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"JUST WHAT IS YOUR DEFENSE?"

By JUDGE GEORGE T. MCDERMOTT*

The judicial quality does not reside in form or ceremony, still less in circumlocution and an avoidance of the pith of the matter. The judicial quality of procedure is found in the impartial hearing and the reasoned determination upon ascertained facts, and it may be speedy, summary, and, as our clients would say, businesslike, without losing its character.—*Charles E. Hughes.*

QUITE by accident, and in blissful ignorance of the English practice act, I stumbled onto a method of getting at the nub of a case at the beginning of the litigation instead of at the end of it, while in the practice. It seemed to work, and I tried it out on the bench, and it has worked well there in the few cases where the play has come up. That method corresponds closely, I am told, to the English practice. I see no reason why a rule requiring a few minutes' face-to-face conference between the parties, their counsel, and a trial judge, within a few days after a case is filed, shouldn't extend the practice to all cases in this country. I hope the United States Supreme Court will give it serious consideration when the new rules for law cases are promulgated.

I first came onto the idea in some strike lawsuits brought to cloud the title to producing oil leases. When oil is struck, a few lawyers start combing the records to find some technical flaw in the title—flaws not visible to the naked eye. For fifteen dollars a suit could be started, and the pipe line companies, not unwilling to hold money in escrow without interest, would not pay for the oil while the title was clouded by litigation. Plaintiff's counsel never dreamed of winning; he did know the lessee couldn't drill without getting pay for his oil; so he figured, too many times correctly, the lessee would pay a substantial sum to release the pipe line runs.

How could the defense lawyers meet that? After ineffectually fumbling around on such cases, some Kansas lawyers struck upon the idea of filing an answer the day after the summons was served, and at the same time they served notice on plaintiff's counsel of a motion for immediate trial, setting out the irreparable damage flowing from the delay. That brought the parties face to face with the trial judge immediately. The trial judges in the oil country recognize a strike

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lawsuit on sight. When plaintiff's counsel appeared on the motion, within ten days after he brought his suit, he was put to the rack of the questions, "Just what is your claim?" and "Why not try it next week?" These queries ended his effort to use the process of the court for extortion.

Shortly after I went on the district bench, a fine lawyer wanted an ex parte restraining order to stop the demolition of some fifty-odd temporary buildings used in constructing a massive project. Serious damage would flow from either granting or denying the order, if the first guess was not the final outcome. A telephone call brought defense counsel in a few minutes; an around-the-table discussion narrowed the dispute to ten buildings, and to a simple question of fact; an agreement was reached that the buildings in dispute would be torn down last; a trial of the fact question was set for the following week, and the case was over before the wrecking crew reached the buildings in controversy.

Then we got into the three-judge cases, the bane of a circuit judge's life. The statute properly demands quick action; there is never any notice to the distant judge except a telephone or wire to come now. The statute contemplates a trial on the preliminary injunction and another on final hearing. Nobody likes to take two bites at a small cherry. So in our circuit, the judges have been advising counsel to be ready to try their cases out when the temporary injunction comes on for hearing, generally about ten days from the filing of the suit. Some of them kicked against the pricks at the start. But we'd ask them, "Just what is your claim?" and then "Just what is your defense. *They all knew,* and on their feet *they'd tell us.* In a very few minutes the nub of the controversy would develop. At times we permitted answers to be filed, incorporating the defenses stated in court, after the trial. The Supreme Court has affirmed one such case and did not suggest that such procedural informality denied anyone due process.

After a while the lawyers came to expect it, and answers were ready when the court assembled. We've had a lot of three-judge cases in five years; only once, I think, has there been two trials. In nearly all—I think all but one—the case was finally tried on the application for temporary injunction.

Among them have been rate cases with volumes of testimony —a case involving gas rates to 141 towns in Kansas, and the Denver Stockyard Case—and cases involving far-flung questions of law, as the proration cases from Oklahoma. As far as we can see, the cases were as thoroughly tried then as if the trial had been held a year later. At least no one has complained of the lack of a fair hearing.

Some of our district judges have used the same tactics in single judge cases. On applications for restraining orders, made when the case was filed, counsel on both sides have been called in that day or the next. Such a conference has uncovered the real dispute; has discovered whether the bill has too much or too little in it; has developed the claim and the defense; and very often has set the case for trial.

If that practice works—and it has—in cases where restraining orders are asked, why won't it work in all cases? You'd be surprised how many dilatory motions to make definite or to strike out can be disposed of by such a conference—even before they are filed. A lawyer with a trumped-up case, unless it is a case founded on perjury, doesn't want to stand up and tell it to the judge. A defense lawyer with no weapon but delay has a bad half hour in such a conference. And in bona fide controversies, it shortens immeasurably the time for its solution to get at the crux of the case ten days after it is filed, instead of in the court of appeals two years later.

Of course, if no lawyer brought a hold-up suit; if no lawyer made a sham defense; if all lawyers wanted to get the case decided as quickly as possible, such a rule would be unnecessary. But until that day dawns, such a rule tends to "smoke 'em out."

In the last analysis, the efficiency of our judicial system is going to depend on men and not on rules. No football coach ever won a conference title at a rules conference. He wins it on the field with men. If the bench and bar were all perfect, any rules would work. But it's a practical world, and the law business is intensely practical. We must play with the cards that are dealt us. And as long as we have sham suits and fake defenses, and as long as some lawyers and judges are indolent and dilatory, we must have rules that serve to prod them along.