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AMERICAN LEGISLATION FOR THE ADJUSTMENT OF INDUSTRIAL DISPUTES*

By Carl I. Wheat**

ARBITRATION—THE METHOD.

I. ARBITRATION NOT A NEW IDEA. ITS USE IN COMMERCIAL AND INTERNATIONAL DISPUTES.

Neither the term nor the mode of procedure which we call arbitration is a new phenomenon. The term has a fixed and definite technical meaning, and for centuries has been used in English law to denote a certain mode of procedure. The significance of the word, thus settled in the common law of England, was carried over to us in connection with our legal inheritance from the mother country long before it was first used in connection with industrial disputes, and our legal books are full of references both to the word and to the method.

"Arbitration," says Bouvier,¹ is "the investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called arbitrators or referees." These arbitrators are not bound to decide the matters before them in accordance with the rules of law or equity, unless the agreement to submit the dispute to them contains some such stipulation. In general, therefore, it may be said that arbitration implies the voluntary agreement by contending parties to submit a matter in controversy to the judgment of a usually informal tribunal made up, at least in part, of persons not parties to the dispute, who are, by the agreement, given the authority to decide the dispute, it usually being agreed in advance by the parties that such decision will be final. When the consent of one of the parties to this extra-judicial procedure is enforced by law, the process is termed com-

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* This is the first of a series of articles on this subject. They consist of chapters from a forthcoming book which is to be published as one of the new series of Harvard Studies in Administrative Law.
** Member of the Los Angeles, Calif. bar.
¹ LAW DICTIONARY.
pulsory arbitration. This is very seldom done, however, and mutual, voluntary consent is an essential part of most references to arbitration. He to whom the submission is made is called an Arbitrator, and his determination is styled an Award.

Although this method known as arbitration is a well-known part of the common law, to be found in the digests under the title "Arbitration and Awards," there is also a statutory form of arbitration, regarding which the statute-books of most of our States possess provisions. These enactments usually prescribe methods for the selection of the arbitrators, what the submission must contain in order to be binding on both parties, and when and how the award shall be made, and they often provide for the calling of witnesses by the arbitrator, and for his compensation. Most of these laws are founded upon the English statutes under which matters in dispute may be referred to arbitrators, the submission being enforced as if it had been a rule of the court. Such statutory arbitration is generally utilized, if at all, in connection with commercial disputes, between merchants or traders, or in cases where a contract includes a stipulation to submit certain matters to arbitration.

Prior to these statutes, however, arbitration did not in England have a continuously successful existence. The pendulum of court recognition has swung back and forth several times since the use of arbitration began. At first the courts were not adverse to enforcing arbitration clauses in contracts, but by the time of Queen Elizabeth the doctrine had become established that either party to such a contract to arbitrate could revoke his promise at any time before the actual award, and plaintiffs who complained of such actions were told that they could not, by their own wills, or by their contracts, "oust the courts of their jurisdiction" to decide such disputes as might arise. Recently, however, by such statutes as are mentioned above, contracts to leave disputes of interpretation to impartial arbitrators have been fostered and are now often encouraged by courts as well as by legislatures.

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2 9 & 10 WILLIAM III, c. 15; 3 & 4 WILLIAM IV, c. 42, § 49.
3 For material regarding the law of Arbitration and Award, and its application to commercial disputes, the following works may be consulted:—"Report of Special Committee on the Lawyers' Court of Compulsory Arbitration," ALLEGHENY COUNTY (PENN.) BAR ASS'N, 1909; MATHEW BACON, COMPLEAT ARBITRATOR, LONDON, 1721, 1744 and 1770; JOHN M. BELL, LAW OF ARBITRATION IN SCOTLAND, Edinburgh, 1861 and 1877; SIDNEY BILLING, LAW OF AWARDS AND ARBITRATION, London, 1845; JAMES S. CALDWIN, LAW OF ARBITRATION, London, 1829 (also Am. ed., 1822, 1833); JULIUS HENRY COREN, COMMERCIAL ARBITRATION AND THE LAW, New York, 1918; WILLIAM OUTRAM CREWE, LAW OF ARBITRATION; THE ARBITRATION ACT, 1889, with.
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But arbitration is not confined to this common-law or statutory method of determining the issues of commercial disputes. In one form of another the method called arbitration has been known from the earliest periods. The ancestor of the Arab Shiek judging the disputes of his fellows, was applying the method of arbitration, his "judgment" was not based upon any principles of law, but upon his sense of justice regarding the particular case voluntarily submitted to him by the parties. Also, very early instances are recorded of its use in cases of dispute between states or nations,—the method still known as international arbitration. Probably the earliest example of the use of this method of settling disputes of which we possess any record is an incident of the life of those early Sumerian peoples who inhabited the Euphrates Valley long before the rise of Babylon. On this occasion, says a very early clay tablet, in order to prevent the outbreak of hostilities between the two powerful city-states of Umma and Lagesh, Mesilim, King of Kish, stepped into the breach, possibly at the request of the two disputants, and decided for them a troublesome boundary question over which there had been frequent friction. Mesilim reigned at least before 3000 B. C., a thousand years before the days of Hammurabi, the lawgiver of Babylon.

Examples of the use of this method have come down to us from the Greeks. Thucydides, the historian of the Peloponnesian War, says that Archidamus, King of Sparta, stated that "it was unlawful to attack an enemy who offered to answer for his acts before a


In addition, the recent publications of the American Judicature Society contain much valuable material for the American student of Commercial Arbitration. See the Journal of that Society for June, 1918. See also Reginald H. Smith, Justice and the Poor, 68, et seq.

Tribunal of Arbitration”, and one of the earliest instances of an international treaty containing arbitration provisions was the fifty year treaty of alliance between Argos and Lacedaemon, which contained a clause providing that in case any difference should arise between the parties to the contract, they should let the matter be arbitrated by a neutral power, “in accordance with the custom of their ancestors.”

The Romans knew and utilized the method of arbitration. Roman Emperors frequently preserved the peace of the world by their arbitrations, while in the case of commercial disputes, they had a well developed system. The Praetor periodically selected from a panel or list of citizens, a certain number, who were given authority to decide such disputes as parties might desire to bring before them. These arbitrators possessed a certain public character, and their judgments were final.

In later days the Popes often acted as arbitrators between nations; and in mediaeval times warring city-states and small principalities were often brought to accord by the action of some powerful neighbor in arbitrating the dispute. In our own times the desire for international arbitration has spread enormously, and between 1815 and the end of the nineteenth century there were some sixty instances of international arbitration, to thirty-two of which the United States was a party. Now many treaties contain clauses obligating the parties to have recourse to arbitration in all save a few seemingly fundamental questions, such as national honor and independence. The Hague Tribunal of International Arbitration has done much to prevent war. The League of Nations, and its projected International Tribunal will no doubt go farther in this direction than has ever before been attempted.

