THE LAWYER’S COURT: PITTSBURGH’S ATTEMPT TO RELIEVE DOCKET CONGESTION

By Robert G. Leh*

Pennsylvania’s bar, despite the Commonwealth’s traditional conservatism in matters governmental, has not hesitated to experiment with arbitration as a means of relieving congested civil trial dockets. This may seem all the more remarkable in view of the lawyer’s traditional suspicions of arbitration, a form of dispute settlement in private which he seldom practiced, and did not understand.

At English common law, an arbitration, while not void, was voidable at small cost to the recalcitrant party who previously had entered into an agreement to arbitrate.¹ Later, English courts were to adopt the view that arbitrations ousted the court’s jurisdiction and therefore were counter to public policy.² Pennsylvania remedied the common law’s slight with statute at an early date. By the Act of 1705, the Commonwealth began a series of arbitration enactments, some of them compulsory, which by 1952 had culminated in the general extension of arbitration (by lawyer-boards) to all civil actions of up to $2,000 value as a condition precedent to jury trial: an effective weapon in the battle against strangulation of the judicial aortae by an accumulation of the ubiquitous small value tort or contract action.³ Therefore, if the

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¹ At any rate, the court would not use its process to compel arbitration. Vynior’s Case, 77 Eng. Repr. 599 (1609).
use of arbitration were ever to develop seriously, Pennsylvania among the Anglo-American jurisdictions would be the likely place.

During the nineteenth century's first decade, politics was to be the anvil on which was forged at white heat the weapon of judicial reform to be seized by Pittsburgh's bar exactly one century later. Out of a battle between the farmer-politicians of the Democracy, led by Simon Snyder, and the haughty Federalist judges who looked on Governor Thomas McKean as their staunch ally, came a victory for the Democracy at the polls and the legislative enactment of their program. Laws providing a jurisdiction for the justice of the peace and arbitration for cases at one party's instance were intended to provide a relief for the farmer from the cumbersome procedure of the courts as he tried to collect his debts and his damage claims for property, stock, and crops.

The Act of 1809 as developed provided a complete system of civil action trial by compulsory process. One party simply informed the county prothonotary of his desire to have arbitrators chosen to hear his case within the next thirty-day period regardless of his adversary's wishes. If the prothonotary were not informed, the case might progress to a conventional trial. Arbitration was a complete and significant hearing of all matters at variance between the parties. Appeal to the common pleas courts would result in a de novo trial under the act; however, it could not accomplish more than to pass on the evidence previously submitted, for according to the law:

In the trial of any cause, after an appeal from an award of arbitration, it shall not be lawful for the appellant to produce as evidence in court any books, papers, or documents which he had in his power to produce at the time of the arbitration, and withheld from the arbitration, after being required by the arbitrators to produce the same.

The enactment had broad theoretical coverage within common law actions, and courts refrained from making orders upon a case

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2 For a complete account, see Sanford W. Higginbotham's Pennsylvania: Keystone in the Democratic Arch (Harrisburg: Pennsylvania Historical and Museum Commission, 1952).
3 Appears as section 38 of the Act of June 16, 1836, P.L. 715; 5 Purdon's Statutes 141 (hereafter P.S.).
under compulsory arbitration from the time arbitrators were chosen until an award was filed or a case otherwise disposed of. Arbitrators were given broad powers under the act: to require the production of books, papers, and documents; to judge of the competency and credibility of witnesses; of the propriety of admitting written evidence offered; to administer oaths and affirmations to witnesses; to adjourn meetings from day to day, for a longer time, and also from place to place; and to decide both the law and fact involved in the submitted cause. Arbitration boards, moreover, had the power to punish, with a twenty-dollar fine, disorderly conduct occurring before them.\(^7\)

Yet the law as refurbished in 1810 and codified in 1836 languished on the statute books, neglected. It contained practical defects which the Democracy's framers did not anticipate, and thus despite the potential revolutionary effects of so broad a compulsion, the law was not much used.\(^8\)

So simple and speedy was the procedure of instituting arbitration that the law made possible the reference of a case before the issues in controversy were fully developed. The responsibility for service of the numerous papers which the law required was placed on him who sought the rule to arbitrate. The parties with the prothonotary chose the arbitrators. If disagreement arose over who the odd man would be, the choice would fall to the prothonotary. It might be assumed that the difference which brought the parties or their agents together before the prothonotary might erupt as they proceeded to choose their judges; that mutual friends might become involved, and hurt; and that neither party would respect the choice of the prothonotary, or else would fear it.

Postponements of the proceedings if liberally allowed under the law's terms could work to the unscrupulous litigant's advantage. Arbitrators were not learned in the law and might not be prominent in the community, although their actions had legal effect and they disposed of large sums of money. The compensation of a dollar a day which the law provided was not sufficient to attract persons skilled in the adjustment of conflicts. As if this were not

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\(^7\) See 5 P.S. 21 and sections following as identified with the Act of June 16, 1836, P.L. 715.

\(^8\) The legislative journal for 1809-1810 serves as evidence of some initial use; a total of 917 cases were referred during the act's first year of life: 560 received arbitration. *Journal of the House of Pennsylvania, 1809-1810*, pp. 459-460.
enough, the network of minor judiciary provided by law at the same time overlapped somewhat in jurisdiction, took legal precedence, and on the whole proved more satisfactory to the common folk of the nineteenth century for whom both systems were intended.

