Arbitration and Business Ethics, by Clarence F. Birdseye

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Hebrew law that commanded the release of every debtor every seven years, the Constitutional Convention authorized the Congress to establish Bankrupt laws.

Weights and measures, counterfeiting, post offices, post roads, patents, copy rights and trade marks, inferior courts, piracies, and other subjects are covered in the grant of legislative powers, and then we come to the general grant of all powers necessary to carry into execution those specifically granted, an unnecessary grant perhaps, but quite proper in order to silence captious objections. This made the Constitution on its face adaptable to all times and to all circumstances. The first application of this clause came when President Jefferson, the strict constructionist, who, as John Quincy Adams said, “came in blowing a trumpet against implied powers,” put through the purchase of Louisiana to “provide for the common defense and general welfare” by opening to the traffic from the interior the mouth of the Mississippi. It was under this clause that the national banking system was established which culminated in the Federal Reserve System, probably the greatest banking system the world has ever known and under which currency and banking have been stabilized and the purchasing power of wages has increased about twice as much as in the quarter of a century immediately preceding the system’s establishment.

Only that part of Mr. Norton’s book which treats of Article I of the Constitution—that part treating of legislative powers—has been discussed in this review, but enough has been said to point out the plan of the book. It is not possible within the scope of a review of any reasonable length to give an adequate estimate of the excellence of the book. It ought to be in every American’s library.

William A. Pickens.

Of the Indianapolis Bar.

ARBITRATION AND BUSINESS ETHICS*

This is a book for the lawyer and the layman. It is a layman’s book inasmuch as it is written in non-technical language and undertakes to present the apparent advantages of settling a dispute by arbitration rather than in the common law courts. It is a lawyer’s book inasmuch as it reveals to the lawyer that one chief object of the business man is to get a dispute decided

quickly with as little friction as possible, and that he is likely to find neither speed nor technical commercial knowledge in the regularly constituted courts. The lawyer will find no exposition of the rules and principles of common law or statutory arbitration, but it is to be hoped that he will observe some phases of our legal justice that the layman deplores. Mr. Birdseye suggests that in most commercial disputes the layman is concerned about privacy and speed and decisions by men who are experts in determining the facts of commercial disputes, rather than the wearing publicity of a public trial, the delay, expense and uncertainty of our courts as now constituted and the assurance that even if he wins his case he will probably be the loser in alienating his opponent's business, in paying big fees for a long trial in court, and in getting justice only after such a struggle that much of its benefit will have been dissipated.

The author asserts that strict commercial arbitration involves voluntary arbitration among members of a single trade and that such trade organization is rare in modern times. He feels that it is most important, however, since there an *esprit de corps* may be built up and the same machinery which operates the arbitration proceedings can go a long way in preventing a dispute from coming to arbitration at all. Mr. Birdseye is sanguine that if trades in homogenous products would adopt such an arbitration arrangement within their organization there would be very few actual arbitrations since most difficulties would be cared for through conciliations, and the point of direct antagonism would never be reached.

The author has very little use for common law arbitration and he accepts the conclusion of Mr. Justice Hand and Mr. Julius Henry Cohen that the doctrine of the revocability of submission in arbitration contracts hinged upon the agency theory and that there was no reason to hold that the arbitrators were agents of the parties who appointed them; unless it was to make every arbitration abortive and secure just so much more business for the regularly constituted courts. Mr. Birdseye does not explain the ways in which common law arbitration was clearly improved by rules of court and by legislation under William and Mary and Queen Victoria.

The book is readable and entertaining although somewhat repetitious. It does not purport to be a legal treatise with footnote references for its many positive statements. It is certain the book is stimulating alike to layman and lawyer; it points out certain homely truths which lawyers are inclined to slight. For instance, it shows that courts exist for man,
not man for courts, and that, if the public cannot get efficient justice from the courts, it is going to try something else.

Mr. Birdseye brings considerable evidence to prove that many businesses have found commercial arbitration to be an excellent substitute for the regular courts in disposing of commercial disputes. The author does not discuss the merit of making the award in arbitration proceedings subject to review in the courts on questions of law. He does state that arbitration statutes should govern the submission of future disputes as well as disputes then pending. There is no discussion, however, of either point.

The appendices are perhaps the most useful part of the book. They contain a great deal of valuable reference material governing specific forms of arbitration agreements and illustrations of the great service which commercial organizations can render in providing facilities for arbitration among their own members.

The subject of the book is correctly indicated by the title, Arbitration and Business Ethics. The author is prompted by a sincere conviction that the more extensive use of arbitration, especially of the voluntary kind in individual trade organizations, will improve the standards of business ethics. He gives a great deal of evidence to show that arbitration machinery in such trades eliminates friction and causes men to live up to both the letter and spirit of their contracts without seeking to take unfair advantage or to win concessions by threatening long and expensive litigation. It seems to the reviewer that he has proved his point and that he has done a real service both to the legal profession and to the commercial world in presenting a method by which some of the needless animosities, unethical conduct and waste may be eliminated from the business world. In addition to furthering the ethical concepts which Mr. Birdseye wishes to advance, it would be a great practical advantage to business men and lawyers if they were familiar with the content of this book.

The book does not purport to be a treatise upon arbitration law itself. The last attempt to write a full consideration of the law of arbitration was made in 1872, when John T. Morse, Jr., published his "The Law of Arbitration and Award." In spite of the fact that our arbitration law is now so rapidly changing, it seems unfortunate that no thorough treatise on this subject has been written in recent years. Of course in England they have a much more extensive use of commercial arbitration than

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1 Law of Arbitration and Award, by John T. Morse, Jr., Boston, 1872.
in this country and there they have the monumental work of "Russel on Arbitration," of which a tenth edition was published by Alfred A. Hudson in 1919. All ten editions of this exhaustive book have been of great value to the legal profession for many years and the periodic new editions bring it up to date for current use. Is it not time that we have some comprehensive treatment of the subject in America? The permanent importance of arbitration law as a branch of legal procedure cannot be doubted; if an exhaustive book were written now the changes that may occur even in the near future could be covered in later editions or supplements.

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NOTICES

(These notices are preliminary; they do not preclude reviews later.)


This volume consists of a series of addresses delivered before the association of the bar of the City of New York. The various papers are by James N. Rosenberg, Allen Wardell, Charles M. Hough, Robert Swaine, Benjamin N. Cardozo, Learned Hand, Hampton L. Carson, Francis J. Swayne, Carlos C. Alden, Sir John W. Salmond, Rt. Hon. Charles J. Doherty, Henry M. Powell, Augustus N. Hand, Willard Bartlett. The subjects of the address in the order of the authors just given are: Reorganization, The Next Step (dealing with reorganization of the corporations that have become insolvent or financially embarrassed), The Review of Criminal Causes in the Courts of the United States, Progress in the Law: A Ministry of Justice (this address was printed in the Harvard Law Review, Vol. 35, p. 113), The Deficiencies of Trials to Reach the Heart of the Matter, James Kent, Can We Improve the Sources of Our Law?, The New Civil Practice Act and Rules (Under this title are printed a series of five addresses by the Dean of the Law School of the University of Buffalo dealing in detail with the new court provisions governing civil procedure in New York State), The Literature of Law (in which the distinguished New Zealand jurist makes a plea for the codification of the common law with provisions so that common law precedents antedating the time of codification should not be recognized after codification), Canadian Constitutional Law, Taxation of Corporate and Personal Income in New York, A Sketch of Constitutional Law in America, and The Court of Appeals and Its Predecessors (which refers to the highest judicial court in the state of New York).