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TRIAL BY LAWYER PANEL: A SOLUTION TO TRIAL COURT BACKLOGS?

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A fundamental problem that faces litigants in personal injury jury cases is the delay from the time they are at issue to the time when they finally reach trial. The Institute of Judicial Administration reports that in 1959 this time averaged 10.1 months in the state courts.[1]

Pennsylvania has endeavored to remedy its problem by enacting, in 1952, a Compulsory Arbitration Statute.[2] It provides that the courts of common pleas[3] and the municipal court of Philadelphia[4] may adopt rules of court compelling cases at issue where the amount in controversy is $2000 or less and where the subject involved is not real estate, to be tried to a panel composed of three attorneys from that judicial district.[5] Furthermore, where the case is not yet at issue or where a suit has not been filed, the parties may agree to refer it to arbitration, with the agreement of reference to contain those facts and issues to be arbitrated.[6]

The three member panel is appointed by the prothonotary, alphabetically, from a list of lawyers who agree to act, unless the rules of court provide some other method of choice.[7] Each board usually sits for one case except in Philadelphia where it sits for three cases.[8] No more than one attorney from a single firm shall sit on the same case.[9] The board is appointed after the case is at issue or after the filing of the agreement of reference, upon praecipe filed by counsel with notice to opposing counsel.[10] The hearing is called by the chairman, who is usually the first person on the alphabetical list, and may be held either in a courtroom or in the office of one of the arbitrators.[11]

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1 Institute of Judicial Administration, State Trial Courts of General Jurisdiction Calendar Status Judy i (1959). The same report shows Denver's District Court has a blacklog of six months. *Id.* at 1.

2 Pa. Stat. Ann. tit. 5 §§ 1-45 (Purdon Supp. 1958). The plan was an amendment to an existing arbitration statute passed in 1836. Pa. P.L. 715 (1836). Mr. Walther E. Alessandroni, Chancellor, Philadelphia Bar Association, states that it was thought less complicated to amend the original statute than to draft an entirely new act. He suggests that as a result the name "Compulsory Arbitration" attached to the plan. A better title, he believes, would be "Trial by Lawyer Panel." The writer has adopted Mr. Alessandroni's suggestion in the title to this note. Letter from Hon. Walther E. Alessandroni, Chancellor, Philadelphia Bar Association, to DICTA, Nov. 6, 1959, on file in the DICTA office [hereinafter cited as *Alessandroni*: Letter of Nov. 6, 1959].

3 The Courts of Common Pleas are courts of general jurisdiction within their respective counties. Pa. Stat. Ann. tit. 17 § 251 (Purdon Supp. 1958).

4 The original statute was amended in 1957 to include the Philadelphia Municipal Court. Pa. Stat. Ann. tit. 5 §§ 23, 30, 57, 73 (Purdon Supp. 1958).

5 Pa. Stat. Ann. tit. 5 § 30 (Purdon Supp. 1958); Pa. Ct. of C.P. (Columbia County) R. V § 3; Philadelphia, Pa. Municipal Ct., R. for Arbitration I.

6 Pa. Stat. Ann. tit. 5 § 30 (Purdon Supp. 1958).

7 Pa. Stat. Ann. tit. 5 § 31 (Purdon Supp. 1958).

8 Philadelphia, Pa. Municipal Ct., R. for Arbitration II D.

9 Pa. Stat. Ann. tit. 5 § 31 (Purdon Supp. 1958). Several counties provide that no two attorneys related by blood or marriage may sit as board members on the same board, nor may an arbitrator sit who is related by blood or marriage to a litigant. Pa. Ct. of C.P. (Columbia County) R. V § 5.

10 Pa. Stat. Ann. tit. 5 § 31(1) (VIII).

11 The time lapse between appointment of the panel and the hearing varies. Compare Philadelphia, Pa. Municipal Ct., R. for Arbitration III A, where the chairman may fix the date of the hearing not less than 15 days nor more than 30 days from the date of appointment of the board, with Pa. Ct. of C.P. (Columbia County) R. V § 8 which provides that the chairman may set the date for the hearing not less than 10 nor more than 20 days from appointment of the board.

