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THE RAILROAD COMMISSION AS A MODEL FOR JUDICIAL REFORM¹

"JUSTICE," said Daniel Webster, "is the greatest interest of man on earth. It is the ligature which holds civilized beings and civilized nations together. Wherever its temple stands, and so long as it is honored, there is a foundation for social security, general happiness and the improvement and progress of our race. And whoever labors upon this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher to the skies, links himself in name, fame, and character with that which is, and must be, as durable as the frame of human society."

It is our high privilege and duty as members of the Bar to tend the flame which burns in the Temple of Justice so that all who journey to the Temple, be they men, women or children, rich or poor, shall have justice administered to them simply, directly and fairly. Are the lawyers of America doing their duty?

Speaking before the American Bar Association in 1916, Elihu Root said:

"Every lawyer knows that the continual reversal of judgments, the sending of parties to a litigation to and fro between the trial courts and the appellate courts, has become a disgrace to the administration of justice in the United States. Everybody knows that the vast network of highly technical rules of evidence and procedure which prevails in this country serves to tangle justice in the name of form. It is a disgrace to our profession. It is a disgrace to our law and a discredit to our institutions."

¹ Based upon the annual address delivered before the California State Bar Association, September 27, 1917.

William H. Taft, in his presidential message of December 1910, declared:²

"One great crying need in the United States is cheapening the cost of litigation by simplifying procedure and expediting final judgment. Under present conditions, the poor man is at a woe-ful disadvantage in a legal contest with the corporation or a rich opponent. The necessity for reform exists both in the United States courts and in all the state courts."

Roscoe Pound, now dean of Harvard Law School, said to the American Bar Association in 1906:³

"Our system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all the in-justice of deciding cases upon points of practice, which are the mere etiquette of justice—direct results of the organization of our courts and the backwardness of our procedure—have created a deep seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community."

These strictures on the procedure of our courts are not new. For years our bar associations, both state and national, have been drawing attention to these conditions and have resolved that they should be remedied. However, apart from the reform by the Supreme Court of the United States of the Equity Rules in the federal courts and the institution of the municipal court of Chicago and a few similar courts, little actual progress has been made in the reform of court procedure.

In the meantime, our people have become more and more dis-contented with the delays and technicalities which attend the administration of justice by most of our courts. Out of this dis-content has sprung the most significant phenomenon in the recent judicial history of the United States—the determination of con-troversies by the simple and efficient procedure of administrative tribunals instead of by the courts.

The administration of justice by administrative boards or commissions is not merely of great historic interest but also, in my opinion, points definitely and concretely to specific steps which can be taken to insure a more direct, speedy and satisfac-tory administration of justice in the courts.

I prefer to be constructive rather than destructive. It would give me far more satisfaction to face forward and to render as-sistance in actually producing a better order of things than to contemplate and bemoan the imperfections of the present. For

² 46 Cong. Rec. 24, 61st Congress 3rd Sess.

³ Am. Bar Ass'n Rep. 1906 p. 408.

that reason, in the hope that I may in this way be helpful in pointing the way to what may be done in the courts, I shall devote the major portion of this paper to the determination of controversies by administrative tribunals.

This movement in the United States began with the state railroad commission. In 1864, conservative Massachusetts established the first railroad commission. Their number has increased until now each of the 48 states of the Union, with the exception of Delaware, has a state railroad or public service commission. Similar commissions have been established in the District of Columbia and in the Territory of Hawaii.

The regulation of railroads was the first work of these commissions. Their powers at the beginning were largely advisory. Their jurisdiction has grown until at the present time the commissions in most of the states regulate other classes of public utilities, as well as railroads. These commissions now exercise important judicial as well as administrative functions.

A marked similarity exists between these various state commissions. All seek to administer justice speedily and efficiently. All try to dispose of complaints informally without the necessity of formal hearings. The pleadings in their formal proceedings are simple, the hearings direct and to the point and the decisions generally promptly rendered. The railroad commissions all represent a definite and largely an effective revolt against the technicalities and the delays of many of our courts.

The Railroad Commission of California is typical of the vigorous, effective railroad and public service commissions of today. From the beginning of its reorganization in March, 1912, it has been my earnest hope that this commission, while fair, just and constructive to the public utilities and their patrons alike, might also be of service in blazing the way for the more simple, speedy and effective administration of justice by the courts. It has been my dream that this commission, created primarily to regulate public utilities, might at the same time do a work equally as great in restoring the faith of those who worship at the flame which glows in the Temple of Justice.

