points should be specifically waived. The questions should be settled so that at the final trial the only question to be determined is whether the exhibit is relevant or material."

Of the experience of this court with pre-trial, then Chief Justice Hughes of the Supreme Court of the United States, in a report to the Conference of Senior Circuit Judges of the Federal Courts in 1940, said:

> "In the District Court for the District of Columbia, notable gains have been made during the past year in clearing up a highly congested calendar, and the Director reports that if a similar degree of progress is made during the next year, the docket will soon become current. Much of that reduction has been occasioned by an intelligent and skillful use of the pre-trial procedure permitted by the Rules of Civil Procedure."

Hon. Harry J. Lemley, of the United States District Court in Arkansas, uses pre-trial in all types of civil cases, both Government and private. He uses it in criminal cases only where counsel for the defendant agrees to the conference in advance. Of his experience he said, in March 1947:

> "As to the practical effect of its use, it enables me to bring about settlements in a large proportion of my cases. In the remaining cases, it enables me to define the issues, both of fact and law, well in advance of trial, and in this connection, where intricate questions of law are involved, I invariably ask for pre-trial briefs; in the final analysis it shortens the trial and enables the Court to dispose of the case in an intelligent manner."

United States District Judge J. Foster Symes, of Denver, Colorado, suggests that usually counsel for plaintiffs plead every possible allegation to substantiate a cause of action and defendants answer every possible defence, but that on the trial a point may emerge which has been overlooked, or in the midst of the trial bewilderment, lack of adequate preparation may appear and injustice result because there is little likelihood that an appellate court will give relief on a plea that counsel were not prepared.

Most situations of this sort, Judge Symes finds, are avoided if, at pre-trial, counsel are required honestly and sincerely to state the issues on which they rely. Also, at such conferences the judge may suggest questions of law that counsel may have overlooked. Pre-trial, he believes, tends to eliminate the common and expensive practice of pleading every conceivable ground or relief and defence in the hope that something in it all will stick.

Of his experience with pre-trial, Judge Symes wrote in February 1947:

"My pre-trial has been very satisfactory and I use it in every type of case that I have for trial. The net result is that after a pre-trial conference more than 50% of the cases pre-tried are settled. This because counsel, after disclosure of the other side, is not so sure of his case and is willing to make a settlement. Pre-trial discloses one fact — that in most cases the client only tells his attorney the most favorable points of his case, and wholly omits matters of testimony in possession of the other side.

"One advantage of the procedure is that it is informal and as yet has not been spoiled by a lot of technical rules, and each judge can run it to suit himself."

In 1939 the Supreme Court of Pennsylvania promulgated a rule authorizing the use of pre-trial in the courts of that state. The rule was practically a duplicate of Rule 16 of the Supreme Court of the United States (*supra*). The Court of Common Pleas of Allegheny County, in which Pittsburgh is located, then issued a rule prescribing in detail the use to be made of pre-trial procedure in that court and made it applicable to practically all cases. The rule required counsel, prior to pre-trial hearing to: (1) raise any preliminary questions regarding pleadings; (2) prepare exhibits for scrutiny of opposing counsel for identification and for admission by stipulation; (3) prepare for his own use a statement of admitted facts which can be made a part of pre-trial stipulation to simplify issues for trial; (4) secure authority from his client to discuss and consummate settlement; (5) agree on examination by a physician of his client before pre-trial where the same is requested by opposing counsel; (6) make preparation to agree if possible on the number of expert witnesses and/or on the appointment by the court of an impartial expert, the expense thereof to be borne by both sides or taxed as costs; (7) prepare to advise the court of the number (not names) of witnesses necessary to establish his case and to advise the court as to the time necessary to present his case.

The pre-trial judge is authorized to grant non suit on failure of plaintiff's counsel to appear; on failure of defendant's counsel to appear, to proceed with the pre-trial, allow amendments to pleading, fix the number of expert witnesses and decide all preliminary matters.

The pre-trial judge prepares a memorandum or order, if counsel so desires, reciting the action taken at the conference which "shall control the subsequent course of the action unless modified at the trial to prevent manifest injustice".

In March 1947 President Judge Rowand of this court said:

". . . when we first started this Pre-Trial practice about nine years ago there was opposition by members of the Bar. They argued that it took too much of their time. I am very pleased to say that this attitude has changed and the Bar, as a whole, is very much pleased.

". . . By reason of the length of time the cases had been pending it was possible to affect many settlements at pre-trial. To date we cannot affect so many settlements as the cases are practically new — what I mean by that is they have only been pending two or three months and the parties are not so willing to settle.