II. INDUSTRIAL ARBITRATION.

In the preceding section we have been speaking of arbitration in two senses, neither of them directly connected with the solution or adjustment of industrial disputes. An understanding of them, however, is necessary for a clear comprehension of such procedure. These have been the arbitration of international controversies, usually by independent sovereigns not connected with the dispute, but at times by formal bodies such as the Hague International Tribunal; and the arbitration of commercial controversies usually
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as a result of provisions in contracts that such disputes would be referred to some impartial third person for decision. In the case of industrial disputes, the term arbitration has also been used, and here it implies the submission of the difficulty to the judgment of an impartial third person or board, whose decision is presumably final. Unlike the methods of arbitration in commercial and in international disputes, the use of the method in connection with industrial disputes is a comparatively new thing. It is the application of an old method to a new phenomenon,—i. e. the phenomenon of industrial warfare.

This phenomenon is of comparatively recent development. During the middle ages what manufacturing was done was in the hands of a class of small employers. Before the rise of the factory system, it was, in fact, rare for a master to have more than two or three journeymen or apprentices under him, and in the vast majority of cases the master worked alone, selling his product wherever he could find a market. Speaking of this period, Gilman says:

"The craftsmen who kept at work any considerable number of journeymen and apprentices were thus comparatively few, and the latter were not numerous enough to create a labor problem between employer and employed. This was as true of seventeenth-century England or of colonial America as of eighteenth-century France or Germany."

Industrial disputes as we now know them could not, in the nature of things, arise so long as this situation obtained. So long as the personal relationship between master and man continued, disputes were personal matters. In England the rate of wages was often fixed by law, and a dissenting employee was either discharged or thrown into jail. There was no combination among the workmen to better their condition, for most of them aspired to become masters themselves before very long. Thus, while the personal relation continued, and while this transition from man to master was comparatively simple, there could be no "labor troubles", and therefore no strikes as we know them today.

With the invention of machinery, however, and the rise of large manufacturing establishments, the old personal touch was lost, and a large class of professional laborers with identical interests appeared. They could, in most cases, never become employers

* METHODS OF INDUSTRIAL PEACE 6.

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themselves, as the increased cost of the tools of production precluded the former easy transition from man to master. The product now sold by the laborer was his labor, and it was sold in exchange for wages, whereas the product sold by the master workman of former days had been exchanged for price. This is a vital distinction, and before the creation of a labor-selling class of workers in any country there is no foundation for a true labor problem. A definite separation of interest between employer and employee now became manifest. The personal relationship disappeared. No longer was long apprenticeship and a considerable degree of skill required of the workman, for the machine did the real work, the workman merely tending it and supplying it with material.

The development of machinery brought with it the development of the factory type of organization in most of the great industries. It was not long before the hordes of workers who thronged the factories began to realize that only by combination and concerted effort could they better their lot. The first efforts to accomplish such combination on any very large scale were answered in England by the passage of the severe Combination Laws of 1800, which until their repeal in 1824 forbade the combination of workmen to better their position in any way. Many men and women were imprisoned or transported to penal colonies, some for the most trivial offenses, which were held to be illegal "combination" by a judiciary partial to the employers. It was dangerous for one workman even to converse with another regarding irksome conditions or low wages. Repression was used on every possible occasion.

In the United States, however, the presence of an almost unlimited supply of free land to which the disgruntled workman could turn to better his lot, together with a somewhat greater spirit of democracy, prevented such harsh measures. Even here, however, the law did not regard labor combinations with favor. Perhaps it was with a certain prescience that the judges of those days almost unanimously decried the use of the power of organization and concerted action by workmen, and punished such actions wherever possible as deeds of conspiracy.

Organization, on the part of the workingmen, was a sine qua non to the development of arbitration in industrial disputes, for before such organization there were no such disputes worthy of the name
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to be arbitrated. Not until the recognition by the workingmen of their needs, expressed in organizations so formed that it was possible concertedly to make serious demands upon the employers, was there such a thing as an industrial dispute in the modern sense of the term.

III. LEGISLATING AGAINST INDUSTRIAL DISPUTES.

Like several other instances in the history of our law, the courts found themselves at a loss to deal with these new phenomena. The older conceptions of the law, such as conspiracy, were pressed into use, but hardly fitted the changed situation, and just as two centuries earlier the common law had floundered about in the morass of the then new problems of the law merchant and of insurance, so at the time of the industrial revolution the judges found themselves undecided. The common law has been called an elastic law, but the inability of the English courts to deal with the problems of the law merchant in the seventeenth-century led to the rise of equity, and the inability of the same courts later to deal with the problems of the new order in industry led very largely to the great use of the legislative method of changing the common law during the nineteenth century. This inability of the ordinary courts to deal with these new problems thus forced these questions into the stage of open warfare and self-help, or into the hands of extra-legal arbitrators. The common law has ever been fixed, conservative, and comparatively unyielding, notwithstanding the claim of its elasticity. True, it has never broken, and it has changed and developed slowly, but it has always found it difficult to assimilate totally new fields of action, such as it met with here.

Appalled by the possibilities of labor organization, public sentiment favored the use of legislation regarding industrial disputes. Repression in the form of entirely forbidding strikes or lockouts did not prove successful, but even today every year sees new legislative attempts to deal with the problem. Gilman says:

"There is plainly a growing sentiment among English-speaking people that labor disputes should in some measure be brought within the field of law, and no longer continue anomalous and lawless: that trade unions and employers should not be allowed to fight out their quarrels, whatever the injury to the public may be. The time is ripe for emphatic assertion of the rights of the public. The adjustment of labor difficul-
ties should be left primarily in the hands of the employer and the trade union. But if they will not settle them speedily and peaceably, then the public must and will find a more effectual way.’’

Three-fourths of our States and three dependencies now possess laws on their statute books which aim to deal with this problem. Local Boards of Arbitration have been legalized, and their establishment made easy; State Boards of Arbitration and Conciliation have been created; public investigation of labor disputes has been attempted, and now one State prohibits strikes or lockouts in essential industries. And yet the ‘‘strike balance sheet’’is continually showing a greater and greater debit. Can the legislative methods succeed? That is our question.