The California Railroad Commission has been referred to as the work of the laity in protest against the lawyers. On the contrary, few pieces of constructive legislation in the United States owe their inception and execution more to lawyers than the reorganized Railroad Commission. The political reorganization of

California from which the reorganized Railroad Commission sprang, was largely done by lawyers under the leadership of a great lawyer, Hiram W. Johnson. The Stetson-Eshleman Act of 1911 was written by two lawyers. The Public Utilities Act,⁴ which became effective in March, 1912, was written by a third lawyer, who also wrote the rules of procedure under which the Railroad Commission operates. Ever since the reorganization of the Railroad Commission in 1912, a majority of the commissioners have been lawyers. These things, it is true, were done largely as a protest against the delays and the technicalities of court procedure, but they were done by lawyers who sincerely and earnestly desired to assist their profession and the people of the state by substituting simplicity, equity and promptness for technicality, form and delay.

The fault in connection with court proceedings lies not so much with the lawyers as with the archaic and wasteful machinery of the law in accordance with which they are compelled to practice law in the courts. What we ought to do, in my judgment, instead of criticising the lawyers, is to take a committee of our lawyers who are bold and constructive and who have marked executive ability and give to them the task of sweeping away the present procedure of our courts and substitute in lieu thereof an entirely new structure which shall cover the entire ground from the first pleading until the decision on the last appeal in the state courts. When the administration of justice in our courts has thus been made simple, direct and effective, no one will more ardently champion the new order of things than the majority of the lawyers.

To show the respects in which the modern state commission has departed in its procedure from our courts of law, and in the hope that the visualization of its proceedings may be helpful in making more satisfactory the procedure of our courts, I shall, with a few strokes of the pen, paint the picture of the administration of justice by the Railroad Commission of California.

In order that the picture may be complete, I shall refer to the procedure applicable to Railroad Commission cases, from the beginning to the end, from the filing of the formal complaint to the decision of the state supreme court on writ of review.

With certain minor exceptions, to which it is not necessary here to refer, all public utilities in the state are subject to regu-

⁴ Cal. Statutes 1911 Extra Sess. Chap. 14. Const. of California, Art. XII. Secs. 22, 23.

lation by the Railroad Commission. In exercising its regulatory powers, the Commission has functions partly administrative and partly judicial. The proceedings before the Railroad Commission are divided into those which are informal and those which are formal. Formal proceedings are those which require notice and hearing. All others are informal. Each year the Railroad Commission adjusts about four thousand informal complaints. These complaints come to the Commission by letter or verbally. The Commission takes them up promptly with the utility affected, either by letter or in person, and seeks to secure an adjustment fair to both parties. I am glad to be able to say that in a great majority of these cases a settlement satisfactory to both parties is reached by the Commission in this entirely informal way.

All commissions, state and federal, strive, in so far as possible, to determine controversies informally. In this paper, I shall confine myself to formal proceedings.

The provisions of the Public Utilities Act with reference to formal complaints are very simple. The Act provides that complaint may be made by the Railroad Commission on its own motion or by any injured party by complaint in writing, setting forth any act or thing done or omitted to be done by any public utility. Upon the filing of such complaint, it is the duty of the Commission to cause a copy thereof to be served upon the defendant. The Act provides that the Commission shall fix the time and place of hearing and shall serve notice thereof, whereupon the hearing is held and the decision rendered. Unless otherwise provided in the decision, the Commission's orders are effective twenty days from date.

The Public Utilities Act provides that the Railroad Commission shall have the power to adopt its own rules of practice and procedure.⁵

In view of the discussions that have taken place for a number of years at many meetings of the various state bar associations and of the American Bar Association with reference to the advisability of empowering the courts to prepare their own rules of practice and procedure, it is interesting to note that the legislature of California conferred this power upon the Railroad Commission without any opposition and without even any discussion.

