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Edson R. Sunderland
University of Michigan Law School

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THE THEORY AND PRACTICE OF PRE-TRIAL
PROCEDURE**Edson R. Sunderland* †*Traditional Theory of Defining Issues For Trial*

MORE than a hundred years ago Henry J. Stephen, serjeant at law, published his celebrated treatise on the *Principles of Pleading in Civil Actions*. The book opened with the following statement:

“In the course of administering justice between litigating parties there are two successive objects,—to ascertain the subject for decision, and to decide. It is evident that, towards the attainment of the first of these results, there is, in a *general* point of view, only one satisfactory mode of proceeding; and that this consists in making each of the parties state his own case, and collecting, from the opposition of their statements, the points of the legal controversy.”¹

This was an accurate statement of the controlling principle which had characterized civil procedure in England, and indeed throughout western continental Europe, since the Norman conquest. It was the principle of party-presentation. The parties themselves framed their own controversies, and laid them before the court for decision. The judges were in no way concerned with what the parties brought forward. A plaintiff's case might have no substantial basis whatever. A defense might be purely fictitious. Whatever the parties asserted or denied was taken at its face value as a basis for the trial. The judges never sought to protect themselves or the parties from the useless trial of issues based upon allegations or denials which had no colorable existence in fact. It was their business to try the cases as the parties presented them, and if a case lacked substance the trial would disclose it.

There was a certain economic extravagance in this theory. A trial is an elaborate and expensive proceeding. It is designed to bring out and sift and weigh substantial and conflicting evidence. Its machinery is

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† Professor of Law, University of Michigan, A.B., A.M., LL.B., Michigan; LL.D., Northwestern.—*Ed.*

¹ STEPHEN, PRINCIPLES OF PLEADING IN CIVIL ACTIONS, 2d. Am. ed., 1 (1831).

designed for heavy duty. The burden of proof must be maintained, the witnesses and the documents must be marshaled in due order, the case in chief must be supported and sustained by proper rebuttal, examination must be tested by cross examination, objections must be made at once or they are waived forever. Every ounce of strength possessed by each of the parties must be available for instant use, for no preliminary skirmishes within the field of maneuvers marked out by the pleadings have disclosed the resources of the contestants. Prudence requires that each shall be prepared for a major engagement no matter how probable it may appear that his opponent has nothing with which to support an attack or to maintain a defense.

This wasteful method of litigation was perhaps the more remarkable because criminal procedure provided a very effective means for promptly eliminating apparent controversies which had no merit. It was not enough that someone charged another with crime. There must first be a preliminary finding that there was reasonable ground upon which to bring the defendant to trial. Unless the examining magistrate or the grand jury were convinced that there was evidence upon which substantial issues could be framed, the case never came on for trial at all.

Pre-trial civil procedure under the English common-law system consisted only of pleading. Whatever the rules of pleading could accomplish in the way of defining and restricting issues contributed to the efficiency of the trial. What could not be done by the rules of pleading could not be done at all.

The great weakness of pleading as a means for developing and presenting issues of fact for trial lay in its total lack of any means for testing the factual basis for the pleader's allegations and denials. They might rest upon the soundest evidence, or they might rest upon nothing at all. The parties could assert or deny whatever they chose. But whether the pleadings represented fact or fancy was something with which the rules of pleading had nothing to do. That was a matter to be dealt with at the trial, not at a preliminary stage.

This total incapacity of the system of pleading to differentiate between issues which were genuine and those which were sham finds striking confirmation in Stephen's famous rules set forth in the classic treatise already referred to. The principles of pleading are there reduced to about fifty rules. They deal with the methods employed for producing issues, for insuring their materiality and singleness, for securing certainty, for avoiding obscurity and confusion, and for

preventing prolixity and delay. They are developed and discussed in some five hundred pages of text. The last rule alone deals with the truth of pleadings, and to it the author devotes one page. The rule reads as follows: "All pleadings ought to be true." But it is a rule without a sanction. It expresses only a pious admonition, for the author says of it:

"While this rule is recognized, it is at the same time to be observed, that in general there is no way of *enforcing* it, as a rule of pleading, because in general there is no way of proving the falsehood of an allegation till issue has been taken, and trial had, upon it."²

Truth in pleading means, of course, the existence of a reasonable basis in fact. Every issue involves contradictory assertions which cannot both be true. But if the pleader alleges nothing which he cannot substantially support by evidence, and denies only that which he has substantial ground for controverting, the issues will be true issues.

