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LEGAL PROBLEMS OF THE PRE-TRIAL CONFERENCE

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Introductory

The pre-trial conference, a procedure which can be traced, so far as origin is concerned,[1] to the conciliation docket established in 1922, in the Chancery Division of the Circuit Court of Wayne County in Detroit,[2] is gradually gaining acceptance as a logical step in the disposition of a law suit.[3] Pursuant to an act of Congress,[4] the United States Supreme Court in 1938, promulgated a rule[5] by which the district court might, in its discretion, call

[1]For an attempt to trace the origin of pre-trial procedure from 1831, in England, and in this country to N. J. Laws 1912, c. 231 (Practice Act), Schedule A, Rule 63, amended in 1926 as Rule 94, N. J. STAT. ANN. (1939) tit. 2, Rules of Supreme Court, Rule 94 (Appendix), see Sunderland, *The Theory and Practice of Pre-Trial Procedure* (1937) 36 MICH. L. REV. 215.

[2]The mandatory pre-trial hearing came into existence in this same court in 1932: The Court of Common Pleas in Cleveland soon followed Detroit's lead; then came the Superior Court for Suffolk County in Boston, in 1935, and the Superior Court of Los Angeles, in 1937. See Note, *Pre-Trial Hearings and the Assignment of Cases* (1939) 33 ILL. L. REV. 699. For a history of pre-trial procedure in Detroit, see *Detroit Circuit Court Integrated* (1931) 14 J. AM. JUD. SOC. 174 and *Pre-Trial Procedure in Wayne Circuit Court* (1933) 16 J. AM. JUD. SOC. 136.

[3]It is now in use in the following jurisdictions as well as in the federal courts: Arizona, California, Colorado, Florida, Illinois, Iowa, Massachusetts, Michigan (Detroit), Missouri, Ohio, South Dakota, Texas, and Wisconsin. For map showing the use of pre-trial procedure in the United States, see (1945) 28 J. AM. JUD. SOC. 157. [The pre-trial conference has been proposed by eminent authority in New York. For a history of the proposal, see MacDonald, Flynn, Schechter, Rowland, and Affron, *A Survey of the Administration of Justice in New York, Part II* (1940-41) 26 CORNELL L. Q. 648, 667.—Ed.]

[4]"The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect." 48 STAT. 1064 (1934), 28 U. S. C. § 723b (1940).

[5]"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

such a conference. Since that time, several states have followed the federal method of authorization while others have, by statute,[6] authorized the trial court to direct the attorneys for the parties to appear for a pre-trial hearing. Statutory authorization, however, would seem unnecessary where the power to make rules of practice and procedure is considered inherent in the judiciary.[7] But in either case, the authorization, whether by rule or by statute, generally, closely follows the federal pattern. This similarity of authorization and the consequent problems which necessarily arise out of the adoption of a new procedural step in the disposition of a cause of action have already caused the development of a small body of case law. Further use of the pre-trial conference and its adoption by other states will undoubtedly result in an increase in the number of reported cases. A study of those now reported not only will reveal the nature of the problems which have already arisen and the attitude of the courts toward pre-trial procedure but will also show the trend of the law pertaining to the pre-trial conference. Such is the purpose of this discussion.

Nature of the Conference

It has been expressly held that the rule which permits the trial court to call the pre-trial conference is procedural in nature.[8] If the rule is procedural, then of course, where the conference comes into being by virtue of statutory authorization, the statute is also procedural in nature. The pre-trial conference, however, is not to be considered a special proceeding, nor can it be called a remedy. It is incidental to a remedy and an episode in an ordinary legal proceeding taking place within an action as the result of a digression from the established practice, to use the language of one court.[9] It is, ac-

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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 controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. 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 to non-jury actions or extend it to all actions." Rule 16, FED. RULES CIV. PROC.

[6]See, as an example, Mo. Laws 1943, p. 353, § 84, Mo. STAT. ANN. (Vernon, Supp. 1945) § 847.84: "The court may in its discretion direct the attorneys for the parties to appear before it for a conference in the county where the case is pending to consider:" (Here follow items identical with those of the federal rule [See note 5 *supra*], with the exception of Item 5, which reads: "Such other matters as may aid in the disposition of the action.")

[7]Parker v. Plympton, 85 Colo. 87, 273 Pac. 1030 (1928); *In re* Constitutionality of Section 251.18, 204 Wis. 501, 236 N. W. 717 (1931).

[8]Eisman v. Samuel Goldwyn, Inc., 30 F. Supp. 436 (S. D. N. Y. 1939).

[9]La Plante v. Implement Dealers Mutual Fire Insurance Co., 12 N. W. (2d) 630 (N. D. 1944).

cording to another court, the latest summary of the state of the case before the trial.[10]

The pre-trial conference, where prescribed by statute, is obviously purely statutory.[11] But it cannot be demanded by a litigant as a matter of absolute right. In the exercise of sound judicial discretion, the court may either grant or refuse to grant a pre-trial hearing to the party seeking it.[12] And even where ordered by the court, its scope and achievements largely depend upon the voluntary co-operation of the attorneys for the respective parties involved.

Problems Prior to the Conference

The pre-trial conference may be called in several ways. A litigant may seek it by application to the court, or the court may, upon its own motion, order such a conference, or one may be called pursuant to a compulsory pre-trial calendar or docket.[13] If a pre-trial conference is ordered, the attorneys for the respective parties are bound to appear[14] and disobedience to the order should subject an attorney to proceedings for contempt of court. While the rule or statute simply authorizes the court to direct the attorneys to appear, there can be no valid objection to an order requiring the parties to be present too. Indeed, witnesses might also be included in the order if their presence seemed desirable to the pre-trial judge. But, whether included in the order for the pre-trial conference or not, a party should be entitled to attend the hearing, and the right to attend seems to be of sufficient value that a denial thereof would constitute an improper act on the part of the pre-trial judge.

The time for the pre-trial hearing is, of course, dependent upon the circumstances in each particular case. Obviously, the nature of the post pre-trial preparation is a very important circumstance. The conference should, however, be held as close to the date of the trial as is practicable.[15] The

[10]United States v. Wood, et al., 61 F. Supp. 175 (D. Mass. 1945).

