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Volume 46 | Issue 2 Article 7

February 1940

Pre-Trial of Lawsuits

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Eight Judicial Circuit

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Recommended Citation

Thomas H. Curd, *Pre-Trial of Lawsuits*, 46 W. Va. L. Rev. (1940).
Available at: https://researchrepository.wvu.edu/wvlr/vol46/iss2/7

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West Virginia Law Quarterly

and The Bar

Published by the Faculty of the College of Law of West Virginia University, and issued in December, February, April and June of each academic year. Official publication of The West Virginia Bar Association.

Subscription price to individuals, not members of The West Virginia Bar Association, $2.00 per year. To those who are members of the Association the price is $1.00 per year and is included in their annual dues. Single copies, 50 cents.

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PRE-TRIAL OF LAWSUITS*

THOMAS H. S. CURD**

If I judge correctly the criticism of the public in recent years against the bench and bar, the burden of that criticism has been directed against the following faults in our practice and procedure:

> Delay in the final determination of litigation;
>
> Unnecessary expense to the taxpayer;
>
> Unnecessary expense to the litigant;
>
> Unnecessary sparring by attorneys in court on unessential matters, and the useless examination of witnesses in court about uncontroverted or nonessential facts.

* Address delivered at the meeting of the Judicial Association at Clarksburg, West Virginia, on September 30, 1939.

** Judge of the Eighth Judicial Circuit. Welch, West Virginia.

It was to correct these faults that pre-trial procedure was initiated. Its success has developed healthy growth and popularity.

Although pre-trial procedure has been generally unknown and unheard of in this state until most recently, it is now in fact here, and lawyers and judges everywhere may expect to have to accept it in the very near future. The English courts have had it in modified form for some time. It originated in this country in Detroit in 1932, has later been adopted in Boston, Los Angeles, San Francisco, and other communities where the dockets of the courts became so congested that necessity again became the mother of invention to relieve the situation in those areas. Not only were the dockets, then far behind, cleared, but it was found to satisfy not only the lawyers and the judges, but the litigants as well, in addition to disposing of litigation of long standing at much reduced expense to the parties to the litigation and to the taxpayers. In various places where there is only one judge to a county or circuit, it has been used with satisfactory results.

In England pre-trial procedure is compulsory. Under Federal Court Rule No. 16, it is discretionary with the courts in the United States. I am not prepared to say at this time whether or not it could be put into operation in West Virginia without authority from the legislature, or at least some changes in our laws on pleading and practice. However, Judge Moynihan, of Detroit, who is the pioneer in pre-trial procedure, is emphatic in respect to the power of every court by inherent right to require pre-trial hearings. Under the authority given the Judicial Council and the supreme court of this state, it would seem unquestionable that rules relating to pre-trial procedure not inconsistent with the present laws could be enforced.

Since I first heard of pre-trial procedure, I have been curious to know just what it meant in a practical way — just what took place in the pre-trial and how it was conducted. I will assume that some of the other judges here know as little as I did about it when I started to prepare this paper. Federal Rule No. 16 is concise but fully covers the procedure and, no doubt, embodies the experience of all those courts using it at the time this rule was made, which is 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 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 of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the action. 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 extend it to all actions."

According to Professor Sunderland, the practice in Detroit is very simple. Cases are set first for pre-trial. An order requires counsel to attend and it is recommended that the parties also attend. The pleadings are taken up and settled by amendment or demurrer or the filing of additional ones. Bills of particulars may be required. Stipulations as to the uncontroverted facts are made. The issues are settled so that on the day of trial only the controverted issues have to be tried, stripped of all unessentials and camouflage. As stated by one writer, pre-trial hearings are so simple and sensible that any lad of 15 with an average I. Q. can grasp the principle in three minutes. There is implied only that it shall be required that counsel appear before the judge and answer his reasonable questions and that the judge will employ his powers to exclude extraneous issues. These results are claimed for the procedure:

