Judicial Council in Operation

North Dakota Law Review

all times in order to control and superintend the conduct of counsel, jurors and spectators. New trial granted.

Tandsetter vs. Oscarson. Plaintiff, while working for the City of Fargo as a motorcycle policeman, was run into by the defendant and quite seriously injured. Application was made to the Workmen's Compensation Bureau by the plaintiff, the claim was approved, and an award made by the Bureau, covering medical and hospital care and compensation for both temporary and permanent disability. As between the City and the plaintiff, the Compensation Act and the award disposed of all questions of liability. The liability of the defendant, however, was one in tort, and plaintiff claimed the right to bring suit for damages. Under Section 20 of the Compensation Act, the Bureau is subrogated to the rights of the injured employee, but should the Bureau sue and recover more than the amount paid out, including costs of suit, the injured person is entitled to the overage. The Bureau investigated, and, being of the opinion that it might not be able to prove the defendant's negligence, or, if successful in that, might not be able to collect upon a judgment recovered, decided not to bring suit. Plaintiff then started his action, and subsequently obtained an assignment from the Bureau, in turn indemnifying the Bureau against costs and stipulating that any judgment recovered should be applied: first, to the costs of suit, secondly, to the amount paid the plaintiff out of the Workmen's Compensation Fund, any balance then left to go to the plaintiff. The defendant entered a demurrer to the complaint. HELD: Application for and acceptance of compensation under the Workmen's Compensation Act operates as an election, and the injured workman can not, thereafter, sue a negligent third party; that right was transferred to the Bureau by the election to take under the Act. (Note: The question of whether or not an injured person could compel the Bureau to bring action against a negligent third party was not involved, and was, therefore, not passed upon. It is clear, of course, that the theoretical liability of a negligent third party is greater than that of the Compensation Fund, as, for example, under the tort action, recovery could be had for pain and suffering.)

JUDICIAL COUNCIL IN OPERATION

Pursuant to the Act of the 1927 Legislature, providing for its establishment, the Judicial Council held its first meeting on the 15th day of December, 1927, at the Chambers of the Supreme Court in Bismarck. The following members of the Council were in attendance: Supreme Court Judges L. E. Birdzell, John Burke, A. G. Burr, A. M. Christianson and W. L. Nuessle; District Judges H. L. Berry, C. W. Buttz, J. A. Coffey, G. Grimson, W. J. Kneeshaw, F. T. Lembke, J. C. Lowe, Geo. M. McKenna, Geo. H. Moellring and Thos. H. Pugh; County Judge J. L. Johnston; Attorneys B. H. Bradford, W. D. Lynch, W. A. McIntyre, Wm. G. Owens and C. L. Young; Attorney General Geo. F. Shafer; visitors, E. R. Sinkler and L. R. Baird. Chief Justice Birdzell presided.

Judge Christianson was first called upon to outline the activities of the Council prior to the formal establishment by legislative act. He

pointed out the difficulties that had confronted the Supreme Court in its efforts to carry out items of legislation dealing with procedure, particularly those statutes that dealt with disqualification of trial judges and the bank receiverships, which resulted in the calling of a meeting of judges in May, 1926. Following that meeting the State Bar Association took formal action favoring the enactment of a Judicial Council Law, and appointed a committee to confer with the judges. This conference was held in December, 1926, and, although there was considerable discussion concerning various matters, the main work of the conference is represented by the Judicial Council Act and the appointment of a committee to report on Juvenile Court matters, particularly as to procedure.

Attorney General Shafer then outlined the work of the State's Attorneys' Association, organized under his leadership and direction, pointing out the problems that beset the better administration of criminal justice by reason of the fact that the three classes of men (the judges, the prosecuting officers, and the private practitioners) are forced, from the very nature of their respective lines of activity to approach the problems from a different angle. Moreover, even after a solution for a particular problem had been formulated to the satisfaction of these groups, it was found to be difficult always to sustain the burden of proving to members of a legislature that proposed legislation was in the interests of the general public. The latter handicap, he believed, was now overcome through the establishment of the Council, and stated, "We now have a body that is adequately organized for the specific purpose of improving legislation with the right to incur expenses and have them paid out of some appropriation. We now have a body that is charged with the responsibility and has the power to deal with the problems of the administration of justice. It is the best agency that has come into existence for the purpose of meeting the tasks and the opportunities that are before us."