It so happened, that, in the United States, the earlier period of discussion regarding arbitration roughly coincided with this rise of public confidence in the efficacy of legislation as a means of developing the law. Formerly denounced and disbelieved in, the legislative method grew in favor during the latter half of the nineteenth-century, and men began to seek relief for their difficulties in great examples of social legislation. The Interstate Commerce Act (1887), the Sherman Anti-trust law (1890), and the first Federal Industrial Arbitration law (1888) are all illustrations of the growing use of this method by the federal government at this time. In the next chapter the early American legislation on the subject of industrial disputes will be discussed at length. Here it will suffice to remark that the results obtained by the use of this method in this country have all been more or less disappointing to those who desired an era of absolute industrial peace. Born of fear in the aftermath of some great strike, or of the desire of some hack legislator to set his name over a law which might draw the ‘‘labor vote’’, most of these statutes disclose an absolute lack of understanding of the economic principles underlying industrial disputes.

In no case which the writer has been able to discover was one of these statutes based upon any thorough study of the economics of the problem. In fact, during the first twenty years of this legislation, ten States (California, Colorado, Idaho, Illinois, Louisiana, Montana, Minnesota, Ohio, Utah and Wisconsin) copied in every essential the provisions of the Massachusetts Act, under

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* Ibid., Preface, VI.
which a "State Board of Conciliation, and Arbitration" had achieved a moderate success. The framers of these laws did not attempt to learn to what factors this local success was due, but copied the law in the blind faith that what would work in Massachusetts would work in their States. We shall examine the experience of Massachusetts later, to learn, if possible, whether her seeming success was, after all, real or not. That the method followed by the other States was not an efficacious one, however, is easy to see from the fact that in not one of the States mentioned did the body created achieve anything like a conspicuous success; and in most cases it died a natural death shortly after its creation. New Jersey, Michigan and Connecticut had meanwhile followed the lead of New York in establishing a somewhat different type of body, but the same experience followed, and in 1901, in the Report of the Industrial Commission of the Federal Government we read that only the laws of Illinois, Indiana (which had a scheme all her own), Ohio, Wisconsin, New York and Massachusetts could "be considered as exercising any important influence upon industrial relations." Since that time the Illinois Board was practically dormant during many years; the Indiana Commission has been abolished because it was unsuccessful; the Ohio and Massachusetts Boards have been consolidated with other State Departments and industrial dispute adjustment forms but a fractional part of their work; in Wisconsin a new method is being tried after many years of "innocuous desuetude" on the part of the old Board; and in New York, after many changes, an attempt recently has been made to resuscitate the somewhat languishing body which originally began its work in 1886.

In all these cases the Boards themselves have been the first to admit that their greatest success has been in the way of informal mediation, and that the method of arbitration, for which they were usually constructed, has not proved successful in any but a few scattering cases. For the same reason that a strong labor movement is only possible in a large center of population, where many workers live in a closely-knit community, these bodies are able to succeed only in such centers. As the continued use of arbitration or mediation is only possible where labor is organized sufficiently strongly to make serious demands, or to defend itself against its employers, a system attempting to use these methods

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*7 Vol. xvi, pt. 1, c. 2.*
can only succeed, if at all, where there is a closely-knit industrial community, well organized. This situation is found in such States as Massachusetts, New York, Pennsylvania, and Illinois, and it is in these States that industrial arbitration through State-created agencies has met its greatest success. Governors may continue to send messages to their legislatures demanding legislation which will put an end to strikes, and lawmakers may debate forever, but without these requisite industrial factors no possible scheme can prove successful in the long run. Thus in States like California, and Colorado, where the industrial sections are widely separated or perhaps isolated from the rest of the community, or in Iowa, Kansas, or North Dakota, which are largely agricultural, very little could be accomplished by utilizing machinery which had worked to some degree in the more industrial States.

IV. ARBITRATION—AN UNSUCCESSFUL METHOD.

We have traced the extensive use of the method called arbitration in the various spheres of commercial, international, and industrial disputes. Yet nowhere has this method been a pronounced or conspicuous success. Commercial arbitration, preached for three hundred years, still lacks the confidence of the great majority of merchants; international arbitration, notwithstanding a popular demand for its use, fails in the great crises and wars still result, increasingly terrible as the years pass by; and, finally, industrial arbitration fails to rid us of the strike or lockout, and the bodies constructed especially for this purpose find their most useful sphere in informal mediation or conciliation rather than in the more formal arbitration. Why has arbitration failed? In this question we near the crux of our problem, and the reasons for failure must be explored before the history of American industrial legislation can be read with understanding.

The first pertinent objection to arbitration as a method lies in the transitory and consensual nature of its so-called tribunals. An arbitrator does not even have the background of the Arab Shiek on which to build his award. The Shiek at least has the Koran, but an arbitrator often comes without too great knowledge of the problems involved in the particular dispute, and in any case he can rely on no large body of rules and principles such as guide a judge to his decision. His chief aim is to settle the dis-
pute before him in a peaceful manner. The possibilities of similar disputes in the future do not concern him. The methods used by his predecessor in the work have no particular meaning. His job is to see that the peace is kept. To accomplish this purpose he exercises his arbitrary judgment.

This very arbitrariness of the arbitrator’s method shows how contra it runs to the whole current of Anglo-American history. The Anglo-Saxon race has always been particularly jealous of arbitrary action by courts and judges. Innumerable instances might be mentioned to illustrate this fact. The fixed rules of the common law from long before the period of Queen Elizabeth almost to the present day, and the strict modes of procedure that still exist in many jurisdictions, bear witness to this fear of arbitrary action by courts, the judge often being little more than a rubber stamp with almost no discretion at all. "The intense desire to exclude the personality of the magistrate for the time being at almost any cost," says Pound, "has left its mark on the law beyond any other factor in lawmaking."

Much of the distrust of equity by the early settlers of New England was based upon this desire. Echoing this feeling, Selden, said:

"Equity is a roguish thing; for the law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make his foot the standard. For if the measure we call a chancellor’s foot, what an uncertain measure this would be. One chancellor has a long foot, another a short foot, another an indifferent foot; 'tis the same thing in the chancellor’s conscience."

