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A GENERAL INTRODUCTION

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"Oh, said the judge,
In robe and fur,
To arbitration pray refer,
This is a friendly suit."

(W. S. GILBERT, *Daymon v. Pythias.*)

An important topic, a new field, a paucity of literature, a controversy—these ordinarily constitute the elements essential for a successful symposium. Then why a symposium on arbitration? True, no one can gainsay that arbitration is important; nor can one fail to appreciate the significance of the increase in its use by American business and trade associations, and of its inclusion in codes as a method that "fair competition" makes necessary for the settlement of commercial controversies. But otherwise the alleged requisites are conspicuously absent.

Arbitration—the ancient Greeks had a word for it, the Biblical disputant utilized it, and throughout all history arbitration seems to have been used and eschewed, damned and praised. Currently, the trade magazines, and scientific, philosophical or just-read-for-fun periodicals are all too crammed with material on the magic arbitration process. A controversy over arbitration—the very word belies the possibility! Why then a symposium; why not relegate arbitration to the realm of used but no longer discussed catholicons such as women's suffrage, Sunday baseball—(or I was about to say the case method of law school instruction, but that could scarcely be done in this REVIEW)? Paradoxically, it is because of the supposed ancientness of the subject, the overabundance of the literature, and the seeming lack of controversy, and because arbitration has been so indiscriminately accepted as an infallible cure for all commercial disputes, that this symposium is presented.

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Any nostrum that can cure all the ills of mankind is to be viewed with a bit of suspicion, not to mention alarm. But such electuaries are generally the biggest sellers, and the louder and more all-inclusive the claims, the more they are accepted on faith, with more pains to the patient, an even greater sale of the remedies, and at last an all too late resort to the physician. Arbitration, according to its professional sponsors, is an almost universal panacea for the peaceful and harmonious resolution of all types of disputes. With enough use of the process, some persons hope that courts will be unnecessary as far as business cases are concerned, except perhaps to compel a recalcitrant to arbitrate or to enforce an award once it has been rendered. Forsooth, with a bit of evolution in human nature and a fortuitous increase in business morality we may be able to dispense even with the latter type of unpleasantness—perhaps we may have courts only for wicked folks who will be deprived of arbitration because of their unworthiness. Silly talk? Perhaps; but read the literature in the field—ghost written publicity in many instances, drafted for well meaning business-men-turned-legopanaceans who see in arbitration a cure-all for court abuse. Read it in the blind selling of arbitration as a commodity, as an automatic insurance against loss in business relations. Fantastic; then recollect that arbitration is held out as a method for fixing wages in labor disputes, and for solving every other kind of problem making for labor unrest, for adjudicating any and all kinds of commercial controversies, tort claims, partnership disputes, family squabbles, and all the other adversary ills with which mankind seems unfortunately afflicted. All these ills are aggravated by the law; all are cured allegedly by this magic nostrum—arbitration. Bear in mind that it is represented as being conducted with speed, economy, unspoiled justice, privacy, and friendliness; with expert logic and without legal logomachy it disposes of cases. And so on *ad nauseum*. If it could but do that we'd need no symposium. . . . "Arbitration", how much that word covers. How helpful can prove to be its speed, its economy, its friendly spirit, its rough-hewn justice by experts who know the complicated facts arising in any ordinary commercial dispute. *But not in all cases*. Courts do have their uses, and a publicly administered system of tribunals is an essential in any democracy.

Analysis, rather than blind hawking of a word (arbitration) is needed in place of the ghost written propagandized selling of a commodity. For there *is* no such commodity.

Perhaps such an analysis will be provocative of a controversy—some will appear in these articles. But at least we may find out when and why we should turn to private and when to public tribunals. The absence of a conflict of views with regard to the type of case, the method of procedure, the kind of law, and the whys and wherefores of arbitration is an unhealthy sign. It is a lazy man's approach, to admit languidly that our courts are bad, that

they will always be that way, and therefore to pass the buck to business and say "arbitrate". The complacent acceptance or insistence by business on arbitration as an easy avenue of escape from the judicial process in all cases shows lax thinking and little foresightedness on the part of the sponsors of the movement or of its business users.

