

PRE-TRIAL PROCEDURE

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Recognition of the high duty of the bench and bar to hear and heed the voice of public opinion by eliminating delay and unwieldiness in certain aspects of the judicial process has in recent years led to many far-reaching procedural innovations. Perhaps none of the new developments has greater potentialities for the public good than has the plan of a pre-trial hearing of each case. After exhaustive discussion with members of the bench and bar of the various cities in which the pre-trial procedure is in effect, we venture to make the following observations and to discuss its practical value.

A pre-trial hearing can be succinctly described as a "preview" of a law suit. The court examines the status and nature of pending litigation with the immediate view of narrowing the issues, providing for stipulation of non-contested facts, and ascertaining the necessity of actual trial; and with the ultimate purpose of achieving swifter and cheaper justice by eliminating "dead-wood" cases which would be voluntarily settled before or during trial, and cases in which settlements best serve the litigants' interests. This process does much to provide a trial docket composed exclusively of cases which are ready for immediate trial and which can be tried immediately upon assignment without the disrupting effect of last-minute continuances. The actual trial requires less time, fewer witnesses, and less expense than would have been occasioned had the case not been groomed and stripped to its essentials for effective disposition.

Until the introduction, in 1932, of pre-trial hearings in the Circuit Court of Wayne County (Detroit), the prevailing theory had been that it was the sole responsibility of counsel to take care of pre-trial preparation. Certain mechanics for discovery and for requiring admission of provable facts had been made available by court rule, but the use thereof was left entirely to the initiative of counsel. The bench and bar has now come to recognize that the public interest in prompt and effective determination of litigation can best be served only if the court itself sees that the advantages of pre-trial procedure are availed of in each case.

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National interest in the pre-trial hearing as the focal point of all pre-trial procedure has resulted from the inclusion in the new Federal District Court Rules of a provision authorizing district judges to conduct pre-trial hearings in their respective courts. Every attorney in the land is now face to face with the prospect of actively participating in a pre-trial hearing. What is now generally regarded as an interesting experiment which has worked well in Detroit, Boston, and Cleveland will become an essential part of the judicial process in hundreds of trial courts.

This discussion is, chiefly, a critical examination of the effectiveness of pre-trial hearings in narrowing the issues, shortening and speeding trials, and avoiding trial in cases where it is not useful. There will also be presented a description of the general nature of the pre-trial hearing, an examination of the system at work in courts already employing it, and a discussion of other forms of pre-trial procedure.

FUNCTIONS OF PRE-TRIAL PROCEDURE

Narrowing the Issues

Even though the general issue has been abolished in many states with the adoption of code pleading rules requiring that the allegations of the declaration be specifically admitted or denied in the answer, every practicing attorney knows that pleadings are often unable to deny many allegations because the plaintiff's statement of a fact does not coincide with the defendant's. Consequently, answers sometimes amount to little more than a statement of the defendant's version of the case.

If the parties go to trial on the pleadings as drawn, the plaintiff (or the defendant, if he alleges new matter) must be ready to produce proof on many matters which can be, and on trial are, so clearly established as to leave no possibility of raising a question of fact. Much of the court's time may be taken up with proof of the width of a street, of the contents of a public record, of the amount of a doctor's bill, or of other matters which do not stand admitted on the pleadings, but which, once proved, cannot be disproved.

When there is a pre-trial hearing, these matters are determined before the case comes on for trial. When actual trial is called, only such witnesses need be used as are necessary to

furnish testimony on the points as to which the parties are in actual and honest disagreement. The trial is quicker. It is cheaper, both for the individual litigant and for the public, since the increased capacity of the court to dispose of cases saves taxpayers the expense of additional judges and new court rooms.

The pre-trial judge often need do no more than suggest to the attorneys that they stipulate some of the facts. The attorneys may work out the stipulation in their offices, and present it to the court. In other cases, they may agree on certain facts during the oral discussion of the pleadings at the pre-trial hearing, which the pre-trial judge will note in an official memorandum as a part of the court record.

The interposition of the court should not be necessary to induce counsel to stipulate some of the facts which are commonly eliminated by the pre-trial hearing. In this category can be placed the following facts: (1) measurements showing width of street and possibly the situation of the motor vehicles in an automobile accident case; (2) certificate of the traffic bureau as to the operation of stoplights at a street intersection at the time of the accident; (3) the actual expense of medical care, or of automobile repairs; (4) weather conditions; (5) the contents of any document which is a matter of public record; (6) the correctness, or the payment or non-payment, of certain items in a disputed bill for merchandise. But experience demonstrates that, even as to such matters, counsel are disinclined to execute an agreed statement unless they are prompted to do so by the court.

Moreover, other matters, which would undoubtedly remain in issue if the pre-trial hearing were conducted before a clerk or master, can often be eliminated from controversy as a result of the advice and suggestion of an experienced judge. The advisability of having the pre-trial hearing conducted before a judge, with full power (as limited by the rules) to dismiss a case or enter judgment of default, cannot be disputed. It is, for example, only when the pre-trial hearing is held before such a magistrate that the parties can be expected to reach an agreement as to the reasonableness of a doctor's bill, or of a garage bill, in a tort case. Similarly, unless a judge is in command, it is impossible to require the parties to make a binding election as to whether there shall be a physical examination of an injured tort-complainant. If such an examination is demanded, it can

be concluded before the case comes on for trial. Again, it is only when the pre-trial hearing is held before a judge that the parties can either sign a stipulation as to all the facts, or agree on the facts orally, and submit the agreed statement for final determination at the pre-trial hearing. Other matters which may be eliminated from issue at the pre-trial hearing, if conducted by an experienced and capable judge, include the following: delivery of goods, in cases of assumpsit for goods bargained and sold; proper amount of damages, should the plaintiff be successful at the trial; admission of liability, the only question being the amount of damages; and consent to the introduction of certain documentary exhibits without identification at the trial.

