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PROGRESS IN VOLUNTARY TRIBUNALS

Resolved, That while in full sympathy with the various movements on foot throughout the country looking to a simplification of our methods of court procedure and other reforms in the administration of justice in the regularly constituted courts of this country, we believe that an effort should be made by members of the bar to encourage the settlement of private differences which give rise to civil actions before tribunals voluntarily selected by the parties, that the practice by members of the bar of selecting fellow-members in good standing to act as arbitrators in such causes presents a safe, speedy, inexpensive method for the adjustment of such differences, the principles of which have long been recognized and encouraged by our jurisprudence, and ample provision for which exists in our statutes on arbitration."

The writer in the Spring of 1914 appeared before the bar associations of St. Louis and of Kansas City, and, at the annual meeting the following September, of the State (see Published Proceedings Mo. Bar Ass'n, 1914) in advocacy of the trial of civil suits by lawyers before lawyers of their own choosing. The foregoing resolution was adopted by the St. Louis and Kansas City Bar Associations at the conclusion of the addresses made. The settlement of differences by statutory arbitration, where the arbitrator chosen was a lawyer, was not unknown. What the writer contended for was the recognition and voluntary adoption by lawyers of this method of the adjudication of private differences which gave rise to the ordinary civil actions, as a *distinct procedure*—not as a mere device for avoiding the expense and delay of the ordinary court procedure, not simply as an expedient

for relieving our overburdened courts, but as a truly evolutionary advance in legal procedure, a building upon and preserving all that is permanently good in the past history of jurisprudence on its procedural side. The underlying principle of the proposed procedure is that *private* differences should be *privately* settled, that the State should function in matters of public concern alone, and that so far as our state courts and their attendant machinery are concerned, their true function is to adjudicate questions in the decision of which the community has an interest distinct from that of the individual whose rights may be directly involved. The writer in the addresses referred to, after distinguishing between adjective and substantive law, attempted to trace the development of the two streams of adjective or procedural law which flowed respectively from the conciliatory spirit of the orient, reaching its perfection in the procedure of the Roman Law, and that which took its rise in the fighting spirit of the Anglo-Saxons, from which we have our modern trials before juries with advocates representing the contending parties (contrasting the Oriental custom of sitting *dharma*, where the creditor fasted in front of his debtor's door, until his debt was recognized and paid, with the Anglo-Saxon procedure of wager of battle), and showed that the proposed procedure was a coalescence of the two—the non-professional arbitrator or *praetor* of the Roman procedure becoming the professional judge, and the *juris consulti*, who instructed their clients as to the law of their cases, stepping into the open and becoming the trial lawyers.

The writer was content to leave the matter here, confident that if the procedure suggested was, as he thought, the next step forward in an enlightened jurisprudence, a development along the lines indicated would sooner or later be witnessed. It came sooner than he expected. The Chamber of Commerce of New York had long had its Committee on Arbitration, as have most of the exchanges of the country. In its report at its 148th annual meeting, held May 4, 1916, it presented a review of its work during the preceding year. In this report it was said: "For a great many cases, the Chamber, through its Committee, furnishes the only machinery for satisfactory settlements. The only other available method is resort to the courts, with its heavy toll of time, inconvenience and expense, or possible submission grudgingly to what one party or other regards as a piece of injustice," and expressed itself as feeling certain that the Chamber "will cordially approve what we regard as a memorable step forward. We refer to the co-operative movement between the New

York State Bar Association and your own Committee on Arbitration.' And they report that they had made the suggestion in a letter dated October 6, 1915, to the New York State Bar Association "that, under its auspices, the New York State Bar Association establish a system of arbitration, whereby lawyers will act as arbitrators for the settlement of disputes among laymen on lines analogous to those followed by our Chamber."

