rescue freedom and democracy, does not propose small cures for great evils. He believes that we are well on our way to ruin, and that if we do not call a halt we shall first be plagued by demagogues and then enslaved by tyrants. In order to call a halt he would go back, in effect, to the principles of the "Old Republicans" of 1798: radical decentralization of political *and* financial power, radical federalism. Since even Jefferson became a tyrant in the opinion of the "Old Republicans," this is going a long way back, and the road will be hard to find. Yet one can only applaud the logic with which Judge Seabury makes his case.

A revived and strengthened federalism in government (based on a revived faith in natural rights), and in industry the development of cooperatives and perhaps a form of Guild Socialism: this is Judge Seabury's prescription. He is well aware that nothing will be done unless he can persuade his fellow-citizens to agree with the gloomy words he quotes from Ortego y Gasset's *The Revolt of the Masses:* "This is the gravest danger that today threatens civilization: State intervention; the absorption of all spontaneous social effort by the State. . . . The result of this tendency will be fatal. . . . The State, after sucking out the very marrow of society, will be left bloodless, a skeleton, dead with that rusty death of machinery, more gruesome than the death of a living organization."

Judge Seabury tries eloquently to make this view prevail; but a brief look at Washington, or at Whitehall, suggests he has a long way to go. The mounting demands of the cold war will not help him.

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PRE-TRIAL. By Harry D. Nims. With an Introduction by Harold J. Gallagher, President of the American Bar Association. New York: Baker, Voorhis & Co., Inc., 1950. Pp. xviii, 334. $5.75.

This is an excellent handbook for lawyers and judges in the newly developed art of pre-trial. Over the last fifteen years there has been a steadily increasing interest in pre-trial conferences. Conducted by the judge with counsel before the actual trial, such conferences are geared to settle various matters which, in actuality, are not or need not be contested, and to strip the case to the heart of the precise dispute between the parties. Thus, simplification of the issues, amendment of the pleadings where necessary, admissions of fact and of documents as exhibits to avoid unnecessary

proof, settlement of items of damage (such as hospital bills), limitation of the number of expert witnesses—all these and other matters formerly the subject of courtroom wrangling or haggling—are settled in advance with a minimum of friction and maximum of gain in trial expedition and efficiency. An important by-product, though properly approached more as a desirable consequence than as a compelled objective, is the settlement of the case without trial. Thus the system has proven a boon to courts facing overcrowded calendars and to litigants desiring the prompt and discriminating disposition of their disputes. This book shows, with a wealth of examples, how the courts most successful in operating this modern device proceed to make it work.

It is over-long that Anglo-Saxon justice has been dominated by the spirit of trial by combat. Unfortunately the development of the jury accentuated, rather than lessened, this concept of a trial as a contest of skills where tactical shrewdness warranted its reward. Every major step in procedural reform, from code pleading on, has involved a contraction of this unusual emphasis on the adversary nature of the proceedings. This has occurred more recently at an accelerating rate, what with the decreased importance of formally-defined issues and the large role now played by deposition and discovery devices. No longer is it a violation of an adversary's sacred rights to go on a "fishing expedition" to find out what the other's case actually consists of; indeed, it is rightfully expected that there will no longer be concealed traps for the litigants, or even for the judge, but that the entire case will be disclosed to the participants and to the court substantially before the trial begins. Of course the development of arbitration is a concurrent example of this trend. Into this modern picture the pretrial conference fits most naturally. In view of the informality of modern pleadings, such conferences are in fact rather necessary, as a means of illuminating what the parties are ultimately contesting, after the helpful preliminary explorations by discovery have been had. But more, this is a substitution of the conference method at a time when counsel have so acquired sufficient information regarding their case that some exchange may be productive of a maximum of accomplishment. Perhaps its greatest utility is in forcing counsel to know their case, even to the point of setting its value for settlement purposes before, and not at the end of, a full-scale trial.

There is nothing particularly novel about a conference between counsel and the court; it may happen often during a litigated case over details of the procedure. What is novel here is its use before, and not in the midst of, trial and in its use in a systematic way under the direction of an expert administrator to cover certain definite matters. In its modern form it was

initiated in about 1929 in a busy trial court in Detroit, was copied a few years later in Boston, received immense stimulus from the attention paid to it in the new Federal Rules of Civil Procedure in 1936 and 1937,[1] and has since spread widely about the country. A recent authoritative work states that it is authorized by rule or statute in twenty-nine states,[2] while other jurisdictions employ it in local areas, such as New York City. Both the Judicial Conference of the United States and the Section of Judicial Administration of the American Bar Association have been interested in advancing the reform. This book is a part of their program. It is written by a distinguished lawyer and legal author who, from long service on the New York Judicial Council and in other groups interested in legal reform, is recognized as a tried crusader. It fills a need, so that no neophyte judge should now want for knowledge of what to do and how to do it.