[11]Matter of Cohen, 179 Misc. 6, 37 N. Y. S. (2d) 115 (Sup. Ct. 1942), *aff'd*, 265 App. Div. 1029, 38 N. Y. S. (2d) 925 (3d Dep't 1943).

[12]Glaspell v. Davis et al., 2 Fed. Rules Dec. 301 (D. Ore. 1942). The court may properly refuse a litigant a pre-trial conference on a stricken defense. Collins et al. v. Wayland et al., 59 Ariz. 340, 127 P. (2d) 716 (1942).

[13]A pre-trial calendar is not synonymous with trial calendar so that a demand for a jury trial, as required by statute, within five days after receiving notice of the setting of the case on the pre-trial calendar does not constitute a waiver of the right to a trial by jury. Union Oil Co. of California v. Hane, 27 Cal. App. (2d) 106, 80 P. (2d) 516 (1938).

[14]Daitz Flying Corporation v. United States, 4 Fed. Rules Dec. 372 (E. D. N. Y. 1945). If plaintiff fails to appear at the hearing, the court may dismiss the case upon defendant's motion. Wisdom v. Texas Co., 27 F. Supp. 992 (N. D. Ala. 1939).

[15]Federal Deposit Insurance Corp. v. Fruit Growers Service Co., 2 Fed. Rules Dec. 131 (E. D. Wash. 1941).

reason for this rule is apparent. The factors prevailing at the time of the pre-trial conference should also be those which will exist at the time of the trial in so far as possible.

While the rule which prescribes pre-trial procedure might be subject to the construction that there should be only one pre-trial order in a case, nevertheless, a consideration of the purpose of the rule would indicate otherwise.[16] If that purpose is not achieved at the pre-trial conference, whether it be on account of the attitude of the parties or the lack of complete information, and even if the failure to achieve the purpose becomes apparent only after adjournment of the conference, there is no legitimate foundation for an objection to a second pre-trial conference or any other number necessary to achieve the aim of the law.[17] One court, adhering to this view, very promptly set the first pre-trial order aside and ordered a new conference where the pre-trial order, which had been submitted by agreement of the parties and approved by the court, disclosed that the contentions of the parties did not meet the issues squarely, and the court was unable to determine the issues which the parties had attempted to present, and there appeared to be no clear conception on either side of the contentions of the other.[18] After all, the pre-trial conference constitutes the most expeditious method, consistent with the rule, whereby admitted facts can be set down and the issues simplified, even though the conference must be adjourned from time to time or a new conference ordered.[19]

The pre-trial conference came into existence as the result of an effort to dissipate a growing dissatisfaction with the courts on account of the inordinate delay and unnecessary and burdensome expense so often connected with the trial of a law suit, and the uncertainty of litigation arising out of the inability of the parties to evaluate the true worth of the claim or defense or to foresee the ultimate outcome of the action. It was designed to narrow the issues, to avoid trials in cases where trial would not be necessary, and to expedite the disposition of pending litigation. In short, it was intended to be a procedural device by which the court might call the attorneys for the respective parties before it and remove, by agreement and admission, every encumbrance to a speedy trial on simplified issues.[20] Its

[16]La Canin v. Automobile Insurance Co. of Hartford et al., 41 F. Supp. 1021 (E. D. N. Y. 1941).

[17]Calvin v. West Coast Power Co., 2 Fed. Rules Dec. 248 (D. Ore. 1941); Glaspell v. Davis et al., 2 Fed. Rules Dec. 301 (D. Ore. 1942).

[18]Calvin v. West Coast Power Co., 2 Fed. Rules Dec. 248 (D. Ore. 1941).

[19]Glaspell v. Davis et al., 2 Fed. Rules Dec. 301 (D. Ore. 1942); Calvin v. West Coast Power Co., 2 Fed. Rules Dec. 248 (D. Ore, 1941).

[20]Nichols v. Sanborn Co., 24 F. Supp. 908 (D. Mass. 1938). *See also* Hillsborough

underlying philosophy is that the litigants, their attorneys, and the trial court should, in an informal manner, approach each other and seek by fair and open methods the grounds upon which they differ.[21] Its purpose is to eliminate unnecessary expense and to conserve time at the trial and thereby speed the determination of individual cases.[22] Its ultimate object is to afford every litigant a fair trial by which all controversies may, so far as is possible, be disposed of only upon their merits.[23] In fact, the conference may be deemed a failure if it does not narrow the issues, settle the pleadings, limit the number of witnesses, and in general shorten the actual period of trial, and in many cases promote settlements so that a trial will not be necessary.[24] This purpose and object have been, and are, of paramount importance in the solution of the problems which arise out of the legislative act and the rule of court prescribing pre-trial procedure.

However, pre-trial procedure is not intended to be a method by which the pre-trial judge may force the settlement of a case,[25] although certain powers of compulsion are vested in the pre-trial court.[26] It is conceded, almost without exception, that if pre-trial procedure is to serve a useful purpose in the process of adjudication, it is necessary that a spirit of co-operation exist between the court and the lawyers representing the litigants.[27] Obviously, in order to bring this about, there must be a mutual understanding of what may be properly achieved by a pre-trial conference. It is natural that litigants and their lawyers will often resent what they may regard as an unjustified interference by the court with their legal rights. For

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County v. Sutton, 150 Fla. 601, 8 S. (2d) 401 (1942); Geopulos v. Mandes, 35 F. Supp. 276 (D. D. C. 1941); Eisman v. Samuel Goldwyn, 30 F. Supp. 436 (S. D. N. Y. 1939); Glaspell v. Davis et al., 2 Fed. Rules Dec. 301 (D. Ore. 1942). And note Levin v. Brumberg, 42 F. Supp. 747 (E. D. N. Y. 1942) where an action by a trustee in bankruptcy to set aside a sale in bulk of a bankrupt's assets, where the purchaser admitted non-compliance with the state bulk sales act, but a trial was necessary to determine the form of decree, was held an appropriate case for a pre-trial conference.

[21]Masten et ux. v. Gower et al., 165 S. W. (2d) 901 (Tex. Civ. App. 1942).