Like early equity, then, to the present day there is nothing to hold an arbitrator from exercising any judgment which he may desire. An arbitrator does not think in terms of law and justice, but merely to bring to a peaceful conclusion the very dispute before him. In this his position is similar to that of the English jury during the early seventeenth-century, whose discretion was very great. Thus in the case of Hixt v. Goats, 10 where the plaintiff brought an action on the Covenant for £700, the jury found only £400 damages. To the objections of the plaintiff’s counsel, Lord Coke answered that in equity there might be many reasons why the

9 TABLE TALK, published about 1654.
10 Rolle, 257 (K. B. 1615).
plaintiff should not have the full sum, adding, "For it seems here that the jurors are chancellors";—and the judgment was affirmed. Shortly after this time, however, in the case of Wood v. Gunston,\textsuperscript{11} in an action for slander, the jury awarded a plaintiff the very excessive sum of £1500, and the judge, after argument as to this action by the jury, allowed a new trial, one of the earliest cases of such action in our law. Sedgwick says:

"It is in truth but slowly, and at comparatively a recent period, that the jury has relinquished its control over even actions of contract, and that any approach has been made to a fixed and legal measure of damage. But by degrees the salutary principle has been recognized, and it is now well settled, that in all actions of contract—and in all cases of tort where no evil motive is charged, the amount of compensation is to be regulated by the direction of the court, and the jury cannot substitute their vague and arbitrary discretion for the rules which the law lays down."\textsuperscript{12}

In the unsatisfactory state of early jury cases, then, is the method of arbitration at the present time. During the years that have passed since Selden's day, the courts of equity have developed a compendious body of rules and principles, and the measure of justice is no longer a measure of the chancellor's conscience, or of his foot. The Ecclesiastical Chancellors gave way to a series of brilliant Common Law Chancellors, trained in the system and methods of the common law, and bringing to equity the lawyer's desire to follow well-trodden paths, and to seek justice in consistency and an established set of rules and doctrines rather than by seeking, in each particular case, to follow a perhaps wayward conscience. In 1818 Lord Eldon, one of the greatest of the Common Law Chancellors, remarked from the bench:

"I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot."\textsuperscript{13}

But arbitration in still another way resembles an early period of our law and this is in its consensual nature. The submission

\textsuperscript{11} Style, 466 (1655.)
\textsuperscript{12} The Measure of Damages, 1 ed., 201-202.
\textsuperscript{13} Gee v. Pritchard, 2 Swans, 402 (1818).
of a dispute to arbitration is still purely voluntary with the parties, whether it be commercial, international or industrial arbitration. Thus was the submission to the early courts.

"Jurisdiction," says Sir Frederick Pollock, speaking of early Anglo-Saxon tribunals, "began with being merely voluntary, derived not from the authority of the State but from the consent of the parties. People might come to the court for a decision if they agreed to do so. They were bound in honor to accept the result; they might forfeit pledges deposited with the court; but the court could not compel their obedience any more than a tribunal of arbitration appointed at this day under treaty between sovereign states can compel the rulers of those states to fulfill its award."

It is for this reason, indeed, that international arbitration has never proved a thoroughly satisfactory method for the solution of international difficulties. The award of the arbitrators has too often only been a species of compromise, not founded upon any principles of justice, but determined rather by expediency in placating one or both disputants. In commercial arbitration there is, to be sure, behind the award the sanction of law, and the successful party may enforce it as a rule of court or is given a cause of action for its breach.

"In either case," says a leading authority, regarding commercial arbitration, "there is behind the successful litigant the power of the Judge to decree, and the power of the Executive to compel compliance with the behest of the Arbitrator. There exist elaborate rules of Court and provisions of the Legislature governing the practice of arbitrations. In fine, such arbitration is a mode of litigation by consent, governed by law, stating from familiar rules, and carrying the full sanction of Judicial decision. International Arbitration has none of these characteristics. It is the cardinal principle of the law of nations that each sovereign power, however politically weak, is internationally equal to any other power, however politically strong. There are no Rules of International Law relating to Arbitration, and of the law itself there is no authoritative exponent nor any recognized authority for its enforcement."

This lack of coercive power behind the arbitrator is fatal to international arbitration, asserts Sir Henry Maine adding:

14 Pollock, "English Law Before the Norman Conquest", 14 L. QUAR. REV. 291.
"Quasi-courts of arbitration, constituted ad hoc, (i.e., for this particular case alone,) of necessity attend simply to the question in immediate dispute, and do not weigh the opinion they give regarded as a precedent?" and "A true court of quasi-justice, like a court of municipal justice, would be sure to consider the effect of a given decision on the whole branch of the law which it administers."

For these reasons Maine argues for an international tribunal of some degree of permanence, while Lord Russell urges against this proposal the liability of nations to lose confidence in any judges who might be set up to try the vast causes which would come before such a court, and therefore argues for tribunals constituted ad hoc but acting along common lines and with a settled body of principles on which to base their judgments. Both agree that international arbitration is not too successful a method because, first, there is no coercive power behind its awards, and second, there is no continuity of principle founding its judgments.

Turning now to the question of commercial arbitration, we find a situation equally unsatisfactory. For many years the method has had its able exponents, and legislation calculated to make easy its use has taken its place upon the statute books of most jurisdictions. Yet the use made of this method is insignificant as compared to the use of the courts. And here again the reason is not far to seek. It is very difficult to make the decisions of these arbitrators of commercial disputes conclusive. In addition only a very exceptional man can long retain the confidence which an arbitrator must necessarily have. His decisions may show a bias in this or that direction, or such a bias may be imagined. Usually there is no body of rules on which he can base his judgments, and his chief aim thus becomes peace,—anything to keep disputes from becoming too grave, anything to keep the parties from carrying their troubles to the courts. Thus the arbitrator in commercial cases is in the position of the Chancellor before the days of the great Common Law Chancellors who brought order and system into the court of chancery by developing a series of rules and precedents, by the study of which parties could learn in advance what the "Social conscience" of the court would be. He is, indeed, a miniature Haroun al Raschid, dispens-

18 International Law, 216.
17 Ibid., 218.
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ing an ever-ready, and arbitrary "justice" to all who apply. Notwithstanding the reports of success from various sources, and notwithstanding the choice of very able men as arbitrators in many instances, this method is still that of "Oriental justice," and any "principles" used by one arbitrator are usually not used by the next. Although beautiful in theory, the fact of the matter is that in practice the commercial community has not as yet accepted the method of commercial arbitration in any general sense.

In industrial arbitration the same arguments obtain. Here we have an embryonic form of adjudication, resembling in its consensual nature the early Anglo-Saxon courts of England, and in its lack of principles and standards the courts of chancery before the days of the Common Law Chancellors. The result is that the award is almost inevitably a compromise, in which the arbitrators, anxious for a speedy and peaceful settlement of the controversy before them, split-the-difference between demands and offers. Nothing could be more demoralizing in the long run. The arbitral tribunal, we repeat, does not think in terms of law and justice. In industrial disputes it desires merely to secure immediate peace, whether in the way of resumption of industrial activity, or a relinquishment of demands which might cause trouble in the future. The important consideration is that, notwithstanding the peaceable adjustment of the dispute then going on, an arbitration decision gives no guarantee that the peace will last any longer than the time necessary to formulate new demands. As one writer has put it:

"The underlying causes of wage disputes remain unaffected by meditation and arbitration decisions, and capable at any time of causing new disputes and of arousing still more unfriendly relations."18

This same writer, in discussing the wage system of American railroads says:

"The piling up of compromise on compromise results in a haphazard, unscientific wage system unsatisfactory to all concerned."19

19 Ibid., xix.
He therefore urges the recognition of certain principles for the determination of these questions:

“Some fundamental principles which may serve as the basis of a fair and reasonable wage or of a just principle of wage increase.”