Each county establishes the amount paid to the panel members. This ranges from ten to fifty dollars per case with an extra ten dollars for the chairman.[12] The key to the program is that a litigant may appeal to a jury trial *de novo;* however, he must first reimburse the county for the amount paid to the arbitrators.[13] The appellant cannot recover this amount in any subsequent proceeding.[14]

No record is kept of the proceeding, but upon demand of either party, a reporter must be provided and a record taken. The demandant then is charged with the cost of the record.[15] Although most of the county rules provide that the hearings shall be conducted, "with due regard to the law according to the established rules of evidence . . . ,"[16] the decision of the panel may not be set aside because such rules were not followed since the appeal is to a *de novo* jury trial.

CONSTITUTIONAL ISSUES

Trial by Jury in Civil Cases

The Pennsylvania Supreme Court sustained the constitutionality of the statute in *Application of Smith.*[17] In doing so, it rejected petitioner's argument that the rules of the Lancaster county court of common pleas and the statute authorizing them were violations of the Pennsylvania constitutional guarantee of a trial by jury in civil cases.[18] The court reasoned that a statute making arbitration the final determination of the parties' rights would violate the constitution.[19] Since the litigants have the opportunity of a trial by jury after the arbitration proceedings, the constitutional guarantee is satisfied. However, this opportunity "must not be burdened by the imposition of onerous conditions, restrictions, or regulations which would make the right practically unavailable."[20] The payment of

12 Pa. Stat. Ann. tit. 5 § 129 (Purdon Supp. 1958); Institute of Judicial Administration, Compulsory Arbitration and Court Congestion 8 (1959). Compare Dill v. Cochran, 15 D.&C.2d 692 (1958) where the court allowed double payment for two cases that were consolidated into one hearing, with Philadelphia, Pa. Municipal Ct. R. for Arbitration V A which states that all cases arising out of the same transaction are considered to be one case so far as compensation for arbitrators is concerned.

13 Pa. Stat. Ann. tit. 5 § 71 (Purdon Supp. 1958). This section was amended in 1956 to provide that the appellant need not pay arbitrators' fees over fifty percent of the amount in controversy. The county sustains the costs over fifty percent.

14 *Ibid.* See also Bucciarelli v. DiCicco, 14 D.&C.2d 61 (1958).

15 Pa. Stat. Ann. tit. 5 § 121 (Purdon Supp. 1958).

16 Pa. Ct. of C.P. (Columbia County) R. V § 9.

17 381 Pa. 223, 112 A.2d 625 *appeal dismissed sub nom* Smith v. Wissler, 350 U.S. 858 (1955).

18 Pa. Const. art. I § 6 provides, "Trial by jury shall be as heretofore, and the right thereof remain inviolate." The court in Application of Smith, *supra* note 17, also refused arguments that the limitation to claims of $1000 was class legislation and that the power of counties to establish their own rules of compensation for arbitrators was a violation of that section of the constitution providing for uniform operation of the laws regulating the courts.

19 *Accord,* Cutler & Hinds v. Richley, 151 Pa. 195, 25 Atl. 96 (1892).

20 381 Pa. at 231, 112 A.2d at 629.

non-recoverable arbitrators' fees was held not to be such a restriction. It was reasoned that if the recovery of court costs could be withheld by the legislature, so could arbitration fees.[21]

The conflict of the statute with the fourteenth amendment to the federal constitution was not directly raised. The United States Supreme Court has held that a state may provide an arbitration procedure it deems proper so long as its choice is not "unreasonable or arbitrary."[22]

Such an arbitration statute probably would not violate the jury provision in Colorado's constitution. The constitution provides, "The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, . . . may consist of less than twelve persons, as may be prescribed by law."[23] This might be construed as allowing jury trials in civil actions only when the legislature has expressly so provided. However, in *Denver v. Hyatt*,[24] the court, in declaring unconstitutional a statute providing for a verdict by three-fourths of the jury, held, "the right of trial by jury in civil cases, as provided by the common law is preserved in all its essentials, except the one of number."[25] Therefore, the reasoning of the *Smith*[26] case would seem applicable: 1) the guarantee of a jury trial at common law meant a jury trial at some period before a final determination of the rights of a party, and 2) the right to jury trial could not be burdened by unreasonable conditions. It would then be a policy consideration as to whether the payment of non-recoverable arbitrators' fees was such a restriction.

