

a lawyer would approach them in commencing an action. By introducing those concepts early, however, they have overcome the difficulties to a large extent, and have presented a large collection of materials on process, venue and jurisdiction which should be very valuable for class-room use.

When we turn to "Trials" and "Appeals" we find a different situation. As pointed out at the beginning of this review, only 117 of 843 pages have been allotted to "Trials"—one chapter out of nine! It is difficult to see how this can be considered in any sense an adequate treatment of trial practice. The same is true of "Appeals." Whole areas of these important fields are entirely omitted; others are dealt with summarily in scanty sections of text. The treatment seems to be good as far as it goes, but it lacks much of going far enough. Much of the material on "The Place of Trial" should be eliminated to make room for topics in the fields of trial and appellate practice. Even Chapter I with its excerpts from "The Symbols of Government" should be sacrificed to provide the necessary space.

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The Arbitration Journal—Volume I, No. 1. Published quarterly by American Arbitration Ass'n. New York, January, 1937. Pp. 431. \$5.00.

It is entirely fitting that the first number of this compact quarterly should devote some eighty pages to "an analysis and exposition of the modern practice of commercial arbitration" and but twenty or so to the discussion of the sanctions in statute and case law upon which such practice depends. The "arbitrative attitude" has from the first emphasized that, apart from private settlements, the ideal disposition of a legal controversy is to consult a "good-will" tribunal where disputes may be decided with the minimum of delay and expense and the maximum of emphasis upon the merits of the case. Too many lawyers, delighting in some technical nicety of procedure or substantive law, forget that whether the litigant seeks justice or a run for his money the facts constitute ninety per cent of the case. To such this periodical offers little. To those especially interested in arbitration practice, whether as laymen or attorneys, the *Journal* offers much in the suggestive analysis of systems, local and foreign, which they may well find applicable to their own problems. They should also be aided by the intelligent discussion of new problems raised by statutory changes and current legal decisions. To the legal practitioner with an occasional arbitration question the *Journal* should supply a growing encyclopedia of modern arbitration law and standard practice. In this connection I would suggest that an occasional supplement of modernized forms might well be published. To the layman the *Journal* should be an advertisement and beacon of hope calling attention to the 7000 members of the National Panel of the American Arbitration Association who are on call to render unpaid expert service as arbitrators.¹

The editors propose² that each number of the *Journal* will contain on the practice side articles on American and international arbitration, an inter-American section which will be reprinted in Spanish for distribution to Latin-American countries and a symposium describing the use of arbitration in some one significant field. Of growing

¹ Floyd B. Odum, *The National System of the American Arbitration Association*, p. 6.

² P. 2.

use to the practitioner will be the summary of Periodical Literature³ on arbitration matters and the book reviews which should furnish an excellent source for those seeking technical or legal bibliographies on the subject. Of less use other than as an arbitrator's social register, seems the list of Outstanding Addresses.⁴

Arbitration in insurance furnishes the subject matter for the first symposium. Its most interesting feature is the contrast between the success of inter-company arbitration of subrogation claims⁵ and public apathy to arbitration of casualty claims generally. In the latter class, in spite of pressure from the President Justice of the Municipal Court of New York, in 3915 cases submitted by insurance companies for arbitration, as of Nov. 30, 1936, 1497 plaintiffs or their attorneys refused to consent to arbitration.⁶ At first sight we would tend to agree with Mr. Stanleigh P. Friedman that the insurance companies have thus, in the opinion of the writer, refuted the charge of bad faith which was frequently brought against them in our courts and in reports dealing with the subjects, that they sought by improper and unethical methods, delay and procrastination to wear or tire out their opponents so as to effect settlements on starvation terms; that such delays were most effectively secured by demanding jury trials in courts already overwhelmed with congested trial calendars.⁷

Indeed there is grave danger that plaintiff's attorneys on relatively small⁸ claims are too prone to regard costs as a factor in income. If they have taken a larger claim upon a contingent fee basis, they tend to prefer the chance of a large verdict to the certainty of a small award.