Sometimes, without formal stipulation of facts, an entire count of a declaration may be stricken by consent, after a discussion with the court has convinced counsel that it would not be worth while to attempt to prove some of the allegations in the declaration. When this is done, the defendant is spared the expense of preparing to meet whatever proofs might be presented in support of a specious claim. Similarly, a matter of affirmative defense may sometimes be eliminated from the pleadings.

There is another way in which changes in the pleadings may narrow the issue. At each pre-trial hearing counsel are required to elect whether they desire to amend their pleadings. If they waive the right to amend, they are bound by such election (subject to special leave of the court if new facts are discovered). Generally, leave to amend at the trial is denied.¹ If, on the other hand, counsel indicate at the pre-trial hearing that they wish to make amendments, the case is held on the pre-trial docket until all amendments are filed. If counsel have drafted their pleadings carelessly, they are given an opportunity to revise and perfect them. Such amendments are frequently tendered. The effect of such amendments often is to define clearly the one important and controlling issue in the case. When this has been brought out, many less important issues can be disregarded.

Speeding the Trial Docket

The efficiency of a pre-trial hearing in achieving a stabilized trial docket is no less important than its effectiveness in limiting and narrowing the issues. Indeed from the standpoint of judicial

1. *Konstantine v. Dearborn* (1937) 280 Mich. 310, 273 N. W. 580.

administration, this is perhaps the most important single function of the pre-trial hearing.

The trial docket is made up of cases which have been certified by the court and counsel, after a pre-trial hearing, as ready for immediate trial on certain issues. They may be assigned on short notice to a certain courtroom. There are no last-minute requests for amendments; there are no requests, after the calling of a case, for a continuance to enable a party to prepare himself more fully on some claim or evidence which "surprises" him. There are no delays while doctors examine a complainant. Furthermore, the trial docket comprises "live" cases exclusively. The "dead-wood" cases, which would be settled when the parties were called into court or after trial had proceeded part of the way, have been effectively culled out at the pre-trial hearing.

At the pre-trial hearing, after careful discussion of the controversial issues, the court and counsel make an estimate as to the amount of time it will take to try the case. This estimate, which is usually quite accurate, is noted in the files of the case by the pre-trial judge. The cases which can be disposed of in a few hours can be specially noted by the assignment clerk, and used to fill in what otherwise would be vacant spaces in the time of the trial judges. When a judge convenes court each morning, he has an accurate idea whether counsel in a succeeding case should be notified to be in court, ready for trial, before the end of the day. The trial judge is able to spend all of his court hours listening to testimony.

The somewhat laborious method of developing facts by examination and cross-examination of witnesses can sometimes be avoided (with the consent of both parties) in favor of an informal hearing. The pre-trial judge in one Detroit case, for example, when he learned that a claim of \$750,000 depended in large part on findings of engineers, suggested that each side appoint one engineer to serve virtually as a friend of the court in reporting to the judge his opinion on the questions of engineering science which were in issue. The proposal was satisfactory to counsel. The engineers and counsel made up a record in chambers after regular court hours, and a case which probably would have taken two or three weeks to try in the ordinary fashion was disposed of in three after-hour conferences.

It frequently happens that counsel who at the start of a case

had demanded a jury trial decide, after the narrowing of issues at the pre-trial hearing, that the remaining issues can be handled just as satisfactorily by a court without a jury. In many cases, therefore, the waiver of jury trials can be ascribed to the operation of the pre-trial docket. Juries are waived in 65 per cent of all law cases now tried in the Wayne County Circuit Court.

Avoiding Useless Trials

The pre-trial hearing is not an arbitration, and ordinarily the judge does not take the lead in seeking to settle cases. In every case, however, he asks the attorneys whether there is any possibility of a settlement. If one of them says there is not, there is usually no further discussion of the matter—unless the judge divines that the apparent reluctance of counsel is merely a mask assumed lest willingness to settle be taken as an admission of a weak case. In such circumstances, the court may suggest to attorneys that the case is a proper one for settlement. This suggestion is usually assented to by both sides, and the matter is then held up while the parties seek to bridge the gap between their respective ideas as to the proper amount to be paid in settlement.

In some cases the parties wish to settle but, despite negotiations, cannot come to complete agreement on the terms of the settlement. Counsel may at their own suggestion, or at the suggestion of the court, bring the litigants into the judge's chambers for an informal conference. The advice and suggestions of the judge are frequently effective in bringing the parties to an agreement. They may talk freely with the pre-trial judge about their chances of prevailing at trial, since he will not, ordinarily, be the judge who will hear the case. The parties are always influenced by the suggestion of the court as to what sum is a proper settlement. They are impressed when he points out the difficulty of proving freedom from contributory negligence in a particular case, or when he suggests that certain documents on which a party relies may not be admissible in evidence. They realize that the judge's familiarity with the nature of the judicial process enables him to predict with some degree of accuracy what may happen to the case in court.

Most of the cases disposed of by settlement at the pre-trial hearing are cases involving individual litigants with not over

\$2000 at stake. But occasionally settlements are made involving sums as high as \$20,000. Recently, in a Detroit case involving a claim of \$15,000, the parties were brought into the chambers of the pre-trial judge and after a two-hour conference, agreed on a settlement which involved payment of \$5,500. The judge estimated that the case would have taken two weeks to try. 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 voluntarily.