In the Report of this Committee on Arbitration to the Chamber at the meeting held May 3, 1917, it reported as follows: "One of the most encouraging features of the past year's work is the marked recognition, by the legal profession, of the value of our method of settling controversies." And said further: "The co-operation of the legal profession is coming in three ways: First, in the legal validation of all contracts, by which parties agree to submit to arbitration questions that may arise out of the contract. Second, in legislation making it practicable to obtain, incidental to an arbitration, a court ruling on any legal question that may arise. Third, *in the appointment of lawyers as arbitrators*, thus enabling the arbitrators to pass on questions of both law and fact." And it reported that, at the last annual meeting of the New York State Bar Association "the plan of having an official list of lawyer-arbitrators, with a system built upon our experience, was unanimously approved by that Association, and our organization and the New York State Bar Association are now working in co-operation." "We think," continued the report, "that it is true today that there is developing a wider feeling on the part of business men generally that the honorable and manly policy to pursue in the event of a commercial controversy is to endeavor to adjust it, if it can be adjusted, without resort to the courts; and, even in cases where recourse to the courts is necessary, to deal with them in a friendly spirit, not with hatred or acrimony, but with a desire to preserve good will and sound commercial relations."

In the published address before the Missouri Bar Association the writer had used this language: "Simple, dignified, honest, conciliatory and democratic, I submit it offers one solution of the vexed question of procedure, so far as it applies to the determination of private differences which give rise to the ordinary civil actions which choke our courts."

As a result of the co-operation of the Chamber of Commerce and the New York State Bar Association, a joint Committee was appointed which prepared and published Rules for the Prevention of Unnecessary Litigation, which were approved by the Chamber of Commerce No-

vember 2, 1916, and by the New York State Bar Association January 13, 1917. These Rules are of the greatest value to business men and to lawyers and will well repay study and observance. Part I was directed at the prevention of litigation at the source, i. e., to the making of contracts, wills and other instruments, and to the seeking advice of counsel. Under Part II of the Rules, which part aims at the prevention of litigation after the facts become fixed and before suit, the following rule was formulated: "Rule IX. When negotiations fail to settle a dispute, submit the question to arbitration and abide by the decision of the arbitrators." And several forms of arbitration, as, one, informal; two, under the code; three, under the auspices of a commercial body, or, four, under the auspices of a bar association, are pointed out, and it is said: "Where the sole arbitrator is a lawyer, or where the submission provides that a lawyer on the board of arbitrators shall be the sole judge of the law, there is no reason why any question of law or fact, involving property rights, should not be arbitrated, provided the parties interested are of full age and sound mind. In arbitrations involving technical questions, whether in law or special lines of business, experience has shown the advantage of selecting as arbitrators persons in that particular line of business or otherwise familiar with the trade customs or technicalities involved." And the announcement is made that provision has been made for arbitration under the auspices of the New York State Bar Association, as follows: "Following the example of commercial bodies, the New York State Bar Association has established under its auspices a system of arbitration which it deems practicable for lawyers to recommend to clients wishing to settle their disputes by arbitration. With one or more lawyers sitting in each case, arbitrators are enabled to pass upon questions of law as well as questions of fact." And referring to the rules governing arbitration the Committee in its report says: "These rules have been prepared simply with the idea of making it easy for opposing lawyers to submit their clients' differences to another *lawyer* of their own selection whenever they and their clients shall think it best to do so." And in the Committee's Report for 1918 it reports the compilation of a list of about 1200 names of lawyers, members of the Association, as willing to act as arbitrators, since which the classified list has been published as "Official Arbitrators of the New York State Bar Association." This list contains the names and addresses of lawyers of each of the nine Judicial Districts into which the State is divided, both general practitioners and specialists.