False issues may not be due to bad faith. They may result from ignorance or bad judgment, or merely from the desire to profit from the turns of fortune which have always been inherent in litigation under our traditional system of procedure. But whatever their cause, the burden which such issues place on the parties, the witnesses, the court and the public is a serious one.

There was little difference in this regard between cases at common law and cases in equity. In each type the development of the issues was in the hands of the parties, and in neither did the system of pleading provide any means for a preliminary test of truth by which fictitious issues could be summarily eliminated.

A limited control over the framing of issues was traditionally exercised by chancery judges in cases where they wished to obtain an advisory verdict from a jury. These issues were directed at the hearing after sufficient proofs had been adduced to disclose the advisability of obtaining the opinion of a jury upon the matter in controversy.³ So far as the issue to be tried was concerned, the proceeding was strictly a pre-trial determination of its existence and substantial importance. But the decision of the jury was not binding on the court, and it was perhaps for that reason that this practice was never looked upon as a

² STEPHEN, PRINCIPLES OF PLEADING IN CIVIL ACTIONS, 2d Am. ed., 493 (1831).

³ 2 DANIELL, CHANCERY PRACTICE, 2d Am. ed., 1285 (1851) (feigned issues).

convincing precedent for the pre-trial examination and framing of issues in ordinary cases.

The oath as an incentive to truthful pleading was never employed by the common law courts, nor even by the courts of chancery, although provisional remedies were often granted only on sworn bills of complaint. Modern experience in England seems to have confirmed this lack of belief in the effectiveness of the oath, for it is not employed. In this country the great reform of the New York code involved a resort to verified pleadings. David Dudley Field expressed extraordinary confidence in their efficacy, saying of the simplified pleadings of the code: "Of course, all the undisputed facts are admitted on both sides, if each party is required, as he should be, to verify his pleadings by his oath."⁴ But the matter is really not so simple as that, and there has been no general requirement of an oath even among those states which adopted the code. The oath where used has tended to become a mere formality, and in some states it has so completely lost all meaning that sworn general denials of each and every allegation in the complaint are regularly employed with the sanction of the courts. No such oath could be seriously made unless the plaintiff's case was a complete fabrication,—a situation not easy to imagine.

Since the fundamental problem is to ascertain before trial what needs to be tried, and for that purpose to determine whether or not there is a *prima facie* foundation for the various assertions and denials of the pleadings, there is no direct solution except to make a preliminary examination of the evidence which the parties have at their disposal. If this can be done conveniently and inexpensively it will supply a basis for the elimination of issues which are so insubstantial as to deserve no consideration at the trial, and may even bring about an immediate and final disposition of the whole case.

Proceedings for discovery before trial offer possibilities of this kind. If parties and witnesses are subject to liberal discovery examinations as soon as the issues are presented by the pleadings, any party to the record has it within his power to test for himself the substantial basis for the positions asserted by his adversaries. Information so obtained will indicate the real points of controversy, in spite of pleadings which confuse or mislead.

But there is no reason why the court should not itself take a hand in the investigation, supplementing the pleadings and the discovery

⁴ I FIELD, SPEECHES, etc., 233 (1884).

which the parties have obtained, by direct interrogation of counsel or parties in the presence of each other, with a view to eliminating issues through admissions or through the withdrawal of allegations or denials, or by obtaining the consent of the parties to the limitation or simplification of proof.