[22]Hadrian et al. v. Milwaukee Electric Railway & Transport Co., 241 Wis. 122, 1 N. W. (2d) 755 (1942). *See also* Brown v. Christman, 75 App. D. C. 203, 126 F. (2d) 625 (1942); La Canin v. Automobile Insurance Co. of Hartford et al., 41 F. Supp. 1021 (E. D. N. Y. 1941).

[23]Masten et ux. v. Gower et al., 165 S. W. (2d) 901 (Tex. Civ. App. 1942).

[24]La Plante v. Implement Dealers Mut. Fire Ins. Co., 12 N. W. (2d) 630 (N. D. 1944). In fact, it has been stated that it was the court's duty to encourage the settlement of cases when the issues have been completed. Mott v. City of Flora et al., 3 Fed. Rules Dec. 232 (E. D. Ill. 1943).

[25]Klitzke v. Herm et al., 242 Wis. 456, 8 N. W. (2d) 400 (1943).

[26]Wisdom v. Texas Co., 27 F. Supp. 992 (N. D. Ala. 1939).

[27]La Plante v. Implement Dealers Mut. Fire Ins. Co., 12 N. W. (2d) 630 (N. D. 1944).

that reason, the pre-trial judge must proceed with tact and understanding,[28] but always with the underlying philosophy of pre-trial procedure determining his action.

The Conference Generally

The pre-trial conference is not a trial of the cause. It may be held in open court or in chambers, in the discretion of the court. The pre-trial judge, of course, should control the conference and make certain that its purpose is attained in so far as possible. The pleadings should be the first subject discussed. Then counsel may be called upon for admissions of facts in order to eliminate some of the issues framed by the pleadings and to simplify the remaining issues and the manner of proof. While an attorney cannot be required to surrender any substantive rights of his client at the conference,[29] he is expected to disclose all legal and fact issues which he intends to raise at the trial, except, of course, such issues as may involve privilege or impeaching matter. As to these two exceptions, disclosure may be made to the judge conducting the pre-trial hearing without disclosure to opposing counsel, and a ruling made on the exception claimed. The test to be applied to impeaching matter or any factual issue which the attorney feels should not be disclosed to his opponent in advance of trial is a simple one. Will disclosure or non-disclosure best promote the ends of justice?[30] In most cases, however, admissions, stipulations, and agreements will involve matters on which there is no controversy, such as hospital records, ownership of the property involved, weather conditions, agency, corporate existence, medical expense, and the like. But, whenever the problem of disclosure or non-disclosure arises, the burden rests upon the party from whom the pre-trial disclosure is sought to satisfy the court that there is substantial ground against making the disclosure.[31] Surprise as a trial tactic is no longer to be tolerated.

The pre-trial judge has the power to determine the most feasible way by which issues unnecessary to a final disposition of the case may be eliminated and the creation of a cumbersome record prevented.[32] He may sustain a

[28]Klitzke v. Herm et al., 242 Wis. 456, 8 N. W. (2d) 400 (1943). *See also* Masten et ux. v. Gower et al., 165 S. W. (2d) 901 (Tex. Civ. App. 1942).

[29]Gurman v. Stowe-Woodward, Inc., 302 Mass. 442, 19 N. E. (2d) 717 (1939).

[30]Burton v. Weyerhaeuser Timber Co. et al., 1 Fed. Rules Dec. 571 (D. Ore. 1941).

[31]Teller v. Montgomery Ward & Co., Inc., 27 F. Supp. 938 (E. D. Pa. 1939).

[32]Eisman v. Samuel Goldwyn, Inc., 30 F. Supp. 436 (S. D. N. Y. 1939). *See also* Yale Transport Corporation v. Yellow Truck & Coach Mfg. Co., 3 Fed. Rules Dec. 440 (S. D. N. Y. 1944). Questions of relevancy of testimony should be more loosely construed at the pre-trial examination of a party than during a trial. Conmar Products Corporation v. Lamar Slide Fastener Corp., 2 Fed. Rules Dec. 154 (S. D. N. Y. 1942).

motion to make a pleading of the opposite party more specific, although, technically, the pleading in question is sufficient.[33] He may even allow the defendant to postpone his election between two inconsistent defenses until the trial.[34] He may, if he sees fit, order a preliminary reference of issues to a master in appropriate cases.[35] At the conclusion of the pre-trial conference, the pre-trial judge may, if the situation requires it, dismiss the case for want of jurisdiction,[36] or because the facts show no cause of action,[37] or because the action is barred by virtue of the statute of limitations.[38] On the other hand, where the conference discloses that the material facts are not in dispute and that the only controversy relates to the legal effect of such facts, the court will be justified in rendering a final judgment.[39] Since the purpose of the pre-trial conference is to simplify the issues, the court has the right to give judgment according to the law on the facts before it, if the conference progresses to the point of eliminating all questions of fact. A disputed fact issue, however, should not be determined by the pre-trial judge.[40] Every such issue should be left for the determination of a jury or of the trial judge, if a jury trial is waived. But it is proper for a

[33]Kearney v. Glenn, 1 Fed. Rules Dec. 203 (W. D. Ky. 1940). In this connection, however, it should be noted that the pre-trial conference is not to be a substitute for proper pleading: "It is defendant's contention that if there is a deficiency in the pleading, the plaintiff may have recourse to pre-trial procedure or the taking of depositions for the determination of the trial issues. It is not thought that the rules relating to the foregoing procedures were intended to relax the requirements with regard to pleading to the extent suggested. While the new rules seek to liberalize practice and free it from many time worn and traditional limitations, it was not the intent to allow a pleading, not requiring a response, to be made in so loose a manner as to require the opposing party to seek the use of further procedures. Such an interpretation adds to the work of the court by adding additional steps in each action, whereas such steps were intended to ease the burden of the court by simplifying the determination of the issues." Sweeney v. Buffalo Courier Express, 35 F. Supp. 446 (W. D. N. Y. 1940).

[34]Venn-Severin Machine Co. v. John Kiss Sons Textile Mills, Inc., 2 Fed. Rules Dec. 4 (D. N. J. 1941).