Nevertheless, it was to the Act of 1809, as amended, that Allegheny County's bar turned when the more conventional institutions of justice faltered. By 1909, it was impossible to have a case tried in the common pleas courts of Allegheny County in less time than three years. In three years, injuries from the fall off the streetcar would have to heal as best they could. Witnesses, successful in fighting off pangs of conscience or temptations to lie, would at length have to play tag with truth in the white mists of forgetfulness that obscured the vision of what was. The grim reaper would catch up judge, counsel, witness, and litigant alike in the ceaseless swings of his scythe. Wrote Attorney W. S. Miller to the editor of the Pittsburgh *Legal Journal* in June of 1910:

> It has been discovered that a mountain of seven thousand cases at issue ready for trial stands in front of every suit that is brought, and a suit now brought cannot be reached for trial until that seven thousand cases has been disposed of, which will take at least three years, and at the end of that time at the rate the business of the courts was conducted during the year 1909 there will still be seven thousand cases ready and awaiting trial. The number was not increased during the year 1909 and it is believed that if we could find some means of getting rid of those seven thousand cases now being pushed along in front of all cases which are being brought from time to time. . . .

The problem for which Miller called upon the bench and bar to devise a solution was not new. Reference had appeared in the *Legal Journal's* pages before. When the Miller letter was written, fairly extensive compulsory arbitration had been in operation one year. By that time, 448 cases had been ruled off the common pleas dockets for arbitration by the bar of Allegheny County, 39 had been settled or discontinued, 313 awards had been made to plain-

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7 W. S. Miller, letter to the editor, Pittsburgh *Legal Journal*, LVIII (1910), (Appendix) 207-208 (hereafter *Appendix*).
tiffs and 239 to defendants. Appeals totaled 104. The net result of the Bar Association’s work was 257 cases finally disposed of. Said one attorney in a letter to the Pittsburgh Legal Journal: “We must soon get away from the idea that facts can only be decided by a jury, if any relief is to be obtained, from the intolerable conditions prevailing here.” Yet, Miller thought, to complete the above quotation, “those seven thousand cases now being pushed along in front of all cases which are being brought from time to time that the courts with their present number and aided by the Arbitration Court might be able to promptly dispose of all business brought before it” (italics supplied).

It is true that the court’s first year of activity may not have adequately portrayed its potential capacity. Certainly, the persons closely connected with the institution’s establishment had more ambitious ideas. The primary purpose of the court, according to J. McF. Carpenter when he addressed a committee appointed to consider changes in the lawyers’ court, “is to provide some method for the prompt adjudication of certain legal controversies and at the same time preserve to litigants their constitutional rights.” “Personally,” he continued, “I have no doubt as to the power of the legislature in the premises. The congested condition of our courts makes it imperative that relief be obtained, however much we may differ as to the constitutional method of getting it.”

For their part, the advocates felt more certain than ever that they had found the plan whereby the courts of Pennsylvania could be relieved of congested trial lists. Attorney Thomas M. Benner saw manifold advantages in the program’s wider use. Should each of the six hundred lawyers in active practice rule out two of their cases at issue it would be “of great public benefit, create

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20 Anonymous, “Statistics of the Lawyers’ Court,” Appendix, 206. Chauncey Lobingier, letter to the editor, Appendix, p. 120. According to J. McF. Carpenter, Law Notes, XIII (1909), 165, the idea of the Lawyers’ Court was first proposed by Attorney H. M. Scott.

21 Address, J. McF. Carpenter, November 5, 1909. Appendix, p. 52. The present author journeyed to Pittsburgh and corresponded with concerned individuals. The Pittsburgh Legal Journal is the only available source of information regarding the Lawyers’ Court. He acknowledges in particular the assistance of Legal Journal editor and publisher Ross Blair. He also thanks Allegheny County’s Prothonotary David Roberts, and Solicitor George W. Shields.

Attorney Carpenter as an author never used his first name (James). Sometime afterward, he sat on the Court of Common Pleas of Allegheny County.

more business and better fees for the lawyer, and lastly relieve
the overworked judge and crowded trial list."

With talk like this establishing an environment, the Lawyers' Court of Allegheny County had been born.

It was sometime before May of 1909 that certain lawyers in Allegheny County decided that the Act of 1809 might, among other benefits, aid in the reduction of docket congestion. At the Bar Association's May meeting the membership adopted that course of action, and a special committee of six attorneys including President Frank C. Osburn and chaired by H. M. Scott was appointed. The committee reported to the June meeting of the association a set of eleven rules which today might be mistaken for rules of county court concerning arbitration after 1952. The report also included a set of arbitrator appointments to staff the court for the remainder of 1909.

1. That a Lawyers' Court of Compulsory Arbitration be forthwith established by the Allegheny County Bar Association.

2. That the president of our association forthwith designate three members of our bar to be known as “Official Arbitrators,” and three other members of our bar to be known as “Official Alternate Arbitrators,” to constitute the Lawyers' Court of Compulsory Arbitration and to hear, try and determine all causes referred to them during the current month of June, 1909, in the manner hereinafter set forth.

3. That the President, or in his absence, the Vice-President or, in the absence of both President and Vice-President, the Secretary, of our association, shall each and every month designate three members of our bar to be known as “Official Arbitrators,” to constitute the Lawyers' Court of Compulsory Arbitration, and to hear, try and determine all causes referred to them during the ensuing calendar month; at the same time one of said officers of our association, in the order of priority above mentioned, shall designate three other members of our bar to be known as “Official Alternate Arbitrators,” to serve during the ensuing calendar month in all cases wherein the “Official Arbitrators,” or any of them, by reason of interest, illness, absence, or other cause cannot or do not sit.

4. That the names of said "Official Arbitrators," and "Official Alternate Arbitrators" shall be certified by the Secretary of our association to the Prothonotary of our county as soon as they are designated from time to time.

5. That the Prothonotary of our county be officially requested to co-operate with us by causing one or all of said "Official Arbitrators" (or, in proper case, substitute one or more of said alternates), to be named in all cases wherein it is his privilege or duty to name one or more arbitrators.

6. That the Lawyers' Court of Compulsory Arbitration shall sit and hold court in the Bar Association room in the Court House, Pittsburgh, every day, except Saturdays and Sundays, during the hours from 9:30 a.m. to 12 noon, and from 1 to 4 p.m., when necessary.

