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Trial Calendar Preference

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TODAY'S CROWDED COURT DOCKETS and delays often prevent cases from being reached until years after the action is filed. This is particularly true in the large urban areas of the country. For example, in 1961 the worst court congestion was Chicago with a 64.9 month delay. Next was Nassau County, Long Island, New York with 62 months; followed by Westchester County, New York, 51 months; New York City with 34 months; Pittsburgh with 33 months; and Philadelphia 30 months.[1] Here in Cuyahoga County, of which Cleveland is the county seat, we were about 16 to 18 months behind. In 1961 there was a net gain of 36 cases in reducing the backlog. At this rate the courts will probably become current in a hundred years.[2]

However, under some circumstances it may be possible to obtain a trial more quickly by a motion for preference on the trial calendar.

Parenthetically, this article does not refer to the criminal courts, where the accused is constitutionally guaranteed a "speedy trial."[3]

One of the best ways to secure a prompt hearing is in those jurisdictions which maintain a short cause calendar. If it appears that a trial will occupy only a short time, such as one or two hours, it can be placed on the short cause calendar, and it will be heard more speedily than if it were placed in order on the regular docket.[4]

Just what kind of cases can be given preference is mentioned specifically in the statutes of many states. Connecticut, for example, gives preference to six different types of action, ranging from summary process[5] to actions by persons who are 65 years or older or who will reach that age during the pendency of the ac-

* B.A., M.A., Univ. of Pennsylvania, Fourth-year student at Cleveland-Marshall Law School.

1 Report of Institute of Judicial Administration (New York City) in Cleveland Plain Dealer, p. 1 (Aug. 8, 1961).

2 85 N. J. Law J. 508 (Sept. 27, 1962).

3 Constitution of the United States, Amend. VI; Constitution of Ohio, Art. 1-10 (1912).

4 Black's Law Dictionary, 1548 (1951).

5 Gives lessor means to recover premises from lessee whose lease has expired.

tion.[6] New York's Rules of Civil Procedure permit preference in cases in which the state or any political subdivision thereof is involved, or any action "in which the interests of justice be served by an early trial."[7] Louisiana also gives preference on the docket to those cases in which the state or any political subdivision may be a party, as well as to all actions for damages arising "ex delicto" or as torts.[8] Ohio grants preference to any action to which the state is a party, actions for wages, and workmen's compensation cases.[9] California allows preference to any person interested under a deed, will, or other written instrument, in water course cases, and to one claiming to be a non-resident for income tax purposes.[10]

Most of the states specifically give preference on the docket to cases in which the state itself or any political subdivision thereof is a party. However, this is also a common law right, for preference and sovereignty are inherent possessions of the sovereign, of which it could not be deprived except by express legislation. Definitions as to what is a "political subdivision" have led to problems involving the proliferation of boards and commissions found today. The courts have upheld the grants of

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[6] Conn. Gen. Stat. Anno., Title 52-192 (1958).
(a) Cases of summary process.
(b) Objections to acceptance of a report of a committee or auditor or award of an abritrator.
(c) Appeals from probate.
(d) Actions by receivers of insolvent corporations.
(e) Actions by persons 65 years of age or older, etc.
(f) Partitions and foreclosure cases.

[7] N. Y. Rev. Rules Civ. Proc., Rule 151 (1956).
(a) Actions brought by or against the state—or board of officers of the state.
(b) An action or special proceeding in which the interests of justice will be served by an early trial.

[8] McGinn v. New Orleans Railway and Light Co., 118 La. 811, 43 S. 452, 13 L. R. A. N. S. 601 (1907), cited in West's Louisiana Statutes Anno. § 13:4157 (1950).
(a) Cases in which the state or any political subdivision may be a party.
(b) Interdiction appeals (person who became insane, incapable of controlling his own interests and placed under control of a guardian).
(c) Contest for political office.
(d) Those affecting the public interest or fiscal policy.
(e) Constitutionality or legality of any tax which delays its collection.
(f) Putting of heirs in possession.
(g) Demands for separation from husband and wife.

[9] Page's Ohio Rev. Code § 2311.08 (1953).

[10] West's Calif. Code Civ. Proc. §§ 1060-1062 (1954).

priority to these various boards even if they are not officially designated by the title of "Board." [11]

In the absence of any specific statutes listing which cases are entitled to calendar preference, the trial court, under its own rules of procedure can advance or prefer certain cases, relying on its own discretion and the best interests of justice.[12]

Trial preference is jealously guarded by the courts and occurs only where circumstances are unusual.[13] Trial preference, though discretionary with the court, has led to some judicial interpretations as to whether the court has wide, reasonable or broad discretion. In one case the trial court consolidated two separate but related causes of action for trial, and upon objection by one of the defendants the Washington Supreme Court held that the question whether or not cases should be consolidated was a matter lying entirely within the discretion of the trial court to arrange its calendar and determine in what manner the cases could be heard most expeditiously.[14] Obviously, as a case may be consolidated and thus heard out of its regular turn, this in itself constitutes a preference.