What an efficient trial judge frequently does on his own initiative during the opening stages of the trial, by interrogating counsel, may be done with better effect at a preliminary judicial hearing before trial, and all matters not really in dispute may thus be withdrawn by express admissions or by court order after an exposure of the want of any evidence sufficient to sustain or refute the claims made in the pleadings.

Every issue which can in this way be withdrawn from the trial agenda will result in a net gain for all parties concerned. It will save time for the court and jury, save expense for the parties to the action, save trouble for the witnesses, diminish the risk of error by simplifying the proceedings, and reduce the labor and cost of an appeal by curtailing the size of the record. If the admissions go far enough, or the evidence is clear enough, no trial at all may be necessary.

It is quite obvious that the traditional principle of party-presentation of issues must undergo some slight modification if the court is to make an effective pre-trial test of the actual existence of alleged points of controversy between the parties. And in view of the almost superstitious veneration with which the legal profession looks upon the familiar systems of pleading as an adequate mechanism for presenting issues, slow progress in developing a pre-trial technique would be expected. Such has been the case.

Development of Pre-Trial Procedure in England and Scotland

In England the first attempt to provide for a pre-trial defining of issues appears to have been made on a very limited scale in 1831. This occurred in an act to authorize and regulate interpleader in common-law actions. The statute provided that when a defendant was sued for money or property in which he had no interest and a third person also made claim to it, the court might order the third party claimant to appear and state the nature and particulars of his claim, and maintain or relinquish it, and the court should hear the allegations of the rival claimants and frame the issues between them and proceed to the trial of the same.⁵

⁵ 1 & 2 Wm. 4, c. 58, par. 1 (1831).

There was no reason why this authority given to the court to determine and frame the issues between the parties should not have been extended to cases of all kinds.⁶ It was a principle of universal validity. But the broad implications of the statute passed unnoticed at the time.

No other attempt to provide a pre-trial hearing in the English courts to ascertain and fix the issues was made for forty years, but in 1868 Parliament revised the practice of the Court of Session of Scotland and introduced a requirement that in every case, after the pleadings were in, there should be a hearing before the judge, at which the pleadings should be adjusted and the record be closed. At that time the judge was to require the parties to state whether they were ready to dispense with any proof, and, if not, they were to submit the issue or issues which they proposed to try. These were to be discussed with the judge on a day to be fixed, and he was to determine whether proof should be allowed and, if so, how it should be taken.⁷

This has continued to be the practice in Scotland. The issues are definite statements of the precise questions which the jury is to answer, and when adjusted and approved by the judge they are signed and authenticated by him.⁸

It is probable that this Scottish practice suggested the summons for directions which was introduced in the English practice in 1883. It was more extensive in its scope than the Scottish adjustment of the issues, and in its original form was designed to supplement the rules of pleading by providing the parties and the court with additional information regarding the true nature of the controversy. The rule authorized but did not require any party, at any time, to take out a general summons for obtaining directions from the court as to all interlocutory proceedings in the action, including particulars of claim or defense, statement of a special case, discovery, mode and place of trial, and any other matter or proceeding in the cause or matter previous to the trial.⁹ It was a short summons, which might be returnable in four days, and was heard by a judge or a master.¹⁰

Ten years later, in 1893, the procedure was strengthened by making it obligatory upon the plaintiff in every action to take out a sum-

⁶ FINLASON, *OUR NEW JUDICIAL SYSTEM* 295 (1877).

⁷ 31 & 32 Vict., c. 100, § 27 (1868).

⁸ BALFOUR, *HANDBOOK OF THE COURT OF SESSION PRACTICE* 84 (1922).

⁹ *RULES OF THE ENGLISH SUPREME COURT*, Order 30 (1935).

¹⁰ 12 *STATUTORY RULES AND ORDERS* 367, Appendix K, No. 3a (1904); *RULES OF THE SUPREME COURT*, Order 54 (1935).

mons for directions after appearance but before pleading, and the judge or master was authorized to make any order that might be just, regarding all interlocutory proceedings, whether the parties requested it or not. The enumeration of matters to be dealt with on the hearing for directions was extended to include pleadings, which might or might not be ordered, admissions, examination of witnesses, inspection of documents and inspection of real or personal property.¹¹

In 1902 the provision restricting the scope of the summons for directions to interlocutory proceedings was removed, and the court or judge was authorized to make any order that might be just with respect to all the proceedings to be taken in the action, whether such order was interlocutory or final.