"'Arbitration' is a blessed word, like 'Mesopotamia'. It tinkles pleasantly on the ear, and suggests a quick and short route by which the terrors of the courts may be avoided in every case. This, I am convinced, is a popular illusion, treasured in the minds of many until put to the crucial test."¹

In a serious study of the subject, we should not be deluded by the pleasant tinkle of the word. We must realize at the outset that we are talking about a legal device, a legal tool if you will, but nothing more. This tool we must put to the crucial test. And a crucial test means a comparison with the other tools which serve a purpose similar to an arbitration, *e. g.*, a reference, an accord and satisfaction, a compromise, an attachment, an injunction, a trial, an admission of the antagonists' contention—all of these are legal tools aimed to settle controversies; arbitration is no more and no less than one of them. Each has its advantages and disadvantages; let us see what light this symposium can throw thereon.

The idea that for better or worse business should turn to its own and not to publicly established processes of law is revolting if it is meant to apply to all business disputes. The arbitration device is too important and too worthwhile to be considered a universal panacea, for when ill-advisedly entered into, it can result most disastrously. The recent *Vitaphone*² controversy, wherein the parties admittedly spent \$750,000 on an abortive arbitration, which was followed by court proceedings and an eventual compromise, ought to teach us that the device is not a pleasantly tinkling word and a process always assured of success. We might bear in mind such fiascos as the *Willett-Sears* case for comparative purposes. But when it becomes more and more common for laws to provide for the specific enforcement of arbitration agreements—making arbitration in effect the sole method of settling disputes once it has been agreed upon, and frequently preventing resort to the courts when they are imperatively needed—we can no longer view arbitration as a playful device wanted by capricious clients. The lawyer can no longer pass it off with a shrug of his shoulders. We should no longer have to rely on business articles and non-legal material. We must view a legal problem as a legal problem and not solely as a business device or puzzle, like cost accounting or radio advertising.

1. Sir Fletcher Rylands in BACON, COMMERCIAL ARBITRATION (1928) *Introduction*.

2. *Vitaphone Corp. v. Electrical Research Products, Inc.*, 19 Del. Ch. 247, 166 Atl. 255, 19 Del. Ch. 354, 167 Atl. 845 (1933), *sub nom.* *Electrical Research Products, Inc. v. Vitaphone Corp.*, 171 Atl. 738 (Del. Sup. Ct. 1934), (1933) 47 HARV. L. REV. 126; (1933) 33 COL. L. REV. 1440.

Primarily we should consider just what arbitration is. True, the normal dictionary defines it as a proceeding wherein disputes are resolved by appointees (judges) of the parties' own choosing. The ordinary business writer on the subject has more often chosen to leave the precise field covered by arbitration undefined; and rather to emphasize that it *is* a proceeding whereby disputes can be solved in a speedy, friendly, economic and expert manner. If arbitration must be friendly, speedy, economic and expert, not all arbitrations, so called, would be arbitrations; but there would be no need of further discussion since the panacea for which we yearn would be at hand—assuming that we could find it. Likewise there is a tendency on the part of some to call any proceeding “arbitration” when a dispute is resolved publicly by other than court judges, or even by court judges so long as they are not acting in their judicial capacity: witness for example the Kansas labor *arbitration* experiment, which in places could resemble a quasi-bureaucratic method of fixing wages and hours. Or glance at a trade association disciplining its members by *arbitration*, or ponder over Roget's “submit to arbitration” as synonymous with “compromise”. Consider the efforts of men like Bernheimer, Cohen, and Dayton to develop a system of arbitration at the Chamber of Commerce of New York which does resemble compromise to a great extent—an informal, elastic, highly efficient system which has achieved well-earned popularity; and contrast that with the rigid, trial-like non-compromise type of arbitration developed by the American Arbitration Association which also has had tremendous vogue and good fortune in New York. The latter organization has from time to time, depending on the field in which it has been operating, changed its idea as to just what arbitration comprises. Study carefully Isaacs' fundamental *Two Views of Commercial Arbitration*³ and you will see that it may be difficult to determine the exact connotation of “arbitration”. Therefore the editors have wisely termed the topic of this symposium “Synthetic Courts”. It is true that one way of arousing public support for any movement that can possibly bear the name is to call it “arbitration”. But in this symposium at least we should not be guilty of verbal tomtomery. It is hoped rather that as a result of these articles it will be possible to determine what the term “arbitration” does and should properly include—as well as the whys and wherefores. As a matter of cold dry law the connotation of the term may become important for purposes not at all connected with tub-thumping. For instance, it has been held that an appraisal is not an arbitration, that historical distinctions originally made to make certain types of arbitrations enforceable by calling them appraisals should now be applied to make them less enforceable than “arbitrations”.⁴

3. (1927) 40 HARV. L. REV. 929.