Pre-trial hearings have also proved effective in discouraging attorneys from bringing suits for their so-called nuisance value. Such value is at present very low indeed, in Wayne County. When the pre-trial judge sees that plaintiff has no cause of action, he is frequently able to dispose of the case summarily, without assigning it for trial.

Where cases are brought for their nuisance value, settlement may not be encouraged by the pre-trial judge. Personal injury cases bulk large in this category. If the plaintiff has undoubtedly been injured, has incurred a readily-ascertainable expense for medical care, and has suffered a definite amount through loss of wages, the judge may be inclined to work toward a settlement in a sum which would not be greater than it would cost the defendant to litigate the case. Payment of \$100 or \$200 to an injured complainant, under such circumstances, may accomplish greater social good than payment of an equal amount in court expenses. On the other hand, where there is something in the facts which suggests a "strike" suit, the pre-trial judge may well prefer to see the case go down under a jury verdict. Only in this way can the bringing of nuisance value suits be discouraged. Indeed, the penetrating inquiries addressed by the pre-trial judge to plaintiff's counsel may go far in assisting defendant's counsel to determine that plaintiff's case has no "settlement value" in it. Sometimes, after frank discussion at the pre-trial hearing, a non-meritorious suit is voluntarily dismissed.

An agreement of settlement reached at the pre-trial stage is a final disposition of the case. The pre-trial judge enters a consent judgment, after assuring himself that the settlement is fair

to both parties, and it is a very difficult matter to get this consent judgment set aside. There can, of course, be no appeal from a judgment thus entered by consent.

Sometimes the effect of the pre-trial hearing is only to initiate the settlement of a case. Counsel may insist before the pre-trial judge that the case cannot be settled and that it be put on the trial list. But after viewing what remains of the case after the pre-trial hearing has trimmed it down to its essentials, there may be—and quite often is—a change of heart. The case is then removed from the trial list and sent back to the pre-trial judge for settlement.

In some cases it is apparent at the pre-trial stage that the defendant's case is legally hopeless, and that he is fighting the action only in order to gain time. If the defendant's desire for time is justifiable, as in the case of a small business man who would be put out of business by the levy of execution, the pre-trial judge may suggest that a consent judgment be entered upon an agreement that it shall be satisfied through periodic payments into court by the defendant. The case is then retained on the pre-trial docket pending the completion of such payments. This practice is more elastic than that provided by statutes authorizing payment of money judgments by installments, because statutory installments must be paid in precisely stated amounts at unfailingly regular intervals, on pain of immediate issuance of execution. Under the moratorium device worked out by the pre-trial judges, the court may grant a short adjournment, if the debtor is unable to pay the full amount of the installment on the due day.

The extent to which a pre-trial hearing is used as a technique of conciliation depends largely on the temperament and attitude of the pre-trial judges. In Detroit, for example, where the judges rotate in conducting the pre-trial call of law cases (each judge handling it for a year or two), those members of the bench who have particular aptitude for conciliation may dispose of four or five cases each day at the pre-trial hearing. Other judges leave the question of settlement more to the parties, and concern themselves chiefly with trimming down contested cases, and cutting out "deadwood," to the end of creating a stabilized trial list of active and ready-for-trial cases. In all courts where the device of the pre-trial hearing has been employed, a surprising number

of settlements have resulted. The settlement is made before, and not on the eve of, or in the midst of, trial.

GENERAL NATURE OF THE PRE-TRIAL HEARING

Conduct of the Hearing

As has been indicated by the foregoing discussion, the pre-trial hearing is an informal conference between court and counsel. In large cities, opposing attorneys may be personally unacquainted until the case is called and they step up before the pre-trial judge. The judge initiates the discussion by asking them what the case is about, whether they are satisfied with the pleadings, how many of the material facts can be agreed on, and whether either of them thinks there may be an opportunity to settle the case. There follows a free discussion.

No stenographic record is taken. The court and the attorneys can usually learn just how the case stands, and the pre-trial hearing usually need not last over ten or fifteen minutes. At the conclusion of the hearing, the judge makes out a report which becomes part of the record.

Experience has shown that attorneys cooperate willingly in appearing at the pre-trial hearing. Of course, there should be these sanctions: dismissal of the trial *praecipe* (which has the effect of removing the case from the trial docket); dismissal of the case, in the event that plaintiff's attorney does not appear; or entry of default in case of the non-appearance of the defendant's attorney. Even though such penalties are not frequently invoked in practice, the mere possibility of a summary disposition of the case is sufficient to insure prompt and regular attendance of counsel. It is obviously important that the pre-trial hearing be attended by senior counsel, rather than by a junior law clerk who does not know enough about the case to aid the court. If a busy barrister sends his clerk, the court will send the clerk back with the message that the pre-trial hearing will be held the next day, and that the case will be summarily disposed of unless Mr. Busy Barrister is present.

In many cases, several pre-trial hearings are had. If the parties wish time to discuss a settlement, adjournment of the pre-trial hearing is granted as a matter of course. If, at the first hearing, counsel ask leave to amend their pleadings, the case may be adjourned for further pre-trial hearing after amendments

are filed. In other cases, the adjournments are usually agreeable to counsel, and are rarely refused by the court, unless it appears that counsel are seeking unduly to delay the assignment of the cause for trial.

Adoption under Rules of Court

Pre-trial hearings may be instituted without the aid of statute by virtue of the inherent rule-making power of the court.² The court may adopt any rule which is peculiarly fitted to local conditions. Merely as suggestive, we cite the rules adopted in the Wayne County Circuit Court and the new proposed uniform Federal District Court rules.

