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Nims: PRE-TRIAL

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RECENT BOOKS

This department undertakes to note or review briefly current books on law and matters closely related thereto. Periodicals, court reports, and other publications that appear at frequent intervals are not included. The information given in the notes is derived from inspection of the books, publishers' literature, and the ordinary library sources.

BRIEF REVIEWS

PRE-TRIAL. By *Harry D. Nims*. New York: Baker, Voorhis & Co., Inc. 1950. Pp. xviii, 334. \$5.75.

Pre-trial has come of age. A few years ago, the systematic use of pre-trial conferences had its twenty-first birthday, and Harry Nims was asked by the Committee on Pre-Trial Procedure of the Judicial Conference of the United States to prepare a pre-trial handbook. The instant volume, published under the joint sponsorship of the pre-trial committee and the Council of the Section of Judicial Administration of the American Bar Association, is the product of that request. It is the first major volume devoted to the subject.

Mr. Nims has undertaken to catalog the pre-trial procedures currently in use in state and federal courts and administrative agencies. Apparently, he asked judges in nearly every jurisdiction for statements of their views and practices, and there is here set forth a summary of, and many excerpts from, their replies. The book contains also an eighty-five page analysis of the reported decisions involving pre-trial questions, an extensive appendix, which includes minutes of pre-trial hearings and specimens of orders, and an exhaustive bibliography.

All who have an interest in the effective use of pre-trial conferences will be grateful to Mr. Nims for his labors¹ in combining into one volume so much data. It is unfortunate, however, that he stopped short of an analysis of the information elicited by his survey. The device of stringing together quotations from judges' letters is entertaining and rather informative, but the interested reader looks in vain for an evaluation of the various facets of pre-trial practice and for a perceptive statement of the relationship of pre-trial to our pleading and practice structure at large. Perhaps, however, the author conceived of his task as one of tabulation, leaving to others analysis and argumentation.

Lawyers who have had any experience with pre-trial practice know that it is used primarily for two purposes: (1) to simplify the trial by limiting issues, stipulating facts, and agreeing upon numbers of witnesses, and (2) to encourage settlement. Both minister to the end result of expeditious and economical litigation. The first is universally welcomed. The second is likewise approved when it comes as the natural result of the rather full revelation of strength and weakness of claims which takes place at a well-run pre-trial conference. But the possibility—indeed, the reality—of judicial pressure to settle cases some mem-

¹He will receive no remuneration for them; all royalties go to the Section of Judicial Administration of the American Bar Association.

bers of the bar to have misgivings about the propriety of the procedure. To be sure, the danger that a lawyer will yield or compromise a client's claim against his own better judgment is minimized where the pre-trial judge is not the trial judge, and some courts always assign a different judge for trial. Even there, however, the danger of unwise settlement is ever present. To deny that this is so is to ignore the reality of the fact that a lawyer has to earn his living, in part, before the pre-trial judge, to whom therefore he does not wish to appear unreasonable. With few exceptions the statements of record applauding the settlement possibilities of pre-trial are by judges. When lawyers are represented as approving, it is usually a judge who reports it.

It is interesting to compare two portions of pre-trial minutes in the book's appendix. At the conclusion of a demonstration conference before Judge Murrah:²

Judge Murrah: There is one other thing that I always mention in connection with these pre-trial conferences. It is obvious that this case, if you get past your divorce, will go to the jury. I just inquire whether or not you have discussed the matter of a settlement.

Plaintiff's attorney: There hasn't been any discussion of settlement worthy of consideration.

Judge Murrah: That is all right. The Court hasn't any disposition whatsoever to require you to make a settlement or to coerce you into a settlement. You should evaluate your client's case in the light of the facts, and it is not for the Court to say, but I think this is a case in which you might be able to arrive at some agreement.

Defendant's attorney: Considering the plaintiff's disposition, I don't believe we can ever get together.

Judge Murrah: . . . Is there anything else?

Contrast with this an actual conference before Justice McNally, of the New York Supreme Court, New York County. After a brief statement that the case involved an infant's fall down defective cellar steps and that the hospital record showed a fracture but complete healing, the following colloquy occurred:³

Mr. Justice McNally: What are you asking for settlement?

Plaintiff's attorney: \$1750.

Mr. Justice McNally: What are you offering, if anything?

Defendant's attorney: \$500.

Mr. Justice McNally: On the basis of the picture exhibited to me and the hospital record, I think the case is worth approximately \$1000.

Plaintiff's attorney: I will take \$1250.

Defendant's attorney: \$500.

Plaintiff's attorney: I will take \$1000.

Defendant's attorney: I will pay \$1000.

Mr. Justice McNally: Case marked "Settled—\$1000."

²P. 232. Judge Alfred P. Murrah, of the Tenth Circuit, is Chairman of the Pre-Trial Committee of the Judicial Conference of the United States.

³P. 240.

In another conference, Justice McNally stated to counsel out of the hearing of each other that the case was "worth \$3000," and they finally assented to his figure. Their initial asking and offering figures were \$7500 and \$100, respectively.

This is the kind of thing which makes so many lawyers understandably fearful of pre-trial practice. When a judge makes a good record of settlements he may be giving rise to considerable resentment in the lawyers who practice before him, and what is more important he may be substituting his judgment improperly for that of the attorney as to the value of the client's case. Far better, it seems to me, is the approach suggested by Judge Murrah's statement above, and recommended by the Judicial Conference of the United States in 1944: ". . . settlement is a by-product of good pre-trial procedure rather than a primary objective to be actively pursued by the judge."⁴

Given a cooperative bar, pre-trial is largely what the individual judge makes it. Mr. Nims' service to the bench and bar lies in the compilation of the wonderfully heterogeneous uses to which pre-trial is put by American judges.

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⁴ P. 307.

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