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rather than total.[22] Second, if there is a deed in the chain of title which is ambiguous in terminology or effect, the grantor of the deed may seek to establish a severance by judicial resolution of the ambiguity. Third, if there are no reservations, exclusions, or ambiguities, or if any ambiguity has been or may be resolved to effect no severance, the ultimate grantee acquired a general estate but his immediate grantor has a possible equitable action to rescind or reform the deed on the ground of mutual mistake.

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PRE-TRIAL PROCEDURE AS AFFECTING SUBSEQUENT COURSE OF ACTION

With the adoption of the new Federal Rules of Civil Procedure,[1] the use of a pre-trial practice has gained in popularity in both State and Federal courts. Rule 16 of the Federal Rules sets out the operation of the pre-trial procedure in the Federal Courts.[2] Practically all states which have adopted a pre-trial system since the Federal Rules have regulations similar to or copied from Rule 16. In the interpretation of the effect of the pre-trial procedure, the weight of judicial authority comes from Massachusetts and Michigan, where such a proceeding has been in effect with great success since the middle thirties in Suffolk and Wayne counties respectively. The purposes of the pre-trial procedure have been held to be a simplication of the issues and a cutting away, by agreement and admission of the parties, all encumbrances to a speedy trial.[3]

Rule 16 leaves the techniques of pre-trial formulation of issues up to the discretion of the individual judge. The usual procedure, however, is briefly dis-

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22. 2 Wyo. L. J. 63 (1948).
1. 28 U. S. C. A. foll. sec. 723c.
2. "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 siplification 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 the number of expert witnesses;
   (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
   (6) Such other matters as may aid in the disposition of the action.
   The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered 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."
3. Geopulos v. Mandes, 35 F. Supp. 276 (Dist. Col. 1941); Yale Transport Corp. v. Yellow Truck & Coach Mfg. Co., 3 F. R. D. 440 (S. D. N. Y. 1944); Kearney v. Glenn, 1 F. R. D. 203 (W. D. Ky. 1940); Glaspell v. Davis et al, 2 F. R. D. 301 (D. Ore. 1942); Eisman et al v. Samuel Goldwyn, Inc. et al, 30 F. Supp. 436 (S. D. N. Y. 1939).

cussed here.[4] The pre-trial practice is set in motion by placing upon the calendar a date for a pre-trial hearing. The hearing is usually held in the private chambers of the judge because the greater informality of the atmosphere results in a quicker understanding and agreement between the parties. However, some judges prefer the formality of the open court because the attorneys and judge proceed toward the business at hand and omit personal matters having no bearing upon the case. Although the usual practice is to have only the attorneys appear, the client may do so if he or his attorney wishes.

The discussion at the hearing centers around a clarification of the true issues and elimination of the apparent issues which present no real controversy. Consideration may be given to desirability of amendment to the pleadings; possibility of obtaining admissions of fact and genuineness of documents; disposing of preliminary matters such as dismissal, change of venue, judgment on the pleadings, fixing of date for trial, etc.; possibility of a settlement; and any other matters which may aid in the disposition of the action.

At the conclusion of the pre-trial conference the court makes what is known as "the pre-trial order". This order contains "the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel. . . ."[5] It is important that the pre-trial order be drawn up in the presence of the attorneys. Any objections to it should be raised at that time or, at the very latest, at the trial. This is borne out by a recent Federal case holding that the plaintiff could not object for the first time on appeal to the pre-trial order limiting the issues, where the order was made with the assent of both parties, and the plaintiff did not object or request amendment of the order in the trial court.[6] It is also essential that any stipulations and agreements that are made at the hearing be included in the pre-trial order. A motion to limit the issues on the basis of the pre-trial conference was overruled where there was only a recital that the defendant made certain concessions and undertakings, and did not state what agreements had been reached by the parties.[7] If there is any question raised which cannot be settled at the hearing it should be included as one of the issues to be decided at the trial.[8] However, "if the conference progresses to the point of eliminating all questions of fact then the court may give judgment according to law on the facts before him."[9]

The pre-trial order will include any amendments allowed to the pleadings which have been discussed at the conference. Whether one may amend his pleading subsequent to the issuance of the pre-trial order has been determined by the courts. The leading case on the point is *Konstantine v. City of Dearborn.*[10] In

4. For a more detailed discussion of the operation of the pre-trial practice see; Shafroth, *Pre-Trial Techniques of Federal Judges,* 28 J. Am. Jud. Soc'y. 39 (1944); Sunderland, *Procedure for Pretrial Conferences in the Federal Courts,* 28 J. Am. Jud. Soc'y. 46 (1944).
5. Fed. R. Civ. P., 16.
6. Fowler v. Crown-Zellerback Corp., 163 F. (2d) 773 (C. C. A. 9th 1947).
7. U. S. v. Hartford-Empire Co., et al, 1 F. R. D. 424 (N. D. Ohio, 1940).
8. Ruedy v. Town of White Salmon, 1 F. R. D. 237 (E. D. Wash. 1940).
9. Hillsborough County v. Sutton, 150 Fla. 601, 8 So. (2d) 401 (1942).
10. 280 Mich. 310, 273 N. W. 580 (1937).

