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An Experiment in Simplified Procedure. Proceedings Before the Industrial Accident Commission.

THE question of the reform of judicial procedure has been before the public for many years, but without much progress. In England, after years of agitation, the judicature act finally accomplished sweeping and beneficial changes, but in the United States in spite of the widespread adoption of the code system of pleading, and in spite of frequent legislative "tinkering", the situation is still unsatisfactory. While there is no organized movement for a radical change in methods of procedure, such as preceded the adoption of the Field Codes, there undoubtedly is a strong undercurrent of dissatisfaction with existing systems which must culminate before many years in a thorough-going revision of our judicial organization and, in this state, of the code of civil procedure.

Such revision probably will be for the most part along the line of the present English practice. It will not be necessary, however, to rely wholly upon the experience of the English courts, as we already have in this state a working system of simplified procedure which may serve to some extent at least as a model for such revision.

In the administration of the Workmen's Compensation, Insurance and Safety Act, the California Industrial Accident Commission has, for the past two years, been engaged with considerable success in developing an inexpensive, non-technical and expeditious system for the disposal of litigated cases coming before it. It is true that the procedure now in force has been

subjected to the strain of heavy litigation for less than a year. Since the taking effect of the Boynton Compulsory Compensation Act on January 1, 1914, the commission has tried and decided approximately five hundred cases, as against less than one hundred in the two years prior thereto under the elective provisions of the Roseberry Law. While it may not yet have reached its final shape, the procedure adopted has been sufficiently tested to warrant a brief description of the methods used and results obtained, with the possible conclusions to be drawn applicable to a revision of the code of civil procedure.

First, a few words as to the peculiar necessity, under the Workmen's Compensation Act, for a special tribunal and radically simplified procedure.

In enacting workmen's compensation laws throughout the United States, it would have been natural to entrust the duty of administering such acts to the civil courts. This was done in England, where workmen's compensation cases are tried in the county courts, with a right of review by the High Court of Justice. The almost unanimous practice in the United States has been to create administrative commissions to hear the litigation arising under such acts and to divest the courts of all powers therein, except a limited right of review upon questions of law. The reason undoubtedly lies in the inferior procedure of American courts, as compared with those of Great Britain, our procedure being cumbersome and expensive enough in the average contested case, and practically prohibitive of justice in the class of cases covered by workmen's compensation acts.

The primary purpose of these statutes is to provide means of support for the victims of industrial accidents at the time such support is needed. Instead of providing for the payment of a large sum of money at some later period, which sum will entirely compensate the injured man for his loss and suffering, he is cut down to sixty-five per cent of his average weekly wages, to be paid for his support until he is able to return to work. Both in the nature of the liability of the employer, and in the mode of payment to the injured employee, therefore, the benefits prescribed by the act are more nearly allied to compulsory accident insurance than to a right to recover damages for a tort. Such acts are, furthermore, designed for the protection of workingmen with an average earning capacity of one thousand dollars per year, the maximum and minimum limits of the California act

being one thousand and sixty-six dollars and sixty-six cents, and three hundred and thirty-three dollars and thirty-three cents, respectively. Employees belonging to this class rarely have sufficient money in reserve to tide them over, in the case of illness or accidental injury, more than the first two to four weeks of idleness before becoming a burden upon relatives, friends or public charities.

To effect the purpose of the act it is necessary that a tribunal be provided to decide cases arising under it with sufficient quickness and freedom from expense to secure the payments to the injured employee at the time that they are needed for support. This the civil courts are unable to do. In California our superior courts are competent eventually to decide a cause with entire justice and to award a sufficiently larger sum than that authorized by the act to compensate in full those surviving the litigation. They are incompetent, however, to secure the payment of the smaller amounts prescribed by the act at the time they are needed for his support or cheaply enough to permit an injured man claiming a doctor's bill of ten dollars, and one week's disability indemnity, to secure the amount given him by the law. Nor could our justices' courts, in spite of their greater flexibility of procedure, do much better, because of the complexity of the legal and medical issues raised in proceedings under the workmen's compensation statutes, requiring specialized training to administer them. To place the administration of this act in the hands of the justices' courts would necessitate such close supervision of their proceedings and frequent construction of the law by the higher courts, as would destroy any possible gain from the superior speed and inexpensiveness of their procedure.