[35]Newcomb v. Universal Match Corporation, 25 F. Supp. 169 (E. D. N. Y. 1938).

[36]Kapp v. Frank W. Kerr & Co. et al., 2 Fed. Rules Dec. 509 (S. D. Mich. 1942) (want of diversity of citizenship). If a defendant contends that the court is without jurisdiction at the pre-trial conference for the reason that the amount in controversy is insufficient, it is the court's duty to investigate the question of jurisdiction. S. S. Kresge Co. v. Godfried, 59 F. Supp. 843 (W. D. Mo. 1945).

[37]Silvera v. Broadway Store, Inc., 35 F. Supp. 625 (S. D. Cal. 1940). *See also* Mott v. City of Flora, 3 Fed. Rules Dec. 232 (E. D. Ill. 1943). And note in De Loach v. Crowley's, Inc., 128 F. (2d) 378 (C. C. A. 5th 1942), that the case may be dismissed on motion if clearly without merit, and this want of merit may consist in an absence of law to support the claim made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.

[38]Fink v. United States, 28 F. Supp. 556 (W. D. Wash. 1939).

[39]Hillsborough County v. Sutton, 150 Fla. 601, 8 So. (2d) 401 (1942).

[40]Ruedy v. Town of White Salmon, 1 Fed. Rules Dec. 237 (E. D. Wash. 1940). *Also see* Schram v. Kolowich et ux., 2 Fed. Rules Dec. (E. D. Mich. 1942).

plaintiff to move for and to obtain a dismissal of his case without prejudice in order to avoid a final judgment at the pre-trial hearing.[41]

A judgment by default against a defendant who fails to appear when the case is called for a pre-trial conference, after the issues are made up, may not be rendered by the pre-trial judge. At least, in a case[42] where defendant's counsel, after his client failed to appear, sought leave to withdraw from the case, and the defendant was notified that his case was in the pre-trial room, the court, although the defendant was not present nor represented by counsel, entered a default judgment for the plaintiff, marked the case 'jury waived' and ordered it sent to the pre-trial room, for assessment of damages. The appellate court sustained the defendant's contention that his constitutional right to have questions of fact at issue in a judicial proceeding submitted to a jury had been abridged. It was conceded that the court had the power to make rules to aid in the dispatch of its business, but that the rule here under consideration did not, upon the failure of the defendant to appear at the pre-trial conference, deprive him of the right to a jury trial upon the issues made by the pleadings. On the other hand, another court has held that the judge may dismiss the plaintiff's case for non-appearance at the conference.[43] But, either a dismissal or default judgment may violate some constitutional right of the party in default. It is rather doubtful if the rule or statute authorizing the pre-trial conference was ever intended to thus terminate a cause of action, even though it be admitted that, if some sort of a sanction cannot be imposed upon a party for failing to attend or have an attorney appear for him at the conference, the purpose of the conference might easily be defeated in many cases.

The Pre-Trial Order or Report

At the conclusion of the conference, although it is optional with the pre-trial judge whether an order will be made,[44] the pre-trial judge should prepare[45] or order the parties to prepare[46] a pre-trial report or order, in which

[41]Ryerson & Haynes, Inc. v. American Forging & Socket Co., 2 Fed. Rules Dec. 343 (E. D. Mich. 1942).

[42]Such rule does not intend that upon pre-trial, where counsel for the defendant does not appear, the court should finally dispose of any case where by the pleadings, issues of fact are presented. "The rule refers only to preliminary matters. It provides that: 'cases . . . listed, called and docketed for pre-trial, shall be considered advanced for that purpose to comply with G. C. § 11384.'" Szabo v. Warady, 44 N. E. (2d) 270, 272 (Ohio App. 1942).

[43]Wisdom v. Texas, 27 F. Supp. 992 (N. D. Ala. 1939).

[44]Yale Transport Corporation v. Yellow Truck & Coach Mfg. Co., 3 Fed. Rules Dec. 440 (S. D. N. Y. 1944).

[45]Fanciullo v. B. G. & S. Theatre Corp., 297 Mass. 44, 8 N. E. (2d) 174 (1937).

[46]Burton v. Weyerhaeuser Timber Co. et al., 1 Fed. Rules Dec. 571 (D. Ore. 1941).

should be noted the results of the conference as to matters agreed to by counsel or independently ordered by the court. This report should be filed in the case. It, of course, should be in writing.[47] It ought to be signed by the pre-trial judge, although the absence of his signature will not invalidate the report,[48] especially if his name is typed thereon.[49] Any admission, agreement, or stipulation to be a part of the order should be incorporated in it.[50] This is a matter of high importance, since the report becomes a part of the official file of the case and fixes the issues which are to be litigated at the trial.

If an attorney makes an agreement, or admission, or enters into a stipulation concerning the existence or non-existence of certain facts or issues involved or not involved and the same is made a part of the pre-trial order or report, his client will be bound,[51] unless, of course, the order is modified at the trial.[52] But generally speaking, the order is not only binding on the parties but also on the judge who presides at the trial. The trial, therefore, should be, as a general rule, confined to the issues disclosed by the pre-trial order.[53] This will apparently include even an issue not pleaded, if it has been discussed at the pre-trial conference and is set forth in the pre-trial order.[54]

Modification or Amendment of the Order

The order made by the pre-trial judge, as already suggested, is not final in the sense that the trial judge must enforce it notwithstanding that the ends of justice may require its modification.[55] He is expressly given the power

[47]*Ibid.* See Klitzke v. Herm et al., 242 Wis. 456, 464 n., 8 N. W. (2d) 400, 403 n. (1943), for form of pre-trial order.

[48]Gurman v. Stowe-Woodward, Inc., 302 Mass. 442, 19 N. E. (2d) 717 (1939); Fanciullo v. B. G. & S. Theatre Corp., 297 Mass. 44, 8 N. E. (2d) 174 (1937); Capano v. Melchionno, 297 Mass. 1, 7 N. E. (2d) 593 (1937).

[49]Gurman v. Stowe-Woodward, Inc., 302 Mass. 442, 19 N. E. (2d) 717 (1939).