7. That said court shall hear, try and determine all causes before it in the same manner as a judge and jury, and when once the trial of a cause is begun it shall be proceeded in to final determination without adjournments, other than the usual adjournments taken by a judge and jury when trying a case.

8. During the trial of all causes said court shall have full control of all proceedings, shall forthwith rule on pleadings, evidence and other matters necessary and requisite to speed and facilitate the trial and determination of the cause; and when the plaintiff shall fail to make out a case, shall not require the defendant to offer any evidence.

9. That each arbitrator shall be allowed and be paid, as part of the costs in each case tried by said court, the sum of five dollars for each and every day, or part of a day, necessarily employed in the field of a cause.

10. Said court shall make and file its award in every case within the time limited by law.

11. That the common pleas and orphans' courts of our county be officially requested by our association to treat engagements of counsel in the Lawyers' Court of Compulsory Arbitration the same as engagements of counsel in court.

In the proposed rules, it should be noted that the bar acted decisively to remove whatever objections existed to the Act of 1836. To eliminate the fear of prejudice and provide competence, only lawyers were used as arbitrators.\footnote{When lawyers serve, the arbitration is called "legal" as distinguished from "lay." Pennsylvania, by enactment in 1870 and 1873, took the lead in this matter.}
called "Official Arbitrators" was to take place each month, made by the President of the Bar Association. The president was also to appoint three alternates. The panel then selected was certified to the prothonotary by the association's secretary. The co-operation of the prothonotary was requested, always to appoint the Bar Association's arbitrators whenever it was his privilege or duty to name one or more arbitrators. Thus, the Bar Association could choose arbitrators without reference to impending cases and relieve the prothonotary of a duty to choose arbitrators which would be his by default (items or rules 1-5).

Fees were set in the rules at five dollars per day, per arbitrator, although it appeared that only under special circumstances would the act allow a fee of more than one dollar. Thus compensation was made more appropriate to the quality of adjudication the association provided (item or rule 9).

The time limitations of the act were relied upon to produce trial on "a day certain," but delay during the trial was another matter. Item or rule 7 of the committee's report provided that the trial proceed to final determination without adjournment. Courts were asked to treat engagements of counsel in Lawyers' Court (item or rule 11) as if they were engagements before a court. A businesslike schedule of operations from 9:30 a.m. to 4:00 p.m. at the courthouse with one hour off for lunch was established (item or rule 6). Further, attorneys appointed to the court sacrificed all their private business for the month of their service.

In practice, attorneys also attempted to remedy remaining objections to the Act of 1836.

Service of the various rules, the rule to choose and the rule in establishing in certain western counties, particularly Erie, arbitration by lawyer. The latter enactment, applying to Erie, was declared unconstitutional after twenty years because it did not fully provide for appeal of arbitrated cases. Cutler and Hinds v. Richley, 151 Pa. 195, 25 A. 96, 1892. Act cited, note 3, above.

"If opposing counsel does not attend the Prothonotary, on request, will nominate the Official Arbitrators. If opposing counsel does attend, he may choose some person other than official arbitrators, but the counsel who took out the rule can name one of the Official Arbitrators and the Prothonotary will name another, so that there will be at least two of the Official Arbitrators in the case." Committee of the Allegheny County Bar Association. "Practice in the Lawyers' Court," Appendix, p. 19. Therefore between one of the counsel and the prothonotary, the procedures of the egalitarian Act of 1809 as amended could be converted into a procedure for "legal" arbitration without additional legislation.

"Ibid., p. 16.
to arbitrate, was accomplished by counsel for the parties them-
selves as the system was placed upon a basis entirely profes-
sionalized. Awards were announced immediately after trial, and
the seven days' rule of the Act of 1836 regarding announcement
of awards appears to have been kept strictly. The prothonotary
detailed first a clerk and later an additional messenger to provide
for the system's effective administration.

Thus, it appears that, by rules and usages generally agreed to
among themselves, the bar in Allegheny County theoretically
achieved conversion of a venerable but little used institution for
which precedent undoubtedly existed in both Pennsylvania law
and tradition: a conversion to the needs of a complex, emerging
industrial society.

In this time and place the bar was playing a creative role. Did
their creation perform as they anticipated it could? Was it, indeed,
the key to remedying docket congestion? If not, what faults did
it contain, and could these later be rectified? It is intended to
adduce evidence that bears on these questions.

Almost from the outset of its existence, suggestions were made
for improvement in the procedures of the court. Some proponents
wanted to magnify the court's status by giving it the legal para-
phernalia which Anglo-American courts generally accumulate, or
by staking out for it undisputed concessions in indispensable areas
of the judicial process. For example, arbitrators should be given
power to find special verdicts in law and fact; or, to reserve the
law so that it might be heard on argument list at common pleas
without the need of a jury trial. Salaries of the arbitrators should
be paid by the county, arbitrators should be appointed by common
pleas judges for five-year terms, and provision should be made
for the filing of vacancies. Since the arbitrators had the right to
award against the plaintiff, they should also have the right to
certify a reason for the award; to write opinions. In default of
appearance by a party, award should be made to the party ap-

\[17 \text{Ibid.}, p. 19.\]
\[18 \text{Ibid.}, p. 20.\]
\[19 \text{Ibid.}, pp. 2, 95.\]
\[21 \text{Address, J. McF. Carpenter, Appendix, p. 53; H. M. Scott, et al., "Re-
port of the Committee on the Lawyers' Court," The Pittsburgh Legal Journal, LIX, No. 2 (1911), 24.}\]
A jurisdiction for the Lawyers' Court should be carved out through the establishment of amounts-in-controversy limits of under one thousand dollars in contract actions, except by agreement of counsel, with compulsory reference where amounts were under five hundred dollars, and finality of award when amounts were under one hundred dollars. The One Hundred Dollar Law, favoring justices of the peace in assumpsit actions, should be repealed, permitting the Lawyers' Court to operate without the costs-competition of the minor magistracy. These suggestions, apart from improving the administration of the Lawyers' Court, would have given the court an aura of stability and independence. They would have smoothed many obstacles from the path of future growth.