In another case the petitioner claimed that the circuit court was refusing to hear this petition inasmuch as it had not been assigned a date for trial. The Supreme Court of Indiana merely noted that the courts may exercise a "reasonable discretion" in the control of their dockets and refused to order the lower court to set a trial date.[15]

Preference in the federal courts is governed by the Federal Rules of Civil Procedure.[16] Cases in which the Federal Government is a party, where the public interest is strongly involved,[17] or cases of great hardship if trial is delayed, are entitled to preference.[18] In a civil rights case the plaintiff, a Negro, alleged that he was denied admission to the law school of the University

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[11] Sullivan v. Republic Steel Corp., 85 N. E. 2d 310 (Ohio 1948).

[12] 53 Am. Jur., Trial, p. 30.

[13] Superior Court of N. J., Rules of Civ. Prac., Rule 4:88-8 (1948).

[14] Washington State ex rel. Sperry v. Superior Court for Walla Walla County, 41 Wash. 2d 670, 251 P. 2d 164 (1947).

[15] *Ibid.*

[16] Barron and Holtzoff, Federal Rules of Civil Procedure, Rule 40, § 901, p. 86 (1960).

[17] Anderson-Fribury Inc. v. Justin R. Clark & Son, 98 F. Supp. 75 (D. C. N. Y. 1951); Weiss v. Doyle, 178 F. Supp. 566 (D. C. N. Y. 1955); Ivey v. David, 17 F. R. D. 319 (D. C. N. Y. 1955).

[18] Bifferato v. States Marine Corp., 11 F. R. D. 44 (D. C. N. Y. 1941).

of Florida because of his race. He requested that the court advance the case on its docket in order that he might be admitted to the next term of the law school. The court held it to be in the public interest to grant his request.[19] As strikes frequently affect the public interest, federal courts step in often. When Vermont granite processors charged a conspiracy between dealers and unions, and the strike had virtually paralyzed the industry, the case was preferred and placed at the head of the calendar for immediate trial.[20]

Generally, any good and sufficient cause should enable a trial judge to grant preference. It rests first on the rules of the court itself to regulate its own calendar,[21] and secondly on the judge's sound legal discretion.[22] Courts of review will not usually disturb the trial courts' advancement of a case except for gross abuse of judicial discretion, resulting in prejudice to one of the parties.[23] In Illinois the record does not even have to show the grounds on which the discretion was exercised; proper exercise being assumed in the absence of a contrary showing.[24]

The most practical application of calendar preference should be in the field of torts. If counsel can show "great hardship" due to trial being delayed until its regular turn, this may be used as argument for advancement.

"Great hardship" has been variously interpreted as old age,[25] impending military service,[26] imminence of death,[27] destitution,[28] and serious injuries.[29]

Old age is a term hard to pin down. Connecticut holds it to be 65 years of age or older.[30] But most other courts would probably put it higher, into the 70's or 80's.[31] A plaintiff's motion

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19 Hawkins v. Board of Control of Florida, 253 F. 2d 752 (C. A. 5, 1958).

20 Anderson-Fribury v. Justin R. Clark & Son, *supra* n. 17.

21 Smith-Hurd Illinois Anno. Stat., Prac. § 2-42. "Subject to (Supreme Court) rules the city, county, circuit and appellate courts may make rules regulating their dockets, calendars and business (1954).

22 Spitzer v. Schlatt, 249 Ill. 416, 94 N. E. 504 (1931).

23 Burdick v. Mann, 60 N. D. 710, 236 N. W. 340 (1931).

24 Spitzer v. Schlatt, *supra* n. 22.

25 Blank v. Medical Arts Center Hospital, 230 N. Y. S. 2d 792 (1962).

26 Relman v. Winer, 33 N. Y. S. 2d 867 (1941).

27 Thomas v. Green Bus Lines, Inc., 94 N. Y. S. 2d 489 (1950).

28 Rinzler v. Manufacturers Trust Co., 75 N. Y. S. 2d 867 (1947).

29 Bifferato v. States Marine Corp., *supra* n. 18.

30 Conn. Gen. Stat. Anno. § 2-192 (1947).

31 Blank v. Med. Arts Center Hosp., *supra*, n. 25.

for preference was granted where the plaintiff was 76 years of age and he would be unlikely to survive a wait of up to six years.[32] In another case the plaintiff was 85, and had suffered severe, disabling injuries.[33] Usually, though, there must be a strong probability that the petitioner will not survive until time of trial.