[50]United States v. Hartford-Empire Co., et al., 1 Fed. Rules Dec. 424 (N. D. Ohio 1940).

[51]Gurman v. Stowe-Woodward, Inc., 302 Mass. 442, 19 N. E. (2d) 717 (1939). *See also* Miles Laboratories v. Seignious, 30 F. Supp. 549 (E. D. S. C. 1940).

[52]*See* Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Olvera, 119 F. (2d) 584 (C. C. A. 9th, 1941), where it was stipulated that the contract was made in Florida but there was evidence, at the trial, from which it could be inferred that the contract was made in Texas, yet, since the order was not modified, the stipulation was binding.

[53]R. Dunkel, Inc. v. Barletta Co., 302 Mass. 7, 18 N. E. (2d) 377 (1938); Silver v. Cushner, 300 Mass. 583, 16 N. E. (2d) 27 (1938). But, where a supplemental answer was allowed to be filed after the pre-trial hearing and order thereon, such order should be considered amended by permitting additional issues to be raised. Jos. Riedel Glass Works, Inc. v. Keegan, 43 F. Supp. 153 (D. Me. 1942).

[54]Rogers v. Union Pac. R. R., 145 F. (2d) 119 (C. C. A. 9th, 1944).

[55]La Plante v. Implement Dealers Mutual Fire Ins. Co., 12 N. W. (2d) 630 (N. D. 1944).

of modification.[56] Clearly, the trial judge rather than the pre-trial judge must determine the course of justice through the exercise of the power to modify the pre-trial order or to require compliance with it, as the exigencies of the trial may demand.[57] In the exercise of judicial discretion, he may therefore define the issues, discharge or modify stipulations,[58] permit amendments or corrections of mistakes in the pleadings.[59] The power to discharge a stipulation entered into under a misapprehension,[60] or improvidently made,[61] to prevent manifest injustice,[62] clearly exists. Nor is there any abuse of judicial discretion in modifying a pre-trial order so that a party may litigate issues, in addition to those disclosed at the pre-trial conference, arising out of newly discovered evidence.[63] The court may also allow a defendant to amend his answer in order to present a factual issue which he had apparently waived at the pre-trial hearing.[64] Ordinarily, however, amendments to the pleadings should not be allowed after the pre-trial conference, unless manifest injustice will result from the denial of the party's request to amend. The pre-trial order is never to be regarded lightly,[65] as such treatment would defeat the very purpose of pre-trial procedure. Consequently, the denial of a defendant's motion to amend the pleadings did not constitute an abuse of a trial court's discretion, where defendant's attorney made no showing of a reason therefor until after the testimony had been taken and an adverse report made by the commissioner to whom the case had been referred

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[56]Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Olvera, 119 F. (2d) 584 (C. C. A. 9th, 1941).

[57]La Plante v. Implement Dealers Mut. Fire Ins. Co., 12 N. W. (2d) 630 (N. D. 1944). *See also* Capano v. Melchionno, 297 Mass. 1, 7 N. E. (2d) 593 (1937).

[58]Konstantine v. City of Dearborn, 280 Mich. 310, 273 N. W. 580 (1937); La Plante v. Implement Dealers Mut. Fire Ins. Co., 12 N. W. (2d) 630 (N. D. 1944). Note Daitz Flying Corp. v. United States, 4 Fed. Rules Dec. 372 (E. D. N. Y. 1945), where an attorney for the federal government appeared at the pre-trial conference and agreed that no issues of fact existed to litigate, and the agreement was held to involve a course of procedure only rather than a waiver of a defense based on substantive law, and therefore would not be discharged, in face of the contention that the attorney had no power to bind the government.

[59]McDowall v. Orr Felt & Blanket Co., 146 F. (2d) 136 (C. C. A. 6th, 1945).

[60]Gurman v. Stowe-Woodward, Inc., 302 Mass. 442, 19 N. E. (2d) 717 (1939); Fanciullo v. B. G. & S. Theatre Corp., 297 Mass. 44, 8 N. E. (2d) 174 (1937); Capano v. Melchionno, 297 Mass. 1, 7 N. E. (2d) 593 (1937).

[61]*Ibid.*

[62]Geopolos v. Mandes, 35 F. Supp. 276 (D. D. C. 1941).

[63]La Canin v. Automobile Ins. Co. of Hartford et al., 41 F. Supp. 1021 (E. D. N. Y. 1941).

[64]Geopolos v. Mandes, 35 F. Supp. 276 (D. D. C. 1941) (the defense of laches was allowed on condition that defendant post a bond protecting the plaintiff against the unnecessary expense of reference in event the defense failed, in plaintiff's action for an accounting.)

[65]Fanciullo v. B. G. & S. Theatre Corp., 297 Mass. 44, 8 N. E. (2d) 174 (1937).

after it came before the court for hearing on the merits forty-eight days after the pre-trial hearing, which resulted in a report that the pleadings were satisfactory to both sides.[66] Similarly, in a case where the defendant moved to strike a paragraph from the complaint, on the ground that the allegation might be read to the jury to defendant's prejudice, the court could not do otherwise than over-rule the motion because the propriety of the allegation could have been determined at the pre-trial conference.[67]

Trial

The pre-trial conference is not intended to be a device by which a litigant may be deprived of a jury trial, if a bona fide issue of fact exists. Indeed, it has been considered error for the court to deprive a party of a jury trial upon the issues made by the pleadings, even where the party fails to appear at the pre-trial conference.[68] The view is undoubtedly proper that every fact issue, which cannot be disposed of by admission, agreement or stipulation, should be left by the pre-trial judge for the jury's determination.[69]

The trial, however, should be conducted in harmony with the spirit of the pre-trial conference. Otherwise, the conference will be an empty form and an idle gesture. Therefore, the propriety of a pleading should be raised and determined by the pre-trial judge before the day of trial.[70] In accord with this principle, there is no element of surprise in compelling a party to proceed on the state of the pleadings as they come to the trial court and such party's rights are not prejudiced thereby.[71] Nor is a finding required on an issue which has been excluded from the case at the pre-trial conference.[72] In other words, the pre-trial report controls the conduct of the trial, and, as a general rule, the trial should be confined to the issues disclosed by such

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[66]Konstantine v. City of Dearborn, 280 Mich. 310, 273 N. E. 580 (1937).