The Wayne County (Detroit) Circuit Court rules provide:

Chancery, Pre-trial, and Reference Division. The pre-trial and Reference Docket is called daily before the presiding Judge at 10:00 a. m. Chancery cases will be called on this docket sometime before they are regularly reached for trial, for the purpose of settlement, disposition of preliminary motions, framing the issues, and trial. Such chancery cases as in the discretion of the presiding judge require early or special attention will be called on this docket * * *. The Pre-trial docket is an official docket. The Judge presiding over this docket has jurisdiction under the rules to enter a decree to dismiss the cause, or to dismiss the trial praecipe, as the case may be, on the failure of either party to answer.

Law Pre-trial and Conciliation Division. Law cases will be called on this docket sometime before they are regularly reached for trial, for the purpose of settlement, disposition of preliminary motions, framing the issues, and trial. Attorneys should be in court promptly that the call may be conducted without interference with their other court assignments. The Pre-trial Docket is an official docket. The Judge presiding over this docket has jurisdiction under the rules to enter a judgment of non-suit, or to dismiss the trial praecipe, as the case may be, on the failure of either party to answer.

2. R. S. Mo. (1939) sec. 2115, appears to authorize the establishment of pre-trial procedure in Missouri by rule of court: "In addition to the ordinary power of making rules conferred by the general law, the court *en banc* may make all rules which its peculiar organization may, in its judgment, require, different from the ordinary course of practice, and necessary to facilitate the transaction of business therein. But all rules for the government of the court in divisions shall be the same before each of the judges at such term." *Konstantine v. Dearborn* (1937) 280 Mich. 310, 273 N. W. 580, held that pre-trial procedure in Michigan was legally established by rule of court.

The new Federal Court rules provide:

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 the 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.
- (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 issues for trial to those not disposed 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 following rules, which were drafted by Herbert Harley, of the American Judicature Society, with the participation of Prof. Edson R. Sunderland, of the University of Michigan Law School, go much further than any existing scheme of pre-trial conference as a means of determining the issues involved in the case. They are of interest as indicating what may be a final goal for pre-trial procedure:

Section 1. In all actions for the recovery of money damages, either liquidated or unliquidated, for foreclosures, specific performance, cancellation or reformation, to quiet title and for the recovery of land or chattels, the plaintiff shall endorse on the summons a concise statement of the nature of his demand.

Section 2. On the return day named in the summons in all actions above mentioned, the parties, in person or by counsel, shall appear in court and the Court shall thereupon determine the issues involved and reduce the same to writing, without requiring written pleadings.

Section 3. In determining the issues involved, the court shall ascertain and make a record of any agreement by the parties as to facts and modes of proof. The court shall make such orders respecting discovery and disclosure as may be deemed advisable, and shall specify the steps to be taken in preparing the case for trial, to the end that all justiciable issues between the parties may be tried and determined in the most direct, economical and prompt manner.

Section 4. The court may, with consent of the parties, enter final judgment at any state; and the court shall enter judgment when it shall be made to appear that there are no genuine and substantial issues to be tried.

Section 5. When all needed steps preparatory to a trial on the merits have been taken, the court shall set the action for trial on a day certain, or on a calendar of trial cases. The court shall at all times have full power of control over the proceedings and may vacate or amend any order or proceeding, or correct any error, or make such further orders as may be proper.

Section 6. On review of the final judgment no error committed by the court in such proceeding shall be deemed reversible unless the party assigning the same shall affirmatively show that he has been substantially prejudiced thereby.

EXAMINATION OF THE SYSTEM AT WORK

In Detroit

Necessity mothered the invention of the pre-trial call in Detroit, where the plan was first used. In 1929, the law calendar was about forty-five months behind, and the chancery calendar about twenty-four months behind. More than half of the cases called for trial, were being disposed of by settlement rather than by entry of judgment. This suggested the question of why these cases could not be settled earlier. A special conciliation docket was set up for law cases; and chancery cases were called for discussion of settlement of issues on a docket which previously had been reserved solely for mechanic's lien cases. This chancery docket soon developed into the pre-trial docket as it now exists, and a similar docket was set up for all law cases by enlarging the scope of the conciliation docket.

The system has worked so well that law cases are now tried about ten months after reaching issue. Chancery cases are called, on the whole, even more speedily, because of special provisions for advancement of chancery cases. Any case, either at law or

in chancery, may be advanced by special motion for a hearing within two weeks after issue is reached. On an average, over twelve per cent of all cases started are finally disposed of at the pre-trial stage. Jury trial is waived in about sixty-five per cent of all cases. In many instances, this waiver comes after the narrowing of the issues at the pre-trial hearing.

The plan is popular with members of the bar. At a hearing held in 1934 by a state legislative committee, the assistant general counsel of a large Detroit insurance company testified that not more than ten to fifteen per cent of his cases reaching the pre-trial docket were ultimately tried. He thought that the amounts paid in individual cases were a little larger than before the system was begun and this seemed to be due largely to the elimination of calendar delay, the consequently greater likelihood of plaintiff's witnesses being available, and the like. Before 1929 there was very little incentive for insurance companies to make an early settlement for time was apt to work in the defendant's favor. Now, when prompt trial can be had, there is less reason for withholding settlement at a fair figure.

The system is beneficial both to plaintiffs and defendants. Out of a group of eighteen large casualty insurance companies, the company in Detroit had the smallest number of pending suits per \$100,000 of earned premium. The percentage of pending suits per \$100,000 earned premium was 13.1 per cent for all eighteen companies, but was only six per cent for the Detroit company. As a result, the reserves for pending litigation which the Detroit company had to carry, were, in proportion to the number of suits brought, less than half the amount set aside for this purpose by other companies.