In 1918 Mr. Julius Henry Cohen, who had been the advisor of

the Chairman of the Committee on Arbitration of the Chamber of Commerce of New York, published a scholarly work on "Commercial Arbitration and the Law" (D. Appleton & Co.), in which the author devotes a chapter (Chap. II) to the efforts made for the prevention of unnecessary litigation, and refers to the 1917 Report of the Committee of the New York State Bar Association and says: "*Earlier, and in 1914, Percy Werner, a member of the St. Louis Bar, wrote concerning the desirability of lawyers as arbitrators. . . . 'Where parties having a private disagreement which they are unable to settle, resort to lawyers who are likewise unable to bring about accord and satisfaction, these lawyers shall elect among their fellow members of the bar a judge before whom to try their case, following the statutory form for arbitration. Their agreement of submission, stating the subject-matter of the controversy, with, of course, sufficient certainty that it can always be used in support of proof of res adjudicata, constitutes the only pleading in the case. Mere matters of procedure, as to time, place and manner of trial, are regulated by the attorneys and arbitrator, or controlled by the latter, as may best suit the convenience of all concerned.'*" Mr. Cohen's book is a most interesting and valuable history of commercial arbitration and contains a strong and convincing attack on the rule of our courts, following a dictum of Lord Coke, in holding that the delegation of power to an arbitrator, and thus an agreement to arbitrate, was revocable, as well as on the holding of our courts that parties cannot by agreement operating in the future oust the courts of jurisdiction, and shows that our courts show a disposition to correct these judicial errors, as he contends them to be. Of course, these decisions only affect the procedure so far as they touch the right parties to agree to arbitrate future differences, and to recede from arbitrations prior to an award by the arbitrator. It has uniformly been held that an award of an arbitrator, whether the result of a common law or of a statutory arbitration, would be enforced by the courts. But it is to be hoped, in the interest of honesty and fair dealing, that the old rule as to the revocability of an agreement to arbitrate will, if it be not abandoned by our courts, be changed by appropriate legislation. Such a bill was in fact introduced by the Committee on Arbitration (formerly the Committee on Prevention of Unnecessary Litigation) at the 1917 session of the New York State Legislature, but failed of passage owing to war conditions (see Report of Committee January, 1919). And, in this connection, attention is drawn to a section of the chapter on arbitration of the Revised Statutes of Missouri (Chap. VII, Sec. 868, R. S. Mo. 1909), which reads as follows:

“Agreement To Arbitrate No Bar To Suit.—Any contract or agreement hereafter entered into containing any clause or provision providing for an adjustment by arbitration shall not preclude any party or beneficiary under such contract or agreement from instituting suit or other legal action on such contract at any time, and the compliance with such clause or provision shall not be a condition precedent to the right to bring or recover in such action.”

The Missouri statute of arbitration was adopted in 1835, and continued practically unchanged since then. The section just quoted was adopted by our legislature in 1909. It is a blot upon our statute book. There is no reason, no sense, no excuse for it. If we could but learn the truth about its formulation, introduction and passage, much valuable light might be thrown on our American legislative methods. In view of the fact that almost all important private contracts made to-day, including insurance contracts, railway construction contracts, building contracts, leases, grain contracts and contracts between employers of labor and labor unions, contain provisions for arbitration, and in view of the strong public policy which supports such agreements, it is safe to say that it does not represent the public will crystallized in legal enactment. Why should we render *void* fair and honest efforts of parties to a contract to provide for a speedy, inexpensive and conciliatory settlement of differences arising under their contracts without resort to the courts or expense to the public? This section should not only be repealed, but, to the contrary, agreements to arbitrate should expressly be made irrevocable after they have once been fairly entered into.