In 1932 in the so-called "New Procedure" cases,¹² and in 1933 in all other cases,¹³ a radical change was made in the sequence of the summons for directions. Prior to the amendments of those years, directions were asked and given before the pleadings were filed. After those amendments, the hearing for directions followed rather than preceded the filing of the pleadings, and it was based thereon.

It is obvious that if the hearing on the summons for directions takes place after the nature of the controversy has been disclosed by the pleadings, and after each party and the judge has seen what positions the adversaries have asserted on the record, the orders made are much more likely to be definite, detailed and adapted to the specific problems presented. Hearings prior to 1932 in fact tended to become a matter of routine. Since they preceded the filing of pleadings, there was likely to be no barrister at that time employed in the case, and a solicitor's clerk usually represented the plaintiff before the master. A dozen or more summonses per hour were ground through the mill, and it was inevitable that the procedure became formal and rather barren. By means of this shift in the position of the hearing for directions, its effectiveness was immensely increased.

At the same time an important change was made in judicial personnel. For fifty years summonses for directions had been returnable before the masters. After 1932 all law cases except a few torts based on malice or fraud, false imprisonment, seduction and breach of promise of marriage, were to be dealt with on a summons for directions heard

¹¹ RULES OF THE SUPREME COURT, Order 30 (1935). See notes to Rule 1 of this Order, Annual Practice (1937).

¹² RULES OF THE SUPREME COURT, Order 38 A (1935).

¹³ RULES OF THE SUPREME COURT, Order 30, rules 1 and 2 (1935).

by one of the judges, and the judge who heard the summons was expected, if possible, to ultimately try the case. This was the so-called "New Procedure."¹⁴

Each judge assigned to the "New Procedure" list, when hearing a summons for directions, is given all the powers conferred on the court or judge in dealing with directions in ordinary cases. These, as already pointed out, include orders regarding pleadings, particulars, admissions, discovery, interrogatories, inspection of documents or of real or personal property, commissions, examination of witnesses, place and mode of trial, and, by amendment made in 1933, "the mode by which particular facts may be proved at the trial."¹⁵

In addition to these general powers regarding directions, the judge hearing the "New Procedure" list is authorized to make any of the following orders:¹⁶

(1) Orders for further and better particulars. These orders are made with great liberality,¹⁷ with a view to forcing a disclosure of what will be brought up at the trial, so as to avoid expense and surprise. The judge usually directs each party to write forthwith to the other for any particulars he may require, such particulars to be given on the same or the following day, or within two days.¹⁸

(2) Orders for discovery and inspection of documents and for admission of facts and documents.

(3) Orders that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial under such conditions as the judge may think reasonable, or that any witness may be examined before a commissioner instead of being required to appear in court, or that no more than a specified number of expert witnesses may be called.

(4) Orders that any question involving expert knowledge shall be referred to a special referee for inquiry and report, including the nature and extent of personal injuries.

It is evident from this glance at the development of pre-trial procedure in England that for half a century there has been a continuous expansion in its scope. And there has been a corresponding increase in its use. One would assume from this that the principle upon which

¹⁴ RULES OF THE SUPREME COURT, Order 38 A (1935).

¹⁵ RULES OF THE SUPREME COURT, Order 30, rule 2(1935).

¹⁶ RULES OF THE SUPREME COURT, Order 38 A, rule 8 (2) (1935).

¹⁷ OGDERS, PLEADING AND PRACTICE, 11th ed., 172 (1934).

¹⁸ ANNUAL PRACTICE (1934), note to Order 38a, rule 8 (2); 175 L. T. 41 (k) (1933).

it rested had proved to be sound, and that the public had become convinced of its value as a device for facilitating litigation.