Particular credit goes to Circuit Judge Joseph A. Moynihan for his splendid and untiring service in the development of pre-trial practice in Detroit and his interest in such work throughout the country.

In Boston

By order of the Justices of the Superior Court of Massachusetts a pre-trial plan, modeled after that of Detroit, applicable to law actions in Suffolk County, became effective on September 1, 1935. Suffolk County was chosen because it includes the City of Boston and has from six to ten jury sessions a day.

Viewed at first with some misgivings on the part of the trial

bar, pre-trial soon became popular, and today, after an experience of approximately nine years it seems thoroughly established as a permanent part of the judicial system. In fact, it is being gradually extended to sittings of the Superior Court in other counties, at the request of the local bars. A brief summary of progress during its early years may be of interest:

REPORT OF WORK IN PRE-TRIAL SESSION IN SUFFOLK COUNTY
FOR CALENDAR YEARS 1936 AND 1937

	1936	1937	Totals
Settled at pre-trial call.....	1,132	1,631	2,763
Nonsuited and Defaulted	537	597	1,134
Jury Waived	495	421	916
Continued	318	464	782
Jury List	2,197	2,921	5,118
Auditor		50	50
	4,679	6,084	10,763

The above table of the disposition of cases on the jury list indicates the progress being made. While only cases on the jury list have been pre-tried, there seems to be no good reason why the same method should not work equally well with jury-waived law cases and equity cases.

In Suffolk County, it is reported by the pre-trial judge, agreements of counsel are usually obtained as to the following matters:

1. Motor Vehicle Tort Cases.
 - (a) Legality of registration of motor vehicle involved.
 - (b) Agency where the operator is other than the owner.
 - (c) The admission at the trial of photographs of the locus and of the vehicle involved without the necessity of producing the photographer.
 - (d) Agreement that a copy of a hospital report may be introduced without producing the custodian of the records.
2. Suits against Municipalities on Account of Defects in Highway.
 - (a) Agreement that the highway in question is a public way.
 - (b) Date of receipt of notices by the defendant required by statute.
3. Public Liability Cases.
 - (a) Ownership or control of the premises in which plaintiff claims the accident occurred.
 - (b) If a snow and ice on sidewalk case, acknowledgment and sufficiency of receipt of notice thereof as required by statute.

- (c) In landlord and tenant cases, the status of the plaintiff, either as a tenant-at-will or lessee, business visitor, guest of a tenant, trespasser, or licensee.
 - (d) Whether accident on a common stairway or passageway or area.
 - (e) A statement of the specific defect in the premises upon which plaintiff relies.
4. Note Cases.
- (a) Genuineness of signature of maker or endorser.
 - (b) Execution of note and delivery.
 - (c) Payments, if any, on account of principal or interest.
5. Insurance Cases.
- (a) Question whether or not policy executed and in force.
 - (b) Premiums, paid or unpaid.
 - (c) Policy properly reinstated after lapse.
 - (d) Double indemnity, resulting through accident—agreement on facts in order to determine whether within the meaning of the terms of the policy.
6. Contract.
- (a) Nature of obligation—oral, written, or implied.
 - (b) Payments, if any.
 - (c) Agreement on facts in order to determine whether Statute of Frauds applies.
 - (d) The production of instruments, documents, correspondence without requiring notice under the statute or summons.

Both the courts and the bar in Massachusetts have suddenly learned that when opposing attorneys come face to face in the presence of an impartial third person, with the cards upon the table, suspicion departs and there results either an amicable settlement or a clarification and narrowing of the real issues in dispute.

It should be noted that in Suffolk County the court adopted as a temporary measure, in order to relieve the congestion of the civil trial docket, the expedient of referring motor vehicle tort actions, on motion of either party, to auditors appointed by the court. The auditor hears the evidence, makes findings of fact, and finds for either plaintiff or defendant. He makes a report in writing to the court, which report is *prima facie* evidence, if any party seeks a jury trial thereafter. This policy has been effective in speeding the trial docket, and a very large percentage of the actions thus referred to auditors are disposed of without trial or hearing. Of the cases in which a report is filed by the auditor only a very small percentage go to a trial by jury.

In One-Judge Courts

The two cities discussed above are metropolitan centers with trial benches composed of a comparatively large number of judges. The plan of pre-trial hearing should, however, be effective and useful in a court where one judge handles all the judicial business. Confirmation of this opinion comes from the experiment tried last year in Essex County, Massachusetts, where a seven-weeks term of court was recently conducted by one judge. The court, at the beginning of the term, devoted one week to a pre-trial call. Of 399 cases listed for hearing, 245 were passed to the trial list, involving, however, only 147 trials because several groups of cases were tried together. Ninety-three cases were disposed of at the pre-trial call, not including six which were transferred to auditors for hearing.

It would seem that in a one-judge court, the judge would gain at the pre-trial hearing a familiarity with the legal issues involved in a case that would be helpful to him upon the actual trial.

In England

In England the only system which corresponds to the pre-trial hearing is the so-called summons for directions, which involves a hearing before a master who has certain powers in passing on matters of pre-trial procedure.

A summons for directions may be issued *ex parte* at the request of either party. It directs the other party to attend a hearing before a King's Bench Master at a certain hour on a certain day to show cause why an order for directions should not be made with reference to pleading, discovery, place of trial, and mode of trial. These summons are available in practically all of the common law actions. Each Master in addition to his other duties, hears each day four calls of these summons for directions. About fourteen cases are listed on each call.