Destitution, as the term is employed in motions for preference, is held to mean that the petitioner is no longer able to live except as a public charge.[34] The mere fact that he is poor doesn't entitle him to a preference. One court states that the "mere showing of heavy indebtedness and presently lacking sufficient income to meet current living expenses will not justify the granting of a preference in granting a trial." [35] Yet in one case where a husband was seriously injured and the wife sacrificed her home life in order to earn living expenses, and the amount earned was less than would have been allotted on relief, the husband was entitled to a preference.[36] It is not necessary for a person to dispose of all his assets, sell his home and go on relief. It is only necessary that he be eligible for public welfare relief in order to qualify for a preferred position on the docket.[37] A corporation in a tort action was not entitled to a preference on grounds of destitution in that it was no longer doing business and owed debts which it was unable to pay, and that the suit was its only asset.[38]

Imminence of induction into the armed services during war time has resulted in a preference. The uncertainty of the length of service, plus the possibility of being lost in action, would certainly be just grounds for preferment.[39] However, where a soldier had been given an unexpected furlough from the armed services, preference was denied because the other parties to the suit would have been prejudiced, as they were unable to be ready

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[32] *Ibid.*

[33] Bitterman v. 2007 Davidson Ave., 104 N. Y. S. 2d 81 (1961).

[34] Holdridge v. Carter, 268 N. Y. S. 2d 411 (1951).

[35] Cohen v. King's Toys & Stationery Store, 135 N. Y. S. 2d 688 (1952); Utnicki v. City of New York, 139 N. Y. S. 2d 548 (1953); DiCarpio v. Babylon Milk & Cream Co., 143 N. Y. S. 2d 38 (1955).

[36] DiCarpio v. Babylon Milk, *supra* n. 35.

[37] Bernstein v. Strammiello, 120 N. Y. S. 2d 490 (1952).

[38] Knollwood Cocktail Lounge v. Edso Building Corp., 15 N. Y. S. 2d 951 (1939).

[39] Relman v. Winer, *supra* n. 26.

for trial within a few days.[40] In another case where the plaintiff's attorney was about to be inducted into the service, the court refused a preference.[41] It reasoned that the petitioner could always find other counsel, just as competent.

Occasionally counsel is faced with the prospect that an aged client may die before his case appears for hearing. In the early common law, actions for torts affecting personal property were made to survive the death of the plaintiff, and were maintainable by his executor or administrator. This has been modified by all American jurisdictions to some extent, if only to provide that causes of action for injuries to all tangible property, personal and real, shall survive the death of both parties.[42] About half of the states permit personal injury actions to survive. The following states permit personal injury actions to survive the death of either or both parties: Alabama, Colorado, Connecticut, Delaware, District of Columbia, Florida, Iowa, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, and Wyoming. In Georgia, Missouri, Tennessee, and Texas it survives if the action has been instituted before the death of one of the parties.[43]

There is no point in belaboring the philosophy behind these "Survival Statutes" for the essential problem of the client who is unlikely to survive the pendency of the action is still there. Most practicing attorneys with whom this author has discussed this matter say that they simply take a deposition setting forth the essential facts and then patiently wait for the case to come to trial. Yet it seems hard to deny to any person for "his personal benefit and comfort the results of any cause of action for the relatively short time left to him in life." [44] Connecticut, as mentioned before, provides that actions brought by or against any person sixty-five years old, or who reaches that age during the pendency of the action, shall be granted a preference.[45] But this is a rare exception.

In the older cases, an aged litigant was not necessarily granted preference merely because he was not likely to survive

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[40] Ragan v. City of New York, 44 N. Y. S. 2d 893 (1943).

[41] Kessler v. Chetcuti, 37 N. Y. S. 2d 375 (1942).

[42] Prosser, Law of Torts, 708 (2d ed. 1951).

[43] Evans, Survival of Tort Claims, 49 Mich. L. Rev. 969 (1931).

[44] Blank v. Medical Arts Center Hosp., *supra* n. 25.