4. Thus the modern arbitration laws are held not to apply to appraisals. *Matter of Fletcher*, 237 N. Y. 440, 143 N. E. 248 (1924). Cf. in general Sturges, *Arbitration Under the Pennsylvania Arbitration Statute* (1928) 76 U. OF PA. L. REV. 345, 357-361; (1925) 34 YALE L. J. 98, *id.* at 109. For the various distinctions between an arbitration and an appraisal see STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 18-42.

Of course none but a student on an examination paper or a court of last appeal can speak with any definite assurance as to what is an appraisal or arbitration. But there is a difference; should it influence our opinion on what is an arbitration?

Most articles on arbitration start with a violent poke at *Vymior's Case*, wherein Lord Coke laid the foundation of the doctrine of revocability of arbitration agreements by holding

“ . . . One bound to an award to stand,
Well the authority may countermand.”⁵

Strange that such a narrow technicality could have had much effect on a grand and glorious method of business reform if business needed it so badly; but no matter—the writer of the article invariably deduces that the failure of arbitration to become more widely used was due in the main to the backwardness of the law in persistently following Coke's revocability *dictum*. Most historical studies attempt to prove that Coke was wrong in his interpretation of the older English cases; most rest content in showing that had he only ruled otherwise, arbitration's history would have been pleasantly different. This tale certainly needs no retelling. The pages recording the facts and decisions of old arbitration cases recount by themselves a history of arbitration and the causes of its failures. We doubt whether business men would have instantly desired to arbitrate cases which they thought should not be arbitrated merely because the law held arbitration agreements irrevocable—perhaps it is because of our nearness to other attempts by law to legislate on questions of morals which the people do not consider *mores*. But history is too important to neglect, it is too significant in any thorough study to be dismissed by crying over spilt milk and blaming the cantankerous Coke for what some think was not such a bad decision, anyhow.⁶ The facts of middle-age arbitration, the story told by the Victorian business men and business records are not devoid of meaning.⁷ When and how did these men turn to arbitration? Did they want the law to help them enforce their arbitration

5. WORREL, REPORTS OF LORD COKE IN VERSE (1742).

6. It has been followed, and supporting reasons for the doctrine are emphasized anew, by many strong modern courts; see, *e. g.*, *W. H. Blodgett Co. v. Bebe Co.*, 190 Cal. 665, 214 Pac. 38, 26 A. L. R. 1070 (1923); *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696 (1904); *Cocalis v. Nazlides*, 308 Ill. 152, 139 N. E. 95 (1923). Such decisions cannot be dismissed by saying the courts are wrong or were actuated by selfish motives to follow precedent blindly. Certainly a doctrine always followed by courts until statutory modifications occur is worthy of some consideration. But *cf.* *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S. D. N. Y. 1915).

7. Interesting comparisons can be found in the introduction to the early legal texts on arbitration law. They seem modern in every respect and show arbitration being used as an escape from judicial trial because of the latter's unfitness for the needs of business, or because of crowded dockets and the inability of courts to take care of the mounting tide of business litigation. See, *e. g.*, the introductions to MORSE, ARBITRATIONS AND AWARDS (1872), or BACON, COMPLEAT ARBITRATOR (1742). The latter is interesting also in noting that the law regarding arbitration is (*sic*) becoming so complex that unless business men and lawyers know the exact steps to take, their proceeding is likely to be invalidated.