that case the court upheld the trial court's judgment and refused to allow amendment. However, the court stated that it was within the discretion of the trial court to grant, or not to grant, amendments and since there was no showing in the record that the trial court had abused its discretion the judgment was affirmed. Generally the Federal courts will allow the amendment. In *McDowell v. Orr Felt & Blanket Company*[11] the trial judge in the pre-trial order, determined that certain contracts involved in a breach of contract suit were void for lack of mutuality. The plaintiff moved for leave to file an amended complaint setting forth that the agreements were partly oral and partly in writing. The trial court refused to grant the amendment but was reversed in the upper court on grounds that a just determination of the case demanded that it be granted. This case illustrates the weight of authority, but perhaps it would be well to keep in mind the view expressed by one Federal judge: "After pre-trial, the Court may find it necessary to permit amendments to pleadings. . . . But *amendments after pre-trial are to be discouraged. The time for making amendments is at pre-trial* and the policy of the Court will be to permit them only where it would be unjust or harsh to do otherwise."[12] (Italics added.)

The pre-trial conference frequently results in stipulations and admissions. The binding effect of these agreements is well settled. The leading case is *Fanciullo v. B. G. & S. Theatre Corporation.*[13] In holding that the trial court did not err in reading to the jury the concessions of the parties as evidenced in the pre-trial report, the court said, "The pre-trial hearing may result in admissions or stipulations as to the elimination or narrowing of issues open under the pleadings. There is no reason why parties should not be bound thereby." The holding has been uniformly followed in subsequent cases involving the point.[14] It has been held that an admission is a substitute for proof[15] or, if carried into effect by a pre-trial order, is as fully determined as if adjudicated in open court and neither party need offer testimony on the issue so determined.[16] One court went so far as to hold that an order by the trial court in conflict with the pre-trial order was error.[17]

The question as to what extent the attorney could bind his client by stipulations made at the hearing was settled in *Gurman v. Stowe-Woodward Inc.*[18] The court held that the attorney could not surrender substantive rights of his client, but if the attorney made some agreement, stipulation or admission as to the facts involved, his client was bound unless some reason could be disclosed why he should

11. 146 F.(2d) 136 (C. C. A. 6th 1944); see Snyder v. Dravo Corp., 6 F. R. D. 546, 551 (W. D. Pa. 1947).
12. Laws, Dist. Judge, "Plan For Pre-Trial Procedure Under New Rules in District of Columbia", 25 A. B. A. J. 855, 858 (1939); also, Laws, Dist. Judge, "Pre-Trial Procedure", 1 F. R. D. 397, 402 (1940).
13. 297 Mass. 44, 8 N. E. (2d) 174. (1937).
14. Geopulos v. Mandes, 35 F. Supp. 276 (D. C. 1941); R. Dunkel, Inc. v. V. Barletta Co., 302 Mass. 7, 18 N. E. (2d) 377 (1938); Mitchell v. Walton Lunch Co., 305 Mass. 76, 25 N. E. (2d) 151 (1939); Wagner v. Mederacke, 354 Mo. 977, 192 S. W. (2d) 865 (1946).
15. Wagner v. Mederacke, supra note 14.
16. Miles Laboratories, Inc. v. Seignious, 30 F. Supp. 549 (E. D. S. C. 1939).
17. Doherty v. Shea, 320 Mass. 173, 68 N. E. (2d) 707 (1946).
18. 302 Mass. 442, 19 N. E. (2d) 717 (1939).

not be. However, if the counsel has made stipulations or admissions and wishes them to be changed, or there is a mistake in the pre-trial order, the lawyer may specify what changes he desires in the report to make it conform to what he contends occurred at the pre-trial hearing, but a bald exception to the use of the pre-trial order at the trial would be overruled.[19]

In the *Tanciullo*[20] case there was no mention of the possibility that the trial court might modify the pre-trial order to prevent injustice. However, in other cases[21] the courts have been prone to follow the general tenor of Rule 16, and allow the trial court to modify the order to prevent a manifest injustice. Primarily the trial court should see that justice is done and if it should appear at the trial that justice requires the discharge of stipulations or admissions which appear to have been improvdiently made, the trial court should act to accomplish this end. This is no excuse for the attorney to prejudice his client's case by making improper stipulations and admissions, for he may find it difficult to prove to the court that justice demands the discharge of those stipulations.

