The British Industrial Court

by

Sir William MACKENZIE, K.C., K.B.E.

President of the Court.

THE attempts by both legislation and the initiative of individual trades in Great Britain to provide for the peaceable settlement of industrial differences have a longer history than is sometimes recognised. The Elizabethan Statute of 1562 providing for the assessment of wages was adjusted, it is true, to an economic system which differs fundamentally from that which took its place with the introduction of machinery and the factory method of production; and this old legislation by the time of its repeal in the reign of Queen Victoria had become, if not a dead latter, certainly an encumbrance. But without going back to the interesting wages clauses of 5 Eliz. Cap. 4. (1562) we find the idea of industrial arbitration clearly expressed in an Act of 1800 "for settling disputes that may arise between masters and workmen engaged in the cotton manufacture in that part of Great Britain called England". This Act set up machinery of a detailed character which, in the event of masters and workmen being unable to agree respecting the price for work done or to be done, gave either party power to demand arbitration. Each side was empowered to appoint an arbitrator, and the award of such arbitrators was to be final and conclusive between the parties. In the event of the arbitrators being unable to agree, the points in difference were to be submitted to a Justice of the Peace in the locality, whose decision, to be given "within the space of three days", was to be final. It is interesting to note that this early statute gave to the arbitrators power of summoning witnesses and examining them upon oath. The Act was amended in 1804, and in 1813 it was referred to in a petition to the House of Commons as having been found "capable of evasion".

In 1824 an arbitration Act was passed which consolidated and replaced earlier measures and aimed at establishing one general law relating to arbitration disputes in every branch of trade and manufacture. The machinery set up was generally similar to that of the Act of 1800 previously mentioned, and perpetuated the defects of that measure by making a Justice of the Peace the final arbiter. The Act was amended on various occasions up to 1896, but remained ineffective. In the fifties the question of providing means of conciliation and

arbitration was much discussed. A Committee of the House of Commons sat in 1856 "to enquire into the expediency of establishing equitable tribunals for the amicable adjustment of differences between masters and operatives". A Bill was introduced in 1859 to set up courts of conciliation, and to provide a system of voluntary arbitration, but was not passed. Various trades had endeavoured independently to establish reasonable means of settling differences. In the pottery industry arbitration was frequently resorted to from 1836. Carpet weaving, the Macclesfield silk trade, the Cheshire salt trade, and the Birmingham wire trade are among early examples of the application of the methods of conciliation and arbitration. In the Glasgow pottery trade the workmen were bound by a rule of their union to refer all disputes to arbitration, and the report of that union for the year 1860 states that the rule had often been put into operation and had been successful in ninety cases out of a hundred.

From this period the principle appears to have made fairly steady progress, the number of trades setting up boards for the mutual discussion of points of difference and the reference, as necessary, of the matters at issue to arbitration, constantly increasing. In 1867 an Act was passed to set up "Equitable Councils of Conciliation", and was added to by an Act of 1872; but both Acts remained inoperative. It may be noted that under the former Act, as in earlier ones, the award or agreement could be enforced by proceedings of distress, sale, or imprisonment.

The machinery set up by the initiative of the various trades themselves showed differences in detail, but was of a uniform general type. Its essential feature was that trade difficulties should be discussed, in the first instance, by those who were best qualified to discuss them, that is to say, the employers and workers concerned, each party to the dispute having equal representation. In the event of failure to agree, the matter was referred to referees or an arbitrator chosen according to some agreed plan. In 1891, a Royal Commission was appointed to enquire into various questions affecting the relations between employers and workmen, and to report whether legislation could, with advantage, be directed to the remedy of any faults that might be disclosed. As a result of the report of this Commission the Conciliation Act of 1896 was passed. The Act enabled the Government to do very little that was not previously in its power to do, but a great improvement was achieved by giving a particular Government Department, namely, the Board of Trade, a definite duty towards, and relationship with, the movement in the direction of the peaceful settlement of industrial disputes. The Board of Trade could, as of right, enquire into the cause and circumstances of any existing or apprehended difference and on the application of the parties interested appoint a person to act as conciliator, or appoint an arbitrator. The

Act served a useful purpose and the department of the Board of Trade concerned in its administration attained, especially under Sir George, now Lord, Askwith, a position of great importance and influence.