[67]Minneapolis Gasoline & Fuel Co. v. Ethyl Gasoline Corp. et al., 2 Fed. Rules Dec. 307 (S. D. N. Y. 1941).

[68]Szabo v. Warady, 44 N. E. (2d) 270 (Ohio App. 1942). *But see* note 43 *supra*.

[69]Schram v. Kolowich et ux., 2 Fed. Rules Dec. 343 (E. D. Mich. 1942); Ruedy v. Town of White Salmon, 1 Fed. Rules Dec. 237 (E. D. Wash. 1940).

[70]Minneapolis Gasoline & Fuel Co. v. Ethyl Gasoline Corp., et al., 2 Fed. Rules Dec. 307 (S. D. N. Y. 1941) (motion to strike).

[71]United States v. Wood et al., 61 F. Supp. 175 (D. Mass. 1945) (motion to amend pleadings overruled).

[72]Fanchon & Marco, Inc. v. Hagenbeck-Wallace Shows Co., 125 F. (2d) 101 (C. C. A. 9th, 1942). Where the parties make an admission or agreement, at the pre-trial hearing, concerning a factual issue and the same is carried into effect by an order of the court, unless the order is thereafter modified, the issue stands as fully determined as if adjudicated after the taking of testimony, and neither party need offer testimony concerning any fact so determined—whether the fact is jurisdictional or a fact on the merits. Miles Laboratories v. Seignious, 30 F. Supp. 549 (E. D. S. C. 1940).

report.[73]

If the pre-trial conference achieves its purpose, the trial court must keep constantly in mind that the pre-trial order, when entered, controls the subsequent course of the action, unless modification at the trial appears necessary for the prevention of manifest injustice. The time of the trial court should not be consumed with matters which should have been disposed of at the pre-trial hearing. For instance, if the parties to a law suit, in which a pre-trial conference has been held, intend to stipulate or make admissions concerning certain issues, they should do so at this conference.[74] They should not wait until the beginning of the trial[75] or after the trial has started,[76] and especially not until after the trial court's findings have been made.[77] Failure to stipulate or make the admission at the pre-trial conference may affect the court's action. At least, one court felt that it was justified in permitting the plaintiff to continue with the introduction of testimony on a major issue which the defendant offered to admit at the trial, on the ground that there was an element of surprise in the defendant's maneuver.[78] Another court felt fully justified in granting a new trial, upon its own motion, because of elements of surprise, which arose during the course of the trial, where the parties had failed to prepare and submit a pre-trial report, until the jury had been empaneled and sworn, in disregard of the pre-trial court's direction to prepare and submit such an order well before trial.[79] Similarly, the failure

[73]R. Dunkel, Inc. v. Barletta Co., 302 Mass. 7, 18 N. E. (2d) 377 (1938); Silver v. Cushner, 300 Mass. 583, 16 N. E. (2d) 27 (1938); Roger v. Union Pac. R. R., 145 F. (2d) 119 (C. C. A. 9th 1944); Waller v. Southern Pac., 37 F. Supp. 475 (N. D. Calif. 1941). Consequently, where the parties agreed, at the pre-trial conference, that there was only one issue in the case, and the court's charge properly covered such issue, the plaintiff was not entitled to a new trial for failure to give a charge which would have been proper if there had been other issues for the jury. Barry v. Reading Co., 3 Fed. Rules Dec. 305 (D. N. J. 1943).

[74]Byers v. Clark & Wilson Lumber Co., 27 F. Supp. 302 (D. Ore. 1939); Brown v. Christman, 126 F. (2d) 625 (App. D. C. 1942); Burton v. Weyerhaeuser Timber Co. et al., 1 Fed. Rules Dec. 571 (D. Ore. 1941).

[75]Burton v. Weyerhaeuser Timber Co. et al., 1 Fed. Rules Dec. 571 (D. Ore. 1941).

[76]Byers v. Clark & Wilson Lumber Co., 27 F. Supp. 302 (D. Ore. 1939).

[77]Brown v. Christman, 126 F. (2d) 625 (App. D. C. 1942).

[78]"This admission could as well have been made at the pre-trial conference and should have been made then. The question on which defendant offers to make the admission is one of the major questions of the case. Plaintiff has gone to expense in preparing testimony on this point and subpoenaing witnesses, and I do not think it would be fair to plaintiff to throw plaintiff's attorney 'out of his stride' by eliminating proof on this question. I accept the statement of counsel that he did not make the admission at the pre-trial conference 'because he had not had the opportunity at that time to study his case closely'. Nevertheless, there is an element of unnecessary surprise in defendant's maneuver. Under the new practice, surprise is to be eliminated whenever possible." Byers v. Clark & Wilson Lumber Co., 27 F. Supp. 302, 303 (D. Ore. 1939).

[79]"I cannot escape the impression that there was some connection between the failure to observe the direction to prepare and to submit the pre-trial order well before trial,

of a defendant to disclose a factual defense at the pre-trial hearing constituted a sufficient reason for the court to award the plaintiff a new trial as such failure prevented plaintiff from having a witness at the trial to meet such defense.[80]

Liability for Costs

As already stated,[81] one of the purposes of the pre-trial conference is the elimination of unnecessary court costs. It is obvious, therefore, that the problem will frequently arise as to what are necessary costs, for those which are not necessary should be taxed against the party responsible for them regardless of the outcome of the case. In solving the problem, however, the time elapsing between the pre-trial conference and the trial, is an important consideration. It would be unreasonable in many instances to expect a litigant to wait until after the day of the pre-trial conference, which usually is called not far in advance of the trial, before making preparation for trial. Similarly, if at the time a deposition is taken, there was no indication that a pre-trial hearing would be had or that it would result in the limitation of the testimony as it did, the party, if successful, ought to be entitled to the costs of the deposition and the fees of the witness whose deposition was taken.[82] On the other hand, where a pre-trial conference is had, the successful litigant at the trial should not be entitled to recover witness fees for a witness whose testimony would be outside the scope of permissible testimony as provided by the pre-trial report, since there was no necessity for subpœaning such witness. Costs are properly allowed as a fee for a witness who testified

and the surprise issues raised at the trial. I can sympathize with the desire of counsel, experienced in the older forms of practice, to withhold disclosure of such dramatic issues until the midst of a trial, but it must be made clear that surprise both as a weapon of attack and defense, is not to be tolerated under the new Federal procedure. In view of the known (and one of the primary) objectives of the New Rules of Civil Procedure, to eliminate surprise as a trial tactic, one can hardly imagine a greater breach of the spirit of the New Rules than to deny an injured man the right to show by the doctor attending him the fullest circumstances of his case. . ." Burton v. Weyerhaeuser Timber Co. et al., 1 Fed. Rules Dec. 571, 573 (D. Ore. 1941).