The Missouri arbitration statute recognizes the right of a party to revoke a submission to arbitrate at any time prior to the final submission to the arbitrators upon hearing for their decision, but provides that the party so revoking shall be liable to an action by the adverse party to recover all the costs, expenses and damages, including attorney fees, in preparing for such arbitration. In the case of *State ex rel. Kennedy v. Merchants' Exchange* (2 Mo. App. 96) it was held that a by-law of a Merchants' Exchange, which compelled members to submit their business controversies to arbitration, on pain of suspension or expulsion, was unreasonable “in the legal and technical sense of that term,” and could not be sustained. The court in its opinion was careful to state that the law was not opposed to arbitration, saying: “On the contrary, it is said to be the policy of the law to encourage these domestic tribunals, although they may, if they choose, disregard the rules

of law in their decisions." The court recognizes it as the law of both England and this country that the reasonableness or the unreasonableness of an award does not affect its validity, so long as there be no misbehavior or corruption in the arbitrators, but holds that every citizen has a right to the protection of the equal laws, "and to all the security against irremedial injustice which the wisdom of centuries has provided in those traditional rules or legislative enactments that govern proceedings in courts of justice," and so holds it a fatal objection to the by-law in question that it would "compel every respectable merchant of the city, on the pain of losing caste and being deprived of means essential to the carrying on of business on equal terms, to submit every controversy arising in the course of trade to a tribunal, which is not bound by legal rules, and which may, if it so choose, utterly disregard, in forming its decision, every ruling of the courts and every legislative enactment." This decision was rendered by the St. Louis Court of Appeals in 1876. In 1899 the Kansas City Court of Appeals, in the case of *Farmer vs. Board of Trade* (78 Mo. App. 557) had before it the question of the right of an exchange to expel a member for a refusal to submit a difference to arbitration under the Constitution, Rules and Regulations of the association. In the course of its opinion in this case the court said: "It is well known that parties cannot, by agreement to arbitrate future differences, oust the courts of jurisdiction. But that principle of law does not affect our statement that the association may have a rule requiring all differences between members to be settled by arbitration and to impose expulsion as a penalty for disobedience of such rule. . . . If parties get into the courts of the country and one of them should set up such agreement against the other, the court would not allow it any force, but would proceed to apply the law without regard to the agreement. But the association may nevertheless enforce, not the agreement to arbitrate . . . *but the penalty for refusing.* For the refusal is a violation of its rules which the member has agreed to obey." The Kennedy case was a proceeding by mandamus to compel the Exchange to reinstate the relator as a member. The Farmer case was an injunction proceeding to restrain an Exchange from suspending or expelling the plaintiff from membership. Both cases involve the question of the validity of a by-law requiring arbitration of differences between members. In the one, it was held that the by-law was unreasonable and void, and in the other it was held that, while a member could not be compelled to arbitrate his differences, he could be expelled for violating his agreement to do so. In other words, while the by-law could not be enforced, the penalty for

not respecting the by-law could be enforced. I submit that this juggling is highly discreditable to our law and results from the effort of our courts to adhere to the early judicial errors, to which Mr. Cohen, in his work above mentioned, refers. In the field of insurance contracts we find it held (*McNees vs. Southern Ins. Co.*, 61 Mo. App. 335) that, though parties cannot oust the courts of their jurisdiction to try causes, by providing that all matters pertaining to the cause of action shall be submitted to arbitration, yet it is well established that the amount of loss or damage may be so submitted; but that (*White vs. Farmers' Mut. Fire Ins. Co.*, 97 Mo. App. 590) where there was a denial of liability *in toto*, then the court had jurisdiction to settle the liability, notwithstanding an arbitration clause in a policy. It is to be hoped that our arbitration statute may soon be brought up to date, by validating all agreements to arbitrate future differences, whether by by-laws of organizations or by clauses in contract, and by taking away the right of revocation prior to a final submission. We feel quite confident that if the bugaboo of arbitration by laymen can be disposed of by the general adoption of arbitration by lawyers, or lawyers sitting with laymen, every reasonable objection to such enactments would be met. There is something inherently absurd for parties to a private controversy calling on voters of a community indiscriminately to elect a judge to settle their private differences, rather than selecting their own judge; and there is something just a little worse than absurdity in the continuous piling up in our public records the legal papers and record entries of every petty little private dispute between citizens which requires adjudication.

PERCY WERNER.