Since the attempts which were made in the early part of the XIXth century to introduce a compulsory element into arbitration, the tendency for some time prior to the Conciliation Act, and the principle embodied in that measure, were that at all stages the parties concerned should be moved by no force stronger than persuasion or argument and bound by no consideration other than a sense of honour. The acceptance of the good offices of the Board of Trade, or other third party, in the matter of conciliation, the agreement to refer points of difference to arbitration and the choice of arbitrator, were all matters that rested on a voluntary basis, and when the award of an arbitrator was issued its observance depended upon the loyalty and good faith of those affected.

During the war the element of compulsion in arbitration was again introduced and this time with effect. Various tribunals were set up under the Munitions of War Acts 1915-1917. The Committee on Production took the foremost place among these tribunals. Originally formed in February 1915 by Mr. Asquith, when Prime Minister, to advise the Government on the production of munitions of war in engineering and shipbuilding establishments, the Committee was afterwards given power to deal with industrial disputes; and on the subsequent creation of the Ministry of Munitions its functions as to the production of munitions were transferred to that Ministry, then under Mr. Lloyd George, as Minister. The Committee on Production was left with its arbitration powers, and became under the Munitions of War Acts a statutory arbitration tribunal and was the best known of the various arbitration tribunals.

Recourse to one or other of the tribunals was often not a matter of choice, but of obligation, though, in practice, the ready availability of rapid and smooth working arbitration machinery led to the reference of many cases for adjudication on the motion, and with the willing assent of, the parties concerned. The extent of the work done by the Committee on Production is indicated by the fact that it gave no fewer than 3,754 awards. The Committee during the later period of its existence consisted of three elements, independent and impartial persons who presided as chairmen, members chosen from the employing interests, and members chosen from the workers. The number of members forming the Committee never exceeded thirteen, and its usual procedure was to sit in divisions of three.

The Committee on Production accumulated an extensive and valuable knowledge of industrial conditions and developed an appreciation of the psychology of employers and workers, which is one of the chief qualifications of a successful arbi-

trator. When the Committee ceased to exist as an arbitration tribunal immediately after the Armistice, there was an obvious and considerable advantage in maintaining a recognisable likeness between its *personnel* and that of its successor, the Interim Court of Arbitration. This latter tribunal was set up under the Wages (Temporary Regulation) Act 1918, for the purpose of determining the rates, known as "prescribed rates", generally payable in the various trades at the close of the war, and if necessary, of substituting new rates for such prescribed rates. The "prescribed" rates and "substituted" rates were legally enforceable. Though its functions appeared to be somewhat limited by the terms of the Act, it did, in effect, deal with disputes of an ordinary type with respect to wages. A difference between employers and workers on a wages question could often be expressed in terms of a question as to whether any, and what, rate should be substituted for the prescribed rate applicable to such workers, a paraphrase of an ordinary application for an advance in wages, which brought the matter at issue within the competence of the Court. Reference to the Court was at the instance of the Minister of Labour (to whom in 1917 were transferred the powers of the Board of Trade in all labour matters), and could take place without the assent of the parties. When the award was given it could be enforced before a Munitions Tribunal having power to inflict fines. A considerable number of the cases dealt with by the Court were referred under the Conciliation Act, which still continued in force. In respect to such cases the jurisdiction of the Court was wider, though the power of enforcement did not attach in these circumstances to its findings. Recourse to the Court as an ordinary arbitration tribunal was alternative to recourse to single arbitrators. The question whether the one form of tribunal or the other was selected in matters referred under the Conciliation Act was determined mainly, if not wholly, by the wishes of the parties.

The Interim Court of Arbitration carried out its duties with recognised success.