[80]Burton v. Weyerhaeuser Timber Co. et al., 1 Fed. Rules Dec. 571 (D. Ore. 1941).

[81]See note *22 supra.*

[82]"Counsel in a case cannot be compelled to anticipate the success of a pre-trial hearing and risk his client's interests by waiting until after the pre-trial hearing before securing testimony by deposition. I am firm in the conviction that the dates of the pre-trial hearing in cases should be dependent upon the circumstances in each particular case. Having in mind the necessity for the post pre-trial preparation, that date should be as close to the date of trial as practicable. It is true in this case that most of McCormack's testimony became unnecessary as a result of the pre-trial. That fact, however, could not be foreseen by plaintiff's counsel at the time the deposition was taken. Therefore, plaintiff is entitled to recover cost of the deposition." Federal Deposit Ins. Corp. v. Fruit Growers Service Co., et al., 2 Fed. Rules Dec. 131, 132-133 (E. D. Wash. 1941).

upon a disputed issue as set forth in the pre-trial report, even though the trial court finds against the successful litigant upon such disputed issue.[83]

So far as exhibits are concerned, a party may proceed at his own risk, if he prepares or obtains them upon his own initiative, after a pre-trial hearing during which no effort was made to see if they are required. The necessity for an exhibit is a matter which should be determined in the pre-trial conference, and a failure to do so could well result in a refusal of the trial court to tax the costs thereof against the unsuccessful party.[84]

Appeal

A litigant may attempt, on appeal, to obtain a reversal of the judgment against him on account of some alleged misconduct of the pre-trial judge, or to convict the trial court of error with reference to the use of the pre-trial order at the trial. The appellate court should, of course, consider every assignment of error properly before it, in the light of the object and nature of the law prescribing the pre-trial conference. Consequently, the denial of a motion for a pre-trial conference does not constitute reversible error, for pre-trial procedure is purely discretionary with the court.[85] Nor is the order made by the pre-trial judge following the conference appealable.[86] This is so because the order is not final in the sense that the trial judge must enforce it notwithstanding that the ends of justice may require its modification. It does not destroy the power of the trial judge to control the conduct of the trial in the interest of justice, and he may therefore, when such interest demands it, define the issues, discharge or modify stipulations,[87] or permit amendments or the correction of mistakes in the pleadings, under general statutory provisions.[88] But, if the parties participate in a pre-trial conference in which they undertake to limit the issues of ultimate liability to certain broad questions of law affecting all defendants alike, they cannot afterwards on appeal raise questions concerning the pleadings, since such questions will be considered waived.[89] Under such circumstances, the

[83]Federal Deposit Ins. Corp. v. Fruit Growers Service Co., et al., 2 Fed. Rules Dec. 131 (E. D. Wash. 1941).

[84]Gotz et al. v. Universal Products Co., Inc., 3 Fed. Rules Dec. 153 (D. Dela. 1943) (patent case).

[85]Collins et al. v. Wayland et al., 59 Ariz. 340, 127 P. (2d) 716 (1942), *cert. denied* 318 U. S. 767, 63 Sup. Ct. 760 (1943).

[86]La Plante v. Implement Dealers Mutual Fire Ins. Co., 12 N. W. (2d) 630 (N. D. 1944); Klitzke v. Herm et al., 242 Wis. 456, 8 N. W. (2d) 400 (1943).

[87]La Plante v. Implement Dealers Mutual Fire Ins. Co., 12 N. W. (2d) 630 (N. D. 1944).

[88]Konstantine v. City of Dearborn, 280 Mich. 310, 273 N. W. 580 (1937).

[89]"Where the pre-trial procedure is resorted to the spirit of the procedure must be observed." Frank et al. v. Giesy et al., 117 F. (2d) 122, 127 (C. C. A. 9th, 1941).

lower court may not be convicted of error in connection with such pleadings. Nor will the lack of a finding by the court, in a case where a jury is waived, on an issue excluded from the case by virtue of the pre-trial order, justify the reversal of the judgment on appeal; the need of any finding on such issue is obviated by the pre-trial order.[90]

It would seem that the pre-trial report is, at least, evidentiary in its nature;[91] if a litigant intends to urge its use or non-use as the basis for a reversal of the case, on appeal, he must make his objection and save his exceptions to any ruling by the court concerning its use during the trial of the cause.[92] Where no objection is made to the reading of the report to the jury and no instructions are requested concerning its force, effect or weight, and the record is bare of any information touching the comments of the trial judge thereon and its authenticity is not disputed or questioned in any way, an objection raised for the first time on appeal comes too late, even though the report had not been signed by the pre-trial judge.[93] But the report of the pre-trial hearing can be considered as part of the record, on appeal, by agreement of counsel,[94] and obviously will be so considered, where properly incorporated and printed in the record, as to the issues in the lower court.[95]

Since it is the duty of the trial court to abide by the pre-trial order, in the absence of some showing in the record that the trial was not conducted in accordance therewith, the parties, on appeal, are bound by the issues established by such report,[96] and it will be presumed that the trial was conducted in accord therewith.[97] Such a presumption was relied upon, in one case,[98] where the bill of exceptions, to which the pre-trial report was annexed, merely

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[90]Fanchon & Marco, Inc. v. Hagenbeck-Wallace Shows Co., 125 F. (2d) 101 (C. C. A. 9th, 1942).