Somewhat at variance with these suggestions was the proposal by Attorney Carpenter that arbitrators be accorded a status as referees to the Courts of Common Pleas. While this arrangement would have unquestionably given these courts more business, it would have placed the arbitrators in the conduct of their referee business under the direction of the Common Pleas, since under Pennsylvania law a referee is subject to a court's control, as distinguished from its review; and referees report findings. They do not enter judgments.

As time went on, more and more attention seemed devoted to the problems of fees and appeals, as if these were major obstacles in the path of the court's continued successful existence.

That fees had been increased from one dollar to five dollars seemed to bother the legal sensitivities, if not the consciences, of some. It was considerably in excess of statutory limits to which the legislature had given attention since the original enactment. Moreover, whether one dollar or two dollars were paid arbitrators for hearing a certain case, the payment could be no more than a token to talented and educated men who had given up compensation for a month for what might be called a "benefit performance." Five dollars per person, while not full compensation, was not a token either. Unwittingly, the bar had placed itself in a dilemma.

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22 E. Y. Breck, A. M. Thompson, and W. M. Hall, "In Re Lawyers' Court of Arbitration," January 15, 1910, Appendix, p. 82.
23 Address, J. McF. Carpenter, Appendix, p. 53.
25 Ibid., p. 5; Address, J. McF. Carpenter, Appendix, pp. 53, 54.
J. Rodgers McCreery was among the observers of the Lawyers' Court plan who believed the increase in fee over that provided by the act was poor policy.

The arbitrators' legal fees exceed the amount of a verdict fee, and the allowance fixed by the Bar Association, while low from the viewpoint of the service rendered, is absurdly excessive as compared with the expense of a trial in a Court of Common Pleas. I would suggest that the arbitrators' fees should not exceed the statutory allowance and that it would be better to make them merely nominal, say $1.00 per diem. The arbitrators are serving pro bono publico at considerable personal inconvenience and loss and a few dollars should not, it seems to me, be permitted to stand in the way of an increase in the success of the institution.

Nevertheless, some recognized that the main problem was providing adequate compensation with a minimum of public complaint. To this end, it had been suggested that either the county or the Bar Association underwrite the cost of the court with a three-thousand-dollar investment. Perceiving that the financial hardship of litigants in using the court might be a factor in a court test of the plan's validity, or in the court's ultimate utility, others sought sophisticated schemes whereby litigants might still pay costs but that these, somehow, might be scaled or graduated to the amount in controversy. One suggestion made was that fees in cases where the amount was below twenty-five dollars be fixed at the limit allowed by law. Another suggestion aimed at reducing costs allowed each arbitrator five dollars per day, with the sum apportioned in amounts of not less than one dollar among all the cases tried in that day. Then the bar would be enabled, if it thought wise, to beat a dignified retreat to the policy of giving tokens.

It may have been that for some months of its operation the Lawyers' Court charged no fees at all. This is the substance of

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26 A similar solution was instituted by the Pennsylvania legislature in 1955, following the advice of the Pennsylvania Supreme Court that parties in low-value cases were discriminated against by a relatively high fixed arbitrators' fee. Application of Smith, 381 Pa. 255; 112 A2d. 625 (1955). See 5 P.S. 71V.
a statement made to the *Legal Journal* by a member of the January, 1910, board during February or early March of 1910. This assertion is minimized, if not contradicted, however, in the report of the arbitrators for March, 1910:

On the question of arbitrators' fees the board was unanimous that fees should be paid by litigants. One of the boards preceding ours charged no fees but we thought we were as much entitled to be paid for our time and service as the judges.

It may have been that early boards sensed a certain amount of self-consciousness about setting fees for an untried service, a feeling which later boards did not experience. Nevertheless, the March board of 1910 found it necessary to treat the fee matter with care: at the time of its report, in nineteen of fifty-eight cases the costs had not been paid.

The Board charged five dollars for each member, and did not cut the fee in any case. However, a charge was not made for every day of hearing and adjournment. In some cases where the amount was small and three days were occupied in the hearings, a charge was made for only one day. The Board tried to decide every case promptly, and the award was at once given to the clerk for filing, and not held up for seven days unless the costs were paid, as is the customary practice in ordinary arbitration.

The fees problem appeared to grow with time. Again, the August, 1910, board suggested in its report:

The fees of arbitrators are somewhat burdensome in small cases and are an element in causing appeals. Some way should be devised to correct this. The practice of

\[\text{S. S. Robertson, "A Fundamental Defect of Lawyers' Court," Appendix, p. 114.}\]


\[\text{Ibid. On the other hand, Attorney Robertson and his colleagues may have been trying to establish on their own a precedent for the relinquishment of fees—perhaps on puff, as sometimes happens in precedent-oriented systems. One would tend to accept as more accurate the report of the March Board, since that board seemed at least to have had no motive other than the reportage of its duties.}\]
arbitrators charging more than the law permits is of doubtful propriety. The fee of $5.00 is reasonable under the circumstances, but the law should authorize it.\textsuperscript{31}

At least once the question of fees resulted in an appeal from the Lawyers' Court. During appeal growing out of a routine action with an award of $182.50 for plaintiff, the plaintiff objected to the fifteen dollars in costs as being twelve dollars in excess of the law. No one appearing on the other side, the exception was sustained, and the court set costs at three dollars. Defendant's attorney later asked for a re-taxation, because of the principle involved. An order was made, granting a re-hearing.\textsuperscript{32}

Whether or not re-hearing ever resulted in re-taxation, \textit{Howley v. Hamnett} must have been both a warning and a lesson to the Allegheny County Bar. \textit{Howley} was argued September 13 on appeal. News of the opinion granting a rehearing appeared in the \textit{Legal Journal} September 17.\textsuperscript{33} In his August report, dated September 22, Attorney Wise announced that "the practice of arbitrators charging more than the law permits is of doubtful propriety": the first time a remark so critical had appeared on the question of fees. Thereafter, on January 7 and 14, 1911, two separate communications appeared in the \textit{Legal Journal}, recommending the institution of regularly salaried long-term arbitrators whose positions approached that of judges.\textsuperscript{34} After the third week in February, 1911, the subject of the Lawyers' Court was to drop from the \textit{Legal Journal}'s news columns.

