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Book Review: Procedure in Anti-Trust and Other Protracted Cases

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BOOK REVIEW

Procedure in Anti-Trust and Other Protracted Cases. A report adopted by the Judicial Conference of the United States. Washington: Administrative Office of the United States Courts, Supreme Court Building (distributor), 1951. Pp. 40.

This publication is a report of a committee of the Judicial Conference of the United States and relates primarily to procedural guide posts, that treat of a number of the common problems unique to "The Big Case." The committee, which handed down the report, comprised experienced trial and appellate court jurists who have repeatedly encountered difficult procedural questions of cases of protracted length and they outline in the report those methods they believe to be particularly effective.

"The Big Case" is one of prolonged proceedings with a resulting voluminous record. Anti-trust litigation is most representative of this type of case and some patent proceedings reach like proportions. In cases of this nature the problem arises of meeting in an expeditious manner the tremendous amount of evidence, both oral and documentary, with which the Court is met. A few cogent examples may show the burden that will exist if the court permits normal adversary procedure to take place throughout the proceedings: in the *Hartford-Empire* case 3,300 exhibits were considered and 18,000 pages of record were made; in the *Libbey-Owens-Ford* case there were 6,000 exhibits proposed to be offered of which 900 were eventually received; in the recent *United Shoe Machinery* case, the Government offered 4,600 exhibits at one time; and, in *Ferguson v. Ford and Dearborn* there were 27,000 exhibits and 70,000 pages of record.

Further complicating the Judge's work in cases of this nature are the broad general pleadings which allege such items as conspiracy or patent infringement in general terms. Conspiracies which are alleged sometimes extend backward over periods up to sixty years and counsel at the time of instigation of suit has little knowledge of what may turn up in the way of evidence. While the trial judge may strive for well defined issues as soon as practically possible, he will find it extremely difficult to do so in the face of counsel's evasiveness that results from a desire not to tip one's hand and from the hope of finding substantially more material evidence as the case proceeds.

Procedural controls on the part of the Court must be adopted to minimize the amount of organizing and study that will be necessary to come to a determination of the issues. Counsel can not be permitted to try "The Big Case" as they see fit. Exhaustive cross-examination, surprise introduction of documents, haphazard arrangements of evidence and exhaustive open court preliminary hearings cannot be tolerated.

The first step of the trial judge is to particularize issues. Vague complaints and reluctance on the part of counsel to be specific during preliminary stages must be met by a determination to arrive at the issues promptly, so that later proceedings will not become unwieldy. The submission of pretrial opening statements, interchange of exhibits between parties and the synopsizing of bulk evidence in advance, all of which is quite foreign to general trial practice techniques, are recommended pretrial procedures.

Of special interest in the well conducted "Big Case" are procedures that at first glance appear to be radical departures from some of our rather well developed and cherished methods of trial. For example, in the offering of a document, the question of relevancy or materiality is raised by the opposing party in the usual law suit, but in a case of great bulk of evidence it has been found more expeditious to have the offering party specifically show materiality and relevance before receipt into the record. Then again, it is suggested that evidence, although material, but not necessary for determination of the issues be excluded if there be other evidence that supports a similar decision. While this latter procedure is an expansion of the rule as to materiality, it is not a deviation from the general principles underlying the rule.

It is also suggested in the report that in some instances a witness be employed to orally relate the contents of considerable numbers of documents rather than to put the multitudinous documents into the records. Narrative variations of voluminous depositions are another innovation.

Of particular interest was a portion of the report dealing with the proof of scientific and technical facts. Issues technical in nature have bothered the Patent Bar for some time. There are those that feel that the lay judge does not readily grasp and appreciate the complexities and subtleties of technical theory and data, with the result that there is a tendency on the part of the court to over simplify the steps taken in the development of new and novel apparatus. Lacking the insight of the difficulties of advancing a particular art Courts deny a finding of invention, whereas a technically trained man may often arrive at the opposite conclusion. The use of technically trained masters for patent cases might be explored with interesting results.

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