Two cases have been decided in state courts involving the question of appealing directly from the pre-trial order. In *Klitzke v. Herm*[22] the court decided that it was without jurisdiction to try the case because the pre-trial order was not an appealable order. *La Plante v. Implement Dealers Mutual Fire Insurance Co. et al*[23] also held that the pre-trial order was not appealable. The court said in its opinion, "The nonappealability of this order becomes obvious upon the study . . . [of the North Dakota Statute[24]] . . . which says that such order shall control the subsequent course of the action unless the ends of justice require its modification." In expressing this view the court said

"Should pre-trial orders made following the conference and preceding the trial be appealable an anomalous situation would be created in view of the power vested in the trial court to modify the order. If the general rule were applied and the appeal resulted in an order that was final and controlling as to the subsequent trial, it would impart to the order attributes of finality contrary to the statute and not contemplated by the legislature. If the rule would not apply, the appellate decision would be subject to modification at the will of the trial court and appeals would merely result in a further delay in the administration of justice, contrary to the purpose of the pre-trial statute."[25]

The impracticality of allowing an appeal directly from the pre-trial order is quite evident from this statement.

To the present day attorney who is trained in the practice under the codes, the pre-trial procedure seems strange, and there is a tendency to frown upon it as being prejudicial to his case. However, in jurisdictions where it has been tried, the overwhelming majority convincingly endorse it as being effective in reducing

19. Mitchell v. Walton Lunch Co., supra note 14.
20. Supra note 13.
21. Geopulos v. Mandes, supra note 14; see Wagner v. Mederacke, supra note 14; Mitchell v. Walton Lunch Co., supra note 14.
22. 242 Wis. 456, 8 N. W. (2d) 400 (1943).
23. 73 N. D. 159, 12 N. W. (2d) 630 (1944).
24. N. D. Sess. Laws 1943 c. 216.
25. Supra note 23, at 632.

the number of trials, in ending delay at the trial and in lessening the expense to the parties.

The procedure will not work effectively unless the judge feels that it can be made to produce the desired results. Further it will not function properly if the bar opposes it. The lawyers must give their full cooperation. Each attorney must fully disclose the facts of his case at the hearing and no longer rely upon surprise tactics of an "ace in the hole" to win his case. There should be a conscientious attempt to eliminate the necessity for proof of matters which are not in dispute. Judges in the federal courts have testified that there is little difficuly in obtaining the cooperation of the bar once it learns that cases are not prejudiced but, in fact, are materially aided by the pre-trial practice.

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QUESTIONING OF JUROR ON VOIR DIRE AS TO INSURANCE

It is commonly believed that juries will render greater damages upon discovering that the loss occasioned by the defendant will be paid by an insurance company. As a result, courts have scrupulously guarded against the injection of the fact of insurance during trial when an insurance company is not a party of record.[1]

A more difficult problem arises in personal injury actions against an insured defendant when plaintiff's counsel questions jurors on voir dire examination as to the jurors' possible connection with or interest in the insurance company. Two reasons have been advanced for allowing such questioning: First, to aid the plaintiff in determining if a cause for challenge exists; and second to determine whether or not plaintiff should exercise his peremptory challenge.[2] The courts are presented with the difficult question of prejudices. The plaintiff is entitled to discover any prejudice or bias of a prospective juror in favor of the insurance company who is the real party in interest and the defendant is entitled to have the prospective jurors unprejudiced against his case upon learning that he is insured.

The great majority of jurisdictions hold that questioning of jurors on voir dire as to their possible connection with or interest in any insurance company[3] or their possible connection with or interest in a designated insurance company[4] is

1. Watson v. Adams, 187 Ala. 490, 65 So. 528, Ann. Cas. 1916E, 565 (1914); Roche v. Llewellyn Iron Works Company, 140 Cal. 563, 74 Pac. 147 (1903); Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020 (1913); Simpson v. Foundation Company, 201 N. Y. 479, 95 N. E. 10, Ann. Cas. 1912B, 321 (1916); Wilson v. Blair, 65 Mont. 155, 211 Pac. 289, 27 A. L. R. 1235 (1922); Vasquez v. Petitt, 74 Ore. 496, 145 Pac. 1066, Ann. Cas. 1917A, 439 (1915); Iverson v. McDonnell, 36 Wash. 73, 78 Pac. 202 (1904).
2. 56 A. L. R. 1456.
3. Berry v. Park, 188 Okla. 475, 110 P. (2d) 902 (1940); Eldridge v. Clark & Henery Construction Company, 75 Cal. App. 516, 243 Pac. 43 (1925); Foley v. Cudahy Packing Company, 119 Iowa 246, 93 N. W. 284 (1903); Dow Wire Works Company v. Morgan, 29 Ky. L. Rep. 854, 96 S. W. 530 (1906). Contra: Green v. Ligon, 190 S. W. (2d) 742 Tex. (1945).
4. Stalcup v. Ruzic, 51 N. M. 377, 185 P. (2d) 298 (1947); Riechmann v. Reasner, 221 Ind. 628, 51 N. E. (2d) 10 (1943); White v. Teaque et al, 353 Mo. 247, 182 S. W. (2d) 288 (1944); Wilson v. St. Joe Boom Company, 34 Idaho 253, 200 Pac. 884 (1921); Cripple Creek Mining Company v. Brabant, 37 Colo. 423, 87 Pac. 794 (1906).