Fortunately speculation upon this point is unnecessary. In 1934 a royal commission was appointed in Great Britain to consider "The Despatch of Business at Common Law," under the chairmanship of Lord Peel and with a distinguished membership from the bench and bar. It held twenty-six public sittings over a period of six months and heard seventy-one witnesses, including the Lord Chief Justice and many judges of the High Court and Court of Appeal, official referees, registrars, masters and other officers of the Supreme Court, judges of the county courts, and many barristers, solicitors and laymen. Its report, together with a large volume of the minutes of testimony taken, was published in 1936. Pre-trial procedure formed an important part of the subject matter of its investigation, and its conclusions regarding that practice may well be taken to represent the most enlightened public opinion. Those conclusions present an unqualified indorsement of the pre-trial hearing and a strong recommendation for widening its scope.

The Commission was of opinion that the great length of trials was the most serious cause of expense and delay, and that this could be most effectively reduced in two ways,—restricting the issues to those seriously contested, and simplifying proof.

"The rules of pleading," say the Commission, "are supposed to define the issues and to prevent surprise, but they have a very limited effect. Pleadings being delivered at an early stage of the action when the facts may be imperfectly known, the object of the pleader is to put his case with sufficient vagueness and with such suitable alternatives that however the facts turn out his client will not be hampered. Consequently most pleadings contain many allegations of fact which are untrue or impossible to prove. At the trial a great part of these allegations is thrown overboard, but the opponent cannot risk being unprepared to meet them. . . .

"Much could be done to alleviate the defects above mentioned . . . by a summons for directions of a wider character. The object of this summons would be a general stock-taking of the case with the object of arriving at the essentials of the dispute and arranging for proof of the necessary facts in the shortest and cheapest manner. . . .

"The master should intervene actively and should use his influence on the parties to be reasonable and accommodating. A note for the judge at the trial should be made of any respect in which the master thinks a party has been unreasonable, so that

the judge can, if he sees fit, penalize such action by way of costs. . . .

"It would be the endeavor of the master in the first place to get the parties to admit all facts not really disputed and to abandon any allegations they had no expectations of proving. He would record, if requested, any admissions asked for and refused. He would next consider any application to prove facts otherwise than by oral testimony in court and any request for the admission of documents. . . . The case should be gone into sufficiently to enable the master to form fairly reliable judgment as to whether a particular order was essential or whether some simpler alternative would not do. In all cases the master would make an order estimating the length of the trial. . . .

"We have assumed that this summons would be taken before a master and not before a judge. There would, of course, be a considerable advantage if such a summons could be taken before the judge who would try the case. But we do not think this could be secured as a general rule. . . .

"If the action of the master on the summons for directions is to be made effective, it will have to be supported by a closer examination of costs by the judge at the trial than is now usual. At present it is rare for the judges to consider in any detail whether or not a party has caused unnecessary expense by not making or not asking for admissions or by unreasonable conduct in other ways. It is said that little use has been made of Order 32, rule 4, under which admissions of fact may be asked for and which provides penalties in costs if they are not made. . . . Without this sanction any efforts of the masters will be ineffective."¹⁹

Progress Toward Pre-Trial Procedure in the United States

In the United States the movement for the reform of judicial procedure became active about the middle of last century, but it did not follow the English plan. There was a general belief that it was the technicalities of pleading, not its inherent weakness due to its provisional and ex parte character, which accounted for its ineffectiveness in laying a foundation for the trial. Hence the great reform inaugurated by the New York code was directed to a simplified pleading system, not to an interlocutory procedure to supplement the pleadings. In other states reform took the same course, whether they adopted the newly invented code or developed special systems of their own.

In 1912 New Jersey adopted a rule very similar to the English

¹⁹ REPORT OF THE ROYAL COMMISSION TO CONSIDER THE DESPATCH OF BUSINESS AT COMMON LAW 77-81 (1936).

rules authorizing a summons for directions.²⁰ But it went back to the original English draft which made the use of the summons optional with the parties. That feature had made the rule quite ineffective, and had been abandoned in England twenty years before it was taken up in New Jersey. The complete absence, in the New Jersey law reports, of any adjudication regarding the operation of this rule for any purpose except striking out pleadings, would seem to indicate that the rule has been largely a dead letter.