The question of appeals themselves was also a fruitful source of controversy. While the ruling-out process probably had a salutary effect upon settlement, since it imperiled the pretensions of many defendants not so ruled by making it easier to designate

\textsuperscript{31} William F. Wise, \textit{ibid.}, No. 11, p. 5.
\textsuperscript{32} \textit{Howley v. Hamnett}, 571 first term 1910, Common Pleas No. 4. Award in June; appeal July 10; and argument September 13, about three months after award. Pittsburgh \textit{Legal Journal}, LVIII (September 17, 1910), 3-4.
\textsuperscript{33} Examination of our dockets and the pleadings filed in the case of \textit{Rowle1ce v. Hamn/lett} does not reveal whether or not a re-hearing was actually held on the re-taxation of arbitrators' fees. However, inasmuch as the dock is initialed by the individual arbitrator, it appears that the fee of $5.00 was actually paid." Letter to the author by Allegheny County Solicitor George W. Shields, March 22, 1963.
\textsuperscript{34} Pittsburgh \textit{Legal Journal}, LVIII (September 17, 1910), 4.
\textsuperscript{41} \textit{Ibid.}, LIX (January 7, 1911), 4; (January 14, 1911), 24.
a “judgment day,” some of these cases might have been settled otherwise. Considering the court’s purposes, a high appeals rate would be doubly bad, since each appeal represented a failure to divert a case from the workload of the Common Pleas. On this account, the question of appeals was to appear again and again on the pages of the *Legal Journal*. By the end of the first year, appeals appeared to be falling behind rule-outs (referrals) and arbitrations. Yet the arbitrators in January, 1910 had appeared preoccupied, if not alarmed.

How to stop appeals and secure some finality of award is the problem we are called upon to solve. In the absence of further legislation, as the work of the arbitrators becomes better known, more confidence will be inspired and appeals will somewhat decrease. Time, however, in this respect cannot be relied upon to work a complete solution, especially when the inspiration for appealing is not so much lack of confidence in the method of adjustment or even the result obtained as the desire for delay or the supposed advantage to be derived in a jury trial.\(^5\)

In February of 1910, H. K. Siebeneck, in a letter to the *Legal Journal*, suggested that fifty percent of appeals could be eliminated if appeals to Common Pleas would be advanced so as to be disposed of within a few weeks or months after award. The reasoning behind the suggestion appeared to be that arbitration losers would not be so anxious to puff their cases in a crowded docket if they knew their appeals would be speedily handled.\(^6\) While the writer did not say so, the prospect of an early day in court after arbitration might lead many to choose the Lawyers’ Court as a shortcut to the Common Pleas. Then, both the Lawyers’ Court and the Common Pleas could drown together in the same swollen river of litigation. Chauncey Lobingier’s suggestion that the arbitrators be converted into referees whose findings, affirmed by the formal judgment of the Common Pleas, could then be the subject of appeals to the Supreme and Superior Courts, was more


\(^6\) Letter, February 12, 1910, H. K. Siebeneck, the Pittsburgh *Legal Journal*, *Appendix*, p. 109. Nevertheless, it appears from the record of the case of *Hoveley v. Hammett* that appeals were being pressed rather rapidly. Above, note 32.
extreme. Yet from the standpoint of the elimination of unnecessary appeals, it might have been strong enough to work.

A suggestion made later by the Committee on the Lawyers’ Court stipulated that the arbitrators be required to present separate findings in law and fact in writing, with the law appellate to the Superior and Supreme Courts, and the facts to Common Pleas on deposit of fifty dollars and bail for costs and security, with payment in full of all costs by then accrued.

J. Rodgers McCreery, whose views on fees have been presented previously, saw the problem of appeals as bound with a comprehensive philosophy of small claims jurisdiction. Two goals were important to him: increasing the number of cases submitted to the Lawyers’ Court, and decreasing the percentage of appeals from its decisions. In line with this thinking, it would be necessary to reduce fees to a level below that of the Common Pleas, and, on the other hand, to increase the expense of taking an appeal. McCreery suggested a legislatively-applied fee upon the taking of an appeal, similar to that charged for appeals to the Superior or Supreme Courts, at that time fifteen dollars. Appeals in forma pauperis would eliminate the injustice of the fee.

The matter of formality of proceedings raged for a brief space as a side issue. At the outset, the committee specified that proceedings before official arbitrators would be identical to proceedings before a judge and jury.

Nevertheless, the Arbitrator’s Report for January, 1910 made the following assessment of proceedings during its term of service:

In conducting the hearings, we aimed to avoid much of the formality of ordinary court procedure, bearing in mind that we were simply arbitrators seeking to do substantial justice and bringing to the discharge of our duty the especial training of the legal profession. If a short examination of the pleadings at the outset did not suffice to acquaint us with the respective contentions of the parties, we usually asked the plaintiff’s counsel for a statement to be followed by a statement from the defendant’s counsel. In this manner we were not only given a

37 Chauncey Lobingier, Appendix, p. 119.
clear grasp of the position of each party, but often were enabled to eliminate unimportant and irrelevant matter. Neither the order nor the manner of eliciting information from the witnesses was considered important. Questions of law and evidence arising in the course of trial and as presented in the minds of the arbitrators were frankly stated and freely discussed with counsel. Aside from making for expedition, this method, we deemed, was of value in giving the litigants, especially in small cases, a better understanding of the matters involved, and would thereby tend towards making the award, when entered, a finality.\footnote{C. C. Dickey, \textit{et al.}, \textit{Appendix}, p. 95.}