(1) Prompt trial of the case when set;

(2) Fewer witnesses and consequent lessening of expense to parties;

(3) 12% of the cases finally disposed of at the pre-trial;

(4) Jury trial waived in 65% of all cases, due to the narrowing of the issues at the pre-trial;

(5) Time taken up after the call of the case with amendments, demurrers, pleas, and motions which cause postponement and upset estimations of time depended on by litigants in succeeding cases is avoided;

(6) Expense to the taxpayer in furnishing jurors is greatly lessened by reducing the time of attendance of the jury at court through settlements, reducing the issues to try, stabilizing the trial calendar for judges who want to use the time when the jury is in attendance in trying cases, not in waiting for them to be tried and for attorneys to prepare for trial.

These results are claimed in Suffolk County, Massachusetts, in which is the city of Boston, for the system for the years 1936-1937, taken from records kept under the direction of the pre-trial judge:

	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

In Suffolk County, Massachusetts, agreement of counsel is usually obtained as to the following matters at the pre-trial:

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 case, on sidewalk, acknowledgment of receipt of notice thereof as required by statute and the sufficiency thereof.
(c) In landlord and tenant cases, the status of the plaintiff, either as a tenant-at-will or lessee, and if not a tenant, whether 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) Execution of written contract — whether party signing for a corporation had authority.
(e) The production of instruments, documents, correspondence, without requiring notice under the statute or summons.

I hope you will pardon me for an allusion to personal experience since I went on the bench. I do not recall that I had at that time ever heard of pre-trial procedure, which was just two years and eight months ago, but I at once became impressed with the obvious uselessness of a $100.00 a day jury sitting idly by while attorneys argued over pleadings, camouflaged for continuance, talked with witnesses and otherwise tried to prepare their cases in court when they should be trying them. This resulted in a local rule of the court that all matters relating to pleadings of all kinds must be taken up with the court before the first day of the term and all matters for continuances except on account of the absence

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of sick witnesses must be taken up three days before the day set for the trial of the case. I find this has been a means of disposing of several cases, either by settlement, dismissal for one reason or another, or submission of the case to the court in lieu of a jury, and the reduction in the jury costs to the county from a $27.00 average cost per case before using the system to a $17.00 average cost per case since for all cases disposed of. Much time has also been saved in court by having attorneys submit to the judge as many instructions as practical as far in advance of the trial of the case as possible. These practices have so stablized the docket that I know to an almost absolute certainty at least two days in advance whether a case will be tried on the day set. If cases fall by the wayside, either from settlement, dismissal or continuance, after the docket is published, so that there will be only one or two cases to be tried on a certain day, only the jurors empanelled to try those cases return that day. With pre-trial procedure made effective to its full extent, and applicable to facts as well as to the law and pleadings, I am satisfied a much greater saving could be realized.

The mere coming together of the judge with attorneys and parties seems to have a psychological effect conducive to a prompt determination of the matter in hand. In open court there is a tendency for counsel and the parties to camouflage, stall for time, and to become antagonistic; in chambers, when not in the presence of the jury and the public, to be more sincere, serene and friendly, especially if they are required to be informal, sit down and do their talking.

In the limited pre-trial procedure had in my court, which has to do only with the pleadings, and not the facts, the attorneys have been in every respect most cooperative. I do not believe, however, it would be wise for a judge in this state, at this time, to undertake complete pre-trial procedure involving facts without the sanction of rules promulgated by the supreme court, backed up by the Judicial Council.

In this discussion, I have not tried to elaborate by going into detail as to the various advantages of the system, but have tried to present a brief idea of what others, experienced with the system, have said on the subject. I have appended a number of references from which the judges may obtain more complete information on the subject of pre-trial procedure.

REFERENCES:

(1939) 23 Journal of American Judicature Society 69;
Report of Section of Judicial Administration of American Bar Asso-
(Continued on p. 154.)