To which remark he adds:

“Of necessity, the result of such an attempt must be fragmentary and inconclusive; but the justification for the endeavor lies in the manifest need of some fundamental principle of wages which may be applied in arbitration proceedings.”

To him, then, the methods in use under these statutes, not only form at present no guarantee against the recurrence of disputes, but actually makes such recurring disputes inevitable. Nor has his conclusion been negatived by the creation of the Labor Board under the Railroad Act of 1920. Just prior to its determination of wage awards to affect the daily wages of 1,800,000 railroad employees in July, 1920, the President of the Brotherhood of Railroad Engineers, Mr. Warren S. Stone, is reported in the daily press to have said,

“Any award now made will be a compromise award, I suppose. . . . Labor has three men on the board, but their votes will be offset by the three men who represent capital. The three that represent the public will actually settle matters very likely, and if they split one man will practically determine it. And his decree may be satisfactory for only six months.”

V. THE END OF LAW.

These conclusions may perhaps be brought out more clearly if we take the time at this point to consider the development of law as worked out by Dean Roscoe Pound of Harvard Law School in a series of articles recently printed in the Harvard Law Review. Starting with the proposition that the object of law is “the administration of justice,” Dean Pound asks what has been the “end” or purpose of law in its various stages of

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20 Ibid., xxiii.
21 Ibid., xxv.
22 This Boston Herald, July 11, 1920.
development. These stages, he says, are four, from the age of primitive law down to the present day.

The first of these periods, (I shall briefly paraphrase Dean Pound's argument regarding "the end of law"),(1) is that of primitive or archaic law, and in this stage the idea was merely to preserve the peace. "In primitive law justice, in the sense of the end of the legal system, was a device to keep peace." The law attempted to give the injured party a substitute for revenge, and the main purpose was that a certain, unambiguous result might be attained. Thus, law, in this stage, resembles arbitration in international law, and industrial disputes. Peace is the sole and final aim. The law in this stage "seeks only to preserve the public peace, to keep down private war and to coerce peaceable settlement of private controversies."(2)

The second stage of the development of law came with the slow creation of a system of exact rules both substantive and procedural,—the stage which Dean Pound has called the period of "Strict Law." Here the point of view is still that of primitive society, but the "end" of the legal system has advanced from a mere aim of keeping the peace at any cost to that of the conservation of the general security, by an unvarying system of legal remedies. The contributions of this period of strict law are "the ideas of certainty and uniformity and of rule and form as means thereto." Formalism is the chief characteristic of this stage of the law. Forms, strictly followed, prevented recurring disputes and stimulated the memory in a day of few records; but chiefly forms were "a safeguard against arbitrary action by the magistrate at a time when there was no elaborate body of substantive rules and principles to furnish standards of decision." This desire to resist arbitrary magisterial action is the chief argument of those persons who today object to procedural reform. "In . . . the strict law . . . forms will break but will not bend," and the law is strictly unmoral, looking solely to the protection of the general security by the creation of an absolute and unchangeable norm for human conduct.

The inevitable reaction from the rigors of the strict law came in the rise of the court of equity, wherein the wrongs done through the application of these strict rules of common law were attempted to be righted by the King's Chancellors, who acknowledged only

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(1) Roscoe Pound, Address Before the New Hampshire Bar Association, June 30, 1917.
the "Law of God." This period identified law with morals, and was mirrored in the civil law of the Continent of Europe in the struggle toward "natural law." The tendency, as might well have been expected, was to go too far, and so the uncontrolled will of the chancellor became a menace which was only curbed by the development of a system of equity under the remarkable guidance of that series of able Common Law Chancellors, of whom we have spoken above.

"Comparing the stage of equity or natural law with that of the preceding stage we may say that whereas the end in primitive law is public peace and in the period of strict law is security, in this stage it is an ethical solution of controversies; that whereas the means employed in primitive law is composition, and in the strict law legal remedy, in this period it is enforcement of duty; and that to the contribution of primitive law, namely, the idea of a peaceable ordering of society, and to those of the strict law, namely, certainty and uniformity reached by rule and form, it adds the conceptions of good faith and moral conduct to be attained through reason."

We now come to the fourth, or present stage of the law, "a body of law with the stable and certain qualities of the strict law yet liberalized by the conceptions developed by equity or natural law." To this stage Dean Pound gives the name "The Maturity of Law," and in it the end sought is equality and security, while property and contract are insisted upon as fundamental ideas. The principle of individual rights is here developed to its highest degree, and by the maintenance of these rights the end of "equality of opportunity and security of acquisitions" is sought to be attained.

However,

"As often happens in such connections, we are systematizing the whole law upon the basis of rights just as that conception is beginning to yield its central position in legal science because of the discovery of a more fundamental conception behind it." 28

This more fundamental conception toward which we are now moving is none other than "The Socialization of Law," in which the interests behind the rights become the primary considerations.

25 27 Harv. L. Rev. 220.
26 27 Harv. L. Rev. 224.
"In consequence the emphasis comes to be transferred gradually from individual interests to social interests. Such a movement is taking place palpably in the law of all countries today. Its watchword is satisfaction of human wants, and it seems to put as the end of the law the satisfaction of as many human demands as we can with the least sacrifice of other demands."  

Social interests become paramount to individual interests, and the freedom of an individual to contract in any way that he wills is held to be inferior to the right of society to see to it that no other individual be coerced into making contracts not good for society in general.