"In some jurisdictions, I understand, there is a preliminary hearing on pre-trial. We do not follow this practice. We have eight to ten judges trying jury cases and to have preliminary hearings on all cases would, as you can readily see, require a number of judges at pre-trial. As we work it now I am called the Pre-Trial Judge in charge of pre-trial having under me four clerks who are trained in this work. Lists for pre-trial are made up in advance. Most of our cases are now pre-tried within fifteen or twenty minutes. Counsel now, following this practice, present their pleadings; exhibits; agree on important matters; and where it was formerly necessary to call in the photographer who took the pictures, give measurements, and so forth, this is admitted at pre-trial. It is unnecessary for employers to bring in the pay roll; doctors need not appear to prove their bills and such other matters of expense. These now are prepared in advance and are readily agreed upon by counsel. This, you will see, is time-saving for the trial judge. . . .

"While, as stated, we do not have as many settlements at pre-trial as formerly, however, when the attorneys come into pre-trial court it is the first time they have been in contact with each other and it is noticeable that they stand aside and talk over their cases, and after pre-trial they usually give an intimation that a possible settlement may be affected. When the cases are actually called in the trial room this bears fruit by the many settlements we have. . . . all our civil and equity cases are pre-tried."

As Judge Rowand points out, when the rules were adopted (1939), this court was from two to two and a half years behind in the trial of cases. In February 1947 he reported that: "If counsel are diligent in getting their cases at issue and attend pre-

trial promptly they can have their cases disposed of within three months".

The Pennsylvania Court of Common Pleas in Philadelphia adopted pre-trial at about the same time it was introduced in Pittsburgh, but since has practically abandoned its use, except for cases where an adverse claimant is interpleaded, possibly because the calendars of the court are not particularly congested.

The United States District Court in Boston, Massachusetts, began use of pre-trial in 1938 and has continued to use it. Judge George C. Sweeney, of this court, described the methods used in the June, 1939, issue of the Journal of the American Judicature Society. In a letter to the writer in March 1947 he says that this description applies to conditions today, and adds:

> "I have only one general observation to make, now, as a result of the continuous use of pre-trials, and that is this: — while a very real value of pre-trials is the narrowing of issues, I think that their chief and greatest value is the fact that, for the first time, opposing counsel are brought together in an informal meeting where the possibilities of exploring their real difficulties are present.
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> "Any desire on the part of either counsel to settle or adjust their difficulties receives guidance and encouragement from the Court. This results in the settlement of almost one-third of all the cases which are pre-tried."

In New York, the Supreme Court is not a court of appeal but a court of general jurisdiction and first instance. In this court, as of July 1st, 1947, in Kings County (Brooklyn) there was a delay of sixteen months in reaching jury trials, in New York County (Borough of Manhattan) as of the same day a delay of nineteen months, and in Queens County fourteen months.

Pre-trial has not been used in this court except in Kings County where, about 1945, Mr. Justice Lewis began experimentation with voluntary pre-trial, and in six months adjusted some 380 cases, whereupon voluntary pre-trial was made a regular part of the work of the court and a pre-trial part established in which pre-trial conferences took place. The majority of these cases were so-called accident cases.[8]

[8] The results for three court years are as follows:

Year	Cases on Pre-Trial Calendar	Settled	Approximately
1945	3,170	913	29%
1946	3,550	830	24%
1947 (to June 27)	3,475	876	24%

The United States District Court in the Southern District of New York has used pre-trial for a number of years. It is not mandatory, but at frequent intervals cases are selected from the calendar which it is believed may benefit from pre-trial. These cases are published and counsel is notified to attend pre-trial conferences at specified times.

The figures for the use of pre-trial between October 1946 and March 20th, 1947, in this court show:

Number of cases called for pre-trial	516
" " " referred to trial calendar	289
" " " disposed of in pre-trial	194
" " " adjourned	33

In this period, the court disposed of a total of 1621 cases, of which 11% were terminated by pre-trial.