[45] Conn. Gen. Stat. Anno., *supra* n. 6.

until his case is reached in its regular order.[46] The controlling case in New York for many years noted that, although a grant of preference in the hearing of a case may be discretionary with the court, a motion to advance had to be accompanied by a showing of destitution and the strong probability of the death of either the plaintiff or defendant. Here, although, plaintiff was over sixty years old, and seriously injured, these facts alone did not justify the granting of a preference. The reviewing court laid down some ground rules which have been followed fairly consistently by the other courts. Such factors as serious injury, old age, inability to engage in gainful employment, high hospital and medical expenses, or a reduced financial condition, are not *per se* sufficient basis for a preference in the trial of a personal injury case.[47] But in a case where a female plaintiff was 76 years old and received serious injuries in a taxicab, and it was shown that she would be unlikely to survive the wait until her case came to trial, she was entitled to a preference.[48] Again, where the plaintiff was 68, and in the opinion of her physicians would not survive the period of time which it would take her cause of action to be reached for trial in its regular order, preference should have been granted.[49] In another personal injury action, where the plaintiff was 75 years old and, in the opinion of her physician, she would not survive until her trial was heard, trial preference was properly granted.[50] An affidavit by an attorney containing only his conclusion that his plaintiff was financially destitute, and the physician's affidavit which failed to state whether the injuries were permanent, and whether in his opinion, based upon a sufficient description of the facts, the plaintiff wouldn't survive until the case was reached in its regular order, didn't justify a preference.[51]

One of the more interesting interpretations of the holding that imminent death was necessary for calendar preference was based on the Connecticut statute.[52] The County of New Haven claimed that it was entitled to calendar preference on the ground

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[46] Healy v. Healy, 99 N. Y. S. 2d 874 (1950).

[47] *Ibid.*

[48] Hyman v. National Transportation Co., 22 N. Y. S. 2d 705 (1956).

[49] Migliorsi v. R. K. O.-Keith-Orpheum Theatres, 148 N. Y. S. 2d 705 (1956).

[50] Walsh v. Federated Department Stores, 129 N. Y. S. 2d 599 (1954).

[51] Holdridge v. Carter, *supra* n. 34.

[52] Conn. Gen'l Stat. Anno., *supra* n. 6.

that the statute used the words "persons" and the county was a "person," more than sixty-five years of age and about to "die" (due to legislative action) on October 1, 1960, which would be before the case could be heard on the regular schedule.[53] The court held that the intent of the legislature meant older human litigants who might die or become incapacitated by age before the regularly scheduled time for trial. There was no indication that the word "persons" meant such an artificial being as a corporation.

Recently the New York courts seem to have relaxed their restrictive interpretation of old age as a basis for calendar preference. An eighty-five year old plaintiff had suffered disabling and permanent injuries which resulted in protracted disability, yet did not aver the possibility of immediate death. The court held that *old age alone* was all that was necessary in order to grant a preference. The court pointed out that the plaintiff should receive whatever resulted from the cause of action for the short time left to him in life.[54] However, very recently the courts have seemed to back off a little. A 73 year old woman who suffered physical injuries was not entitled to preference because of her advanced years. There was no claim of destitution or other similar grounds. Her claim for preference was based solely on an argument that the petitioner would not live until the time of trial. The doctor stated, "It is my opinion with reasonable medical certainty that the (plaintiff) 'may' not live to see the trial of this action." The court held there must be an "unequivocal" showing that death is imminent, or that the petitioner will not live until the time of trial. So there a preference was an improvident exercise of discretion.[55]

A unique preference was recently granted for an hysterical disability. The plaintiff was a passenger in the defendant's automobile and suffered brain injuries when the defendant suddenly stopped. Physicians found her to be suffering from an acute hysteric anxiety induced by the accident, which could not be treated until her *legal problem* was settled. The court held that the interests of justice would be served by an early trial.[56]

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[53] County of New Haven v. Porter, 194 Conn. 265, 164 A. 2d 236 (1960).

[54] Blank v. Med. Arts Center Hosp., *supra*, n. 25.

[55] Brier v. Plaut, 37 Misc. 2d 476 (N. Y. 1963).

[56] Weinstein v. Levy, 239 N. Y. S. 2d 753 (1963).

Even if there are grounds for a preference, the attorneys for plaintiff and defense cannot stipulate that the case be placed on the preferred calendar and expect the court to acquiesce. The judge is permitted to exercise his own discretion as to the arrangement of the court's calendar and conduct of the trial, and therefore it is not necessarily error to reject the motion for advancement.[57]

Basically it is difficult to see why the various situations mentioned above should not result in calendar preference. It seems strange in this modern day that death should extinguish a cause of action, or that, even if a jurisdiction has a survival act, a plaintiff should not have the benefit of his cause of action. The courts, under their various rules of civil procedure, have a very large discretion as to the order in which cases may be tried, and this discretion will not ordinarily be interfered with by the reviewing courts.[58] In cases involving great hardship, and upon a proper motion, the courts may advance cases on their trial calendars.

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[57] Wicks v. Wolcott, 107 N. Y. S. 2d 931 (1951).

[58] Bingham v. Hill, 4 Ohio Dec. Repr. 144 (1878).