The modifications made by the California Industrial Accident Commission in the rules of procedure heretofore in use, in the attempt to formulate a speedy and inexpensive procedure suitable to the needs of the class of litigants before it, are sweeping. The principal changes are as follows:

1. Fees and court costs are almost entirely eliminated. There are no filing or jury fees and the cost of reporting and transcribing the evidence is borne by the state. The only cost to the litigants is in the witness fees, which are the same as in court proceedings, and the charges of the attorney, where one is employed. In half of the cases before the commission the injured employee is unrepresented, and where an attorney is retained the average fee

allowed by the commission, where no briefs or memoranda of points and authorities are presented, is ten dollars.

2. The importance of pleadings is greatly minimized. Their function being merely to give notice of contested issues before trial.

The only pleadings allowed are the application and answer. Demurrers upon questions of form or substance, and motions to strike out, are abolished. Issues of law are raised orally at the trial, or by memoranda of points and authorities at any time, no decision being made upon them until the final decision of the cause. Trials are not delayed by the settlement of preliminary issues, and usually take place within fifteen days after the filing of the application.

Applications for compensation which omit material allegations are allowed to stand upon proof of such material allegations at the hearing, with or without amendment, and answers which fail to raise issues later found to be material in the decision of the case, are disregarded, evidence being allowed at the trial upon such defenses. In case of defects in the application or answer, however, the opposing party is always allowed further opportunity to introduce testimony if surprised, and costs will be imposed upon the party making the mistake if the opposing party has been put to unnecessary expense, as by the production of witnesses to prove issues not controverted at the hearing.

3. The procedure at the trial is also informal. The attitude of the commission upon rules of evidence will be discussed in a later paragraph. As to the remainder of the trial procedure, it should be noted that the purpose of the hearing is not to listen to such proof as may be presented by either side, but is to get at the facts, largely upon the initiative of the commission itself. The proceeding is looked upon in the nature of an investigation instead of a trial, and wherever the necessity for further testimony becomes apparent, the commissioner or referee conducting the hearing will arrange for the calling of the necessary witnesses, etc. The powers given the commission in this respect are very broad, section twenty-four (a) of the Workmen's Compensation, Insurance and Safety Act reading as follows:

> " . . . . but the commission may, *with or without notice to either party,* cause testimony to be taken, or inspection of the premises where the injury occurred to be made, or the time-books and pay roll of the employer to be examined by any commissioner or any referee appointed by the commission, and

> may from time to time direct any employee claiming compensation to be examined by a regular physician; the testimony so taken and the results of any such inspection or examination to be reported to the commission for its consideration."

The principle referred to, that the hearing is an investigation and not a trial, determines the nature of the whole proceeding. The witnesses are examined chiefly by the commissioner or referee. After he has elicited all the information that appears to bear on the subject, the representatives of either side are allowed to ask such additional questions as may occur to them. The examination by either side, following the principal examination by the commissioner, is in the nature of a direct examination, for the purpose of eliciting whatever facts may have been overlooked, and not a cross-examination. While cross-examination is not prohibited, that kind of cross-examination which seeks to "re-hash" the whole of the testimony previously given without knowing in advance of any variations to be brought out, is not allowed.

The taking of testimony of medical and expert witnesses is also greatly simplified. The physicians who attended the injured man are of course called upon to give their story of what they found, and their opinion upon the nature of the injury. Expert testimony is rarely summoned by either party for the reason that the commissioner appoints its own medical experts. In case the medical testimony is conflicting, or the exact condition of the man is not established by impartial testimony, the injured man is sent to some specialist chosen by the medical director of the commission for his skill and experience upon the kind of disability in question. This referee is paid by the state and reports directly to the commission, copies of his report being sent to each side for their comments thereon. In consequence, the bringing of hosts of experts by each side, each expert having been found in advance to be favorable to the side producing and paying him, is entirely done away with.

No arguments are made at the hearing, although the privilege of stating contentions of law or fact is permitted. Written memoranda of points and authorities, or comments upon the evidence, are freely received provided the case will not be unduly delayed in waiting for them.