In a recent address, John C. Knox, Senior Judge of this court, said:

> "One of the purposes of the pre-trial conference is to lend the good offices of the Court in the exploration of the possibility of bringing about a settlement. Nevertheless, I am opposed to forcing adjustments.
>
> "The approach is something like this — I ask each side to outline the facts and to express their views of the basis on which settlement can be had. Out of my experience, and that of my associates, we often can make a fair appraisal of case values. Many of those considered for settlement are personal injury cases. Assuming there is liability on the part of the defendant, we can aid the parties in determining the amount of damages. Even when the question of liability is in dispute, defendants frequently wish to avoid the expense of a trial, and will compromise the issue of liability as well as the question of damages. . . .
>
> "Pre-trial procedure is also useful in obtaining concessions. Complaints are often drawn loosely and not infrequently these confused pleadings can be clarified. Amendments are permitted freely, as justice requires. Matters of record and other essential elements, the proof of which would be time-consuming, inconvenient and expensive, are conceded. This is particularly true as respects public documents, hospital records, X-rays, and the like.
>
> "Sometimes, concessions are made as to particular transactions which a foreign corporation performs within this

State. This eliminates the necessity of bringing witnesses to testify to such transactions.

"Of course some attorneys may object to a settlement of cases on the pre-trial calendar because their fees may not be as large as if a trial were had. Nevertheless, I think a majority of the lawyers, who have had experience with pre-trial practice, believe that it is of benefit to them and their clients.

"We plan soon to pre-try all civil cases upon our dockets, jury, non-jury and admiralty.

"Pre-trial conference has the effect of adding more stability to the actual trial calendar. The effort to settle has been made. Issues have been simplified, stipulations and concessions made, amendments of pleadings have been determined, cases are better prepared for trial. The result is there is more certainty in the trial calendar.

"I approve whole-heartedly the practice of pre-trial procedure."

Hon. Eugene Rice, Judge of the United States District Court for the Eastern District of Oklahoma, began to use pre-trial in 1937. He states that the federal judges in his state "have found it to be a very great aid in the disposition of cases and in the administration of justice".

Judge Rice does not use pre-trial in every case. He determines the cases which are to be put through pre-trial. At times, the attorneys request pre-trial, and their request may or may not be granted, depending on circumstances. The decision is governed by the type of case, by the expediency or necessity involved and by the conditions involved, for the District is a rural one, the largest town having a population of about 35,000.

Judge Rice believes that pre-trial is more effective in equity than in jury cases, although in the latter pre-trial affords the attorneys an opportunity to discuss with the court the date for trial, the probable length of trial, aids the court in setting the docket with a minimum of inconvenience to counsel and to court, and also affords an opportunity to counsel to discuss possible settlement.

Judge Bower Broadus, one of the United States District Judges in Oklahoma, reports that pre-trial has been used for the past seven years "extensively" in three district courts in that state, and almost universally in civil actions, although it is not mandatory. He states that the use of pre-trial has abolished

fictitious issues, reduced the cost of trials, dispensed with the use of many witnesses and reduced the cost and labour of appeal by curtailing records. He states, also, that there has been some use of the procedure in the Oklahoma state courts, but since there is no rule there regarding it, such use has been limited.

On January 1st, 1945, the Missouri Circuit Court for the Eighth Judicial Circuit, located in St. Louis, adopted a permissive rule for pre-trial based on a provision in the Missouri Code, but the judges in this court who have acted as Pre Trial Conference Judges under this rule, have not used the procedure to any great extent, due to the fact that there has been no serious congestion of the court's docket. Judge Robert L. Aronson, however, while serving as Pre Trial Judge in the last four months of 1945, used pre-trial conferences in all contested cases. Of his experience he says:

> "I found the practice of the pre-trial conference highly successful in reducing the number of cases which had to be tried as contests and in reducing the number of issues which had to be tried in those which went to trial. The business of divorce courts was at its peak during the period last mentioned and the volume of business in the Court was such that without resort to pre-trial conference it would have been quite impossible to handle the business of the Court."

Hon. Albert A. Ridge, Judge of the United States District Court for the Western District of Missouri, reports:

> "Since my appointment to the Federal Bench, two years ago, I have utilized pre-trial procedure in all cases appearing on my docket. The other Judges of this District utilize such procedure only in cases where the parties request such a conference. Such is the procedure in the State Courts of Missouri, of which there are ten divisions in this metropolitan area. As a consequence, the experience I herein relate to you is personal to my division of Court.
>
> "The general practice which I follow is to examine the pleadings in each case after issue has been joined. After doing so, notes are made as to the probable trend for the discussion of issues at pre-trial. Notice is then sent to counsel, informing them of the setting of the case for a pre-trial conference.
>
> "I usually devote two days at a time to the holding of conferences. At such times, ten, twenty and sometimes thirty, cases are taken from the general docket. After an

examination of the pleadings, an estimated length of time the pre-trial conference will consume is made.

"Prior to the utilization of pre-trial procedure in this Court, trial of a cause was obtainable somewhere between eight months and one year from the time of the filing of the case in Court. At the present time [March 12th, 1947], the Court is calling for pre-trial conferences, cases that were instituted in this Court in December, 1946.