Subsequently, this report was subjected to a critical, though anonymous discussion which found its way to the \textit{Legal Journal's} pages:

The plan of the Bar Association was the establishing of an institution which would have the formality of a court. In avoiding this formality these arbitrators disregard the plan expressly adopted after much mature consideration by the Association. In the discussion of the plan before it was put in actual motion it was quite plain that part of the scheme to lessen appeals was to impress litigants and witnesses with the idea that the cause is being tried with all the "formality of a court." The litigants cannot look upon all things as lawyers see them and there are times and places when "all the pomp and circumstances of war" is a good thing. A trial in the Lawyers' Court should be such a time and place.\footnote{Anonymous, "Discussion of the Report of January Arbitrators," \textit{Appendix}, p. 98.}

S. S. Robertson, a member of the January board, retorted in kind:

Another suggestion is that the Lawyers' Court educates the public by showing it other and more desirable means of obtaining justice than through the ordinary methods of the courts. Some of us who have served thought there might be something in this and we also thought we might help the idea along by eliminating everything which savored of mere technique and form and by acting so as to create the impression that there were three fairminded men sitting at the table ready to discuss the controversial
matter across that table and to award according to the right as they conscientiously believed they found it. But about this time in comes a third suggestion that if any good is to be done the awe and majesty of the law must be preserved and that the three little volunteer arbitrators must assume a borrowed dignity and must perch themselves on a bench and split hairs on questions of evidence and listen to the arguments of counsel and do all of the other things that real judges and real courts do, much to the sorrow of those who feel that the law is sadly clogged by the forms of administering it in the courts. What does this third suggestion amount to but the substituting of three men for thirteen and by compulsion, be it observed? And who wants that?45

Proposals were advanced from time to time that through law the Lawyers' Court should achieve a permanent status. 44

In a report published in the February 11, 1911, issue of the Legal Journal, the Committee on Legislation let down the proponents of an augmented Lawyers' Court, gently but firmly. Holding that the court had performed satisfactorily, the committee decided no further legislation was necessary:

If legislation suggested should be carried through it would establish another tribunal which would only tend to confuse in the administration of justice and take away from the dignity and honor of the court that which now gives it high standing.46

The only way to accomplish the ends of the Lawyers' Court without committing a travesty would be to create another institution that would be, in name and fact, a court. Thus, a few weeks later, the Bar Association, presumably after consulting Harrisburg where the General Assembly had meantime convened, proposed the establishment of a county court of Allegheny County, a court of record, with judges elected for a term of ten years and paid a salary of five thousand dollars per year. The court was to be invested with jurisdiction over civil actions and replevin where amount or property in controversy was under the sum of six

45 S. S. Robertson, Appendix, p. 113.
hundred dollars, with exclusive jurisdiction over desertion and non-support actions and appeals from magistrate's courts.\textsuperscript{16}

Once again, things seemed to be going the way of J. McF. Carpenter, who in a letter printed January 7, 1911, had stated:

I favor legislation authorizing the Courts of Common Pleas to appoint assistants, whether called arbitrators or designated by some other title makes little difference. I think appointments should be for a term of years and that the appointees should devote as much time to the discharge of their duties as our judges devote to the discharge of theirs. In a word, the appointment would imply that the appointee give all his time to the performance of his official duties. This, of course, further implies payment of an adequate salary by the county. There is no longer any doubt about the necessity for improvement in the methods of adjudicating causes involving limited amounts. Our Arbitration Court is a step in that direction, but does not meet all requirements.\textsuperscript{17}

That was the end. Henceforth, the Lawyers' Court was to lead a thoroughly exorcised existence in the pages of the \textit{Legal Journal}. Arbitrators and alternates continued to be perfunctorily appointed with decreasing regularity. In its last issue of the year 1917, the \textit{Legal Journal} noted the usual appointments with the legend: "Until further arrangements are made, the arbitrators will meet at various places, by appointment, no regular meeting places having been chosen."\textsuperscript{18}

Somewhere in Pittsburgh, keeping appointments made by bygone counsel with a ghostly clerk on behalf of departed litigants, the shades of these six men may be meeting still.

The Lawyers' Court had experienced an active life of only eighteen months. Though it was during the second six months of this period that docketed cases and arbitrations increased most

\textsuperscript{16}"An Act to Establish a County Court for the County of Allegheny," \textit{Ibid.}, LIX (February 25, 1911), 3, citing 2, 6.

\textsuperscript{17}Letter, J. McF. Carpenter, published \textit{ibid.} (January 7, 1911), 4. For a favorable and more widely available view of the Lawyers' Court see J. McF. Carpenter, "The Lawyers' Court of Compulsory Arbitration: Operation of the Allegheny County, Pa., Court," \textit{Law Notes}, XIII (1909), 165.

\textsuperscript{18}Pittsburgh \textit{Legal Journal}, LXV (December 29, 1917), 6. All attorneys intimately connected with the work of the Lawyers' Court have since passed away. Letter to the author, Ross M. Blair, president and editor. Pittsburgh \textit{Legal Journal}, March 1, 1962.
The work of the lawyers' court, July 1, 1909-January 1, 1911: docket, trials, and appeals

<table>
<thead>
<tr>
<th></th>
<th>90</th>
<th>180</th>
<th>360</th>
<th>540 days</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total cases docketed</td>
<td>83</td>
<td>192</td>
<td>448</td>
<td>687</td>
</tr>
<tr>
<td>Total cases tried</td>
<td>49</td>
<td>134</td>
<td>313</td>
<td>531</td>
</tr>
<tr>
<td>Total awards appealed</td>
<td>12</td>
<td>53</td>
<td>104</td>
<td>246</td>
</tr>
<tr>
<td>% appeals, to docket</td>
<td>14.4%</td>
<td>27.6%</td>
<td>23.2%</td>
<td>35.8%</td>
</tr>
<tr>
<td>% appeals, to trials</td>
<td>24.4%</td>
<td>39.5%</td>
<td>33.2%</td>
<td>46.3%</td>
</tr>
<tr>
<td>Appealed to Lawyers' Court</td>
<td>25</td>
<td>63</td>
<td>152</td>
<td>265</td>
</tr>
</tbody>
</table>

In all, the court processed 531 cases in eighteen months, equaling the work that would have been done by an especially active fifth common pleas court. A fair representation of the docket, both in regard to causes in action and amounts in controversy, was included in this workload. The arbitrators of January, 1910 commented on the capacities of a competent board:

"... a competent board, or for that matter, one person equally as well as three, could hear and dispose of five or six cases a day."  