4. The principal gain is in the disregarding of rules of evidence at the hearing as far as questions of admissibility are concerned, obviating objections and arguments upon points of evidence and appeals upon errors in admission of evidence, and shortening materially the time consumed in trying cases. Another gain lies

in making the presentation of proof non-technical. Litigants do not, except in complicated cases, require the services of an attorney, thus avoiding a large part of the cost of litigation.

It must not be inferred, however, that the commission is endeavoring to dispense with the law of evidence viewed as a guide developed by years of experience as to what kinds of evidence are of value, and what kinds are to be distrusted. While questions of admissibility are ruled out for purposes of speed and inexpensiveness of trying issues, the evidence is always taken with the limitation that it is received only for what it is worth, and in rendering the decision is weighed in the light of the experience of the courts upon the value of such evidence. In this respect the practice of the commission is the same as the practice of many superior court judges when sitting without a jury in discouraging objections upon points of evidence where the testimony is in any degree relevant. In juvenile court and probation proceedings the same informality is usually adopted by the court, particularly as to the practice of the court to inform itself by hearsay and evidence of other misdeeds, etc.

The power of the Industrial Accident Commission to receive evidence which would not be admissible in formal proceedings in courts of law has been strongly questioned in a case recently decided by the commission, that of Marsters v. Hind, Rolph and Company and Employers' Liability Assurance Corporation, decided on September 25, 1914. Inasmuch as this case is now before the Supreme Court upon writ of review, only the contentions of the opposing sides will be quoted, without entering into a discussion thereon. In this case the husband of the applicant died from blood-poisoning, supposed to have been contracted from an abrasion or bruise received by him while working upon the ship where he was employed. The only evidence that the deceased did receive such abrasion while acting in the course of his employment, except for the corroborative testimony of persons noticing the swollen condition of his wrist shortly after the injury, and of the medical testimony showing the entire possibility of the abrasion having been received as claimed, consisted in the statements of the deceased made to a shipmate, to his wife, his superior officer and the attending physicians before his death. It was strongly contended by the defendants that evidence of his statements as to the cause of his injury, being inadmissible in the courts of law, could not legally be allowed to go into the record before the commission, and at any rate, could not be considered by the commission in

rendering its decision; that hearsay evidence is notoriously bad evidence and entitled to no weight whatever; that the provision of the Workmen's Compensation Act, authorizing the commission to dispense with the technical rules of evidence was intended to draw a distinction between rules of evidence which were technical, and rules of evidence which were substantial in their nature, the hearsay rule being in the latter class.

The decision of the commission, however, was to the effect that it was authorized by the law to receive such evidence, and to consider it for what it was worth under all the circumstances; that the different provisions of the Workmen's Compensation Act authorizing it (1) to dispose with technical rules of evidence, (2) to regulate and prescribe the nature and extent of the proofs and evidence, (3) to conduct investigations and take testimony with or without notice, and the sections providing that (4) informalities in proceedings should not invalidate any decision, and (5) making the findings and conclusions of the commission on questions of fact not subject to review by the courts, confer this authority. The commission goes on in its opinion to urge that this informality is also permitted by the fact that it is an administrative commission, and not a court, and by the necessity of informal procedure to carry out the purpose of the act. In regard to the inability to use such hearsay evidence for what it is worth, after its reception, the commission points out that the law of evidence is a system of arbitrary rules for excluding evidence which, as a class, is dangerous, from the consideration of an untrained jury which might be prejudiced thereby. That it is not necessary, however, to bind a court or other trained and experienced tribunal by arbitrary rules excluding all evidence of a given class regardless of the merits of particular testimony in a particular case.

The procedure of the courts of continental Europe is alluded to in this regard, where there is no law of evidence, the only guide being logical relevancy, and the evidence being weighed according to its weight as viewed in the light of human experience.

The decision of the Supreme Court upon this question is awaited with considerable interest, as the quickness and inexpensiveness of the procedure of the Industrial Accident Commission is involved to a considerable extent in the questions appealed.