agreements and awards, did they yearn for extrajudicial methods of enforcement? Was arbitration to them a method of good business, a temporary substitute for courts, or something to which they turned because they wanted permanent business tribunals and not permanent courts? Does history show that arbitration was availed of only in periods when the law was at its worst; that as a result of business men turning to their own tribunals the law took a new lease on life, improved itself, profited by the processes, and the "law" then developed in business tribunals, so that the business man willingly returned to the fold once the courts had improved? Were the tribunals so successful that business grudgingly abandoned them; or did it do so gladly, voluntarily? An historical study which answers these questions can shed much light on our present problems; or at least it can prove that conditions have so changed that history cannot help us. Or perhaps we will discern legal times and problems like ours; and we can deduce from the experience of centuries the answer to the problem of the place of extrajudicial tribunals in modern society. Business fact is just as important as guesses from legal hunches, especially in any subject so closely allied to business as arbitration. Business history such as Professor Wolaver presents should open our minds to a fuller appreciation of what lies in store for us in any modern attempt to substitute extrajudicial tribunals for the recognized processes of the law. At the same time we must make our comparisons with the many present day facts set forth so frequently throughout the many articles herein—history is continuous and stops only at the time the history is being read.

Nevertheless a proper arbitration law and a proper arbitration attitude must be predicated on modern business fact and modern business viewpoint. There can be no synthesis between law and business if each stands aloof and will not understand, let alone speak, the other's language. What does modern business demand of the law? Wherein does it find our process defective? Does it demand its own tribunals permanently, or as a temporary expedient until the courts improve? Does it really want the law to enforce mandatorily the processes of business tribunals? It is high time for us as lawyers not to guess about business fact or to create it in our own minds for the purpose of obtaining the result we desire. Courts, alas, too often do so, and assume that a carefully prepared statement in a lawyer's brief constitutes, not an argument for a particular case, but business fact in general. We do not need to do that here. We need not depend solely on propaganda written by those who are so deeply interested in the spread of the arbitration movement that they willingly, though perhaps sincerely and unconsciously, close their eyes to all realities and present alleged fact in such a way that one would think that business wants and needs arbitration and nothing else. But on the other hand we cannot dismiss the business man's view of the law with the simple statement that it is wrong. It may be wrong, legally-logically speaking; but

its existence is the important thing, and it is not to be rebutted by legal ideology. We need a synthesis, we need impartial knowledge so that we can combine historical fact and modern business reality to produce good arbitration law and good arbitration advice. Professor Tausch attempts to give us his impartial view of a sane business viewpoint, which is valuable not only for its own sake but for what the law should and can do with it, for the light it bears on extrajudicial problems in general.

Strangely enough, the major accomplishments in arbitration law have been procured, not by lawyers, but by business propagandists. Most Bar Associations have refused to take suggested changes seriously, and have not concerned themselves with the modern arbitration laws, except half-heartedly to oppose them. But these business propagandists treat them as an ideal, a fetish—they want not only their own state but every state to pass them. The business lobbies pushing the bills are too well organized to be stopped by light opposition, too well versed in piquant phraseology to be successfully opposed by any wishy-washy logic—assuming that they should be opposed. It is unfortunate, whether or not one likes the principles of the modern arbitration laws, to see them being passed in their present carelessly drafted form, often inconsistent in themselves, often doing violence to or being contradictory to other statutes in the same state in which they are adopted.⁸ It is even more unfortunate to see the courts, through a myriad of technical decisions, build up a mass of ever-increasing contradictory and puzzling law,⁹ though it has in some instances been dictated by the necessities of the situation. Remember that these laws in effect provide that once parties have agreed to arbitration, the court has no discretion but to compel them to arbitrate, that an agreement to arbitrate under these laws no longer adds arbitration to the possible methods of settling the dispute, but takes away all other methods of court procedure and leaves arbitration alone in their stead.

The ordinary lawyer has not had wide experience with arbitration; and perhaps because the business man has tried to advance the process as an existing reality he reacts to the process *in toto* on the result obtained by it in the individual case. One good result, and he is "sold" on the process; a contrary one, and he will damn it. It is not fair to take such an attitude. We should examine the process and the arbitration laws impartially, ferret out their weaknesses, praise where praise is due, reform where reform is

8. The author has attempted to set forth the state of the statutes in *Rules of Law or Laissez Faire in Commercial Arbitration* (1934) 47 HARV. L. REV. 590, 591-598.