In March 1912, after conference with leading lawyers of the state, the Railroad Commission adopted Rules of Procedure

⁵ *Ibid.*, Sec. 53. *Ghriest v. Railroad Commission*, (1915) 170 Cal. 63, 148 Pac. 195.

which, with slight modifications, have been effective ever since. The rules provide boldly for the elimination of all demurrers and dilatory motions. The only motion permitted is a motion to dismiss on the ground of lack of jurisdiction. I shall never forget the horror with which leading members of our profession in California regarded this innovation. The Railroad Commission was told, in effect, that a lawyer has a constitutional right to demur and to interpose dilatory motions, and that no procedure which does not provide for these pleadings and for the interminable delays which result therefrom can possibly succeed. The best proof of a pudding is in the eating thereof. I venture to say that if it were today proposed to restore demurrers and dilatory motions in the proceedings before the Railroad Commission, such a proposal would meet with the vigorous opposition of every lawyer who practices before the Railroad Commission.

In order not to break too suddenly with the procedure and traditions of the past, the Railroad Commission provided in its rules of procedure that upon the filing of a complaint, a copy thereof is immediately mailed to the defendant who is directed to advise the Commission in writing within five days as to whether there is anything in the form of the complaint to which substantial objection can reasonably be made. Although at first objection to the form of the complaint was frequently made, the Commission is now generally advised by the public utility that it has no objection to the form of the complaint. Not infrequently the defendant goes further and at once files its answer without waiting for formal service of the complaint. If no reply is received within five days, or if such objection as is made is found to be inconsequential, a copy of the complaint is then formally served by the Commission upon the defendant together with notice to satisfy the same or to file an answer within ten days. I may say parenthetically that the lawyers practicing before the Railroad Commission have been so well trained that answers are generally filed within the ten days allowed and that if a request for an extension of time to file an answer is made, the extension if granted rarely exceeds a few days. The Commission tries to be courteous in the matter of extensions of time but has in mind constantly the necessity of keeping its business moving.

As a result of the rules of procedure adopted by the Commission and the co-operation of the litigants appearing before it, formal complaints are generally ready to be set for hearing within

twenty days after the filing of the complaint. As soon as the answer is filed, the case is promptly assigned and set for hearing.

Hearings are generally held by a single commissioner or examiner. The most important cases are heard by several commissioners or by the Commission en banc. Hearings are held in the particular community affected so that all parties interested may appear and be heard with a minimum of expense and inconvenience. It is not necessary that parties be represented by counsel, but in important cases the litigants generally appear by attorneys.

The atmosphere of the hearing before a typical state commission is entirely different from the atmosphere of many of our courts. A hearing before a state railroad or public service commission is not a contest between trained intellectual gladiators, each seeking to take advantage of every technicality and both frequently trying the procedure instead of the facts of the case. A hearing before a state commission is a simple and direct investigation to ascertain the facts. The presiding commissioner is not an umpire for the purpose of seeing to it that counsel play the game in a particular way. His function is to have the facts developed as promptly and as fully as possible. His attitude is that of a co-investigator and he feels entirely at liberty to take an active part in the examination and cross-examination of witnesses.

The theory of proceedings before the California Railroad Commission and similar commissions is that the state itself is interested in the ascertainment of the truth. Accordingly, the Railroad Commission's own experts investigate the facts and introduce their reports in evidence, being subject to cross-examination in exactly the same manner as other witnesses.

In so far as possible, the parties are urged to present their testimony in the form of reports instead of orally. Recently, in an important rate case pending before the Railroad Commission counsel for the utility presented a witness on the question of land values. He began to testify with reference to each parcel of land involved, giving his views in detail, as would be done in court. Testimony on the same issue affecting the same utility recently consumed months of time in one of the local federal courts. After this testimony had run along for a while, the presiding commissioner suggested that much time could be saved if the witness would put his conclusions in the form of a written report,

which could then be examined by the parties, the witness being recalled for only such cross-examination as might seem wise after careful inspection of his report. The attorneys for both sides readily agreed to this procedure, which will result in having the entire matter presented in a day or two instead of consuming weeks or months.