Judge Nuessle, as Chairman of the Committee on Juvenile Court matters, next presented the report of that committee, indicating, however, that Judge Pugh should be convicted of the charge of doing most of the work, and citing several specific instances to impress the fact that the committee was not so much concerned about the adoption of a formal, fixed set of rules as it was about the propriety and necessity of provoking further discussion to the end that something might be evolved that would aid administrative officers in meeting the practical problems created or aggravated by seemingly unusual facts and circumstances. The following is a summarization of the rules and explanatory statement adopted:

Juvenile Court

1. The petition or complaint should be set forth clearly, directly and in detail, by the use of simple language.

2. No such petition or complaint shall be filed with the clerk of the district court until the same has been submitted to the district judge having jurisdiction, nor until he shall have indorsed direction for issuance of summons.

3. When summons is to be served personally it shall contain a statement of each charge or shall have attached thereto a copy of the petition or complaint.

4. The clerk of court shall keep a "Juvenile Court Record" for such cases, which shall not be subject to examination by others than the clerk, the district judge and the juvenile commissioner except upon written order of the district judge. Information in the files or the record shall not be made public.

5. Upon making arrest of a person known to the peace officer to be a minor under 18, such person shall be taken before a juvenile commissioner or the district judge instead of before a justice of the peace.

6. If taken before a commissioner, that officer shall immediately investigate the facts and report his findings to the district judge, who shall determine whether further proceedings shall be under the Juvenile Court Act or under the Code of Criminal Procedure, and if the latter, the district judge shall sit as committing magistrate.

7. In sentencing a person under 21 to the penitentiary a statement setting forth the peculiar facts that induced the district judge to so commit the offender shall be transmitted to the warden.

By way of explanation the Committee directed attention to the various mandatory acts and court decisions that should be considered in connection with Sections 11402 to 11428 C. L. 1913, Chapter 179 Laws of 1915, Chapter 83 Laws of 1921, and Section 11281 C. L. 1925, particularly stressing the fact that the Legislature did not establish a new court but merely clothed the district courts with enlarged discretionary powers. *State vs. Overby* (*N. D.*) 209 *N. W.* 552, is quoted thus: "The district court has jurisdiction over all criminal offenses and exclusive original jurisdiction over all felonies, and of all persons brought therein, charged with the commission of crime. The Juvenile Court Act does not deprive the district court of jurisdiction in criminal causes; it specifically states in the repealing clause that it is cumulative and not exclusive as to all law, excepting only the law as administered in justice and police courts. . . . The intent to divest justice courts and police courts of all jurisdiction is made unmistakably clear. . . . Section 11416, which requires the officer making the arrest to give into the care of a juvenile officer all children arrested under the age of 18 years, is to prevent children of tender years from being thrown into jail with hardened criminals and is in harmony with the object and purpose of the juvenile act. . . . The juvenile court is not a criminal court; and it is the purpose of the law to treat juvenile offenders under 18 years of age not as criminals, but, as far as practicable, to give them the paternal care of the home, to save them from the stigma attaching to crime, to guard and protect them against themselves and all evil-minded persons."

Procedure

In explanation of the recommended procedure the following was approved: That, upon complaint to the commissioner, he should make summary examination of the facts having in view the delinquency complained of, the conditions of the home surroundings, rights of parents, guardian or custodian, and the maintenance of control in the natural guardians, if possible.

Should the commissioner find this inadvisable, a petition should be procured, setting forth with clearness, directness and in detail the

charges made. The making of the petition by the commissioner should be the last resort. Omnibus charges should be avoided in the interest of (1) certainty in the disposition of the child; (2) justice; and (3) that the charges may be met and that disposition will be upon the charges made.

The title of the case should be "The State of North Dakota vs. the child, parents, guardian or next friend and all whom it may concern," although the law seems to indicate that the child alone is to be named as defendant.

Upon filing of the petition or complaint with the commissioner entry should be made in his docket and a more formal examination conducted, notice being given all persons concerned, witnesses subpoenaed and examined, and such temporary order made as the evidence warrants.

Should it be necessary to enter a final order, it is the duty of the commissioner to make report and recommendations to the district judge, who shall fix a day of hearing. The petition, findings, recommendations and order should then be filed in the office of the clerk of court, and summons issued by the clerk. Service of summons should be made on all persons interested. In the *Solberg case,* 203 *N. W.* 898, the Court said: "The statute clearly contemplates notice of the proceedings before the commissioner, and, we think, by necessary implication, of the hearing before the district judge."