9. But only by a mass of peculiar decisions have the courts been able to make any kind of sense out of the statutes, only by peculiar reasoning have they been able to prevent the gross injustices which would result from trying to apply the law rigidly. See (1934) 47 HARV. L. REV. 699. Many of the technicalities are set forth in the articles herein; others are developed in Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding* (1933) 46 HARV. L. REV. 1258; *Arbitration and Conflicts of Laws: A Study of Benevolent Compulsion* (1934) 19 CORN. L. Q. 197. It is not necessary, therefore, to set them forth in this introduction.

necessary. Legislative committees, composed of lawyers, all too frequently oppose any bill which seems to encourage arbitration, not on its merits or demerits, but because of an underlying fear that arbitration may cut into fees, already diminishing too fast. And this sort of opposition only whets the appetite of the non-legal members on the floors of the legislatures to pass the bills regardless.

When arbitration was first professionalized, its sponsors were rather proud of the fact that an arbitration would make it possible for a business man to settle a case without counsel. Such an attitude was not likely to make arbitration popular with the Bar, except perhaps to those conniving few who recalled the law school ditty which sang praise to the dishonored and misguided text-writer who wrote "Every Man His Own Lawyer". Regardless, or perhaps mindful, of the words of that noble bard who composed the ditty, the sponsors of the movement realized the need of some support of the Bar, even though it be passive. Alas, at times when it becomes a question of taking legal steps, clients do pay more attention to lawyers' advice than to business editorials in trade journals. Turning a right about face, there developed a new "talkey-talk" about arbitration as a "new field of practise"; in fact even a legal mind reading it without thinking too hard might believe that here were offered emoluments far in excess of that proffered by the more dishonorable, disliked and unwanted practise of litigation as therein described. Were not the net fees from arbitration greater than the net fees from a court trial? What lawyer ever profited from a lawsuit? The sponsors of the arbitration laws might have had another argument, which thus far, however, has been kept in oblivious silence. Agree in contracts to arbitrate, and you not only may represent your client in an arbitration, which is analogous to a lawsuit, but also in a motion to compel arbitration and a motion to confirm the award: two cantankerous processes are thus offered to the unscrupulous which do not exist by mere litigation! But no matter; perhaps it may be a bit human for counsel, as well as for clients to whom it is second nature and ethically allowable, to think at times in terms of filthy lucre; but it should not be paramount in his mind. The field of practise is a red herring, a straw man. The underlying social objection to arbitration as it is sold today is not that it deprives the lawyer of his fees, but that it deprives the business man of counsel and advice on matters where he needs counsel and legal advice; it denies the lawyer a chance to advise his client of the gravity of waiving all his rights to trial, to injunction, to provisional remedy, to rules of laws, for a mess of pottage sold in the form of standardized arbitration clauses. The Bar must develop a healthy, sane attitude toward arbitration, based on the intrinsic merits of arbitration in the individual case, and on a desire to serve its clients best, with or without it. From this group of articles it is hoped that a proper

attitude may be developed; one man alone should not attempt to speak for the Bar, but if all speak together a composite attitude can be set forth.¹⁰ The "field of practise" thought may serve as a temporary and isolated palliative; the broad, carefully considered viewpoint is of inestimable value in its relation to the whole.

Upon a wholesome legal viewpoint depends wholesome arbitration laws. The laws before 1920 in the United States have clearly proven unsatisfactory; but despite professional panegyrics the modern laws passed since 1920 have contributed to even greater unsolved difficulties and perplexities.¹¹ The main dispute seems to be over the advisability of mandatory, specific performance of all arbitration agreements. This is primarily a problem for the equity expert, who can draw on the proper legal attitude and the proper legal and business facts while utilizing the complicated, technical mess these modern laws have placed before us, and can supplement it with a sound knowledge of the pitfalls, advantages and rules of equitable enforcement. Professor Simpson does that for us herein, and tries to help us solve the paradox in modern arbitration law, this compulsion of an allegedly voluntary act. There are many legal problems in arbitration law other than the equitable enforcement of arbitration agreements. They pertain to the proceeding itself, the award, the parties, the arbitrators and the extent and method of legal control in general; all raise serious difficulties. The articles which follow should point them out, but Professor Sturges' excellent recent treatise considers them with such characteristic thoroughness that they are not covered in detail in this symposium. It was a problem to choose the topics the editors felt needed the most attention, and this one phase of law treated seemed to be far and away the most pressing problem.