VI. ARBITRATION—A STAGE OF PRIMITIVE LAW.

Such, in brief, is the development of the end of law in legal rules and doctrines, according to Dean Pound. Where does arbitration fit into this analysis? Clearly it is a method of quasi-judicial action which is still in the stage of primitive law. The end to be secured is peace. Each case is a separate, and distinct problem, attacked often by arbitrators unused to the judicial method, and whose sole aim is to smooth over difficulty which lies directly before them, with no particular reference to those which have gone before or those which are to come in the future. In such a situation it is inevitable that the result should be compromise, splitting-the-difference, and a casuistry in which future general security is almost universally sacrificed for present peaceful solution,—regardless of fires of discontent left smouldering below the for-the-moment unruffled surface. As Dean Pound says:

"When in the course of an industrial dispute today, a strike occurs or is threatened, we may see a situation that takes us back to these beginnings of the public administration of justice. In a primitive social organization the chief agencies of social control are religion, operating through supernatural sanctions and given efficacy by the priesthood, and morals, operating through the sanction of the general moral sense of the community and given efficacy by the internal discipline of the clan and the guild. A lesser and feeble agency of social control is law, operating through the sanction of politically organized force, and given efficacy by the state. In antiquity, men obtained redress by self-help, by the help of the

27 Harv. L. Rev. 226.
gods, and by the help of the state. But the state was by no means the ordinary nor the most effective recourse of the injured. So today in those occasional types of controversy for which the law as yet has made no adequate provision or for which our administrative machinery is inadequate, and hence men will not or cannot invoke the orderly action of the public authorities, the self-help of the contesting parties is resorted to, restrained only by the general moral sense of the community. Thus a season of private war ensues; and private war as a mode of obtaining redress for private grievances was the staple of primitive social life. But note how society endeavors to secure the paramount social interest in peace and public order when a strike is called today. The disputants, intent only on their own interests, may disturb the whole order of society. Thereupon all manner of moral and extra-legal pressure is brought to bear to induce them to come to some compromise or to submit to some form of arbitration. Press, pulpit and platform resound with exhortations, not that exact justice may be done, but that the dispute may somewhat be adjusted and society be left to pursue its orderly course. The problem of primitive society with respect to all disputes was the problem of society today with respect to industrial disputes: How may disputants be induced to forego private war and made to adjust their controversy without infringing the social interest in the general security?  

The administrator who suddenly finds himself appointed a member of a State Board of Arbitration and Conciliation is in no easy position. The disputes which he might be called upon to adjust come from a welter of different industries, and are bewildering in their complexity. The arbitrator who would solve any one of them in a manner that would guarantee peace in the future as well as a mere peaceful solution of the present difficulty, would need the assistance of a large statistical body to sift out the necessary data from the mass of possible evidence. Were he a person well acquainted with the technicalities of the trade in question, he might be able to develop in time a certain sensitiveness to the vital points in dispute which would make a series of successful awards possible. But he cannot, in the nature of things, be well acquainted with every industry of the State, unless indeed the State has but one or two leading industries, and unless he has extensive statistical assistance and superhuman zeal. Even so, under ordinary conditions of arbitration, were this successful

28 Rodos Foud, Address Before New Hampshire Bar Association, 6-7, June 30, 1917.
arbitrator to die, his successor would have to start in again exactly where his predecessor began. No body of principles would come down to him for guidance. Add to this the fact that the quality of men on these Boards is frequently much affected by political considerations, and the probabilities against success are apparent.

On the other hand, it is possible for such a body of principles to be built up. Mr. Justice Higgins of the Australian Federal Arbitration Court, has done so for the determination of the minimum wage to be paid in that Commonwealth and for other like matters. In two recent articles in the Harvard Law Review 29 he describes vividly the methods used in developing the system of precedents and principles, and lists thirty-three "principles of action" which have been established to guide the court.

What Mr. Justice Higgins has done shows the possibilities where an extraordinary mind attacks the problem of arbitration in industrial disputes. In building up his principles, however, he has not been unmindful of the danger of attaining in his zeal a stage of strict law which would be worse for the commonwealth than the anarchy that existed before his court was created. This is an ever present danger, and it is this direction in which lie the pitfalls for such bodies as the Kansas Court of Industrial Relations. The public demand is for peace. This has, however, often been maintained, if at all, only by a continuous series of compromises or open conflicts. In addition, the "consciences" of the judges of such a court are apt, like those of the chancellors of old, to vary according to the measures of their respective feet. The law itself sets forth no standards by which to measure these consciences; and the "judges" are turned loose upon a sea of industrial turmoil with nothing to guide them but the demand of the public that "its rights" be maintained inviolate. In the Railroad Act of 1920 the Labor Board there created is at least given the foundation upon which far-seeing members may be able to build principles of action such as have been developed by Mr. Justice Higgins, for the standard of a living wage is there set forth in detail.

The first decision of the Kansas Court of Industrial Relations show a realization of these dangers, and a desire on the part of the judges to base their decisions upon certain fundamental principles. The law itself lays down a certain vague norm for their action—

i.e., that a "fair wage" should be guaranteed,—and the court attempts to define such a wage, thus laying the foundation for a standard which may in time develop as has that of the Australian Court of Arbitration.30

That the problem is fraught with difficulty may be seen from the experience of the Federal Board of Mediation and Arbitration in railway disputes. Says Stockett:

"There has been almost universal condemnation of the practice in arbitration of splitting the difference between the demands of the men and the concessions of the employers. Prof. Adam Shortt, who has served on numerous boards of conciliation and investigation in Canada, refers to it as a 'demoralizing principle', and Judge Wm. C. Chambers, U. S. Commissioner of Mediation and Conciliation, when acting as chairman of the Eastern Firemen's Board in 1913, expressed the hope that the award would not be a compromise, but in the nature of a judgment or decree of the court. The employees have registered their disapproval of compromise decisions both in the course of arbitration proceedings and in minority reports appended to the awards. Employers, too, have emphasized the necessity of basing wage decisions on some principle of reasonableness and fairness. In 1913 the railways in the Eastern District refused for a considerable period to arbitrate their dispute with the firemen under the provisions of the Erdman Act, partly on the ground that the award would of necessity be a compromise, and thus work to their disadvantage. Their attitude was probably the same as that of a recent investigator who stated, '—It is not absolutely certain but that in exceptional cases a strike or lockout is a more wholesome culmination of an aggravated dispute than a series of temporizing and unsatisfactory compromises.' 731

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30 State of Kansas et al. v. Topeka Edison Co., Docket No. 3254-1-2. Court of Industrial Relations, Kas., March 29, 1920. In this case the Court says, regarding a "fair wage":

"The skilled worker, in fairness, should receive a higher wage than the unskilled worker. The worker who has spent years of time and effort in preparing himself for a peculiarly technical line of work is entitled to greater consideration from the public than the more unskilled worker. The hazards of employment should also be noted and the worker engaged in such an employment as that under consideration (electrical linemen) should receive a higher wage than his fellow workmen who may be engaged in a safe occupation. The degree of responsibility placed upon the worker is a matter of importance. The continuity and regularity of the employment should be considered, for it is apparent that an employment which is seasonal in its nature must have a higher wage than one in which regular, steady work is offered, because, after all, it is the annual earnings that are to govern rather than the daily wage, in many instances. By no means the least important consideration should be the industry and fidelity of the individual, for the worker who is faithful to his trust and is industrious, working to the best of his ability in the interest of his employer, is entitled, as a matter of right, to a greater reward than the worker who thinks only of his wage and not of the interest of his employer and of the public who are directly affected by his labors. Perhaps more important than any other circumstance, however, is the relation of the wage to the cost of living". (This was the first case decided by this Court.)