The hearing on a summons for directions is usually very short and quite formal. Because it is held before issue has been joined, there is no questioning to determine the matters really in dispute, and no effort to induce settlement. The Master makes his order by filling in blanks on a printed form, directing the number of pleadings to be filed, fixing the time for filing the imposing requirements as to bills of particulars, providing for discovery

as to documents, and setting the time and mode of trial. There are no technical and intricate orders issued.

The object of those who devised the summons for directions was to cheapen and expedite litigation. It has recently been described by the English Law Society, however, as being quite useless in practice. Members of the bar rarely attend the hearings, but are represented by their managing clerks. It is known in advance what the directions will be. Recently suggestions have been made that summons for directions should be postponed until after the proceedings are closed so that the dispute may be narrowed and the evidence thereby shortened, and that it should be decided at the hearing what the discovery order should be, how many documents should be copied for the use of the court, whether evidence should be admitted by affidavit, and what directions as to expert and other witnesses should be made. If these reforms are made, it would enable the court to direct the course of procedure in every case to the determination of issues in a simple and effective manner. Until such reforms are made, however, it would appear that the practice is less effective than the pre-trial hearings held in Detroit, Boston, and Cleveland.

Such reforms may result from a new English Court Rule, adopted December 17, 1937, to take effect January 11, 1938. This rule changes the practice on summons for directions to give the master power, on the hearing for directions, to make such order as may be just with respect to pleadings, particulars, discovery and inspection of documents, interrogatories, inspection of real or personal property, admissions of facts or documents, and place or mode of trial, and to order that any particular fact or facts may be proved by affidavit, or that any witness may be examined before a commissioner, or that any facts may be proved by oath on information and belief or by production of documents or entries in books or by copies of documents or entries, or that no more than a specified number of expert witnesses may be called, or that an expert may be appointed by the court to inquire and report upon any matter of fact, or that the consent of the parties to waive or limit their right of appeal be recorded.

This rule gives to the masters the power which had been conferred on judges, in certain types of cases, under the so-called "New Procedure," which was abolished at about the time of the promulgation of the new Rule above described.

Many of the objectives sought at the pre-trial hearing under the American procedure are attained in some measure at least by separate proceedings in England. Whether or not these interlocutory proceedings are had in a particular case depends upon the initiative of counsel. Thus, for example, application may be made to a master to settle the issues when they are not sufficiently defined by the pleadings, and he may direct that an account be taken, or some other form of preliminary inquiry be made. In practice, however, this method of settling issues is rare. Again, when points of law are raised by the pleadings, either party may apply to set them down for hearing and disposition before trial. The proceedings are in the nature of a hearing on demurrer. Although the potential value of this form of preliminary hearing needs no comment, it is unfortunately not much used in practice.

A third type of interlocutory hearing is described under the English Rules as a special case. In this particular type of proceeding the court may take the initiative. Such a hearing is had when the parties are agreed on the facts. They may go to trial without pleadings and make an agreement between themselves as to the amount of damages which should be paid according to the decision of the court on an agreed statement of facts accompanied by all relevant documents. In practice, this procedure is not much used.

The English rules make extensive provisions for pre-trial discovery. The discovery, as used in the King's Bench Court, may be divided into interrogatories, disclosure of documents, and particulars. The purposes of interrogatories are to learn what case has to be met, to see if the other party will pledge his oath to the truthfulness of his case, and to impeach or destroy the other party's case. They are particularly useful in cases where answers both deny an allegation and admit and avoid the same. They are frequently used by defendants as a means of showing mitigation of damages and inducing settlements. The practice is rather strict. If the answers of one person interrogated are insufficient, he may be required to answer further. A corporate officer is not permitted to answer that he does not know, but is required to make inquiry within the corporation until he ascertains the required information.

Disclosure of documents is usually obtained under an omnibus demand on the other party to make discovery on oath of the docu-

ments which are or have been in his possession or power relating to any matter or question involved. The affidavit is divided into three schedules. One contains the documents the party possesses and is willing to produce, which must be set out in detail. The second contains the documents he possesses but claims to be privileged. These, as a rule, are not itemized. The third schedule describes the documents which the deponent no longer possesses. A criticism of the rule is that in practice a party upon whom discovery is made is required to set forth and furnish a number of copies of every letter exchanged between party and his counsel and every other scrap of paper in any way relating to the dispute. Parties are put to inconvenience and expense in producing many copies of inconsequential papers.

If either of the parties is not satisfied with the particularity of his opponent's pleadings, his counsel writes a letter to opposing counsel, asking for a more particular statement as to certain items. If this request is refused, an application is made to a Master, who decides whether or not further particulars will be required.

As a device for settling cases, the English rules permit a defendant to pay into court a certain amount as an offer of settlement, at the same time denying liability. If the plaintiff accepts the sum in satisfaction, he withdraws it from court and cannot further prosecute his action. If, however, he wishes to prosecute his action further, the money is left in court and a hearing is had on the sole issue as to whether the sum paid in by the defendant is sufficient, except that if the action is for unliquidated damages, a question may still remain as to whether the defendant is under any liability. A similar rule provides that if a defendant takes the position that suit is brought unnecessarily, he may file a plea of tender and pay into the court the entire amount claimed. Unless plaintiff can prove to the court he was justified in starting the suit, plaintiff must pay the costs of court proceedings. This is thought to be of some effect in inducing creditors to make a diligent attempt to collect an uncontested bill before starting suit.

OTHER FORMS OF PRE-TRIAL PROCEDURE

Pre-trial hearing is not, of course, intended completely to supplant other well-established devices designed to assist counsel in

preparing for the trial of the case or for its early disposition, including such matters as discovery, examination of documents, requests for admission of facts, and motions for summary judgment.