The law can do more for the business man than provide him with good arbitration law; it can in many instances provide rules which will make reference to arbitration unnecessary. It may be that despite the alleged anachronisms in our present day trial, despite its cost, delay, and contentiousness, parties can by proper contractual control over adjective law obtain in regularly organized courts the alleged benefits of an extrajudicial method of settlement. Professor Isaacs sets forth how it may be done; it is for us to decide after analysis its comparative value, and whether it should be utilized in preference to, or in conjunction with extrajudicial tribunals. Certainly it is too important a subject to be dismissed with a bullyish statement that courts will never do. Its connection with extrajudicial tribunals is so obvious that it generally has been erroneously overlooked. Professor Isaacs, with his inimitable method of making the complex easy and insisting on essentials

10. Cf. Phillips, *A Lawyer Looks at Commercial Arbitration* (1934) 44 YALE L. J. at press, for the author's view as to what is a proper legal viewpoint.

11. See, e. g., Skeen, Book Review (1929) 17 CALIF. L. REV. 191; Weidlich, *A Test of Compulsory Arbitration in New York* (1930) 4 CONN. B. J. 95; Legis. (1934) 47 HARV. L. REV. 1036; (1934) 48 HARV. L. REV. 121; SECOND REPORT OF THE TEXAS CIVIL JUDICIAL COUNCIL (1930) 101-109, and the references cited *supra* note 9.

which we all find easy to overlook, has in effect demonstrated that arbitration is but a branch of a larger subject—the contractual control over the method by which our disputes are to be settled.

On the other hand, there must be some contractual control of arbitration law in order to assure a successful proceeding. A bland provision for arbitration will achieve little; even the most earnest proponent of arbitration admits that without provisions for the conduct of the arbitration, its future is likely to be dismal. Provisions in the contract for all contingencies would make an extremely voluminous document, and none but an expert arbitration draftsman could compose it satisfactorily. It is customary, therefore, to provide in an arbitration agreement for the proceeding to be conducted in accordance with certain named arbitration rules, generally of a trade or arbitration association. This assures success—if the rules are well drawn—and also provides an administrative body (generally the association) to care for the many administrative details which are bound to occur at the hearing. Without experienced administration, arbitration is apt to prove unwieldy and most unreliable. How these rules work out in practise is told for us by Mr. Braden, who modestly neglects to mention that the personal element in rules administration is of vital importance. Upon the way he has conducted the arbitration in the American Arbitration Tribunal rests its success; alas, there are few who are capable of thus administering arbitrations. The large number of failures in administered arbitrations shows that poor administration and poor personalities can spoil the device; and the cases cited to show how rules work are always evidence of some failure, else there would be no case.¹² And it does not follow that were arbitration to achieve a much wider vogue than is now its lot the trade association machinery now in existence could stand the gaff. True, an association handling fifty or one hundred cases a year can easily point with pride to the speed of its hearings, its docket always up to date, and its unique personnel of arbitrators. But thrust on that association or any number of them the amount of litigation which is thrust on the courts of New York City, for example, and it is possible that the trade association system would be pitifully inadequate to cope with the problem, and would fall because of its very simplicity. It should not be assumed that a system working for casual, spasmodic arbitrations is the one to apply to a wholesale use by an entire industry. And wholesale uses are provided for in many of the NRA codes, as can be seen from references made in this volume, and from other published documents.¹³ Serious thought

12. "There is irony in the fate of one who takes precautions to avoid litigation by submitting to arbitration, and who, as a reward for his pains, finds himself eventually in court fighting not on the merits of his case but on the merits of the arbitration. And when we mass hundreds of thousands of situations in which the courts have passed on arbitrations . . . unless we lose all sense of realism the total result is a monumental tragi-comedy." Isaacs, *Book Review* (1930) 40 *YALE L. J.* 149.