71 THE ARBITRAL DETERMINATION OF RAILWAY WAGES, XV.
Thus, thinks this writer, arbitration of this haphazard sort kills itself,—for while the employees are encouraged to make more frequent, and often swollen demands, knowing that they will be largely cut, ("Demandez beaucoup si vous soulez peu.") the employers agree to arbitration only as a last resort. Clearly the fundamental need is a system or series of principles upon which the arbitrator may base his decision, unaffected by the desires of the moment. Thus alone will any real success be possible, and not until this is done will industrial arbitration cease to be "merely mediation conducted under the guise of judicial procedure."

VII. THE DEVELOPMENT OF PRINCIPLES.

Between the dangers of developing a stage of strict law and of leaving all to the "conscience" of the moment, the members of an Arbitration Board or an Industrial Court must carefully pick their way. There is unfortunately no hint as yet in most proposals for arbitration of a real understanding of the basic fact that, so long as the administrator is not provided with carefully devised norms to guide his conduct, his justice will always continue to be measured by the size of his conscience or his foot. In other words, until a system of basic assumptions carefully defining "a fair wage", "proper working conditions", "fair day's work", and the like, is erected, which can fill the place in these bodies the common law fills in ordinary courts, arbitration will remain in the stage of primitive law, with the constant danger that the judges themselves, in their zeal to define the principles under which they are to work, will build for themselves a system of fixed rules leading to the unfortunate result of a stage of "strict law."

The three most significant steps in jural development, according to Dean Pound, are

"(1) peaceable disposition of controversies, (2) attempt to dispose of causes justly as well as peaceably, (3) attempt to reach justice through rules and standards,—administration of justice according to law."23

And in another place:

"The crude solutions brought forth by a policy of peace at any price can but mitigate, they cannot wholly supersede

22 Ibid, 193.
23 Roscoe Pound, Address Before the New Hampshire Bar Association, 8, June 30, 1917.
the conflicts involved in personal intervention by the wronged to secure justice. In an industrial arbitration today the arbitrators must make a decision that 'will go down,' and are much more anxious to make concessions than to apply principles or to do even justice. At all events they seek to terminate the dispute.' 54

This difficulty is universally recognized. The passages from Stockett, reproduced earlier in this chapter, show the conclusions of an American observer regarding American conditions. Much earlier, Mr. Joseph D. Weeks, in his memorable report in 1879 on Industrial arbitration and conciliation in England, voiced the same complaint regarding arbitration boards, saying:

"When the practical operation of these boards is considered, a very serious difficulty is found in the absence of any recognized definite principle as a basis upon which awards shall be made. For example: First and foremost among industrial questions, is that relative to the wages of labor. When this is before a board for decision, the question arises at once, What shall be the basis upon which the award shall be made?" 55

Speaking of the same English situation at a somewhat later date, the Webbs remark:

"This growing antipathy to arbitration is, we think, mainly due to their (the Trade Unionists') feeling of uncertainty as to the fundamental assumptions upon which the arbitrator will base his award. When the issue is whether the 'standard earnings' of the Lancashire Cotton-spinners should or should not be decreased by ten per cent, there is no basis accepted by both parties, except the vague admission that the award should not be contrary to the welfare of the community. But this offers no guidance to the arbitrator. Judge Ellison, for instance, acting in 1879 in a Yorkshire coal-mining case, frankly expressed the perplexity of an absolutely openminded umpire. 'It is (he said) for (the men's advocate) to put the men's wages as high as he can. It is for (The employers' advocate) to put them as low as he can. And when you have done that it is for me to deal with the question as well as I can; but on what principle I have to deal with it I have not the slightest idea. There is no principle of law involved in it. There is no principle of political economy in it.' 56

54 Ibid.
55 INDUSTRIAL CONCILIATION AND ARBITRATION, 41.
56 INDUSTRIAL DEMOCRACY, 229.
This last statement is hardly correct for each side does rest its claim upon an economic basis, the trouble being that they do not agree upon their basic assumptions. Says the Webbs:

"The arbitrator’s award if it is not a mere ‘splitting the difference’, must be influenced by one or the other of these assumptions, either as a result of the argument before him, or as the outcome of his education or sympathies. However judicial he may be in ascertaining the facts of the case, the relative importance which he will give to the rival assumptions of the parties can scarcely fail to be affected by the subtle influences of his class and training."

This fact is well illustrated by our own State Boards of Arbitration usually made up of three members, one chosen from the ranks of labor, and the third a neutral member, ostensibly representing the public. Almost invariably it has been the case that the first two become mere advocates of their respective constituencies, the final decision thus being put into the hands of the third member, or umpire.

A final objection that is often urged against the method of industrial arbitration is that it is "a weapon of the weak", i.e., one who fears defeat if he should have to go ahead and fight it out. This sentiment has been expressed to the writer on numerous occasions by labor leaders of different sections of the country. They admit that arbitration often brings beneficent results,—to unions that are too weak to fight their battles alone. During their period of gestation the impartial, neutral umpire can usually be trusted to be on their side at least as often as he is on the other, and so long as the need exists they will gladly consent to arbitration. True, this feeling is usually unexpressed and often unconscious, but it is almost always present. "Why should one agree to ‘arbitration’ when the chances are that by main force a greater victory may be gained?" Prussian, if you will, but strictly human.

The feeling of the party to an industrial dispute that he does not wish third parties meddling in his business has been clearly

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37 Ibid., 220.
38 The only exception to this general rule known to the writer is that of Mr. Charles Wood, for many years representative of the employers on the Massachusetts Board. Mr. Wood, whose indefatigable efforts often saved the Board from oblivion, came to be trusted by labor perhaps more even than was their own members, and when he left the Board, Mr. Wood was voluntarily chosen as arbitrator in several large disputes. He confessed to the writer, however, that his success was largely due to his extraordinary interest in the work, and that he had not attempted to formulate any set of principles on which to base his awards. A certain genius for meditation was the secret of his success.
expressed by Mr. F. W. Meyers, Commissioner of the California Bureau of Labor Statistics, in the Tenth Biennial Report of that Bureau,

"One has but to look at the current news of the day," says he, "and note therein the vast number of industrial disputes existing, and the very few thereof in which arbitration was being had or desired by the interested parties. To understand how little disposition there is on the part of industrial disputants to leave the settlement of their affairs to outsiders in the cases in which arbitration is invoked, it will usually be noticed that he who first says, 'Arbitrate' is usually not he who feels confident of success, and that it is the coercion induced by a sense of weakness, or by some other coercive influence, and not a desire to see even justice done, which usually induces the willingness to arbitrate."