The Full Faith and Credit Clause

Any arbitration program will be ineffective if sister states do not enforce the judgments rendered as a result of the awards. Recently,[27] an Ohio court of common pleas refused to recognize an award signed by a prothonotary of Mercer County, Pennsylvania as a valid judgment enforceable under the full faith and credit clause of the Federal Constitution.[28] Since that case, the statute has been amended to read,

> . . . upon being approved by the court, such award and approval shall be regarded as a judgment of the court, and the award and approval shall be regarded and have the dignity of judicial proceedings within the meaning of Article IV § 1 of the United States Constitution.[29]

Even as here where the state's local policy is declared, the United States Supreme Court is the final arbiter of what constitutes a judgment within the full faith and credit clause.[30] Whether an award of an arbitration board is a judgment within that clause seems never to have been ruled upon by that Court. The most au-

21 *Ibid.* The court commented by way of dictum that to make an appellant pay back the entire cost where the amount in controversy was small would be unfair. This led to the amendment found in note 12 *supra*.
22 Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 158 (1931).
23 Colo. Const. art. II § 23.
24 28 Colo. 129, 63 Pac. 403 (1900).
25 *Id.* at 146, 63 Pac. at 409.
26 Application of Smith, 381 Pa. 223, 112 A.2d 625 (1955).
27 In McClure v. Boyle, 141 N.E.2d 229 (Ohio 1957).
28 U.S. Const. art. IV, § 1.
29 Pa. Stat. Ann. tit. 5 § 58.1 (Purdon Supp. 1958).
30 Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935).

thoritative decision is by the Maryland Supreme Court which upheld enforcement of a judgment pursuant to an arbitration award under an earlier Pennsylvania statute.[31]

The Colorado Constitutional Arbitration Provision

The Colorado constitution authorizes the legislature to provide for arbitration legislation.[32] The Colorado Supreme Court has held that under *this provision* the legislature is empowered to establish only voluntary arbitration programs.[33] Therefore, it may be argued that by the mere inclusion of such a provision the framers of the constitution intended to preclude the passage of compulsory arbitration legislation.

ACCOMPLISHMENTS OF THE PLAN

A survey conducted by the Institute of Judicial Administration presents the most comprehensive report of the Pennsylvania plan's success.[34] The findings of the survey are summarized in part in the following paragraphs.

Appeals from Arbitration Awards

In the various counties, the average number of cases decided during each of the years 1956 through 1958 was 2,181.[35] From the total cases arbitrated, 3.1% were appealed in 1956, 3.8% in 1957, and 4.2% in 1958. Of these cases, reversal or substantial modification of the award was achieved only in 11.5% of the cases appealed in 1956, 11.1% in 1957, and 10.5% in 1958.[36]

No figures are available on the number of appeals taken from awards made in the Philadelphia municipal court, but more than 15,000 cases have been processed since arbitration was commenced in February, 1958.[37]

31 Wernag v. Pawling, 5 G.&J. 500 (Md. 1833); cf. Maxwell Shapiro Woolen Co. v. Amertotron Corp., 158 N.E.2d 875 (Mass. 1959), where the court, in deciding another question, assumed an arbitration award should be given full faith and credit.

32 Colo. Const. art. XVIII § 3.

33 Compulsory Arbitration, 9 Colo. 629, 21 Pac. 274 (1886).

34 Institute of Judicial Administration, Compulsory Arbitration and Court Congestion (1959); see also, Arbitration Commission, Philadelphia, Pa., Statistical Report, Feb. 17, 1958 to Jun. 30, 1959 (1959); Comment 2 Vill. L. Rev. 529 (1959); Comment 8 Stan. L. Rev. 410 (1956).