It was stated in Parliament that of some 850 awards given by the Court only three were disputed and followed by a stoppage of work. But, as its name implies, the Court was a temporary and, to some extent, an improvised one. It came to an end in November 1919 with the passage of the Industrial Courts Act. Except that certain provisions of that Act provided for the transfer of unfinished cases from the Interim Court to the newly created body, the Industrial Court, and gave that Court power until 30 September 1920 to determine certain questions relating to " prescribed rates ", all element of compulsion in arbitration was swept away, and in that respect the position became the same as it was before the war.

The Industrial Courts Act, passed in 1919, when Sir Robert Horne was Minister of Labour, makes provision,

in the main, for two different purposes. It sets up arbitration machinery and it also provides for Courts of Enquiry into existing or apprehended disputes. The latter have compulsory powers, requiring the attendance of witnesses and the production of documents, and have for their duty the issue of a report to the Minister of Labour, which will enlighten the public on the questions at issue. A Court of Enquiry is specially appointed to enquire into a particular trade dispute and, having made its report, it ceases. It is not intended to be a Court of Arbitration, and its report, even though it amounted to a finding upon, as well as an explanation of, the points at issue, would not be binding even as a matter of honour upon the parties in the same way as an award given by an arbitrator sitting and recognised as such. Whether the parties subsequently agree, as they did in the case of the Court of Enquiry presided over by Lord Shaw concerning the Dockers' dispute (1), and in that presided over by Sir David Harrel concerning the Tramways' dispute (1), to accept the report of the Court as a settlement of their difference, is another matter.

In providing arbitration facilities the aim of the Industrial Courts Act appears to be to give the parties as wide a choice as possible in respect to the kind of tribunal to which the difference shall be submitted. The Act thus carried into effect a recommendation of the Committee on Relations between employers and employed, better known as the "Whitley Committee" after its illustrious Chairman, the present Speaker of the House of Commons. In its report of 31 January 1918 the Committee recommended "that there should be established a Standing Arbitration Council for cases where the parties wish to refer any dispute to arbitration, though it is desirable that suitable single arbitrators should be available where the parties so desire". Under the Act a difference may be referred to the Industrial Court, or to one or more persons appointed by the Minister of Labour, or to a Board of Arbitration formed *ad hoc*, consisting of one or more persons nominated by the employers and a similar number nominated by the workmen and an independent chairman nominated by the Minister. The second and third options were already available to parties under the Conciliation Act, and the special feature of the Industrial Courts Act is the provision it makes for a permanent Industrial Court. The value of such Court, consisting, as far as the President and some of the members are concerned, of persons engaged solely and exclusively in industrial arbitration, may be said to have been demonstrated by the experience of the Committee on Production and the Interim Court of Arbitration. As regards personnel and staff,

(1) See *Inter. Lab. Rev.*, Vol. I, No. 3, p. 107 *sqq.*

the Court may also be regarded as a direct successor of the two previously mentioned tribunals.

The Industrial Court at present consists of thirteen persons. Of these four, including the President, are designated as "independent persons", others as "representing employers", others as "representing workmen", while two are women members. It is not the practice for the whole Court to hear any one case. The usual procedure is for each case to be heard by a division of the Court, consisting of the President or a chairman as an "independent person" and other members "representing employers" and "representing workmen" respectively. If women are, or are likely to be, affected, a woman member is also usually added. This system is subject to variation with circumstances, and cases are not infrequent where a member of the Court will sit alone. The constitution of a division of the Court is in the discretion of the President.

The members of the Court are appointed by the Minister of Labour and the aim in constituting the Court was to create a body, which it was hoped would inspire general confidence in respect of its ability, knowledge, and representation of different points of view. The President and Chairman are all persons who have had no active participation in industry. Three are of the legal profession and one was formerly a distinguished Civil Servant. The description of other members as "representing employers" and "representing workmen" is applicable rather to the matter of antecedents and previous experience than to function and attitude. With an inside knowledge of the Court and its private deliberations it is perhaps permissible and right to say that judicial impartiality is not only the aim, but, within human limitations, the achievement of all members alike.