[91]See Capano v. Melchionno, 297 Mass. 1, 7 N. E. (2d) 593 (1937), where the court avoided determining whether the report was evidentiary in character but conceded that it did amount to a stipulation as to the issues to be tried before the jury. Also note the decision in Mitchell v. Walton Lunch Co., 305 Mass. 76, 25 N. E. (2d) 151 (1940), to the effect that the trial court might properly explain to the jury that the parties have entered into a stipulation, which has rendered it unnecessary to prove a fact essential either to the cause of action or the defense to it.

[92]Capano v. Melchionno, 297 Mass. 1, 7 N. E. (2d) 593 (1937). *See also* Finegan v. Prudential Insurance Co. of America, 300 Mass. 147, 14 N. E. (2d) 172 (1938); Eckstein v. Scoffi et al., 299 Mass. 573, 13 N. E. (2d) 436 (1938); Fanciullo v. B. G. & S. Theatre Corp., 297 Mass. 44, 8 N. E. (2d) 174 (1937).

[93]Fanciullo v. B. G. & S. Theatre Corporation, 297 Mass. 44, 8 N. E. (2d) 174 (1937).

[94]Finegan v. Prudential Insurance Co. of America, 300 Mass. 147, 14 N. E. (2d) 172 (1938).

[95]Eckstein v. Scoffi et al., 299 Mass. 573, 13 N. E. (2d) 436 (1938).

[96]R. Dunkel, Inc. v. Barletta Co., 302 Mass. 7, 18 N. E. (2d) 377 (1938).

[97]Silver v. Cushner, 300 Mass. 583, 16 N. E. (2d) 27 (1938).

[98]*Ibid.*

stated that, except for reference to such report by counsel for the plaintiff, it was not referred to or offered at the trial, since this did not show the case was not tried in accord with the report. In another case,[99] the pre-trial report was held binding on appeal, where it was a part of the record and contained the admission sought to be avoided, especially since the report was in proper form, and there was nothing in the record suggestive of a lack of authority upon the part of the attorney to make the admission.

Conclusion

The pre-trial conference undoubtedly offers the bench and bar a procedural device by which they can, in many cases, eliminate some of the factors causing the general dissatisfaction of the public with the administration of justice by the courts. Its effectiveness, however, depends today almost entirely upon the willingness of the court to order the conference and the whole-hearted voluntary cooperation of the attorneys for the litigants. Some judges hesitate to use the pre-trial hearing, and many lawyers are reluctant to show their hands before trial. A discretionary and voluntary pre-trial conference can succeed only where the court and the lawyers realize that a law suit is not a battle of wits but a judicial process by which human controversies may be determined solely upon their merits.[100] Such a conception of a law suit is not yet generally accepted.

There is much to indicate that every civil case, with rare exceptions,[101] should appear automatically upon a pre-trial calendar or docket. Perhaps no discretion should be left to the trial court whether a pre-trial conference will be held, and a party should be entitled to such a conference as a matter of legal right.[102] But even a mandatory pre-trial conference would not necessarily insure the success of the conference. The pre-trial judge should be authorized to impose appropriate sanctions, if necessary, including the entry of a dismissal or a judgment by default, for non-appearance at the conference or disobedience to any other lawful order made by the court in connection with the pre-trial hearing.[103]

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[99]Gurman v. Stowe-Woodward, Inc., 302 Mass. 442, 19 N. E. (2d) 717 (1939).

[100]"There should be no surprises as to points to be tried, no unexpected coups which might thwart justice, and no forcing to produce evidence to points concerning which there can be no question." Laws, *Plan for Pre-trial Procedure Under New Rules in District of Columbia* (1939) 25 A. B. A. J. 855.

[101]Divorce suits might constitute an exception. *See* Freifield, *Pre-Trial and Divorce,* (1943) 27 J. Am. Jud. Soc. 74.

[102]For a suggested rule for compulsory pre-trial hearings, *see Report of the Committee on Pre-Trial Procedure* (1938) 63 A. B. A. Rep. 534, 541.

[103]This power apparently is vested in the court by virtue of Rule 41 (b), 28 U. S. C.,

Advocates of the pre-trial conference have suggested its extension to the trial of criminal cases. But the advisability of a pre-trial hearing in a case of this type, is subject to considerable doubt. Constitutional objections are obvious. The scope of the conference would necessarily be closely restricted by the prohibition against self-incrimination. The authority of an attorney to make admissions that could bind the defendant would constantly be in question. More harm than benefit might come from such a conference.

But the extension of the principle of the pre-trial conference to appellate practice would seem highly desirable. In fact, the need is urgent for a device of some sort by which the parties might determine the precise points which will be presented on appeal. This device might well be a conference called perhaps by the trial court prior to the granting of the appeal, or conducted by a judge of the appellate court before the briefs are printed.[104] Such a step in the appeal from the decision of a trial court would not only lessen the labor of the appellate court but would also result in the rendition of opinions based upon the controlling factors of the case.

The pre-trial conference undoubtedly has the capacity to be far more useful than its earlier exponents anticipated. But the practice of the states of adopting the federal rule as the basis for the pre-trial hearing, while desirable in that it makes for a harmonious and uniform system generally, has the undesirable effect of preventing the adoption of substantive variations or some radically different device which might be vastly superior to the pre-trial conference as it now exists. There is no assurance that the present day pre-trial conference represents the zenith of possible attainment in the procedural field as a means for expediting the trial of a law suit.

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following § 723c: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." *See also* notes 42 and 43 *supra*. But what can the court do with a defendant who fails to appear or disobeys an order of the court?

[104]"Few of us have probably ever stopped to realize how inadequate is our procedure for defining those issues, and how imperfect and fragmentary is the resulting statement of the issue in many important cases in the appellate courts. There is usually nothing corresponding to the pleadings which form so essential a part of both common law and code procedure. The issues on appeal are primarily questions of law and are often very different from the issues of fact formulated by the pleadings and on pre-trial. And yet at no point along the line is there ordinarily any procedure intended or adopted to effect a corresponding definition of the precise points which are being taken up for decision by the higher court." Peacock, *Pre-trial and the Appellate Courts* (1940) 24 J. AM. JUD. SOC. 173.