13. Cf. KELLOR, *ARBITRATION IN THE NEW INDUSTRIAL SOCIETY* (1934), reviewed in (1934) 34 *COL. L. REV.* ; (1934) 48 *HARV. L. REV.* 141; (1934) 83 *U. OF PA. L. REV.* .

must be directed to a proper system for wholesale arbitration; much attention needs to be directed to find the proper channel, if any, for its future development. Herbert Shaffer, Esq., of the Cincinnati Bar, has made a unique suggestion of a neutral lawyer acting as a "commissioner" in arbitration to tend to procedural administration in accordance with state or section wide arbitration rules.¹⁴ The proposal is worthy of mature consideration.

The scope of rules—and of arbitration in general—is at present hazy and undeveloped. Should "arbitration" be functionalized and differ from trade to trade? Or should it differ in the particular result we wish to achieve through it? Upon thought it becomes obvious that arbitration's use, type and success bears close relation to the subject matter and the type of case involved. Professor Sturges, before being called to New Deal service, was to have given us a picture of arbitration as it could be used in debtor's estates, and for credit purposes.¹⁵ Unfortunately government duties prevented his contributing, but the topic is significant, and a functionalized picture of arbitration when it appears will be a real contribution. The use of arbitration in one field might seem to be a narrow specialized topic; actually it may well be that it is blazing the trail for many worthwhile studies in the future. After all, when one stops thinking of arbitration as a generalized idea in terms of pretty pictures and startling shibboleths; when one realizes that it has its limitations as well as its uses, that it is a specialized tool for specialized cases, specialized studies are bound to come to the fore. In fact, we are bold enough to predict that they will become the practical form in any pragmatical development.

In this connection Mr. Oliver's definition of the ends and aims of arbitration in labor controversies is most instructive. It gives us a sharp jolt—and a proper one—to realize that arbitration in labor disputes and in commercial disputes serves different means and different ends. A proper definition and viewpoint of industrial arbitration is of paramount importance in shaping industrial relations. Its similitudes and dissimilitudes to commercial arbitration are instructive to us here, not merely for comparative purposes, but to help us shape fundamental industrial policy. Some of the state "arbitration" acts exempt or include labor as well as commercial arbitration. Mr. Oliver's work should cast much light on the wisdom thereof. His frank attitude in telling us what is on his mind as being important from the employees' viewpoint cannot be dismissed with a statement that one does not like it; he knows the attitude and it is upon this attitude that we must act. His building of a labor policy upon public, rather than private interests of either employer or employee cannot be condemned by any thinking individual,

14. BATES, PRACTISE, PLEADING, PARTIES AND FORMS (4th ed. 1932) 809.

15. Cf. Billig, *What Price Bankruptcy: A Plea for "Friendly Adjustment"* (1929) 14 CORN. L. Q. 413; *Extra-Judicial Administration of Insolvent Estates: A Study of Recent Cases* (1930) 78 U. OF PA. L. REV. 293; *A Realistic Approach to the Study of Insolvency Law* (1931) 16 CORN. L. Q. 542; Phillips, *A Business Tribunal for Corporate Reorganization* (1933) 11 HARV. BUS. REV. 178; Note (1930) 30 COL. L. REV. 1025.

and as one can gather, "public" does not mean the particular class to which one belongs. And this public interest is what marks a differentiation between arbitration in labor disputes, and arbitration in commercial controversies in many cases.

Withal, it can be seen that the lawyer's task in arbitration is complicated and difficult. The proper viewpoint may help build good law, but in addition to that a good working knowledge of the "tricks of the trade" and the pitfalls that exist are essential to advising and helping clients. These Mr. Fraenkel gives us. We should know how to prepare and conduct an arbitration; we must know how to serve as well as to philosophize. Mr. Fraenkel approaches the problem from an enforcement angle. There is another angle, however, which has not been touched: the avoidance approach. There are many cases where clients have been forced to agree to unfair arbitration provisions, often being sold these general arbitration clauses under the delusion that they were buying a short, speedy, friendly, cheap, and expert method of obtaining justice. There are instances where arbitration simply will not provide that; where courts are needed; where an arbitration clause is being used for dilatory chicanery and not for justice. The lawyer must know here how to avoid these provisions by perfectly ethical methods. He must know how to speak in terms of the individual case, and not abstract justice, speed and economy, in obtaining court trials as well as arbitration. To us it is far more unethical for a lawyer to allow his client to place an arbitration clause in his contract without warning him of the dangers and pitfalls which he may encounter, far more unethical to remind him, after he has agreed to arbitrate, of the Sunday School merits of arbitration and advise him to obtain justice by an arbitration which may not be able to provide it in the individual case, than it is to try to obtain a trial at law for him in a case for which arbitration is an ill-fitted remedy and in which court relief is imperatively indicated. The limitations of which Mr. Fraenkel reminds us, should be borne in mind.