One thing demonstrated by this survey most clearly is that no one single method necessarily guarantees maximum success. The system is adaptable to the idiosyncrasies of the individual judge; indeed it will not achieve results unless the judge is interested or enthusiastic. Hence in the great federal system it has been wise and necessary to leave its use optional with the judges. In a court organization now so thoroughly integrated as that of New Jersey it has been possible to require pre-trial in all courts for civil litigation. That, however, is still unusual. On many details there is much diversity in practice. These involve such matters as the place of the conference, whether in chambers or in the courtroom; the timing, whether slightly or substantially before the date set for trial; the choice of the presiding judge, whether the destined trial judge or one who will not sit; the presence or absence of the parties themselves; the subject matter, particularly the suggestions to be made as to possible settlements; and the extent of recording the proceedings and embodying the results in a binding pre-trial order.[3] As to the latter, experience does seem to show that such an order is quite necessary or the conferences will have little permanent effect on the case other than to produce a certain number of settlements. And there is a consensus of view that the judge should carefully avoid exercising pressure for a compromise, a desirable outcome, but one that should flow

1. Although apparently overlooked here, see note 4 *infra*, this preceded the activities of the American Bar Association and has been perhaps the greatest single stimulus to the spread of pre-trial throughout the country; in fact, FED. R. CIV. P. 16 on pre-trial procedure is the most widely copied of all the governing provisions. An advantage it had—one we owe to Chairman William D. Mitchell of the Supreme Court's Advisory Committee who worked it out—was the spelling out of the different matters properly to be developed in such a conference, a specification always useful in the popularization of a new device. See Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 501, 502 (1950).

2. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 206-18 (1949).

3. With the material in the book there may also be compared the illuminating experience in a highly important field of federal litigation set forth in detail in McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27 (1950), an article appearing after publication of this book.

naturally from the clarification of the case in conference, rather than from coercion of the parties by the court.

Within its purpose, therefore, this book is an appropriate exemplification of this useful trial adjunct. There is no attempt to explore other aspects of the subject than those indicated. The historical picture is not fully developed;[4] nor is there any attempt to integrate it specifically with other parts of modern procedure to show the philosophy which supports its present-day practicality. What statistics are given appear to be the reports from individual judges or courts in direct correspondence with the author. Thus we do not have—nor are there yet available—complete mass statistics to show how, in our busiest courts, the system is actually working in the court picture as a whole, and what proportion of cases are pre-tried successfully. That kind of comparative analysis was not needed for the immediate purpose in view. It may well be useful and necessary later, for there is still considerable resistance, in both bench and bar, to the decline of the adversary ideal in litigation. A comparable and, indeed, supplementary device, the summary judgment, has had rather hard sledding at the hands of some tribunals from just such an outlook; serious studies of the rise and decline in use of this device, too, would be helpful in reconsidering its value.[5] Pre-trial is still in the heyday of its popularity, though there have been intimations of like judicial doubts as to it.[6] An analysis of comparable results in the total court picture is always useful in appraising where we are and considering where we should like or ought to go. Meanwhile we can be duly grateful for the sound piece of evangelism embodied in this volume.

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MONEY IN THE LAW—NATIONAL AND INTERNATIONAL. A Comparative Study in the Borderline of Law and Economics. By Arthur Nussbaum. Brooklyn: The Foundation Press, Inc., 1950. Pp. xxxii, 618. $8.00.

The first edition of Dr. Nussbaum's book in 1939 was a pioneer work, the first in English on the thorny but vital topic of the law of money. It

4. This may have led to the unfortunate mistake of the President of the Bar Association in his Introduction in giving priority in this field to the Section of Judicial Administration of the A.B.A. The work of the latter followed after, and took much inspiration from, the acceptance of the procedure by the Advisory Committee, first in its Preliminary Draft of 1936, in Rule 23, and later in its Report of April 1937, in the now well-known Rule 16.

5. I have discussed this somewhat more fully in the article cited note 1 *supra*.

6. Compare the dissent in American Machine & Metals v. De Bothezat Impeller Co., 173 F.2d 890, 891 (2d Cir. 1949). There appears to be question in some quarters as to the complete utility of the various pre-trial devices in long-protracted litigation such as the usual antitrust case; but in the article previously cited, note 3 *supra*, Mr. McAllister demonstrates clearly not only the utility, but the absolute need, of pre-trial control of just this type of case.