At the hearing the defendants may appear personally and by counsel. The complete record should disclose the following: 1. The petition; 2. The report and recommendation of the commissioner; 3. The order for hearing; 4. The summons; 5. The return of service; 6. The answer of the defendants or any of them; 7. The appointment of a guardian ad litem if the parents are not interested (The commissioner may be such); 8. The taking of evidence, record of which is made; 9. The findings and conclusions of the court; 10. The order making disposition of the child.

The legal right to removal of custody from the parents is dependent upon the following findings by the court: 1. That the child is under 18; 2. That the facts show delinquency as charged; 3. That the parents are unfit or improper guardians, or are unable or unwilling to care for, protect, train, educate, correct and discipline the child; and 4. That it is to the best interests of the child and the State that it be taken from the custody of the parents. In *Ex Parte Blackey,* 208 *N. W.* 238, the Court said: "Under Section 11402 the juvenile court has jurisdiction over the child only while it is a ward of the State, and it is a ward of the State until it is 18 years of age. . . . The supervision and further orders cannot go beyond the term of the stewardship of the State which terminates when the child reaches the age of 18 years."

The district court is vested with comprehensive discretion and may enter final orders as follows: 1. Permitting the child to remain in its home, subject to the friendly visitation of the commissioner, and to report from time to time to such officer or to the court; 2. Appointing some reputable citizen as guardian of the person of the child and therein directing the guardian to place the child in a suitable family

home and to provide the necessary maintenance and clothing and to oversee the education, discipline and care of the child; 3. Committing the child to some suitable institution for the care of dependent or neglected children; 4. Committing the child to the State Training School. In committing to a guardian or an institution other than the State Training School the religious beliefs of the parents of the child shall be considered by the Court.

Following the consideration of the foregoing report, Mr. C. L. Young, Past President of the State Bar Association, presented rather clearly and in detail the opportunities before the Judicial Council, stressing the thought that the Council was not to be considered as a conference of judges, but an official body, including practicing lawyers, rather independent of the courts, and charged with the responsibility of working out remedies that would cure defects of administration that are not entirely legislative in character.

Having read the record of the proceedings of this organization meeting of the Judicial Council, we are impressed by the constructive character of all of the discussions, under the leadership and direction of Chief Justice Birdzell. Practically every member present had a share in those discussions, which were pertinent to the matters under consideration, and disclosed application and diligence deserving of the highest commendation. We extend our share of it.

Judicial Council Rules

1. The Judicial Council shall hold two regular meetings in each year on the third Tuesday of the months of April and October, such meetings to convene at ten o'clock A. M., at the rooms of the Supreme Court at Bismarck, North Dakota. Special meetings of the Council may be called by the Chairman whenever he deems such meetings necessary. The Chairman shall call a special meeting of the Council whenever a request therefor, in writing, shall be made by ten members of the Council.

2. The Executive Secretary of the Council shall give notice, in writing, of the time and place of all meetings to the members of the Council, by sending such notice at least ten days prior to the holding of any meeting.

3. There shall be an Executive Committee consisting of the Chief Justice and four members to be elected from the membership of the Judicial Council. The elective members of the committee shall be elected for a term of two years, two to be selected at the October meeting of the Council, provided that at the meeting in October, 1928, four members shall be elected, two of whom shall serve for one year and two for two years, the terms to be assigned by lot. Any vacancy arising in the membership of the Executive Committee shall be filled by selection made by the remaining members of the Executive Committee and the person so selected shall serve during the remainder of the term of office vacated.

4. The Executive Committee shall have power to and shall appoint special committees from time to time, as may be required, to investigate all matters and questions submitted to it by the State Legislature or the Governor of the State, each Committee so appointed shall

report its findings and recommendations as to matters and questions submitted to it to the next regular or special meeting of the Council. The Executive Committee shall select the Executive Secretary of the Council. The Executive Committee shall receive and act upon the recommendations made by the Council at any meeting. The Executive Committee shall, at least thirty days before any regular meeting of the Council, file with the Executive Secretary a full report of the findings and work entrusted to any Committee, together with recommendations as to the program and matters to be considered at such meeting of the Council; copy of a report of the Committee and its recommendations for consideration at meetings of the Council shall be at once forwarded by the Secretary to each member of the Council.