In the same general vein Professor Commons says that:

"Arbitration in the proper sense of the term, is a make-shift and a sign of weakness."40

He continues:

"Only imperfectly does it establish justice or guarantee peace;—it has been abandoned or limited wherever the parties have had experience with it."41

To Professor Commons the true solution lies in developing and fostering the system of "Trade Agreement," i.e., the system of peaceable collective bargaining and conciliation. He realizes, however, that there is always the possibility that these methods will not meet with success, and a fatal deadlock ensue, with its danger of open industrial battle, but concludes:

"If we reduce the matter to its simplest terms we shall probably find that the occasions where it is necessary to fall back on arbitration proper are the following:

1. When a representative of either side does not want to face his constituency in making a concession.

2. When a new union or a new employers' association, inflated with a novel feeling of strength, finds itself unexpectedly against a hard reality, and looks about for a way out.

39 2 APPENDIX TO JOURNALS OF ASSEMBLY AND SENATE OF CALIFORNIA, 35 Session, 135 (1903). (Italics mine.)
41 Ibid.
3. When the parties have agreed between themselves on all points except one or two, and these have been reduced to such simple terms that any person of integrity and intelligence can give a decision.

4. When the public is so seriously damaged that it practically forces the contestants to submit to outside interference.\textsuperscript{42}

It is, then, in these exceptional situations, rather than the regular courses of industry, that Professor Commons believes arbitration to be necessary. Thus the danger of public loss as a direct result of industrial stoppages induced by industrial disputes may at times make it imperative that the public, as represented by the state, should step into the breach and demand a peaceful settlement. If the final end of such public action is to be merely "peace" we shall remain in the stage of primitive law in which we find ourselves today. On the other hand, if the law can develop a system of "rights of humanity" of at least equal significance to its long-developed system of "rights of property", there is hope that the future may see an appeal to justice take the place of open warfare. What the foundations of such principles of human rights must be will be the province of another chapter.

Industrial disputes, however, are not likely to be ended by any form of mediation or arbitration yet devised, unless the parties to such disputes agree upon at least the fundamental relations between themselves. The problem lies deeper than the mere smoothing over of disputes. It lies rather in creating a spirit of conciliation. Most disputes of the present day have their underlying causes in misunderstanding. Such disputes may be peaceable adjusted by mediation and conciliation, but when there exist fundamental disagreements regarding matters on which both sides feel that no compromise is possible, no method yet devised will check the recourse to force. Arbitration in such cases can never be more than a temporary means for the postponement of open struggle. Only the careful building up of a general recognition by both parties of certain fundamentals of the relation between them will make possible truly successful governmental action for the adjustment of such disputes. These principles of bargaining, of wage adjustment, of proper working hours, of decent working conditions must be worked out to the satisfaction of both sides before any general era of industrial peace will be possible. Even

\textsuperscript{42} \textit{Ibid.}
then, certain matters will remain which either side will consider fundamental, and on which general agreement will be impossible. The relation of the State to such matters is a problem for the future, and the complete elimination of strikes and lockouts appears, to say the least, dubious. As one writer put it:

"Conciliation and arbitration, whether state created or mutually agreed upon by the disputants, has proved to be a failure and utterly worthless as a means of bringing about lasting peace. At its best it is only a miserable makeshift, a worn out expedient invented to postpone the evil day through compromise. Its acceptance by either party to a dispute is either an acknowledgement of weakness or doubt of the justice of the position taken. Power seldom makes any concession and justice does not permit of compromise when a question of right principle is involved. A principle is either right or wrong. It cannot be compromised."

Any general agreement, or public recognition of norms of fair wages, proper hours, decent conditions, and collective bargaining methods would, however, minimize these "matters of principle" and put an end to compromise by furnishing accurate standards for decision. For forty years our States have struggled to find the way to industrial peace, but little has been done to provide such standards for decision. These must await a more general understanding of the problem and a more genuine desire to eliminate open industrial warfare.

VII. SUMMARY.

We have seen that arbitration, as a method, and as practiced in connection with industrial disputes, is a type of primitive adjudication still in the stage of archaic law, and that its end is, or at least has been up to the present time, merely to bring peace to the community, regardless of how the methods used might fit into the general scheme of progress, and regardless of the danger that future disputes might spring from present compromise.

To square the function of arbitration with the more modern concept that security and the general social development are even more important "ends" than mere temporary peace, we have

seen that the fundamental requirement is that we should arm the administrative organs of industrial intervention with a series of principles and standards upon which they may base their decisions. These principles, like those of modern equity as developed by the Common Law Chancellors, would be the norms by which demands should be measured. With these as a background, the danger of compromise and splitting-the-difference is minimized.

We have also seen that great care must be taken not to have such principles crystallize into a mere inelastic series of rules. This danger of developing a stage of strict law in such bodies as the “Courts of Industrial Relations” now springing up, is more serious than is at first apparent, and if allowed to occur will destroy all the good results which might otherwise be expected from these bodies.

Finally, if the intervention of organs of the State in industrial disputes is to be successful, it must be realized that the end of industrial peace alone will not carry us very far,—no farther than have the illusive experiments of the past forty years. If peace is the sole end there are other methods far superior to arbitration or meditation which could be utilized. Among these might be mentioned governmental assistance toward very powerful unionization, or some method of equalizing the opposing forces by creating a balance of power, or of having both sides to labor agreements deposit sums of money to guarantee compliance, like bonding a man to “keep the peace”; a plan which has, indeed, been tried in several instances with considerable success. Certain it is that the aim of merely producing an industrial truce will not suffice today, and that the body which attempts it will either fall into disrepute or be swallowed up in the welter of industrial conflict. As an American commentator has expressed it:

“The word ‘arbitration’ makes a sentimental appeal, because it seems to call for justice between man and man. But it is doubtful whether an arbitrator can possibly satisfy even himself as to what is justice in a given dispute. The conditions are too complicated, and he has no rules for his guidance.”

44 See Lauchheimer, THE LABOR LAW OF MARYLAND.
45 See Edward Cummings, “Industrial Arbitration in the United States,” QUAR. JOUR. ECON., 17, July, 1895, in which he described this method as used after a large English boot and shoe trade dispute.
46 John R. Commons, “Arbitration, Conciliation and Trade Agreement,” 56 TEN INDEPENDENT, 1440, 1442. (Italics mine.)
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