While the pre-trial hearing may serve many of the purposes of the traditional methods of discovery, it seems desirable that the courts should retain and broaden existing rules for discovery.³ Either party should have full privilege to compel the opposite party to submit to oral examination on oath concerning all the issues in the case. Each party is entitled to know the other's case. Such discovery should be available before pleading, as a means of enabling the party to declare or answer, as well as after joinder of issue, to enable the party to prepare for trial. Courts should adopt a liberal policy in permitting use at the trial of the record made in discovery proceedings; and such records should in certain instances be available for use as depositions.

PRACTICAL CONSIDERATIONS AND RECOMMENDATIONS

1. Whether the pre-trial hearing should follow closely the joinder of issue, or should be postponed until a few weeks before the actual trial, is probably a matter which must be determined according to the individual needs of each jurisdiction. On the whole, it seems to be better to have the pre-trial hearing not more than three weeks before the trial.

2. The pre-trial hearing should be held before a judge, not a referee.

3. There is no need to compel counsel to disclose the details of their proof in any case in which they prefer not to make such disclosure before trial.

Although not intended to exclude other well established pre-trial plans or systems, the plan of calling each case on a pre-trial docket produces results which cannot be obtained in any other way. This circumstance is due principally to the fact that the diligence of the court will go further in narrowing the issues, disposing of cases that do not need trial, and providing a stabilized trial docket, than will attorneys on their own initiative. The prediction is that the use of this device in federal district

3. The question of discovery before trial is thoroughly discussed in Ragland, *Discovery Before Trial* (1932).

courts under the new rules will lead to its adoption in the courts of many states. Such adoption will be a monument to the zealotness of the bench and bar in serving the public good by providing a speedier and less costly justice.

A pre-trial docket is an official docket. The judge presiding over this docket has jurisdiction under the rules to enter a decree or judgment, to dismiss the cause or to dismiss the trial *praeiudice*, as the case may be, on the failure of either party to answer, or to comply with the orders or rules of the court. The general purpose of pre-trial practice is to clear up the backlog of old cases by disposing of as many cases as possible without trial and by shortening the trial of the others. Gradually it will be extended to more recent cases. This procedure is a permanent administrative device requiring all cases, before going on the list for jury trial, to pass through the pre-trial call. These calls should be held daily. The lists of cases to be heard should be made up each week and sent to the attorneys whose cases appear. At the call the judge asks each attorney to explain his side of the case and then attempts to bring about settlement if he thinks it desirable. Otherwise, the judge and counsel discuss waiver of jury trial, the form of pleadings and amendments thereto which must be offered at this time, the clarification and simplification of issues, agreements to avoid bringing unnecessary witnesses into court, and the limitation of expert witnesses. The judge then fills out a form in each case containing the disposition of any request as to pleadings, the judge's opinion as to the possibility of settlement, a statement of every fact agreed upon, and sometimes a concise statement of the agreed issues to be tried. All notations are binding upon the parties at the trial. All requests for adjournment must be made during the pre-trial session. Thereafter, no adjournments are allowed except for excellent reasons. The pre-trial call of the case should take place about two weeks before the case is expected to come to trial. After the call attorneys should be notified by telephone the day before the actions will be reached and again on the day they are reached, fifteen minutes before trial. In this way the smallest number of cases consistent with a strong calendar may be held for trial each day, and every case is assured an opportunity for trial on the first day that witnesses must appear in court.

The success of the rule depends upon the judges assigned to

handle the pre-trial calendar. They must be able, tactful, and respected by the bar. The pre-trial hearing of a case should be held about two weeks before trial, because experience in the State of Massachusetts and in Detroit, Michigan, indicates that attorneys and their clients are most receptive to the suggestion of settlement at about this point in a lawsuit. In Detroit, a pre-trial call held six weeks before trial was a relative failure, while it is a success when held two weeks before trial. It has been said that, if a pre-trial call takes place shortly before a case is reached for trial, "the case has seasoned and imminence of trial makes the question of settlement a real and pressing one."

As congestion of the calendars will be reduced by the decrease in the number of trials and in the time spent in actual trial, the pre-trial hearings, although remaining two weeks in advance of actual trials, will necessarily move closer to the dates when cases are first placed on the calendar.

It is not certain that the court may compel disclosure of evidence, although *Ex parte Peterson*⁴ indicates that the court has such inherent power. However, the success of the rule depends upon consent and cooperation between court and counsel.

No provision is made for motions to dismiss for lack of jurisdiction or for failure of the complaint to state facts sufficient to constitute a cause of action. This omission is due chiefly to the fact that such a provision would necessitate a modification of the rules of civil practice. No provision has been made for appeal. It is expected that the benefits of the rule will be derived from the consent of the parties and their counsel. It is essential, however, that a memorandum of the stipulations of counsel, concessions or admissions, *et cetera*, should be filed with the papers to be used at trial, to be binding on the parties in the same way as any other stipulations. Possibly this should be included in the rule.

Provision should be made for as many judges to preside over pre-trial hearings as are necessary to keep up with the volume of cases actually tried. In Boston one judge handles approximately one hundred and eighty cases in one week.

Notice to counsel of the pre-trial hearing might be given by mail several days in advance of the hearing. In any case, there

4. (1919) 253 U. S. 300.

should be published in the court paper a calendar of cases to be called at the pre-trial hearing. This calendar should be staggered—as many cases to be called each hour as experience may indicate can be handled.

The court journal should publish from day to day a continuous calendar of cases which have been marked “ready” after the call of the pre-trial calendar. In this way, attorneys may see from day to day the standing of their cases as they approach trial. Additional telephone notices should also be given.