5. The procedure of the Industrial Accident Commission is also interesting in the way in which it bears upon the services of attorneys. The amount of compensation allowed injured persons

is so closely limited by the act to actual need for support that large attorneys' fees would defeat its purpose. Remuneration is therefore slight, except in complicated cases. The elimination of arguments upon rules of evidence, and the elimination of technical steps in procedure, largely do away with the necessity of professional guidance except upon three points: preliminary advice as to the institution of a claim, advice as to necessary witnesses to be summoned and briefs upon difficult points of law, where they arise. And even here the services of an attorney are usually convenient rather than necessary, as the commission itself advises the litigants without expense, and actively supervises the presentation of proof.

No system of procedure can, however, be judged solely by a description of its different steps and rules. Its results also must be considered. To determine the value of any new system, inquiry should be made as to three points, (1) has the system where it has been tried reduced the time necessary to reach a final decision, (2) has it reduced the cost of litigation, (3) has it opened the way for any greater injustice or possibility of wrong decisions than now exists in the more formal systems of procedure? These tests will be applied in the order given to the trial of cases before the Industrial Accident Commission, as far as it is possible to draw any definite conclusions.

The actual time consumed in taking testimony before the commission in view of the elimination of objections upon points of evidence, etc., is short. In making an average of the time consumed in trying cases, it appears that less than two hours is taken per trial in receiving testimony. Occasionally a very hotly contested case may take from four to six hours, but this is more than balanced by the number of smaller cases in which one hour suffices to examine all of the witnesses.

In the other stages of a proceeding for compensation, the commission has also been successful in reducing the time taken up. An average of all of the cases decided in the first six months of the year 1914 shows that the period consumed from the filing of the application until the sending out of the decision is six weeks. An average of twenty cases decided during the months of October and November, 1914, shows that this has been somewhat increased, due to congestion of the calendar, but nevertheless the average for these twenty cases falls below seven weeks from start to finish. In discussing this average it should be remembered that, during the year 1914, something over seven hundred cases were

filed under the Boynton Act, and practically four hundred decisions made, in addition to some fifty decisions upon cases arising under the older Roseberry Act. When it is considered that the irreducible minimum for determining a claim, including the ten days statutory period required for notice, the time for transcribing the testimony and that necessarily consumed in rendering a decision after the case has been submitted, will take at least three weeks, and that the taking of additional testimony after the first hearing, which is frequently required, and the obtaining of reports from medical referees, takes two weeks longer at least, it will be seen that the commission has achieved extraordinary results. It is probable that when the facilities of the commission become adequate to handle the present rush of cases, the average time required to decide a case will be lowered to five weeks from the filing of the application to the adjustment of the controversy.

The reduction in expense of litigation before the commission has already been commented upon. There are no filing, stenographical or jury fees, except a charge of ten cents per page for copies of the testimony where a party desires a copy for his own use. Even this charge is not made where the party was not present or represented when the testimony was taken. The only cost to the litigant, therefore, is the statutory per diem of witnesses summoned by him, and the attorney's fee, averaging ten dollars, where one is employed. The imposition of such costs upon the adverse party as have been named is in the discretion of the commission.

The time and expense of appeals to the Supreme Court or District Courts of Appeal from the decisions of the commission is not included in the above comparison. It is sufficient to say that only one mode of appeal is allowed by the Workmen's Compensation, Insurance and Safety Act, i. e., by writ of certiorari or review, which is exceedingly direct and expeditious as compared with the usual course of appeals from judgments of the Superior Court. There is no stage of a proceeding before the commission, therefore, which is as lengthy or costly as the similar stage of a proceeding before the courts.

A procedure is not sufficient, however, which merely reduces cost and time of litigation. It is also necessary that the informality of the procedure adopted does not open the way to opportunity for a wrong decision. The great and perhaps only advantage of formality in court proceedings is that it prevents arbitrary and

hasty action. Indeed, technicalities and formalities have been at all times a defense against arbitrary and unjust decisions, as well as an obstacle to speedy and inexpensive relief. It is impossible, of course, to find statistics upon the proportion of cases wrongly decided, either by the commission or by any court. The causes that may lead to possible injustice may, however, be scrutinized to see whether the procedure used by the commission opens the door to any greater possibility of injustice from these causes than now exists in the superior courts. The different ways in which injustice is possible in litigation may be summarized as follows: (1) technicality of procedure, which may delay relief or make it unduly expensive, or create a bar which litigants with righteous claims are unable to surmount; (2) extreme informality of procedure, which may allow an opportunity for hasty and ill-considered rulings; (3) hasty, ignorant or corrupt action by the court; (4) perjury by witnesses or fraud by counsel or parties upon the opposing party.