The Court is entirely an independent tribunal, and is not subject to any Government or departmental control or influence. It sits mainly in London, but from time to time it sits also in the industrial centres of England, Scotland, Ireland, and Wales.

In addition to its judicial functions, the Court has certain advisory or consultative duties. The Minister of Labour may refer to it for advice any matter relating to, or arising out of, any trade dispute or any other matter which in his opinion ought to be so referred.

Sitting almost continuously and dealing with a great variety of questions, the Court acquires a knowledge of industrial matters, apart from the previous wide experience of certain of its members, which is usually sufficient to enable the members to follow and appreciate the technical points that are made by the parties appearing before them. The President may, however, invite the assistance of assessors, and, in cases where this is done, it is usual to ask for, and accept, the nomination of each side. The assessors sit with

the Court and deliberate with it after the hearing of the case, not only elucidating matters of a technical character, but emphasising any special features of the case that occur to them. They are not required, however, to share responsibility for the decision of the Court. In all those cases where assessors have been invited, the Court have derived great assistance from them, and there is no doubt that this feature of the Court's resources is of high value in arriving at a just decision in a case involving highly technical issues.

Under the Industrial Courts Act cases are referred to the Court by the Minister of Labour, who is required under the Act to be satisfied that, if there is special machinery for dealing with disputes in the trade concerned, its possibilities have been exhausted. The Court charges no fees and awards no "costs". Usually the case for each side is put by one of the interested parties or by an official of the employers' association or trade union as the case may be. Occasionally one or both of the parties appear by counsel or solicitor. The appearance of legal representatives of the parties is, however, in the discretion of the Court. Evidence is not taken on oath, nor is the attendance of witnesses enforced by civil process.

Since the Court was instituted in December 1919 up to the end of May 1921, it has issued about 650 decisions. The decisions, which are published in volume form from time to time, cover an immense variety of trades and classes of workers, ranging from railway employees to canvas hosepipe makers and from town clerks and other important officials in local government to bobbin and shuttle makers. The trades which stand out with the greatest prominence in respect to the number of cases brought before the Court are, as might be expected, in view of their national importance, the engineering and shipbuilding trades, the building trade, the iron and steel trade, and the transport trade. It is to be noted, however, that industries like the cotton and woollen and mining, in which organisation for the settlement of disputes is highly developed, are not entirely unrepresented, certain cases having been submitted to the Court which fall outside the scope of the special trade machinery.

There is no less variety in the nature of the questions submitted than in the industries submitting them. Many, and perhaps most, of the differences are straightforward claims for increases or reductions in wages, but other questions, often of a complicated character, relating to working conditions, construction of industrial agreements, and such matters, have also been adjudicated upon by the Court. Among these may be noted such differences as that raised at a certain port as to the number of men necessary to work a dredging hopper (determined, it may be noted, by the method of experiment by members of the Court itself), and the question raised in the cotton weaving industry as

to what, if any, deduction should be made from the very elaborate Colne or Uniform Lists, in the case of firms carrying on business in certain outlying districts and villages.

Arbitration by the Industrial Court rests upon an entirely voluntary basis. Both parties to a difference must agree to the reference to the Court, and the award or finding of the Court depends for its observance upon the honour and civic sense of the parties. It is not necessary here to consider the arguments for and against the introduction of an element of compulsion into industrial arbitration. The war-time predecessors of the Court, that is to say, the Committee on Production and the Interim Court of Arbitration, wielded certain compulsory powers. The reference of a dispute to one of these bodies was not always within the option of both parties, and the awards were capable of enforcement under penalty against both employer and workman. The acceptance of that system was probably the result, however, of nothing more than the general willingness to surrender individual rights at a time of national crisis ; and the Parliamentary debates on the Industrial Courts Bill are sufficient to show that, in normal times, public opinion in this country holds the disadvantages of compulsory arbitration to be greater than the advantages. There is no doubt that liberty to settle, even by means of strikes and lock-outs, the terms on which labour shall be employed is jealously regarded; but even if this highly valued right were given up, there still remains the difficulty of devising satisfactory sanctions or penalties which compulsory arbitration implies. Experience during the war shows that it is not always easy to translate the penalties attaching to industrial obligations from paper to practice. Apart, therefore, from the present state of public opinion, it may well be argued that it is far better to make a straightforward appeal to a sense of fair-play than to rely on the enforcement of doubtful penalties. And experience again shows that such an appeal seldom fails, the number of awards repudiated by the disappointed party being almost negligible. An appeal to honour is effective, however, only so long as it is personal and direct. Hence it is a pre-requisite of industrial arbitration that in the trades or industries concerned there shall be adequate organisation. There must be a corporate sense on each side and the means in each camp of maintaining discipline.