One of the distinctive features of practically all administrative tribunals exercising judicial functions is that they are not bound by the technical rules of evidence. Specific provision to this effect is contained in the California Public Utilities Act.⁶ Every business man regulates his conduct in the affairs of life largely on hearsay evidence and other evidence which would not be admitted in a court of law. He does so because it is the sensible thing to do and because he trusts himself to give to the evidence only the weight to which it is entitled. Only too frequently the technical rules of evidence result in concealing the truth instead of permitting it to be developed. The California Railroad Commission accepts hearsay evidence whenever it believes that such evidence will assist in developing the truth, but never rests its decisions solely on hearsay evidence. Objections to the introduction of evidence are seldom made before the California Commission, except occasionally by some lawyer who comes before the Commission for the first time still corrupted by the practice of the courts. To those who practice daily before the courts it will be unnecessary for me to direct attention to the enormous saving of time which results from the absence of objections to evidence.

The filing of briefs is generally discouraged by the Commission by reason of the delay in the decision which ensues therefrom. The Commission always analyzes the testimony carefully in any event and generally the filing of briefs is not helpful. Where questions of law are involved and in important proceedings, the filing of briefs is permitted and at times encouraged, but counsel are asked to co-operate with the Commission in having the briefs filed as promptly as possible. Counsel practicing before the Commission understand that such briefs as are filed must be short and to the point.

The commissioner or examiner presiding in the particular proceeding prepares and presents to the Commission a draft of opin-

⁶ *Ibid.*, Sec. 53.

ion and order, which, when approved and ordered filed, become the opinion and order of the Railroad Commission.

I shall now refer to the procedure subsequent to the rendering of the decision. In this respect, the California Public Utilities Act went further in the elimination of delays and in making the Commission's work effective than any railroad commission or public utilities act of any of the states prior thereto. In no other respect has the California Act been more widely commented upon and followed in so far as the constitutions of other states would permit.

Referring first to rehearings, the Public Utilities Act provides that no cause of action shall arise in any court out of any order or decision of the Railroad Commission, in favor of any person or corporation who has not made, before the effective date of the order or decision, application to the Railroad Commission for a rehearing. The petition for rehearing must set forth specifically the grounds of rehearing and no ground not thus set forth can be urged in any court.⁷ These provisions have been sustained both by the supreme court of this state⁸ and by the federal courts.⁹ Their purpose is obvious. If there is any reasonable ground for objection to a decision of the Railroad Commission, it is manifestly desirable that such objection shall be pointed out to the Commission and that the Commission shall have an opportunity to review its decision in the light of such objection before the parties are plunged into the delays which inevitably ensue from court proceedings. When a petition for rehearing is filed, the Railroad Commission is given an opportunity, if it has made an error, to modify its decision or to grant a rehearing. In quite a number of cases, the decision as originally made has been modified and the necessity for proceedings in the courts has been avoided.

A writ of review lies directly from the Railroad Commission to the supreme court. No other court of the state has power to review, reverse, correct or annul any order or decision of the Commission. Nothing could have more injured the efficiency of the Commission than to have had its decisions rendered inoperative for long periods of time by proceedings, first, before the superior courts, then before the district courts of appeal and, finally, before the supreme court. The decisions of the Commission

⁷ *Ibid.*, Sec. 66.

⁸ *Clemmons v. Railroad Commission*, (1916) 173 Cal. 254, 159 Pac. 713.

⁹ *Palermo Land & Water Co. v. Railroad Commission*, (1915) 227 Fed. 708.

which are taken to the courts are generally such that the losing party would not be satisfied in any event until he had secured the decision of the supreme court of the state. The framers of the Act believed that it would be a waste of time to permit proceedings in the lower courts and hence provided for review solely and directly by the supreme court, in the hope and in the confident expectation that these provisions would be sustained. I am glad to be able to say that the supreme court of this state has upheld this procedure.¹⁰

The Public Utilities Act provides that the findings of the Railroad Commission on questions of fact shall be conclusive. Without any statutory provisions whatever, the Supreme Court of the United States has repeatedly held that the findings of the Interstate Commerce Commission on questions of fact are conclusive, at least in the absence of fraud or of any evidence whatsoever to sustain the findings. Similar effect has been given to the findings of state railroad and public service commissions, both by the state courts and by the federal courts. The conclusion thus reached seems to be both just and reasonable. When an expert body has passed on the facts, its conclusions thereon should be final if it has acted honestly.

I remember very well in this connection an opinion expressed by the late Commissioner Eshleman in connection with this very matter. When this subject was under consideration and when he was hearing the objections of certain public utility representatives, he said that some of them would not be satisfied unless they had twenty successive appeals and that then they would still be dissatisfied unless they could take one further appeal to God Almighty.