"The attitude of the Bar in this District is one of indifference toward pre-trial procedure. This is due to the fact that only one of the thirteen Courts that are in daily session in this metropolitan area (three United States District Courts and ten State Courts) utilizes such procedure in the administration of its docket. However, in the use of such Procedure, I have received the cooperation of the members of the Bar generally and I believe, if pre-trial procedure was more universally used, it would be acceptable to the Bar.

"An example of the value of pre-trial conference is demonstrated by the following.

"A contract for the erection of a war plant was before the Court for construction. At three adjourned pre-trial conferences held in the case, some eighty-odd exhibits were marked and introduced in evidence by agreement of the parties. Sixty separate statements of fact were also agreed to by the parties. At the termination of the conferences, a date for trial of the case was agreed upon. At the trial date, the parties appeared in Court and introduced evidence in addition to that agreed upon at pre-trial conference, for one and one-half days. At the conclusion thereof, the Court took the case under advisement and in thirty days thereafter rendered an opinion. To have tried this case in the usual manner, without pre-trial conference, the identification of exhibits, and to acquaint the Court with the contents thereof, would undoubtedly have consumed several weeks of trial. As a consequence of pre-trial, the Court was thoroughly familiar with the contents of all exhibits prior to the date set for trial, and the agreements and explanations made by the parties at pre-trial conference gave the Court an insight as to the issues involved, so that, immediately after the submission of the case to the Court, the Court was in a position to proceed with a decision of the case, without taking time to review the facts introduced in evidence as the Court would have been required to do in the usual trial and disposition of such a case."

Mr. Will Shafroth of the Administrative Office of the United States Courts in Washington, D.C., reported, in February 1947, that in twenty of the United States District Courts in which pre-trial has been used quite extensively, out of all cases in which issue was joined only 29% were actually tried, while in sixty-four other District Courts, making much less use of the procedure, 46 to 48% of cases were tried.

Senior Judge Robert A. Inch of the United States Court for the Eastern District of New York (Brooklyn) reports that he and his associates have found pre-trial useful in occasional cases, particularly in civil jury cases where the facts are largely conceded. Judge Inch states: "The effect of its use has been plainly helpful where it results from this cooperation of counsel with the court in order to save time and expense, and I think the bar considers it a helpful procedure to have this delay and expense avoided. We have no statistics of its use."

Judge Mortimer W. Byers of this court uses pre-trial in a rather unusual manner. After the jury has been sworn, he calls upon counsel to agree in open court as to all matters of official record and, as far as possible, as to the physical conditions likely to be involved in the trial, with a view to confining the controversy to contest issues. Judge Byers believes that this procedure educates the jury and deprives counsel, who might waste time in taking testimony on undisputed matters, of the opportunity to do so.

In 1937 the calendars of the Superior Court in Los Angeles County, California, were seriously in arrears and in that year the court began to use mandatory pre-trial. It was adopted by the unanimous vote of the fifty judges of that court. At the outset it was used with success. Then the administration of the court changed. There was opposition to pre-trial on the part of some members of the Bar and the use of this procedure was gradually abandoned and today is used but very little.

In 1944 the American Bar Association conducted a pre-trial clinic in which judges and lawyers experienced in pre-trial conducted several conferences. This clinic is reported in 4 Federal Rules Decisions Reports, pp. 35 *et seq.*, together with a comprehensive report on pre-trial by a committee of judges of the United States Circuit Courts of Appeals.

Pre-trial seems to have developed a method of disposing of controversies, within the court, with the aid of lawyers, but without the delay, expense and technicality that have cursed the judicial process for years. It eliminates appeals. It commends

itself to business men as a sensible and practicable procedure. It provides a method by which disputes can be disposed of in a way that leaves all parties satisfied instead of one or both disgruntled and with a grievance against courts and the law. It should increase the use of the courts. It may turn out that Judge Harry M. Fisher's statement in a letter to the writer in March 1947 is prophetic of things to come:

> "I do not apologize for using the pre-trial conference as a vehicle for bringing about amicable adjustment. I think therein lies its chief value. It cuts across archaic rules of procedure as well as outworn concepts of the judge's function. It is not a matter of 'streamlining' but one of approach. Since every lawsuit ultimately comes to an end, why not help the parties to reach that end by amicable, business-like 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."