The pre-trial proposal above mentioned has been substantially approved by many bar associations in the State of New York and the Judicial Council of the State of New York. The proposed rule, it is believed, will require no changes in statutes or in the rules of civil practice. Some change, however, will be needed in certain rules of the general term of the Circuit Court, in order to embody the new rule. The object of the rule is to simplify, shorten, and possibly avoid trial. It is not intended to force settlements upon the litigants or their counsel, although it will invite compromises.

ACTIONS IN EQUITY

The pre-trial hearings of chancery cases, like those at law, consist principally of informal conferences between the court and counsel in order to simplify the pleadings, eliminate issues, and facilitates the settlement of cases. Because of the complicated nature of the subject matter in chancery cases, the judge who hears the chancery pre-trial docket has before him the files of the case under discussion, so that he may examine the bill and answers. As in the case of the law pre-trial docket, there are many cases which are settled without going to trial.

In one respect, however, the chancery pre-trial hearings differ from those on the law side of the court. The distinction is founded on the illustrative fact that, of the 1,000 chancery cases started each month in the Wayne (Detroit) Circuit, there are many in which the right to relief is unquestioned, and which require only formal attention by the court, without the necessity of a trial. All such cases are segregated at the pre-trial state, and listed for summary disposition. This in effect constitutes a short-cause docket, which is disposed of, as a matter of convenience, in connection with the pre-trial docket.

Among the cases so disposed of, mortgage foreclosures predominate. Where there is no contest, the pre-trial judge directs the plaintiff's counsel to bring his witnesses into court and to place his proofs before a stenographer who has a desk inside the bar of the court room. Transcripts of the proofs are then submitted to the pre-trial judge who, after reading them, grants an appropriate decree. If, in a foreclosure case in which there is no substantial contest, the mortgagor desires relief under the moratorium act, this petition may also be disposed of at the pre-trial hearing. If counsel agree by stipulation as to the rental value of the property, the court enters an order directing the mortgagor to pay into court a monthly sum, as the condition of the court's postponing entry of a decree. If counsel do not agree, motion and affidavits as required by the moratorium act are submitted at the pre-trial stage, and the matter is there disposed of.

In foreclosures involving an actual contest on points of law, the chancery pre-trial judge permits the parties to submit the case to him on stipulation of facts for early decision. If the parties want a hearing, the case may be assigned to a circuit court commissioner for the taking of testimony, or it may be set down for regular trial.

Other cases segregated at the pre-trial stage and summarily disposed of include divorce cases wherein there is no contest except for the question of property settlement and also divorce cases which after going to issue become *pro confesso* because of the withdrawal of bill, cross-bill, or answer.

The judge who hears the chancery pre-trial docket, in addition to performing the duties strictly belonging to that office and dealing with foreclosure cases and others in which formal proofs have been taken before a court stenographer, also, as a matter of convenient management, passes on all motions for adjournments and motions made in connection with the cases referred to commissioners for the taking of proofs. In Detroit all of these duties are assigned to the presiding judge, who is also the chancery pre-trial judge.

If plaintiff's counsel does not appear for the pre-trial hearing of a chancery case, the court will, on request of counsel for the defendant, dismiss the bill. If the defendant has filed a cross-bill, the court will permit the defendant to proceed thereon. If

the attorney for the defendant does not appear, the court will permit plaintiff's counsel, on request, immediately to place his proofs before a stenographer. The defendant, in order to contest the case, then has to move to have the proofs set aside, showing cause therefor. The court shows some liberality in granting such motions, conditioning them in most cases, however, on payment of costs.

Generally, attorneys do not avail themselves of these opportunities to put the opposite party in default, but request an adjournment of the pre-trial hearing for a few days to permit opposing counsel to appear, and such requests are always granted. If the case be one wherein the court believes a full hearing to be essential to the attainment of justice, the court may insist on such adjournment.

In the chancery pre-trial hearings, as at law, adjournments are frequently granted to permit counsel to prepare their cases more fully before the final framing of issues. Such adjournments are granted or denied in the discretion of the pre-trial judge.

Cases which are set down on the regular chancery trial docket, for full hearing, are assigned for trial within a week after the pre-trial hearing. If, in this brief interval, the parties change their minds about settling the case, it is referred back to the pre-trial judge. If the settlement is reached after the trial is begun, the trial judge disposes of it by appropriate order or decree. Cases which at the pre-trial hearing are referred to a court commissioner for the taking of proofs are returned to the pre-trial judge after the commissioner has made findings of fact and conclusions of law. If no exception is taken thereto, an appropriate decree is entered forthwith. If exceptions to the findings are filed, written briefs (with a transcript of the testimony and the exceptions relating to the findings of fact) are submitted in support of and in opposition to the exceptions, and the case is then decided on briefs. Cases wherein such exceptions are filed may be assigned to other judges for final decision.

EXPANSION OF THE PRE-TRIAL SYSTEM

While extended discussion of the possibilities for further development or geographical extension of the pre-trial system has no place in an article which is a mere description of the present system as now in operation in various places—still the

picture here drawn might be given perspective by brief mention of the developments which judges are contemplating as a means of increasing the effectiveness of the pre-trial system.

Plans to extend the pre-trial system contemplate, first, an elaboration of the scope of the pre-trial hearing. Some of the judges are of the opinion that it would be more effective if the pre-trial hearing were attended by the parties as well as by counsel, so that the pre-trial judge might explain to the litigants in the language of the layman, just what questions of fact and law would be presented in court, and what their chances might be for prevailing, upon trial, on the various issues involved.

It has been suggested, also, that if witnesses were brought in at such a conference, the judge by talking with them might learn whether or not they could testify to the facts which they were expected to prove, and might discover that there was in fact no real controversy.