To consider these four causes in more detail:

1. The possibility of injustice by reason of litigants with righteous causes being unable to surmount technical bars in procedure or production of evidence, is lessened in proceedings before the commission. The free introduction of evidence for what it is worth, which might not be admissible in the superior courts, often aids in preventing a denial of justice, as in cases where a fact at issue would be proved to the entire satisfaction of the average reasonable man, but could not be technically established in the courts by reason of the absence or death of necessary witnesses.

2. While informality of procedure gives a greater opportunity for arbitrary and hasty action of the judge, this danger is overcome in proceedings before the commission, by the requirement that a majority, if not all, of the commissioners must pass upon every case. The danger of a one-man point of view in making a decision is also less than in superior court proceedings. An additional safety factor in this respect lies in the practice of the commission to refer cases in any way doubtful to the members of its legal and medical staffs for opinions upon difficult issues. While the opinions submitted on request are not always followed, at least every angle of the question at issue is exhausted before a decision is made.

3. The same scrutiny by more than one trier of the facts also

diminishes whatever danger there might be in the course of years of ignorant or corrupt decisions, making it less than if the decision were to be rendered by one man only, as in the superior courts. On the other hand, the findings of fact of the commission are made by the act not subject to appeal on any ground, thereby conferring probably a somewhat greater immunity from appellate scrutiny than is accorded to findings of fact of a jury or of a judge sitting without a jury. Considering these two circumstances together, however, it at least cannot be said that the powers and procedure of the Industrial Accident Commission open the way to any greater possible injustice than now exists under the powers and procedure of the superior courts.

4. Not much can be said upon the subject of perjury. Possibly perjury can be detected the more easily in the superior courts, by reason of prolonged and usually fruitless cross-examination being more freely allowed. But on the other hand, certain kinds of perjury are more easily checked in proceedings before the commission. Testimony as to the nature or extent of the injury, or as to the present condition of disability of the injured man, is always checked by sending the man to medical referees appointed by the commission for thorough examination. With such examination at the expense of the commission, fraud and malingering can more easily be detected than by the production of expert witnesses by each side, each "expert" being ascertained in advance to be favorable to the side calling him as a witness, as is done in the courts.

What suggestions can be made as to the reform of procedure in the superior courts, as shown from the experience of the Industrial Accident Commission to date? Of course this question must be approached with great caution, both because of the fact that the litigation handled by the Industrial Accident Commission is highly specialized and of a different nature from that arising before the courts, and also because the simplified procedure used by the commission has not been tested for a long period of years. Any suggestion could be only tentative.

Doubtless no radical reform in the law of evidence or in the mode of conducting a trial can be brought about as long as the jury system is retained. There must be a preliminary purification of the evidence by the court by the use of a system of rules of evidence wherever a jury is used, and the country is not ready at the present time to consider the abolition of the jury system. Any

radical reform along this line should therefore be approached, not by abolishing the jury system or by sweeping away such technicalities of procedure as are necessary to safeguard it, but by the supplying of an optional or partially compulsory system to be used side by side with it, until the experience of some years under such optional, informal system shall indicate more clearly what further changes may safely be made. Such suggested system should, speaking generally, be along these lines:

First: Its use should be made compulsory in all actions where a jury is not a matter of right, as in equity and divorce actions. In proceedings at law, where a jury can be demanded by either side, as of right, it should be used only by the consent of both parties, both thereby waiving all technical or obstructive objections, and employing the simplified procedure according to its spirit and purpose.

Such consent could be made at any time and the case put immediately upon the calendar of informal procedure cases. Preferably, however, a request to have the case placed upon such calendar should be contained in or attached to the complaint in actions at law at the time of service and should be consented to by the defendant at the time of first appearance.

Second: A date for the hearing of the case should be set at the time of appearance or when the consent of the defendant is first obtained, and such hearing should be had within two weeks after service upon the defendant or consent to use this procedure. Only one postponement should be allowed, and that for not over two weeks, unless the parties request a continuance for the purpose of arranging a settlement.