5. A quorum of the Judicial Council shall consist of a majority of the members. They shall have full power and authority to transact all business which may regularly come before the Council, provided that no recommendation shall be made to the Legislative Assembly, or to the Governor of the State, except on the affirmative vote of three-fourths of the members present.

6. The order of business shall be: 1. Reading and approval of the minutes of regular and special meetings; 2. Reports of standing committees; 3. Reports of special committees; 4. Unfinished business; 5. New business.

7. These rules may be amended, altered or changed, or added to, at any regular meeting of the Council.

8. In the absence or inability of the Chief Justice to act at any meeting of the Judicial Council, the acting Chief Justice of the Supreme Court shall preside over deliberations and sessions of the Council and perform the duties of the Chief Justice.

Judicial Council Committees

The following commitee appointments were authorized at the meeting, and subsequently announced:

Executive Committee—Judge W. L. Nuessle, Chairman ex-officio; Mr. C. L. Young, Prof. Roger W. Cooley, Judge C. W. Buttz, Judge A. M. Christianson.

Committee to investigate the operation of the conciliation statute and to consider the advisability of substituting for the conciliation method a small claims court—Judge J. L. Johnston, Chairman, Judge George H. Moellring, Mr. B. H. Bradford.

Committee to investigate and report as to the advisability of limiting appeals from justice court to the district and county courts and from such courts to the supreme court—Mr. W. A. McIntyre, Chairman, Judge M. J. Englert, Judge John Burke, Mr. Wm. G. Owens.

Committee on reducing the costs of the administration of justice—Judge John C. Lowe, Chairman, Judge C. W. Buttz, Judge F. T. Lembke, Judge G. Grimson, Mr. W. D. Lynch.

Committee on statistical bureau—Judge A. G. Burr, Chairman, Prof. Roger W. Cooley, Judge J. A. Coffey.

Committee on changing the terms of court—Judge Fred Jansonius, Chairman, Judge Geo. M. McKenna, Judge H. L. Berry.

Committee on amendment of juvenile court act—Judge Thos. H. Pugh, Chairman, Judge W. L. Nuessle, Judge W. J. Kneeshaw, Hon. Geo. F. Shafer.

Conference of Judges

The Conference of Judges, provided for under Section 9 of the Judicial Council Act, was held upon adjournment of the Council. At this conference the discussion centered upon the advisability and necessity of making changes in existing court rules.

COMMENT ON FACTS

The Judicial Council of the State of Massachusetts, acting favorably upon the proposal to repeal the law of that State which prevents a Judge from commenting upon the facts in jury trials, had this to say:

"A majority of the Council believes that as time goes on it is more and more important to honest, poor litigants who can not, or do not, have as shrewd, able and skillful lawyers as their opponents, that there should be a competent unmuzzled judge on the Bench, whose sole duty is to do his best to see that justice is done impartially. This is our understanding of the common law function of a Judge in accordance with the best traditions of the profession and of the public service.

"Jurymen are drafted from their private affairs, often at serious loss to themselves. If called upon to decide any important and difficult question outside of a court room, we believe that practical men would expect to hear what a trained man, specially employed to sit with them and listen to a case fairly, thought about it in order that they might consider his views before making up their own minds. We do not see why men should not have the same assistance inside of a court room. The question seems to us one upon which the judgment of the laymen of the community, who serve on juries, is likely to be as good, if not better, than that of lawyers.

"The right to jury trial, guaranteed by our constitution, contemplates a trial before citizens of the same vigorous intelligence as of old, who can be trusted to listen to the Judge's views if he feels that the case calls for a statement of them, and at the same time to follow his direction that they must make up their own minds and that it is their own judgment which is to govern. . . . We believe that the statute of 1860 (preventing comment) is a reflection upon the brains, courage and good sense of those of our people who are subject to jury duty, and that it should be repealed. It should not be left to partisan lawyers alone to deal with the facts, especially as the skill of one may greatly outweigh that of his opponent. The jury should have all the assistance in arriving at a just verdict which may be given them by the only trained and impartial mind participating in the trial."

The approval was not unanimous, however, Mr. Frederick W. Mansfield being quoted as follows:

"I am not impressed by the argument that under our present law the Judge is 'muzzled.' He has a right to comment on the testimony even now and as a practical matter it is usually a very dull Judge who can not, and does not, intimate to the jury what his opinion is of the evidence. But whether the Judge is muzzled or not under the present law, I very much fear if it is changed that the result will be to take the muzzle off the Judge and put it on the jury."