Assuming that there were five such days in a week, then 360 working days might have existed, exclusive of vacations and holidays, in which to try fifteen hundred to two thousand cases. In fact, 531 cases were tried, which amounts to less than a case and a half per day, on the average. Referrals to arbitration may not

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9 Pittsburg Legal Journal, LVII (1909), 5, 74-76, 206; ibid., LIX (February 18, 1911), 53-55.
26 Average judgments ran from a low of $564 to a high of $2,593, according to the reports of the January and August boards of 1910. During the latter months the largest single award was $38,097.86, the second, $15,497.50, and the lowest, $31.22. A total of $338,800.06 was ultimately awarded plaintiffs by the court. William F. Wise, Pittsburgh Legal Journal, LVIII (September 24, 1910), 5. Of the 687 cases ultimately docketed (Table 1), 265 were appeals from aldermen and justices of the peace, 239 were original assumpsit actions, 88 were trespass, 32 on mortgages, 24 on replevin, and 39 miscellaneous (9 categories). Pittsburgh Legal Journal, LIX (February 18, 1911), 54-55.
21 C. C. Dickey et al., Appendix, p. 96.
always have proceeded smoothly. Lawyers may even have taken several days away from the business of the court to catch up on private practice. Still, it is well known among students of judicial administration that a missing or difficult witness, an overly long lunch hour or barside conference, or a haggle over a minor point of law can upset the schedule of the most expeditious-minded judge, despite the existence and intent of rules such as Lawyers' Court Rules 7 and 8.

But nevertheless, assuming steadiness of referrals, conscientiousness of judges, and absence of minor delay; and assuming that 20% of the 7,000 case backlog might be settled before trial; and finally assuming that the common pleas courts were capable of handling additions to the backlog as well as Lawyers' Court appeals: the Lawyers' Court would still have required over four years to consume the 7,000-case backlog.²

Along with the rather modest case load which the Lawyers' Court assumed, its proponents would have some rather serious questions to answer on the matter of appeals.

| TABLE 2: THE LAWYERS' COURT AND THE COURTS OF COMMON PLEAS: RECORD OF TRIALS AND APPEALS |
|---------------------------------|-----------------|-----------------|
| Cases Tried | Cases Appealed | % Appeals to Trials |
| Lawyers' Court | 531 | 246 | 46.3% |
| Common Pleas No. 1 | 364 | 33 | 9.0% |
| Common Pleas No. 2 | 341 | 23 | 6.7% |
| Common Pleas No. 3 | 693 | 45 | 6.4% |
| Common Pleas No. 4 | 362 | 44 | 12.1% |

N.B.: Lawyers' Court appeals to the Court of Common Pleas where the original action was filed; Common Pleas appeals to Superior and Supreme Courts of Pennsylvania. Common pleas trials include trials by jury only, representing judgments on verdicts; in addition, common pleas judges conducted bench trials, heard motions, and performed similar duties in the fields of criminal and equity law.

All discussion aside, the final appeals rate of 46.3% of tried cases compares favorably with neither the record of the common pleas during the period in question, nor with the 1913 record of the successor, the County Court of Allegheny County. Even the

²²It is conceded that settlement rates might increase drastically toward the end of the four-year period if all assumptions were fulfilled.
record of the recently-established Common Pleas No. 4 was, proportionately, little more than a quarter of the rate of the Lawyers' Court. The appeals rate of the county court would have compared favorably with the rate of the common pleas. At no stage of its history does the Lawyers' Court compare favorably in appeals rates with any other court in Allegheny County, and the appeals controversy appears to have merited all attention given it.

Some would assert that the effect the Lawyers' Court could have upon the docket of the common pleas is overstated, since settlements, discontinuances, and the shifting strategies of lawyers might work a heavy toll on appeals before a common pleas gavel could fall. Indeed, there exists some evidence supporting this contention. Nevertheless, well-founded expectations regarding the favorable effect of screening devices upon workloads of courts of unlimited jurisdiction exist. The original court of unlimited jurisdiction should provide at best an expeditious means of trying controversies weighty in fact, law, or consequence. Dockets essentially unpared may not provide trial upon "a day certain." Hence, courts with such dockets can hardly provide an expeditious means of trial. Whether because of injustice, legal strategy, psychological factors generated by informality, novelty of the process, or appeal's preeminent ease, the Lawyers' Court was not fulfilling well its intended function.

Costs of justice studied reveal the Lawyers' Court in a favorable light, especially so when the size of awards is considered. Lack of docket delay and the prospect of the early settlement this entailed may have made the fifteen-dollar arbitrator's fee seem to

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25 "In collecting the data for the Prothonotary’s report on the work done by the Lawyers' Court from July 1, 1909, to January 1, 1911, I found that a number of cases had been settled after the first rule had been taken out, and that a number of other cases had been settled after appeals had been taken from the awards of the Lawyers' Court; but it is impracticable without great labor and considerable time to gather exact data on these features of the work." Letter, George F. P. Longfitt (clerk of the Lawyers' Court) to H. M. Scott, Esq., January 31, 1911. Pittsburgh Legal Journal, LIX (February 18, 1911), 55.