The future of extrajudicial tribunals is an open question. We can profit immensely from the wide experience of many years of using arbitration in England; we are but babes in arms compared to our Anglo-Saxon brethren in that respect. Mr. Nordon's narration of the English experience should prove of more than passing import. Many have tried to give the impression that our modern arbitration acts are but copies of the English law. In truth they differ in almost every important particular.¹⁶ But what experience the British have had under their law can point the way to improvement in ours, while we are in the present law-developing period in arbitration.

Perhaps extrajudicial tribunals are but a flighty development, a temporary expedient of a business world impatient with the tools provided by law. Perhaps they are a quasi-permanent—for nothing can be truly permanent—solution to the difficulties constantly arising because of our fast moving economic life. Perhaps extrajudicial tribunals will be absorbed as was the

law merchant. Perhaps from the extrajudicial tribunals the law will learn the needs of business, take the best therefrom and incorporate it in our legal system so that thereafter business will no longer need to turn to its own "courts". Certainly, we feel, the legal order is capable of furnishing business-like courts and business-like law. Certainly we feel the business man will not complain if we take away the dilatory chicanery in our practise, which he condemns publicly, but expects and asks his counsel to pursue every time he happens to be a defendant in an action. Certainly we trust that the law will be broadminded and far-sighted enough to synthesize the best that business can offer us with already existing legal problems. But regardless, the symposium should give some idea of the problems presented by an extrajudicial system of tribunals, and strip a serious subject of the ballyhoo foisted upon it. True, it can but touch the surface. But it can point the way for honest future research. It should be read with an open mind. And with an open mind the Bar should approach the business man's substitute for our regularly established legal institutions. Only then can it judge its merits and shortcomings; only then can it improve its own failings. And perhaps if the Bar will adopt an open mind and fairly analyze, business can be persuaded to do likewise, and see that our shortcomings cannot be overcome by constant nagging, but may be by thoughtful, helpful analysis of the difficult problems which face us. Perhaps business can adopt a legal viewpoint on legal problems—at least semi-legal enough so that it will cease trying to sell us its substitute by advertising methods and tub-thumping and meet us with straightforward logic and honest fact. If the symposium can but teach a proper attitude, can make us all see that there is a difficult problem and see it with an open mind, it shall not have failed in its purpose.

NOTE: The article by CHARLES L. NORDON, ESQ., cannot be published in this issue due to an unavoidable delay, occasioned by the awkwardness in communicating with MR. NORDON in London. The Editors feel the article is of such value that it will be published in the January issue of the REVIEW.

16. The British law devotes itself more to providing an adequate procedure for arbitration and less to rigid enforcement than do our modern American acts. Note that the enforcement of arbitration agreements is entirely discretionary with the courts in England, and further that their act makes no provision for compelling arbitration by direct court order. The Arbitration Act of 1889, 52 & 53 VICT., c. 49 (1889), as modified and added to by the Arbitration Act of 1934, contains several valuable features which could be well copied by our American Acts; for example, provisions for removal of arbitrators—not provided in any of our acts; provisions to make for speed in arbitrations—apparently unknown in the states; an improved method for obtaining court advice on legal rules—abhorrent to the sponsors of the American acts; provisions for interest on awards—the cause of many American difficulties; interim awards—which are often so necessary in business cases, but prevented under American decisions in the "Draft Act" states; a clarification of the differentiation between arbitrator and umpire—a matter upon which the American law is in a hopeless jumble; providing for such things as discovery and interrogatories—not permitted here; equitable enforcement of awards—a subject upon which doubt exists in America, *etc., etc.* We think it is clear that if there were less attention given by the American proponents of legislation to fanatical enforcement provisions and more to building up sound procedural requirements and permissive authority in arbitrators, clarifying the law so that it fits modern needs and business conditions, arbitration's future would be much more stable than it now is, and the entire subject much more satisfactory.