The absence of legal sanction differentiates the decisions of the Industrial Court from those of the ordinary Courts of Law. The establishment of a permanent arbitration tribunal and its description as a Court indicate, however, that it marks a greater advance in the history of industrial arbitration in this country than the merely formal changes in the pre-existing arrangements would suggest.

It will have already been seen from this article that the Industrial Court was by no means novel in the respect that

it provided facilities for industrial arbitration. Apart from war legislation, those facilities had always been available under the Conciliation Act of 1896. Its unique feature is to be found in the fact that it forms a permanent or standing tribunal existing chiefly, although not entirely, for the purposes of the judicial settlement of industrial differences. Previously the practice had been to appoint single arbitrators as occasion arose. What were thought to be the defects of this system are perhaps indicated in a statement of Sir Robert Horne, when Minister of Labour, in the course of the passage of the Industrial Courts Bill through Parliament :—

> "You want indeed", he said, "a body of people who are able to take a comprehensive view of the labour question and, in particular, who are able to take a comprehensive view of the wages question. Every set of wages in every trade is related in some degree to every set of wages in every other trade. You cannot dissociate what is decided in one case from what may be asked in another case. Therefore, it would be futile to have a Court *ad hoc* for each case that might come up, because then you would get a series of dissociated judgments, which would have no relation to each other and which would tend to cause confusion where you hoped for harmony".

There is no doubt another side to the question. A foolish consistency, as a great writer says, is the hobgoblin of little minds, and arbitration would not be likely to achieve popularity or general acceptance, if it were thought by the parties to a particular dispute that the issues were to be determined, not on the merits of their own case, but by reference to remote considerations with which they had nothing to do and of which they were not informed. But the reactions as well as the direct consequences of an award are among the considerations that certainly need to be borne in mind when arriving at a decision, if something like peace and order are to be brought into the realm of industrial relationships; and it may be well said that a standing tribunal is likely to be more conscious of this fact than a single arbitrator.

The further aim which may be said to lie behind the establishment of the Industrial Court is expressed by Sir Lynden Macassey in a perspicuous article in the *Journal of Comparative Legislation and International Law* for January 1920. He writes : "The vital problem is to work the new Industrial Court so intimately into the texture of our industrial life that its decisions will be universally accepted as fundamental principles on which every industry can build...". This no doubt is an aim which should be set for attainment. Industrial arbitration is a plant of tender growth. An Industrial Court is, however, unlike a Court of law which to-day applies to the cases submitted to it principles and rules which are already to be found in, or inferred from, statutes and previous recorded decisions. By no ingenuity can "authority" be discovered for a view on the ordinary claim for an increase or reduction in a rate of wages. Yet the attempt

to give shape and expression to the growing sense of social justice and to establish a recognised body of principles by which industrial questions can be judged is one that the Industrial Court may be fairly expected to undertake. It is a matter in which, if acute controversy is to be avoided, ambition may easily overreach itself. All law is the result of a process of crystallising the good sense of mankind into definite rules. But what has been so slow in the matter of the common and criminal law cannot be effected by hasty generalisations in the sphere of industrial relationships, where the matters at issue often represent a tangle in which law, ethics, economics, and politics are inextricably interwoven.