On the other hand Mr. Friedman himself concedes⁹ that a Report of a Special Committee of the Board of Justices of the Municipal Court stated that "ninety-five per cent of the demands for jury trials are made by defendants" and refers to the Annual Report of the President Justice in 1930 stating that "one can reasonably infer the cause for the demands for jury trials on the part of the defendant is to a great extent to delay the inevitable day of judgment." That the insurance companies are not wholly blameless is suggested by New York's able Superintendent of Insurance¹⁰ when he says:

So far as insurance is concerned the main difficulty to be overcome is to get the companies to submit a larger number of cases and to secure the consents of the plaintiffs' attorneys. While 43 companies are cooperating, only about half a dozen of them refer a substantial number of cases to arbitration. Many of the companies pick a few cases here and there which they think may be desirable to arbitrate from their own point of view. This will never get us anywhere. The practical way to break the jam is for each of the companies participating to submit a substantial number of "run of the mill" claims for arbitration. If this were done and continued for a number of years we should definitely know whether arbitration is so efficient and effective that it can in a large measure supplant trial by court and jury.

³ P. 112.

⁴ P. 114.

⁵ Mr. Beha, in *Good Will among Insurance Companies*, pp. 43, 46, indicates that out of 634 claims submitted since the inauguration of an arbitration plan, 416 have been settled, 218 arbitrated, none appealed.

⁶ Friedman, *Relief for Injured Persons and the Courts*, pp. 25, 29-30.

⁷ P. 29.

⁸ The jurisdiction of the New York Municipal Court is limited to claims of \$1,000, interest and costs.

⁹ P. 27.

¹⁰ Louis H. Pink, *Arbitration or Law Suits*, pp. 32, 37.

Another cause of public apathy in both large and small claims may be the distrust of attorneys and plaintiffs once bitten by the umpireage¹¹ system of arbitration. Under this system each side selects a paid arbitrator and, if they cannot agree, they select a paid umpire. It is only natural when the umpire's findings of facts and figures coincide with those of the insurance company's arbitrator, as they too often do, that the individual claimant should feel that the umpire has favored the side most likely to employ him in the future as arbitrator or umpire. Two of the shorter articles on "Should Arbitrators Be Paid," one representing the English viewpoint that "the laborer is worthy of his hire,"¹² the other commending the American Arbitration Association for its National Panel of unpaid experts on call to act as disinterested three man courts,¹³ point up this problem. Plaintiff's counsel who have received an award of \$7,000 for a \$30,000 house gutted by fire and then been denied relief¹⁴ "as for a total loss" when the Building Commissioner has ordered it torn down as too dangerous to repair have nothing but a wholesome fear of the umpireage system. It is to be hoped that arbitration of the modern type will dispel this attitude.

The leading article¹⁵ on the law side of the Journal is directly related to the insurance symposium. It traces the development of the distinct concepts of appraisal and arbitration. It emphasizes the alleged unfortunate effect of that distinction under modern statutes. Where originally the appraisal was countenanced by the courts as a device to avoid the rule that arbitrations are contrary to public policy, the distinction is now interpreted by the courts to deny to appraisals the efficient statutory enforcement granted the arbiters' award. So long as appraisals are carried out under the umpireage system it seems to the writer that the practice of the insurance companies needs more reformation than the attitude of the courts.

All in all this combination of law and business practice should be a welcome addition to both the fields of economic and legal literature. It should encourage those who feel that only through an appreciation of economic, social and business practice can there be an adequate approach to legal problems.

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BOOK NOTES

THE ULTIMATE POWER. By Morris L. Ernst. Garden City, N.Y.: Doubleday, Doran & Co., 1937. Pp. xv, 326. \$3.00.

This book, intended to be a best seller, is an impassioned appeal by a New Deal lawyer for some reform to curb the power of the Supreme Court. It is another in the

¹¹ Sir Frederick Pollock in a congratulatory message to the new Journal characterizes this practice as follows: ". . . there is reason to think that the provisions for arbitration in existing commercial contracts are too often imperfect or out of date, such as the old-fashioned form of reference to two arbitrators and an umpire." Pp. 4-5.

¹² W. E. Watson, p. 18.

¹³ John S. Burke, p. 21.

¹⁴ Contrast *Midwood Sanatorium v. Firemen's Fund Ins. Co. of San Francisco*, 261 N.Y. 381, 185 N.E. 674 (1933), rearg. denied, 262 N.Y. 469, 188 N.E. 24 (1933), with *Rutherford v. Royal Ins. Co.*, 12 F. (2d) 880 (C.C.A. 4th 1926) and other cases collected in 49 A.L.R. 817.

¹⁵ Kupfer and Danziger, *Appraisals under Arbitration Laws*, p. 92.