In some jurisdictions pre-trial has been used when the calendars are behind and trials delayed, but when this condition has been overcome, it has been dropped and the court returned to the old procedure, prompted, perhaps, by fear that if pre-trial is used the work of the court may fall off. When this occurs cases are tried which could be settled, the trial of others lasts far longer than necessary, and trials involve unnecessary technicalities and unnecessary evidence, costly to litigants, all of which could have been avoided by the use of pre-trial. The fact that a court is not busy seems a rather poor excuse for depriving litigants of the benefits that pre-trial would give them.

It is said that a distinguished lawyer of California, commenting on pre-trial, once remarked that when John Jones and Pete Smith have a lawsuit, it is their right to determine just how their lawsuit shall be managed. But have they? Have litigants such a right? Or has the court, furnished to the public by taxpayers, the right to insist that litigants afford to the court reasonable cooperation to reduce to a minimum the time and expense required to dispose of their disputes?

Is the function of a court merely to provide a forum for trial where the judge acts as an umpire of the contest, or is it its duty to the public and to jurymen and witnesses, who must give their time with little or no compensation, to insist that lawyers and

litigants cooperate with the court to simplify trials and eliminate technicality in reasonable ways?

To the litigant, the end sought is not the development of juridical principles, but a fair, reasonable and quick disposition of *his case* with the least possible expenditure of his time and money.

Pre-trial does not involve exciting courtroom contests, so dear to our forefathers, which even now have an appeal to the public when distinguished lawyers battle. But the excitement and public interest of such trials do not justify the delay and the cost, in time and money, which they impose upon the litigant and taxpayer. There is much to be said for substituting for most of them a calm and matter-of-fact discussion in the quiet of a judge's chambers.

The advocates of pre-trial do not suggest that all cases should be disposed of by mediation instead of trial, but they do say that a very large proportion of the cases which are now tried can be more effectively and more economically disposed of by pre-trial with greater satisfaction to the litigants.

Important to the success of pre-trial procedure as is the co-operation of the Bar, its future seems to rest primarily with the judges, for a judge can order such conferences in any case and can insist that when held they are effective. If judges, generally, become convinced that public interest is best served by the prompt disposition of controversies with just as little expense and delay to the litigants as is possible, substantial progress seems certain.

The existing lack of public confidence in our courts is due in no small measure to the fact that lawyers and judges dislike change and innovation in legal methods. The debt which we owe to those who have fought for and protected the traditions of the law will never be fully realized and must never be forgotten. But some of these champions of the *status quo*, many of whom we greatly admire and respect, remind us somewhat of Lord Tweedsmuir's affectionate tribute to his father in "Pilgrim's Way", in which he said:

> But a stalwart theologian of the old school he was, rejoicing in the clamped and riveted Calvinistic logic and eager to defend it against all comers. . . . He conceived it his duty to defend the faith of his fathers against any innovator.[9]

[9] "Pilgrim's Way" (English Title "Memory Hold The Door"), p. 249; by permission of the Executors of the late Lord Tweedsmuir.

Apparently there is a sort of rhythm in the changes that come in law. Perhaps we are in one of the periods now when changes must and will be made.

Pre-trial embodies an idea which has long slumbered in men's minds, *i.e.*, that the old arms-length, technical courtroom battle, with its rigid rules, is not the best method of disposing of most controversies.

In this connection it is interesting to note a statement of Judge Pinanski, of the Superior Court of Massachusetts:

> Pre-trial procedure substitutes an open, business-like and efficient presentation of the real issues for a traditional strategy of concealment and disguise. Its general adoption and use might do much to restore the confidence of the public in litigation as a desirable method of settling disputes.[10]

Undoubtedly, in recent years, more people's lives and interests have been modified or affected by decisions of collective bargaining conferences between unions and management than by court decisions. Of these conferences, Mr. George W. Taylor, member of the National War Labor Board for three years and its Chairman in 1945, writes in the New York Times Magazine of July 6th, 1947: "There are many instances where common interests have been taken up in a so-called pre-negotiation conference, held between the union and management, before any decisions are made and before rigid positions are formulated". And he contends that good technique of collective bargaining requires use of what he calls "pre-negotiation conferences".

Conclusion

The experience of our courts with pre-trial seems to demonstrate beyond question that it can: (1) reduce the expense of litigation to litigants; (2) reduce the time required of jury-men and witnesses; (3) reduce the time required to reach cases for trial; (4) enable courts to reduce calendar congestion; (5) dispose of one third to one half of pending cases without trial, usually to the satisfaction of the interested parties since such dispositions must be by agreement; (6) reduce the number of appeals with their attendant delay and expense, since all cases disposed of in the pre-trial conference are ended there for good and all; (7) do much to restore public confidence in the courts.

[10] Boston Bar Bulletin (May 1938).