Inquiry may appropriately be made as to how the simple and direct procedure established by the Public Utilities Act and by the Commission's Rules of Procedure operates and particularly as to whether justice is done thereunder.

Since March 23, 1912, the Railroad Commission has rendered over 4,500 decisions in formal proceedings. Ninety-nine per cent of these decisions have become effective without appeal to the courts. Of the remaining one per cent, I am glad to be able to say that the federal courts have decided in favor of the Railroad Commission each case which has been brought before them affect-

¹⁰ *Pacific Telephone Co. v. Eshleman*, (1913) 166 Cal. 640, 137 Pac. 1119, Ann. Cas. 1915C, 822, 50 L. R. A. (N.S.) 652.

ing the Commission and that before the state supreme court the Commission has fared almost equally as well, subsequent to the first three or four contests.

Furthermore, as far as I have been able to observe, both the public utilities and the representatives of the public are satisfied that the Railroad Commission's simple and direct procedure has not deprived them of any substantial rights and that the decisions of the Railroad Commission have generally been fair and just. Of course, we could hardly expect that a public utility claiming enormous values for franchises which have been freely granted to it by the public or excessive values for water rights or so called intangibles would express satisfaction with the Railroad Commission's procedure. However, apart from a few sporadic cases of this kind, I think I may safely say that there is a consensus of opinion that the procedure of the California Railroad Commission and similar state railroad and public service commissions produces speed, efficiency and justice.

Another type of administrative tribunals in which simple and prompt procedure is applied is the Industrial Accident Commission or Workmen's Compensation Commission of the principal states of the Union. This type of tribunal had its genesis in the decision of the courts of the State of New York, holding unconstitutional a Workmen's Compensation Act of that state.¹¹

The people of New York replied by a constitutional amendment and statutory enactments, overwhelmingly adopted, which not merely changed the substantive law with reference to the relationship between employer and employee but went further and took the entire administration of that law away from the courts and conferred it upon an administrative tribunal with simple procedure.

The movement toward the administration of justice by commissions instead of by the courts has resulted in the establishment of a number of powerful federal commissions, whose procedure is modeled more or less after that of the state commissions, which led the way. The most conspicuous example of these federal commissions is the Interstate Commerce Commission, which is charged with the duty of regulating and supervising in certain respects interstate railroads and other carriers, including now telephone and telegraph companies. By amendment to the Interstate Commerce Act, from time to time, the procedure before the

¹¹ *Ives v. South Buffalo Ry. Co.*, (1911) 201 N. Y. 271, 94 N. E. 431.

Interstate Commerce Commission and on review of its decisions is now closely analogous to the proceedings before the modern effective state railroad or public service commissions.

The recently created Federal Trade Commission adopts in the exercise of its limited judicial functions an analogous procedure.

I have tried to portray briefly and succinctly, the growth and practice of the state and federal commissions which exercise judicial powers and which try most earnestly to live up to the ideal of justice simply and promptly administered. By those who disapprove of them, they are at times referred to as "lunch counter" tribunals. Why this name, I am not quite certain—perhaps because justice is supposed to be administered by them with the speed with which a man eats his lunch, or possibly because the commissioners are assumed to work so hard that they have no time for meals other than at the lunch counter. By those who approve of them, these tribunals are frequently referred to as the "peoples' courts," because in them the members of the public are supposed to be able to have justice administered without ostentation or technicality, simply and promptly.

I have referred to these tribunals in the earnest hope that an understanding of the methods by which they administer justice may be helpful to the members of the Bar in the task of simplifying judicial procedure on which they have been engaged during the last few years.

Our country is today at war. Every man who loves his country realizes more than ever the need of service to the state and to the nation. With the war has come to our people an understanding of the imperative need for efficiency in all branches of the nation's life, including the courts.

In this exigency, the lawyer's obligation is clear. It is his duty to sweep away the delays and technicalities of the law and to make the administration of justice by our courts simple, speedy and effective. We shall then again see the Temple of Justice strong and stately and beautiful, with people from all ranks of life flocking thither, their faith revived and having administered to them simply, promptly and fairly, the greatest of all blessings—Justice.

MAX THELEN.*

SAN FRANCISCO.

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