26 On a six-case day total costs might reach $175.85 for clerk, tipstaff, arbitrators, and witnesses ($1.50 per day for witness, plus $.06 per mile travel, five mile average), or $29.30 per case. A jury trial for a $2,500 judgment in the common pleas might have cost $145.42 for judge, clerk, tipstaff, jurors (14, at $2.50 per day, per juror), and witnesses. Salaried employees calculated on a per diem apportionment of their salary, simply to provide a figure for comparison. Letter to the author by Allegheny County Solicitor George W. Shields, March 22, 1963.
many litigants a premium paid for a promptly returning investment. The average award for August seems especially significant in this context. However, an appeal rate of 64% of cases actually tried that month supplies considerable mitigation for what would otherwise be enthusiasm for cheap justice as far as the taxpayer was concerned.

Table 3: Work of the Allegheny County Court, August 11, 1911-December 31, 1913

<table>
<thead>
<tr>
<th></th>
<th>Cases Entered</th>
<th>Disposed</th>
<th>Appealed</th>
</tr>
</thead>
<tbody>
<tr>
<td>August 11-December 31, 1911</td>
<td>1,345</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Year of 1912</td>
<td>3,976</td>
<td>4,032</td>
<td></td>
</tr>
<tr>
<td>Year of 1913</td>
<td>4,573</td>
<td>3,467</td>
<td>364</td>
</tr>
<tr>
<td>Totals</td>
<td>9,894</td>
<td>7,499</td>
<td>364</td>
</tr>
</tbody>
</table>

% appeals of 1913 disposals: 10.5%
% appeals of total disposals: 4.8%

Table 3 reveals the Allegheny County Court's voracious appetite for litigation. The enactment provided one judge for each 200,000 population, and each judge and his juries were free to go off and hear cases wherever and whenever the facilities for trial were provided. Thus the effectiveness of the county court is multiplied by the number of judges assigned and available for duty. The Lawyers' Court, however, was indivisible. Its effectiveness always remained at the number one.

In conclusion, we ask again, did the Lawyers' Court perform as its creators anticipated it would? Was it the key to remedying docket congestion? It would seem that these statistics on the Lawyers' Court operations, appearing as they did in print at the beginning of 1911, may have had considerable effect on the course finally taken.

The evidence reveals considerable doubt over the questions of fees and appeals throughout the court's brief life, as well as on the issues of formality of procedure and permanence. The lawyers evinced good will about their project. They tried to make creative and helpful suggestions for its improvement, as their correspondence reveals. In the end, they had to admit that their court, because of docket load and appeals problems, was playing too modest a role. This admission would concern any lawyer not preoccupied
already by the fees which his clients paid to arbitrators for speedy justice. As the correspondence reveals, the problem of fees was not insuperable if the bar association itself desired to make further sacrifices. The suggestions for cutting off appeals were not adopted. Any one of them might be unconstitutional in the Supreme Court's eyes, with the fifteen-year-old Cutler case serving as precedent for what can happen to "legal" arbitration schemes which do not consider seriously the traditions of appeal. The establishment of a new court, however, clearly was not illegal. If the Commonwealth intended paying the new judges' salaries, why emphasize further the use of a Lawyers' Court which charged an illegal fee?

Admittedly, the image of what the court was supposed to be was blurred through debates over its informality, but this blurring, like the question of fees repayment, would not have proven an insuperable obstacle were the Lawyers' Court itself fulfilling an essential role. Even today, the bar spends its energy freely in precisely the same arguments over the informality of post-1952 arbitration boards without condemning the institution, or refusing to serve, or even endangering arbitration's utility.

In the court's failure, however, lay the key to the solution of vexing docket congestion. The Lawyers' Court was a static model which did not provide sufficient flexibility to meet the needs of burgeoning dockets. A dynamic model which increased in capability as its burdens developed was vital. A means of discouraging appeals had to be found. Somehow a solution to the fees problem had to be worked in. In the rectification of these faults would have lain a solution to the problem of docket congestion.

With this in mind, consider Pennsylvania Compulsory Arbitration as it rectifies the faults of the Allegheny County Lawyers' Court. First, a dynamic model is provided, since a new panel of three lawyers is appointed for each case as it arises. Each case is thus given attention, and since the system is court-organized and directed, the attention given must be prompt. Moreover, a condition-precedent system of compulsion is instituted, resulting in a smoother flow of cases out of the docket to arbitration than the compulsion of one party by another under the Act of 1809 was capable of providing. Second, fees are paid by the county, amounting to between $50 and $100. If, however, an appeal i
desired, the appellant pays the fee, reimbursing the county. Critics have termed this "the stiffest jury fee in the United States" with good reason. While litigants are not complaining about the lawyers' ministrations, the appeals-to-trials rate is not above 5% in most counties.

The Allegheny County lawyers in 1910 might have conceived of a more dynamic model. They might have foreseen fees repayment. However, they could not have foreseen that in 1955 the Supreme Court of Pennsylvania, seriously concerned over statewide civil docket congestion, would permit a fee repayment requirement as a condition precedent to jury trial beyond the condition of arbitration, and that the following year the United States Supreme Court would refuse to review the Pennsylvania decision. More acute and widespread necessitous circumstances than Allegheny County had suffered in 1909 had to prevail, and in a more tolerant age at that, before this element could be supplied like a catalyst to turn frustration into triumph.

A constitutional procedure: Application of Smith, note 27, above. Appeal dismissed, sub nom Smith v. Wissler, 350 U. S. 858; 76 S. Ct. 105 (1956). The fee cannot be recovered back on taxed as costs if the appellant is victor. Costs assignment to appellants comes from this Act of 1809 as amended, but the impoverished were excepted, and the appellant could recover the costs back (see 5 P.S. 71, 72, 77). The arbitrator's fee is, since 1952, an additional costly element.

Above, note 51: quotation in text.