No other definite attempt to provide a pre-trial procedure, supplementary to the pleadings, for laying a proper foundation for the trial, seems to have been made in the United States prior to the remarkable effort of the Circuit Court of Wayne County, Michigan, sitting in Detroit, which began in 1929.²¹

In that year the law calendar was forty-five months in arrears. Finding on investigation that fifty per cent of the cases set for trial were eventually disposed of by settlement, the judges concluded that if a pre-trial examination of the cases could be had and an effort made to facilitate settlement, a large number of them would never be called for trial at all and those which were called would be likely to have many issues eliminated.

Events proved that they were right. Pre-trial dockets at law and in chancery were established for all cases at final issue. Appearance of counsel before the pre-trial judge was made compulsory. Hearings were informal, and inquiry was made as to what amendments of the pleadings, if any, were necessary to state the true issues, whether any matters formally in dispute could not be eliminated from the controversy by admissions, whether a settlement of the case might be effected, and if a trial was to be held how long it would probably take to try the case.

This procedure in Detroit was developed by the trial court itself, without any legislation, and without any reference to the English plan. It is much simpler than that used in England and yet it enjoys the chief advantages now found in the English system, namely, that it is compulsory, that it is employed after the pleadings are closed, and that the hearing is held before one of the judges.

A large number of cases are finally disposed of on the pre-trial hearing. These constitute about twelve per cent of all cases noticed

²⁰ N. J. Laws (1912), c. 231 [Practice Act], Schedule A, Rule 63, amended in 1926 as rule 94.

²¹ "Pre-trial Procedure in the Wayne County Circuit Court, Detroit, Michigan," SIXTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF MICHIGAN 61-75 (1936).

for trial. The effect of the pre-trial hearing in limiting the scope of those cases which are tried cannot be ascertained statistically, but it is doubtless substantial. Law cases waited forty-five months for trial before the practice was adopted; they are now reached in twelve to fifteen months,²² with no increase in the number of judges.

The Detroit system of pre-trial procedure was adopted in 1935 by the Superior Court of Suffolk County, sitting in Boston, Massachusetts and has apparently been very successful.²³

In the proposed new rules of civil procedure for the federal courts, pre-trial hearings are provided which are not obligatory on the parties, nor optional with them, but which may be ordered in special cases or by general rule in the discretion of the district judge. They will relate to the simplification of the issues, amendments, admissions of fact or of documents, limitations of the number of expert witnesses, references, and any other matters which may aid in the disposition of the action.²⁴

Doubtless the effectiveness of any pre-trial system in eliminating unsubstantial and fictitious issues would be greatly enhanced if the court had the power and were willing to penalize parties by the imposition of costs when they unreasonably refuse to admit facts or to abandon issues which ought not to be contested. As pointed out by Lord Peel in his report for the Royal Commission, the English courts have this power but they are loath to exercise it. In this country such power has not commonly been conferred, but there would certainly be small risk of abuse if it were granted to our courts as an aid in the administration of the pre-trial settlement of issues.

The value of pre-trial procedure is by no means limited to metropolitan courts with crowded calendars. It is proportionally as valuable in a small court as in a large one, for it operates upon each separate case to eliminate all those matters which ought not to be permitted to take up time and cause expense at the trial. It substitutes an open, business-like and efficient presentation of real issues for the traditional strategy of concealment and disguise. Its general adoption and use might do much to restore the confidence of the public in litigation as a desirable method of settling disputes.

²² SIXTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF MICHIGAN 56 (1936).

²³ THIRD ANNUAL REPORT OF THE JUDICIAL COUNCIL OF NEW YORK 227 (1937).

²⁴ REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE (District Cts. of U. S.), Rule 16 (April, 1937).