Third: All demurrers, both for defects of form and substance, should be abolished, substituting instead merely an informal oral or written statement of contentions on points of law or fact at the taking of the testimony. The only pleading by the defendant should be a verified and detailed answer.

Fourth: At the first hearing the person trying the case should require the parties to stipulate as to all issues that they could agree upon, and outline the contested issues of fact or law. Costs should be imposed upon each party for issues contested by it without sufficient grounds for raising the issue.

Fifth: The hearing should be in the nature of an investigation before an examiner or court commissioner, in which the examiner takes the leading part in bringing out the necessary facts instead

of acting as umpire between the litigants. The examiner should have full power to call for additional evidence, appoint expert opinion witnesses, and make investigations upon his own motion if necessary, provided notice be given to the parties of his conclusions where no prior notice is given. In general, the responsibility for getting at the merits of the case should be upon the examiner equally with litigants. In cases not presenting complicated issues it should be possible for a litigant to dispense with the services of an attorney if he so desires, relying upon the guidance of the examiner in presenting his case.

One strong difference between the American and German systems of trial practice in this respect lies in the guidance given the litigants by the person trying the case. The American practice is for the judge to act as umpire, the responsibility for presenting the case properly and in preventing the other side from presenting its case, resting upon the attorneys. In Germany, on the other hand, the court exercises a much stronger control over the proceedings. In Berlin there are over eighty judges, as compared with twenty or thirty-five in a city of equal size in English-speaking countries. The German judges supervise the presentation of a case, making suggestions to either side, and endeavoring to gain the essential facts where the attorney has misconstrued the issues or failed to present them properly.

Sixth: The examiner should not be bound by rules of evidence to the extent that arguments upon the law of evidence would be in order before him, and no appeal upon errors in admitting evidence should be allowed. At the confirmation of the report, to be discussed below, the superior court should, of course, give such weight to evidence not admissible in more formal proceedings as the judges think advisable under all the circumstances. If relevant evidence is wrongly refused admission in the opinion of the superior court, arrangements should be made to add such testimony to the record. The intent of this procedure, as far as the law of evidence is concerned, should be to preserve the spirit of the rules of evidence as means of testing the weight of evidence, but to abolish all arguments or appeals upon questions of admissibility, to prevent delay in the proceedings.

Seventh: The examiner to transmit the record, with his findings of fact and findings of law stated separately, to the superior court, for confirmation upon both findings of law and fact. Such confirmation should be made preferably by two or more judges,

after informal oral or written argument upon the record by each side. If desired, an informal statement of contentions of law and fact could be placed in the record by the parties before the examiner prepares his findings, instead of being made to the court.

Eighth: The superior court to have power to set aside, modify or re-draft findings of fact or of law, to call for further testimony, either in the form of affidavits, depositions or re-submission to the examiner; to amend the pleadings upon its own motion to correspond with the issues developed at the trial; and in general to completely settle the controversy without trying the case over again.

Ninth: The findings of fact as confirmed by the superior court to be conclusive, and not subject to review, and appeal to be allowed only upon issues of law.

The change in our procedure herein outlined is not as great an innovation as might appear. In substance it is to a considerable extent similar to that used in courts of chancery before the amalgamation of legal and equitable proceedings. The procedure of our law courts was developed almost entirely out of the necessities of the jury system, its characteristic features being a preliminary settlement of the exact issues in controversy and a law of evidence by which the testimony can be purified by the court to prevent the jury being prejudiced. The characteristics of equitable procedure, which was not based upon the jury system, lay in the trial of cases upon sworn statements of the parties and depositions of witnesses, with an occasional reference to a master in chancery, subject to confirmation by the court, and in the absence of rules of pleading for settling issues and of a law of evidence. When the amalgamation of legal and equitable proceedings was brought about, the retention of the jury system unfortunately necessitated the application of legal principles of procedure to the combined form of action, rather than the application of equitable rules. The result has been far from satisfactory. In the interests of speedy and inexpensive determination of litigated cases, it is submitted that a return should be made in non-jury cases to a form of procedure based to a considerable extent upon the older equitable procedure. In considering such return a study should be made of the present English procedure, and in California, of a working model of what simplified procedure can accomplish on a small scale in the procedure of the Industrial Accident Commission.

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