35 Institute of Judicial Administration Compulsory Arbitration and Court Congestion, 6 (1959).

36 *Id.* at 30.

37 Letter from Hon. Frank Zal, Arbitration Commissioner, Municipal Court of Philadelphia, to DICTA, Nov. 4, 1959, on file in the DICTA office (hereinafter cited as *Zal*: Letter of Nov. 4, 1959).

The Effect on Calendar Delay

The Institute of Judicial Administration's study indicated that about one-third of the counties questioned found a decrease in calendar delay in jury trials; several counties noted that delay was decreased in non-jury trials as well.[38] Two counties which saw no speed-up in jury trials were, nevertheless, able to eliminate a portion of the regular trial term as a result of the plan. Moreover, an increase in small claims was noted without a corresponding clogging of the courts.[39]

In Philadelphia, the effects were more dramatic. Mr. Frank Zal, Commissioner of Arbitration, enumerated the results: 1) a drastic reduction in the processing time for cases of $2000 or under, 2) a greater flexibility in the scheduling of cases, 3) an incentive to settle cases privately, 4) the opportunity to increase the municipal court's jurisdiction from $2000 to $5000, 5) a decrease in the backlog of the court of common pleas (which had not adopted compulsory arbitration), and 6) a faster disposition of cases in the $2000 to $5000 range by the municipal court. He attributes the success of the program to the over-whelming co-operation by the members of the bar, who have offered their time and office space.[40]

The Effect on Costs

Seven of the counties reported an increase in cost due to the expense of arbitrators' fees. Twenty-four found no increase and three found a decrease. One county was able to cancel twelve weeks of court at a saving of $3500 per week.[41] No cost figures are yet available for Philadelphia.

Some Current Problems

The support of the Pennsylvania lawyers for the plan seems overwhelming.[42] Nevertheless, dissents are to be found both in Philadelphia and in the counties. In Philadelphia, some lawyers complain they must have eight or nine cases referred to them before they fulfill their three required hearings. This is due to the number of settlements after referral to a board, but before the hearing. Some attorneys who have acted as chairmen have found the burden of contacting the parties and arranging the time and place for hearing outweigh the usefulness of the plan.[43]

In the counties there is a feeling that lawyers should sit on panels outside their own counties in order "to remove personalities from arbitration."[44] The counterargument to this view is that the plan is the responsibility of the local bar associations. They must exercise discipline over their members and settle administrative problems. This could not be done if the lawyers were from another bar association.[45]

38 Institute of Judicial Administration, Compulsory Arbitration and Court Congestion, 6 (1959).
39 *Ibid.*
40 *Zal:* Letter of Nov. 4, 1959. Mr. Zal reports that initially 2,500 lawyers of the Philadelphia Bar Association volunteered to serve, but now firms are withdrawing some of their members from the arbitrators' list. *Ibid.*
41 Institute of Judicial Administration, Compulsory Arbitration and Court Congestion, 11 (1959).
42 *Zal:* Letter of Nov. 4, 1959; *Alessandroni:* Letter of Nov. 6, 1959.
43 *Zal:* Letter of Nov. 4, 1959.
44 Institute of Judicial Administration, Compulsory Arbitration and Court Congestion, 12 (1959).
45 *Alessandroni:* Letter of Nov. 6, 1959.

The requirement for repayment of the arbitrators' fees is still being attacked, particularly where the amount in controversy is small. On the other hand, it has been pointed out that full reimbursement will not necessarily protect a party with a small claim, for if he wins before a panel, the other party may appeal. This could force a compromise of the award.[46]

Each of the foregoing criticisms is concerned with the mechanics of the plan. None attacks its underlying theory. If another jurisdiction considers the plan, it must first decide that compulsory arbitration will solve its own particular judicial problems. If the plan will, the jurisdiction must then determine that it is willng to forego a jury trial in the first instance in exchange for trial by lawyer panel. No jurisdiction other than Pennsylvania has yet made this decision.[47]

46 *Ibid.*
47 A plan similar to that adopted in Pennsylvania was introduced in the Ohio legislature in 1958, but failed to pass. Ohio H.B. 601 (1958).